Federal Court  Cour fédérale

**Date: 20190726**

**Docket: T-733-19**

**Citation: 2019 FC 1009**

**Ottawa, Ontario, July 26, 2019**

**PRESENT: Madam Justice Strickland**

**BETWEEN:**

**KIRBY OFFSHORE MARINE PACIFIC LLC, KIRBY OFFSHORE MARINE OPERATING LLC**

**Plaintiffs**

**and**

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

**Defendants**

**and**

**THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND**

**Party by Statute**

**ORDER AND REASONS**

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## I. Introduction

[1] Before the Court are two related motions, both of which concern a shipowner's right to limit its liability for oil pollution damage by way of the *Marine Liability Act*, SC 2001, c 6 [MLA].

[2] More specifically, Kirby Offshore Marine Pacific LLC [Kirby Pacific] and Kirby Offshore Marine Operating LLC [Kirby Operating] commenced an action in this Court seeking to limit their liability [Kirby Operating and Kirby Pacific are together referred to as Kirby in these reasons] arising from a ship-source oil pollution incident. They now bring a motion seeking an order providing direction as to the constitution of a limitation fund, the enjoining of other claims, and other relief as described in their Notice of Motion [Enjoinment Motion].

[3] Heiltsuk Hímás and Heiltsuk Tribal Council, each on their own behalf and on behalf of the members of the Heiltsuk First Nation [together, Heiltsuk] filed a claim against Kirby and others in the British Columbia Supreme Court [BCSC] pertaining to oil pollution damage arising from the same ship-source incident. Heiltsuk now brings a motion seeking to stay Kirby's limitation action, brought in this Court, on the basis that it is not a convenient forum [Stay Motion].

[4] The facts and law overlap in the Enjoinment Motion and the Stay Motion and they were heard together in Vancouver on July 8, 2019.

## II. Background

[5] The background facts relevant to these motions are largely undisputed.

[6] In brief, Kirby Operating is the registered owner of the tug "Nathan E. Stewart" [tug]. Kirby Pacific is the registered owner of the barge "DBL-55" [barge]. When operating together, the tug and barge were connected through a JAK®ATB Coupling System [coupling system].

[7] Having discharged the barge's cargo of jet fuel and gasoline, the connected tug and barge were en route to Vancouver when the second mate of the tug, Henry Hendrix, an employee of Kirby Pacific, fell asleep while at the helm. At approximately 1:08 a.m. on October 13, 2016, the tug and barge struck Edge Reef off Athlone Island, at the entrance to Seaforth Channel, approximately ten nautical miles west of Bella Bella, British Columbia [Incident]. As a result of the Incident, the tug's fuel tanks were breached and approximately 107,552 litres of diesel fuel and 2,240 liters of lubricants were released from the tug into the sea.

[8] On that same date, a Unified Command was formed to lead the Incident response. This included representatives of Kirby, the Canadian Coast Guard, the British Columbia Ministry of Environment and Climate Change Strategy, Environment and Climate Change Canada, Transport Canada, Fisheries and Oceans Canada, Heiltsuk, as well as others, including spill response contractors and environmental consultants engaged by or on behalf of Kirby.

[9] On October 29, 2016, Kirby Offshore Marine LLC [Kirby Offshore], which is described in the Kirby submissions as the parent company of Kirby Operating, entered into a Funding Agreement with Heiltsuk Tribal Council, on behalf of Kirby Operating and Kirby Pacific, in respect to spill response costs, income loss claims, and other claims and expenses arising out of the Incident. Kirby states that, to date, in excess of CAD $3.5 million has been paid to Heiltsuk Tribal Council under the Funding Agreement.

[10] On October 13, 2016, the barge was separated from the tug and towed to another location. Salvage operations for the tug concluded and a final situation report was issued by the Unified Command on November 21, 2016. Kirby states that, in conjunction with the

governments of British Columbia and Canada, it has remained engaged in environmental impact assessment activities resulting from the Incident.

[11] On December 16, 2016, Starr Indemnity & Liability Company, on behalf of Kirby, provided a letter of undertaking to the Ship-source Oil Pollution Fund [SOPF] in the amount of CAD $20 million [SOPF LOU]. On February 3, 2017, a letter of undertaking in the amount of CAD $12 million was similarly provided to the Heiltsuk Tribal Council [HTC LOU].

## III. Procedural History

[12] On October 9, 2018, Heiltsuk filed a Notice of Civil Claim – Admiralty (*In Rem* and *In Personam*) in the BCSC [BCSC Claim] as against the owners and all others interested in the tug and barge, Kirby Pacific, Kirby Offshore, Kirby Operating, John Doe Corporation, the master and second mate of the tug [all referred to collectively with respect to the BCSC Claim as the Kirby Defendants], the Attorney General of Canada [AG Canada], and the Attorney General of British Columbia [AG British Columbia].

[13] The BCSC Claim describes Heiltsuk Nation as being comprised of five tribes which make up a self-governing nation of indigenous people who are "aboriginal people" under s 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*] and qualify as an Indian Band under the *Indian Act*, RSC 1985, c I-5. Heiltsuk Hímás are the hereditary chiefs of Heiltsuk Nation, and Heiltsuk Tribal Council is its elected governing body. Heiltsuk Tribal Council is stated to be an assignee of all choses in action related to the Incident for listed Heiltsuk business entities.

[14] The BCSC Claim is a lengthy document but, in essence, it asserts Heiltsuk's Aboriginal interests in "Heiltsuk Territory", which territory it describes as including lands and water-covered lands in a described "Claim and Loss Area". Heiltsuk asserts that this includes all saltwater covered lands, including the seabed and foreshore, and certain named Indian reserve lands. However, their claim of Aboriginal title and other Aboriginal rights excludes, except for those named Indian reserve lands, all lands above the high water mark, without prejudice to future Aboriginal title claims regarding the excluded areas. In essence, Heiltsuk appears to only be claiming Aboriginal title and rights over territories it claims were impacted by the Incident. It has left to another day its claim to other Aboriginal title and rights over the rest of its claimed traditional territory. Heiltsuk states that it has asserted the necessary facts in the BCSC Claim to establish communal Aboriginal rights or other interests over the Claim and Loss Area, including Aboriginal title, Aboriginal management rights, Aboriginal harvesting rights, and communal and commercial licence rights to fish and harvest marine resources.

[15] The BCSC Claim asserts that the Kirby Defendants are liable for the Incident. Heiltsuk bases its allegations against the Kirby Defendants on recklessness, negligence, nuisance, breach of contract, and breach of statutory duty. The relief sought includes: declarations of the asserted Aboriginal title and rights; a declaration that the Kirby Defendants are obliged under the British Columbia *Environmental Management Act*, SBC, 2003, c 53 [EMA] to perform or fund environmental assessments; a declaration that Canada and British Columbia have a legal duty to consult with Heiltsuk concerning decisions made pursuant to s 180(1) of the *Canada Shipping Act*, SC 2001, c 26 [CSA] or s 91.2(3) of the EMA; oil pollution damages under the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, concluded at London on March 23, 2001 [Bunkers Convention] or, alternatively, the *International Convention on Civil*

*Liability for Oil Pollution Damage, 1992*, concluded at London on November 27, 1992, Article V of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000 [CLC]; other damages; and a mandatory injunction requiring Kirby to comply with all applicable Canadian and British Columbia laws relating to minimum watch personnel.

[16] Heiltsuk also asserts in the BCSC Claim that the limits on "pollution damage", as defined in the Bunkers Convention or, alternatively, the CLC, unjustifiably infringe its rights under s 35 of the *Constitution Act, 1982* by limiting recovery stemming from impairments of the environment that do not involve losses of profit. This includes precluding compensation for interference with use and enjoyment of Aboriginal harvesting rights and preventing complete compensation for interference with Aboriginal interests. Heiltsuk asserts that the infringements are unjustified because Canada failed to consult with Heiltsuk about the impact of the Bunkers Convention, or the CLC, on Heiltsuk's Aboriginal rights. It also asserts that Canada failed to remedy the infringements though s 107 of the MLA, which allows for claims related to loss of income or loss of food source or animal skins, but does not allow for claims based on communal harvesting rights or fishing for communal consumption or use. Further, Heiltsuk claims that the Bunkers Convention or the CLC unjustifiably infringe s 35 by preventing Heiltsuk from seeking to recover, through common law causes of action, for damages not covered by those definitions of "pollution damages" under those conventions. Heiltsuk also asserts that the provisions of the conventions that prescribe recoverable claims are invalid to the extent that they apply to a claim for loss or damage relating to Aboriginal rights.

[17] On April 1, 2019, in response to the BCSC Claim, the Kirby Defendants filed a "Jurisdictional Response" in Form 108, pursuant to Rule 21-8 of the *British Columbia Supreme Court Civil Rules*, BC Reg 168/2009 [BCSC Civil Rules] disputing the jurisdiction of the BCSC.

[18] On May 1, 2019, the Kirby Defendants filed a Notice of Application in the BCSC proceeding seeking an order staying or dismissing the BCSC Claim against the Kirby Defendants. On that same date, Kirby filed a Statement of Claim in this Court, T-733-19, commencing its limitation action [Limitation Action]. The Limitation Action seeks, *inter alia*, an order limiting liability for all claims arising against Kirby from the Incident, pursuant to the Bunkers Convention and the *Convention on Limitation of Liability for Maritime Claims, 1976*, concluded at London on November 19, 1976, as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976*, concluded at London on May 2, 1996 [LLMC]. Alternatively, Kirby seeks to limit its liability in accordance with the CLC. Further, it seeks an order constituting a limitation fund, and enjoining Heiltsuk and any other person or party from commencing proceedings or continuing proceedings against Kirby in respect of the Incident in any other Court. Kirby also seeks orders on a variety of matters relating to the requested limitation fund.

[19] On May 31, 2019, Heiltsuk filed a Notice of Application in the BCSC Claim seeking an order that the BCSC confirm its jurisdiction to adjudicate the claims against the Kirby Defendants in that proceeding. On that same date, Heiltsuk filed a Notice of Motion in this Court seeking to stay the Limitation Action on jurisdictional grounds. Heiltsuk set down its Notice of Application in the BCSC Claim to be heard on August 6, 2019. Kirby asserts that this was done unilaterally.

[20] By Direction dated June 14, 2019, Chief Justice Crampton required Heiltsuk to bring its motion seeking a stay of the Limitation Action and for it to be heard on July 8, 2019.

[21] On July 3, 2019, the Administrator of the Ship-source Oil Pollution Fund [Administrator], as a party by statute pursuant to s 109 of the MLA, filed a Notice of Appearance and subsequently submitted motion records in response to the Enjoinment Motion and the Stay Motion.

## IV. Issues

[22] In my view, while there are many peripheral matters raised in the parties' submissions, there are two issues arising from these two motions which must be determined by this Court:

i. Should Heiltsuk be enjoined from continuing the BCSC Claim against the Kirby Defendants to that action, or

ii. Should this Court stay the Limitation Action brought by Kirby in this Court?

## V. Legislation

[23] In my view, prior to addressing these issues, it is necessary to understand the rather complex legislative backdrop and the regime surrounding a shipowner's entitlement to limit its liability. This provides critical context to the issues and analysis that follows.

[24] The MLA sets out how maritime claims, as defined in that Act and set out below, will be addressed in Canada. Importantly, this includes incorporating into the law of Canada the provisions of international conventions, to which Canada is a signatory, which permit shipowners to limit their liability for maritime claims.

[25] The most relevant provisions of the MLA are set out below.

| | |
|---|---|
| **Definitions** | **Définitions** |
| **2** The definitions in this section apply in this Act. | **2** Les définitions qui suivent s'appliquent à la présente loi. |
| ***Admiralty Court*** means the Federal Court. (*Cour d'amirauté*) | ***Cour d'amirauté*** La Cour fédérale. (*Admiralty Court*) |
| … | […] |
| **PART 3** | **PARTIE 3** |
| **Limitation of Liability for Maritime Claims** | **Limitation de responsabilité en matière de créances maritimes** |
| **Interpretation** | **Définitions et dispositions interprétatives** |
| **Definitions** | **Définitions** |
| **24** The definitions in this section apply in this Part. | **24** Les définitions qui suivent s'appliquent à la présente partie. |
| ***Convention*** means the Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on November 19, 1976, as amended by the Protocol, Articles 1 to 15 of which Convention are set out in Part 1 of Schedule 1 and Article 18 of which is set out in Part 2 of that Schedule. (*Convention*) | ***Convention*** La Convention de 1976 sur la limitation de la responsabilité en matière de créances maritimes conclue à Londres le 19 novembre 1976 – dans sa version modifiée par le Protocole – dont les articles 1 à 15 figurent à la partie 1 de l'annexe 1 et l'article 18 figure à la partie 2 de cette annexe. (*Convention*) |
| ***maritime claim*** means a claim described in Article 2 of the Convention for which a person referred to in Article 1 of the Convention is entitled to limitation of liability. (*créance maritime*) | ***créance maritime*** Créance maritime visée à l'article 2 de la Convention contre toute personne visée à l'article 1 de la Convention. (*maritime claim*) |
| … | […] |

***Protocol*** means the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on May 2, 1996, Articles 8 and 9 of which are set out in Part 2 of Schedule 1. (*Protocole*)

***unit of account*** means a special drawing right issued by the International Monetary Fund. (*unités de compte*)

**Extended meaning of expressions**

**25 (1)** For the purposes of this Part and Articles 1 to 15 of the Convention,

**(a) *ship*** means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion, and includes

…

**(ii)** a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up,

…

…

**Inconsistency**

(2) In the event of any inconsistency between sections 28 to 34 of this Act and Articles 1 to 15 of the Convention, those sections prevail to the extent of the inconsistency.

**Application**

***Protocole*** Le Protocole de 1996 modifiant la Convention de 1976 sur la limitation de la responsabilité en matière de créances maritimes conclu à Londres le 2 mai 1996, dont les articles 8 et 9 figurent à la partie 2 de l'annexe 1. (*Protocol*)

***unités de compte*** S'entend des droits de tirage spéciaux émis par le Fonds monétaire international. (*unit of account*)

**Extension de sens**

**25 (1)** Pour l'application de la présente partie et des articles 1 à 15 de la Convention :

**a) *navire*** s'entend d'un bâtiment ou d'une embarcation conçus, utilisés ou utilisables, exclusivement ou non, pour la navigation, indépendamment de leur mode de propulsion ou de l'absence de propulsion […] y sont assimilés […] les navires échoués ou coulés ainsi que les épaves et toute partie d'un navire qui s'est brisé;

[…]

**Incompatibilité**

(2) Les articles 28 à 34 de la présente loi l'emportent sur les dispositions incompatibles des articles 1 à 15 de la Convention.

**Champ d'application**

**Force of law**

**26 (1)** Subject to the other provisions of this Part, Articles 1 to 15 and 18 of the Convention and Articles 8 and 9 of the Protocol have the force of law in Canada.

…

**State Party to the Convention**

**27** For purposes of the application of the Convention, Canada is a State Party to the Convention.

…

**Procedure**

**Jurisdiction of Admiralty Court**

**32 (1)** The Admiralty Court has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention.

**Right to assert limitation defence**

**(2)** Where a claim is made or apprehended against a person in respect of liability that is limited by section 28, 29 or 30 of this Act or paragraph 1 of Article 6 or 7 of the Convention, that person may assert the right to limitation of liability in a defence filed, or by way of action or counterclaim for declaratory relief, in any court of competent jurisdiction in Canada.

**Force de loi**

**26 (1)** Sous réserve des autres dispositions de la présente partie, les articles 1 à 15 et 18 de la Convention et les articles 8 et 9 du Protocole ont force de loi au Canada.

[…]

**État partie à la Convention**

**27** Pour l'application de la Convention, le Canada est un État partie à la Convention.

[…]

**Procédure**

**Compétence exclusive de la Cour d'amirauté**

**32 (1)** La Cour d'amirauté a compétence exclusive pour trancher toute question relative à la constitution et à la répartition du fonds de limitation aux termes des articles 11 à 13 de la Convention.

**Droit d'invoquer la limite de responsabilité**

**(2)** Lorsque la responsabilité d'une personne est limitée aux termes des articles 28, 29 ou 30 de la présente loi ou du paragraphe 1 des articles 6 ou 7 de la Convention, relativement à une créance – réelle ou appréhendée – , cette personne peut se prévaloir de ces dispositions en défense, ou dans le cadre d'une action ou demande reconventionnelle pour obtenir un jugement déclaratoire, devant tout

tribunal compétent au Canada.

**Powers of Admiralty Court**

**33 (1)** Where a claim is made or apprehended against a person in respect of liability that is limited by section 28 or 29 of this Act or paragraph 1 of Article 6 or 7 of the Convention, the Admiralty Court, on application by that person or any other interested person, including a person who is a party to proceedings in relation to the same subject-matter before another court, tribunal or authority, may take any steps it considers appropriate, including

**(a)** determining the amount of the liability and providing for the constitution and distribution of a fund under Articles 11 and 12 of the Convention;

**(b)** joining interested persons as parties to the proceedings, excluding any claimants who do not make a claim within a certain time, requiring security from the person claiming limitation of liability or from any other interested person and requiring the payment of any costs; and

**(c)** enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the

**Pouvoirs de la Cour d'amirauté**

**33 (1)** Lorsque la responsabilité d'une personne est limitée aux termes des articles 28 ou 29 de la présente loi ou du paragraphe 1 des articles 6 ou 7 de la Convention, relativement à une créance – réelle ou appréhendée – , la Cour d'amirauté peut, à la demande de cette personne ou de tout autre intéressé – y compris une partie à une procédure relative à la même affaire devant tout autre tribunal ou autorité – , prendre toute mesure qu'elle juge indiquée, notamment :

**a)** déterminer le montant de la responsabilité et faire le nécessaire pour la constitution et la répartition du fonds de limitation correspondant, conformément aux articles 11 et 12 de la Convention;

**b)** joindre tout intéressé comme partie à la procédure, exclure tout créancier forclos, exiger une garantie des parties invoquant la limitation de responsabilité ou de tout autre intéressé et exiger le paiement des frais;

**c)** empêcher toute personne d'intenter ou de continuer quelque procédure relative à la même affaire devant tout autre tribunal ou

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| Admiralty Court in relation to the same subject-matter. | autorité. |
| … | […] |
| **Procedural matters** | **Procédure** |
| **(4)** The Admiralty Court may | **(4)** La Cour d'amirauté peut : |
| **(a)** make any rule of procedure it considers appropriate with respect to proceedings before it under this section; and | **a)** établir les règles de procédure qu'elle juge utiles relativement à toute affaire dont elle est saisie au titre du présent article; |
| **(b)** determine what form of guarantee it considers to be adequate for the purposes of paragraph 2 of Article 11 of the Convention. | **b)** déterminer quelle garantie elle estime acceptable pour l'application du paragraphe 2 de l'article 11 de la Convention. |
| **Interest** | **Intérêt** |
| **(5)** For the purposes of Article 11 of the Convention, interest is payable at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act. | **(5)** Pour l'application de l'article 11 de la Convention, l'intérêt est calculé au taux fixé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes à verser par le ministre du Revenu national à titre de remboursement de paiements d'impôt en trop au titre de cette loi. |

[26] Schedule 1, Part 1 of the MLA contains the text of Articles 1 to 15 of the LLMC. The most relevant Articles are set out below for ease of reference.

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| **Article 1** | **Article 1** |
| **Persons entitled to limit liability** | **Personnes en droit de limiter leur responsabilité** |
| **1** Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2. | **1** Les propriétaires de navires et les assistants, tels que définis ci-après, peuvent limiter leur responsabilité conformément aux règles de la présente Convention à l'égard des créances visées à |

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| | l'article 2. |
| **2** The term ***shipowner*** shall mean the owner, charterer, manager and operator of a seagoing ship. | **2** L'expression ***propriétaire de navire***, désigne le propriétaire, l'affréteur, l'armateur et l'armateur-gérant d'un navire de mer. |
| **3** Salvor shall mean any person rendering services in direct connexion with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f). | **3** Par ***assistant***, on entend toute personne fournissant des services en relation directe avec les opérations d'assistance ou de sauvetage. Ces opérations comprennent également celles que vise l'article 2, paragraphe 1, alinéas d), e) et f). |
| **4** If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention. | **4** Si l'une quelconque des créances prévues à l'article 2 est formée contre toute personne dont les faits, négligences et fautes entraînent la responsabilité du propriétaire ou de l'assistant, cette personne est en droit de se prévaloir de la limitation de la responsabilité prévue dans la présente Convention. |
| **5** In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself. | **5** Dans la présente Convention, l'expression ***responsabilité du propriétaire de navire*** comprend la responsabilité résultant d'une action formée contre le navire lui-même. |
| **6** An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself. | **6** L'assureur qui couvre la responsabilité à l'égard des créances soumises à limitation conformément aux règles de la présente Convention est en droit de se prévaloir de celle-ci dans la même mesure que l'assuré lui-même. |
| **7** The act of invoking limitation of liability shall not constitute an admission of | **7** Le fait d'invoquer la limitation de la responsabilité n'emporte pas la reconnaissance de cette |

liability.

responsabilité.

[27] "Maritime claims" as defined in s 24 of the MLA, mean claims described in Article 2 of the LLMC. Articles 3 and 4 set out certain limitations to these claims.

**Article 2**

**Claims subject to limitation**

**1** Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

**(a)** claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

**(b)** claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

**(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

**Article 2**

**Créances soumises à la limitation**

**1** Sous réserves des articles 3 et 4, les créances suivantes, quel que soit le fondement de la responsabilité, sont soumises à la limitation de la responsabilité :

**a)** créances pour mort, pour lésions corporelles, pour pertes et pour dommages à tous biens (y compris les dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation) survenus à bord du navire ou en relation directe avec l'exploitation de celui-ci ou avec des opérations d'assistance ou de sauvetage, ainsi que pour tout autre préjudice en résultant;

**b)** créances pour tout préjudice résultant d'un retard dans le transport par mer de la cargaison, des passagers ou de leurs bagages;

**c)** créances pour d'autres préjudices résultant de l'atteinte à tous droits de source extracontractuelle, et survenus en relation directe avec l'exploitation du navire ou avec des

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;

**(e)** claims in respect of the removal, destruction or the rendering harmless of the cargo of the 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.

