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MARINE LAW MYTH #17: REPAIRER'S STORAGE COSTS ARE A VALID CLAIM AGAINST GOODS

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A Common Problem: Bill Disputes and Storage Charges

It is all too common a scenario in marine industry that a repairer, such as a shipyard or independent machinist, welder or shipwright, completes work on a vessel or piece of marine equipment and the owner challenges the bill on the basis that it is excessive or the work was not completed properly. The owner refuses to pay all or part of the bill, and the repairer refuses to release the equipment. The repairer is stuck with having to store and preserve the owner's goods and to wait for payment, and the owner is without their property. The repairer feels cheated and the owner feels that their property is being held for ransom. This is not to say that either the repairer or the owner have acted improperly, only that invariably, people have different views on what is a fair charge for repair work, and what is good work.

These types of disputes almost always give rise to a claim by the repairer for additional monies owning for storing the equipment (be it moorage charges for dock space at the shipyard, or dry-land and shop-space storage charges) after the time the invoice is due and when the repairer releases the goods to the owner. Until the dispute is resolved, the owner's bill continues to grow and the repairer's costs eat further and further into their profit. It is a dilemma for both parties.

Inside

The Myth:

It is a myth that charges for storing and preserving the equipment pending payment of the invoice form a valid part of the repairer's claim for monies owing. In other words, if there is a dispute between a repairer and an owner of goods and the repairer refuses to release the goods until the invoice is paid, the repairer cannot claim for costs for storing the goods and money spent on preserving the goods.

This comes as a surprise to many repairers. From a repairer's perspective it seems unjust that, after having completed good work on equipment and charged a fair price, an owner can refuse to pay the bill, and the repairer will be stuck with the cost of keeping the goods. In many cases it is not the repairer's fault that the owner refuses, or cannot pay – why should the repairer cover the cost of storage that the owner would have paid elsewhere had they simply paid the bill and taken their goods? From the owners perspective, why should they have to pay an excessive bill for poor work in order to have their vessel released, as well as have to pay the repairer more money because they refuse to release the boat in the meantime?

An Example: The "Freedom Eagle"

The B.C. Supreme Court considered this law in the 1993 case of *MacNaughton v. Stewart*, which involved the vessel the "Freedom Eagle". In this case the owner of the "Freedom Eagle" entrusted the vessel to two prospective buyers. One of the potential buyers represented himself as the owner of the vessel and contracted a shipyard to do work on the vessel. The work was concluded after two days in July and the shipyard rendered an invoice. The invoice went unpaid and the vessel sat at the shipyard until November when, in expectation that the bill would not be paid any time soon and with winter approaching, the shipyard carried out work to winterize the vessel. The shipyard then rendered another invoice for the cost of the original work, the winterizing and storage charges for the period of July to November.

Upon receipt of the November invoice the true owner offered to pay the shipyard the amount of the original invoice in exchange for release of the vessel, but this was refused. The owner then sued the shipyard for release of the vessel, asking the court to find that the shipyard was owed only the amount for the original work, and that the shipyard could not assert a lien for the storage charges and the winterizing.

In deciding the case, Justice Owen-Flood distinguished between value the shipyard had imparted on the vessel in making the original repairs and improvements, which he found formed a valid repairers lien on the vessel, and the monies spent on the vessel for storage and winterizing. Owen-Flood found that the monies spent for storage and winterizing were not spent for the purposes of improving the vessel (which is necessary to have a repairer's lien), but were spent for the purposes of protecting the repairer's position, that is their security in the vessel. Therefore, the shipyard could not charge for the storage or winterizing.

No Storage Charges under a Marine Possessory Lien as well

After considering the repairers lien, Owen-Flood in the *MacNaughton* case also considered whether the storage charges formed part of the shipyard's marine possessory lien. A marine possessory lien is different from a repairers lien, though they are both types of security for work done on goods (a repairer can have both types of liens at the same time). Unlike a repairers lien (which is created by statute – the provincial *Repairers Lien Act* – and provides an automatic right of sale of the goods if the invoice goes unpaid for 90 days) marine possessory lien only gives the repairer the right it keep the vessel until the bill is paid. A repairer can sue for payment of their bill and hold the vessel as security, but the marine possessory lien gives no automatic right of sale – the court has to grant this. Looking to several old commonwealth cases Owen-Flood confirmed that, like a repairers lien, storage charges did not form part of a marine possessory lien.

