

## MARINA OPERATOR'S LIENS

Marina operators in British Columbia often provide a broad range of services to vessel owners in addition to simply providing moorage. When a marina's bill is unpaid, it will almost always have a personal cause of action against the person who incurred the debt. However, in most cases the preferred course of action will be to attempt to assert some sort of lien over the vessel in order to secure the payment of the unpaid bill, obtain priority in case the owner has other unpaid creditors and to preserve the vessel so that it is not sold or lost at sea pending payment of the debt. The nature of the lien, which a marina has over a vessel, will depend on the nature of the service provided. This article will review liens and other related remedies of marina operators as they relate to the supply of fuel, moorage, and repairs to vessels.

### SUPPLY OF FUEL

A marina with an unpaid bill for fuel supplied to a vessel has a **statutory right *in rem*** (in other words “against the vessel”) pursuant to section 22(2)(m) of the *Federal Court Act*. This *Act*, as well as Rule 55 of the *Supreme Court Rules*,<sup>1</sup> gives a marina the right to arrest a vessel<sup>2</sup> to prevent it from being moved. After the vessel has been arrested, the marina can ask the court for an order that it be sold in order to pay its outstanding debts.

Although this can be a very effective remedy, it has a number of disadvantages:

1. Since it is necessary to commence a court action and retain a court appointed sheriff (commonly referred to as a marshall) to serve the warrant of arrest on the vessel, it is expensive, especially in outlying areas which do not have a local court appointed sheriff;

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<sup>1</sup> Rule 55(1) incorporates by reference the admiralty jurisdiction of the Federal Court of Canada.

<sup>2</sup> Or its sister ship if arrested in the Federal Court: see s. 43(8) of the *Federal Court Act*.

2. In order to arrest the vessel it is necessary to commence legal proceedings prior to any change in ownership of the vessel;
3. It is necessary that the fuel was ordered by the owner of the vessel or by someone who had the authority of the owner to order the fuel; and
4. In the event that the vessel is sold to satisfy the claim, the supplier of the fuel has no more priority than that of an ordinary unsecured creditor.

**REPAIRS**

By far, the most effective lien available to a marina for unpaid repair bills is the repairer's **possessory lien**. This lien allows the marina to retain the vessel until the repair bill has been paid and has priority over a mortgage. In order to have such a lien, the following conditions must be satisfied:

1. The work must have been done at the request of the owner or his agent (under some circumstances a request will be implied);
2. The repairer must have been given exclusive possession and control of the vessel in the sense that he can prevent the ship from being taken away;
3. The work must have improved the vessel (mere maintenance such as storage is not sufficient); and
4. The work must be completed (unless completion is prevented by the owner).

Unfortunately, since the British Columbia *Repairer's Lien Act* does not apply to vessels<sup>3</sup> the marina must maintain continuous possession of the vessel and cannot use the mechanism provided for in the *Act* for the sale of the vessel. There are some non-maritime cases involving motor vehicles where the courts have endorsed a practice of allowing motor vehicles to be released on a temporary basis without the loss of a

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<sup>3</sup> See *F.B.D.B. v. Finning* (1989) 34 B.C.L.R. 237 (B.C.S.C.).

possessory lien<sup>4</sup>. However to date, these cases do not appear to have been applied in the maritime context.

Another limitation of the repairer's possessory lien, which is of particular importance to marinas, is that a repairer cannot charge for moorage during the period that it is asserting its possessory lien.<sup>5</sup> In Ontario, where it appears that the constitutional validity of the Ontario *Repair and Storage Lien Act* has never been challenged, there are several cases allowing for storage charges to be claimed under the specific provisions of the Ontario *Act*.<sup>6</sup> There is at least one English court case which suggest that this rule could be avoided if the repair contract specifically provides that moorage or storage will be charged if a possessory lien is asserted.<sup>7</sup> However, in one British Columbia case involving a competing creditor, the court only allowed storage charges for the period when the repairs were being performed. Subsequent storage charges while the possessory lien was being asserted were denied.<sup>8</sup>

If a marina has given up possession of the vessel, or if it wishes to be in a position to continue to charge moorage, it may assert a statutory right *in rem* and arrest the vessel pursuant to s. 22(2)(n) of the *Federal Court Act*, as is the case with fuel.

## MOORAGE

Although there are surprisingly few cases directly on point, the writer is of the view that a marina has a **statutory right in rem** under section 22(2)(m) of the *Federal Court Act* for the supply of "services wherever supplied . . . for the maintenance of the ship".<sup>9</sup>

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<sup>4</sup> *Industrial Acceptance Corporation v. Tompkins Contracting Ltd.* (1967) 62 D.L.R. (2d) 693 (B.C.S.C.) and the cases referred to therein.

<sup>5</sup> See *Macnaughton v. Stewart* [1993] B.C.J. No. 1180 (B.C.S.C.); *C.I.B.C. v. Barkley Sound (The)* [1999] B.C.J. No. 512 (B.C.S.C.).

<sup>6</sup> *Giorgianni (c.o.b. Call Service) v. Schaer* [2005] O.J. No. 405 (Ont. S.C.); *Altenburger (c.o.b. Bayview Marine Resort) v. Buzaglo* [2000] O.J. No. 4438 (Ont. S.C.).

<sup>7</sup> *Delantera Amadora S.A. v. Bristol Channel Shiprepairers Ltd.* [1976] Lloyd's Law Reports 372 (Q.B.).

<sup>8</sup> *C.I.B.C. v. Barkley Sound (The)*, *supra* footnote 5.