…

**Article 4**

**Conduct barring limitation**

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.

opérations d'assistance ou de sauvetage;

**d)** créances pour avoir renfloué, enlevé, détruit ou rendu inoffensif un navire coulé, naufragé, échoué ou abandonné, y compris tout ce qui se trouve ou s'est trouvé à bord;

**e)** créances pour avoir enlevé, détruit ou rendu inoffensive la cargaison du navire;

**f)** créances produites par une personne autre que la personne responsable, pour les mesures prises afin de prévenir ou de réduire un dommage pour lequel la personne responsable peut limiter sa responsabilité conformément à la présente Convention, et pour les dommages ultérieurement causés par ces mesures.

[…]

**Article 4**

**Conduite supprimant la limitation**

Une personne responsable n'est pas en droit de limiter sa responsabilité s'il est prouvé que le dommage résulte de son fait ou de son omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis témérairement et avec conscience qu'un tel dommage en résulterait probablement.

[28] Thus, Article 2 describes the claims that are subject to limitation. Specifically, it states that subject to Articles 3 and 4, the claims listed, *whatever the basis of liability may be*, shall be subject to limitation of liability. For the purposes of these motions, the most relevant provision is claims in respect of damage to property in direct connection with the operation of the ship and consequential loss resulting therefrom (Article 2(1)(a)). Another potentially relevant provision is claims in respect of other loss resulting from infringement of rights occurring in direct connection with the operation of the ship (Article 2(1)(c)). Certain claims are exempted from limitation and these are set out in Article 3. For the purposes of these motions, it is of note that the LLMC does not apply to a claim for oil pollution damage within the meaning of the CLC (Article 3(b)). Further, a shipowner will be barred from limiting liability in the circumstances described in Article 4. The limits of liability for claims arising on any distinct occasion are determined by the ship's tonnage and a calculation contained in Article 6.

[29] Article 9 concerns the aggregation of claims:

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| **Article 9** | **Article 9** |
| **Aggregation of claims** | **Concours de créances** |
| **1** The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion: | **1** Les limites de la responsabilité déterminée selon l'article 6 s'appliquent à l'ensemble de toutes les créances nées d'un même événement : |
| **(a)** against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or | **a)** à l'égard de la personne ou des personnes visées au paragraphe 2 de l'article premier et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celle-ci ou de celles-ci; ou |

[30] Article 11 speaks to the constitution of a limitation fund:

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| **Article 11** | **Article 11** |
| **Constitution of the fund** | **Constitution du fonds** |
| **1** Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked. | **1** Toute personne dont la responsabilité peut être mise en cause peut constituer un fonds auprès du tribunal ou de toute autre autorité compétente de tout État Partie dans lequel une action est engagée pour des créances soumises à limitation. Le fonds est constitué à concurrence du montant tel qu'il est calculé selon les dispositions des articles 6 et 7 applicables aux créances dont cette personne peut être responsable, augmenté des intérêts courus depuis la date de l'événement donnant naissance à la responsabilité jusqu'à celle de la constitution du fonds. Tout fonds ainsi constitué n'est disponible que pour régler les créances à l'égard desquelles la limitation de la responsabilité peut être invoquée. |
| **2** A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority. | **2** Un fonds peut être constitué, soit en consignant la somme, soit en fournissant une garantie acceptable en vertu de la législation de l'État Partie dans lequel le fonds est constitué, et considérée comme adéquate par le tribunal ou par toute autre autorité compétente. |
| **3** A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), | **3** Un fonds constitué par l'une des personnes mentionnées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 de l'article 9, ou par son assureur, est réputé constitué par toutes les personnes visées |

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| (b) or (c) or paragraph 2, respectively. | aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 respectivement. |

[31] Article 12 speaks to the distribution of the fund and Article 13 bars other actions, stating that "where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted".

[32] Returning now to the main body of the MLA, Part 6 of that Act deals with liability and compensation for pollution. It too incorporates into Canadian law various international conventions to which Canada is a signatory, including the CLC and the Bunkers Convention.

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| **PART 6** | **PARTIE 6** |
| **Liability and Compensation for Pollution** | **Responsabilité et indemnisation en matière de pollution** |
| **DIVISION 1** | **SECTION 1** |
| **International Conventions** | **Conventions internationales** |
| **Interpretation** | **Définitions et interprétation** |
| **Definitions** | **Définitions** |
| **47 (1)** The following definitions apply in this Division. | **47 (1)** Les définitions qui suivent s'appliquent à la présente section. |
| ***Bunkers Convention*** means the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, concluded at London on March 23, 2001. (*Convention sur les hydrocarbures de soute*) | ***Convention sur les hydrocarbures de soute*** La Convention internationale de 2001 sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures de soute, conclue à Londres le 23 mars 2001. (*Bunkers Convention*) |
| ***Civil Liability Convention*** means the International | ***Convention sur la responsabilité civile*** La |

Convention on Civil Liability for Oil Pollution Damage, 1992, concluded at London on November 27, 1992, Article V of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000. (*Convention sur la responsabilité civile*)

Convention internationale de 1992 sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures, conclue à Londres le 27 novembre 1992, dont l'article V a été modifié par la résolution adoptée par le Comité juridique de l'Organisation maritime internationale le 18 octobre 2000. (*Civil Liability Convention*)

***discharge***, in relation to oil and bunker oil, means a discharge of oil or bunker oil that directly or indirectly results in the oil or bunker oil entering the water, and includes spilling, leaking, pumping, pouring, emitting, emptying, throwing and dumping. (*rejet*)

***rejet*** S'agissant d'un hydrocarbure ou d'un hydrocarbure de soute, rejet d'un hydrocarbure ou d'un hydrocarbure de soute qui, directement ou indirectement, atteint l'eau, notamment par déversement, fuite, déchargement ou chargement par pompage, rejet liquide, émanation, vidange, rejet solide et immersion. (*discharge*)

***Fund Convention*** means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, concluded at London on November 27, 1992, Article 4 of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000. (*Convention sur le Fonds international*)

***Convention sur le Fonds international*** La Convention internationale de 1992 portant création d'un Fonds international d'indemnisation pour les dommages dus à la pollution par les hydrocarbures, conclue à Londres le 27 novembre 1992, dont l'article 4 a été modifié par la résolution adoptée par le Comité juridique de l'Organisation maritime internationale le 18 octobre 2000. (*Fund Convention*)

…

[…]

***International Fund*** means the International Oil Pollution Compensation Fund, 1992

***Fonds international*** Le Fonds international d'indemnisation de 1992 pour les dommages

established by Article 2 of the Fund Convention. (*Fonds international*)

dus à la pollution par les hydrocarbures constitué par l'article 2 de la Convention sur le Fonds international. (*International Fund*)

…

[…]

***Supplementary Fund*** means the International Oil Pollution Compensation Supplementary Fund, 2003 established by Article 2 of the Supplementary Fund Protocol. (*Fonds complémentaire*)

***Fonds complémentaire*** Le Fonds complémentaire international d'indemnisation de 2003 pour les dommages dus à la pollution par les hydrocarbures constitué par l'article 2 du Protocole portant création d'un Fonds complémentaire. (*Supplementary Fund*)

***Supplementary Fund Protocol*** means the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, concluded at London on May 16, 2003. (*Protocole portant création d'un Fonds complémentaire*)

***Protocole portant création d'un Fonds complémentaire*** Le Protocole de 2003 à la Convention internationale de 1992 portant création d'un Fonds international d'indemnisation pour les dommages dus à la pollution par les hydrocarbures, conclu à Londres le 16 mai 2003. (*Supplementary Fund Protocol*)

…

[…]

**Civil Liability Convention**

**Convention sur la responsabilité civile**

**Force of law**

**Force de loi**

**48** Articles I to XI, XII *bis* and 15 of the Civil Liability Convention – that are set out in Schedule 5 – have the force of law in Canada.

**48** Les articles I à XI, XII *bis* et 15 de la Convention sur la responsabilité civile – lesquels figurent à l'annexe 5 – ont force de loi au Canada.

**Contracting State**

**État contractant**

**49 (1)** For the purposes of the application of the Civil Liability Convention, Canada is a Contracting State.

**49 (1)** Pour l'application de la Convention sur la responsabilité civile, le Canada est un État contractant.

…

**Admiralty Court's jurisdiction – limitation fund**

**52 (1)** The Admiralty Court has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under the Civil Liability Convention.

**Right to assert limitation defence**

**(2)** When a claim is made or apprehended against a person in respect of liability that is limited under the Civil Liability Convention, that person may assert their right to a limitation of liability by constituting a fund as required under that Convention and filing a defence, or by way of action or counterclaim for declaratory relief, in the Admiralty Court.

**Stay of proceedings**

**(3)** When a fund is constituted in the Admiralty Court, any other court, where an action asserting limitation of liability under the Civil Liability Convention has been commenced, shall stay the proceedings and refer all claims under that Convention to the Admiralty Court.

[…]

**Compétence exclusive de la Cour d'amirauté**

**52 (1)** La Cour d'amirauté a compétence exclusive pour trancher toute question relative à la constitution et à la répartition du fonds de limitation aux termes de la Convention sur la responsabilité civile.

**Droit d'invoquer la limite de responsabilité**

**(2)** Lorsque la responsabilité d'une personne est limitée aux termes de la Convention sur la responsabilité civile, relativement à une créance — réelle ou appréhendée —, cette personne peut se prévaloir de la limitation de responsabilité en constituant le fonds de limitation requis au titre de cette convention et en présentant une défense, ou dans le cadre d'une action ou demande reconventionnelle pour obtenir un jugement déclaratoire, devant la Cour d'amirauté.

**Suspension d'instance**

**(3)** Une fois le fonds de limitation constitué auprès de la Cour d'amirauté, tout autre tribunal où a été intentée une action où est invoquée la limitation de responsabilité prévue par la Convention sur la responsabilité civile suspend l'instance et renvoie toute créance fondée sur cette convention à la Cour d'amirauté.

**Admiralty Court's powers**

**53 (1)** When a claim is made or apprehended against a person in respect of liability that is limited under the Civil Liability Convention, the Admiralty Court, on application by that person or any other interested person, may take any steps that it considers appropriate, including

**(a)** determining the amount of the liability and providing for the constitution and distribution of a fund under that Convention; and

**(b)** joining interested persons as parties to the proceedings, excluding any claimants who do not make a claim within the time limits set out in Article VIII of that Convention, requiring security from the person claiming limitation of liability or from any other interested person and requiring the payment of any costs.

…

**Procedural matters**

**(3)** The Admiralty Court may

**(a)** make any rule of procedure that it considers appropriate with respect to proceedings before it under this section; and

**Pouvoirs de la Cour d'amirauté**

**53 (1)** Lorsque la responsabilité d'une personne est limitée aux termes de la Convention sur la responsabilité civile, relativement à une créance – réelle ou appréhendée –, la Cour d'amirauté peut, à la demande de cette personne ou de tout autre intéressé, prendre toute mesure qu'elle juge indiquée, notamment :

**a)** déterminer le montant de la responsabilité et faire le nécessaire pour la constitution et la répartition du fonds de limitation correspondant, conformément à cette convention;

**b)** joindre tout intéressé comme partie à l'instance, exclure tout créancier forclos en application de l'article VIII de cette convention, exiger une garantie des parties invoquant la limitation de responsabilité ou de tout autre intéressé et exiger le paiement des frais.

[…]

**Procédure**

**(3)** La Cour d'amirauté peut :

**a)** établir les règles de procédure qu'elle juge utiles relativement à toute affaire dont elle est saisie au titre du présent article;

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| **(b)** determine what form of guarantee it considers to be adequate for the purposes of paragraph 3 of Article V of the Civil Liability Convention. | **b)** déterminer quelle garantie elle estime acceptable pour l'application du paragraphe 3 de l'article V de la Convention sur la responsabilité civile. |

[33] The text of Articles I to XI, XII *bis* and 15 of the CLC are set out in Schedule 5 of the MLA. Again, for ease of reference, the most relevant Articles are addressed here.

[34] Article 1 of the CLC contains various definitions, including:

| **ARTICLE I** | **ARTICLE PREMIER** |
|---|---|
| For the purposes of this Convention: | Au sens de la présente Convention : |
| … | […] |
| **5** ***Oil*** means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship. | **5** ***Hydrocarbures*** signifie tous les hydrocarbures minéraux persistants, notamment le pétrole brut, le fuel-oil, l'huile diesel lourde et l'huile de graissage, qu'ils soient transportés à bord d'un navire en tant que cargaison ou dans les soutes de ce navire. |
| **6** ***Pollution damage*** means: | **6** ***Dommage par pollution*** signifie : |
| **(a)** loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided 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 | **a)** le préjudice ou le dommage causé à l'extérieur du navire par une contamination survenue à la suite d'une fuite ou d'un rejet d'hydrocarbures du navire, où que cette fuite ou ce rejet se produise, étant entendu que les indemnités versées au titre de l'altération de l'environnement autres que le manque à gagner dû à |

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| actually undertaken or to be undertaken; | cette altération seront limitées au coût des mesures raisonnables de remise en état qui ont été effectivement prises ou qui le seront; |
| **(b)** the costs of preventive measures and further loss or damage caused by preventive measures. | **b)** le coût des mesures de sauvegarde et les autres préjudices ou dommages causés par ces mesures. |
| **7** ***Preventive measures*** means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage. | **7** ***Mesures de sauvegarde*** signifie toutes mesures raisonnables prises par toute personne après la survenance d'un événement pour prévenir ou limiter la pollution. |
| **8** ***Incident*** means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage. | **8** ***Événement*** signifie tout fait ou tout ensemble de faits ayant la même origine et dont résulte une pollution ou qui constitue une menace grave et imminente de pollution. |

[35] Articles III and IV speak to shipowner liability for pollution damage caused by the ship, including the circumstances in which a shipowner will not be entitled to limit liability:

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| **ARTICLE III** | **ARTICLE III** |
| **1** Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident. | **1** Le propriétaire du navire au moment d'un événement ou, si l'événement consiste en une succession de faits, au moment du premier de ces faits, est responsable de tout dommage par pollution causé par le navire et résultant de l'événement, sauf dans les cas prévus aux paragraphes 2 et 3 du présent article. |
| … | […] |
| **4** No claim for compensation for pollution damage may be | **4** Aucune demande de réparation de dommage par |

made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

pollution ne peut être formée contre le propriétaire autrement que sur la base de la présente Convention. Sous réserve du paragraphe 5 du présent article, aucune demande de réparation de dommage par pollution, qu'elle soit ou non fondée sur la présente Convention, ne peut être introduite contre :

**(a)** the servants or agents of the owner or the members of the crew;

**a)** les préposés ou mandataires du propriétaire ou les membres de l'équipage;

**(b)** the pilot or any other person who, without being a member of the crew, performs services for the ship;

**b)** le pilote ou toute autre personne qui, sans être membre de l'équipage, s'acquitte de services pour le navire;

**(c)** any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;

**c)** tout affréteur (sous quelque appellation que ce soit, y compris un affréteur coque nue), armateur ou armateur-gérant du navire;

**(d)** any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;

**d)** toute personne accomplissant des opérations de sauvetage avec l'accord du propriétaire ou sur les instructions d'une autorité publique compétente;

**(e)** any person taking preventive measures;

**e)** toute personne prenant des mesures de sauvegarde;

**(f)** all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

**f)** tous préposés ou mandataires des personnes mentionnées aux alinéas c), d) et e);

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge

à moins que le dommage ne résulte de leur fait ou de leur omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis

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| that such damage would probably result. | témérairement et avec conscience qu'un tel dommage en résulterait probablement. |
| … | […] |
| **ARTICLE V** | **ARTICLE V** |
| **1** 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: | **1** Le propriétaire d'un navire est en droit de limiter sa responsabilité aux termes de la présente Convention à un montant total par événement calculé comme suit : |
| **(a)** 4,510,000 units of account for a ship not exceeding 5,000 units of tonnage; | **a)** 4 510 000 d'unités de compte pour un navire dont la jauge ne dépasse pas 5 000 unités; |
| **(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); | **b)** pour un navire dont la jauge dépasse ce nombre d'unités, pour chaque unité de jauge supplémentaire, 631 unités de compte en sus du montant mentionné à l'alinéa a); |
| provided, however, that this aggregate amount shall not in any event exceed 89,770,000 units of account. | étant entendu toutefois que le montant total ne pourra en aucun cas excéder 89 770 000 d'unités de compte. |
| **2** 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. | **2** Le propriétaire n'est pas en droit de limiter sa responsabilité aux termes de la présente Convention s'il est prouvé que le dommage par pollution résulte de son fait ou de son omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis témérairement et avec conscience qu'un tel dommage en résulterait probablement. |

[36] Returning once again to the provisions of the MLA, Division 1 of the MLA addresses the Bunkers Convention.

[37] Section 69 of the MLA states that Articles 1 to 10 of the Bunkers Convention, which are set out in Schedule 8 to the MLA, have force of law in Canada. It is significant to note that pursuant to s 72 of the MLA, Part 3 of the MLA (Limitation of Liability for Maritime Claims) also applies to claims arising under the Bunkers Convention. Thus, for the purposes of these motions, while there is general agreement that the Bunkers Convention has application, reference will also be made to the LLMC to the extent that it applies to claims arising under the Bunkers Convention, including limitation of liability.

[38] Article 1 of the Bunker Convention contains various definitions including:

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| **ARTICLE 1** | **ARTICLE 1** |
| **Definitions** | **Définitions** |
| For the purposes of this Convention: | Aux fins de la présente Convention : |
| … | […] |
| **5** ***Bunker oil*** means any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil. | **5** ***Hydrocarbures de soute*** signifie tous les hydrocarbures minéraux, y compris l'huile de graissage, utilisés ou destinés à être utilisés pour l'exploitation ou la propulsion du navire, et les résidus de tels hydrocarbures. |
| … | […] |
| **7** ***Preventive measures*** means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage. | **7** ***Mesures de sauvegarde*** signifie toutes mesures raisonnables prises par toute personne après la survenance d'un événement pour prévenir ou limiter le dommage par pollution. |
| **8** ***Incident*** means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and | **8** ***Événement*** signifie tout fait ou tout ensemble de faits ayant la même origine et dont résulte un dommage par pollution ou qui constitue une menace grave |

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| imminent threat of causing such damage. | et imminente de dommage par pollution. |
| **9** ***Pollution damage*** means: | **9** ***Dommage par pollution*** signifie : |
| **(a)** loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided 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; and | **a)** le préjudice ou le dommage causé à l'extérieur du navire par contamination survenue à la suite d'une fuite ou d'un rejet d'hydrocarbures de soute du navire, où que cette fuite ou ce rejet se produise, étant entendu que les indemnités versées au titre de l'altération de l'environnement autres que le manque à gagner dû à cette altération seront limitées au coût des mesures raisonnables de remise en état qui ont été effectivement prises ou qui le seront; et |
| **(b)** the costs of preventive measures and further loss or damage caused by preventive measures. | **b)** le coût des mesures de sauvegarde et les autres préjudices ou dommages causés par ces mesures. |

[39] Article 3(1) states that, except as provided in Article 3(3) and (4), shipowners shall be liable for pollution damage caused by any bunker oil onboard or originating from the ship. Article 4 states that the Bunker Convention shall not apply to pollution damage as defined by the CLC. Article 6 provides for the limitation of liability of shipowners:

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| **ARTICLE 6** | **ARTICLE 6** |
| **Limitation of Liability** | **Limitation de la responsabilité** |
| Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit | Aucune disposition de la présente Convention n'affecte le droit du propriétaire du navire et de la personne ou des personnes qui fournissent |

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| liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended. | l'assurance ou autre garantie financière de limiter leur responsabilité en vertu de tout régime national ou international applicable, tel que la Convention de 1976 sur la limitation de la responsabilité en matière de créances maritimes, telle que modifiée. |

[40] Returning again to the provisions in the main body of the MLA, Part 6, Division 2, of the MLA pertains to liability not covered by Division 1:

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| **DIVISION 2** | **SECTION 2** |
| **Liability Not Covered by Division 1** | **Responsabilité non visée par la section 1** |
| **Interpretation** | **Définitions** |
| **Definitions** | **Définitions** |
| **75** The following definitions apply in this Division. | **75** Les définitions qui suivent s'appliquent à la présente section. |
| … | […] |
| ***oil*** means oil of any kind or in any form and includes petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes but does not include dredged spoil. (*hydrocarbures*) | ***hydrocarbures*** Les hydrocarbures de toutes sortes sous toutes leurs formes, notamment le pétrole, le fioul, les boues, les résidus d'hydrocarbures et les hydrocarbures mélangés à des déchets, à l'exclusion des déblais de dragage. (*oil*) |
| ***oil pollution damage***, in relation to any ship, means loss or damage outside the ship caused by contamination resulting from the discharge of oil from the ship. (*dommages dus à la pollution par les hydrocarbures*) | ***dommages dus à la pollution par les hydrocarbures*** S'agissant d'un navire, pertes ou dommages extérieurs au navire et causés par une contamination résultant du rejet d'hydrocarbures par ce navire. (*oil pollution damage*) |
| … | […] |
| ***pollutant*** means oil and any | ***polluant*** Les hydrocarbures, |

