

OCT 09 2018

Form 82 (Rule 21-1(4))

S1810902
No.
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

ADMIRALTY ACTION *IN REM* AGAINST THE SHIP
"NATHAN E. STEWART"/"DBL 55"
AND *IN PERSONAM*

BETWEEN:

HEILTSUK HÍMÁS and HEILTSUK TRIBAL COUNCIL,
each on their own behalf and on behalf of the members of
Heiltsuk Nation

PLAINTIFF

AND:

THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP "NATHAN E. STEWART"/"DBL 55",
KIRBY OFFSHORE MARINE LLC,
KIRBY OFFSHORE MARINE PACIFIC LLC,
KIRBY OFFSHORE MARINE OPERATING LLC, JOHN DOE CORPORATION,
ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
SEAN CONNOR and HENRY HENDRIX

DEFENDANTS

**NOTICE OF CIVIL CLAIM – ADMIRALTY
(*IN REM AND IN PERSONAM*)**

Name and address of each plaintiff:

Heiltsuk Tribal Council, 226 North Wabalisla Street, Bella Bella, B.C.

Description of ship and/or other property:

The ship "Nathan E. Stewart"/"DBL 55" an articulated tug and barge

Name and address of the defendant(s) in personam:

Kirby Offshore Marine LLC, 55 Waugh Drive, Suite 1000, Houston, Texas, U.S.A.
77007

Kirby Offshore Marine Operating LLC, 55 Waugh Drive, Suite 1000, Houston, Texas,
U.S.A. 77007

Kirby Offshore Marine Pacific LLC, 55 Waugh Drive, Suite 1000, Houston, Texas,
U.S.A. 77007

SEAN CONNOR, address unknown to the Plaintiff at this time

HENRY HENDRIX, address unknown to the Plaintiff at this time

To the defendant(s):

TAKE NOTICE that this action has been started against you by the plaintiff(s) for the claim(s) set out in this notice of civil claim.

IF YOU INTEND TO RESPOND TO this action, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST FILE a response to civil claim in Form 2 in the above registry of this court within the time for response to civil claim described below and SERVE a copy of the filed response to civil claim on the plaintiff's(s') address for service.

YOU OR YOUR LAWYER may file the response to civil claim.

APPLICATION FOR JUDGMENT AGAINST THE SHIP OR OTHER PROPERTY MAY BE MADE AND JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

Service on ship:

The time for response to civil claim is 21 days from the service of this notice of civil claim on the ship or other property described in this notice of civil claim (not including the day of service).

Service on defendant *in personam*:

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

A response to civil claim filed on behalf of a ship or other property must set out the nature of the interest that you claim in the ship or other property.

CLAIM OF THE PLAINTIFF

PART 1: STATEMENT OF FACTS

A. Overview

- 1.1. On October 13, 2016, the ship "Nathan E. Stewart"/"DBL 55", an articulated tug-barge (the "Vessel") ran aground off the west coast of British Columbia, in the Seaforth Channel at Edge Reef, near the mouth of Gale Pass on Athlone Island (the "Incident"), and released diesel fuel and other pollutants into surrounding marine areas (the "Spill"),

which marine areas include major indigenous harvesting areas (the "Spill Area"), lying within the Claim and Loss Area defined below.

B. The parties

1. The Plaintiffs

- 1.2. Heiltsuk Nation, consisting of five tribes – the Wúyalítǵv (People of the Outside), Wúílitǵv (People of the Inlet), Ýísdáitǵv (People of Ýísdá, where mountain meets the sea), Qvúqvaýáitǵv (People of the Calm Water) and Xíxís (Down-river People) (collectively the "Five Tribes") – make up a self-governing nation of indigenous people, are an "aboriginal people" under section 35(1) of the *Constitution Act, 1982* ("s. 35"), and qualify as an Indian band under the *Indian Act*, R.S.C. 1985, c. 1-5, as amended ("Heiltsuk").
- 1.3. The Plaintiffs, Heiltsuk Hímás, are the hereditary chiefs of Heiltsuk Nation, and specifically the hereditary chiefs of the Five Tribes, who under Heiltsuk custom and/or laws, collectively own and govern the lands, including water-covered lands and foreshore, within the Claim and Loss Area defined below.
- 1.4. The Plaintiff, Heiltsuk Tribal Council is the elected governing body of Heiltsuk Nation under Heiltsuk custom and/or laws, and the council of Heiltsuk Nation under the *Indian Act*, R.S.C. 1985, c.1-5, as amended, with an office at 226 North Wabalisa Street, Bella Bella, British Columbia ("HTC"). HTC represents Heiltsuk with respect to their Aboriginal rights and title.
- 1.5. HTC is, *inter alia*, an assignee of all choses in action relating to the Spill from various Heiltsuk business entities listed in **Schedule C** to this Notice of Civil Claim (collectively the "Heiltsuk Companies"). Waglisla Band Store Ltd., or another of the Heiltsuk Companies, owns and operates, *inter alia*, the sole grocery store in Bella Bella (the "Band Store").

2. The in rem Defendant

- 1.6. The Defendant ship "Nathan E. Stewart"/"DBL-55" is an articulated tug and barge registered in the United States of America (the "Vessel"):
 - a. at all material times, the Vessel consisted of two components, the tug "Nathan E. Stewart" and the barge "DBL-55", connected to each other through a "JAK" coupling system, and these components worked as a single ship;
 - b. at all material times, the Vessel had a gross tonnage equal to or greater than 4,800, with its specific gross tonnage not known to the Plaintiff, but which gross tonnage is known to the Kirby Companies, a group particularized below;
 - c. the Vessel was a sea-going vessel constructed or adapted for the carriage of oil in bulk as cargo;
 - d. the Vessel was not registered in Canada, and was a "foreign vessel" as that term is defined under s. 2 of the *Canada Shipping Act, 2001*, SC 2001, c. 26 ("Canada Shipping Act" or "CSA");

- e. at all material times, the Vessel routinely transited between various ports in Alaska and either the state of Washington or Vancouver, British Columbia, to transport oil; and
 - f. at all material times, the Vessel carried "bunker" oil used or intended to be used for the operation or propulsion of the ship, consisting of diesel, lubricant oils, and other kinds of oils, the specifics of which are not known to the Plaintiff but are known to the Kirby Companies as particularized below.
- 1.7. The precise nature of the cargo oil or cargo residue, and whether that cargo oil or cargo oil residue was "persistent hydrocarbon mineral oil, such as crude oil, fuel oil, heavy diesel oil and lubricating oil" within the meaning of the term "oil" under Article 1 of the Civil Liability Convention, described further below, is not known to the Plaintiff but is known to the Kirby Companies.

3. The Corporate Defendants

- 1.8. The Defendant, Kirby Offshore Marine LLC, formerly K-Sea Transportation Partners LLC, is a Delaware company with a registered agent at 2711 Centerville Road, Suite 400, Wilmington, Delaware, 19808, and with corporate offices at Suite 1000, 55 Waugh Drive, Houston, Texas, U.S.A. ("Kirby Offshore").
- 1.9. The Defendant, Kirby Offshore Marine Operating LLC, a subsidiary of Kirby Offshore, is a Delaware company with a registered agent at 2711 Centerville Road, Suite 400, Wilmington, Delaware, 19808, and with corporate offices at Suite 1000, 55 Waugh Drive, Houston, Texas, U.S.A. ("Kirby Operating").
- 1.10. The Defendant, Kirby Offshore Marine Pacific LLC, a subsidiary of Kirby Operating, is a Delaware company with a registered agent at 2711 Centerville Road, Suite 400, Wilmington, Delaware, 19808, and with corporate offices at Suite 1000, 55 Waugh Drive, Houston, Texas, U.S.A. ("Kirby Pacific").
- 1.11. The Defendant, John Doe Corporation, is a corporation that engaged or participated in the ownership, management or operation of the Vessel, the name, the address and the extent of the participation of which corporation is unknown to the Plaintiff ("John Doe Corp.").
- 1.12. Kirby Offshore, Kirby Operating, Kirby Pacific and John Doe Corp. (collectively "Kirby", the "Kirby Companies" or the "Corporate Defendants") are corporations owned, directly in the case of Kirby Offshore or otherwise indirectly, by Kirby Corporation, a Nevada company with offices at Suite 1000, 55 Waugh Drive, Houston, Texas, U.S.A.
- 1.13. At all material times, the Vessel was owned, managed, and operated by Kirby. Without limiting the foregoing, at all material times, the Kirby Companies
- a. owned, managed or operated the Vessel as a group enterprise, joint venture, or partnership;
 - b. further or alternatively, each owned, managed or operated the Vessel as an instrumentality of one or more of the others; and
 - c. further or alternatively, contracted with each other in relation to the Vessel;
- the particulars of which arrangements are not known to the Plaintiff but known to Kirby.

