

Marine Law Myths: Registering Liens on Vessels

A *lien* is neither easy to define, nor easy to understand, but almost everyone knows that a lien is something they don't want on their property. Whether you are buying a home, a vehicle, or a boat, almost every buyer will consider whether what they are buying has a lien on it. This is because a lien is a legal right that someone else has in that property, typically as a result of them providing some material or service to the property, that can interfere with your use and enjoyment of it. When buying a house for example, you may search the Land Title Registry to see if there are any builder's liens placed on the property by building contractors, and to ensure the vendor removes them before they receive all of your purchase money. The same is typically true of buying a vehicle, which might have a mechanic's lien on it as a result of work that was done to the vehicle but not paid for by the previous owner. Ignoring either of these liens can result in someone trying to seize and sell your property to collect the money for their lien. Liens on vessels, however, have a unique history and character and readers are well advised to understand the following points of law.

The Rationale of Liens and Registering Liens

The principle of liens developed many hundreds of years ago as a way of protecting people, who put effort and materials into preserving or bettering another's property, from the risk of not being paid when that property was taken from them or sold to another person. For example, a farrier who shod a horse and was not paid before the horse was taken from him had a lien on the horse for the value of his work and materials. A farrier who maintained possession of the horse until he was paid was in the best position, having a *possessory lien* which put his claim in priority to almost all other creditors, but often this was bad for business because the farrier's customer needed the horse to earn money to pay the farrier's bill. It was a catch-22 for the farrier: release the horse and risk not getting paid, or keep the horse and have an unhappy customer who can't afford to pay the bill because he can't work without his horse. Commerce dictated, and the law would evolve to allow the farrier to give up possession of the horse without losing his lien. While the unpaid farrier could release the horse and pursue the owner for payment with a lien against the horse, the law held that if a *bona fide purchaser* of the horse (someone not in cahoots with the persons trying to sell the property to avoid the debt) bought the horse without notice of the lien, the farrier lost his lien.

As the law evolved and the value of labour and material (and therefore liens) increased, governments began providing for public registries where liens could be registered against property and therefore could be searched by potential buyers. This was intended to encourage commerce and protect tradespeople by placing a burden on the person buying the property to check the registry for liens. The law evolved to the effect that a buyer that did not check a registry for a lien that was indeed registered could not claim they were unaware of it, and therefore were stuck with the lien on their newly purchased item.

In British Columbia, like many jurisdictions, this history is now evolved into a system where liens against land must be registered in the Land Title Registry, and liens against personal property (such as vehicles) must be registered in the Personal Property Registry – each are publicly accessible and maintained by the provincial government. If the liens are not registered and periodically renewed, in most cases, the lien is lost either after a short period of time following the work being completed or when the person claiming the lien giving up possession of the property. Under most provincial repairer’s lien legislation, for example, a repairer can give up possession of the repaired item and yet retain a possessory lien if the lien is properly registered. This possessory lien (without actual possession) gives the repairer a high priority against competing claims.

Myth #1: A repairer who Gives up possession of a Vessel can rely on their registered lien

While it is often understood a lien on a vessel can be registered against a vessel in the provincial Personal Property Registry because the B.C. *Repairers Lien Act* refers to liens being registered against “boats”, this does not mean that the registered repairer’s lien will be effective in preserving the repairer’s priority if they give up possession and there are other lien claimants involved (such as a mortgage holder). Canadian courts have consistently held that the ranking of lien holders in respect of vessels is a matter of *Canadian maritime law*, and that *Canadian maritime law* is a body of federal law that trumps provincial law that contradicts it. Under *Canadian maritime law* a vessel repairer must maintain possession of the vessel in order to preserve their possessory lien. Therefore, even though a repairer may have registered their lien in the Personal Property Registry, the repairer loses their possessory lien, and the priority it gave them to rank over many other lien holders, if they give up possession of the vessel.