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| substance or class of substances identified by the regulations as a pollutant for the purposes of this Part and includes | les substances qualifiées par règlement, nommément ou par catégorie, de polluantes pour l'application de la présente partie et, notamment : |
| **(a)** a substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the waters' quality to an extent that their use would be detrimental to humans or animals or plants that are useful to humans; and | **a)** les substances qui, ajoutées à l'eau, produiraient, directement ou non, une dégradation ou altération de sa qualité de nature à nuire à son utilisation par les êtres humains ou par les animaux ou les plantes utiles aux êtres humains; |
| **(b)** any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any waters, degrade or alter or form part of a process of degradation or alteration of the waters' quality to an extent that their use would be detrimental to humans or animals or plants that are useful to humans. (*polluant*) | **b)** l'eau qui contient une substance en quantité ou concentration telle — ou qui a été chauffée ou traitée ou transformée depuis son état naturel de façon telle — que son addition à l'eau produirait, directement ou non, une dégradation ou altération de la qualité de cette eau de nature à nuire à son utilisation par les êtres humains ou par les animaux ou les plantes utiles aux êtres humains. (*pollutant*) |
| ***pollution damage***, in relation to any ship, means loss or damage outside the ship caused by contamination resulting from the discharge of a pollutant from the ship. (*dommages dus à la pollution*) | ***dommages dus à la pollution*** S'agissant d'un navire, pertes ou dommages extérieurs au navire et causés par une contamination résultant du rejet d'un polluant par ce navire. (*pollution damage*) |

[41] Pursuant to s 77, shipowners are liable for oil pollution damage from their ship, and related costs and expenses reasonably incurred to prevent, repair, remedy or minimize such damage, as described in those provisions and, pursuant to s 77(2), for environmental damage:

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| **Liability for environmental damage** | **Responsabilité : dommage à l'environnement** |
| **77 (2)** If oil pollution damage from a ship results in impairment to the environment, the owner of the ship is liable for the costs of reasonable measures of reinstatement undertaken or to be undertaken. | **77 (2)** Lorsque des dommages dus à la pollution par les hydrocarbures causée par un navire ont des conséquences néfastes pour l'environnement, le propriétaire du navire est responsable des frais occasionnés par les mesures raisonnables de remise en état qui sont prises ou qui le seront. |

[42] Part 6, Division 3 of the MLA concerns the jurisdiction of this Court:

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| **DIVISION 3** | **SECTION 3** |
| **General Provisions** | **Dispositions générales** |
| **Admiralty Court** | **Cour d'amirauté** |
| **Jurisdiction** | **Compétence** |
| **79 (1)** The Admiralty Court has jurisdiction with respect to claims for compensation brought in Canada under any convention under Division 1 and claims for compensation under Division 2. | **79 (1)** La Cour d'amirauté a compétence à l'égard de toute demande d'indemnisation présentée au Canada en vertu d'une convention visée à la section 1 et de celle présentée en vertu de la section 2. |
| **Jurisdiction may be exercised *in rem*** | **Compétence – action réelle** |
| **(2)** The jurisdiction conferred on the Admiralty Court may be exercised in rem against the ship that is the subject of the claim, or against any proceeds of sale of the ship that have been paid into court. | **(2)** La compétence de la Cour d'amirauté peut s'exercer par voie d'action réelle contre le navire qui fait l'objet de la demande ou à l'égard du produit de la vente de celui-ci déposé au tribunal. |

[43] Part 7 of the MLA concerns the Ship-source Oil Pollution Fund. This is a complex regime but, as described in the submissions of the SOPF, it is a special purpose account in the accounts of Canada established to facilitate the indemnification of claims of ship-source oil pollution in Canadian waters while protecting the tax payer. The SOPF is represented by its

Administrator (MLA s 92, 94(1)). Pursuant to s 101(1) of the MLA, and subject to other provisions of Part 7, the SOPF is liable for loss, damage, costs or expenses relating to oil pollution from ships, referred to in s 51, 71 and 77 of the MLA, Article III of the CLC, and Article 3 of the Bunkers Convention relating to pollution damage, if certain criteria are met. These criteria include, in accordance with s 101(1)(c), that the claim exceeds the shipowner's maximum liability under the CLC (to the extent that the excess is not recoverable under the International Fund or the Supplemental Fund), or the owner's maximum liability under Part 3 of the MLA. In other words, where s 101(1) of the MLA applies, the Administrator can be held liable for the amount a shipowner would otherwise have been held liable under Part 6 of the MLA.

[44] In addition to any rights against the SOPF under s 101 of the MLA, claims may be filed directly with the Administrator, pursuant to s 103 and/or s 107 of the MLA.

[45] When a claimant commences proceedings against a shipowner or the ship itself, *in rem*, s 109 of the MLA mandates that the Administrator appear and take action, as she deems appropriate, for the proper administration of the SOPF:

| **Proceedings against owner of ship** | **Action contre le propriétaire d'un navire** |
|---|---|
| **109 (1)** If a claimant commences proceedings against the owner of a ship or the owner's guarantor in respect of a matter referred to in section 51, 71 or 77, Article III of the Civil Liability Convention or Article 3 of the Bunkers Convention, except in the case of proceedings based on paragraph 77(1)(c) commenced by the Minister of | **109 (1)** À l'exception des actions fondées sur l'alinéa 77(1)c) intentées par le ministre des Pêches et des Océans à l'égard d'un polluant autre que les hydrocarbures, les règles ci-après s'appliquent aux actions en responsabilité fondées sur les articles 51, 71 ou 77, l'article III de la Convention sur la responsabilité civile ou |

| | |
|---|---|
| Fisheries and Oceans in respect of a pollutant other than oil, | l'article 3 de la Convention sur les hydrocarbures de soute intentées contre le propriétaire d'un navire ou son garant : |
| **(a)** the document commencing the proceedings shall be served on the Administrator by delivering a copy of it personally to him or her, or by leaving a copy at his or her last known address, and the Administrator is then a party to the proceedings; and | **a)** l'acte introductif d'instance doit être signifié à l'administrateur – soit par la remise à celui-ci d'une copie en main propre, soit par le dépôt d'une copie au lieu de sa dernière résidence connue – qui devient de ce fait partie à l'instance; |
| **(b)** the Administrator shall appear and take any action, including being a party to a settlement either before or after judgment, that he or she considers appropriate for the proper administration of the Ship-source Oil Pollution Fund. | **b)** l'administrateur doit comparaître et prendre les mesures qu'il juge à propos pour la bonne gestion de la Caisse d'indemnisation, notamment conclure une transaction avant ou après jugement. |
| **If Administrator party to settlement** | **Règlement d'une affaire** |
| **(2)** If the Administrator is a party to a settlement under paragraph (1)(b), he or she shall direct payment to be made to the claimant of the amount that the Administrator has agreed to pay under the settlement. | **(2)** Dans le cas où il conclut une transaction en application de l'alinéa (1)b), l'administrateur ordonne le versement au demandeur, par prélèvement sur la Caisse d'indemnisation, du montant convenu. |

[46] The Administrator submits that, as a limitation action is essentially an action against a fund constituted to stand in place of the polluting ship, in this case the tug and barge, the Administrator is a party to the Limitation Action and considers it proper to make submissions in the subject motions. The Administrator also appears as a party by statute in the BCSC Claim.

## VI. Positions of the Parties

[47] While there are two motions before this Court, there is overlap of fact and law concerning the issue of enjoining Heiltsuk from continuing its action against the Kirby Defendants in the BCSC Claim, and the issue of whether or not to stay Kirby's Limitation Action in this Court. The written submissions of the parties reflect and acknowledge this and, when summarizing the positions of the parties below, I have not wholly segregated their respective enjoinment and stay submissions.

### *A. Kirby's Submissions*

[48] Kirby submits that it is appropriate for this Court to exercise its exclusive jurisdiction to constitute and distribute a LLMC fund, and that it should do so and adjudicate the Limitation Action. In doing so, it says that Heiltsuk should be enjoined from continuing the BCSC Claim against the Kirby Defendants in that proceeding.

[49] Kirby submits that the claims against the Kirby Defendants in the BCSC Claim are governed by the Bunkers Convention and are subject to the limitation of liability provisions set out in the LLMC. Pursuant to s 32(2) of the MLA, a shipowner asserting a right to limitation of liability under the LLMC may do so "in any court of competent jurisdiction in Canada". Kirby relies on the Federal Court of Appeal's decision in *Siemens Canada Limited v JD Irving Limited*, 2012 FCA 225 [*JD Irving FCA*], for the proposition that, as the shipowner, Kirby has the right to choose the forum in which it asserts its limitation claim. And, once it has done so, Kirby submits that its choice cannot be overridden by this Court or by the BCSC (*JD Irving FCA* at paras 50 and 115). Further, s 32(1) of the MLA provides that this Court "has exclusive jurisdiction with

respect to the constitution and distribution of a limitation fund" under the LLMC. While this Court does not have exclusive jurisdiction over all actions in which a shipowner asserts its rights under the LLMC, the Federal Court of Appeal in *JD Irving FCA* stated that, practically speaking, the Federal Court does have exclusive jurisdiction over such limitation proceedings (*JD Irving FCA* at paras 91-92 and 116).

[50] In Kirby's view, the Incident is clearly a matter of maritime law and, regardless of how Heiltsuk has framed its claims in the BCSC Claim, the claims all relate to pollution damage allegedly resulting from the Incident. Kirby can, therefore, exercise its statutory right, pursuant to the MLA, to limit its liability in the Federal Court.

[51] Regarding the constitution of an LLMC limitation fund, Kirby submits it is appropriate to do so at this stage. Its motion for directions made pursuant to s 33 of the MLA is interlocutory in nature and simply seeks directions that a fund be constituted, along with other related directions. To delay the constitution of the fund would erode the protection of the shipowner intended by the MLA. The determination of whether the shipowner is actually entitled to limit its liability will occur only after evidence has been adduced at a limitation trial in this Court (*JD Irving, Limited v Siemens Canada Limited*, 2011 FC 791 [*JD Irving FC*] at paras 81-84; *JD Irving FCA* at para 20).

[52] Should this Court grant the request to constitute an LLMC limitation fund, then the amount of the fund is determined by Article 6 of the LLMC based on tonnage of the ship in question. Kirby asserts that, although joined at the time of the Incident, in the circumstances of this matter the tug and barge do not constitute one vessel (*Rhone (The) v Peter AB Widener (The)*, [1993] 1 SCR 497 at 541, 101 DLR (4th) 188 [*The Rhone*]; *Bayside Towing Ltd v*

*Canadian Pacific Railway*, [2001] 2 FC 258 at para 36 [*Bayside*]). Therefore, it submits that the LLMC fund should only be calculated based on the tonnage of the tug, and therefore should total 1.51 million Special Drawing Rights [SDRs], or approximately CAD $2.73 million.

[53] With respect to an order enjoining Heiltsuk from continuing its proceeding against the Kirby Defendants in the BCSC Claim, Kirby notes that when a claim is made against a party in respect of liability that is limited under the LLMC, s 33 of the MLA permits the Court to take "any steps it considers appropriate" including "enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the Admiralty Court in relation to the same subject-matter". Kirby submits that the test to be applied by this Court is that of "appropriateness" and not the *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96 [*Amchem*] or *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*] tests. It submits that such an order is appropriate as this Court has jurisdiction over all claims arising from the Incident (*Federal Courts Act*, RSC 1985, c F-7, s 22 [*Federal Courts Act*]), and that the subject matter of both the BCSC Claim (as pertaining to the Kirby Defendants in that matter) and the Limitation Action in this Court is the same – namely, the Incident. Further, the very purpose of the limitation regime is to avoid multiple proceedings and it would therefore not be reasonable to allow Heiltsuk to pursue their BCSC Claim prior to a determination of Kirby's right to limit its liability. Enjoining the BCSC Claim would result in cost savings for the parties, it would prevent a multiplicity of proceedings, cause no prejudice to Heiltsuk, and avoid the significant prejudice to Kirby should it be obligated to participate in what could be a decades-long dispute over complex Aboriginal title and rights claims. While Heiltsuk advances these claims against the federal and provincial governments in the BCSC Claim, they are entirely unrelated to the

Incident in respect of which limitation is being invoked. This is contrary to the very purpose of a limitation action under the MLA.

[54] Finally, Kirby asserts that it has not attorned to the jurisdiction of the BCSC as Heiltsuk submits. The Kirby Defendants in the BCSC Claim have taken no steps to defend that matter on its merits and the only steps they have taken, filing the Jurisdictional Response and Notice of Application, have been to dispute the jurisdiction of the BCSC. Nor has Kirby attorned to the jurisdiction of the BCSC by way of the HTC LOU or by alleged non-compliance with the BCSC Civil Rules. Moreover, attornment to the BCSC has no relevance because the Limitation Action in this Court is a summary proceeding that is concerned only with the discrete issue of whether Kirby is entitled to limit its liability under the MLA.

[55] As to Heiltsuk's Stay Motion, the Federal Court of Appeal in *JD Irving FCA* held that the applicable provision for determining whether it is warranted to stay a limitation action commenced in the Federal Court pursuant to the MLA, due to the commencement of a liability action in another forum, is section 50(1)(b) of the *Federal Courts Act* and the test in *Mon-Oil Ltd v Canada*, [1989] 26 CRP (3d) 379, 27 FTR 50 (FC) [*Mon-Oil*]. Contrary to Heiltsuk's submissions, s 50(1)(a) has no application (*JD Irving FCA* at para 125-127). Kirby also submits that the *forum non conveniens* analysis, which Heiltsuk submits should be included in a determination of whether a stay should be granted under s 50(1) of the *Federal Courts Act*, is inapplicable, based on *JD Irving FCA*. It further submits that the case law relied upon by Heiltsuk in favour of the *forum non conveniens* test concerns s 46(1) of the MLA, which is unrelated to the subject matter of this proceeding.

[56] Further, Kirby says that even if this Court does not have jurisdiction to grant Heiltsuk's claim for Aboriginal title and rights, this Court does have jurisdiction to determine the legal question of whether the limitation regime set out in the MLA would unduly and unjustifiably infringe upon the asserted rights. The constitutionality of the limitation regime can be determined by this Court based on an assumption of the existence of the claimed title and rights. That approach would avoid Heiltsuk actually having to establish its Aboriginal rights and title within the Limitation Action. In addition, Heiltsuk has not particularized exactly what claims for pollution damages they would be precluded from advancing under the Bunkers Convention, or the CLC, without first establishing Aboriginal rights or title. Nor have they pursued a claim concerning their Aboriginal title and rights which they filed in 2003 in the BCSC. Thus, they have not established that a stay is necessary. Kirby also submits that it is not seeking a permanent stay of the BCSC Claim against all defendants to that proceeding. Rather, it is seeking to temporarily enjoin Heiltsuk from proceeding in the BCSC Claim against the Kirby Defendants alone, and only until the Limitation Action is adjudicated by this Court. In this regard, should a trial be necessary for establishing liability and quantifying damages after the Limitation Action, because Kirby has been found not to be entitled to limit its liability or because the provisions of the MLA are found to be unconstitutional, Kirby has agreed that such an action may proceed before the BCSC.

*B. Heiltsuk's Submissions*

[57] Heiltsuk opposes the constitution of a limitation fund by Kirby in the Federal Court and the enjoinment of Heiltsuk's proceeding in the BCSC Claim. Heiltsuk seeks a stay of

proceedings and submits that the grounds for such a stay are also grounds for this Court to refuse to constitute a limitation fund and to refuse to enjoin the BCSC Claim.

[58] Heiltsuk responds to Kirby's request for enjoinment by submitting that although the choice of forum by a shipowner is important, such an election does not automatically oust the power of the Court to decline jurisdiction, relying on *Magic Sportswear Corp v Mathilde Maersk (The)*, 2006 FCA 284 [*Magic Sportswear*]). Heiltsuk asserts the Federal Court of Appeal in *JD Irving FCA* failed to consider its own prior decision in *Magic Sportswear* and did not overrule the principle stated in that case that the Court presumptively retains its power to decline jurisdiction under s 50(1) of the *Federal Courts Act*. As a result, Heiltsuk argues that *JD Irving FCA* is an incomplete answer to the issue before this Court and that it can still, in its discretion, decline jurisdiction under s 50(1) of the *Federal Courts Act*.

[59] Heiltsuk submits that there are good reasons for this Court to voluntarily decline jurisdiction on the basis of a more convenient forum. These include the fact that Kirby agreed to voluntarily submit to the jurisdiction of the BCSC by way of a binding agreement, the HTC LOU. Although the Federal Court has exclusive jurisdiction over the constitution and distribution of a limitation fund, the MLA does not address what parties may agree to contractually. As Article 11 of the LLMC allows a shipowner to constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted, nothing prevents Heiltsuk and Kirby from agreeing that the BCSC can hold a limitation fund as a competent authority. Further, Kirby has submitted to the jurisdiction of the BCSC by way of the HTC LOU and also attorned to its jurisdiction by failing to contest jurisdiction within the time specified by the BCSC Civil Rules after filing its Jurisdictional Response.

[60] In addition, Heiltsuk claims that it will face significant prejudice if it is forced to proceed in the Federal Court. In the BCSC Claim it is advancing a claim to Aboriginal title and other rights impacted by the Incident, which it cannot do in the Federal Court as this Court lacks jurisdiction. Heiltsuk states that its Aboriginal title claims are integral to its claims against Kirby. In that regard, while bringing a claim under the MLA and the Bunkers Convention, Heiltsuk is also challenging the constitutionality of certain aspects of the MLA that it says interfere with its Aboriginal rights and title. Specifically, it challenges the provisions of the MLA that prohibit it from recovering certain types of damages from shipowners for interference with its Aboriginal rights and title. Further, Heiltsuk's constitutional challenge concerns the definition of "pollution damage" to the extent that it excludes damage to the environment and to non-profit communal harvesting rights. Its challenge extends further to MLA provisions eliminating common law claims against, and limiting the liability of, shipowners. It asserts that its constitutional challenge would be fundamentally impaired if it were forced to proceed in this Court and give up Aboriginal title as part of its challenge. According to Heiltsuk, this jurisdictional issue distinguishes this matter from *JD Irving FCA* where the Federal Court had jurisdiction over all components of the proceeding commenced in the Ontario Superior Court of Justice.

[61] Concerning the constitution of a limitation fund, Heiltsuk argues that it is not an appropriate time to effect a fund, as there is a contentious and live issue that has yet to be determined, specifically the question of whether the tug and barge are to be considered as one ship or as two ships for the purposes of determining the amount of the LLMC limitation fund.

[62] In relation to their motion for a stay of proceedings, Heiltsuk submits that a stay should be granted in this case under s 50(1)(a) or s 50(1)(b) of the *Federal Court Rules*. Heiltsuk asserts

that the BCSC Claim is a "parallel proceeding" and that s 50(1)(a) is thus applicable. It further submits that the tests under s 50(1)(a), as developed by the Federal Court of Appeal, are in substance the same, being whether the Federal Court is *forum non conveniens*. This includes an examination of various factors as set out in *Magic Sportswear* at paras 91-92 and in *Mazda Canada Inc v Cougar Ace (The)*, 2008 FCA 219 at para 11 [*Mazda Canada*]. Further, Heiltsuk asserts that the Federal Court of Appeal has implied that a simplified approach may apply where a claim is being proceeded with in another Canadian court (*Apotex Inc v AstraZeneca Canada Inc*, 2003 FCA 235 [*Apotex*]). Turning to s 50(1)(b), Heiltsuk submits that the test under that provision is the two part "interest of justice" test (*JD Irving FCA* at paras 19 and 126-127). Heiltsuk asserts that it will suffer significant prejudice if a stay is not granted, mainly because it will be unable to advance its claim to Aboriginal title to immovable property owned by British Columbia in the Federal Court, specifically the inland seabed and foreshore of the Claim and Loss Area, which Heiltsuk asserts does not involve obligations of the federal Crown. In its view, loss of its right to claim Aboriginal title, being an element of its challenge to the validity of parts of the MLA, is a loss of juridical advantage. Heiltsuk also submits that there would be no prejudice to Kirby if a stay is granted for a number of reasons, including the fact that it is willing to agree to a limitation fund being constituted in the BCSC and that Kirby would not be deprived of a summary process as similar procedures are available in the BCSC.

*C. The SOPF*

[63] The SOPF submits that this Court should exercise its exclusive jurisdiction in regard to the LLMC and the related Limitation Action. It submits that this Court should do so for a number of reasons. First, the Incident and related claims under Part 6 of the MLA and the BCSC Claim

are a matter of "Navigation and Shipping", within the meaning of s 91(10) of the *Constitution Act, 1867* and Canadian Maritime Law, falling within the Federal Court's subject matter jurisdiction pursuant to s 2, 22, 42 and 43 of the *Federal Courts Act*, and by virtue of the relief sought by Kirby pursuant to the MLA. Second, the Bunkers Convention and LLMC apply. Third, the MLA provides that Kirby may proceed with a limitation action in the Federal Court notwithstanding that Heiltsuk filed the BCSC Claim first in time in that Court. Fourth, the grant of exclusive jurisdiction to the Federal Court is overriding. Fifth, the Federal Court has particular experience and expertise in the adjudication of the pollution damage claims properly falling within Part 6 of the MLA, including those advanced pursuant to the Bunkers Convention and the CLC. And sixth, it is in the interest of the Administrator and, presumably the parties, to have the claims of Heiltsuk and other possible claimants brought and determined in a streamlined and expeditious manner which would be achieved by the Limitation Action unencumbered by the broad and complex claims asserted by Heiltsuk in the BCSC Claim against British Columbia and Canada, primarily in regard to Aboriginal title and rights.

[64] The SOPF notes that Heiltsuk has pleaded the CLC in the alternative in the BCSC Claim. However, neither Heiltsuk nor Kirby have pleaded the facts required to engage the CLC (*e.g.* the carriage of persistent oil). In the absence of a factual or legal basis upon which Heiltsuk can establish liability under the CLC, the Administrator submits that that a CLC fund should not now be constituted.

