**Heiltsuk Nation:
Submissions on the *Pilotage Act***

**March 14, 2018**

# Introduction

1. Heiltsuk First Nation (“Heiltsuk”) thanks the Chair, Mr. Marc Grégoire, for this opportunity to address the *Pilotage Act*, R.S.C. 1985, c. P-14.

## Heiltsuk First Nation and Reconciliation

1. Heiltsuk is a band of Aboriginal peoples on the Central Coast of British Columbia. Our traditional territories consist of land and marine areas, including offshore marine areas, encompassing the Goose Island Group and Banks, Campbell Island and Bella Bella. Our traditional territories include but are not limited to twenty-three reserves.
2. We have traditionally and continuously used, occupied, and exercised jurisdiction over our traditional territory for thousands of years. We have never surrendered our territories or jurisdiction to the Crown through conquest, treaty or other means.
3. Traditional harvesting is central to Heiltsuk society. We depend on natural resources within our territories for our food and health, our traditional activities, and our economy. Harvesting is part of our cultural identity. We have, for thousands of years, managed and engaged in the harvesting and use of resources from their land and marine areas of their territories for, among others, food, social and ceremonial purposes. Traditional harvesting was and remains integral to our distinctive culture.
4. Marine species that we have traditionally harvested include salmon, halibut, ground fish, shellfish (including crabs, prawn, shrimp, clams and oysters), sea urchins, sea cucumbers, herring, herring spawn-on-kelp, eulachon, abalone, and seaweed. We assert and exercise Aboriginal rights to harvest marine life, based on practices of harvesting for food, social and ceremonial (“FSC”) purposes, and in some cases for trading purposes. Heiltsuk established an Aboriginal right to harvest herring spawn-on-kelp for both FSC purposes, and also and also for trade (i.e., commercial) purposes, in *R. v. Gladstone*, [1996] 2 S.C.R. 723. Furthermore, we assert rights to manage and protect marine resources and habitats within our traditional territorial waters as an essential aspect of our right of Indigenous self-government.
5. Currently, Canadian marine legislation excludes participation by First Nations and fails to recognize their jurisdiction, despite the direct impacts of marine legislation on Aboriginal title and rights, including their rights to co-manage their territories. The *Pilotage Act* is part of a suite of federal statutes that must be amended to recognize the power and duty of First Nations to steward their marine territories. Prime Minister Trudeau has committed the Crown to reconciliation with First Nations peoples. In addition to adopting principles respecting the Government of Canada’s relationship with Indigenous peoples, to guide reviews of laws, policies and operational practices, the government further announced in November 2017 that it supported full implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and alignment of the laws of Canada with UNDRIP. Even more recently, the government announced its intention to recognize Indigenous rights, including Indigenous self-determination and the inherent right of self-government.
6. Heiltsuk is hopeful that this review process and its submissions will manifest in amendments to the *Pilotage Act* that reflect Prime Minister Trudeau’s renewed commitment to reconciliation.

## The *Nathan E. Stewart*

1. The vulnerability of our marine territories to ship-source pollution accidents was recently illustrated by a devastating oil spill in one of our key harvesting areas.
2. In October 13, 2016, an articulated-tug barge (“ATB”) ran aground in the Seaforth Channel while operating under a waiver granted by the Pacific Pilotage Authority (“PPA”), The oil barge was empty, but the tug itself – the *Nathan E. Stewart* – grounded, and leaked over 100,000 litres of diesel and other types of oil and lubricants into the Pacific Ocean.
3. The area where the accident occurred is a major traditional and commercial marine harvesting area. Heiltsuk harvests many species from the area, including abalone, black cod, clams, cockles, crabs, halibut, herring, SOK, lingcod, prawns, rock cod, red snapper, salmon, salmon eggs, sea cucumber, sea urchin and seaweed. As a result, the area has been closed by DFO to all shellfish harvesting, initially closed to sea cucumber harvesting, and also has caused an additional closure of the crab fishery. Heiltsuk has instituted a closure for the impacted area for FSC harvesting. Various marine species will suffer ill effects, and Heiltsuk’s commercial and traditional harvesting may be impacted for years.
4. In addition to spill impacts, the tug sank in shallow waters, where a recovery barge could not travel. Recovery meant dragging the tug along the seafloor to a barge, where it could be lifted from the water. The seafloor where the tug sank, and where it had to be dragged, was a habitat for endangered abalone.
5. The *Nathan E. Stewart*, along with other ATBs, regularly operated under waivers through Heiltsuk waters. Investigations after the spill into the tug’s operations revealed inadequate safety practices, and reckless or negligent conduct, that led to the accident. Given that the accident occurred in under-regulated conditions permitted by the pilotage authority, any review of the *Pilotage Act* must prioritize the safer operation of vessels that will effectively protect the environment on which indigenous and other communities rely.

