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MARINE LAW MYTHS: REGISTERING LIENS ON VESSELS

By Darren Williams. Mr. Williams is a partner at Williams & Company in Victoria, B.C., which specializes in Marine & Admiralty law. This article first appeared in Mariner Life and is also posted on the firm's Web site at www.marinelaw.ca. Mr. Williams can be contacted at dw@Marinelaw.ca or 1-866-765-7777. This article is reproduced with permission. © Williams & Company.

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.

Inside

Federal Developments	4
Provincial Developments	
British Columbia	5
Ontario	5

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.

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For CCH Canadian Limited

STEPHANIE MAH, B.A. (Hons.), LL.B., Team Leader/Writer
(416) 224-2224, ext. 6442
e-mail: Stephanie.Mah@wolterskluwer.com

HYUN JOO KIM, Editor
(416) 224-2224, ext. 6282
e-mail: hyunjoo.kim@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Cheryl.Finch@wolterskluwer.com

FARIDA KARIM, B.A., Marketing Manager
(416) 228-6138
e-mail: Farida.Karim@wolterskluwer.com

© 2009, CCH Canadian Limited
90 Sheppard Ave. East, Suite 300
Toronto, Ontario M2N 6X1

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 a 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 Ship-*

ping 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.

FEDERAL DEVELOPMENTS

Canada and the United States Work Together To Cut Air Pollution From Shipping

On April 9, 2009, Canada’s Transport Minister, John Baird, and the Honourable Jim Prentice, Minister of the Environment, announced the federal government’s support for a joint Canada–U.S. proposal to the International Maritime Organization (IMO) to establish an Emission Control Area (ECA) in North American coastal waters to help reduce air pollution, smog and acid rain and to benefit human health in coastal areas.

The proposed Canada–U.S. ECA would require large ships operating in the designated areas to abide by stringent standards. Specifically, to reduce their nitrogen oxides emissions by 80 per cent and sulphur oxides by 96 per cent. Emissions of fine particles will also be reduced.

“Since we share waterways, economic ties and an environment, it just makes sense that Canada and the United States work together to reduce pollution from shipping and keep people healthy”, said Minister Baird.

An IMO committee will review the proposed ECA this July, with formal adoption expected in March 2010. Once approved, Transport Canada will develop supporting regulations under the *Canada Shipping Act, 2001*. The Government of Canada is confident that these stringent emission standards will improve the environment and the health of Canadians.

“An Emission Control Area will significantly reduce air pollution levels on our coasts, which means cleaner air to breathe and fewer pollutants deposited in our forests, wetlands, lakes and rivers”, said Minister Prentice.

The federal government has consulted with stakeholders in the marine industry, provincial governments, environmental groups, and community groups in both countries over the last three years. Stakeholders can also

provide comments as the proposal makes its way through the international approval process at the IMO.

Transport Canada and the RCMP Move To Improve Airport Security

Canadian travellers will be safer as a result of a new information-sharing agreement to conduct expanded criminal background checks for workers with access to secure areas in Canadian airports. The agreement between Transport Canada and the RCMP was signed on April 8, 2009, within the 10-day deadline given by Canada’s Transport Minister, John Baird.

This Memorandum of Understanding will allow for greater information sharing between the RCMP and Transport Canada and will enable Transport Canada to base security clearance decisions on more complete data from a broader range of intelligence sources.

“We have a duty to keep Canadians safe and secure when they travel”, said Minister Baird. “This agreement is a big step forward in protecting Canadian passengers and employees against potential threats.”

Transportation security clearances are granted to individuals who, by the nature of their work, require access to restricted areas of airports. Clearances are granted only to applicants who are not considered a risk to transportation security.

This Memorandum of Understanding is part of the Canadian government’s ongoing effort to enhance national security intelligence and information sharing. Before finalizing the new agreement with the RCMP, Transport Canada had already reviewed the criteria and procedures for security clearance decisions, and drafted a stronger set of guidelines.

Canada and Japan Expand Bilateral Air Transport Agreement

Canada and Japan have reached an agreement to expand the existing bilateral air transport agreement between the two countries to benefit trade, tourism and investments in Canada’s economy.

“This expanded agreement will be of considerable benefit to Canadian business”, said the Honourable Stockwell Day, Minister of International Trade and Minister for the Asia-Pacific Gateway. “This agreement will permit Canadian citizens to fly directly to regions in Japan outside of Tokyo, making their travel more efficient. As well, it will help create new jobs for our economy, expand market potential and build connections for our citizens across the important Asia-Pacific Gateway.”

