December 2012

Legal Net

Boat Builders Beware: No Maritime Lien for "Construction" of Foreign Vessels?

Canadian boat builders beware, if you are involved in the construction of a foreign vessel in Canada, you do not have the protection of a maritime lien for the unpaid value of your goods and services. In recent weeks the Federal Court of Canada has released the decision in *Comfact Corporation v. Hull 717*, and clarified that amendments made to the *Marine Liability Act* in 2010 do not include protection for the value of goods and services rendered in *constructing* the vessel.

"Hull 717"

The background facts in the *Hull 717* decision are not rare in the industry. Davie Yards Inc., a Quebec shipyard, was contracted by a Norwegian company to build *Hull 717*. Davie sub-contracted the welding work on Hull 717 to Comfact Corporation. Comfact undertook the welding work, but before Comfact was fully paid, Davie Yards became insolvent and its assets, including *Hull 717,* were sold to unrelated parties. The Export Development Canada bank held a mortgage on the vessel and claimed that its mortgage ranked ahead of the money owed to Comfact. Because the proceeds of the vessel sale were less than the total amount of the mortgage and Comfact's claim, the court had to determine which claim had priority to the proceeds of the vessel.

What makes the *Hull 717* decision important is that it is the first Canadian decision to consider how the law relating to maritime liens for construction work done on foreign vessels in Canada has changed in recent years, and it confirms that boat builders are not given the protection they might like.

Why is a Maritime Lien Useful?

Why is a maritime lien beneficial to a Canadian boat builder? Canadian maritime law provides a right to sue a vessel (as though it were a person) if the owner of the vessel is also personally liable for the claim. This right to sue the vessel is called a *statutory right in rem*. The statutory right *in rem* is useful because if the owner is insolvent or cannot be found, a claimant can sue, arrest and sell the vessel to satisfy its claim. The claimant must show however that there was some behavior or attitude on the part of the owner that they intended to be liable for the goods or services supplied to the vessel. For example, a repairer could not contract with another repairer to take on part of their job without the knowledge of the owner, and then sue the owner and vessel when the other repairer did not pay their invoice. Another limitation of the statutory right *in rem* is that the claimant loses the right to sue the vessel if ownership changes hands before their claim is filed in court.

While useful, the statutory right *in rem* is far less powerful than a maritime lien. Unlike a statutory right *in rem*, the maritime lien is not lost if ownership of the vessel changes hands before a claim if filed in court. A maritime lien claimant also has priority over many other types of creditors, including mortgages.

How the Law Changed in 2010

Prior to 2010, Canadian businesses that supplied goods and services to a vessel may have had a statutory right *in rem* against the vessel (if the owner was liable for the claim as well), but they did not have a maritime lien for the value of those goods or services. As the court stated, "the enactment of section 139 of the *Marine Liability Act* in 2010 changed Canadian Maritime Law. It created a maritime lien where none existed before".

That Canadian businesses did not have a maritime lien for their goods and services prior to 2010 was seen as unfair because, for example, under American maritime law the same type of claimant was given a maritime lien, which was recognized in Canadian courts. As a result, if a vessel came into Canada having had work completed in the U.S. and then had work done in Canada, the claim by the American business would outrank the claim by the Canadian business because the former was a maritime lien and the latter was not. This was the mischief that the 2010 amendment to the *Marine Liability Act* sought to correct.

Section 139 provides that a person carrying on business in Canada, has a maritime lien for "goods, materials, or services" wherever supplied to "foreign vessel" for its "operation or maintenance" including "stevedoring or lighterage" and for work relating to the "repair or equipping" of the vessel. As an aside, although an outdated term, readers may know that lighterage is the fee for moving cargo within a port, such as from ship to dock by barge. Immediate logic may have it that goods and services supplied to construct a vessel would be included in the protection offered by s.139 as they are goods or services supplied for the maintenance or equipping. Confact, who supplied welding services to Hull 717 argued such, but the court disagreed.

Why Section 139 Does Not Apply to Vessel Construction

The *Hull 717* decision is important because in it the Court concludes that the value of the welding work completed on the hull did not fall within s.139. In arguing its claim was a maritime lien under s.139, Comfact maintained its services were for the "operation, maintenance, repair or equipping" of Hull 717, terms used in s.139. The bank replied the services were by way of vessel "construction" and there was a distinction between work related to the construction of a vessel, and work related to operating, repairing, maintaining or equipping".

The court noted its jurisdiction to adjudicate claims arising out of contracts for the "construction" of vessels was specifically described in s.22 of the *Federal Courts Act*, and further noted the absence of the same term in the *Marine Liability Act*. The court stated: "in my opinion, the answer to this case lies in the insertion of the word "construction" in section 22(2)(n) of the *Federal Courts Act* and its exclusion in section 139(2)(b) of the *Marine Liability Act*". In essence the court found that if Parliament had wanted to provide claim for construction under s.139 they would have used the word "construction". The court went to say: "I cannot accept that the failure to mention "building" or "construction" in section 139(2)(b) of the *Marine Liability Act* was a slip. Parliament could not have intended to grant a maritime lien to those engaged in the construction of a ship, such as the plaintiff in this case".

Assuming the court's conclusion is correct, there are a variety of reasons Parliament may have not intended to afford Canadian boat builders the protection offered by s.139. Two reasons raised by counsel in *Hull 717* decision are that builders can retain title of the vessel until they are paid, or they can retain possession of the vessel. Alternatively, another partial reason is that given the intent of s.139 was to afford the same protection to Canadian suppliers as is given to their American counter-parts, a claim by a Canadian builder (as opposed to a repairer of a vessel built years previous) is less likely to face a competing claim by an American supplier if the vessel was under construction in Canada and therefore had never left Canada. Undoubtedly, more cases will follow which further define the limits of protection given by this important section of the *Marine Liability Act*.

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