4. The Personal Defendants

- 1.14. Sean Connor was master of the Vessel during the Incident, with an address not known to the Plaintiffs at this time (the "Captain").
- 1.15. Henry Hendrix was the second mate, navigation officer or watch-keeper of the Vessel during the Incident, with an address not known to the Plaintiffs at this time (the "Second Mate").

5. Other parties or persons

- 1.16. The Attorney General of Canada is a representative of the Queen in right of Canada ("Canada"), with offices including the British Columbia Regional Office of the Department of Justice at 900 – 840 Howe Street, Vancouver, B.C. V6Z 2S9. Canada is, subject to Aboriginal rights and title, the owner of seabed, and more specifically lands below the average low-water mark, except for "inland" waters owned by the Queen in right of British Columbia. Canada holds the Ship-source Oil Pollution Fund, as described further below. The Attorney General of Canada is entitled to notice of any challenge to the constitutional validity of any law under section 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, ch. 68.
- 1.17. The Attorney General of British Columbia is a representative of the Queen in right of British Columbia ("British Columbia"), with an address for service c/o Deputy Attorney General, Ministry of Justice, P.O. Box 9280 Stn Prov Govt, Victoria, B.C. V8W 09J7. British Columbia is, subject to Aboriginal rights and title, the owner of foreshore, and more specifically lands between high- and low-water marks, as well as seabed covered by "inland" waters. The Attorney General of British Columbia is entitled to notice of any challenge to the constitutional validity of any law under section 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, ch. 68.
- 1.18. The Ship-source Oil Pollution Fund (the "SOPF") is an account in the accounts of Canada continued under s. 92(1) of the *Marine Liability Act*, S.C. 2001, c. 6 ("MLA"). The SOPF is liable under specific conditions for claims under, *inter alia*, Article 3 of the Bunkers Convention, as described further below, or Article 3 of the Civil Liability Convention, as described further below. The SOPF must, under s. 109 of the MLA, be served, through the SOPF's Administrator, with a document commencing proceedings against the owner of a ship in respect of, *inter alia*, Article 3 of the Bunkers Convention, as described further below, or Article 3 of the Civil Liability Convention, as described further below.
- 1.19. The International Oil Pollution Compensation Fund, 1992 (the "International Fund") is a "person" under the MLA that must, under MLA s.62, be served, through the director of the International Fund, with a document commencing proceedings against the owner of a ship in respect of, *inter alia*, Article 3 of the Civil Liability Convention described below.
- 1.20. The International Oil Pollution Compensation Supplementary Fund, 2003 (the "Supplementary Fund") must, under MLA s. 68, be served, through the Director of the Supplementary Fund, with a document commencing proceedings against the owner of a ship in respect of, *inter alia*, Article 3 of the Civil Liability Convention described below.

C. Background

1. Heiltsuk's Aboriginal Interests

- 1.21. Since before both Contact and Crown Sovereignty defined below, Heiltsuk have exclusively occupied, owned, governed, managed and harvested from their land and marine areas under pre-existing Aboriginal sovereignty and pursuant to Heiltsuk laws, in the Central Coast region that is Heiltsuk traditional territory ("Heiltsuk Territory"). **Schedule A** to this Notice of Civil Claim is a map of Heiltsuk Territory.
- 1.22. Heiltsuk are an indigenous people who enjoyed Aboriginal sovereignty, exclusively occupied, owned, and used Heiltsuk Territory for thousands of years, since before the time of Heiltsuk contact with Europeans ("Contact"), and since before the Crown asserted sovereignty over what is now British Columbia, in or about 1846 ("Crown Sovereignty"), which Crown Sovereignty is subject to, *inter alia*, Aboriginal rights and title recognized and affirmed by s. 35.
- 1.23. Heiltsuk have not surrendered or ceded Aboriginal rights or title. Heiltsuk have since Contact and Crown Sovereignty continued to, *inter alia*, occupy, control and manage Heiltsuk Territory, and assert Aboriginal rights and title within and to Heiltsuk Territory, to present day. Heiltsuk have established an Aboriginal right to harvest herring spawn-on-kelp for commercial, as well as for food, social, ceremonial and livelihood ("FSC") purposes, as recognized by the Supreme Court of Canada in *R. v. Gladstone*, [1996] 2 S.C.R. 723.
- 1.24. Heiltsuk Territory specifically includes lands and water-covered lands in the area delineated by the map attached as **Schedule B** to this Notice of Civil Claim (the "Claim and Loss Area"). For purposes of this proceeding, the Claim and Loss Area:
 - a. includes all salt-water-covered lands, including seabed and foreshore; and
 - b. includes all "Indian reserve" lands, namely
 - i. Koqui Reserve No. 6 located on Dufferin Island;
 - ii. Bella Bella Reserve No. 1 located on Campbell Island;
 - iii. Kluemt Reserve No. 15 located about 15 km north of Bella Bella;
 - iv. Kokyet Reserve No. 1 located on Yeo Island;
 - v. Grief Island Reserve No. 2 located on Yeo Island; and
 - vi. Tankeah Reserve No. 5 located on the east shore of Don Peninsula,
 - c. Excepting the aforementioned "Indian reserve" lands, excludes all lands above the high-water mark for purposes of Aboriginal Title and Aboriginal Management Rights defined below, without prejudice to future title claims respecting these excluded areas.
- 1.25. The Incident occurred on Athlone Island, and near the village site of Qvúqvái, on Dufferin Island. Both Athlone Island and Dufferin Island are within the Claim and Loss Area. Qvúqvái is located near the mouth of Gale Pass. Gale Pass and marine areas within the Claim and Loss Area have rich ecosystems that have served and continue to serve as

traditional harvesting sites for many food species, including *číkva* (clam) and *ǵálǵñíq̓* (abalone).