## The *Jake Shearer*

1. Even more recently, on November 26, 2017, the vulnerability of our marine territory to ship-source pollution accidents was again illustrated by the ATB *Jake Shearer* coming uncoupled from its barge, the *Zidell*, which was carrying 12.5 million litres of fuel oil. The tug and the barge violently uncoupled when hit with a rogue wave, and the barge floated astray in the stormy waters near Goose Island. The barge narrowly avoided running aground against Goose Island, and its smaller nearby islands, when two members of the crew risked their lives by jumping onto the barge to release an anchor. The single anchor miraculous caught on the ocean floor, preventing the barge from running aground. A tug capable of rescuing the barge took 16 hours to arrive. The official response vessel from Prince Rupert, carrying spill equipment in the event of a pollution incident, was estimated to arrive on site two days later.
2. Heiltsuk understands that the *Jake Shearer* was carrying a pilot aboard. However, the pilot was not a local pilot, and the lack of knowledge about the local marine areas meant that Heiltsuk mariners had to assist, to locate a place of refuge for the *Zidell* to be towed and inspected.

# Specific Issues

1. Heiltsuk makes submissions in three areas:
	1. the relationship between pilotage authorities (and more specifically the Pacific Pilotage Authority or PPA) and First Nations;
	2. the compulsory pilotage and waiver regime; and
	3. the power of authorities to investigate and penalize non-compliance.

Heiltsuk believes that comments will assist government in developing a scheme that is safer, environmentally responsible and transparent.

## Relationship between the Pacific Pilotage Authority & Indigenous Nations

1. Heiltsuk, like many Indigenous coastal communities, is inextricably tied to our ancestral lands and waters. Our waters sustain us, are part of our cultural and spiritual identity, and are the backbone of our economy. This means that the Heiltsuk way of life is especially vulnerable to environmental damage from shipping and other marine uses.
2. Heiltsuk peoples are also uniquely knowledgeable about their local waters. We live in our territories for thousands of years, have harvested from our waters for millennia, and have stewarded our marine territories since time immemorial. As a result of our connection, we are uniquely positioned and obligated to contribute to the safe navigation of ships through our waters.
3. Despite our connection, our stewardship and our detailed knowledge of our own marine territories, we do not have any role in the Pacific Pilotage Authority’s governance or operation. While Canada works to adjust to Indigenous self-government, Heiltsuk should be accorded an immediate role in the PPA’s governance and its operations.

### Lack of Board Representation

**Recommendations:**

* Codify board composition requirements in the *Pilotage Act,* and
* Set aside positions for representatives of Indigenous communities whose rights are impacted by the operations for each authority.
1. The *Pilotage Act* currently makes no allowance for Indigenous representation on pilotage authority boards.
2. By convention, pilotage authorities’ boards are typically composed of representatives from the pilots, industry and the public. For the PPA, this convention sees two industry appointments, two pilot appointments and two public appointees.
3. The current convention makes no explicit allowance for Indigenous representation. Further, Indigenous peoples are under-presented in the industry and pilotage groups that supply representatives to the PPA board. For example, Heiltsuk understands that BC only has five pilots with an Indigenous background.
4. To the best of Heiltsuk’s knowledge, an individual from a coastal First Nation has never served on the PPA’s board.
5. Participation of Indigenous peoples on the Board of the PPA would be consistent with Canada having signed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which speaks to Indigenous participation in decision-making which would effect their rights:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision- making institutions.

1. UNDRIP also speaks to the right of Indigenous peoples to protect the environment of their lands, territories and resources, and to states establishing and implementing assistance programs for such protection:

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

1. The regulatory systems of authorities under the *Pilotage Act* are essential to the safety of the marine resources of coastal Indigenous peoples.
2. Heiltsuk is further concerned that the PPA’s current board governance, which reserves positions for industry representatives may give rise to conflicts of interest at the board level. Pilotage authorities are legislatively tasked with providing pilotage services “in the interests of safety.” (*Pilotage Act*, s. 18) Despite this solely public legislative focus, the authorities guarantee, by convention, management roles to the very industries whose activities are being regulated.