This expanded agreement allows airlines to offer unlimited services between Canada and any Japanese city outside of the Tokyo area. It also allows, for the first time, under certain conditions, access to Haneda Airport, Tokyo’s metropolitan airport. The agreement further includes modernized aviation safety and security provisions and provides mechanisms for airline prices to adapt faster to market fluctuations.

This new agreement marks further progress in the Government of Canada’s Asia-Pacific Gateway and Corridor Initiative (APGCI). The \$1 billion APGCI is a national initiative that focuses on ensuring Canada’s competitiveness in global commerce, including air services, while also benefiting local communities by improving the safety, security and environmental sustainability of the transportation system in the long term. In the two years since the Government of Canada launched this initiative, strategic infrastructure projects valued at over \$2.6 billion have been announced across all four western provinces, including a total federal contribution of almost \$1 billion from the APGCI and other sources.

PROVINCIAL DEVELOPMENTS

British Columbia

Canada–B.C. Partnership Completes Border Crossing Improvements

On April 3, 2009, the governments of Canada and British Columbia celebrated the completion of five vital improvements to the Lower Mainland’s border crossings. These five-year, \$290 million Border Infrastructure Fund projects will improve trade and tourism, and improve B.C.’s economy.

Kevin Falcon, British Columbia’s Minister of Transportation and Infrastructure, and Russ Hiebert, Member of Parliament for Surrey-White Rock-Cloverdale, celebrated this project, which was completed on time and on budget, and

expressed their gratitude to all individuals who worked on these improvements.

“Everyone in British Columbia and Canada will benefit from the completion of the Border Infrastructure Program”, said Minister Falcon. “The improved transportation corridors have increased safety and efficiency for all road users and will significantly enhance the economy in Canada, British Columbia and the Lower Mainland.”

More than 1.3 million trucks pass through the Lower Mainland’s four border crossings each year, carrying goods in excess of \$24 billion. The \$290 million Border Infrastructure Fund is a cost-shared program between the Government of Canada and the Government of British Columbia that funded improvements to key sections of the province’s road network leading to the region’s four border crossings. These improvements have also resulted in enhanced links between border crossings and ports, container facilities, industrial parks, airports and rail facilities.

Ontario

Canada and Ontario Invest in GO Service Improvements

GO Transit riders will benefit from an additional \$213 million in service improvements as part of the \$500 million joint investment between the governments of Canada and Ontario. These projects will reduce wait times for commuters and get more cars off the road.

“These investments in public transit will give people more time with their families while also creating jobs and making a real difference to the communities GO serves”, said Canada’s Minister of Transport and Infrastructure, John Baird. “We’re getting people moving, and the economy going.”

The April 3rd announcement builds upon the \$249 million in federal and provincial funding previously announced by Prime Minister Stephen Harper and Premier Dalton McGuinty for expansion of GO Transit parking facilities across the Greater Toronto Area and the Hamilton Junction rail-to-rail grade separation project, bringing the total commitment to date to \$462 million. The remainder of the joint Canada–Ontario commitment will be confirmed in the near future.

In addition to maintenance activities across the system, GO will use the federal and provincial funding to refurbish locomotives and purchase new two-level pas-

senger rail coaches, install snowmelt systems and build bicycle shelters.

Canada and Ontario To Create Jobs and Improve Mobility in Winsor-Essex

Advance construction has begun on the Howard Avenue CPR grade separation project thanks to an investment by the Canadian and Ontario governments. The project will reduce road congestion, improve commute times and create new jobs for the local community.

Gagnon Demolition Inc. of Essex County began demolition of the Ziebart Tidy Car building on April 6, 2009, prior to construction of the main grade separation contract. Demolition of this building will not affect traffic and the Ministry of Transportation is working with the City of Windsor to mitigate any impacts to businesses and residents in the area. The value of this demolition project is approximately \$40,000 and work is expected to be complete by May 15, 2009. Tenders for construction of the main grade separation project will be announced later this spring with work beginning in the summer.

The contract for the construction of the rail bridge structure and grade separation will be tendered and awarded later this spring with work expected to start later this summer. This project was jointly funded by the governments of Canada and Ontario under the Let's Get Windsor-Essex Moving strategy, a \$300 million commitment for several transportation infrastructure projects that will improve efficiency and reduce congestion in Windsor-Essex. Funding for this strategy comes from the Canada-Ontario Border Infrastructure Fund.

"I am proud of this investment by the Government of Canada. It will pave the way for future border crossing infrastructure improvements which will, in turn, boost our local economy and encourage trade and tourism in our region", said Jeff Watson, Member of Parliament for Essex. "The advance construction of the Howard Avenue rail separation will also provide much-needed jobs now to support the economies of Windsor-Essex, Ontario and Canada."