- 1.26. Within the Claim and Loss Area, Heiltsuk have traditionally harvested
 - a. all edible marine resources, including but not limited to fish and plant-life, and including all species of *ǵálǵñíq̓* (abalone), *káqa* (black cod), *číkva* (clam), *zuáli* (cockles), *kínáxv* (crab), *puái* (halibut), herring spawn-on-kelp, *nálm̓* (ling cod), *lákálá* (rock cod), various types of salmon (including sockeye, chinook, chum, pink and coho), salmon eggs, sea cucumber, seaweed, and yelloweye; and
 - b. land resources, including but not limited to medicinal and other plant-life such as *dñás* (red cedar bark) and *díxv* (yellow cedar bark), and deer and other animals that feed on, *inter alia*, marine vegetation in or near the Claim and Loss Area (collectively the “Marine Resources”).
- 1.27. The Spill caused impacts or risks of impacts, particularized below, on populations of Marine Resources within the Claim and Loss Area, and caused Heiltsuk to not harvest, or will result in delayed future harvesting, of various species or resources including but not limited to *číkva* (clams), *zuáli* (cockles), *kínáxv* (crab), *puái* (halibut), *nálm̓* (ling cod), *lákálá* (rock cod), medicinal and other plant-life, *ǵálǵñíq̓* (abalone), and such other species and resources that the Plaintiffs may particularize before or at trial (the “Lost Marine Resources”).
- 1.28. Within Heiltsuk Territory, including but not limited to the Claim and Loss Area, Heiltsuk have for thousands of years and as part of their distinctive culture and way of life, used lands and waters to, *inter alia*, teach, transmit, cultivate and reinforce traditional skills, practices, rituals, knowledge and spiritual beliefs between community members, including Heiltsuk children.
- 1.29. Heiltsuk asserts facts, particularized below, which underlie the following communal Aboriginal rights or other interests relating to the Claim and Loss Area:
 - a. without prejudice to title claims relating to other portions of Heiltsuk Territory, Aboriginal title over the Claim and Loss Area (“Aboriginal Title”);
 - b. without prejudice to “self-government” claims relating to other portions of Heiltsuk Territory, Aboriginal rights of government within the Claim and Loss Area, including rights of law-making consistent with *Ǵviłás*, described below, respecting *inter alia* sustainable uses of lands and waters, natural resources, habitat, and the environment, and more specifically, respecting regulation of harvesting and the preservation of ecosystems and resources for harvesting (“Aboriginal Management Rights”);
 - c. Aboriginal harvesting rights relating to the Lost Marine Resources, either generally or alternatively in and around the Claim and Loss Area (“Aboriginal Harvesting Rights”); and
 - d. other legal rights to fish for or otherwise harvest marine resources in and around the Claim and Loss Area, pursuant to communal and/or commercial fishing licences (“Communal Licence Rights” and “Commercial Licence Rights”).

(collectively the “Aboriginal Interests”).

2. Aboriginal Title

- 1.30. Since before Crown Sovereignty, Heiltsuk exclusively occupied and used, *inter alia*, the Claim and Loss Area. In particular, since before and after Crown Sovereignty, Heiltsuk occupied, governed, controlled access to, used and enjoyed the Claim and Loss Area pursuant to Heiltsuk law. Heiltsuk occupation included the regular and exclusive use of the Claim and Loss Area for fishing, harvesting and other activities.
- 1.31. Heiltsuk presently occupy the Claim and Loss Area, and that occupation has been continuous since Crown Sovereignty.
- 1.32. Since before Contact and before Crown Sovereignty, Heiltsuk have relied on the integrity of the fish habitats and the health of the populations of Marine Resources in *inter alia* the Claim and Loss Area, to support *inter alia* harvesting by Heiltsuk that has been integral to their distinctive indigenous culture since before Contact.

3. Aboriginal Management Rights

- 1.33. Heiltsuk have existed as an organized self-governing indigenous society since before Contact. Heiltsuk enjoyed pre-existing Aboriginal Sovereignty and Heiltsuk law within Heiltsuk Territory based on Łáxváí, which refers to inherent jurisdiction flowing from ownership of lands and waters.
- 1.34. A body of Heiltsuk laws that Heiltsuk know as “Ĝviłás”, which Heiltsuk transmit and apply through various means including histories, life lessons, ceremony, and prayer, expresses Heiltsuk spiritual values, principles, and beliefs about their ways of being, and embodies Heiltsuk legal principles. Ĝviłás governs, *inter alia*, the relationship of Heiltsuk with the natural and spiritual world, and governs the responsibility of Heiltsuk to their resources, including their lands, their waters, and living beings within Heiltsuk Territory.
- 1.35. Since before Contact, Heiltsuk governed, *inter alia*, the Claim and Loss Area pursuant to Ĝviłás, to control and manage sustainable uses of lands and waters, natural resources, habitat, and the environment, and more specifically, to regulate harvesting and preserve ecosystems and resources for harvesting. Such Heiltsuk governance pursuant to Ĝviłás was and is integral to Heiltsuk’s distinctive culture.
- 1.36. Ĝviłás requires, *inter alia*, that Heiltsuk manage and protect their lands, their waters, and all living beings of Heiltsuk Territory. Ownership and stewardship responsibilities over specific areas of Heiltsuk Territory, including the Claim and Loss Area, are passed on by Heiltsuk Hímás, and by nuyem-giwa, meaning house, crest and family systems, under Heiltsuk law. Under Ĝviłás, Heiltsuk lands, including seabed, foreshore and other water-covered lands, are habitats for Marine Resources that are managed by and that sustain Heiltsuk, and to which Heiltsuk owe reciprocal spiritual and legal caretaking responsibilities. Heiltsuk stewardship under Ĝviłás is a part of Heiltsuk law that requires care for land and marine resources through sustainable harvesting. Management under Ĝviłás may require, from time to time, that Heiltsuk purposefully limit or refrain from harvesting to ensure the health and sustainability of the resources and the integrity of the ecosystem.

4. Aboriginal Harvesting Rights

- 1.37. Since before Contact, Heiltsuk harvested the Lost Marine Resources from the Claim and Loss Area for food, social, ceremonial and livelihood (“FSC”) purposes, and/or for trading (or “commercial”) purposes. Such harvesting was and is integral to Heiltsuk’s distinctive culture. FSC purposes include, *inter alia*, use of catch for sustenance; use of catch for social and/or ceremonial purposes; use of the activities of harvesting in specific areas and at specific times to teach, transmit, cultivate and reinforce traditional skills, practices, rituals, knowledge, and spiritual beliefs between community members, including Heiltsuk children; and such other uses that Heiltsuk may particularize at trial.

5. Communal licence rights

- 1.38. Without limiting or prejudice to the existence or scope of Heiltsuk’s Aboriginal harvesting rights, HTC held and regularly holds communal fishing and harvesting licences for all or some of the Lost Marine Resources, issued by Canada under, *inter alia*, the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.
- 1.39. Heiltsuk harvest, *inter alia*, all or some Lost Marine Resources from the Claim and Loss Area pursuant to, *inter alia*, HTC’s communal licences.

6. Commercial licence rights

- 1.40. Without limiting or prejudice to the existence or scope of Heiltsuk’s Aboriginal harvesting rights, HTC held and regularly holds commercial fishing and harvesting licenses for all or some of the Lost Marine Resources, such as číkva (clams).
- 1.41. Heiltsuk harvest some Lost Marine Resources within the Claim and Loss Area, such as číkva (clams), for commercial purposes.
- 1.42. The Claim and Loss Area is the main location for Heiltsuk’s commercial harvesting of číkva (clams), as well as a key location for Heiltsuk’s harvesting of herring spawn-on-kelp, pursuant to, *inter alia*, HTC’s commercial licences.

D. The Vessel grounding and the spill

1. The Vessel and its passage

- 1.43. At all material times prior to October 13, 2016, the Vessel regularly sailed along the coast of British Columbia, Canada to deliver bulk fuel to Alaska from other parts of the United States. The Vessel would travel through the “Inside Passage”, which is a coastal route for vessels extending from Alaska to north-western Washington state, or alternatively travel another route, but in any event, pass through Seaforth Channel, which is within Heiltsuk Territory and within British Columbia.

2. Applicable deck watch and other requirements

- 1.44. At all material times, s. 200(3) of the *Marine Personnel Regulations*, SOR/2007-115 (the “Regulations”), enacted under the CSA, specified that Part 2, Division 4 of the Regulations applied to foreign vessels in Canadian waters. Division 4 included s. 247(1), which required that the master of the Vessel ensure that deck watch consists of, at a minimum, a person in charge of the deck watch, and, *inter alia*, at least one “additional person”. Section 244 of the Regulations also required a deck watch maintained in accordance with, *inter alia*, Part 3-1 of section A-VIII/2 of the *Seafarer’s Training*,

Certification and Watchkeeping Code ("STCW Code"), which is now Part 4-1 of the STCW Code after amendments in 2010. Former Part 3-1(15) of the STCW Code, now Part 4-1, allows an officer in charge to be sole lookout only in daylight, and only under specific conditions. Accordingly, at least two provisions of the Regulations required two people on the bridge during, *inter alia*, hours of darkness (the "Legal Deck Watch Requirement").