### Maintain regional Pilotage Authorities

**Recommendations:**

* Retain regional pilotage authorities.
1. Heiltsuk is concerned that a move away from regional pilotage authorities to a single national authority would dilute the local representation and create a national authority unfamiliar or less familiar with local conditions.
2. The creation of a national authority will also eliminate the effective engagement of local Indigenous governments. Indigenous communities are unique in their knowledge of local waters and local conditions.

### Increasing Indigenous participation in PPA operations

**Recommendations:**

* Create structures to facilitate regular cooperation between the PPA and coastal Indigenous governments.
* Create opportunities for Heiltsuk mariners to engage in PPA operations in their territory, and to gain exposure and experience in piloting.
1. Heiltsuk believes that Indigenous groups should play a larger part within authorities at an operational level, as well as at a policy level, starting with greater cooperation and information-sharing between the PPA and Heiltsuk mariners.
2. For example, regular meetings between the PPA and Indigenous governments like Heiltsuk will allow Heiltsuk mariners to provide useful insights about local environments to the PPA, and in exchange, the PPA could allow Heiltsuk observers, including younger Heiltsuk mariners interested in pursuing piloting, to shadow current pilots, and assist in transits through their Heiltsuk waters.

## Compulsory Pilotage & Waiver Requirements

1. Heiltsuk’s traditional waters are within a “Compulsory Pilotage Area” (CPA) designated under the *Pacific Pilotage Regulations,* C.R.C. c. 1270 (the “Regulations”). Rules concerning vessel operations in CPAs, and especially the granting of waivers, thus relate directly to ship-source pollution threats to marine resources in our traditional waters.
2. The *Nathan E. Stewart* incident and the *Jake Shearer* incidents, described above, exemplify the risks that inadequate or unenforced regulations pose to the resources of Indigenous peoples, especially where shipments of large quantities of hydrocarbons are concerned.

### CPA Regulations

**Recommendations:**

* Consult with First Nations to determine appropriate boundaries near traditional waters.
* Modify CPAs to include waters between the Scott Islands, Virgins Rocks and Gertrude Rock.
* Modify PPA guidelines to include the following no-go areas for vessels carrying oil cargoes: Johnson Channel, Return Channel and the Fisher Channel
1. Heiltsuk waters are located within CPA Area 4, as designated by s. 3(d) of the Regulations. Area 4 generally follows the contours of the BC Coast closely and does not extend substantially into Queen Charlotte Sound. Current CPA boundaries exclude large swaths of water in Queen Charlotte Sound and Hecate Strait. Heiltsuk views the current boundaries as under-inclusive. This under-inclusivity increases the risk that vessels will transit near Heiltsuk waters without appropriate safety systems and policies.
2. Heiltsuk mariners suggest a more appropriate boundary would extend from the Scott Islands, off of Cape Scott, north east to the Virgin Rocks and then north-west to Gertrude Rock, off the coast of Aristazabal Island. This new boundary would provide added protection to Heiltsuk waters. Simultaneously, the new boundaries would not unduly impact navigation through the Queen Charlotte Sound and Hecate Strait.
3. Heiltsuk views the current compulsory pilotage applicability criteria under the Regulations as generally appropriate. The Regulations provide that compulsory pilotage applies to all non-pleasure craft over 350 gross tons and pleasure craft over 500 gross tons, subject to certain exceptions. (Regulations, s. 9) Likewise, Heiltsuk does not believe that CPA criteria must require consideration of cargo types.
4. Heiltsuk is aware of guidelines issued by the PPA in September 2017. These guidelines, amongst other provisions, created several no-go routes for ships carrying oil cargoes. The guidelines currently provide:

For vessels carrying or pushing/towing oil cargoes, the following are NO-GO areas: FitzHugh Sound, Lama Pass, Seaforth Channel, Boat Bluff and Heikish Narrows, Princess Royal Channel, Grenville Channel, Laredo Sound and Principe Channel.[[1]](#footnote-1)

1. Heiltsuk additionally submits that the following waters should be declared off-limits to ships carrying oil as a cargo: Johnson Channel, Return Channel and Fisher Channel.