[65] The Administrator submits that it would be appropriate for the Federal Court to partially and temporarily enjoin Heiltsuk and other potential claimants from proceeding in the BCSC Claim. It bases these submissions largely on those expressed by Kirby relating to: the Federal

Court's jurisdiction; the fact that the actions' subject matter are similar or the same; that it would avoid a multiplicity of proceedings; that it would result in cost savings; the fact that procedural advantages are not relevant in the application of the test; and that it would avoid causing prejudice to the parties. The Administrator supports the enjoining of further proceedings in the BCSC against Kirby but only as they relate directly to the compensation claims being advanced under Part 6 of the MLA, the Bunkers Convention, or the CLC in regard to which Kirby is invoking a right to limit its lability. Further, it only supports enjoining until the Federal Court adjudicates the Limitation Action. Heiltsuk's claims in the BCSC Claim against the provincial and federal Crowns in regards to establishing infringement of Aboriginal rights should not be enjoined.

[66] The SOPF also makes submissions as to the constitution of any limitation fund and other matters.

[67] As for the Stay Motion, the Administrator relies on her submissions made in response to the Limitation Motion and opposes a stay of the Limitation Action.

## VII. Preliminary Matters

[68] There are a number of preliminary points to be made and matters to be addressed before turning to an analysis of the issues identified above. These concern the jurisdiction of this Court, the extent of the enjoinment sought by Kirby, the applicability of the CLC, the proper tests to be applied in this matter with respect to the requested enjoinment and stay, Heiltsuk's assertion that Kirby has attorned to the jurisdiction of the BCSC, and the admissibility of an affidavit of Ms.

Andrea Kreutz, legal assistant to counsel for Heiltsuk, affirmed on June 24, 2019, and filed in Heiltsuk's Stay Motion record [Kreutz Affidavit].

*A. Jurisdiction of this Court*

[69] There is no real dispute as to the jurisdiction of this Court. Pursuant to s 22(1) of the *Federal Courts Act*, this Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases where a claim for relief is made or a remedy is sought under or by virtue of Canadian Maritime Law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping (as described in s 91(10) of the *Constitution Act, 1867*), except to the extent that jurisdiction has been otherwise specially assigned, and without limiting the generality of s 22(1), this Court has jurisdiction in respect of the matters listed in s 22(2) which includes any claim for damage caused by a ship (*Federal Courts Act*, s 22(2)(d); also see MLA s 2, 42 and 43). Here the claims for oil pollution damage arise from the Incident. The shipowner's right to limit liability, the relief sought by Kirby, is contained within the provisions of federal legislation, the MLA. There can be no doubt that the Limitation Action is one of Canadian Maritime Law. This Court regularly entertains maritime matters, including limitation actions and claims brought by the SOPF.

[70] Further, Heiltsuk does not seriously dispute that, pursuant to s 32(1) of the MLA, the Admiralty Court, defined in s 2 of the MLA as the Federal Court, has jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 to 13 of the LLMC. Rather, Heiltsuk takes the view that this Court should voluntarily decline its jurisdiction and that its exclusive jurisdiction can be afforded to and be exercised by the BCSC, even if the MLA grants this power *exclusively* to the Federal Court.

*B. Extent of requested enjoinment*

[71] It is significant to this analysis that Kirby does not seek the enjoinment of the BCSC Claim in whole or a stay on a permanent basis. Rather, Kirby seeks to temporarily enjoin Heiltsuk from proceeding in the BCSC Claim only against the Kirby Defendants to that action and only until its Limitation Action in this Court has been adjudicated.

*C. Application of the CLC*

[72] In the BCSC Claim, Heiltsuk seeks, amongst other relief, pollution damages under the Bunkers Convention or, alternatively, under the CLC. However, in its Stay Motion and in its response to the Enjoinment Motion, Heiltsuk asserts that it was not privy to the nature of the oil or residue of oil carried by the tug and barge and that it made no pleading in that regard. Heiltsuk submits that at this stage neither Kirby nor Heiltsuk are asserting that persistent oil was carried as cargo and, in the absence of Kirby asserting persistent oil as cargo or disclosing the fact of such cargo, Heiltsuk's claim falls under the Bunkers Convention. Heiltsuk also submits that it specifically opposes the constitution of any limitation fund under the CLC on the same basis.

[73] The pleading of the CLC by Heiltsuk in the BCSC Claim is significant for two reasons.

[74] First, the limitation of liability, and thus the amount of any limitation fund, under the CLC is higher than under the Bunkers Convention and the LLMC. Under the CLC, a ship not exceeding 5,000 units of tonnage would give rise to a limitation fund of 4,510,000 SDRs (Article V, subparagraphs 1(a) and 9(a)). Under the Bunkers Convention and the LLMC, incorporated into the MLA by s 72, a ship with a tonnage not exceeding 2,000 tonnes would give rise to a limitation fund of 1,510,000 SDRs. For ships in excess of that tonnage, an additional amount of

604 SDRs is added for each additional tonne, up to 30,000 tonnes. In rough figures, the tug's tonnage is said to be 302 tonnes, which would give rise to a limitation of liability under the CLC of CAD $8,146,000, as compared to CAD $2,727,000 under the Bunkers Convention/LLMC. Similarly, the limitation of liability for the barge, said to have a tonnage of 4,276 tonnes, under the CLC would be CAD $8,146,000 and CAD $5,211,000 under the Bunkers Convention/LLMC.

[75] Second, under s 52(1) of the MLA, the Admiralty Court, being the Federal Court, has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under the CLC. Under s 52(2), when a claim is made or apprehended against a person in respect of liability that is limited under the CLC, that person may assert their right to a limitation of liability by constituting a fund as required under that convention and filing a defence, or by way of action or counterclaim for declaratory relief, *in the Admiralty Court*. Section 52(3) goes on to state that when a fund is constituted in the Admiralty Court, any other court where an action asserting limitation of liability under the CLC has been commenced shall stay the proceedings and refer all claims under that convention to the Admiralty Court. Thus, if Heiltsuk is asserting a claim under the CLC in the BCSC Claim, it is plain and obvious that this Court has exclusive jurisdiction over the claim and that the BCSC Claim, in that respect, must be enjoined until the Limitation Action is determined.

[76] Heiltsuk has not amended its pleadings concerning the CLC in the BCSC Claim and, when appearing before me, its counsel submitted only that it may eventually do so in the future. I note that the Incident occurred nearly three years ago and the response to it was subject to a Unified Command in which Heiltsuk had representation and, accordingly, it would have some

knowledge of the type of spilled oil. Further, in support of its Enjoinment Motion, Kirby filed an affidavit of James Guirdry, sworn on June 17, 2019, who identifies himself as an officer of Kirby Pacific, Kirby Operating, and Kirby Offshore. Therein, Mr. Guirdry deposes that at no time did the barge carry any type of persistent hydrocarbon oil as cargo (presumably as a barge that was not self-propelled it did not carry bunkers), that the breached fuel tanks of the tug released diesel fuel and lubricants used solely for the operation or propulsion of the tug (*i.e.* fitting the definition of "bunker oil" in Article 1(5) of the Bunkers Convention), and that no fuel or oil of any kind was released from the barge (*i.e.* no persistent oil as defined in Art 1(5) of the CLC was released). Heiltsuk does not contest this evidence. The SOPF submits that neither Heiltsuk nor Kirby have pleaded the facts required to engage the CLC and that currently there is no factual or legal basis upon which Heiltsuk can establish liability under the CLC. For that reason, the Administrator submits that a CLC fund should not now be constituted.

[77] While I do not agree with Heiltsuk's submission that, in the absence of Kirby asserting persistent oil as cargo or disclosing the fact of such cargo, Heiltsuk's claim automatically falls under the Bunkers Convention (particularly as it was Heiltsuk that asserted a damages claim based, in the alternative, on the CLC), I do agree with the Administrator that there is no factual basis upon which a CLC fund could be constituted at this time. Accordingly, these reasons will address only the Bunkers Convention/LLMC.

[78] I note, however, that the fact that Heiltsuk still maintains its alternative CLC claim in the BCSC Claim is a factor that supports this Court retaining its jurisdiction with respect to the Limitation Action. This is because, should Heiltsuk, at some time in the future, assert that the CLC does apply, then, given this Court's exclusive jurisdiction arising pursuant to s 52 of the

MLA, the Limitation Action would necessarily have to be pursued in this Court, subject to any limitation period or other concerns that would preclude it. To the extent that jurisdiction over some aspects of the Limitation Action, brought under the Bunkers Convention, are shared with the BCSC Court, it would not be in the interest of justice to have the Limitation Action addressed there while there is a possibility that it might have to be transferred to this Court as a claim under the CLC.

*D. The tests for enjoinment and a stay of proceedings*

*(i) Test for enjoinment*

[79] In my view, the Federal Court of Appeal's decision in *JD Irving FCA*, and the decision of Justice Heneghan of this Court which was under appeal in that matter (*JD Irving FC*, cited above) are directly on point with the issues before me. Because *JD Irving FCA* touches on so many of the issues raised in these motions, it is appropriate to address that decision in some detail.

[80] In that case, Siemens commenced proceedings in the Ontario Superior Court of Justice against J.D. Irving [Irving] and Maritime Marine Consultants (2003) Inc. [MMC] for the recovery of the loss of two steam turbines which, in the course of being loaded onto a barge, fell into the sea. Irving and MMC filed statements of claim in this Court seeking a declaration that they were entitled to limit their liability in regard to the loss to the amount of $500,000, plus interest, and an order constituting a limitation fund. Siemens brought interlocutory motions seeking to stay the Federal Court actions to the extent that they pertained to the constitution and distribution of a limitation fund pursuant to s 33 of the MLA, and for a permanent stay of the

actions insofar as Irving and MMC claimed an entitlement to limit their liability pursuant to s 28 and 29 of the MLA. In response, Irving and MMC brought motions in which they sought directions from this Court as to the manner in which their limitation actions were to be heard and determined, as well as an order enjoining Siemens and others from commencing or continuing proceedings against them before any court other than the Federal Court in respect of the incident.

[81] Justice Heneghan dismissed Siemens' motions for an interlocutory and a permanent stay of the Federal Court proceedings and enjoined Siemens and others from commencing or continuing proceedings against Irving and MMC before any court or tribunal other than the Federal Court. She also ordered the establishment of a limitation fund pursuant to Articles 9 and 11 of the LLMC. Her decision was upheld by the Federal Court of Appeal.

[82] On appeal, Siemens argued that some or all of the matters raised in the Ontario action were not maritime in nature and were therefore outside the jurisdiction of the Federal Court, as well as other jurisdictional issues. Justice Nadon, writing for the Court, rejected those arguments on the basis of s 22 of the *Federal Courts Act*.

[83] Justice Nadon then considered the question of enjoinment, noting that in order to respond to that issue and to the motions to stay the Federal Court proceedings, it was necessary to review the MLA and the LLMC. Justice Nadon stated that "[i]t is of crucial importance to remember that the provisions of the MLA at issue in this appeal, particularly those pertaining to the right to limit liability and the constitution and distribution of a limitation fund, are meant to give effect to the Convention of 1976 and the Protocol of 1996" (*JD Irving FCA* at para 46).

[84] As to s 32 and s 33 of the MLA, Justice Nadon stated:

> [50] On the one hand, section 2 of the MLA defines the "Admiralty Court" as being the Federal Court and confers upon that Court exclusive jurisdiction with respect to any matter pertaining to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention (see: subsection 32(1) of the MLA). On the other hand, subsection 32(2) of the MLA provides that where a person may limit his liability pursuant to sections 28, 29 and 30 of the MLA or paragraph 1 of Articles 6 or 7 of the Convention, that person may assert his right to limit either by way of a defence filed to an action or by way of an action or counterclaim for declaratory relief in any court of competent jurisdiction in Canada. *In other words, the MLA gives a shipowner the right to choose the forum in which he will assert his right to limit, irrespective of the forum in which the claimant has filed or may file his or her action for damages*. In the present instance, both Irving and MMC are seeking to assert their right to limit their liability by way of an action for declaratory relief filed in the Federal Court.
>
> [51] Finally, section 33 of the MLA allows a shipowner, who may be entitled to limit his liability by reason of sections 28 or 29 of the MLA or paragraph 1 of Articles 6 or 7 of the Convention, to apply to the Federal Court for, *inter alia*: (a) a determination of the amount of the liability; (b) the constitution and distribution of a fund under Articles 11 and 12 of the Convention; and (c) an order enjoining any person from commencing or continuing proceedings in any court other than the Federal Court in relation to the subject matter raised by the shipowner's proceedings.
>
> [Emphasis added.]

[85] Justice Nadon stated that the proceedings commenced by Irving and MMC in the Federal Court stemmed from s 32(2) of the MLA, whereby Parliament gave shipowners, *i.e.* those who might be entitled to limit their liability pursuant to s 28 or 29 of the MLA or paragraph 1 of Article 6 or 7 of the LLMC, the choice of the forum in which they intended to assert their right to limitation: "[t]hus, notwithstanding the fact that Siemens was entitled to commence its proceedings in the Ontario Superior Court, Irving and MMC properly commenced their limitation proceedings in the Federal Court". As a result, the Federal Court was properly seized

of those actions and could exercise the powers granted to it by Parliament under s 33(1) of the MLA:

> [92] Thus, on the facts, *it is my view that the only court that can adjudicate Irving and MMC's right to limit their liability for the incident is the Federal Court. Hence, the issue as to whether Irving and MMC's conduct bars them from limiting their liability is an issue that only the Federal Court can determine*. Consequently, whether Siemens' loss "resulted from his [Irving and/or MMC] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" is what the Federal Court will have to determine in the context of the limitation proceedings before it. In other words, that issue is not one which a jury in Ontario would be faced with in the context of the Ontario proceedings commenced by Siemens. That jury would, no doubt, hear evidence regarding liability and damages but, in my respectful view, the issue pertaining to the right to limit is not one which an Ontario judge would put to it, by reason of the Federal Court being properly seized of that issue pursuant to subsection 33(1) of the MLA.
>
> [Emphasis added.]

[86] In my view, for the purposes of placing a limitation action in context, it is significant to note that Justice Nadon also addressed the purpose and impact of a decision rendered in such an action. In the limitation action, the Federal Court would not be called upon to determine, as a matter of law, whether Irving and MMC were liable for the loss. Rather, the true issue which arose from both the Ontario and the Federal Court proceedings in that case *was whether Irving and MMC were entitled to limit their liability*. If both could limit their liability, then, given the facts, the case against them was likely to go away upon payment of the limitation amount. If one or both of those parties were not entitled to limit their liability, then the Ontario liability and damages proceedings would continue against the party or parties not entitled to limitation. In the event that limitation was "broken", settlement was also very likely because the judge of this Court in the limitation action would have concluded that the loss resulted from intent or

recklessness within the meaning of Article 4 of the LLMC, or in the case of MMC, that it did not fall under the protection of Article 1(4) of the LLMC. As stated by Justice Nadon at para 94: "In other words, the fundamental issue between the parties is not liability nor damages, but the right to limit liability. Once the right to limit liability has been determined, the debate between the parties will most likely be at an end" (*JD Irving FCA*).

[87] In fact, the limitation action did proceed in this Court and I was the trial judge in that matter. The sole issue at the limitation trial was whether Irving was barred by its conduct from limiting its liability, pursuant to Article 4 of the LLMC, and with respect to MMC (and its principal), whether they were entitled to limit their liability pursuant to Article 1(4), as persons for whose acts, neglect or default Irving was responsible, and, if so, whether that entitlement was barred by their conduct pursuant to Article 4. I concluded that Siemens had not established that Irving had acted recklessly and with knowledge that loss of the cargo would probably result, within the meaning of Article 4 of the LLMC, and, therefore, that Irving was entitled to limit is liability. And, in supplemental reasons, I concluded that MMC and its principal were not persons who were entitled to the benefit of the limitation pursuant to Article 1(4) of the LLMC (*JD Irving Limited v Siemens*, 2016 FC 69, with supplemental reasons at 2016 FC 287 [*JD Irving 2016*]). As predicted by Justice Nadon, no further litigation as to liability or damages followed those decisions.

[88] Having addressed the purpose and scope of a limitation action, Justice Nadon found that the test applicable under s 33(1) of the MLA was the test of appropriateness, and not the tests set out in *Amchem* and *RJR-MacDonald* (*JD Irving FCA* at para 82).

[89] In that regard, and having considered the decision in *Canadian Pacific Railway Co v Sheena M (The)*, [2000] 4 FC 159, [2000] FCJ No 467 (QL) (FCTD) [*The Sheena M*], Justice Nadon found that it was not possible to come to any other view considering the words used by Parliament in s 33(1) of the MLA, being that the Federal Court "… may take any steps it considers appropriate, including:… (c) enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than in the Admiralty Court in relation to the same subject matter" (*JD Irving FCA* at para 106). Justice Nadon further noted that:

> [107] This test is, no doubt, a broad and discretionary one. The words of the provision could not be clearer in that Parliament has directed the Federal Court to make an order of enjoinment where it is of the view that it would be appropriate to make such an order. Thus, I am of the view that the Court may enjoin if, in all of the circumstances, that is the appropriate order to make. The judge, after performing that exercise, was satisfied that an order enjoining Siemens and others was appropriate. Not only do I see no error in her reasons, such an order was the correct one to make when all of the circumstances of the case are taken into consideration.

[90] In addressing the application of the appropriateness test, Justice Nadon noted that because Irving and MMC had chosen, pursuant to s 32(2) of the MLA, to have their limitation actions determined in the Federal Court and, in furtherance of that decision, to have the Federal Court determine the amount of their limited liability and to constitute a limitation fund under Articles 11 and 12 of the LLMC, the Federal Court was the only Court which could determine Irving and MMC's right to limit their liability for the incident. Further, he observed that the action for damages in Ontario and the limitation proceedings arose from the same incident. Moreover, Irving and MMC had a presumptive right to limit their liability, noting that it was important to recall the purpose of the LLMC. And, it was likely that once the issue of the entitlement to limit liability was determined by this Court the parties would resolve the matter.

Justice Nadon found that in these circumstances it would not be reasonable, prior to a determination of Irving and MMC's right to limit their liability, to allow Siemen's to pursue its action before the Ontario Superior Court. There was no prejudice to Siemens in temporarily preventing it from continuing its action there and by forcing it to proceed in the Federal Court to resolve the limitation issue. Justice Nadon stated:

> [115] In my respectful view, Siemens' attempt to pursue the matter in the Ontario Superior Court is the result of its belief that it stands a better chance of succeeding on intent and recklessness before a jury as opposed to a judge. Whether or not there is some basis for this view is, in my opinion, an irrelevant consideration. *Further, as I have indicated on a number of occasions, the issue pertaining to the right to limit is now a matter for the Federal Court only because of the choice made by Irving and MMC to have that issue determined, pursuant to subsection 32(2) of the MLA, by that Court. That choice, in my respectful opinion, cannot be overridden by the courts, either the Federal Court or the Ontario Superior Court.*
>
> [116] *I would conclude my remarks on this point by saying that although the Federal Court does not have exclusive jurisdiction regarding the issue of limitation of liability, it does, for all practicable purposes, have that exclusive jurisdiction.* I am of this view because first, subsection 32(2) allows a shipowner to choose the forum in which he will assert his right to limit his liability. Second, the Federal Court is the only court which has jurisdiction with regard to the constitution and distribution of a limitation fund. Thus, save in exceptional circumstances, shipowners will almost invariably choose to assert their right to limit liability in the court which has exclusive jurisdiction with respect to the constitution of the limitation fund. To this, I would add that the Federal Court is the court which has the expertise in admiralty matters and that that fact is well known to the shipping community here in Canada and internationally.
>
> [117] It is my view that Parliament was aware of these considerations and had them in mind when it gave the Federal Court the broad powers, including that of enjoining, found in subsection 33(1) of the MLA. The words of subsection 33(1) constitute a clear recognition by Parliament that the Federal Court was the court to which broad powers should be given so as to

> allow it to deal effectively with all issues pertaining to the limitation fund and the underlying claims for limitation of liability.
>
> [118] *In the end, the determination of a motion to enjoin pursuant to subsection 33(1) of the MLA is a discretionary decision which must be made taking into account all of the relevant circumstances.* In my respectful opinion, that is what the judge did in determining, on the facts before her, that it was appropriate to enjoin Siemens and others from commencing or continuing with proceedings in a court other than the Federal Court. I see no basis whatsoever to interfere with her decision.
>
> [Emphasis added.]

[91] As to the tests in *Amchem* or *RJR-MacDonald*, Justice Nadon held that those tests were not consistent with the relevant provisions of the MLA. The power to enjoin given to the Federal Court by the MLA does not arise under either the common law or equity, but from a specific grant of power by Parliament:

> [120] With respect to the tests proposed by Siemens, I am of the view that those are inconsistent with the relevant provisions of the MLA. It is clear that the power to enjoin given to the Federal Court by the MLA does not arise under either common law or equity. It results from a specific grant of power by Parliament to that court. In my view, as I indicated earlier, the basis upon which the Federal Court is to exercise its power to enjoin could not have been made clearer by Parliament when it enacted subsection 33(1) of the MLA. Further, not only is the view taken by Siemens inconsistent with the clear language of section 33, but it is also inconsistent with the nature and purpose of section 33 and the international limitation of liability regime to which Canada adhered to when it adopted the Convention and the Protocol, in that the power granted to the Federal Court by paragraph 33(1)(c) of the MLA is, without doubt, to give effect to international maritime policy and that this power cannot be analogized to a court's ability to grant anti-suit injunctions in the context of whether the court of one country or the other should accept jurisdiction over a given matter. One cannot avoid the reality that subsection 33(1) can only be properly understood in light of the current limitation of liability regime as set out in the Convention, of which Articles 1 to 15 and 18 are given force of law pursuant to subsection 26(1) of the MLA.