- 1.45. The area of the Inside Passage near Bella Bella, where the Vessel would eventually ground as particularized below, was a compulsory pilotage area designated by the Pacific Pilotage Authority (the "Authority" or the "PPA") under the *Pilotage Act*, R.S.C. 1985, c. P-14. The Authority had issued, to the Vessel, a waiver of requirements for hiring a PPA-licensed pilot while navigating in compulsory pilotage areas for a period ending on or about March 1, 2017 (the "Waiver"). Kirby obtained the Waiver based on the qualifications of two officers of the Vessel, but neither of these two qualifying officers was the navigation officer or watch-keeper of the Vessel during the Incident.
- 1.46. At all material times, the Vessel ostensibly operated subject to a Kirby safety management system ("SMS"), which included a common procedures manual (the "Manual" or "CPRM"), with the specifics of the SMS and the CPRM not known to the Plaintiff, but known to Kirby. The SMS required that both a deck officer and an additional person maintain bridge watch while in pilotage waters, subject to the additional person making safety rounds, answering alarms, or performing other tasks of short duration (the "SMS Deck Watch Requirement").
- 1.47. Throughout the history in which the Vessel transited through Canadian waters, including its transiting through compulsory pilotage areas, the specifics of which voyages are not known to the Plaintiff but known to Kirby, the crew of the Vessel
 - a. routinely used a watch rotation that did not provide for or otherwise ensure any additional person for bridge watch during, *inter alia*, transit in pilotage waters during night hours,
 - b. routinely used a watch rotation that created a significant risk of any single person on bridge watch suffering from fatigue, and
 - c. routinely failed to use electronic alarms to warn if the Vessel was deviating from its route(collectively the "Inadequate Practices").
- 1.48. At all material times, the upper wheelhouse of the Vessel was set up for a one-person bridge watch.
- 1.49. The Inadequate Practices were recorded in, or otherwise apparent from, the Vessel's logbooks (the "Logbooks"), the specific contents of which Logbooks are not known to the Plaintiff but are known to Kirby.

3. The grounding

- 1.50. On or about October 12-13, 2016, after delivering, *inter alia*, fuel oil to the Ports of Skagway and Ketchikan in Alaska, the precise nature of which fuel oil is not known to the Plaintiff but known to Kirby, the Vessel was travelling with seven crewmembers

including the Captain and the Second Mate (the "Crew"), and without a local pilot, from Ketchikan, Alaska to Vancouver, British Columbia.

- 1.51. Shortly before 1:00 a.m. on October 13, 2016, the Vessel missed a course change eastward into Seaforth Channel. The weather at that time was moderate rain and winds of 10 knots. About 10 minutes after missing the eastward course change, at approximately 1:06 a.m., the barge-portion of the Vessel ran aground at Edge Reef, near the mouth of Gale Pass on Athlone Island (the "Location"). The Location is within the Claim and Loss Area.
- 1.52. The Incident resulted from the acts and omissions of Kirby and Personal Defendants herein, particulars of which include but are not limited to the Inadequate Practices, and the following:
 - a. failure to supervise the Crew on the bridge to ensure they were operating the equipment correctly and performing all of their duties, including keeping a proper lookout and having two or more persons keep a proper lookout while in pilotage waters or otherwise in Canadian waters;
 - b. failure to ensure that the Crew, and specifically the officer or watch-keeper of the Vessel during the Incident, met the minimum standard of experience, training, and licensing to operate without a local pilot;
 - c. failure to train the Crew adequately or at all in the correct operation of the navigation equipment on board the Vessel;
 - d. failure to exercise a proper degree of caution while navigating at night;
 - e. navigation of the Vessel with the assistance of inexperienced personnel;
 - f. failure to operate and monitor the navigation equipment properly;
 - g. failure to keep a proper lookout, or any lookout;
 - h. improper use of, or failure to use, the Vessel's radar;
 - i. failure to keep the Vessel within the navigable waters of Seaforth Channel;
 - j. failure to operate the Vessel at a safe speed or in a safe manner;
 - k. continued operation of the Vessel after knowing of navigation difficulties;
 - l. failure to detect a known or reasonably ascertainable navigation hazard in sufficient time to avoid the Incident;
 - m. failure to properly interpret, use or obtain information which was, or should have been, available to those on board the Vessel by radar, radio, lookout or otherwise;
 - n. failure to take all available means appropriate to the prevailing circumstances and conditions to determine if a risk of grounding existed;
 - o. improper navigation under the circumstances, having regard to the ordinary practice of seafarers and the special circumstances of the case;
 - p. failure to take any proper precautions to avoid the Incident;
 - q. failure to take early and substantial action to avoid the Incident;

- r. operation of the Vessel in such a manner as to cause or allow it to ground on a substantial and easily avoidable navigation hazard;
- s. failure to recognize at the time of running aground the seriousness of the damage caused to the Vessel; or
- t. engagement in such further and other acts of carelessness or recklessness better known to Kirby and the Personal Defendants

(the "Negligent Conduct").

1.53. Without limiting the foregoing, the Plaintiff alleges that the Second Mate, or alternatively such other watch-keeper of the Vessel at or about the time of the Incident, being the sole person on deck watch, fell asleep or otherwise failed to keep watch, in or about the period between 12:30 a.m. and 1:00 a.m.

1.54. At all material times, each member of the Crew was an employee or dependent contractor of Kirby.

4. The Spill

1.55. At about 1:11 a.m., the Crew notified Prince Rupert Marine Communications and Traffic Services ("MCTS") that the Vessel had run aground. MCTS issued a distress signal for any available vessels to assist.

1.56. The Coast Guard Vessel "Cape St. James" arrived at the Location approximately one hour after the Vessel ran aground, but without its basic oil response equipment.

1.57. At or around 4:10 a.m., the Crew detected diesel oil in the water, and shortly thereafter, the Crew reported their belief that bulkheads of the Vessel had been breached, fuel was leaking out, and the Vessel was taking on water in the bilge. The Crew began deploying the containment boom and pumping fuel from the tug-portion to the barge-portion of the Vessel, but the containment boom parted at one or more points due to the sea state and winds.

1.58. The Coast Guard vessel "John P. Tully" was dispatched, first to the Bella Bella Coast Guard Station, and then to Shearwater Marina and Resort, to pick up oil pollution response equipment, and arrived at the Location approximately 6 hours after the Vessel had run aground.

1.59. By 9:00 a.m., the Crew reported that 6 pumps were operational in an effort to dewater, but the Crew reported that the pumps were unable to keep up with the ingress of water.

1.60. At approximately 9:26 a.m., the tug-portion of the Vessel began to sink, and the crew evacuated onto the barge-portion, from which the Coast Guard rescued them.

1.61. By 7:00 p.m. that evening, the barge-portion of the Vessel broke away from the tug-portion, after which the barge-portion was temporarily anchored in Dundavan Inlet and subsequently moved to dry dock in Vancouver for repairs.

1.62. The Vessel grounding led to the Vessel directly crushing, *inter alia*, ḡáḡḡíq̓ (abalone) and releasing approximately 110,000 litres of toxic substances into the Claim and Loss Area, including diesel oil, and other oils or contaminants (collectively the "Pollutants"), the precise details of which are not known to the Plaintiffs but better known to Kirby.