### Waiver Regulations

**Recommendations**

* While a vessel is transiting pilotage waters, it must have two persons on the bridge at all times, and at least one of those persons must hold a pilotage waiver (or a pilotage licence).
1. Vessels subject to compulsory pilotage may apply to pilotage authorities for waivers from pilotage requirements. The power to issue waivers and establish conditions for the issuance of waivers is granted to pilotage authorities under s. 20(1)(c) of the Act. The Regulations currently set out the Pacific waiver framework in s. 10.
2. The *Nathan E. Stewart* was operating under waiver at the time of its grounding, but preliminary evidence indicates that no crew-member qualifying for a waiver was on deck at the time of grounding. In light of evidence that the waiver system currently in place failed, Heiltsuk is deeply concerned that regulations place, ensure, and enforce, adequate safety precautions on vessels operating under waiver.
3. The report of the U.S. National Transportation Safety Board indicates that when the *Nathan E. Stewart* grounded, only the second mate was on watch. The vessel was not using the cross-track alarm function of its electronic chart system (ECS) which would raise an alert of the vessel deviated from its planned route. The vessel did not have a pilothouse alerter installed, to detect when its master or becomes incapacitated.
4. Heiltsuk submits that, subject to no-go routes, it is not necessary to limit certain types of ships’ access to waivers, on the basis of that ship’s cargo or configuration. Similarly, Heiltsuk does not take issue with waivers being issued for ships that are merely transiting Canadian pilotage waters for commercial purposes with no intent to deliver goods to Canadian communities along these waters. Such leniency requires, however, that government be in a position to ensure that all ships actually comply with safety measures, such as Guideline requirements that vessels with waivers employ a Bridge Navigational Watch Assistant System set to a maximum interval of 10 minutes and Class A AIS set to transmit.
5. While the standards introduced in the Guidelines are generally appropriate, the Guidelines provide that two persons must be on the bridge at all times only in “confined waters,” defined as “any passage in which the vessel’s planned track necessitates passing within 1 nautical mile of grounding dangers to the vessel.” The Guidelines consider this requirement to be met where the second person leaves the bridge while a BNWAS is operating at 10-minute intervals and maintains regular voice contact with the remaining person on the bridge, subject to the *Marine Personnel Regulations*.
6. Given the events of the *Nathan E. Stewart*, more stringent measures are clearly required. Give the reports of the crew on the *Nathan E. Stewart* to the NTSB, it would appear that the manner in which they manned the *Nathan E. Stewart* was commonplace. Heiltsuk submits that waivers should require that two persons, at least one of whom holds a waiver, should be on the bridge at all times during a vessel’s navigation through pilotage waters.

### Transparency in the Waiver process

**Recommendations:**

* Pilotage authorities should make accessible, to Indigenous governments, information on vessels operating in pilotage waters under waiver, including their route, their cargo, whether they will be loading or unloading, and their historical safety records.
1. The current legislative framework makes little to no allowance for monitoring *by Indigenous governments* of waiver issuances or the operation of vessels under waivers. Vessels operating under waiver may currently transit through traditional waters if Indigenous governments without their knowledge. Yet Indigenous governments are best positioned to be first responders in the event of any accident. The lack of a framework that allows Indigenous governments to monitor vessels with waivers fails to recognize the interests of such governments to steward their resources, and fails to make use of the proximity of Indigenous communities to act as first responders.
2. In the *Nathan E. Stewart* and *Jake Shearer* incidents, Heiltsuk had no information as to the route these ATBs were taking, their cargo, or their compliance with manning requirements, including pilots.
3. Heiltsuk submits that Indigenous governments should have access to information on which vessels and crew-members are granted waivers at any given time; information about the conditions of that vessel’s waiver; and information relevant to pilotage issues, such as whether it may travel in “no-go” areas. For example, Heiltsuk should be able to know whether or not a vessel’s primary cargo is oil or oil products, and therefore unable to transit “no-go” areas described above and in the September Guidelines.
4. Further, where a vessel operating under a waiver enters an Indigenous government’s traditional waters, the Indigenous government should be provided with information on the vessel’s estimated times of arrival and departure in the waters, its anticipated route, cargo and information on the vessel itself. This should include the vessel’s name, crew information and past safety records.
5. Heiltsuk, like many other coastal Indigenous governments, has never ceded jurisdiction over its lands, including water-covered lands that make up its traditional marine areas. Heiltsuk asserts jurisdiction over its traditional waters, which UNDRIP Article 26 stipulates should be recognized:

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or other- wise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

1. This jurisdiction includes a right of Heiltsuk to know about ships transiting through Heiltsuk waters that may represent a threat to Heiltsuk marine resources, and are, for that reasons, subject to regulation.