> [121] As a result of the Convention, shipowners are entitled to set up one fund and to have all claims against the fund brought in one proceeding and in one court for the distribution of that fund. *Consequently, I have no difficulty stating that subsection 33(1) and the test of "appropriateness" which appears therein are in no way analogous to a conflict of laws situation where one jurisdiction may be more appropriate than another jurisdiction.* Considerations such as comity have no relevance in making a determination under subsection 33(1). As counsel for MMC argues in his Memorandum at paragraph 26, "[t]he paramount consideration is practicality and giving effect to the purpose of the legislation: [t]he need to bring all claims into concursus".
>
> [122] In the circumstances of this case, and in the circumstances of most actions for limitation of liability, subsection 33(1) of the MLA clearly enables the Federal Court and its judges to provide the ways and means to deal in the most expeditious manner with the issues arising from a shipowner's claim that he is entitled to limit his liability. Consequently, the question of *forum non conveniens* is not one that arises in the context of a claim for limitation of liability, particularly when, as here, the Federal Court's jurisdiction over the matter before it cannot be disputed. To this, I would add that there is also no question that the Ontario court is properly seized with the action for damages commenced by Siemens. This is in sharp contrast to the situation which arises in anti-suit injunctions where the main question is whether a foreign court has improperly assumed jurisdiction over a matter which is pending in a Canadian court. Thus, in my respectful view, the *Amchem* test is not the relevant test in dealing with a motion brought under subsection 33(1) of the MLA.
>
> [123] With regard to the test enunciated by the Supreme Court in *RJR-MacDonald*, I see no basis whatsoever for the application of that test.
>
> [Emphasis added.]

[92] Heiltsuk attempts to distinguish *JD Irving FCA* on a number of grounds.

[93] First, Heiltsuk submits that the type of stay sought in this case is different from the one sought in *JD Irving FCA*. It submits that in that case Siemens asserted that the Federal Court

lacked jurisdiction *entirely* over an incident. In this case, Heiltsuk only seeks that the Court *voluntarily* decline jurisdiction.

[94] In my view, this argument cannot succeed. I do not agree that the kind of stay sought differs in the two cases. Irving and MMC sought to stay the action in another court until the limitation action in this Court had been addressed, as does Kirby in this motion.

[95] The second argument is made in response to Kirby's submission that in *JD Irving FCA* the Court held that the choice made by the shipowner to have limitation determined, pursuant to s 32(2) of the MLA, is determinative and cannot be overridden by the courts. Heiltsuk submits that the Federal Court of Appeal failed to consider its own prior decision in *Magic Sportswear* where a statutory provision under the MLA allowed a party to bring a claim in the Federal Court but where the Court held that such a provision does not, without more, oust the power of the Court to decline jurisdiction in an appropriate case.

[96] For the reasons that follow, I do not agree that the Federal Court of Appeal overlooked *Magic Sportswear*. That case was concerned with s 46 of the MLA and contracts of carriage of goods by water. As the Federal Court of Appeal explained in *Magic Sportswear*, contracts for the carriage of goods by sea often specify both the exclusive forum for settling disputes between the shipper and the carrier, and the applicable law. The High Court or an arbitrator in London is often named as the exclusive forum where any disputes arising from the contract are to be resolved in accordance with English law. The high cost and inconvenience of having to litigate a claim for cargo loss in a foreign forum could deprive Canadian shippers of an effective remedy for a breach of contract by the carrier, and compel the acceptance of a settlement on terms favourable to the carrier. To address this, in 2001 Parliament enacted s 46(1) of the MLA:

| | |
|---|---|
| **Institution of Proceedings in Canada** | **Procédure intentée au Canada** |
| **Claims not subject to Hamburg Rules** | **Créances non assujetties aux règles de Hambourg** |
| **46 (1)** If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where | **46 (1)** Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe : |
| **(a)** the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada; | **a)** le port de chargement ou de déchargement – prévu au contrat ou effectif – est situé au Canada; |
| **(b)** the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or | **b)** l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence; |
| **(c)** the contract was made in Canada. | **c)** le contrat a été conclu au Canada. |

[97] The appeal in *Magic Sportswear* was about whether the dispute over the alleged cargo loss should be resolved in the High Court in London, as the contract provided, or in the Federal Court, which had jurisdiction by virtue of s 46(1). In the circumstances of that case, s 46(1) conferred jurisdiction on the Federal Court over the shippers' claim against the carriers because

the contract was made in Canada and the carriers had a place of business in Canada. The appeal raised two issues concerning the exercise of that jurisdiction.

[98] The first was whether s 46(1) of the MLA removed the discretion of the Federal Court to grant a stay pursuant to s 50(1) of the *Federal Courts Act*, even if another jurisdiction is a more convenient forum than Canada (the *forum non conveniens* doctrine). Second, if s 46(1) does not deprive the Court of its discretion to stay proceedings when it is the less convenient forum, what weight, if any, should the Court give in its *forum non conveniens* analysis to the parties' contractual choice of forum and to the judgments asserting the jurisdiction of the English High Court over the dispute by virtue of the exclusive jurisdiction clause.

[99] The Federal Court of Appeal observed that s 46(1) of the MLA does not state that, once one of the jurisdictional criteria in s 46(1) is present, the court in which the claimant has elected to proceed *must* exercise its jurisdiction. The subsection merely provides that, when it applies, a claimant may institute proceedings in a court in Canada that would have jurisdiction if the contract had referred the claim to Canada. It gives no directive to the court in Canada in which the claimant elects to proceed respecting that court's exercise of its jurisdiction. Further, s 46(1) does not expressly remove the broad discretion of the Federal Court and the Federal Court of Appeal under s 50(1) of the *Federal Courts Act* to stay a proceeding over which they have jurisdiction, but where "the claim is being proceeded with in another court or jurisdiction" or a stay "is in the interest of justice". It requires more specific language than that in s 46(1) of the MLA to remove from the courts a power fundamental to their ability to control their own process. It would also produce anomalous results to interpret s 46(1) as implicitly removing the

Federal Courts' discretion in deciding to stay on the ground that another court is the more convenient forum.

[100] Here, the subject matter of the claims do not concern the carriage of goods by sea and s 46(1) has no application. In my view, it was for this reason that *Magic Sportswear* was not mentioned by the Federal Court of Appeal in *JD Irving FCA*. Moreover, Justice Nadon held that the words of s 33 of the MLA, which does have application here, could not be clearer in that Parliament has directed the Federal Court to make an order of enjoinment where it is of the view that it would be appropriate to make such an order. Further, he held that, as a result of the LLMC, shipowners are entitled to set up one fund and to have all claims against the fund brought in one proceeding and in one court for the distribution of that fund. Consequently, Justice Nadon stated that he had no difficulty in finding that s 33(1), and the test of "appropriateness" which appears therein, are in no way analogous to a conflict of laws situation where one jurisdiction may be more appropriate than another jurisdiction. Considerations such as comity have no relevance in making a determination under s 33(1).

[101] In my view, the Federal Court of Appeal's decision in *JD Irving FCA* could not be clearer and is binding. The proper test for enjoinment is appropriateness as set out in s 33 of the MLA, and the decision to enjoin is a discretionary one to be made taking into account all of the relevant circumstances.

*(ii) Test for a stay of proceeding*

[102] Stays of proceedings in this Court are governed by s 50(1) of the *Federal Courts Act*:

| | |
|---|---|
| **Stay of proceedings authorized** | **Suspension d'instance** |

| | |
|---|---|
| **50 (1)** The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter | **50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire : |
| **(a)** on the ground that the claim is being proceeded with in another court or jurisdiction; or | **a)** au motif que la demande est en instance devant un autre tribunal; |
| **(b)** where for any other reason it is in the interest of justice that the proceedings be stayed. | **b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige. |

[103] In *JD Irving FCA*, Justice Nadon stated that the success of either the motions to enjoin or the motions to stay led to the dismissal of the other motions. Because the motions to enjoin in that case were properly granted, he concluded that the motions for a stay of the limitation actions must be dismissed. In other words, if it was appropriate in the circumstances to enjoin Siemens and others from commencing or continuing with proceedings in a court other than the Federal Court, it necessarily followed that it was not in the interest of justice to stay the Federal Court proceedings.

[104] Regardless, he also went on to consider s 50(1) of the *Federal Courts Act* and stated that, as in the case of the motions to enjoin, the decision to stay proceedings in the Federal Court is a discretionary decision. He agreed with Justice Heneghan that the two-part test in *Mon-Oil* is the test that should apply in the context of proceedings grounded in s 32 of the MLA. He further noted:

> [126] There can be no doubt that in *The Sheena M*, the prothonotary dismissed the motion for a stay before him on the basis of paragraph 50(1)(b) of the *Federal Courts Act* (*The Sheena M*, paragraph 21). In the present matter, the motions to stay the Federal Court proceedings stand to be decided on the basis of that provision and not on the basis of paragraph 50(1)(a). Contrary to

> Siemens' assertion, the action pending in Ontario is not a "parallel proceeding" to the limitation actions in the Federal Court, in that the limitation actions are summary in nature and that they are meant to deal, not with liability or damages, but with a precise issue, *i.e.* Irving and MMC's right to limit their liability for the loss which arises from the incident. Clearly, the relief sought in the Ontario proceedings and that sought in the Federal Court are not the same.
>
> [127] Consequently, the sole question before the judge was whether it was in the interest of justice that the Federal Court proceedings be stayed. Under the *Mon-Oil* test which, in my view, is the correct test, the judge had to determine two questions, namely, whether the continuation of the Federal Court proceedings would cause prejudice to Siemens and whether the stay of the Federal Court proceedings would cause an injustice to Irving and MMC. The judge asked herself these questions and she concluded that the test was not met by Siemens.

[105] Heiltsuk submits that while s 32 of the MLA grants the Federal Court exclusive jurisdiction with respect to the constitution and distribution of a limitation fund under Articles 11 to 13 of the LLMC, this does not oust the Court's power to order a stay. This view is premised on s 46 of the MLA and *Magic Sportswear*. Heiltsuk submits that the same reasoning applies to s 32 and 33 of the MLA which permit this Court to grant a stay in favour of a more appropriate forum. In my view, for the reasons set out above, *Magic Sportswear* has little application to s 32 and 33 of the MLA. That said, I do believe that Heiltsuk is correct in stating that this Court still retains the power to order a stay, even in light of Kirby's election to seek to limit its liability before the Federal Court. I address this issue below.

[106] Heiltsuk also asserts that s 50(1)(a) of the *Federal Courts Act* has application and, on this basis, that some form of a *forum conveniens* test, or the factors to be considered in applying such a test, can be applied. It relies on a variety of decisions in that regard including *Amchem*; *Magic Sportswear* at paras 91-92; *Apotex*; *Ford Aquitaine Industries SAS v Canmar Pride (The)*, 2005

FC 431 at paras 67-70 [*Ford Aquitaine*]; *Mazda Canada*; *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*, [2001] 3 SCR 907 at paras 89 and 91; *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205 at para 71; and *Westec Aerospace Inc v Raytheon Aircraft Co*, 1999 BCCA 243 [*Westec*]. However, none of these cases concern s 32 and 33 of the MLA and all of them pre-date *JD Irving FCA*.

[107] Heiltsuk does not acknowledge that the Federal Court of Appeal in *JD Irving FCA* specifically found that s 50(1)(a) had no application in that matter, nor does it acknowledge the Court's finding that the *Mon-Oil* test applies when applying s 50(1)(b). And, while it does acknowledge the two-part test applicable to the latter provision, it submits that this Court should incorporate *forum non convenience* test factors when applying s 50(1)(b). As I understand Heiltsuk's submission, it attempts to avoid the finding as to the applicable test set out in *JD Irving FCA* by inserting the *forum conveniens* test within the two-part *Mon-Oil* test. In my view, this approach cannot succeed.

[108] In *JD Irving FCA*, Justice Nadon found that, contrary to Siemen's assertion, the pending Ontario action in that case was not a "parallel proceeding" to the limitation action in the Federal Court. This was because limitation actions are summary in nature and are meant to deal with one specific issue – the shipowner's right to limit their liability for the loss which arises from the incident – and not with liability or damages. Justice Nadon found that the relief sought in the Ontario proceedings and that sought in the Federal Court were not the same. In the result, the sole question was whether it was in the interest of justice that the Federal Court proceedings be stayed (paras 126-127).

[109] Accordingly, unless Heiltsuk can demonstrate that the BCSC Claim is a "parallel proceeding", only s 50(1)(b) and the *Mon-Oil* test must be considered.

[110] Heiltsuk submits that the proceedings before the BCSC and the Federal Court are the same in that "they involve the same Incident, and the same Spill". It says that the cause of action in the BCSC Claim is the same cause of action to which Kirby seeks to establish a limitation defence in this Court and that, pursuant to s 32(2) of the MLA, Kirby could have raised a right to limit its liability by way of a defence in the BCSC Claim. In this regard, Heiltsuk relies on an interpretation of "parallel proceeding" by the British Columbia Court of Appeal in *Westec*.

[111] In my view, this submission cannot succeed for two reasons.

[112] First, such an interpretation of "parallel proceeding" was expressly rejected in *JD Irving FCA*. The Limitation Action before the Federal Court is meant to be summary in nature. It concerns only whether Kirby is *entitled to rely* on the limitation of liability provided by the LLMC. That is, whether or not Kirby is barred from that right, pursuant to Article 4, because the loss resulted from its act or omission, committed with the intent to cause the loss, or, recklessly and with the knowledge that such loss would probably result. The Limitation Action does *not* deal with liability or damages.

[113] The BCSC Claim is 26 pages long. It does not just claim against Kirby, the shipowners. It claims against all of the Kirby Defendants as well as the AG Canada and the AG British Columbia. Thus, the parties to the two actions are not the same. Further, it asserts not only recklessness, and therefore that Kirby is not entitled to limit its liability under the MLA, but makes various other claims, including: that certain expenses have not been paid under the

Funding Agreement; that Canada and British Columbia refused or failed to order Kirby to perform or fund environment assessments and that Kirby has breached a statutory duty to do so; and that Heiltsuk has Aboriginal title and rights. Heiltsuk seeks to have Aboriginal title and rights declared and it asserts that these rights were adversely impacted by the spill, but for which damages are not presently recoverable under the MLA. Therefore, it says that the relevant provisions of the MLA are unconstitutional insofar as they infringe those rights.

[114] Further, the relief sought in the two actions is clearly not the same. In the BCSC Claim, Heiltsuk states:

> 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 obliged 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 [*sic*] 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 the Spill impacts on the Aboriginal Interests;
>
> f. Pollution damage 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 defendant's 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., c. 79; and

m. Such further and other relief as the honourable court may deem just.

[115] Conversely, the relief sought by Kirby in the Limitation Action filed in this Court pertains only to limitation of liability. Specifically, it seeks: a declaration that claims can be limited under the LLMC or, alternatively, the CLC; an order constituting a limitation fund under the LLMC or, alternatively, the CLC; an order as the form of security for such funds; an order enjoining Heiltsuk or any other claimants from commencing or continuing proceedings against Kirby concerning the Incident other than in the Federal Court Limitation Action and enjoining any claims against Kirby, the LLMC fund, or the CLC fund after a time to be fixed by this Court; an order declaring that Kirby is entitled to claim against the LLMC or CLC fund for monies expended prior to the commencement of the Limitation Action in relation to the Incident; directions for ascertaining the persons who are entitled to claim against the LLMC or CLC fund and a process for the payment of such claims; costs; and such further relief as this Court may deem just.

[116] In my view, it is very clear that the BCSC Claim and the Limitation Action are not parallel proceedings (*JD Irving FCA* at para 126).

[117] As to Heiltsuk's reliance on the 1999 decision of the British Columbia Court of Appeal in *Westec*, that case is not binding on this Court, its pre-dates *JD Irving FCA* and, in any event, in my view, it does not support Heiltsuk's position.

[118] In *Westec*, the British Columbia Court of Appeal was considering actions commenced in Kansas and in British Columbia. It stated:

> [26] This issue arises from Westec's contention that the Kansas proceedings are not truly "parallel" in the sense that term was used in *472900 B.C. Ltd. v. Thrifty Canada*. Westec argues that it is suing in British Columbia on a contract, the existence of which Raytheon does not even acknowledge in its Kansas action. On the principle that contracts are treated separately in law, Westec argues that there are not parallel proceedings in this case which would trigger the analysis in *472900 B.C. Ltd. v. Thrifty Canada*.
>
> [27] With respect, the narrow meaning Westec gives to the words "parallel proceedings" flies in the face of the juridical use of the term and the policy rationale that supports it. Lord Diplock, to repeat his quotation from *The Abidin Daver, supra*, described parallel proceedings as being, "a suit about a particular subject matter between a plaintiff and a defendant", and earlier in his Lordship's reasons, at 476, as being, "litigation between the same parties about the same subject matter in which the roles of plaintiff and defendant were reversed". The present case clearly falls within that description.
>
> [28] Taking a narrow, particular, and formalistic approach to determining whether proceedings are parallel is also not consonant with the policy rationale for avoiding parallel proceedings. There are two policy concerns with parallel proceedings. Litigating the same dispute twice, in two sets of proceedings in different jurisdictions creates obvious inefficiencies and waste. More importantly, parallel proceedings raise the possibility of inconsistent or conflicting judgments being given. In *The Abidin Daver, supra*, Lord Diplock, at 477 (All E.R.), said that the danger

> of conflicting decisions if two actions were to proceed concurrently in different jurisdictions is a significant one and that:
>
> > Comity demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states. It is a recipe for confusion and injustice.
>
> [29] If additional costs and inconvenience and the possibility of conflicting decisions are to be avoided, *the focus of the inquiry as to whether there are parallel proceedings should remain on the substance of the dispute and not on how it is framed in any given action*.
>
> [Emphasis added.]

[119] In the Limitation Action and the BCSC Claim, the parties are not the same. And while the actions both concern the impact of the Incident, namely pollution damage, the BCSC Claim goes far beyond the question of whether Kirby is entitled to limit its liability pursuant to the LLMC or the CLC. Most notably, it seeks a determination of Aboriginal title and rights and the making of a declaration in that regard so as to found a constitutional challenge to the limitation provisions of the MLA. The determination of Aboriginal title and rights is an issue between Heiltsuk and Canada and/or British Columbia and its resolution, while it may have an impact on shipowners, does not involve Kirby.

[120] The second reason Heiltsuk's submission must fail is that the policy reasons it cites in support of its position actually support granting a stay. In *Westec* the British Columbia Court of Appeal stated that there are two policy concerns with parallel proceedings. First, litigating the same dispute twice, in two sets of proceedings in different jurisdictions, creates obvious inefficiencies and waste. And second, parallel proceedings raise the possibility of inconsistent or conflicting judgments. As Justice Nadon found in *JD Irving FCA*, these are exactly the types of

policy concerns that justify proceeding with a limitations action in the Federal Court before proceeding with the liability action before any court, whether that be the Federal Court or the BCSC.

[121] This is because, as was the case in *JD Irving FCA*, it is unlikely that Kirby has a "real defence to the action for damages", it is instead seeking to rely on an entitlement to limit its liability for those damages. If it is determined that Kirby is entitled to limit its liability, then the question of recklessness, and all of Heiltsuk's other allegations as to liability, such as negligence and nuisance, will be resolved and will be removed from a liability trial in the BCSC Claim. Entitlement to limitation would not be litigated twice. And, leaving aside for a moment the potential constitutional challenge, if it is determined that Kirby is entitled to limit its liability, then there is a very real practical consideration that the parties would settle the claim for the amount of the liability fund, which would save costs and judicial resources (*JD Irving FCA* at para 111).

[122] In sum, the *JD Irving FCA* decision stands for the proposition that a limitation action is not a parallel proceeding to a liability action. Further, the policy reasons underlying the rule against litigating the same dispute twice support that it is preferable to have a limitation action heard before a liability action.

[123] In my view, as was the case in *JD Irving FCA*, there is no "parallel proceeding" underway in another court or jurisdiction as required to engage s 50(1)(a) of the *Federal Courts Act*. Therefore, and contrary to the Heiltsuk submissions, s 50(1)(a), and consequently the issue of *forum conveniens* and the factors to be considered in such an analysis as set out in *Mazda*

*Canada*, *Magic Sportswear*, *Ford Aquitaine* and the other case law referenced by Heiltsuk, have no application.

[124] That said, I do not take *JD Irving FCA* to stand for the proposition that a choice of forum made by a shipowner pursuant to s 32(2) of the MLA serves to remove this Court's discretionary authority to grant a stay as provided pursuant to s 50(1) of the *Federal Courts Act*. The MLA does not say this. And, Justice Nadon acknowledged that, as in the case of the motions to enjoin, the decision to stay proceedings in the Federal Court is a discretionary decision. Rather, s 32(2) provides a statutory right to the shipowner to choose the court in which to bring its limitation action. Once that choice has been made, it is to be respected by this and other courts. Nor, in my view, does a s 32(2) choice of forum serve to preclude this Court from exercising any discretion it may have to decline jurisdiction when that jurisdiction is shared with another court. Rather, what *JD Irving FCA* illustrates is that once a s 32(2) forum selection has been made, then the Federal Court will be unlikely to do so.

[125] To conclude, the proper test for considering a stay is *Mon-Oil*, as any stay of proceeding arising out of s 32 of the MLA would be granted pursuant to s 50(1)(b) of the *Federal Courts Act*.

*E. Attornment*

[126] Heiltsuk asserts that Kirby has attorned to the jurisdiction of the BCSC. Heiltsuk points out that the BCSC shares concurrent jurisdiction with this Court in addressing a shipowner's right to limit its liability, by way of s 32(2) of the MLA. According to Heiltsuk, the BCSC has subject matter jurisdiction over all aspects of its claim "with the possible exception" of the

constitution and distribution of a limitation fund (MLA s 32(1)) but that this exception is subject to any agreement by Heiltsuk and Kirby. That is, according to Heiltsuk, this Court's *exclusive* jurisdiction with respect to any matters relating to the constitution and distribution of a limitation fund granted by s 32(1) of the MLA can be displaced by attornment to the BCSC's jurisdiction or agreement of the parties.

