

## **Seashore Eyesores and Canada's Plague of Unwanted Vessels –**

### **Part 1: The Right of Reasonable Anchorage v. Permanent Moorage**

Like many other coastlines, the British Columbia coastline is littered with hundreds of neglected and abandoned vessels of all shapes and sizes. From small wooden sailboats to large steel tugs, these vessels typically end up where they are not wanted because the owner cannot find, or more often cannot afford, a more appropriate place to moor or dispose of them. Some vessels are genuine navigational hazards, others are serious pollution risks, the rest mere irritants. While several other marine jurisdictions, such as Washington State, California, Texas and Florida, have implemented aggressive and successful programs to remove unwanted vessels, Canada's onion-like layers of government have left frustrated mariners and waterfront landowners crying over what to do about these seashore eyesores. In this first of a series of articles on this growing problem, we will discuss the often abused right of reasonable anchorage, and whether a public right of permanent moorage (to a buoy) actually exists.

#### **Freedom of Navigation and the Right to Anchorage:**

Anchored or secured to a mooring buoy, and faced with criticism that their vessels are eyesores or navigational hazards, vessel owners often rely on the legal right of anchorage to resist having to move their vessel. The right of anchorage is incidental to one of the oldest legal rights in Canada, the freedom to navigate on tidal waterways. This holiest of marine rights, however, is often misunderstood, and therefore misused or even abused. Two reasons for this misuse relate firstly to the condition that the right to anchor be used reasonably, and secondly to the difference between anchoring a vessel, and mooring a vessel to a permanent buoy.

#### **The Test of Reasonable Anchorage:**

In a December 2009 judgment of the B.C. Provincial Court (*R. v. Lewis*), the Court considered the issue of reasonable anchorage as a right. The Court was asked whether a federal regulation (the *Boating Restriction Regulations*) under the then *Canada Shipping Act* could restrict anchoring in Vancouver's False Creek to those vessels that had been issued a permit. The vessel owner, who had been fined and ordered to move, argued, among other things, that he was exercising his right to navigation by anchoring in False Creek and that his constitutional Charter right to life, liberty and security of person was violated by the restriction on anchorage. The court provided this useful commentary:

*There is a common law right to navigation which includes the incidental right to anchor: Halsbury's Laws of England 2004 Vol. 49(3) 475-477. This is not a right to*

*anchor or moor permanently but it must be exercised reasonably as determined by the circumstances at the time of anchoring such as the weather, loading or unloading of the vessel, or the need for repairs to the vessel. The right to anchor therefore contemplates the right to do so for a reasonable time, for a reasonable purpose. Both the right to navigation and the right to anchor must not be exercised so as to interfere with the equal rights of others. These rights to navigate and anchor have paramountcy and can only be modified or extinguished by an authorizing statute.*

The Court, in dismissing the vessel owner's request to strike down the law restricting anchorage in False Creek, found the *Boating Restriction Regulations* were within the federal government's jurisdiction over navigation and shipping, and the prohibition was a reasonable one given the confined space of False Creek and the high demand by vessels.

### **Anchoring v. Mooring**

The second common misuse of the right to anchorage is that often the vessel seeking to rely on this right is not anchored at all, but rather moored (to a mooring buoy). For this discussion of the law, and while obvious to most readers, *anchoring* is a temporary manner of securing a vessel to the seabed using tackle that is intended to be hauled aboard the vessel, while *mooring* is a more permanent method of securing the vessel to the seabed using "ground tackle which is not intended to be, and cannot conveniently be taken on board the vessel using it in the ordinary course of use" (*Harris, D. – The Law of Moorings, 2005*). Concrete blocks, with a float, is a common example of a mooring.

While it is clear in Canadian law there is public right of reasonable anchorage, it is far from clear that there is a public right to long term or permanent moorage. In early cases from the United Kingdom, on which much of Canadian maritime law relies, the right of permanently mooring to a buoy was seen as similar to the right of anchoring (ex. *A.G. v. Wright, 1897*). Early Canadian cases referred to such U.K. cases without ever specifically deciding the issue for Canadian mariners. Critics of this view asked "if one parks a vessel on a mooring for...6 months, without moving at all, how can that be navigating? How can the bed owner have no right to disturb a moorer, who is otherwise effectively claiming the exclusive use of a bit of his land on a permanent footing?" (*D. Harris*). "A man may not use the highway to stable his horse" was a common maxim in the debate. Then in the 1967 a Scottish court clarified U.K. law, ruling that the public right of navigation did not include a right of permanent moorage (*Fowley Marine v Gafford*). Although Canadian courts have not expressly decided the issue, the U.K. law deals with identical issues, and may well persuade Canadian courts given similar problems in Canada.

## **No Right to Permanent Moorage?**

If the law is decided in Canada that permanent moorings are not part of the public right of navigation, the result is that in order to place, maintain and use a permanent mooring, you need the permission of the owner of the seabed. In the absence of such permission the buoy is trespassing, and the court can order the trespass to cease (the mooring be removed). At this point it is common to assume the federal government has the final say on whether permanent moorage can be established or maintained, but that assumption would be a mistake, for two reasons.

Firstly, in most cases along the B.C. coast where vessels are moored, the Provincial government owns and controls the seabed, or has leased the seabed to a local government or individual. It is this party that has the right to decide whether a trespass is committed. Secondly, in the absence of a public right to permanent moorage, even though the federal government has exclusive authority to control aids to navigation across Canada, its permission to place a private buoy does not replace the landowner's right to prohibit the permanent buoy from trespassing on their seabed. On the other hand, the owner of the seabed's power to allow permanent buoys is subject to the Department of Transport's discretion to remove the buoy if it interferes with navigation or does not comply with marking requirements.

In short, there are many vessels that improperly rely on the right of anchorage by remaining anchored beyond what is reasonable given the circumstances, and there are many vessels that utilize permanent mooring buoys when in fact no such right to moor may exist. The obvious question is what remedy does a mariner, landowner, or government body have against a vessel that has abused its right to anchor, or has no right to moor? These remedies will be discussed in subsequent articles in this series on seashore eysores.

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