## Enforcement & Penalties

1. An effective legislation framework allows authorities to monitor industry compliance and deter non-compliance through penalties. Heiltsuk submits that the Act and its regulatory scheme must confer greater powers and duties on authorities to detect and penalize non-compliance.

### Investigations

**Recommendations**

* The Act or the Regulations should expressly authorize and require authorities to conduct inspections.
* The Act or the Regulations should expressly permit inspections by Indigenous governments.
1. Heiltsuk submits that pilotage authorities should regularly inspect vessels to ensure compliance with applicable laws and regulations. The PPA currently reserves a right, under the Guidelines, to inspect vessels to verify waiver conditions:

PPA reserves the right of verification of waiver conditions by random checks by a PPA Manager or through cooperative boardings by Transport Canada Inspectors, RCMP or CCG [Canadian Coast Guard] Officers or others who have been requested to do so by the Authority. Copies of logs may be required. PPA has also instituted a system of “geo-fencing” by AIS to verify compliance of vessels passing key check-in points in the compulsory pilotage areas of the BC coast.[[2]](#footnote-2)

The Act and Regulations are silent, however, as to any authority’s power to investigate compliance.

1. The Act also does not adequately require pilotage authorities to investigate the conduct of ships operating under waiver in pilotage waters following marine accidents or occurrences. Under the Regulations, crew of such vessels are required to submit a Marine Occurrence Report to the PPA within 72 hours of the accident, subject to certain exceptions. (Regulations, s. 29) This regime does not, however, adequately investigate compliance before an accident; it relies entirely on self-reporting from the vessel’s crew.
2. Heiltsuk submits that the current legislative framework be amended to provide for regular compliance investigations into vessels operating under waivers.
3. Furthermore, Indigenous governments should have the power to perform inspections, to observe and participate in investigations following marine accidents, and have access to the results of such investigations. Especially with respect to inspections, Indigenous governments are constantly present in their territorial waters, and have easy access to vessels in their waters.

### Penalties

**Recommendations:**

* Raise maximum penalties under the Act to deter non-compliance.
* Factors in determining penalties should include the size of ship, the value of cargo and the rule contravened.
* Types of penalties should include non-monetary penalties, such as suspensions of waivers, or remedial education.
1. The maximum allowable fines under the Act are so low that they provide zero deterrent value in light of the potential commercial benefit for vessel operators to violate pilotage requirements. For example, under s. 47, proceeding without a pilot in pilotage waters is liable on conviction to a fine not exceeding $5,000. (Act, s. 47) Similarly, any contravention of the Act, a regulation made under the act or by an Authority, carries a maximum fine of $5,000. (Act, s. 48)
2. Low maximum fines may also undermine the ability of authorities to prosecute offences, as the cost to authorities to prosecute offences will far exceed the penalty. Authorities may be unable to prosecute all but the most egregious violations simply due to a lack of financial ability under the current framework.
3. Government should seriously reconsider fines and compensation limits, under the Act and also under related regimes, such as the *Marine Liability Act*. Marine legislation is markedly ineffective in its penalty regimes to achieve specific and general deterrence.
4. In developing a suitable penalty framework, government should consider the size of a ship (even without cargo, which may reflect the danger presented by its fuel), the value of the vessel’s cargo, and the rule being contravened (e.g., travel in a no-go zone). These factors would introduce an element of proportionality between the penalty and the profitability of a voyage that does not comply with requirements, while also accommodating vessels operating without cargo.
5. A suitable penalty framework would also include non-monetary penalties (such as suspensions of licences and education), to address the public interest in remedial education, and specific deterrence to prevent repeated incidents.

# Conclusion

1. While Heiltsuk has engaged in both Indigenous round-tables provided in this review, it has also decided that a submission is necessary to ensure that its voice is recorded. Heiltsuk urges the Chair in this review to consider individual engagement with Indigenous communities on the coastline. This will give the Chair the greatest opportunity to understand direct impacts of transportation accidents on these Indigenous communities, the depth of their local knowledge and stewardship experience, and the fact of their singular presence in the marine territories that the PPA is intended to protect. Heiltsuk welcomes your attendance in Bella Bella to discuss these pilotage matters at any time.
1. PPA, *Pacific Pilotage Authority ‘Pilotage Waiver Standard of Care’ Implementation Guidelines*. (Sept. 15, 2017), page 4. [↑](#footnote-ref-1)
2. Guide, page 6 [↑](#footnote-ref-2)