- 1.63. The Pollutants directly killed or damaged marine life in the Claim and Loss Area, including Marine Resources: contaminated Marine Resources: and contaminated marine habitats, including but not limited to intertidal or foreshore areas, where Marine Resources grow and where Heiltsuk harvests Marine Resources.
- 1.64. The tug-portion of the Vessel remained grounded and submerged from October 13 to November 14, 2016.
- 1.65. The Spill resulted in the Department of Fisheries and Oceans declaring, on or about October 14, 2016, an emergency chemical contaminant closure of shellfish fisheries for the waters and intertidal foreshore of DFO management areas 7-8, 7-9, 7-12, 7-19, 7-20, 7-21, 7-22, 7-23, 7-24 and 7-32.
- 1.66. The Spill occurred several weeks prior to the planned opening of Heiltsuk's cikva (clam) harvesting season in, *inter alia*, the Claim and Loss Area.

5. Reckless conduct by Kirby

- 1.67. At all material times, Kirby actually knew that the Legal Deck Watch Requirement applied to the Vessel while it was in Canadian waters through, *inter alia*, the knowledge of its directing mind(s) with respect to compliance with Canadian law by, *inter alia*, the Vessel, the identity of which directing mind(s) is not known to the Plaintiff, but known to Kirby.
- 1.68. At all material times, Kirby actually knew that the SMS Deck Watch Requirement applied to the Vessel while in pilotage waters, and that the area of the Inside Passage near Bella Bella, where the Vessel would eventually ground as particularized below, was a compulsory pilotage area, through the knowledge of its directing mind(s) with respect to compliance with Canadian law by, *inter alia*, the Vessel, the identity of which directing mind(s) is not known to the Plaintiff, but known to Kirby.
- 1.69. At all material times, Kirby actually knew of the Inadequate Practices, through the knowledge of its directing mind(s) with respect to compliance with Canadian law, or with the SMS, by, *inter alia*, the Vessel, the identity of which directing mind(s) is not known to the Plaintiff, but known to Kirby.
- 1.70. At all material times, Kirby knew that the Vessel continuing with the Inadequate Practices created an obvious risk that the Vessel would, over time, ground at night and release pollutants.
- 1.71. At all material times, Kirby had authority
 - a. to direct the Crew of the Vessel to comply with the Legal Deck Watch Requirement and the SMS Deck Watch Requirement, by having a second person on deck watch while in Canadian waters, including pilotage waters, and
 - b. to hire additional crew for the Vessel if existing crew levels were inadequate for the Vessel to maintain a second person on deck watch during, *inter alia*, night hours.
- 1.72. Despite actual knowledge of the Legal Deck Watch Requirement, the SMS Deck Watch Requirement, and the Inadequate Practices, Kirby recklessly allowed the Vessel to

continue with the Inadequate Practices, despite the risk of the Vessel grounding and releasing pollutants as occurred during the Incident (the "Reckless Conduct").

E. Operational Expenses

- 1.73. Following the Spill, Heiltsuk incurred expenses in connection with both response efforts by Heiltsuk, and response efforts by or on behalf of Kirby, including but not limited to use of HTC and other Heiltsuk staff resources during regular work hours and during "overtime" hours; professional resources; other human resources; ground vehicles; boats; facilities; food; equipment; scientific advisors or consultants providing HTC with *inter alia* professional expertise relating to environmental impact assessments ("EIAs") and related activities; and consulting firms providing HTC with *inter alia* ecological risk assessment services, including dive surveys, sampling, and toxicology analysis (the "Operational Expenses").
- 1.74. On or about October 29, 2016, HTC and Kirby entered into a funding agreement (the "Funding Agreement") under Articles B, 2 and 3 of which Kirby agreed to provide HTC with expense payments relating to any "reasonably incurred cost in connection with a Response Effort", with Response Efforts being defined as "expenses in support of and in connection with deploying resources, manpower, and materials in response to the Incident".
- 1.75. Following the Funding Agreement, Heiltsuk continued to incur Operational Expenses.
- 1.76. Kirby has not paid for a number of Operating Expenses relating to response efforts, the particulars of which the Plaintiffs will provide by trial, including expenses relating to environmental impact assessments ("EIAs"), all of which, or alternatively some of which Heiltsuk reasonably incurred in connection with "Response Efforts" within the meaning of the Funding Agreement, and further or alternatively, constitute loss or damage caused by contamination resulting from the escape or discharge of oil from a ship within the meaning of "pollution damage" under the MLA (the "Unpaid Operational Expenses").

F. Insufficient environmental impact assessments (EIAs)

1. The duty of Kirby to perform EIAs

- 1.77. Section 91.2(2) of the *Environmental Management Act*, S.B.C. 2003, c.53 (the "EMA"), provides that a "responsible person" in relation to a spill must, subject to any regulations, take the actions necessary to address the threat or hazard caused by the spill, which may include, *inter alia*, identifying and evaluating long-term impacts of the spill:

[91.2(2)] Subject to the regulations, if a spill occurs or is at imminent risk of occurring, the responsible person in relation to the spill must ensure that the actions necessary to address the threat or hazard caused by the spill are taken, which actions may include, but are not limited to, the following actions, if applicable:

...

(d) identify and evaluate the long-term impacts of the spill;

(e) take steps to resolve or mitigate those immediate and long-term impacts.

- 1.78. At all material times, British Columbia had not enacted any regulations under the EMA relating to ship-source marine spills which defined, qualified, or limited the necessary actions that a responsible person must take under EMA s. 91.2(2) to address threats or hazards caused by a ship-source marine spill.
- 1.79. At all material times, EIAs relating to, *inter alia*,
- a. the short-term and long-term impacts of the Spill on human health and well-being; and
 - b. the short- and long-term impacts of the Spill on the Marine Resources, including their habitats and ecosystems, their population, their health and reproductive capacity, and their ability to support sustainable, traditional harvest and consumption,

were actions necessary to address the threat or hazard caused by the Spill (the "Required EIAs").

2. The power of Canada and British Columbia to order EIAs

- 1.80. Section 180(1) of the *Canada Shipping Act*, 2001, SC 2001, C. 26 ("CSA"), provides that if the Minister of Fisheries and Oceans believes on reasonable grounds that a vessel has discharged a pollutant, he or she may, *inter alia*, if he or she considers it necessary to do so, direct any person or vessel to take measures that he or she considers necessary to remedy pollution damage from the vessel.
- 1.81. Section 91.2(3) of the EMA provides that a director under the EMA may, if satisfied that compliance with any regulations is not sufficient to deal with the adverse effects of a spill on the environment, order the responsible person to take specified spill response actions that the director considers necessary or advisable in addition to the regulatory requirements.

3. Lack of the Required EIAs

- 1.82. After the Spill, Kirby refused and has continued to refuse to perform or fund the Required EIAs.
- 1.83. After the Spill, Canada and British Columbia refused or otherwise failed to perform, and refused to order Kirby, under CSA s. 180(1) or under EMA s. 91.2(3) respectively, or otherwise, to perform or fund the Required EIAs.
- 1.84. After the Spill, Canada and British Columbia refused or otherwise failed to consult with Heiltsuk about any decision to act or refrain from acting under CSA s. 180(1) or EMA s. 91.2(3), respectively.

G. EIA-related expenses incurred by HTC

- 1.85. Due to Kirby's refusal to perform, or fund, the Required EIAs, and for lack of any order by Canada or British Columbia that Kirby perform or fund the Required EIAs, Heiltsuk has incurred expenses, and may incur reasonable expenses in the future, to *inter alia* investigate, and monitor the short-term and long-term effects of the Spill on the Marine Resources, including effects on their habitats, and effects on their health, their populations, and their reproductive capacities, through both scientific analyses and evaluations based on indigenous knowledge (the "Unpaid EIA Expenses").

