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FINDERS KEEPERS? – SALVAGE LAW FOR THE NON-PROFESSIONAL SALVOR

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A mariner's rights and responsibilities relating to salvage are often misunderstood. Finding an abandoned vessel at sea or along the shoreline, for example, does not give the mariner the automatic right to salvage the vessel, nor does it give them an ownership interest in the property if they recover it. More than a few would-be salvors have come to me in some form of hot water because they have tried to salvage something they thought was free for the taking when it was not. Marine law does not recognize the concept of "finders keepers". Mariners who approach potential salvage opportunities correctly, however, can be reasonably rewarded; thus it is wise for mariners to understand the following brief summary of Canadian salvage law.

The Absent Owner & The Receiver of Wrecks

When a mariner discovers property that appears to be lost and the owner is absent, there is no automatic right to claim salvage. The *Canada Shipping Act, 2001* ("CSA 2001") provides that when a person claims possession of a "wreck" (which includes a vessel and an aircraft, but also flotsam, jetsam, and any other items that were part of, or on, a vessel or aircraft) they must report it to the Receiver of Wrecks, which is an office of the Department of Transport. The Receiver has no obligation to do anything once notified; however, they must be notified before any action is taken in respect of the wreck. While the law now requires every wreck be "delivered" to the Receiver upon demand, the reality is that many wrecks

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cannot be easily delivered, and the Receiver does not like to act as a “lost and found” for smaller wrecks. The Receiver will generally only insist on being involved after they are notified if the wreck poses a risk to the environment or navigation, or there is significant value to it.

Once reported, the Receiver may make efforts to find the owner of the wreck. If the owner cannot be located within 90 days, the Receiver may release the wreck to the would-be salvor. If the value of the wreck is less than \$5,000, the storage costs would exceed the value, or the wreck is perishable or poses a threat to public safety, the Receiver does not have to wait the 90 days before releasing it. Except in emergency situations where it is not practicable to give notice to the Receiver, the salvor will be denied salvage unless they have notified the Receiver and received permission to proceed. Once salvaged, the salvor is entitled to a salvage reward, which is typically part of the sale proceeds of the wreck (if there are proceeds). The balance of any sale proceeds is kept by the federal government, if not claimed by the owner. The Receiver will not pay a salvage reward if the wreck cannot be sold for value. Therefore, if the wreck appears to be of minimal value, think twice before commencing salvage work – you may end up with a wreck you can do nothing with, and have no way to recover your expenses.

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The Interested Owner – Salvage Contract Versus No Contract

Where the owner of a wreck is identifiable, and shows an interest into the property, salvage may proceed with their permission in one of two ways: with a contract or without a contract. Salvage without a contract is referred to as “pure salvage”. Whether there is a contract will often depend on how the property comes in jeopardy. For example, where a vessel washes ashore and is in no immediate peril the owner will often have the opportunity to negotiate a contract with a salvor. These contracts are often for a fixed price, on a time and expense basis, or the parties agree that the salvage reward will be decided by an adjudicator after the work is complete. Property owners and salvors are free to contract on whatever terms they feel are appropriate, provided one of the parties (typically the property owner) is not under undue influence, the influence of danger or the salvage fee is not excessively small or large for the actual work completed. An agreement made under any of these circumstances will often not be binding.

When there is no contract to provide for a salvage reward the salvor can rely on two sources of law that provide for a right to a reward. These are the CSA 2001 and the common law (which is the law developed by decisions of the courts, as opposed to legislation written by the government). Each of these sources of law provide a mariner with separate rights to claim a salvage reward if certain criteria are met.

The Common Law Requirements: Peril, Voluntariness and Success

The common law of salvage has developed over more than 500 years by various courts hearing salvage claims. From these cases the law has distilled three criteria that must be met for a salvor to receive a reward. Firstly, the property being salvaged must be in peril. The requirement that the property be in peril does not mean that the item need be in immediate harm, such as by sinking, but the property must be in some jeopardy.