<sup>9</sup> Although not specifically referred to, this is the section that appears to have been relied upon by the *Federal Court* in *False Creek Harbour Authority v. Shodun (The)* 2002 FCT 275 (Fed. Ct. T.D. when it gave the order for condemnation of the bail posted for the release of the ship.

A marina may also have a statutory right *in rem* under section 22(2)(s) of the *Federal Court Act* for "dock charges". If so, this particular claim survives a change in ownership. Unfortunately, this section does not appear to have received any judicial interpretation. However since this section appears to have been added as a result of the *Maritime Liens and Mortgages Convention, 1926*, it is likely that the term "dock charges" will be restricted to docks operated by public authorities as is the case in the *1926 Convention*.

As discussed above, one of the problems associated with a statutory right *in rem* is that it does not give any priority greater than that of a general unsecured creditor. A dock owner avoided the harshness of this rule in 1989 in the case of *Metaxas v. The Ship Galaxias* [1989] 1 F.C. 386 (Fed. Ct. T.D.). In this case, a creditor of the ship commenced a Federal Court action and placed the ship in the possession of a court appointed sheriff for the purposes of selling the ship. While the vessel was in the hands of the sheriff (and under arrest), a dock owner entered into an agreement with the sheriff to provide moorage to the vessel at an agreed upon rate. Several months later when the vessel was sold, the dock owner was paid by the bailiff, who had first priority to the proceeds of sale of the ship. In the more common cases nowadays, where the sheriff is not granted possession of the vessel, this same result can also be achieved by an application to the court, before the moorage commences, requesting that moorage be given the same priority as sheriff's expenses.<sup>10</sup>

In the case of derelicts, a marina is often more concerned with removing an unwanted vessel from its dock than it is with collecting outstanding moorage. In this case a court action based upon trespass along with an application for an injunction requiring the owner to vacate the dock may be the most appropriate remedy. Unfortunately, this type of remedy is of limited use because of the necessity of establishing irreparable harm and the necessity of having an owner available who has the means to move the vessel. It is most useful in the case of a deep-sea ship blocking a loading terminal.

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<sup>10</sup> Under some limited circumstances, moorage will be treated as Sheriff's costs even without such an application. See *Holt Cargo Systems Inc. v. Abc. Containerline N.V.* (2000) 185 F.T.R. 1 (Fed. Ct. T.C.).

One possible method of dealing with unwanted vessels is to give the vessel and its owner notice of termination of their tenancy in accordance with the terms of the moorage contract. At the same time, a letter should be delivered offering them continued moorage at a substantially increased rate with a term that continued occupation of the moorage slip after the date of termination would be deemed acceptance of the new moorage contract. With luck, the increased rent will be sufficient to cause the vessel to vacate. If not, after several months of moorage at the increased rate, the marina can proceed to have the vessel sold pursuant to its statutory right *in rem*. The increased moorage will help offset the legal and other costs involved in having the vessel sold by court order. This method is not known to have been tested in court.

**Statutory Authorities** such as the Small Crafts and Harbours Division of the Department of Fisheries and Oceans have extra powers not available to private marine operators. For example, section 14 of the *Fishing and Recreational Harbours Act* gives D.F.O. the authority to seize and sell abandoned vessels at harbours listed in the schedule to the regulations. Section 29 of the regulations provides that a vessel may not be removed until all charges have been paid. This *Act*, however, does not appear to apply to the numerous independent harbour authorities that are operating throughout Canada.

It is the writer's understanding that at the present time a number of marinas and harbour authorities are having derelicts sold pursuant to the provisions of the provincial *Warehouse Lien Act* by wording the moorage contract to include the word "storage" and/or incorporate by reference the provisions of the *Act*. In a case where there were no competing creditors, one Federal Court decision appears to have supported a seizure under this *Act*, although it appears that the marina did not rely upon the sale provisions of this *Act*.<sup>11</sup> However, given the constitutional case of *Finning Ltd v. F.B.D.B.*<sup>12</sup>, which held that the *Repairers Lien Act* of British Columbia was not applicable to boats, the *Warehouse Lien Act* may be subject to a similar constitutional challenge, especially in the

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<sup>11</sup> *False Creek Harbour Authority v. Shodan*, *supra*, footnote 11; see also *Mosquito Creek Marina v. Malecek* 2006 BCPC 139 (Prov. Ct.).

<sup>12</sup> *Supra*, footnote 3.

case of vessels that are moored in the water.<sup>13</sup> For vessels stored on dry land, the case for applying the *Warehouse Lien Act* is somewhat stronger.

**In summary**, the remedies available to marinas will depend upon both the type of service provided and whether or not the marina is operated pursuant to a statutory authority such as the *Fishing and Recreational Harbours Act*. If a marina is not operating under a statutory authority and it does not have a possessory lien, it only has a right to a statutory right *in rem*, which gives it no priority. Even if it has a possessory lien, it cannot give up possession of the vessel or sell it pursuant to the *Repairers Lien Act*. What is needed to change this situation is the enactment of federal legislation similar to the provincial *Repairers Lien Act* and *Warehouse Lien Act*.

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<sup>13</sup> See for example the unofficial tips for harbour authorities page of the Department of Fisheries website where it says: "Unfortunately, there is some uncertainty surrounding the application of the *Warehouse Lien Act* to fee collection. On the one hand, there has been a court decision that seems to indicate that the Act may apply if incorporated into a berthage agreement. On the other hand, Pacific Region has received a legal opinion that states that the *Warehouse Lien Act* cannot be applied to vessels." [http://www.dfo-mpo.gc.ca/sch/Fee/HA-AP-revenu\\_e.html](http://www.dfo-mpo.gc.ca/sch/Fee/HA-AP-revenu_e.html); See also *Ordon v. Grail* [1998] 3 S.C.R. 437.