HEILTSUK FIRST NATION
Submission to the Senate Committee on Transport and Communications regarding Bill C-48, the *Oil Tanker Moratorium Act*
March 13, 2019

1. Heiltsuk First Nation (“Heiltsuk”) thanks the Committee for the opportunity to provide their support for Bill C-48. Bill C-48 marks a crucial step in protecting British Columbia’s coastal waters from the potential devastating impacts of oil tanker spills. Heiltsuk has experienced the impacts of marine oil spills first-hand. In May 2016, a fuel truck rolled into the marine environment and discharged diesel into herring spawning habitat. In October 2016, the tug- barge *Nathan E. Stewart* (the “NES”) grounded and spilled approximately 110,000 litres of diesel and other oils into one of Heiltsuk’s major harvesting areas. In November 2017, a fully laden oil barge (with 12.5 million litres of gasoline and diesel) very nearly grounded when the barge broke away from its tug, the *Jake Shearer*, again in a primary Heiltsuk harvesting area.

2. Heiltsuk are deeply concerned about the health of the coastal ecosystems which they have stewarded for thousands of years. The central coast holds some of the richest and most diverse ecosystems in the world. Heiltsuk rely on the health of ecosystems for their food, their health, their cultural activities, their economy, and their cultural and spiritual identities. Heiltsuk’s law, Ōvîlás, establishes Heiltsuk’s responsibility for the lands, the waters, the living beings in Heiltsuk territory.

3. Heiltsuk address four main points in these submissions:
   a. Heiltsuk has an inherent right to govern its territories, recognized under s. 35 of the *Constitution Act, 1982*. This right includes Heiltsuk jurisdiction to regulate the use of its lands and waters. Reconciliation of Canadian and Heiltsuk sovereignties call for Canada’s respectful attention to Heiltsuk’s need to safeguard their waters.
   b. Marine oil spills have a disproportionate impact on coastal Indigenous communities.
   c. Canada’s existing marine oil spill regime is inadequate to safeguard Heiltsuk waters and address the full range of marine oil spill impacts.
   d. The Bill should ultimately provide for an additional power of government to set geographic limitations that may dictate where oil tankers may not travel at all, or may travel only under certain conditions.
1.0 Heiltsuk jurisdiction over their lands and waters

4. Heiltsuk has an inherent right to govern its territories which calls for Canada’s respectful attention to Heiltsuk’s need to safeguard their waters and their peoples by prohibiting supertankers along the central coast.

5. Heiltsuk are Indigenous peoples who occupied, owned and exercised pre-existing sovereignty over lands and waters along the central coast before contact with Europeans, and before the Crown’s assertion of sovereignty in 1846 over what is now British Columbia.

6. Heiltsuk’s traditional territory is part of the central coast of British Columbia. Their traditional territory encompasses 16,658 square kilometres of land, including but not limited to twenty-three reserves, and further extends to nearshore and offshore waters and water-covered lands. Heiltsuk exercised sovereignty over Heiltsuk territory prior to the Crown asserting sovereignty in 1846. In fact, archeological evidence has confirmed that Heiltsuk’s occupation dates back at least 14,000 years.

7. An essential part of pre-contact and pre-Crown-sovereignty Heiltsuk culture involved stewardship of lands and waters under their own legal order, known as Ḷvīl̓ās. Ḷvīl̓ās did and still embodies Heiltsuk spiritual and legal principles; governs Heiltsuk relationships with the natural and spiritual world; and establishes Heiltsuk responsibility to lands, waters, and living beings within Heiltsuk territory.

8. Despite the Crown’s assertion of sovereignty in 1846, and notwithstanding the Crown establishing in 1858 the colony of British Columbia, Heiltsuk have not ceded, surrendered or otherwise relinquished ownership or sovereign jurisdiction (including any “radical”, “underlying” or “allodial” title) over Heiltsuk Territory, due to conquest or treaty.

9. Rights of (self-) government under s. 35 of the Constitution Act, 1982 are rooted in the pre-existing sovereignties of Indigenous peoples. In recent decades, the Supreme Court of Canada has expressly and repeatedly recognized the pre-existing sovereignties and legal orders of Indigenous peoples, and the need to reconcile such Indigenous sovereignties with assumed Crown sovereignty. The Supreme Court of Canada has recognized a need for Canadian society to reconcile “pre-existing Aboriginal sovereignty with assumed Crown sovereignty” (Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 at para. 20).

10. In 1996, the Royal Commission on Aboriginal Peoples concluded that “the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the Constitution Act, 1982 as an Aboriginal and treaty right” and that this provided “a basis for Aboriginal government to function as one of three distinct orders of government in Canada” (Report of the Royal Commission on Aboriginal Peoples, Vol. 2 (1996) at pp. 158-160). Indigenous (self-) government in “local” affairs are now
expressed as a key right within the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).