Secondly, the salvor must be acting voluntarily in order to be entitled to a reward. In other words, the salvor cannot be under any obligation to save the property. Government agencies, such as the Coast Guard, would logically be excluded from claiming salvage because in many circumstances their roles require them to assist in saving life at sea (which often requires the saving of property). However, legislation such as the CSA 2001 can override the

common law, and this has been done where the CSA 2001 provides that Canadian government ships and crew can claim salvage where the government vessel used in the salvage is a tug or fitted with equipment intended to be used for salvage.

Thirdly, the common law demands the efforts of a salvor be successful. While the efforts of the salvor do not have to produce a complete success in saving the property, their role in the salvage must materially benefit the assistance given to the property.

The International Convention Requirement: “Useful Result”

The second independent source of salvage reward is the *International Salvage Convention, 1989*, which forms part of the CSA 2001. The purpose of this international agreement is to encourage the salvage of property, and the avoidance of environmental harm that wrecks often entail, by setting criteria for when a salvor can expect a reward. The *International Salvage Convention, 1989* provides that “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters” that provides a “useful result” entitles the salvor to a reward. The Courts have held that the “useful result” test should be given a plain meaning. In a later article we will discuss examples of when efforts were held to give a “useful result”.

The Booty: Valuing the Salvage Reward

The *International Salvage Convention, 1989* and the common law of salvage have similar criteria that will be considered in setting the amount of a salvage reward. The criteria considered are: the value of the property after it is salvaged; the skill and effort of the salvors in minimizing damage to the property and the environment; the measure of success in the salvage operation; the degree and nature of danger involved; the time and expense in the salvage operation; the value of the salvage equipment used; and the promptness of the salvage services. Generally, the greater the risk, skill, expense and success, the larger the salvage reward. As a rule though, a salvage reward will never exceed the value of the salvaged property, and rarely exceeds 50% of the salvaged property unless the value of the property is relatively small.

Salvage is a vast and colourful area of marine law. Readers are encouraged to provide their comments or stories in response to this brief discussion on salvage law.

FEDERAL DEVELOPMENTS

Canadian Government Takes Action To Protect Arctic Waters and Enhance Northern Sovereignty

On June 17, 2009, Canada’s Transport Minister, John Baird, announced that Canada’s Arctic waters will be better protected through legislative amendments to the *Arctic Waters Pollution Prevention Act*. The amendments, which received Royal Assent on June 11, 2009, will safeguard Arctic waters from pollution and allow Canada to exercise greater control over these waters.

“With these amendments, Canada increases its ability to protect its Arctic waters from pollution by expanding the geographic area covered under the Act, which is aimed at preventing ship-source pollution”, said Minister Baird. “These measures will help to ensure environmentally responsible shipping in our Arctic waters.”

The amendments extend the application of the *Arctic Waters Pollution Prevention Act* by increasing the area defined as “Arctic waters” to 200 nautical miles offshore, from 100 nautical miles. The expanded coverage will allow Canada to prevent possible pollution from marine activity in Canadian Arctic waters.

The expansion of coverage to the Arctic shipping legislation was established by the Integrated Northern Strategy. The Integrated Northern Strategy is based on four key pillars: promoting northern economic and social development; protecting our fragile northern environment; exercising Canada’s sovereignty in the North; and improving northern governance. The amendments to the *Arctic Waters Pollution Prevention Act* marks an important step and complements Arctic initiatives already in place under the Health of the Oceans component of the National Water Strategy.

Program To Help Ships Turn Off Engines and Improve Air Expanded

On June 4, 2009, John Baird, Canada’s Transport Minister, announced that the Government of Canada was taking another step to improve air quality by launching

Round Two of the Marine Shore Power Program. The program helps improve air quality by enabling ships to turn off their diesel engines while docked and instead connect to electric power that is supplied from specially designed transformers at port facilities.

The Government of Canada has allocated \$6 million over four years to the Marine Shore Power Program to support cost-shared projects, and will provide up to 50 per cent of the eligible costs – up to a maximum contribution of \$2.5 million – of a project conducted over two years.

Last year, under Round One of the program, Port Metro Vancouver received federal funding to install shore power for cruise ships. The Port will supply power to ships during the 2009 cruise ship season.

The Marine Shore Power Program falls under Transport Canada's ecoTRANSPORT Strategy, which is part of the government's plan to protect the environment and health of Canadians, while furthering Canada's economic prosperity.