Myth #2: A “maritime lien” is any lien on a vessel

A maritime lien is not any lien on a vessel. A maritime lien is a special type of lien that does not need to be registered, nor can it be registered. It travels with the vessel wherever it goes, even into the hands of a *bona fide purchaser* without notice (a completely unsuspecting buyer) – hence the court has called maritime liens “secret liens” (see Myth #3 below). Maritime liens do not arise whenever work is done to a vessel. A maritime lien in Canada only arises for the following types of claims against a vessel: for salvage work, for collision damage, for crew wages, and for master’s disbursements. A Canadian repairer cannot have a maritime lien against a vessel. A maritime lien gives the holder priority over most other lien holders, including prior registered mortgages.

Myth #3: “Checking to see if there is a lien on a vessel”

Correctly or not, liens against vessels are often registered in the Personal Property Registry, and buyers may check this registry for such liens. However, it is a myth that, if the registry search does not reveal a lien registered against the vessel, there is no lien on the vessel. Maritime liens, or “secret liens” can encumber the vessel without appearing on the federal Ships Registry or the Personal Property Registry. These maritime liens can rank ahead of even mortgages, so you can imagine the bank’s surprise if you buy a vessel with borrowed money and the bank later learns there is a maritime lien on the vessel for more than the vessel is worth. This raises the important point that purchasers of vessel ought to insist on the vendor of the vessel warranting the vessel “free and clear of all liens”, as well as doing some pre-purchase research to see if there are, for example, any unpaid crewmembers or salvors that may have maritime liens against the vessel.

Myth #4: “Putting a lien on a vessel”

I am often asked to “put a lien” on a vessel for an unpaid crewmember, someone who has been injured on a vessel, or someone who has assisted in the salvage of a vessel. There are two aspects to the myth that you can “put a lien” on a vessel.

Firstly, the federal Ships Registry does not allow for the registration of just any lien on vessels. The *Canada Shipping Act 2001*, which sets out the powers of the Ships Registry, allows only for the registration of mortgages and bank financing agreements. Therefore, repairers or unpaid moorage providers, for example, cannot “put” a lien on a vessel using the federal Ships Registry.

Secondly, true maritime liens exist as a matter of law, in that they arise when the act that they depend is completed, and not when any lien is registered. For example, the salvor’s maritime lien arises when they are successful in saving the stricken vessel, and the unpaid crewman’s maritime lien arises as soon as they go unpaid when they ought to have been paid – neither needs to be registered in any registry in order for the claimant to have a lien on the vessel. In other words, there is no need for a maritime lien-holder to “put” or “register” their lien on the vessel.

Myth #5: “Removing a lien from a vessel”

A true maritime lien can only be removed from a vessel by agreement of the lien holder or by court order. The lien will travel with the vessel from buyer to buyer wherever it goes until the lien holder relinquishes the lien or the court orders it removed. Often, when a vessel that is subject to a maritime lien is being sold, the court will order the vendor of the vessel to pay into court monies equivalent to the claim of lien (plus an amount for interest and legal costs) which becomes the “bail”. The ship is then sold “free and clear” of the lien, and the lien claimant and vendor are left to fight over the money held by the court. In this way, if there is a dispute about the lien, the dispute does not necessarily have to be resolved before the vessel can be sold “free of all encumbrances”.

If someone has taken steps to register a repairer’s lien on a vessel under the *Repairers Lien Act*, the lien can be removed by court order, or with the consent of the party who registered the lien, or as a result of the person who registered the lien not keeping the registration up to date as required by most provincial legislation. Again though, simply because the lien is registered does not make it effective against other lien holders because provincial law cannot change the order of priorities of claimants over a vessel because that order is set by *Canadian Maritime Law*.

Conclusion:

I started writing this article when I heard a radio advertisement for a title-search company which told customers they could, for a fee, determine (by searching the registry) whether a vehicle or boat they were buying was free of liens. While this statement may be true about motor vehicles, it is not true of all liens on vessels. Maritime liens are unregistered liens or “secret” liens that can travel with the vessel from owner to unknowing owner. Anyone buying a vessel should be keenly aware of their unusual nature – failure to do so can be an expensive lesson.

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