

February 2010

A Double-Edged Sword: The Arrest of Vessels - Part 1

As a young deckhand working on the refit of my family's trawler in a Victoria shipyard, I remember clearly the surprise and anger of my father when confronted by a steely-eyed bailiff intent on taping an arrest warrant to the freshly painted mast. While there are more appropriate responses than hanging the bailiff from the boom by his trousers, it was as clear then, as it is now, that having your vessel arrested can be a startling and costly inconvenience. From another perspective, the ability to arrest a vessel is a tremendously powerful remedy, unique at law in many ways, that when wielded carefully and with honest intentions, can be extremely useful. However, like a double-edged sword, an arrest warrant used improperly can injure the person wielding it as much as their intended target. In part one, of a two-part series, on vessel arrests, we discuss the purpose of arrest, and explain its availability and procedure.

What is Arrest?

The arrest of property, such as a vessel and its equipment or cargo, is a legal mechanism that prohibits anyone from moving the property, typically in order that the property can serve as security for a claim. The need for arrest comes from the fact that vessels are highly movable objects that can travel with relative ease from country to country, and in and out of the jurisdiction of their courts. When a claim involving a vessel is brought in one court, the ability of a successful litigant to obtain their reward often depends on whether there is a valuable asset within legal reach of the court that can be sold to pay the claimant. Arrest ensures that the vessel, or bail in place of the vessel, remains within reach of the claimant while their dispute is resolved by the court.

Freezing the vessel in place is a key benefit to arrest. A vessel when arrested cannot, for example, leave the dock that it was arrested at without permission of all the parties to the dispute, or permission of the court. The same is true of any equipment which forms part of the vessel, or ordinarily forms part of the vessel despite not being on the vessel at the time of the arrest. For example, a main engine removed prior to arrest of the vessel would also be subject to the arrest affected on the vessel itself.

Arrest does not change who has possession of the vessel or its equipment. That is, simply because you arrest a vessel does not mean you are in possession of it. An arrested vessel remains in the possession of the person who had it prior to the arrest, and that person is responsible for the costs of moorage and upkeep as if it were not arrested. The important exception to this is that a repairer who asserts a possessory lien on a vessel (refuses to release the vessel until their bill is paid) loses lawful possession of the vessel if they arrest it, even though the vessel never moves. This means the repairer's claim (a possessory lien) no longer ranks ahead of other important creditors, such as mortgagees. In this way, while arrest may be a powerful tool, there are costly downfalls to using it at the wrong time.

Arrest also does not technically prevent a vessel from being bought or sold. However, the practical reality is that it is very difficult to sell an item that is plastered with legal papers and is prohibited from being moved. Arrest also does not stop property from being mortgaged or otherwise pledged as security, but for the reasons just stated, it is unusual that a vessel is used as security for a loan while it is arrested.

When is Arrest Available?

A vessel can be arrested when it is the subject of a claim that the court has given itself “in rem” jurisdiction over. *In rem* is latin for “against the thing”, and refers to the court’s authority over objects, as opposed to authority over people. Along the B.C. coast, the Federal Court of Canada and the B.C. Supreme Court each have *in rem* jurisdiction over a lengthy list of vessel-related disputes, including matters relating to: ownership or possession, mortgages or financing agreements, loss of life or personal injury, damage to cargo or another vessel, carriage or unloading of goods, salvage, towage, pilotage, construction, repairs and supplies, seamen’s wages, marine insurance, and dock charges.

In most of these disputes, arrest of the vessel must be obtained before ownership of the vessel changes from the person who owned the vessel when the claim arose. The exception to this is a claim which gives rise to a *maritime lien*, which is a special lien that follows the vessel through changes in ownership. For example, claims for salvage, collision damage, and seamen’s wages give rise to the right of arrest even though the new owner has no idea the claim existed when they bought the vessel, and the lien appeared on no registry. Until recently, repairers and suppliers to vessels were prevented from arresting after the vessel changed ownership, but due to recent changes in the *Marine Liability Act*, a repairer or supplier can arrest even after ownership changes, but only if the vessel is a foreign flagged vessel. The Federal Court, but not B.C. Supreme Court, also allows for sister-ship arrest, which is the arrest of a ship that belongs to the same owner as the ship that is being claimed against. This is useful if the first vessel is not available for arrest, but her sister is.

What is the Procedure for Arrest?

The arrest of a vessel is achieved by asking the court to issue an “arrest warrant”, and having a person authorized by the court serve the warrant on the vessel. In British Columbia, arrest warrants can be issued by either the Federal Court of Canada, or the B.C. Supreme Court. The Provincial Court of British Columbia (Small Claims Court), whose jurisdiction includes most disputes up to \$25,000, does not have jurisdiction to issue arrest warrants. However, a person is often justified bringing an *in rem* claim for less than \$25,000 in B.C. Supreme Court in order to obtain a warrant.

In both Federal Court and B.C. Supreme Court, the warrant is obtained by filing: a claim, an affidavit to lead warrant, and a draft warrant. The requirements of the claim are that it describe a claim within the *in rem* jurisdiction of the court, including those referred to above. The

requirements of the affidavit to lead warrant are slightly different in Federal Court than in B.C. Supreme Court, but in both cases the affidavit must describe the *in rem* claim, its relationship to the vessel being arrested, and that it is unsatisfied. If the claim and affidavit have no irregularities, the court registry will typically automatically issue the warrant and provide it directly to the bailiff for service on the vessel. The person who sought the warrant must pay for the bailiff services and typically directs the bailiff where to find the vessel. A Federal Court warrant can be served by either a bailiff or a RCMP Constable, but a B.C. Supreme Court warrant can only be served by a court bailiff. Because flying a court bailiff into remote areas, where the RCMP exist anyway, can be very expensive, it is typically better to rely on Federal Court warrants when arresting in more remote areas of the coast.

When serving the warrant the bailiff will typically seek to place the warrant on a conspicuous spot on the vessel, such as the mast or helm, or galley or wheelhouse door. The bailiff is authorized by the court to board any vessel, and interfering with the bailiff or harming him, Dad, is a criminal offence. Moving the vessel, removing its equipment, or removing the warrant of arrest can result in being held in contempt of court and a fine.

In the upcoming second part of this series on vessel arrest, we will discuss avoiding and removing arrest warrants, and the consequences of improper motives for arrest.

Darren Williams, retired mariner, is a marine lawyer leading the interprovincial Merchant Law Group LLP office in Victoria B.C. and can be reached for question or comment at dw@MarineLaw.ca, toll-free at 1-866-765-7777 or by emergency phone at 250-888-0002.