

## ***Applying Indigenous Law in Environmental Prosecutions: Sentencing Hearing in Heiltsuk Nation leads to \$2.7M Fisheries Act Fine***

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April 20, 2020

On August 19, 2019, the British Columbia Provincial Court released the sentencing decision in *R v Kirby Offshore Marine Operating LLC*.<sup>1</sup> The accused pled guilty to one count under the *Fisheries Act*, s. 36(3), for unlawfully depositing diesel fuel into waters in the Seaforth Channel after a tugboat ran aground and sank. The accused was fined \$2.7 million for the *Fisheries Act* offence, which is one of the largest fines for an environmental offence in Canada.

The offence took place in Heiltsuk territory, and the sentencing hearing was conducted in the traditions of the Heiltsuk Nation with a Talking Circle. This unique approach integrated the familiar sentencing principles for environmental offences (i.e. deterrence, culpability, and harm) with the traditional laws of the Heiltsuk Nation.

### **The Offence**

In the early hours of October 13, 2016, the “Nathan E. Stewart” tugboat ran aground and sank at a reef next to Athlone Island in the Seaforth Channel, near Bella Bella, BC. The tugboat was pulling a barge. Both the tugboat and the barge were owned by the defendant Kirby Offshore Marine Operating LLC (“Kirby”).<sup>2</sup>

The tanks on the tugboat ruptured, spilling approximately 110,000 litres of diesel fuel and 2,200 litres of lubricants into the ocean.<sup>3</sup> The incident was attributed to the operator of the tugboat falling asleep, and failing to alter the tug’s navigational course to avoid the reef.<sup>4</sup> Kirby pled guilty to the offence.

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<sup>1</sup> 2019 BCPC 185 [*Kirby*].

<sup>2</sup> *Ibid* at para 1.

<sup>3</sup> *Ibid*.

<sup>4</sup> The Transportation Safety Board of Canada completed an investigation into the incident. See: Transportation Safety Board of Canada, “Marine Transportation Safety Investigation Report M16P0378: Grounding and subsequent sinking – Articulated tug-barge: Tug *Nathan E. Stewart* and tank barge *DBL 55*” (13 October 2016), online at: <<https://tsb.gc.ca/eng/rapports-reports/marine/2016/m16p0378/m16p0378.html>> [*TSBC Report*].

Kirby was also charged with and pled guilty to one count under the *Migratory Birds Convention Act, 1994*<sup>5</sup> for the unlawful deposit of diesel fuel and one count under the *Pilotage Act*<sup>6</sup> for unlawful pilotage by proceeding through an area without a licensed pilot.

### The Sentencing Hearing

The incident occurred in the traditional territory of the Heiltsuk Nation. A sentencing hearing took place at the community hall in Bella Bella, BC in the traditions of the Heiltsuk Nation with a Talking Circle. The Talking Circle was a solemn and tradition-filled forum, where members of the community had the opportunity to speak about the harm they experienced resulting from the incident through victim impact statements.

At the Talking Circle, the Hereditary Chiefs, elected Chief, and other members of the Heiltsuk Nation sat with counsel and the Court in a circle. Individuals from the community spoke about the impact the incident had on the community's resources and economy, and expressed "a sense of despair with the dissipation of the spiritual energy as the beaches and resources [were] soiled with diesel and oil."<sup>7</sup>

The Heiltsuk Nation is a self-governing nation with its own tribal council. Its history stretches 14,000 years. The Heiltsuk Nation exercises its rights to steward and harvest its resources throughout its traditional territories, and they depend on natural resources for food, health, traditional activities, their economy, and their cultural identity.<sup>8</sup> There were 9 salmon rivers, 56 clam beds, 18 cockle beds, and a northern abalone bed located near where the incident occurred. The Heiltsuk Nation traditionally harvests at least 25 species from the area that was impacted by the spill.<sup>9</sup>

### Application of Sentencing Principles

In *Kirby*, the Court considered familiar sentencing principles for environmental offences arising from the leading cases of *R v Terroco*<sup>10</sup> and *R v Brown*.<sup>11</sup> These principles include the defendant's level of culpability, the defendant's past record and involvement with authorities, whether the defendant accepted responsibility for or showed remorse for the offence, the damage and harm done by the offence, and deterrence.

<sup>5</sup> SC 1994, c 22.

<sup>6</sup> RSC 1985, c P-14.

<sup>7</sup> *Kirby*, *supra* note 1 at para 11.

<sup>8</sup> *TSBC Report*, *supra* note 4 at 1.18.5: Heiltsuk First Nation.

<sup>9</sup> *Ibid.*

<sup>10</sup> 2005 ABCA 141.

<sup>11</sup> 2010 BCCA 225.