Canadian port authorities and terminal operators are encouraged to submit applications for funding by October 16, 2009. A guide for applicants is available on Transport Canada's ecoFREIGHT Web site at www.tc.gc.ca/programs/environment/ecofreight/menu-eng.htm.

Government of Canada Mandates Transit Work–Rest Rules

On June 3, 2009, John Baird, Canada's Transport Minister, announced that rules to enhance the safety of operators, passengers, and other road users will soon be in place for transit operations under federal jurisdiction.

"These changes will make it safer for everyone involved, from transit passengers to motorists, and pedestrians", said Minister Baird. "This will greatly reduce the risk of driver fatigue-related incidents and collisions."

The amendment to the Commercial Vehicle Drivers Hours of Service Regulations will help reduce fatigue by restricting the hours transit employees governed by federal rules can drive. Three transit services are affected by this change: OC Transpo in Ottawa, Gatineau's Société de transport de l'Outaouais, and Transit-Windsor.

The proposed amendments were published in the *Canada Gazette*, Part I on March 14, 2009. After considering all comments received, Transport Canada finalized the regulations and they will become law six months after publication in the *Canada Gazette*, Part II on June 10, 2009.

PROVINCIAL DEVELOPMENTS

Alberta

Canadian Government Helps Calgary Workers Go Green

On May 21, 2009, the Government of Canada announced that it will partner with the City of Calgary, Calgary Economic Development, and the Calgary Regional Partnership to support a new telework initiative, "WORKshift–Think Outside the Office".

WORKshift will receive a contribution of up to \$800,000 under Transport Canada's ecoMOBILITY Program. The initiative will develop a plan that supports telework programs throughout the Greater Calgary area by raising public awareness of the benefits of teleworking, and providing businesses with specific guidance and support in planning, designing, and implementing telework programs.

"Our government supports innovative ways to deliver results for the environment while stimulating the economy", said the Honourable Rob Merrifield, Minister of State (Transport). "Telework initiatives like this will benefit employees, businesses and all Calgarians by cutting commute times, increasing productivity and reducing greenhouse gas emissions."

The ecoMOBILITY Program works with provinces, municipalities, and regional transportation authorities to help develop initiatives that encourage commuters to choose public transit or other alternatives to personal vehicles. Through the program, the federal government is taking action to find ways to meet transportation needs, reduce costs to Canadians, and protect the environment.

Manitoba

Northern Manitoba Passenger Rail Service Receives More Funding from Canadian Government

On June 5, 2009, the Government of Canada announced the \$5.2 million in federal funding to Keewatin Railway Company – a passenger and freight rail company owned and operated by three First Nations communities – for capital improvements to the passenger rail service between The Pas and Pukatawagan in northern Manitoba.

Of the total \$5.2 million funding, \$1.1 million comes from existing capital funding and \$4.1 million comes from funding under the Economic Action Plan made available in Budget 2009.

“Keewatin Railway Company is very thankful to the federal government for its continued support and is pleased with the announcement of stimulus funding announced in the federal budget”, said Anthony Mayham, CEO of Keewatin Railway Company. “With this funding, Keewatin Railway Company will be able to improve the tracks and the safety of passengers by providing a new

waiting station in Pukatawagan. Keewatin Railway Company will also be getting closer to take over full operations by way of building a new maintenance building for our locomotives and coaches.”

The projects funded under the Economic Action Plan will include railway track rehabilitation, acquisition of a locomotive and other rail equipment, and construction of a locomotive repair facility in The Pas, as well as a new station in Pukatawagan. It is expected that Keewatin Railway will spend \$2.2 million on these projects in 2009-2010 and \$1.9 million in 2010-2011. The remaining \$1.1 million will be used to replace railway ties and culverts in 2009.

Federal funding comes from Transport Canada’s Regional and Remote Passenger Rail Services Class Contribution Program. The program ensures that safe, reliable, viable and sustainable passenger rail services are provided to certain areas of the country where these services are either the only means of surface transportation for remote communities, or an alternative means of transportation for rural communities. These services also support economic activities in the lumber, mining, recreation, and tourism sectors and provide an essential lifeline for isolated communities.