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In essence, the court's view is that the purpose of incurring storage and preservation costs of the vessel is not for the benefit of the owner, but for the benefit of the repairer in preserving their lien on the vessel. This is because, at the end of the day, if the invoice is not paid and the only security to satisfy the bill is the sale proceeds of the vessel (whether the vessel is sold by automatic right under a repairers lien or by court order under a marine possessory lien), it is in the repairer's interest that the vessel be preserved.

The Cure for Repairers: Contracting for Storage Liens

For repairers, there is a light at the end of this dismal legal tunnel of having to pay for storing someone's goods when they refuse to pay a bill. That light is that the repairer can include in their contract with the owner terms that if the original invoice for repair work goes unpaid for so many days (either because the owner fails or refuses to pay all of the bill), another separate contract automatically arises, a storage contract for the goods.

The terms of the storage contract, which would be part of the terms of the original Work Order signed by the owner when they deliver their goods for repair, would provide that in the event the owner does not take possession of the goods (either voluntarily or because the repairer will not release them with the repair bill unpaid), the repairer has the contractual right to charge for storage and that these storage charges, by agreement, form a lien against the goods.

In other words, where the repairer cannot rely on the common-law (law that comes from cases like the *MacNaughton* case above) to give them the right to claim a lien for storage charges, they can expressly contract with the owner to do so. I would estimate that less than 10% of the repairers on the coast have such a clause in their Work Orders. The wording on the Work Order must be clear and specific and preferably brought to the owner's attention when they first deliver the goods for repair.

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FEDERAL DEVELOPMENTS

Canada Shipping Act Repealed and *Canada Shipping Act, 2001* in Force

The *Canada Shipping Act* was repealed, and the *Canada Shipping Act, 2001*, including the transitional and consequential amendments, came into force on July 1, 2007.

The *Canada Shipping Act, 2001* features updated terminology and modernized legislation aimed at promoting the safety and economic performance of the commercial marine industry. Key changes include provisions that will protect and support efficient crews, ensure passenger and vessel safety and protect the environment. The *Canada Shipping Act, 2001* also includes a new administrative penalties scheme that will provide an alternative method for dealing with contraventions.

Canada's Government Announces Blue Sky Agreement with Iceland

On July 18, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities announced the first Open Skies agreement with the Republic of Iceland, under the Government of Canada's Blue Sky policy.

The new agreement, which replaces the Memorandum of Understanding on Air Services that has allowed air services to Canada by Icelandair since 1995, will allow airlines of both countries to operate passenger and all-cargo scheduled air services between any city in Canada and Iceland. Canadian carriers will also be allowed to use Iceland as a platform to serve a third country and *vice versa*.

The Canada-Iceland Blue Sky agreement complements the free trade agreement that has recently been negotiated between Canada and Iceland by facilitating the circulation of travellers and cargo between the two countries.

Official Opening of the Peace Bridge Plaza

On July 16, 2007, Canada's government and the Buffalo and Fort Erie Public Bridge Authority officially opened the new Canada Border Services Agency Peace Bridge Travellers Operations Building, the Peace Bridge Refugee Processing Unit, and the Peace Bridge Newcomers Centre. The occasion also marked the completion of the redevelopment of the Peace Bridge plaza, which will help reduce border congestion and expand infrastructure capacity.

The Peace Bridge is Canada's second busiest border crossing, handling 5.5 million cars and 1.3 million trucks in 2006.

The completed projects include:

- relocation and increase in the number of primary inspection lanes on the Canadian plaza;
- improvements to general security on the plazas;
- construction of three additional primary truck inspection booths on the American plaza; and
- construction of a truck staging area on the Canadian plaza.