11. Canada have recognized the inherent rights of government that stem from pre-existing occupation, or more accurately, pre-existing ownership and sovereignty. For example:

   a. Principle 1 of Canada’s “Principles” respecting Indigenous relations states, “Canada’s constitutional and legal order recognizes the reality that Indigenous peoples’ ancestors owned and governed the lands which now constitute Canada prior to the Crown’s assertion of sovereignty,” and refers to the responsibility of all governments to recognize “the inherent right of self-government for Indigenous nations.”

   b. Principle 4 “affirms the inherent right of self-government as an existing Aboriginal right within section 35.”


12. Heiltsuk continues to fulfil their responsibility to steward and protect their ecosystems. Heiltsuk initiatives include patrols of marine territories, stewarding resources, engaging with British Columbia and other First Nations in marine planning for the central coast, engaging with federal and provincial agencies to create marine protected areas within the Northern Shelf Bioregion, and engaging in the Cohen Commission on Sockeye Salmon.

13. Heiltsuk will engage in litigation when necessary to protect their authority that stems from their Łáxváí, or inherent authority of ownership. Heiltsuk established its Aboriginal right to communally and commercially harvest herring spawn-on-kelp in court (R. v. Gladstone, [1996] 2 S.C.R. 723). Heiltsuk successfully quashed the federal certificate of the Northern Gateway-Enbridge pipeline project, which created an unacceptable risk of oil spills (Gitxaala Nation and others v. Her Majesty the Queen, 2016 FCA 187). Heiltsuk is currently in litigation to recover losses caused by the NES oil spill, which will involve their proving to a court their aboriginal title over seabed and foreshore, related resource management rights, and harvesting rights.

14. As part of their Indigenous sovereignty, Heiltsuk has a right to make and apply Indigenous laws that manage and protect the habitats and ecosystems within Heiltsuk territory. The Indigenous governments of Heiltsuk and other coastal First Nations have determined, as an exercise of their ongoing sovereignty, that supertankers are an unacceptable risk to their ecosystems and to the survival of their peoples. Coastal First Nations declared a ban on crude oil tankers in their waters in March 2010 with the Coastal First Nations Declaration. This determination calls for respectful attention by Canada to the needs of these coastal First Nations.
2.0 Disproportionate spill impacts on coastal First Nations

15. Coastal First Nations experience disproportionate impacts from oil spills. Heiltsuk have had first-hand experience with this fact, as represented by all three recent incidents, but especially the NES oil spill.

16. On Oct. 13, 2016, at about 1 a.m., a U.S.-based ATB (or articulated-tug-barge) consisting of the *Nathan E. Stewart* and an oil barge capable of holding millions of litres of oil, was travelling through the Inside Passage from Alaska to Washington state when it grounded at Edge Reef near the mouth of Gale Pass on Athlone Island, close to Bella Bella. Contrary to law, only one person was on watch on the bridge, and he fell asleep. Although the NES was on a return voyage from Alaska, such that the barge was empty, the grounding resulted in the sinking of the tug, the snapping of the coupling pins, and damage to the barge. The tug spilled its fuel – approximately 110,000 litres of diesel and other oils – in the marine waters.

17. Heiltsuk has published an Investigation Report concerning the first 48 hours of the spill documenting the inadequacies of polluter-led spill response. These inadequacies included lack of sufficient equipment, confusion over who was in charge, and the fact that the first oil spill response vessel from Prince Rupert only arrived at 6 p.m.

18. The spill response effort, and the need to host 200 respondents and other persons, strained scarce resources. Bella Bella is a small community accessible only by boat, by plane, and by ferry once per week. It has one grocery store, one gas station, no restaurant, no hotel and no bank. Heiltsuk primarily collect food by harvesting fish and other resources and storing them. Heiltsuk staff had to put aside community needs to engage in the spill response, and to retain experts for legal and scientific advice. Heiltsuk had to contribute vehicles and boats, fuel, equipment, building space, and about 600 meals per day, prepared by families in the community, during response efforts.

19. The aftermath of the spill has had traumatic impacts on Heiltsuk ways of life. The grounding occurred where Heiltsuk harvests much of their marine and terrestrial wildlife. For example, Gale Creek and the marine area near Athlone Island, all within the spill area, is a rich ecosystem from which Heiltsuk have traditionally harvested using sustainable practices. Heiltsuk have traditionally harvested at least twenty-five food species from the spill area. The spill area includes habitat for endangered abalone. The spill area is also the location of the majority of Heiltsuk’s commercial clam harvest. The kelp canopy in the affected area is habitat for sea otters and other marine life, and Heiltsuk harvests the kelp for use in communal and commercial spawn-on-kelp harvests throughout Heiltsuk territory.