[127] This submission is made in the context of Heiltsuk's pending motion before the BCSC in which Heiltsuk has asked that Court to "confirm its jurisdiction". That motion was filed in response to the Limitation Action and Enjoinment Motion filed by Kirby in this Court. In its Stay Motion in this Court, Heiltsuk states that it has asked the BCSC for a determination that Kirby has both submitted and attorned to its jurisdiction and thereby accepted that the BCSC has jurisdiction over the claims made in the action before that Court in the BCSC Claim. Accordingly, Heiltsuk submits that Kirby is precluded from asking the BCSC to decline to exercise its jurisdiction.

[128] In its Stay Motion, Heiltsuk also submits that the BCSC's jurisdiction – and therefore the question of Kirby's attornment to same – is a factor that this Court must consider when deciding if it should decline to exercise its jurisdiction (*Magic Sportswear* at paras 70, 81 and 89). Further, the fact that Kirby expressly submitted to the BCSC's jurisdiction is worthy of significant weight in that regard (*S&W Berisford plc v New Hampshire Insurance Co*, [1990] 2 QB 631 at 646). Additionally, given the importance of comity, a decision of a sister court in Canada "to take" jurisdiction may well be accepted as conclusive (*47200 BC Ltd v Thrifty Canada Ltd*, [1998] 168 DLR (4th) 602 (BCCA)).

[129] As will be addressed later in these reasons, when this Court is afforded exclusive jurisdiction over a matter, I am not persuaded that another court can be afforded and exercise that jurisdiction either by way of agreement of the parties or by attornment to that court. Further, it is of note that Kirby is not taking the position that the BCSC has no jurisdiction in this matter. Rather, Kirby seeks only that the BCSC Claim be stayed until disposition of the Limitation Action before this Court.

[130] Regardless, I note that Heiltsuk bases its attornment assertion based on three grounds. The HTC LOU, correspondence between counsel, and a failure by Kirby to challenge jurisdiction within the required timeline. I will briefly address each of these.

*(i) HTC LOU*

[131] Heiltsuk argues that Kirby agreed to submit to the jurisdiction of the BCSC by way of the HTC LOU, the most relevant portions of which are as follows:

> The Defending Interest hereby undertakes and agrees:
>
> 1. To submit to the jurisdiction of the Federal Court of Canada or the Supreme Court of British Columbia, to instruct solicitors in Canada at Borden Ladner Gervais LLP to accept service on behalf of the Defending Interest, of any Canadian legal proceedings in connect with the above described Incident, and to instruct such solicitors to appear in such proceedings on behalf of the ATB and her owners.
>
> …
>
> 11. That this letter of undertaking is not and shall not be deemed to be an admission of liability by the Defending Interest and is provided without prejudice to all rights, privileges, and defences available to the ATB or to the Defending Interest, including (without limitation) any proceedings to establish a limitation of liability for the benefit of the defending Interest or a limitation fund in respect thereof, or to bring a counterclaim.

> 12. That the Security Amount shall be reduced upon the Federal Court of Canada or the Supreme Court of British Columbia granting declaratory relief as to a lesser limitation of liability for the benefit of the ATB or the Defending Interest, or the establishment of a limitation fund in respect of the ATB or the Defending Interest in the Federal Court of Canada or the Supreme Court of British Columbia, and upon all appeal periods expiring or, if applicable, all appeals being determined.

[132] Heiltsuk submits that the HTC LOU was entered into as "a commonly-accepted form of security to avoid the arrest of a vessel, and to ensure for a claimant, with the agreement of shipowners, the jurisdiction of a Canadian court of a claimant's choice". No authority is offered in support of this proposition.

[133] I accept that an LOU is a form of security often provided to avoid the arrest of a ship, or other ships or assets of the same or related ownership, following an incident where the ship is alleged to have caused damage or loss to the recipient of the LOU. Indeed, from the recital it is apparent that in this case the HTC LOU was provided in consideration of Heiltsuk Tribal Council agreeing to refrain from arresting the tug and barge or other assets or property in the same or associated ownership for the purposes of establishing jurisdiction of the Canadian courts, obtaining security or otherwise, and in return, the listed undertakings were given.

[134] However, nothing in the HTC LOU states or suggests that Kirby undertook to allow Heiltsuk to select its preferred court (as between the Federal Court and the BCSC) for the purposes of a limitation action. Undertaking number 1 does state that Kirby agrees to submit to the jurisdiction of the Federal Court or the BCSC, to instruct counsel to accept service of any Canadian proceedings in connection with the Incident, and to appear in such proceedings. However, undertaking number 11 makes it very clear that the HTC LOU is provided without

prejudice to all rights, privileges, and defences available to Kirby, and, specifically, any proceedings to establish a limitation fund or a limitation of liability for the benefit of Kirby.

[135] In my view, pursuant to the HTC LOU, it was open to Heiltsuk to commence a claim in the BCSC as it did. However, it was also open to Kirby to commence its Limitation Action in this Court. This was a right reserved to Kirby pursuant to undertaking number 11 and s 32(2) of the MLA which states that when a claim is made or apprehended against a person in respect of which liability is limited by Article 6 or 7 of the LLMC *that person* may assert the right of limitation of liability in a defence filed *or by way of action,* in *any* court of competent jurisdiction in Canada.

[136] In summary, there is no support found in the HTC LOU for Heiltsuk's argument that Kirby attorned to the jurisdiction of the BCSC for the purposes of a limitation action. To the contrary, the HTC LOU sets out that Kirby is entitled to bring a proceeding seeking to limit its liability, which it is now doing, without restriction on its choice of court.

*(ii) Correspondence between counsel*

[137] Heiltsuk submits that, through the correspondence of their counsel, Kirby has attorned to the jurisdiction of the BCSC by indicating they would be filing a response to the Heiltsuk Notice of Civil Claim. I have reviewed this correspondence and, while I appreciate that a "response" could be a response to civil claim (*i.e.* a defence) or that it could be a jurisdictional response, at no time did counsel for Kirby explicitly specify or promise that they would be filing a response to civil claim (a defence). More significantly, on April 1, 2019, Kirby filed a Jurisdictional Response (Form 108, Rule 21-8, BCSC Civil Rules) disputing that the BCSC has jurisdiction

over the Kirby Defendants and submitting that the BCSC ought not to exercise its jurisdiction over those defendants. And, on May 1, 2019, Kirby filed a Notice of Application seeking an order, pursuant to Rule 21-8(4)(a) of the BCSC Civil Rules, staying the BCSC Claim against the Kirby Defendants, and an order pursuant to Rule 21-9(1) or Rule 21-8(2), dismissing or staying the BCSC Claim against the Kirby Defendants on the ground that the BCSC does not have jurisdiction or, alternatively, that the BCSC ought to decline jurisdiction, in respect of the claims advanced by Heiltsuk against it. Kirby has not filed a defence or taken any other action to progress the BCSC Claim, even in the face of correspondence from counsel from Heiltsuk dated May 1, 2019, advising that if a Response to Civil Claim had not been received by June 14, 2019, default would be sought without further notice. And, in response to that correspondence, counsel for Kirby advised that their client would not be filing a Response to Civil Claim and did not attorn to the jurisdiction of the BCSC.

[138] I am not persuaded that Kirby attorned to the jurisdiction of the BCSC by way of the correspondence of its counsel.

*(iii)Non-compliance with BCSC Civil Rules*

[139] Heiltsuk also submits that Kirby attorned to the jurisdiction of the BCSC as a result of non-compliance with Rule 21-8(5) of the BCSC Civil Rules and of decisions of that court including *Fastlicht v Carmichael*, 2018 BCSC 37 [*Fastlicht*], and *Blazec v Blazec*, 2009 BCSC 1693 [*Blazec*].

[140] Specifically, Heiltsuk asserts that after filing its Jurisdictional Response on April 1, 2019, Kirby failed to serve a notice of motion within 30 days as required by BCSC Civil Rule 21-8(5):

**Rule 21-8 — Jurisdictional Disputes**

…

**Party does not submit to jurisdiction**

(5) If, within 30 days after filing a jurisdictional response in a proceeding, the filing party serves a notice of application under subrule (1) (a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1) (c),

(a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:

(i) the jurisdictional response;

(ii) a pleading or a response to petition under subrule (1) (c);

(iii) a notice of application and supporting affidavits under subrule (1) (a) or (b), and

(b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,

(i) apply for, enforce or obey an order of the court, and

(ii) defend the proceeding on its merits.

[141] According to Heiltsuk, missing the service requirement by even one day means that the Jurisdictional Response itself, and any subsequent notice of motion, amount to Kirby having attorned to the BCSC's jurisdiction.

[142] Kirby submits that a Jurisdictional Response was filed on April 1, 2019. A Notice of Application disputing jurisdiction was filed within the 30 days, on May 1, 2019. The application materials were served on May 3, 2019. While Heiltsuk asserts that because the Notice of Application was served outside the 30 day window, Kirby attorned to the jurisdiction of the

BCSC, Kirby states that this wrongly interprets Rule 21-8(5). That rule sets out the means by which a party can acquire immunity from attornment, that is, take steps to defend an action on its merits without being deemed to have attorned. However, in Kirby's view, whether it can enjoy immunity is not relevant. This is because the Kirby Defendants have not taken any such steps in the BCSC Claim. Further, it is trite law that filing a Jurisdictional Response and Notice of Application cannot alone constitute attornment (*Mid-Ohio Imported Car Co v Tri-K Investments Ltd*, (1996), 13 BCLR (3d) 41 (CA) at para 15; *Stewart v Stewart*, 2017 BCSC 1532 at para 26 [*Stewart*]). Kirby submits that in all of the case law relied upon by Heiltsuk, the defendants failed to comply with the Rule 21-8(5) time limit and took additional steps that the court determined to constitute attornment.

[143] I have reviewed the cases provided by the parties concerning the interpretation and application of the relevant BCSC Civil Rules, however, these offer no clear answers, particularly as Heiltsuk does not assert that Kirby attorned to the jurisdiction by a failure to assert territorial jurisdiction of the BCSC, that in *Blazek* a defence had been filed and many procedural steps had been taken, and in other decisions procedural steps on the merits had also been taken while Kirby has filed only the Jurisdictional Response and the Notice of Application seeking to stay the BCSC Claim on the basis of jurisdiction.

[144] In any event, for the purposes of the motions before me I need reach no conclusion on attornment under the BCSC Civil Rules. I am not persuaded that the HTC LOU, the correspondence between counsel, or the disputed attornment due to non-compliance with the BCSC Civil Rules should result in this Court declining to exercise its concurrent jurisdiction afforded pursuant to s 32(2) of the MLA, as Heiltsuk submits. This is because Kirby has selected

this jurisdiction, which it was entitled to do under that provision, and because this Court also has exclusive jurisdiction of the matters set out in pursuant s 32(1) and 33 of the MLA, which, as will be discussed below, cannot be displaced by agreement or attornment. Further, Kirby has agreed that if the Limitation Action in this Court determines that it is not entitled to limit its liability, then the trial on liability and damages will proceed in the BCSC.

*F. Kreutz Affidavit*

[145] This affidavit is found in Heiltsuk's Stay Motion. Ms. Kreutz does not state the purpose of the affidavit. It describes a variety of documents attached as Exhibits A to Q. In some instances the source of the documents is not identified and the affidavit does not explain how they were obtained by Ms. Kreutz or Heiltsuk. In other paragraphs, Ms. Kreutz states that she is advised and verily believes to asserted facts, but she does not state who advised her of the facts or why she believes them.

[146] Kirby points out that one of the Exhibits is a Marine Investigation Report prepared by the Transportation Safety Board of Canada concerning the grounding and subsequent sinking of the tug and barge. However, s 33 of the *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c 3, states that an opinion of a member or an investigator is not admissible as evidence in any legal, disciplinary or other proceedings.

[147] Having reviewed Kreutz Affidavit, I am of the view that it adds little information relevant or material to the motions before me. To the extent that the Exhibits are intended to support Heiltsuk's views as to common ownership of the tug and barge (relating to the one ship/two ship

limitation issue), or the fault or recklessness of Kirby, those issues will be addressed in the context of the trial in the Limitation Action.

[148] Accordingly, paragraphs 1 to 11 and Exhibits A to J, inclusive, shall be struck out. This is, however, without prejudice to Heiltsuk's right to seek to have any of those documents admitted at the trial of the Limitation Action, at which time issues of admissibility can be addressed and resolved.

## VIII. Issue 1: Should Heiltsuk be enjoined from continuing the BCSC action against the Kirby Defendants to that action?

[149] As indicated above, in these circumstances, the correct test for enjoinment is appropriateness as set out in s 33 of the MLA. The decision to enjoin is a discretionary one, to be made taking into account all of the relevant circumstances.

[150] In applying that test, it is to be kept in mind that Kirby is not seeking to enjoin the BCSC Claim in whole. Rather, Kirby seeks to temporarily enjoin Heiltsuk from pursuing its liability action only against the Kirby Defendants in the BCSC and only until the Liability Action in this Court has been determined.

[151] In my view, it is appropriate to enjoin the BCSC Claim as against the Kirby Defendants for the following reasons.

[152] First, as discussed above, pursuant to s 32(1) of the MLA, this Court has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund constituted pursuant to Articles 11 and 13 of the LLMC. While Heiltsuk argues that this explicit grant of exclusive jurisdiction by Parliament does not oust the inherent jurisdiction of the

BCSC to deal with the constitution and distribution of a limitation fund, I find this submission to be of no merit. In *Douez v Facebook, Inc*, 2017 SCC 33, the Supreme Court of Canada considered s 4 of British Columbia's *Privacy Act*, RSBC 1996, c 373, which stated that despite anything contained in another Act, an action under the *Privacy Act* must be heard and determined by the Supreme Court of British Colombia. The Supreme Court rejected Facebook's argument that s 4 gave the BCSC exclusive jurisdiction only vis-à-vis other courts within that province and stated:

> [107] Section 4 of the *Privacy Act* states that these torts "must be heard and determined by the Supreme Court" despite anything contained in another Act. Section 4 is a statutory recognition that privacy rights under the British Columbia *Privacy Act* are entitled to protection in British Columbia by judges of the British Columbia Supreme Court. I do not, with respect, accept Facebook's argument that s. 4 gives the Supreme Court of British Columbia exclusive jurisdiction only vis-à-vis other courts *within* the province of British Columbia. *What s. 4 grants is exclusive jurisdiction to the Supreme Court of British Columbia to the exclusion not only of other courts in British Columbia, but to the exclusion of all other courts, within and outside British Columbia. That is what exclusive jurisdiction means.*
>
> [108] Where a legislature grants exclusive jurisdiction to the courts of its own province, it overrides forum selection clauses that may direct the parties to another forum (see *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, at para. 25). It would, in my respectful view, be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court. To decide otherwise means that a clear legislative intention can be overridden by a forum selection clause. This flies in the face of *Pompey*'s acknowledgment that legislation takes precedence over a forum selection clause (*Pompey*, at para. 39).
>
> [Emphasis added.]

[153] The Supreme Court has also stated that, as courts of general jurisdiction, the superior courts have jurisdiction in all cases except where jurisdiction has been removed by statute (*Windsor (City) v Canadian Transit Co*, 2016 SC 54 at para 32).

[154] Given that the Federal Court has been granted exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund by way of s 32(1) of the MLA, that jurisdiction does not lie with the BCSC. It is necessary, and therefore appropriate, that this Court exercise that jurisdiction. Accordingly, as the fund must be constituted and distributed by this Court, it is also appropriate that the Limitation Action proceed in this Court, being the forum selected by Kirby in exercise of its right to do so afforded by s 32(2) of the MLA, and that the Heiltsuk action in the BCSC Claim as against the Kirby Defendants be enjoined until the Limitation Action is determined.

[155] Because this Court has been granted exclusive jurisdiction in this regard, Heiltsuk's further submission that Heiltsuk would be agreeable to the BCSC constituting and distributing a limitation fund, and that the BCSC could do so by virtue of the fact that monies are paid in and out of that Court on a regular basis in a variety of matters, also cannot carry any weight in this analysis. Nor can its related suggestion that it would be willing to agree to the BCSC addressing all issues relating to the constitution and distribution of a limitation fund "as if it were the Admiralty Court". And, while Heiltsuk asserts that Kirby attorned or submitted to the jurisdiction of the BCSC, a party cannot attorn, submit, or agree to jurisdiction that a court does not have (see *Board of Naturopathic Physicians of British Columbia v Heuper*, 1976 CarswellBC 152 at para 21, 66 DLR (3d) 727; *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at para 30).

[156] Nor can parties "contract out" of the exclusive jurisdiction of this Court, which Heiltsuk says is an option because s 32(2) of the MLA does not specifically exclude the possibility. In this regard, Heiltsuk notes that Article 1 of the LLMC allows a shipowner to "constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation". According to Heiltsuk, nothing in the MLA purports to prevent Kirby and Heiltsuk from agreeing that the BCSC may hold a limitation fund "necessarily as an other competent authority under Article 11". Putting aside that the s 32(1) grant of exclusive jurisdiction by the MLA, in and of itself, precludes contracting out of that jurisdiction, Heiltsuk's submission ignores s 26(1) of the MLA. That section states that "[s]ubject to the other provisions of this Part, Articles 1 to 15 and 18 of the Convention… have the force of law in Canada". By way of s 31(1) of the MLA, the Admiralty Court, being the Federal Court, is given exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 to 13 of the LLMC. That is, Article 11 is subject to s 32(1), the latter of which prevails. There is no room for parties to select their own "competent authority" and, in any event, the evidence before me does not support that Kirby has agreed to such an interpretation or selection.

[157] Second, pursuant to s 33(2) of the MLA, the choice of commencing a limitation action in the Federal Court was open to Kirby. That statutory right of choice is to be respected by the Courts. And, as a result, this Court is seized with the Limitation Action and can exercise the powers granted to it pursuant to s 33(1) of the MLA (*JD Irving FCA* paras 91-92 and 109).

[158] Third, Kirby has a presumptive right to limit its liability. The purpose and policy behind the LLMC and the Bunkers Convention is to preclude unnecessary litigation. The history and

purpose of the LLMC have been described in many prior cases, including the reasoning for the extremely high threshold required to "break" limitation under Article 4. In *The Sheena M*, this Court stated that:

> [8] A part of the reasoning behind the 1976 Convention is neatly set out in Griggs and Williams, *Limitation of Liability for Maritime Claims*, Lloyd's of London Press, 1998, at page 3, which begins by the authors referring to the 1957 Limitation Convention:
>
> > It was recognized that the previous system of limitation had given rise to too much litigation and there was a desire that this should be avoided in future. There was agreement that a balance needed to be struck between the desire to ensure on the one hand that a successful claimant should be suitably compensated for any loss or injury which he had suffered and the need on the other hand to allow shipowners, for public policy reasons, to limit their liability to an amount which was readily insurable at a reasonable premium.
> >
> > The solution which was finally adopted to resolve the competing requirements of claimant and defendant was (a) the establishment of a limitation fund which was as high as a shipowner could cover by insurance at a reasonable cost, and (b) the creation of a virtually unbreakable right to limit liability.
> >
> > The text of the 1976 Convention finally adopted by the Conference therefore represents a compromise. In exchange for the establishment of a much higher limitation fund claimants would have to accept the extremely limited opportunities to break the right to limit liability. Under the 1976 Convention the right to limit liability is lost only when the claimant can prove wilful intent or recklessness on the part of the person seeking to limit (Article 4).

(See also: *JD Irving 2016* at paras 24-34; *Daina Shipping Company v Te Runanga O Ngati Awa*, [2013] 2 NZLR 799 at paras 26-30; and *Margolle and another v Delta Maritime Company Limited and others (The Saint Jacques II)*, [2002] EWHC 2452 (Admlty) at para 16).

[159] The Supreme Court of Canada addressed the purpose of the LLMC, and the interpretation and application of Article 4, in *Peracomo Inc v Telus Communications Co*, 2014 SCC 29. That case dealt with intent to cause loss under Article 4 of the LLMC, rather than recklessness. The Supreme Court addressed the purpose of the LLMC and found that Article 4 establishes a very high level of fault based on the LLMC's purpose to establish "a virtually unbreakable limit on liability":

> [24] I turn first to the *Convention*'s purpose. The contracting states to the *Convention* intended the fault requirement to be a high one - the limitation on liability was designed to be difficult to break: *Margolle v. Delta Maritime Co. (The "Saint Jacques II" and Gudermes")*, [2002] EWHC 2452, [2003] 1 Lloyd's Rep. 203, at para. 16; *Schiffahrtsgesellschaft MS "Merkur Sky" m.b.H. & Co. K.G. v. MS Leerort Nth Schiffahrts G.m.b.H. & Co. K.G. (The "Leerort")*, [2001] EWCA Civ 1055, [2001] 2 Lloyd's Rep. 291, at para. 18. The *Convention* has been described as a "trade-off": "As a *quid pro quo* for the increase of the [limitation] fund, the article providing for the breaking of limitation became tighter, so that it is almost impossible for the claimants to break the right to limit": A. Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd ed. 2007), at p. 865. Meeting the threshold fault requirement requires a high degree of subjective blameworthiness: *Nugent*, at p. 229 (interpreting the similarly worded Warsaw Convention, 137 L.N.T.S. 11, as amended by the Hague Protocol, 478 U.N.T.S. 371). The fault standard set by art. 4 has been described as "a virtually unbreakable right to limit liability" (P. Griggs, R. Williams and J. Farr, *Limitation of Liability for Maritime Claims* (4th ed. 2005), at p. 3) and as "an almost indisputable right to limit . . . liability": *The "Bowbelle"*, [1990] 1 Lloyd's Rep. 532 (Q.B.D.), at p. 535; see also D. Damar, *Wilful Misconduct in International Transport Law* (2011), at p. 168; R. P. Grime, "Implementation of the 1976 *Limitation Convention*" (1988), 12 *Marine Pol'y* 306, at p. 313; P. Heerey, "Limitation of Maritime Claims" (1994), 10 *MLAANZ Journal* 1, at p. 3; T. Ogg,

> "IMO's International Safety Management Code (The ISM Code)" (1996), 1 *I.J.O.S.L.* 143, at p. 149; J. F. Wilson, *Carriage of Goods by Sea* (7th ed. 2010), at p. 288; E. Gold, A. Chircop and H. Kindred, *Maritime Law* (2003), at p. 728. It is worth noting that the contracting states considered, but expressly rejected, the inclusion of "gross negligence" as a sufficient level of fault to break the liability limit: Comité Maritime International, *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* (2000), *Article 4*. Conduct barring limitation, at pp. 123-32.
>
> [25] In my respectful view, the Federal Court of Appeal's approach to breaking the limit on liability lowered the intended fault element and thereby undermined the *Convention*'s purpose to establish a virtually unbreakable right to limit liability.