H. Losses

- 1.86. The Negligent Conduct and the Reckless Conduct caused or contributed to foreseeable harm to, including but not limited to contamination of, Marine Resources in or exposed to the Claim and Loss Area, and harm to marine habitats within the Claim and Loss Area. Without limiting the foregoing, the Negligent Conduct and the Reckless Conduct were direct or otherwise proximate causes of, *inter alia*,
- a. immediate and long-term impacts on *inter alia* fish habitats and ecosystems in the Claim and Loss Area, including contamination of such sites, rendering them, *inter alia*, unsuitable for traditional uses such as harvesting and cleansing ceremonies;
 - b. immediate and long-term negative impacts to, *inter alia*, Lost Marine Resources, including immediate mortality and injury, contamination of plankton and food sources, reduced populations, reduced health and reproductive capacities, and the rendering of Lost Marine Resources unsuitable for harvest for traditional and/or commercial purposes;
 - c. fishing closures imposed by Canada which restricted harvesting for traditional and/or commercial purposes; and
 - d. risks of unsafe harvesting and/or damage to populations of Lost Marine Resources warranting Heiltsuk refraining from and continuing to refrain harvesting for FSC and/or commercial purposes, pursuant to, *inter alia*, Ġviłás and their Aboriginal Management Rights.
- 1.87. Further or alternatively, in the absence of the Required EIAs or other studies showing no significant impacts to the safety, health and populations of *inter alia* Lost Marine Resources in the Claim and Loss Area, the Spill created risks of unsafe harvesting and/or damage to populations of *inter alia* Lost Marine Resources, and have caused Heiltsuk to refrain from harvesting Lost Marine Resources within the Claim and Loss Area, pursuant to, *inter alia*, Ġviłás, their Aboriginal Management Rights, and/or reasonable safety and conservation concerns.
- 1.88. Due to the Spill, and further or alternatively the conduct of Kirby and the Personal Defendants, the Plaintiffs have suffered and will continue to suffer foreseeable loss, harm and damage, including but not limited to following:
- a. the Unpaid Operational Expenses, due under the Funding Agreement and/or constituting “pollution damage” under the MLA;
 - b. further or alternatively, the Unpaid EIA Expenses;
 - c. further or alternatively, such further amounts necessary for Heiltsuk to complete the Required EIAs;
 - d. past and future mental distress, and/or adverse impacts on mental, emotional and social well-being of Heiltsuk individually, communally, culturally, and/or socially, including negative effects relating to, *inter alia*, stresses arising from participation in response efforts, anxiety about food safety and health of resources relating to Marine Resources, loss or impairment of their abilities to engage in harvesting or other activities in the Claim and Loss Area for FSC or other purposes, and such other negative effects the Plaintiffs may identify through,

inter alia, health impact assessments, particulars of which the Plaintiffs may provide prior to or at trial:

- e. expenses incurred by Waglisla Band Store Ltd., or other Heiltsuk Companies, caused by the Spill requiring response efforts that foreseeably interfered with, *inter alia*, the shipping of roof trusses and other construction materials for the new Band Store (the "Construction Materials"), which expenses included storage costs for the Construction Materials, additional unloading and loading costs for the Construction Materials, and costs of construction crews wasted by the delay in the delivery of the Construction Materials;
- f. losses relating to past and future interference with Heiltsuk's use and enjoyment of the Claim and Loss Area, and further or alternatively, past and future interference with Heiltsuk's exercise of Aboriginal Harvesting Rights, Communal Licence Rights, and/or Commercial Licence Rights, relating to the Claim and Loss Area, including but not limited to the following losses:
 - i. contamination or a risk of contamination of the Claim and Loss Area;
 - ii. loss of use of the Claim and Loss Area, and/or loss of its suitability for use, for social and ceremonial purposes;
 - iii. costs that Heiltsuk has incurred, or may reasonably incur, to restore or reinstate fish habitats and ecosystems in the Claim and Loss Area;
 - iv. time, effort and expense involved in Heiltsuk having to replace some of the Lost Marine Resources that they would have ordinarily harvested from the Claim and Loss Area from multiple and more areas;
 - v. losses of harvests, despite mitigation efforts, for food, social, ceremonial and livelihood purposes;
 - vi. losses of profits or income by Heiltsuk, or by Heiltsuk Companies, relating to harvesting activities for FSC purposes, or to related goods, services or activities; and
 - vii. losses of profits or income by Heiltsuk, including Heiltsuk fishers and/or harvesters, or by Heiltsuk Companies, relating to harvesting activities for commercial purposes, or to related goods, services or activities; and
- g. such other losses for which the Plaintiffs may provide particulars prior to or at trial, or otherwise establish at trial

(collectively the "Losses").

PART 2: RELIEF SOUGHT

2.1. The Plaintiffs claim the following relief:

- a. A declaration of Aboriginal Title over the Claim and Loss Area, or a portion thereof;
- b. Further or alternatively, a declaration of Aboriginal Management Rights over the Claim and Loss Area;

- c. Further or alternatively, a declaration of Aboriginal Harvesting Rights to fish for the Lost Marine Resources;
- d. A declaration that Kirby is obligated under EMA s. 91.2(2) to perform or fund the Required EIAs;
- e. Further or alternatively, a declaration that Canada and British Columbia have a legal duty to consult with HTC or Heiltsuk about Crown decision-making under CTA s. 180(1) or EMA s.91.2(3) respectively, and a duty to inform themselves, and to inform HTC or Heiltsuk, about the extent of Spill impacts on the Aboriginal Interests;
- f. Pollution damages under the Bunkers Convention, or alternatively under the CLC, without the Impairment Exemption as defined below, or alternatively, with the Impairment Exemption;
- g. Further or alternatively, damages, including general and special damages;
- h. A mandatory injunction requiring that Kirby require and ensure that the crews of vessels owned or operated by Kirby and sailing within inland waters of British Columbia comply with all applicable Canadian or British Columbia laws relating to minimum watch personnel;
- i. Condemnation of the defendants' Vessel or its bail;
- j. Costs;
- k. Interest at admiralty rates;
- l. Further or alternatively, interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and
- m. Such further and other relief as this honourable court may deem just.

PART 3: LEGAL BASIS

A. Overview

- 3.1. Without prejudice to any future proceedings concerning Aboriginal Title, or the applicability, paramountcy or exclusivity of traditional laws within Heiltsuk Territory, or alternatively, within areas of Aboriginal Title, and subject to constitutional challenges set out herein concerning various provisions of the MLA, the Plaintiff pleads and relies on MLA s. 69, which gives force of law to various Articles of the "Bunkers Convention", which under MLA s. 47(1) means the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, concluded at London on March 23, 2001, as set out in MLA Schedule 8 (the "Bunkers Convention").
- 3.2. Alternatively, if the Vessel was carrying "persistent" oil in bulk as cargo, or residue of such "persistent" oil, Heiltsuk pleads and relies on MLA s. 48, which gives force of law to various Articles of the "Civil Liability Convention", which under MLA s. 47(1) means the *International Convention on Civil Liability for Oil Pollution Damage, 1992*, concluded at London on November 27, 1992, as subsequently amended and as set out in MLA Schedule 5 (the "Civil Liability Convention" or "CLC"). If the CLC applies or may apply, then insofar as Heiltsuk refers herein to Bunkers Convention provisions, or to

Bunkers-related MLA provisions. Heiltsuk pleads, in the alternative, the equivalent CLC provisions, and to CLC-related MLA provisions.

- 3.3. The Plaintiffs plead and rely on MLA s. 107, properly construed in the context of s.35 of the *Constitution Act, 1982*, as confirming or extending the responsibility of shipowners and/or SOPF for losses of food, social, ceremonial and livelihood harvesting, either as "pollution damage" or otherwise as a form of loss for which SOPF is responsible. Further or alternatively, if or to the extent that MLA s. 107 does not confirm or fully extend the responsibility of shipowners or SOPF for losses of food, social, ceremonial and livelihood harvesting, the Plaintiffs plead and rely on MLA s. 107 as a contributing factor in the MLA unjustifiably infringing the Plaintiffs' constitutionally-protected Aboriginal Harvesting Rights, as detailed below.