20. The impacts from the spill from the NES have already been widespread and substantial. The true ecological, financial and cultural impacts of the spill are currently unknown. What is clear is that Heiltsuk have suffered disproportionate impacts from the
spill relative to other coastal communities, due to their deep spiritual, societal, and commercial connections to the resources and ecosystems of their lands and waters.

21. The oil carried within the tug-portion of the NES falls below the threshold quantity in Bill C-48 and was bunker fuel rather than cargo. The spill highlights, however, the devastating impacts that even a “small” spill can have on sensitive ecological areas. The diesel that spilled from the NES would weigh about 97.35 metric tons. By comparison, the 12,500 metric-ton threshold set in Bill C-48 addresses a volume of oil that is 128 times the actual spill from the NES.

3.0 Canada’s marine regime does not adequately address spill impacts on First Nations

22. Heiltsuk’s experience with the NES shows that Canada’s marine oil spill regime (“Canada’s Marine Regime”) does not adequately address oil spill impacts for First Nations. Gaps revealed by the spill of approximately 110,000 litres of oil from the NES will apply equally, if not with magnified effect, to spills from supertankers.

23. If an incident similar to the NES were to occur today in Heiltsuk territory, nothing would change in terms of the inadequate response and the challenges posed by the aftermath of the oil spill. Canada’s Oceans Protection Plan has not provided any solutions to these existing challenges, to date, and neither British Columbia nor Canada have meaningfully supported the building of an Indigenous Marine Response Centre (the “IMRC”).

24. In order for there to be a successful “world-class” oil spill response, there would need to be significant changes to Canada’s response and remediation regime. This would include strengthening environmental protections in legislation, such as Canada’s Pilotage Act, the Fisheries Act, the Canada Shipping Act, 2001, the Canadian Environmental Assessment Act, 2012, and British Columbia’s Environmental Assessment Act. This would also include investing in the building of response infrastructure, such as the IMRC. The IMRC would ensure a rapid response to oil spills on the central coast of British Columbia.

25. An example of failed post-incident response includes that more than two years after the NES spill, Heiltsuk has still been unable to coordinate any robust environmental impact assessments (EIAs) with the polluter, Canada, or British Columbia. Oil spills in marine environments may spread through water into complex eco-systems including many living marine resources, food-chains, and habitats. EIAs were, and are still, necessary for Crown governments and Heiltsuk government to assess and understand the immediate, intermediate and long-term impacts of the spill on ecosystems, and on the health and populations of impacted species. The EIA process has, however, been hampered by a refusal of the polluter to pay for a robust EIA; a perceived lack of authority on the part of British Columbia and Canada to order the polluter to engage in or
fund any EIA; and an apparent lack of willingness on the part of Canada to act under s.180 of the *Canada Shipping Act, 2001*, to require the development of a robust EIA.

26. The ability of Heiltsuk to quantify their losses from the NES spill depends on robust EIAs that will look at and quantify spill impacts on habitats and marine resources. Yet no federal legislation requires effective EIAs or provides for capacity funding to Indigenous governments so that they may themselves assess spill impacts to ecosystems and marine resource populations.

27. The lack of required EIAs is a significant gap that curtails the ability of impacted First Nations to understand the extent of their losses (especially prospective losses) which they must claim for and prove if they are to receive any compensation. The gap is significant enough that Heiltsuk has had to commence litigation to address the EIA issue. Heiltsuk’s Notice of Civil Claim, filed October 9, 2018, is available at “http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk-Notice-of-Civil-Claim.pdf”.

28. Canada’s Marine Regime presents other impediments as well, due to how the regime defines “pollution damage.” Canada’s Marine Regime exists under the *Marine Liability Act*, S.C. 2001, c. 6 (“MLA”). The MLA addresses spills of “bunker” oil, meaning oil used for the operation or propulsion of a ship, by giving force of law to the Bunkers Convention. The Bunkers Convention limits claims against any “ship-owner” to a claim for “pollution damage.” But the definition of “pollution damage” impairs access of Indigenous governments to full compensation for their losses because it excludes, or appears to exclude, any impacts flowing from “impairment of the environment”, except for “loss of profit”. The MLA allows claims by individuals who fish for food for their own consumption or use. But Canada’s Marine Regime ultimately fails to provide compensation for communal Indigenous fishing rights, for the social and ceremonial aspects of food fishing, and for other sorts of damage to the social and cultural fabric of Indigenous societies.