[160] I note in passing that the recklessness aspect of Article 4 of the LLMC was dealt with at the trial of the limitation action in *JD Irving 2016* and also discussed the policy and purpose of that convention (*JD Irving 2016* at paras 24-34).

[161] Thus, the limitation of liability permitted by the LLMC, and thereby the Bunkers Convention, is the result of policy decisions made and adopted into the domestic law of the states who are signatories to those, and other, international conventions. In this case, the MLA is the statutory vehicle by which the limitation of liability provisions of the Bunkers Convention, the LLMC, the CLC, and other conventions are incorporated into Canadian law.

[162] As in *JD Irving FCA*, the facts surrounding the Incident are not greatly disputed. Here the second mate fell asleep at the helm. The tug and barge hit a reef and the resultant hull damage permitted pollutants to escape into the sea. This situation entirely lends itself to a summary determination as to whether Kirby's entitlement to liability is barred pursuant to Article 4 of the LLMC. Whether framed as recklessness, negligence, nuisance, breach of contract, or otherwise, what Heiltsuk asserts is that the Kirby Defendants are liable for pollution damages arising from

the Incident. The Limitation Action determines only one thing, whether Kirby is entitled to limit its liability pursuant to the Bunkers Convention and the LLMC. If the Limitation Action proceeds in advance of the liability trial and it is found that Kirby is entitled to limit its liability, then this will effectively put a cap on the amount that Kirby is liable to pay and will remove from the litigation in the BCSC Claim all issues of liability and damages in that regard. Thus, there will be no duplication of proceedings and a cost savings will be achieved.

[163] If the determination arising from the Limitation Action is that limitation is "broken", that is, Kirby is not entitled to limit its liability, or the limitation of liability provisions are successfully challenged and found not to apply on the basis of an infringement of Heiltsuk's Aboriginal title and rights, then the BCSC Claim will address liability and quantum of damages at trial.

[164] In my view, to permit the Limitation Action to proceed in advance of the BCSC Claim will serve to narrow the issues before the BCSC and it is therefore appropriate that the Limitation Action proceed in advance of the BCSC Claim and, accordingly, that the BCSC Claim as against the Kirby Defendants in that action be enjoined until the Limitation Action has been determined.

[165] As to the other relief sought by Heiltsuk in its BCSC Claim, this includes a declaration that Canada and British Columbia were obliged to consult with Heiltsuk about decisions made under s 180(1) of the CSA and s 91.2(3) of the EMA. This remedy is not an aspect of the Limitation Action and does not preclude that action from proceeding in advance of the BCSC Claim. During the hearing before me, counsel for Kirby advised that since the motions in this matter were filed, the Attorney General of Canada had, on June 27, 2019, filed its Response to Civil Claim [Canada's Response] and provided a copy of that document to this Court. In

Canada's Response, the Attorney General asserts, to the extent that Heiltsuk seeks to challenge the decision of the Minister to act or fail to act under s 180(1) of the CSA, such a challenge is within the exclusive jurisdiction of this Court pursuant to s 18(1) of the *Federal Courts Act*. That is, this Court retains exclusive jurisdiction over judicial review of federal ministers, whether the relief is sought is *certiorari*, *mandamus*, or a declaration.

[166] I need make no finding on that submission. However, if a separate application for judicial review is required with respect to s 180 of the CSA, this again has no practical implication on proceeding with the Limitation Action. And, if Heiltsuk were successful, any additional remediation costs would be either encompassed by the limitation fund or, if limitation is broken, could be pursued in the BCSC Claim. I would add, however, that Canada's Response also indicates that throughout the Incident response, the Minister did not perceive a need to invoke s 180 of the CSA because Kirby at no time demonstrated an unwillingness to take all reasonable response measures. Further, Canada claims that it has worked with Kirby to respond to the Incident, monitor the impact of the spill, and to remediate the impacted marine habitat. Canada also states that the four parties, Heiltsuk, Canada, British Columbia, and Kirby, are still discussing the terms of reference for the Environmental Impact Assessment. Further, the affidavit of Marilyn Slett, Chief Councillor of HTC, dated June 20, 2019 and filed in support of Heiltsuk's Stay Motion [Slett Affidavit], confirms that Canada and British Columbia have engaged with Kirby to develop "robust terms of reference for an environmental impact assessment". Draft terms were developed in May 2019 which Ms. Slett states require further discussion. This raises the possibility that the requested remedy is premature.

[167] As to the injunctive relief sought, requiring compliance by Kirby with all applicable laws relating to watch personnel, regardless of whether this remedy is well founded in law or not, is again not an aspect of the Limitation Action and does not preclude the Limitation Action from proceeding in this Court.

[168] It must also be noted that the BCSC Claim is in its infancy and proceeding with the Limitation Action will not result in duplication of effort. At the time that the Enjoinment Motion was filed, the AG British Columbia had filed its Response to the Civil Claim [British Columbia's Response], however, the AG Canada had not. As noted above, the latter was filed on June 27, 2019. At this time the pleadings in the BCSC Claim have not closed, pending a potential reply from Heiltsuk.

[169] This leaves the declaratory relief sought by Heiltsuk as to its Aboriginal title and rights asserted by way of the BCSC Claim. In my view, this is the only aspect of these motions the resolution of which is troublesome, and this is primarily from a practical perspective. The parties all propose different ways in which they feel this should be approached.

[170] Heiltsuk asserts that the Limitation Action cannot proceed until its Aboriginal title and rights have been determined within the BCSC Claim. Further, it says that until that is accomplished, the constitutional question of whether the limitation provisions of the MLA, LLMC, Bunkers Convention, or the CLC unjustifiably infringe those rights cannot be addressed. It argues that only after determining these issues should a limitation fund be established. In effect, the Kirby Defendants would be precluded from a determination of whether they are entitled to limit their liability and, if so, to pay out valid claims, until the issues of Aboriginal title and rights have first been resolved.

[171] I have considerable difficulty with this proposition on a number of levels.

[172] First, it appears from British Columbia's Response that on January 10, 2003, members of the Heiltsuk Nation and Heiltsuk Indian band filed Action No. S036668 in the Vancouver Registry of the BCSC [2003 Writ]. This apparently seeks declarations of Aboriginal title and rights to Heiltsuk traditional territory which includes the Claim and Loss Area, however, the prior claim has not been adjudicated nor discontinued. British Columbia's Response asserts that the BCSC Claim is duplicative because the 2003 Writ includes the same relief sought in the BCSC Claim. As such, British Columbia argues that it is an abuse of process and should be struck out. I note that, in her affidavit, Ms. Slett deposes that the 2003 Writ was a protective writ which she understands was "aimed at preserving any title claims and preserving any damage claims relating to infringement of aboriginal rights and title, against possible limitation periods that were thought, at that time, might apply to title claims". However, she says that Heiltsuk has not taken any procedural steps advance the 2003 Writ since it was filed more than 15 years ago and Heiltsuk currently has no intention of filing a Notice of Intention to Proceed in that matter. It is now "claiming for aboriginal title in its lawsuit against Kirby", but only in relation to areas of the territory impacted by the spill. A copy of the 2003 Writ was not provided as an exhibit to that affidavit.

[173] This Court need not address the allegation of abuse of process which, no doubt, will be dealt with by the BCSC. It is significant, however, because if the BCSC were to find that the BCSC Claim is an abuse of process based on the pre-existing claim, then the issue of Aboriginal title and rights would be severed from the BCSC Claim. In effect, this would likely mean that

Heiltsuk's constitutional challenge, which it submits is intricately tied to those title and rights, could not proceed in the BCSC Claim.

[174] In any event, what is apparent from the above is that the question of Heiltsuk's Aboriginal title and rights has been a live one before the BCSC for over 15 years and has not been progressed. Nor is there any evidence before me that there have been any negotiations with British Columbia or Canada as to Heiltsuk's asserted Aboriginal title and rights. This is significant because the resolution of such claims, either through litigation or negotiation, is a complex, lengthy process that takes years, if not decades, to resolve. Much evidence is required to establish the extent of those rights, both geographically and by way of usage. In this case, amongst other things, Heiltsuk asserts a claim to submerged lands below navigable waters which Canada's Response indicates is a novel claim not previously specifically addressed by the courts.

[175] According to Heiltsuk, because it has now tied a portion of its claim of Aboriginal title and rights to its action against Kirby in the BCSC Claim, Kirby is precluded from obtaining a determination of whether it is entitled to limit its liability under the LLMC, Bunkers Convention, or CLC until the Aboriginal title and rights claim is determined, and any constitutional challenge to the MLA is resolved. This, in effect, defeats the intended purpose of these conventions, being to avoid unnecessary litigation, quickly resolve and pay claims made against limitation funds, and to provide certainty to claimants, to the international shipping community, and the other state signatories to the various international limitation conventions as to liability for and how claims will be resolved.

[176] While Heiltsuk submits that it is now only seeking a declaration as to the Claim and Loss Area, it is difficult to see how that portion of the area over which Heiltsuk asserts title and rights

could be segregated out of its territorial claim in whole, and resolved simply on the basis of the impact area of an oil spill. There is considerable doubt in my mind that Canada and British Columbia would be open to negotiating or litigating an Aboriginal title and rights claim on a patchwork basis, as proposed by Heiltsuk.

[177] The approach taken by Heiltsuk also raises the concern that, in the future, other oil pollution claims could similarly be stalled because of unresolved Aboriginal claims to title and rights, or litigants otherwise tying their pollution claims to other matters. The approach proposed by Heiltsuk would preclude the constitution and distribution of a limitation fund until such claims are resolved. In many pollution incidents there are multiple claimants. These could include fisher persons, fish processors, aquaculture operators, tour operators, and countless others. In similar circumstances, those claimants could potentially be denied the constitution of a fund, the determination of whether the shipowner was entitled to limit its liability, and, more importantly, access to the distributed fund while the Aboriginal title and claim was resolved.

[178] For its part, Kirby states that even if, as Heiltsuk submits, the Federal Court does not have jurisdiction to grant Heiltsuk its asserted Aboriginal title and rights, this Court does have jurisdiction to determine the legal question of whether the limitation regime set out in the MLA would unduly and unjustifiably infringe on those rights contrary to s 35 of the *Constitution Act, 1982*. Further, Rule 220 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] provides for the preliminary determination of a question of law that may be relevant to an action, and the Federal Court of Appeal has held that a pre-trial determination of a question of law can proceed on the basis of an assumption of truth of the allegations of the pleadings, provided that the facts, as alleged, are sufficient to enable the Court to answer the question (*Perera v Canada*,

[1989] 3 FC 381 (FCA)). Thus, the constitutionality of the limitation regime in the MLA could be determined by this Court in advance of, and without Heiltsuk actually establishing, its Aboriginal title and rights. Instead, these would be assumed for purposes of the determination of that question of law. If the constitutionality of the limitation regime is upheld, then the issue of what Aboriginal title and rights Heiltsuk may have will be of no moment for the purposes of the Limitation Action.

[179] As attractive as that submission may be from the perspective of not delaying the Limitation Action for many years while Heiltsuk seeks to establish its Aboriginal title and rights, I agree with Heiltsuk that it is difficult to see how a constitutional challenge, based on an infringement of an Aboriginal right, could proceed in a factual vacuum (see *Delgamuukw v British Colombia*, [1997] 3 SCR 1010 at para 165). Once a right has been established, which requires considerable evidence, the next question is whether it is being infringed by the Crown and, if so, if the infringement is justified. Without knowing exactly what the right is, it is difficult to see how infringement of the right could be determined as a pure question of law. How would the Court know if the limitation is unreasonable, if it imposes undue hardship, and whether it denies Heiltsuk its preferred means of exercising that right without knowing what the right is and without evidence as to the infringement of that right? This level of information is not found in the BCSC Claim, and proposed questions of law under Rule 220 must be pure questions of law such that they may be answered without having to make findings of fact. As stated in *R v Wilson-Jules-Derrickson*, 2000 BCSC 484 at para 50: "It may not be impossible to challenge a law as infringing aboriginal rights guaranteed by s 35(1) in the absence of evidence of a particular aboriginal right, how it was infringed or whether the infringement is justified, but I think such cases would be rare."

[180] Further, to even consider the possibility of proceeding by way of a pure question of law requires the bringing of a motion under Rule 220, following which the Court decides whether to order that the proposed question be determined before trial. It seems probable that the AG Canada would have an interest in such a motion brought in this matter and may have views on whether infringement can be assumed for the purposes of determining if the infringement is justified. The AG British Colombia may also wish to participate in such a motion.

[181] In short, there is simply insufficient information before me, and this suggestion has not been sufficiently developed by the parties, to enable me to make such a determination at this time.

[182] A third approach is put forward by the SOPF. It takes the view that it is appropriate to effect a limitation fund under the Bunkers Convention at this time and that this Court determine the Limitation Action. It submits that the constitutional challenge could be dealt with in the BCSC Claim after the Limitation Action has been determined in this Court and Heiltsuk's Aboriginal rights have been determined in the BCSC Claim.

[183] I observe in passing that the SOPF fund is sometimes referred to as a fund of "first and last resort".

[184] In its submissions, the SOPF points out that pursuant to s 101(1) of the MLA, and subject to other provisions of part 7 of the MLA, the SOPF is liable for loss, damage, costs, or expenses relating to oil pollution damage from ships as referred to in s 51 (preventative measures for purposes of the CLC), s 71 (preventative measures for purposes of the Bunkers Convention) and s 77 (oil pollution damage from a ship not covered by Division I of the MLA, being the

international conventions described therein), Article II of the CLC (pollution damage caused by a ship), and Article 3 of the Bunkers Convention (pollution damage caused by bunker oil on board or originating from a ship), if certain criteria are met, including if the claim exceeds the shipowner's maximum liability under the CLC (to the extent the excess is not recoverable under two additional layers of funding, the International Fund or the Supplementary Fund), or the shipowner's maximum liability under Part 3 of the MLA (which includes the LLMC/Bunkers Convention). As the SOPF puts it in its submissions, where a shipowner would be held liable under Part 6 of the MLA, the Administrator of SOPF can be held liable for that amount where s 101(1) of the MLA applies. I note that in circumstances where claims exceed a shipowner's maximum liability and are made against the SOPF, these are claims of last resort.

[185] Pursuant to s 103 of the MLA, a claimant can also make a claim directly against the SOPF for s 101(1) losses or damage. It can also make claim with respect to losses relating to fishing pursuant to s 107 of the MLA. This includes claims by individuals who derive income from fishing, from the production, breeding, holding or rearing of fish, or from the culture or harvesting of marine plants, as well as individuals who fish or hunt for food or animal skins for their own consumption or use. In this way, the SOPF is a claim of first resort. In its written submissions, the SOPF states that, to date, no claims of first resort arising from the Incident have been filed with it. I note that the Slett Affidavit confirms that Kirby has paid CAD $200,000 to Heiltsuk in relation to the loss of the commercial clam fishery for the 2016/2017 season and that the Guirdry Affidavit states that Kirby has paid CAD $3.5 million to Heiltsuk in relation to the Funding Agreement, which agreement pertains to spill response efforts.

[186] The SOPF regime has significance because, to the extent that the claimed losses are covered by the MLA, even if they exceed any limitation of liability that Kirby may be entitled to avail itself of, they are recoverable by Heiltsuk. Further, economic loss linked to a fishery or harvested marine resources is also recoverable, as are losses of a source of food and animal skins. These claims could be pursued and, if assessed as valid, paid directly to Heiltsuk (or its individual members) by the SOPF without need of first pursuing the claims against Kirby.

[187] Similarly, pollution damage as defined in Article 1 of the Bunkers Convention can be claimed:

| | |
|---|---|
| **9** ***Pollution damage*** means: | **9** ***Dommage par pollution*** signifie : |
| **(a)** loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided 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; and | **a)** le préjudice ou le dommage causé à l'extérieur du navire par contamination survenue à la suite d'une fuite ou d'un rejet d'hydrocarbures de soute du navire, où que cette fuite ou ce rejet se produise, étant entendu que les indemnités versées au titre de l'altération de l'environnement autres que le manque à gagner dû à cette altération seront limitées au coût des mesures raisonnables de remise en état qui ont été effectivement prises ou qui le seront; et |
| **(b)** the costs of preventive measures and further loss or damage caused by preventive measures. | **b)** le coût des mesures de sauvegarde et les autres préjudices ou dommages causés par ces mesures. |

[188] Thus, loss of profit resulting from impairment of the environment is recoverable, such as lost fishing income, and compensation claims can be made for impairment to the environment itself when reasonable measures have actually been taken to effect reinstatement.

[189] The SOPF notes that the Limitation Action will necessarily involve only those pollution damage claims under Part 6 of the MLA which properly arise under the Bunkers Convention or the CLC, irrespective of how those claims are pleaded in the BCSC Claim (*i.e.* as negligence, nuisance, etc.). Further, pollution damage claims against shipowners are prohibited "other than in accordance with" those conventions (Bunkers Convention, Article 3(5); CLC Article III(4)). However, at least these claims could be processed, and ultimately adjudicated, most efficiently by this Court within the Limitation Action. As to claims by Heiltsuk that currently lie outside of Part 6 of the MLA, and specifically outside of the Bunkers Convention and CLC (*i.e.* injunctive relief, communal and cultural losses, and compensation for infringement of Aboriginal rights), these would either not be directly affected by the Limitation Action or would be only temporarily impacted if this Court were to enjoin Heiltsuk from proceeding with the BCSC Claim against the Kirby Defendants until this Court has determined Kirby's entitlement, if any, to limit its liability. The SOPF submits that this Court could affect case management to ensure the efficient progression of that process and, in the meantime, Heiltsuk could still proceed with its claim to Aboriginal rights and title in the BCSC Claim.

[190] And, if Heiltsuk is ultimately successful in the BCSC Claim for compensation for infringement of its Aboriginal rights beyond what is currently encompassed by pollution damage and preventative measures as defined in the Bunkers Convention or CLC, or in invalidating a shipowner's right to limit its liability for a loss or damage claim relating to Aboriginal rights, the damages they would be entitled to would not be diminished by this approach. Heiltsuk would then be entitled to additional damages from the Kirby Defendants either because those damages were outside the scope of the limitation fund when it was constituted, or because they are above any retroactively invalidated limitation fund. Or, Heiltsuk would be able to claim the additional

damages as against the SOPF which would, presumably, remain exposed to liability over the shipowner's limit of liability for valid proven claims pursuant to s 101 of the MLA should any court order expand the scope of that provision.

[191] Put otherwise, the SOPF submits that damages now claimed by Heiltsuk (but which have not yet been proven) and which fit into the pollution damages and preventative measures definitions will remain compensable as against Kirby or the SOPF. And, should Heiltsuk successfully challenge the MLA as regards to the alleged infringement of Aboriginal rights, the potential recovery of any expanded damages would be in addition to available existing damages recovery.

[192] The SOPF adds that given the broad commercial rational underpinning the limitation regime, it may well be retained, even as against Aboriginal claimants. But, even if a court were to carve out an exception to a shipowner's right to limitation as against claims for interference with Aboriginal rights, the Administrator could potentially still be held liable under s 101 of the MLA to compensate a claimant up to about $174 million in relation to the Incident, where a claimant could prove an actual qualifying loss or expenditure. But this possibility of a change in the existing law should not be a concern of this Court. Rather, focus should be on the policy rationale of the MLA regime, being that shipowners are entitled to limit liability and continue their operations, and that claims can be paid out quickly from constituted limitation funds and/or other layers of available compensation.

[193] The SOPF submits that it would be appropriate for this Court to partially and temporarily enjoin Heiltsuk and other potential claimants in the BCSC Claim, largely for the reasons expressed by Kirby, being this Court's jurisdiction, similar or the same subject-matter, to avoid a

multiplicity of proceedings, to promote cost savings, the non-relevance of procedural advantages, and prejudice, to the extent that those proceedings relate directly to the compensation claims being advanced by Heiltsuk under Part 6 of the MLA, the Bunkers Convention, or the CLC, in regard to which Kirby is invoking its right to limit its liability. The SOPF submits that Heiltsuk's claims in the BCSC Claim as against Canada and British Columbia regarding allegation of infringement of Aboriginal rights should not be enjoined.

[194] In considering these proposed approaches, I note that nothing in the materials before me suggests that those of Heiltsuk's claims that fall within the existing limitation of liability regime would exceed either any limitation of liability that Kirby may be entitled to effect, or the funds in excess of that amount that may available by way of the SOPF. My point here is that it is probable that much of the damages claimed by Heiltsuk will be covered by the existing MLA regime such as loss of income from fishing activities, compensation to individuals who fish or hunt for their own consumption, environmental reparation, and claims in respect of loss resulting from infringement of rights other than contractual rights. And, given the policy basis for the limitation regime found in the MLA, Heiltsuk may have an uphill battle to succeed in any argument that the MLA is unconstitutional pursuant to s 35 of the *Constitutional Act, 1982* because it restricts Heiltsuk's common law rights for compensation for damages.