B. The parties

- 3.4. The Vessel was a "ship" that spilled "bunker oil" under Articles 1 and 3 of the Bunkers Convention, and each of the Kirby Companies is a "shipowner" under the Bunkers Convention, and they are accordingly jointly and severally liable for all "pollution damage" within the meaning of Article 1(9) of the Bunkers Convention.
- 3.5. Alternatively, the Vessel was a "ship" that spilled "oil" under Articles 1 and 3 of the Civil Liability Convention, such that each of the Kirby Companies, or some of them, or one of them, is an "owner" liable for "pollution damage" within the meaning of Article 1(6) of the Civil Liability Convention.

C. Background

1. Heiltsuk's Aboriginal Interests

- 3.6. The Plaintiffs assert the Aboriginal Interests and each of them as referenced in Part 1.

2. Aboriginal Title

- 3.7. The Plaintiffs assert Aboriginal Title over the Claim and Loss Area.

3. Aboriginal Management Rights

- 3.8. The salt-water-covered lands within the Claim and Loss Area are "inland" waters located within the Province of British Columbia, pursuant to, *inter alia*,
- a. the Imperial statute (1858 (U.K.), 21-22 Vict., c. 99) which resulted in the colony of British Columbia including "Queen Charlotte's Island, and all other Islands adjacent to the said Territories";
 - b. common law principles defining waters "inter fauces terrae" (or "within the jaws of the land") as inland waters; and
 - c. Order in Council 1347 (June 10, 1981) by which the British Columbia declared an "inland marine zone" encompassing all the marine area landward of the baseline of the territorial sea, and more specifically, landward of a straight baseline joining the tip of Haida Gwaii with the northern tip of Vancouver Island.
- 3.9. Further or alternatively, all or some of the salt-water-covered lands within the Claim and Loss Area lie within the internal waters of Canada.

- 3.10. The Plaintiffs assert Aboriginal Management Rights over the Claim and Loss Area, which include law-making powers respecting, *inter alia*, sustainable uses of lands and waters, natural resources, habitat, and the environment, and more specifically, respecting regulation of harvesting and the preservation of ecosystems and resources for harvesting.

4. Aboriginal Harvesting Rights

- 3.11. The Plaintiffs assert Aboriginal Harvesting Rights by which they may harvest the Lost Marine Resources from, *inter alia*, the Claim and Loss Area, for FSC and/or for commercial purposes.
- 3.12. The Aboriginal Harvesting Rights are *sui generis* communal interests in Marine Resources that are, *inter alia*, proprietary in nature at least for purposes of pollution damages or other damages, and the Plaintiffs rely on, *inter alia*, the law as it relates to *profits a prendre*.

5. Communal licence rights

- 3.13. HTC's Communal Licence Rights involve communal interests in Lost Marine Resources that are, *inter alia*, proprietary in nature at least for purposes of pollution damages or other damages, and the Plaintiffs rely on, *inter alia*, the law as it relates to *profits a prendre*.

6. Commercial licence rights

- 3.14. HTC's Commercial Licence Rights involve interests in Lost Marine Resources that are, *inter alia*, proprietary in nature at least for purposes of pollution damages or other damages, and the Plaintiffs rely on, *inter alia*, the law as it relates to *profits a prendre*.

D. The Vessel grounding and the spill

1. Limitation to a claim under the Bunkers Convention

- 3.15. The MLA requires claims for compensation against shipowners to be only under the Bunkers Convention, pursuant to MLA Schedule 8, Article 3(5), which stipulates that, "No claim for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with this Convention [Bunkers Convention]" (the "Bunkers Single Claim Provision").
- 3.16. Alternatively, the MLA requires claims for compensation against owners to be only under the CLC, pursuant to MLA Schedule 5, Article 4, which stipulates that, "No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention [Civil Liability Convention]" (the "CLC Single Claim Provision").

2. Limitations on polluter liability, subject to recklessness

- 3.17. The MLA limits the liability of "shipowners" for "claims" under the Bunkers Convention through MLA Schedule 1, which is the *Convention on Limitation of Liability for Maritime Claims, 1976*, (the "Convention"), given force of law in Canada under MLA s. 26(1), as follows:

- a. Article 2(1) of MLA Schedule 1 stipulates that a limitation of liability applies to specific types of claims, including

“(a) claims in respect of... loss of or damage to property... in direct connexion with the operation of the ship... and consequential loss resulting therefrom:

...

“(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations:

“(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

...

“(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.”

- b. Article 6(1)(b) of MLA Schedule 1 stipulates that limits of liability for “claims” arising on any distinct location, not involving claims for loss of life or personal injury, shall be calculated as follows:

“[6(1)(b)(i)] 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons.

“[6(1)(b)(ii)] for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 604 Units of Account;

for each ton from 30,001 to 70,000 tons, 453 Units of Account;
and

for each ton in excess of 70,000 tons, 302 Units of Account.”

(the “Bunkers Limitation”);

- c. Article 4 of MLA Schedule 1 stipulates, “A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result” (the “Bunkers Recklessness Exception”).

- 3.18. Alternatively, the MLA limits the aggregate amount of “liability” of the “owner” of a ship under the Civil Liability Convention “for any pollution damage caused by the ship” as follows:

- a. Article 5(1) of MLA Schedule 5 stipulates, “The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows: (a) 4,510,000 units of account for a ship not exceeding 5,000 units of tonnage; (b) for a ship with a tonnage in excess

thereof, for each additional unit of tonnage, 631 units of account in addition to the amount mentioned in sub-paragraph (a)'' (the ''CLC Limitation''); and

- b. Article 5(2) of MLA Schedule 5 stipulates, ''The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result'' (the ''CLC Recklessness Exception'').
- 3.19. Subject to the Bunkers Recklessness Exception and subject to any challenges to the validity of the Bunkers Limitation in Canada, claims for ''pollution damage'' under the Bunkers Convention that exceed the Bunkers Limitation are, under MLA s. 101(1), recoverable from SOPF.
- 3.20. Alternatively, subject to the CLC Recklessness Exception, and any challenges to the validity of the CLC Limitation in Canada, claims for ''pollution damage'' under the Civil Liability Convention that exceed the CLC Limitation are, under MLA s. 57 and Schedule 6, recoverable from the International Fund and the Supplementary Fund.

3. No limitations of liability for Kirby

- 3.21. With respect to the Reckless Conduct, the Plaintiff pleads and relies on the Bunkers Recklessness Exception.
- 3.22. Alternatively, if the Civil Liability Convention applies, with respect to the Reckless Conduct, the Plaintiff pleads and relies on the CLC Recklessness Exception.

4. Negligence

- 3.23. Kirby, the Captain and/or the Second Mate owed a duty of care to, *inter alia*, the Plaintiffs or some of them, or to persons who assigned their causes of action to the Plaintiffs, relating to their operation of the Vessel.
- 3.24. Kirby, the Captain and/or the Second Mate breached the duty of care through the Negligent Conduct and/or the Reckless Conduct.
- 3.25. The breaches of the duty of care by Kirby, the Captain and/or the Second Mate were the proximate causes of the Losses.
- 3.26. To whatever extent that legal liability of Kirby, the Captain and/or the Second Mate is not excluded or limited under the MLA, the Plaintiffs plead and rely on, *inter alia*, common law tort principles, including principles of negligence and *res ipsa loquitur*, and principles of vicarious liability.

5. Nuisance

- 3.27. To whatever extent that legal liability of Kirby, the Captain and/or the Second Mate is not excluded or limited under the MLA, the Plaintiffs plead and rely on, *inter alia*, the law of nuisance, including both the law of public nuisance, and the law of private nuisance.
- 3.28. Without limiting the foregoing, the Plaintiffs assert that the Spill constituted an unreasonable, substantial and foreseeable interference with the Plaintiffs' use and enjoyment of the Claim and Loss Area, based on their Aboriginal Title or other proprietary interests.

