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Seashore Eyesores, Part II – All the Work, None of the Reward?

The Canadian Coast Guard's (Proposed) Duty of Derelict Vessel Removal

When vessels become too expensive to maintain they are often left to rot at anchor, tied to a buoy or dock, or sitting on the beach – their owners either broke or nowhere to be found. Because many are not imminent navigational hazards, or priority pollution threats, these derelict vessels fall between the cracks of the current laws intended to deal with them. On June 16, 2011 the House of Commons heard the first reading of a private members bill (*Bill C-231*) to amend the *Canada Shipping Act 2001,* which was tabled by Nanaimo-Cowichan MP, Jean Crowder, in an attempt to better deal with this growing problem. In this *Legal Net* we will discuss how these proposed changes to the law are significant, and whether they are bound to be effective in dealing with Canada's plague of seashore eyesores.

Hot Potatoes

Like hot potatoes, various levels of government (townships, port authorities, municipalities, and offices within provincial and federal government) attempt to pass the responsibility of dealing with derelicts from one to another. For example, a township plagued by an unwanted vessel calls the provincial government demanding it be removed because the derelict contravenes the provincial legislation governing the use of Crown land (because it is typically sitting or anchored on seabed owned by the Province). The Province often replies it has no money to deal with the wreck, and it is in any event, a federal problem given the federal government's exclusive constitutional jurisdiction over navigation and shipping. The township then calls the federal Navigable Waters Protection office saying the derelict poses a threat to navigation, and Environment Canada complaining the derelict is a pollution threat. However, Navigable Waters Protection often finds the derelict is not an active hazard to navigation, so it lacks jurisdiction under the *Navigable Water Protection Act*. Meanwhile, Environment Canada, with powers to order the removal of a derelict where it poses a pollution hazard, may find the derelict does pose a pollution hazard, but it cannot locate the owner, and has no money to deal with the derelict itself anyway.

Around the potato goes, typically ending up in the hands of local land-users who first complained about the derelict. With derelict removal and disposal costs often starting in the

thousands of dollars, and escalating into hundreds-of-thousands of dollars, most local governments are unable to find the resources to deal with a derelict. And so they sit.

The Current Framework for Dealing with Derelicts:

The current legal framework for dealing with derelict vessels is undeniably ineffective, for at least two reasons. First, derelict vessels are, by definition, abandoned, or ones where the owner has no practical ability (or motivation) to deal with them themselves. A government order, or court order, requiring the derelict be moved is only as effective as the ability to find the owner and make them aware of the order, and the owner's ability to comply with the order. In many cases, neither is possible.

The second reason the current framework is ineffective, is because it is wholly discretionary. While the *Canada Shipping Act 2001 ("CSA 2001")* requires anyone finding a derelict to report it to Transport Canada's Receiver of Wrecks and take any measures with respect to the wreck that the Receiver deems appropriate, the *CSA 2001* also provides that the role of the Receiver is completely discretionary. The Receiver may chose to do nothing, and this is often the case.

While the *CSA 2001* provides that the Minister of Transport may appoint anyone to be a Receiver of Wrecks, this role is currently filled by the Navigable Waters Protection Office ("NavWaters"). NavWaters' mandate is primarily to review and approve works (docks, piers, and developments generally) that may interfere with navigation. Because derelicts often do not pose an active, objective, threat to navigation, those reported to the Receiver often do not receive the attention of NavWaters that complainants would like. Even if a derelict does receive priority attention by NavWaters, the Receiver of Wrecks, it has been said by one official who wished to go unnamed, "not a lost and found department". In other words, the Receiver does not typically take possession of a derelict by removing it and storing or disposing of it, mostly because it lacks the resources to do so. Rather, the Receiver's role under the current framework is to make efforts, if it deems appropriate, to find the owner. If the owner cannot be found within 90 days of the wreck being reported, the Receiver may award the derelict to the person who reported it (if the value of the derelict is not significantly more than the finders salvage award) or it may sell or dispose of the wreck. However, because many derelicts are worthless the finder does not want possession of it, no one will buy it, and the Receiver cannot afford to remove it, so the derelict sits. And around the potato goes.

Framework Proposed under *Bill C-231* – All of the Work, but no Reward?

Bill C-231 makes two significant changes to the current framework. Firstly, it designates the Canadian Coast Guard ("CCG") as a Receiver of Wrecks under the *CSA 2001*. Historically, as a special operating agency under the Department of Fisheries and Oceans, the CCG's mandate under the *Oceans Act* and the *CSA 2001* is to provide services in: aids to navigation and channel maintenance, marine communications, ice-management, search and rescue, and pollution response. It also provides support services to other bodies, such as using its vessels as research and patrol platforms for fisheries management. Unlike NavWaters, which currently holds the office of Receiver and has little of its own equipment, this historical mandate will mean the CCG has most of the equipment and training necessary to be a Receiver. I say "most" because it has not typically been CCG's role to become involved in heavy salvage, which would presumably occur under the changes proposed by *Bill C-231*.

Secondly, *Bill C-231* changes the Receiver's discretionary role into a mandatory one, *requiring* the CCG to take action in respect of a derelict reported to them. The amendments provide the Receiver of Wreck [CCG] "*shall"* take measures "*to remove, dispose of, or destroy wreck*", in accordance with regulations. The regulations referred to would detail circumstances where it would be appropriate for the CCG to remove, dispose or destroy a "wreck". A "derelict" vessel is included in the definition of a "wreck" under the *CSA 2001*.

Many will say *Bill C-231* is a good start at solving Canada's problem of seashore eyesores. However, there are issues that need to be addressed before *Bill C-231* can truly have the effect it is intended to have. The proposed changes will suffer from the same root problem that troubles the current framework, that is, where will the money come from to fund the CCG's work to remove derelicts? The CCG works hard to meet it's current mandate with the funding it is given. The role contemplated under *Bill C-231* (wreck removal and disposal) will require additional specialized equipment and training, measured in the millions of dollars annually, and take assets away from other important roles, such as search and rescue and fisheries management. Although the CCG will undoubtedly take on any role the legislature requires, money will have to come from somewhere. In other jurisdictions, wreck removal is funded by a fee levied when vessel certificates are issued or renewed.

An interesting but less obvious problem, and one perhaps not detected by the drafters of *Bill C-231*, is that under the salvage provisions (Part 6) of the current *CSA 2001* the master and crew of a Crown vessel, including CCG, can claim salvage rewards for a "useful result" obtained in respect of a wreck, such as removing a derelict (presuming the derelict has some value, such as for scrap metal). Under the provisions relating to wrecks (Part 7), however, there is no stated entitlement of a Receiver of Wrecks themselves to a salvage award. The question arises: once CCG is appointed Receiver of Wrecks, can it still claim a salvage award? In this lawyer's

opinion, it cannot, given the current wording of *Bill C-231*. There is an obvious conflict of interest because CCG would be both the salvor, and the adjudicator of its own reward.

As a result, it would appear that *Bill C-231*, perhaps unintentionally, is fettering CCG's ability to recover some of its costs of removing derelicts by eliminating its right to claim a salvage award. If CCG is to succeed in its role under *Bill C-231* of cleaning up our coastlines, it ought to have as many resources as can reasonably be provided, including utilizing its rights to a salvage reward for fulfilling its new duties.

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