[195] To the extent that losses arising from the "Aboriginal Interests" asserted by Heiltsuk in the BCSC Claim may lie outside claims that are recoverable by way of the MLA, at this time these are not particularized and are in no way quantified. It is also open to question whether, or to what extent, there is a duty to consult when Canada is entering into international conventions and then making domestic law implementing those conventions. As to infringement of any

Aboriginal title and rights that may be established at trial, the MLA likely does not directly infringe these title and rights but perhaps could more accurately be described as potentially adversely affecting them by limiting what can be claimed as compensation under the existing regime. And, even if the MLA were found to infringe Heiltsuk's asserted or established Aboriginal title or rights, there is a live issue as to whether such an infringement is justified given the policy and purpose of the MLA. Further, in Canada's Response it is noted that portions of the Claim and Loss Area are navigable waters and subject to the common law public right of navigation. This right is held in common by all Canadians and the issue of Aboriginal rights to submerged land below navigable waters has not yet been addressed by the courts.

[196] My point is, not only is a determination of Heiltsuk's Aboriginal title and rights a long way off in time, it is unclear whether a constitutional challenge would still be viewed as warranted by Heiltsuk at that stage or that it would succeed, for all of the above reasons. Given these many uncertainties and the complexities of these issues, it is appropriate, in my view, to enjoin Heiltsuk from proceeding against the Kirby Defendants until the Limitation Action has been determined, and to exercise this Court's exclusive jurisdiction to constitute a limitation fund (MLA s 32(1), 33(1) and 33(4)).

[197] Although Heiltsuk asserts that a limitation fund must be subject to a trial not only concerning Article 4 of the LLMC (reckless conduct barring a shipowners right to limit liability), but also with respect to its allegation that the right to limit liability is unconstitutional as it is an infringement on its Aboriginal rights and title, in my view, it is clear from the MLA and the LLMC/Bunkers Convention that a limitation trial is concerned with only one thing, and that is whether or not the shipowner is entitled to limit its liability. This is determined by a trial to

assess whether limitation has been broken based on Article 4 of the LLMC. In my view, a challenge to the limitation regime itself, based on asserted rights, should not preclude that process in these particular circumstances, where the right to limitation has been tied to a claim seeking to establish Aboriginal title and rights.

[198] That said, the resultant situation whereby Kirby may be successful in a Limitation Action, but for many years will still be unable to finally resolve claims against it while Heiltsuk's claim to Aboriginal title and rights in the BCSC Claim is being resolved, and any subsequent constitutional question of infringement of those rights is determined, as opposed to the intended summary process of a limitation action, is hardly ideal. During the hearing of these motions I encouraged the parties to propose a more practical approach to addressing the constitutional issues, however, such a proposal has yet to be received.

[199] In short, given all of these considerations, it is not reasonable for the Limitation Action to be delayed until after the Heiltsuk's claim of Aboriginal title and rights has been resolved; the losses that Heiltsuk asserts in the BCSC Claim are proven, which will require considerable scientific evidence as to Heiltsuk's claims of immediate and long terms impacts on fish habitats, ecosystems, and marine resources; and the constitutional question as to the infringement of those rights and whether any infringement is justified is addressed. Rather, it is appropriate that the claims against the Kirby Defendants in the BCSC Claim be enjoined until the Limitation Action is resolved.

[200] Finally, I make this additional comment. Heiltsuk asserts that this Court lacks jurisdiction to address its constitutional challenge to the MLA on the basis that its "claim is to Aboriginal title to immovable property owned by The Queen in Right of British Columbia, specifically

‘inland’ seabed and foreshore of the Claim and Loss Areas, all of which lies within British Columbia”. It asserts that, as such, this Court does not have jurisdiction over claims of Aboriginal title over immovable property ultimately owned by the provincial crown (*Kelly Lake Cree Nation v Canada*, 2017 FC 791, aff’d 2019 FCA 23). I make no finding either as to whether Heiltsuk accurately characterises its claim, or as to this Court’s jurisdiction on that basis.

## IX. Issue 2: Should this Court stay the Limitation Action brought by Kirby in this Court?

[201] In *JD Irving FCA*, the Federal Court of Appeal held that the success of either the enjoinment or stay motions will lead to the necessary dismissal of the other motion. That is the case here as well.

[202] Regardless, as set out above, the test for a stay in the context of proceedings grounded in s 32 of the MLA is to be determined based on s 50(1)(b) of the *Federal Courts Act*, being whether it is in the interest of justice that the limitation action be stayed, as determined by the *Mon-Oil* test, specifically, in this case:

a) would the continuation of the Limitation Action cause prejudice to Heiltsuk, and

b) would the stay of the Limitation Action cause an injustice to Kirby.

(*JD Irving FCA* at paras 126-127.)

[203] Heiltsuk asserts that it will be prejudiced if the Limitation Action proceeds. It bases this on its view that it will be “deprived of a substantial element of its “defense” to the asserted limitation of liability”.

[204] In fact, there is a presumption that a shipowner will be entitled to limit its liability under the LLMC or Bunkers Convention. Further, if Heiltsuk asserts that Kirby is not entitled to limit

its liability, then the onus is on Heiltsuk to establish that that the loss resulted from Kirby's personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result (LLMC, Article 4), that is, to break limitation. This is unrelated to Heiltsuk's claim of Aboriginal title and rights. Proceeding with the Limitation Action will not result in a duplication of the BCSC Claim because, if limitation is not broken, Heiltsuk's claims of recklessness, negligence, and nuisance will all fall within the limitation of liability and any further actions will be precluded because they would relate to the pollution damage arising from the Incident, encompassed by the LLMC or Bunkers Convention, and which will be prescribed (LLMC, Article 13; Bunkers Convention, Article 3(5); MLA, s 72). In this scenario, all claims will be disposed of by payment out of a limitation fund constituted in this Court. If limitation is broken, the trial for liability will continue in the BCSC. Recklessness, as well as questions of common ownership of the tug and barge, will already have been established and this will serve to narrow the liability allegations against the Kirby Defendants. These determinations may also have an impact on whether Heiltsuk will chose to continue to advance its claims relating to Aboriginal title and rights within the BCSC Claim.

[205] I see no prejudice to Heiltsuk to proceeding with the Limitation Action. The pleadings in the BCSC Claim have yet to close, the only step taken by Heiltsuk to date is to file an application seeking to have the BCSC confirm its jurisdiction, thus that claim is in its infancy. And, while the Limitation Action is progressing, Heiltsuk can advance its claim of Aboriginal title and rights in the BCSC, which Heiltsuk asserts must be determined before infringement of those rights can be assessed.

[206] As to Heiltsuk's submission that, while a Limitation Action is intended to be summary in nature and that Kirby would not suffer any procedural prejudice if the Limitation Action were stayed because the BCSC Civil Rules make provisions for summary judgement and summary trial, this is inconsistent with Heiltsuk's submission that a determination as to an entitlement to limitation could not proceed until after its Aboriginal title and rights had been determined in the BCSC Claim. It is difficult to see how Aboriginal title and rights could be determined by way of a summary judgement or trial process.

[207] Conversely, to require Kirby to wait until Heiltsuk's claim of Aboriginal rights and interest has been resolved, before a determination is made as to whether Kirby is entitled to limit its liability under the MLA, the LLMC or the Bunkers Convention, is prejudicial to Kirby. As discussed above, Kirby has a right to select the forum in which the limitation action will be heard. Further, the right to limit liability is a presumptive right and is part of international law that provides certainty to shipowners, states, and claimants. It is a balance between the commercial interest of shipowners, their limited ability to successfully deny liability for oil spills and the speedy resolution and payment of qualifying claims. To force Kirby to wait for years, possibly decades, before a determination of its right to limit its liability is made is contrary to the MLA regime. It means that Kirby would be unable to remove this potential and unquantified debt from its books for years to come. Moreover, there is no certainty that in the interim further claimants will not make claims which Kirby would have to address and which would be precluded if the limitation fund is constituted and Limitation Action is successful. In that event, all claims would have to be made by a specified date, could be paid out of the limitation fund, and further actions would be prohibited.

[208] Nor should Kirby be forced to participate in a trial concerned with the determination of Aboriginal title and interests. To permit a limitation action to be tied to claims beyond the issue of the shipowner's entitlement to limit liability pursuant to the CLC or Bunkers Convention is to defeat or attempt to circumvent that process.

[209] Having considered all of these factors, it is my view that Heiltsuk has not established that it would be prejudiced if the Limitation Action is not stayed, nor that a stay is necessary in these circumstances. Conversely, a stay would cause an injustice to Kirby. Accordingly, it is not in the interest of justice that the Limitation Action be stayed and I decline to exercise my discretion to do so.

## X. Directions and Orders sought

### *A. Constitution of a limitation fund*

[210] For the above reasons, this Court directs that a limitation fund may be constituted pursuant to the Bunkers Convention and the LLMC.

[211] Heiltsuk raises the "one ship or two ships" issue in its submissions, which it asserts is a matter for trial, or at least summary trial. This is a question of whether, at the time of the Incident and for purposes of calculating the limitation amount, the tug and barge should be considered as two distinct vessels or as a combined vessel. This determination is significant because the amount of the limitation fund calculated pursuant to Article 6 of the LLMC is based on the tonnage of the involved vessel. In my view, this is a valid issue.

[212] Kirby, citing *The Rhone* and *Bayside*, submits that a tug and barge will only constitute one vessel for the purposes of calculating the amount of the limitation fund if there is a common owner and both vessels are found to be causally negligent. Kirby submits that these conditions are not met in this case. Thus, the limitation amount should be based on the tonnage of the tug alone, at 1.51 million SDRs. Conversely, Heiltsuk submits that where an articulated-tug-barge is operating as a composite vessel, rigidly connected and designed to maneuver as one ship, as well as the question of whether the Kirby companies are common owners, are questions of fact and law yet to be determined. Thus, if a limitation fund is to be constituted in this Court, it should be based on the combined tonnage of the tug and barge.

[213] In my view, *The Rhone* may be of limited assistance in this regard as it concerned a configuration in which a barge, which struck the *Rhone* while it was moored, was being towed by four tugs. The Supreme Court of Canada held that all of the ships within a flotilla belonging to an impugned shipowner need not be taken into account in determining the extent of the shipowner's liability. Apart from the vessel responsible for the overall navigation of a flotilla, only those vessels of the same ownership which physically caused or contributed to the resulting damage formed the unit for which liability is limited. In the matter before me, it is open to debate as to whether a flotilla exists, given the articulated tug and barge configuration, whether the tug was responsible for the navigation of the barge, and whether the barge contributed to the resultant damage arising from the Incident. In my view, this issue should be pursued in greater depth within the Limitation Action.

[214] Accordingly, for the purposes of the directions provided herein, the combined gross tonnage of the tug (302 m.t.) and barge (4276 m.t.) will be used to ascertain the amount of the

limitation fund, being 4578 m.t. However, Kirby is not precluded from bringing a preliminary motion in the Limitation Action seeking to reduce that amount on the basis that the fund should be based only on the tonnage of the tug. If not, this issue will be dealt with in the course of the trial on limitation.

[215] The fund will be constituted based on the combined tonnage of the tug and barge together with interest thereon from the date of the Incident until the date of the constitution of the fund, pursuant to Articles 6(1)(b) and 11 of the LLMC and s 32(1), 33(4)(a) and 33(5) of the MLA.

[216] The Court is not satisfied that the existing LOUs are a satisfactory guarantee of the fund to be constituted. The LOUs are agreements between Kirby and the SOPF (SOPF LOU) and Kirby and Heiltsuk (HTC LOU), respectively. They do not provide security to any other claimants. While to date Heiltsuk is the only known claimant, the possibility of others cannot be ruled out. Pursuant s 33(4) of the MLA, this Court may determine what form of guarantee is considered to be adequate for the purposes of Article 11(2) of the LLMC. Kirby shall, within ten days of this Order, provide to the Court for approval, the form of guarantee of the fund that Kirby proposes.

*B. Reduction of the amounts secured by the LOUs*

[217] Pursuant to undertaking 12 of the HTC LOU, the security amount of the HTC LOU, currently CAD $12,000,000, will be reduced by the amount of the limitation fund constituted in accordance with these reasons.

[218] Pursuant to undertaking 9 of the SOPF LOU, the security amount of the SOPF LOU, currently stated to be CAD $20,000,000, will be reduced by the amount of the limitation fund

constituted in accordance with these reasons. I note, however, that during the hearing of these motions the SOPF confirmed that the amount of the SOPF LOU has been reduced by CAD $3,000,000 to reflect claims paid. Accordingly, the SOPF LOU will be reduced from the amount of CAD $17,000,000 by the amount of the limitation fund constituted.

*C. Enjoinment*

[219] Kirby's Enjoinment Motion is granted to the extent that Heiltsuk is enjoined from proceeding against the Kirby Defendants in the BCSC Claim until such time as the Limitation Action has been determined, as well as any appeals thereof. More specifically, Heiltsuk and any other persons are enjoined from commencing or continuing proceedings before any court or tribunal, other than the Federal Court in this Limitation Action, as against the Owners and All Others Interested in the Ship "Nathan E. Stewart" and the ship "DBL 55", Kirby Offshore Marine LLC, Kirby Offshore Marine Pacific LLC, Kirby Offshore Marine Operating LLC, Sean Connor and Henry Hendrix, in respect of the Incident.

[220] Heiltsuk is not, by this enjoinment order, precluded from pursuing its claim for Aboriginal title and rights in the BCSC Claim or other remedies sought in that proceeding which are not related to the determination of the Limitation Action, all subject to any order of the BCSC as to the conduct of the BCSC Claim.

[221] The issues determined and the procedure established by this Order do not preclude Heiltsuk, or any other claimants, from alleging that the Kirby Defendants are not entitled to limit liability on the basis of barred conduct set out in Article 4 of the LLMC, the Bunkers

Convention, and s 72 of the MLA. Nor shall they preclude the Kirby Defendants from denying liability and contesting the quantum of any claim.

*D. Stay*

[222] Heiltsuk's Stay Motion is denied. Heiltsuk may, within 30 days of the date of this Order, file a Defence to the Limitation Action, and any Counterclaims or Third-Party Claims it may choose to bring.

*E. Draft Order*

[223] Within seven days of this Order, Kirby shall circulate to Heiltsuk, the SOPF, and submit to this Court a draft order which will address the constitution of the limitation fund and the logistics of the Limitation Action. More specifically, the draft shall state the amount of the fund and its date of constitution, set out the proposed form and the proposed extended advertising of the notice of the Limitation Action to potential claimants, taking into consideration the submissions of the SOPF in that regard. The draft order will also propose the time limits within which claimants, other than Heiltsuk, must file their defences or claims against the fund. It will also set out that any claims not filed within the specified period will be barred from participation in the distribution of the limitation fund, that following any determination by this Court that Kirby is entitled to limit its liability, and any appeals thereof, that the fund will be rateably distributed amongst claimants whom the Court determines are entitled to claims against it, and such other matters as Kirby may propose in furtherance of the requirements of the MLA, LLMC and Bunkers Convention. The parties are encouraged to submit a draft order that is mutually agreeable to them.

*F. Case management*

[224] The Limitation Action shall continue as a specially managed proceeding, pursuant to Rule 384 of the *Federal Courts Rules*. Any party shall be at liberty to seek orders and directions from the Case Management Judge concerning the completion of pre-trial steps, and any other relevant matter arising from the MLA, the LLMC, the Bunkers Convention, the *Federal Courts Rules*, or otherwise.

**ORDER in T-733-19**

**THIS COURT ORDERS AND DIRECTS that**:

1. The motion of Kirby Offshore Marine Pacific LLC and Kirby Offshore Marine Operating LLC [Kirby] seeking an Order and Directions as to their limitation of liability with respect to the October 13, 2016 grounding of the tug "Nathan E. Stewart" [tug] and the barge "DBL 55" [barge] and resultant release of oil into the marine environment [Incident] is granted as follows:

    a. Heiltsuk Hímás and Heiltsuk Tribal Council [Heiltsuk] and any other persons are enjoined from commencing or continuing proceedings before any court or tribunal, other than the Federal Court in the proceeding commenced by Kirby on May 1, 2019, by Statement of Claim in matter T-733-19 [Limitation Action], against The Owners and All Others Interested in the Ship "Nathan E. Stewart" and the Ship "DBL 55", Kirby Offshore Marine LLC, Kirby Offshore Marine Pacific LLC, Kirby Offshore Marine Operating LLC, Sean Connor, and Henry Hendrix [Kirby Defendants], in respect of the Incident until such time as the Limitation Action and any appeals therefrom have been fully and finally determined. More specifically, Heiltsuk is enjoined from continuing its proceeding in the Notice of Civil Claim – Admiralty, filed in the British Columbia Superior Court on October 9, 2018 [BCSC Claim], as against the Kirby Defendants, until such time as the Limitation Action has been determined, as well as any appeals thereof.

b. Heiltsuk is not, by this enjoinment order, precluded from pursuing its claim for Aboriginal title and rights in the BCSC Claim or other remedies sought in that proceeding which are not related to the determination of the Limitation Action, all subject to any order of the BCSC as to the conduct of the BCSC Claim.

2. The motion of Heiltsuk seeking to stay the Limitation Action is dismissed.

3. Heiltsuk may, within 30 days of the date of this Order, file a Defence to the Limitation Action, and any Counterclaim or Third Party claims it may choose to bring.

4. A limitation fund shall be constituted pursuant to the International Convention on Civil Liability for bunker Oil Pollution Damage, 2001, concluded at London on March 23, 2001 [Bunkers Convention], the Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on November 19, 1976, as amended by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on May 2, 1996 [collectively, the LLMC], and s 33(1)(a) and 72 of the *Marine Liability Act* [MLA].

5. For the purposes of this Order and Directions, the limitation fund will be constituted based on the combined gross tonnage of the tug (302 m.t.) and the barge (4276 m.t.) together with interest thereon from the date of the Incident until the date of the constitution of the fund, all pursuant to pursuant to Articles 6(1)(b)

and 11(1) of the LLMC and s 32(1), 33(4)(a), and 33(5) of the MLA. However, Kirby is not precluded from bringing a preliminary motion seeking to reduce that amount and for the fund to be based only on the tonnage of the tug. In the absence of such a motion, the question of whether the limitation amount should be based on the tonnage of the tug alone, or the combined tonnage of the tug and barge, will be dealt with in the course of the trial on limitation. If it is determined that the that the limitation amount should be based only on the tonnage of the tug, the limitation fund will be reduced accordingly.

6. The Court is not satisfied the existing letters of undertaking [LOUs] are a satisfactory guarantee of the fund to be constituted. Pursuant s 33(4) of the MLA, this Court may determine what form of guarantee is considered to be adequate for the purposes of Article 11(2) of the LLMC. Kirby is directed, within ten (10) days of this Order, provide to the Court for its approval, the form of guarantee of the fund that Kirby proposes.

7. Pursuant to undertaking 12 of the Heiltsuk Tribal Council LOU [HTC LOU], the security amount of the HTC LOU, currently CAD $12,000,000, will be reduced by the amount of the limitation fund constituted in accordance with this Order and Directions.

8. Pursuant to undertaking 9 of the Ship-Source Oil Pollution Fund [SOPF] LOU [SOPF LOU], the security amount of the SOPF LOU, understood to currently be in the amount of CAD $17,000,000, will be reduced by the amount of the limitation fund constituted in accordance with this Order and Directions.

9. Kirby is directed, within seven (7) days of this Order, to circulate to Heiltsuk, the SOPF, and to submit to this Court a draft order setting out the amount of the limitation fund and the date and manner of its constitution. Additionally, setting out the proposed form and the proposed extended advertising of the notice of the Limitation Action to be provided with respect to potential claimants, taking into consideration the submission of the SOPF in response to the Enjoinment Motion concerning such advertisement. The draft order will also identify the proposed the time limits within which claimants, other that Heiltsuk, must file their defences or claims against the fund, again taking into consideration the submission of the SOPF in response to the Enjoinment Motion. The draft order will also specify that any claims not filed within the specified period will be barred from participation in the distribution of the limitation fund, that following any determination by this Court that Kirby is entitled to limit its liability, and any appeals thereof, that the fund will be rateably distributed amongst claimants whom the Court determines are entitled to claims against it, and such other matters as Kirby may propose in furtherance of the requirements of the MLA, LLMC and Bunkers Convention.

10. The issues determined and the Limitation Action procedure established by this Order do not preclude Heiltsuk, or any other claimant, from alleging that the Kirby Defendants are not entitled to limit liability on the basis of barred conduct set out in Article 4 of the LLMC, the Bunkers Convention, and s 72 of the MLA. Nor shall they preclude the Kirby Defendants from denying liability and contesting the quantum of any claim.

11. The Limitation Action shall continue as a specially managed proceeding, pursuant to Rule 384 of the *Federal Courts Rules*. Any party shall be at liberty to seek orders and directions from the Case Management Judge concerning the completion of pre-trial steps, and any other relevant matter arising from the MLA, LLMC, Bunkers Convention, the *Federal Courts Rules*, or otherwise.

12. Kirby shall have its costs of these motions. If the parties cannot agree on costs, they can be addressed in written submissions, not to exceed three (3) pages in total length and without attachments or affidavits, to be served and filed within 15 days of the date of this Order.

"Cecily Y. Strickland"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-733-19 |
| **STYLE OF CAUSE:** | KIRBY OFFSHORE MARINE PACIFIC LLC, KIRBY OFFSHORE MARINE OPERATING LLC v HEILTSUK HIMAS AND HEILTSUK TRIBAL COUNCIL, EACH ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF HEILTSUK NATION |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | JULY 8, 2019 |
| **ORDER AND REASONS:** | STRICKLAND J. |
| **DATED:** | JULY 26, 2019 |

**APPEARANCES:**

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| Lisa C. Fong | FOR THE DEFENDANTS |
| David K. Jones | FOR THE DEFENDANTS |
| Jason R. Kostyniuk | FOR THE PARTY BY STATUTE |

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