The Court noted that the culpable conduct in this case fell towards the higher end of the degree of blameworthiness, even though the offence was not intentional.<sup>12</sup> The area where the spill occurred was actively used by the Heiltsuk Nation, and diesel is a highly deleterious substance which caused significant harm to a sensitive environment.<sup>13</sup> The defendant's guilty plea and post-offence conduct demonstrated acceptance of responsibility, as the defendant immediately attempted to mitigate the spill, and was cooperative throughout the subsequent investigation.<sup>14</sup> The Court noted that the spill occurred in an area frequented by many other vessels, and the Court fixed the fine so as to send a clear message to others that they owe a high duty to remain vigilant in protecting the sensitive environment.<sup>15</sup>

The parties presented a joint submission on sentencing, which was accepted by the Court. The defendant was fined \$2.7 million under the *Fisheries Act*, to be paid into the Environmental Damage Fund.<sup>16</sup> Kirby was fined an additional \$200,000 under the *Migratory Birds Convention Act, 1994*, and \$5,000 under the *Pilotage Act*, bringing the total fine to \$2,905,000. The sentencing judge noted that

The Heiltsuk Nation pointed out in the course of the Talking Circle that no amount of monetary fine could justify the damage that had occurred to their traditional lands. Their expressions of frustration and anger are understandable. Their heritage and traditional lands and waters were contaminated by the spill. These legitimate sentiments could never be properly addressed within the context of environmental prosecutions.<sup>17</sup>

The Heiltsuk Nation also requested that the defendant be banned from their traditional waters, although the court did not have the jurisdiction to do so.<sup>18</sup>

### Exercise of Indigenous Jurisdiction

In response to the incident, the Heiltsuk Tribal Council also established a committee, the Dáduqvłá Committee, to assess and adjudicate the spill in the context of Heiltsuk laws, known as Ğviłás, and prepare a written decision of its findings.<sup>19</sup> The Heiltsuk Tribal Council undertook this review as an exercise in self-governance and authority over its territory.<sup>20</sup> The Committee explained the principles of Ğviłás, reviewed the events

<sup>12</sup> Kirby, *supra* note 1 at paras 14-16.

<sup>13</sup> *Ibid* at paras 21-23.

<sup>14</sup> *Ibid* at paras 18-20.

<sup>15</sup> *Ibid* at para 24.

<sup>16</sup> *Ibid* at paras 33, 36, and 38.

<sup>17</sup> *Ibid* at para 34.

<sup>18</sup> *Ibid* at para 35.

<sup>19</sup> Heiltsuk Tribal Council, "Dáduqvłá qntxv Ğviłásax: Decision of the Heiltsuk (Hałzaqv) Dáduqvłá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill" (May 2018) at p 5, online at: <[http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk\\_Adjudication\\_Report.pdf](http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf)>.

<sup>20</sup> *Ibid* at p 6.

leading to the spill to determine if *Ĝviłás* were breached, considered the harm caused by the incident, and presented recommendations to all parties involved as to how they could make things right.

The Heiltsuk Nation has also brought a civil claim against Kirby. In the civil claim, the Heiltsuk Nation seeks compensation for lost harvest and cultural uses, and seeks declarations of Heiltsuk's title and rights.<sup>21</sup>

The actions taken by the Heiltsuk Nation are one of several recent examples where Indigenous communities have taken steps to exercise authority over their traditional territories. Outside of environmental prosecutions, we have also seen Indigenous communities take self-governance actions in the environmental assessment context.

For example, the Tsleil-Waututh Nation in British Columbia completed an impact assessment grounded in Tsleil-Waututh legal principles of the Trans Mountain pipeline expansion project.<sup>22</sup> The community examined the potential impacts of the project on the Tsleil-Waututh Nation's title, rights, and interests. A second example is Stk'emlúpsenc Te Secwépemc Nation in British Columbia, who completed an assessment of the KGHM Ajax Gold Mine project.<sup>23</sup> The community designed a review panel process founded on their laws and traditional governance structures to consider whether the Stk'emlúpsenc Te Secwépemc Nation gave their free, prior, and informed consent for the project.<sup>24</sup>

## Conclusions

The incorporation of Indigenous traditions makes *Kirby* notable among recent *Fisheries Act* prosecutions where companies have received million dollar fines. As Indigenous legal orders continue to be articulated and revitalised, we are likely to see more such collaborative approaches. See our recent updates to *Ontario Water Law*, [available electronically](#) on Proview from Thomson Reuters, to learn about recent enforcement action related to discharges to water.

<sup>21</sup> Heiltsuk Tribal Council, "R v. Kirby Offshore Marine Operating: Judge orders Kirby pay fine to Environment Canada Fund" (20 August 2019), online at: <<https://www.heiltsuknation.ca/r-v-kirby-offshore-marine-operating-judge-orders-kirby-pay-fine-to-environment-canada-fund/>>.

<sup>22</sup> Tsleil-Waututh Nation, Treaty, Lands & Resources Department, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (2015), online at: <[https://twnsacredtrust.ca/wp-content/uploads/TWN\\_assessment\\_final\\_med-res\\_v2.pdf](https://twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf)>.

<sup>23</sup> Stk'emlúpsenc Te Secwépemc Nation, "SSN Pípsell Report: For the KGHM Ajax Project @ Pípsell" (2017), online at: <<https://drive.google.com/file/d/0B92rPs-T5VkgWVpacENEWTM5MDA/view>>.

<sup>24</sup> Stk'emlúpsenc Te Secwépemc Nation, "Decision of the SSN Joint Council on the Proposed KGHM Ajax" (2017), online at: <[stkemlups.ca/files/2013/11/3-2017.03.04-SSN-Joint-Council-Decision-Document-.pdf](http://stkemlups.ca/files/2013/11/3-2017.03.04-SSN-Joint-Council-Decision-Document-.pdf)>.

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Document #: 1711379