Heiltsuk Tribal
Council

Speaking Notes for Presentation – Heiltsuk First Nation
Jessie Housty, Councillor on Heiltsuk Tribal Council
December 12, 2016

My name is Jessie Housty. I am a citizen of the Heiltsuk Nation, an elected member of Heiltsuk Tribal Council, and the chairperson of the Lands Portfolio for Heiltsuk. Before I begin, I'd like to acknowledge those who are here with me today: Chief Marilyn Slett, my Chief Councillor, and Andrew Callicum, Executive Director for Heiltsuk Nation.

In the time that I have to speak to you, I will give my Nation's views on the funding of environmental assessments. Specifically, Heiltsuk Nation proposes that legislation provide for a "proponent pays" approach to aboriginal participation.

If the information to be gathered by an EA process is intended to be used for consultation purposes, then it has to be collected in a manner where a First Nation can meaningfully provide and receive information about impacts on their aboriginal rights and titles.

Heiltsuk Nation engaged in parts of the Northern Gateway Enbridge Pipeline Joint Review Panel process. Heiltsuk wanted to engage in the whole process, which took about eight years and spanned four "phases", from providing input on the terms of the review panel process, to submissions of written evidence, community hearings, oral hearings and closing submissions. Heiltsuk was not able to engage in the whole process due to the limits of its financial capacities. Heiltsuk did apply for and receive some funding from the Participant Funding Program, but it was so little, compared to the magnitude of what had to be done to meaningfully participate, that the funding was fundamentally inadequate.

Legislative amendments to CEAA, and to the suite of acts being considered - the Fisheries Act, the Navigation Protection Act and the National Energy Board Act - should be made in accord with at least two principles.

- The first principle is that First Nations are governments. As with all levels of government, First Nations are entitled to know about the impacts of projects on their communities and their resources, and specifically on their aboriginal rights and titles.
- The second principle is that a proponent wishing to profit from projects should pay for assessments of impacts on First Nations. In other words, CEAA should be based on a "proponent pays" model, where First Nations do not bear the brunt of the costs of participating in an assessment.

The need for CEAA to recognize these principles is illustrated by important flaws in the Northern Gateway process.

Heiltsuk and other First Nations were advised that the review process was our opportunity to provide information on the impacts on our rights and title. We were further advised that if we failed to do so, a decision on the pipeline project could be made without consideration of impacts on our rights and title. Because consultation would rely on information obtained during the review process, a failure to participate would negatively impact consultation. Therefore, for

Heiltsuk and other First Nations, it became important to have the capacity to obtain both legal and expert assistance, to review the application, to prepare responding expert reports, to participate in the community and in the oral hearings, to provide written evidence, and to make written submissions – that is, to fully participate in the process.

However, the sheer magnitude of the capacity that Heiltsuk needed to fully participate was impossible to achieve. Neither the CEAA nor the NEB process required that the proponent, or Canada, fund Heiltsuk so that it could fully participate.

As I stated before, Heiltsuk did receive some funding from the Participant Funding Program, but measured against the enormity of our financial burden on this matter, the funding was in no way a solution.

- Without proper funding, Heiltsuk could not retain experts to properly examine Northern Gateway's scientific evidence, or obtain its own scientific evidence to assess impacts on aboriginal rights. This was especially concerning given the voluminous amount of scientific evidence presented by the proponent, and given the science-heavy focus of the Joint Review Panel (and of all CEAA panels).
- Further, the PFP limited the uses to which Heiltsuk could apply the marginal PFP funding it did receive. For example, most of the funding could not be used for legal expenses, despite legal representation being Heiltsuk's most significant expense during the Phase 3 hearing, which involved cross-examination of Northern Gateway's expert panels, and of Canada's environmental and consultation experts.

More generally, participation in any environmental assessment requires that Heiltsuk allocate personnel, time and money to that assessment – all scarce resources in our communities. Further, when the costs of participating in environmental assessments is placed on First Nations like Heiltsuk, rather than on proponents, this prejudice is multiplied by the fact that Heiltsuk must face many projects and many assessments – often simultaneously. We cannot be in a position where the stakes for our people are so high, and the barriers to fully participate are so immense.

Heiltsuk's inability to fully participate in the review process resulted in severe prejudice to Heiltsuk's aboriginal rights and title. Throughout the review process, Heiltsuk had sought information about the impact of a potential oil spill on, among other resources, its established aboriginal right to a commercial herring spawn-on-kelp fishery. Heiltsuk continually advised the proponent, and Canada, that Canada had the duty to provide the missing information, and that the Heiltsuk did not have the capacity to obtain the missing information on its own.

In Phase 4 of the Northern Gateway review process, a Department of Fisheries and Oceans representative justified the absence of the missing information on the basis that Canada could not afford to obtain the information, and that taxpayers would reject the notion of Canada expending funds to obtain the missing information to support the proponent's bid for the project.

The representative proposed that by requiring that the missing information be obtained as a condition post-project certification, the financial burden would shift to Northern Gateway to pay for obtaining the information in order to meet the conditions of the project. Respectfully, the

Department of Fisheries and Ocean's justification defies the very purpose of environmental assessment, which is to determine if project certification should be issued. Moreover, the better solution is that proponents be required to pay for obtaining information concerning impacts on aboriginal rights and title.

Unfortunately, at the end of Phase 4 of the review process, the information that Heiltsuk sought was still missing information. Neither the proponent nor Canada provided it. Decisions were made without this critical information being provided and considered. And on a frustrating note, during the judicial review of the National Energy Board's decision to grant Northern Gateway's certificate to build the pipeline, both the company and Canada's response to Heiltsuk's position on the missing information was that Heiltsuk had every opportunity to obtain that information on its own.

The proponents on energy projects are substantial business enterprises, often carrying on international businesses, with considerable resources. These proponents are in the business of building and maintaining energy projects in order to make profits. They understand the cost of doing business, and the financial risks and rewards of doing business. It is undeniable that Northern Gateway, for example, stood to make a great deal more money for many decades than it would spend in making its application to build its pipeline through the joint review process. It is our position that in these circumstances, proponents should pay for the environmental assessments, and related assessments (such as an aboriginal impacts assessment), as part of their application expenses.

Said another way, First Nations should not be bearing expenses relating to environmental assessments. When engaging in consultation about projects, the law is clear that the Crown has a duty to procure and provide First Nations with information about how the project may impact their aboriginal rights and title. Assessments should allow for requirements that proponents create funds, as a precondition for assessments, to finance aboriginal participation and associated expenses relating to assessing project impacts on aboriginal rights and title.

Thank you for listening to me today. Heiltsuk Nation will provide its further views on amendments to CEAA 2012 in its written submission.