3.29. Without limiting the foregoing, the Plaintiffs assert that they have suffered special damage from the Spill, meaning damage over and above the general suffering or inconvenience of the public, through interference to, *inter alia*, their constitutionally-protected, or other, proprietary interests as particularized above.

E. Breach of contract

3.30. The Funding Agreement was a binding and enforceable agreement giving rise to contractual obligations of Kirby separate from its obligations under the MLA.

3.31. Heiltsuk asserts breaches of the Funding Agreement by Kirby, particulars of which the Plaintiffs will provide prior to trial.

F. Insufficient environmental impact assessments (EIAs)

1. Kirby's breach of a statutory duty to perform EIAs

3.32. Kirby failed to fulfil a statutory duty under EMA s. 91.2(2) to identify and evaluate long-term impacts of the Spill by performing, or funding, the Required EIAs.

2. The duty of Canada and British Columbia to order EIAs

3.33. As part of a duty of Canada and British Columbia to meaningfully consult with HTC or Heiltsuk about how decisions or inaction under CSA s. 180(1) or EMA s. 91.2(3), respectively, might adversely affect the Aboriginal Interests, including by preventing Heiltsuk from quantifying Spill impacts as part of obtaining compensation for interference with asserted Aboriginal rights, both Canada and British Columbia had a duty to inform themselves of the nature and severity of the Spill impacts on Aboriginal rights, and to convey that information to HTC.

3.34. Each of Canada and British Columbia has not fulfilled its duty to inform itself of the nature and severity of the Spill impacts on Aboriginal rights, by performing or funding the Required EIAs or by ordering Kirby to perform or fund the Required EIAs, and to convey the results to Heiltsuk as part of consulting about acting or not acting under CSA s. 180(1) or EMA s. 91.2(3), respectively.

3.35. Each of Canada and British Columbia has not fulfilled its duty to consult with Heiltsuk about how its acting or not acting under CSA s. 180(1) or EMA s. 91.2(3), respectively, might adversely affect Aboriginal rights.

G. EIA-related expenses incurred by HTC

3.36. Heiltsuk asserts that the Unpaid EIA Expenses, which address, *inter alia*, nature, extent and likely duration of any damage that has occurred from the Spill, and which relate to the monitoring of the recovery of damaged environments, fall within the definition of "pollution damage" under the Bunkers Convention.

H. Losses

1. The MLA covers cultural losses

3.37. The responsibility of SOPF for, *inter alia*, losses of sources of food is properly construed, in the context of s. 35 of the *Constitution Act, 1982*, MLA s. 107(2)(d) and (3), and Heiltsuk's Aboriginal Harvesting Rights, to include all losses, including mental distress

and food, social, ceremonial and livelihood losses, that Heiltsuk suffered from the Spill interfering with, *inter alia*, their Aboriginal Harvesting Rights.

- 3.38. Further or alternatively, the definition of “pollution damage” under the Bunkers Convention (or alternatively the CLC), as adopted by the MLA, deprives Heiltsuk of its right to full compensation for interference with their Aboriginal rights, and unjustifiably infringes Heiltsuk’s s. 35 Aboriginal rights as particularized below.

2. Limits on “pollution damage” unjustifiably infringe s. 35 Aboriginal rights

- 3.39. The definition of “pollution damage” under the Bunkers Convention (or alternatively the CLC) refers to “loss or damage caused outside the ship by contamination...” but also provides that “*compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken*” (the “Bunkers Impairment Exemption” or alternatively the “CLC Impairment Exemption”).
- 3.40. The Bunkers Impairment Exemption (or alternatively, the CLC Impairment Exemption), prevents HTC and Heiltsuk from seeking compensation for impairments of the environment which result in non-economic losses, including loss of the following interests:
- a. non-monetary use and enjoyment of the Claim and Loss Area;
 - b. immediate and long-term harm to marine habitats within the Claim and Loss Area;
 - c. immediate and long-term harm to Marine Resources within the Claim and Loss Area; and
 - d. non-profit harvesting of Lost Marine Resources under Aboriginal Harvesting Rights and Communal Licence Rights for FSC purposes.
- 3.41. The Bunkers Impairment Exception (or alternatively the CLC Impairment Exception), in the definition of “pollution damage” under the Bunkers Convention (or alternatively under the CLC), operates with the Bunkers Single Claim Provision and the Bunkers Limitation (or alternatively the CLC Single Claim Provision and the CLC Limitation) to restrict claimants who have suffered harm to a claim against a shipowner (or alternatively to a claim against an owner) for pollution damage.
- 3.42. The Bunkers Impairment Exception (or alternatively the CLC Impairment Exception) unjustifiably infringes Aboriginal rights recognized and affirmed under s. 35 by limiting recovery for losses stemming from impairments of the environment that do not involve losses of profit. Without limiting the foregoing:
- a. the Bunkers Impairment Exception (or alternatively the CLC Impairment Exception) precludes compensation for interference with use and enjoyment of the Claim and Loss Area, and for interference with the Aboriginal Harvesting Rights to harvest for FSC purposes (the “Excluded Losses”);
 - b. the Bunkers Impairment Exception (or alternatively the CLC Impairment Exception) infringes s. 35 by, *inter alia*, preventing complete compensation for

interference with the Aboriginal Interests, and effectively contributes to such interference: and

- c. the infringements of the s. 35 rights by the Bunkers Impairment Exception (or alternatively the CLC Impairment Exception) are unjustified. Without limiting the foregoing, Canada
 - (i) did not consult with Heiltsuk about the impact of the Bunkers Impairment Exception (or alternatively the CLC Impairment Exception) on their Aboriginal rights, and
 - (ii) failed to remedy the infringements through the provisions of MLA s. 107, which, *inter alia*, do not provide for communal harvesting rights, and do not provide for fishing by individuals for family or communal consumption or use.

3.43. Further or alternatively, the Bunkers Single Claim Provision and the Bunkers Limitation (or alternatively, the CLC Single Claim Provision and the CLC Limitation) unjustifiably infringe s. 35 by preventing HTC and Heiltsuk from seeking to recover the Excluded Losses through common law causes of action.

3.44. The Bunkers Impairment Exception, and further or alternatively the Bunkers Single Claim Provision and the Bunkers Limitation (or alternatively, the CLC Impairment Exception, and further or alternatively the CLC Single Claim Provision and the CLC Limitation) are invalid to the extent they apply to a claim for loss or damage relating to Aboriginal rights.

3. Assessments of Losses without the Required EIAs

3.45. Heiltsuk rely on the legal principle expressed by the maxim, “*omnia praesumuntur contra spoliatores*”, such that presumptions of losses should be made against Kirby, where it has acted in a manner that inhibits the ability of Heiltsuk to assess the extent of the impacts from the Spill, specifically by failing to provide for sufficient environmental impact assessment (“EIA”) studies necessary to identify and evaluate the long-term impacts of the Spill on, *inter alia*, the Marine Resources, including their habitats, ecosystems, population, health, reproductive capacity, and ability to support traditional harvest and consumption.

4. Reasonable mitigation of loss

3.46. With respect to the Losses that Heiltsuk has suffered or will likely suffer due to, *inter alia*, their refraining from harvesting the Lost Marine Resources from the Claim and Loss Area, pursuant to Ġviłás, their Aboriginal Management Rights, and/or reasonable safety and conservation concerns, Heiltsuk pleads and relies on law relating to mitigation of damages requiring only that Heiltsuk act reasonably with respect to avoiding losses.

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Place of trial: Vancouver

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October 9, 2018

Date:



Signature of
 plaintiff lawyer for the Plaintiff

Ng Ariss Fong, Lawyers
per: Lisa C. Fong