29. Marine oil spills thus represent a double threat to coastal First Nations. Oil spills threaten the ecosystems and resources that lie at the heart of Indigenous societies, and at the same time, Canada’s Marine Regime expressly excludes the key types of losses that coastal First Nations suffer from such oil spills.

4.0  Additional features that the law should include

30. Bill C-48 should be made law. The law should, however, ultimately provide government with an additional power to set geographic limitations that may dictate where oil tankers may not travel, or where they may travel only under certain conditions.

31. As Heiltsuk indicated to the House of Commons in November 2017, the Bill does not provide for any possible or prospective geographic limitations that may dictate where tankers may not travel at all, or where tankers may travel only under certain conditions. Without government having a power to ban tankers or classes of tankers of any size from
specific geographic areas, the Bill does not implement a moratorium on tankers, but merely a moratorium on tanker ports. Crown governments should have the power to do more.

32. Heiltsuk again proposes that the law ultimately include a provision that confers a power on government, or on delegate agencies, to establish – through regulations and after collaboration and consultation with First Nations – limits or conditions on routes for different tanker classes. In this way, government could, after proper study and consultation, develop appropriate regulations for how tankers – not only those carrying 12,500 metric tons of oil or more, but also smaller tankers in appropriate cases – may or may not travel around sensitive harvest areas, or other areas of ecological concern.

33. A power of Canada to create “no go” zones for tankers, or to otherwise set limits or conditions in specific geographical areas, through regulations, would recognize both dangers and the sensitive areas of the coast. Different routes involve different levels of risk – to safety, and to marine resources – depending on many factors, including weather, visibility, water levels, vessel size, vessel design, vessel maneuverability, the nature of a vessel’s cargo, and the real risks of human error (as illustrated by the NES spill, where contrary to law, only one person was on watch on the bridge, and he fell asleep).

34. For example, a restriction addressing the safety of ATBs on certain routes, during certain weather and during times of the year, might have prevented the 2017 accident involving the tug, Jake Shearer, where its coupling pins snapped, leading to its loss of its fully-laden oil barge carrying 12.5 million litres of gasoline and diesel. That barge very nearly grounded on the rocks surrounding Goose Island – within a primary Heiltsuk harvest area – but for the barge’s anchor miraculously catching on the sea-floor before the barge ran aground.

35. During the time of the incident, the Jake Shearer was travelling in the outside waters during winter weather, when the seas are known to be especially rough and unpredictable, particularly on the central coast. Regulations setting limits or conditions on ATBs travelling in winter weather in the outside waters may prevent future incidents.

36. Most significantly, Heiltsuk recommended, and they reiterate, that a power to set travel restrictions, limits or conditions should expressly allow for regulations that impose financial obligations on tanker owners who elect to travel in designated area.

37. To these ends, Heiltsuk previously recommended, and recommends again, the addition of a regulation-making power in the Bill, which would enable the Governor in Council to create regulations to set geographic restrictions, limits or conditions, and responsibilities for tankers and owners:

Regulations

24(1) The Governor in Council may make regulations

(a) establishing special areas in which travel by oil tankers is restricted;
(b) establishing special areas in which travel by oil tankers is subject to limits or conditions;

(c) prescribing the oil tankers or classes of oil tankers that are subject to restrictions, limits or conditions in special areas;

(d) prescribing the restrictions, limits or conditions to which prescribed vessels are subject in special areas, including but not limited to responsibilities of owners

   a. to assess, monitor, and respond to spills and spill-related threats and hazards;
   
   b. to identify and evaluate the immediate, short-term and long-term risks to and impacts on human health, infrastructure and the environment;
   
   c. to resolve, mitigate or respond to risks to and impacts on human health, infrastructure and the environment; or
   
   d. to fund any such activities.

(2) The Governor in Council may, by regulation, amend the schedule by adding or deleting any oil or class of oils.

5.0 The Promise of the Future

38. Heiltsuk welcomes continuing to work with Canada on a nation-to-nation basis in order to collaborate on critically required environmental protection legislation. This legislation is a necessary step towards protecting Heiltsuk’s way of life, and to ensure that nations can focus on building a healthy coastal economy for continued use by present and future generations.

Respectfully,

HEILTSUK FIRST NATION

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The *Nathan E. Stewart* spilled 97.35 MT of diesel fuel and lubricants into the marine environment. The proposed ban on tankers will prohibit tankers that carry 12,500 MT or more of crude or persistent oil.

That is 128 times the size of the *Nathan E. Stewart* spill.

What would a spill of 12,500 MT look like?