PROVINCIAL DEVELOPMENTS

Alberta

New International Air Cargo Transshipment Program for the Calgary International Airport

On July 6, 2007, Lawrence Cannon, Minister of Transport, Infrastructure and Communities, launched an international air cargo transshipment program at Calgary International Airport. The transshipment program will allow cargo to be flown from overseas into Calgary, stored temporarily, and then flown to a final destination abroad. Cargo could also be shipped by rail or road from Calgary to the United States.

The program will enhance Calgary International Airport's air cargo capacity, and will have a positive impact on the local economy.

The new program simplifies air carrier access to Calgary because Canadian and foreign air carriers will now be able to use Calgary International Airport to transship international cargo, even if these rights are not provided in Canada's bilateral air transport agreements.

Nova Scotia

Tender Called for Rumble Strip Installation

On July 25, 2007, the Department of Transportation and Public Works advertised a tender for the installation of rumble strips on the shoulders of Highway 104, from Exit 3 near Amherst, for 99 kilometres to Exit 12, near Debert.

Rumble strips are grooves cut into the pavement surface that produce sound and vibration when vehicles travel across them, thus alerting drivers whose minds are wandering because of fatigue or distraction.

According to Angus MacIsaac, Minister of Transportation and Public Works, Highway 104 was selected for the pilot project because it is a divided road through rural terrain with wide, paved shoulders.

Quebec

The Governments of Canada and Quebec Invest in the Restoration of Quebec Shortline Railways

On July 5, 2007, the Governments of Canada and Quebec announced a total investment of more than $75 million over five years to restore the infrastructure of shortline railways.

Shortline railways are an essential element of commercial trade for Quebec businesses. In Quebec, over 80% of the products transported by shortline railways are shipped to a final destination in the United States. These regional railways transport mainly wood, paper, pulp, particle board, mineral ore, and aluminium.

The investment will be used to improve conditions and operability in order to ensure a more efficient and competitive rail network that is better integrated into the main rail network, especially in key transport and trade corridors.

BRIEFLY NOTED

Class Proceeding Stalled in "Queen of the North" Sinking

On July 16, 2007, the British Columbia Supreme Court declined to certify a class proceeding commenced by passengers of the ferry "Queen of the North", which sank on March 22, 2006, after running aground in Wright Sound, British Columbia.

Two of the passengers commenced an action against British Columbia Ferry Services Inc. and three crew members, and applied to the Court to have the action certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

The Court assessed the requirements for a class proceeding to be certified, and having considered the identifiable class, common issues, whether a class proceeding was the preferred procedure, and whether the representative plaintiff was appropriate, the Court could not certify the class proceeding.

Kotai and Kotai v. The Owners and all Others Interested in the Ship, "Queen of the North", British Columbia Ferry Services Inc., and Henthorne, Lilgert, and Bricker, 2007 BCSC 1056, Docket No. S062025 (July 16, 2007).

Marine Liability Act Applies

In the summer of 2003, Patricia MacKay, while on the whale-watching vessel "Against the Wind", tripped over a cooler and broke her leg. Shortly thereafter she retained counsel to pursue damages for the injuries and loss, but owing to various delays, the action was not commenced until after the two-year limitation period under the *Marine Liability Act* (the "Act") had expired. Counsel for MacKay argued that the subject of the suit fell under provincial jurisdiction – specifically the "Property and Civil Rights" powers in the *Constitution Act* (in which case the limitation period was six years), while counsel for the defendant vessel owners argued this matter fell under federal jurisdiction as it was a "claim in relation to Navigation and Shipping" and the suit was barred. The motions judge agreed that this case fell under federal jurisdiction, but stated that under subsection 16(3) of the Act, he could provide relief against the two-year time limit and allowed the action to proceed. The defendants appealed this ruling, while the plaintiff, Mackay, appealed the ruling that this case fell under federal jurisdiction.

After a lengthy analysis of the history of the federal-provincial division, the Court concluded that the motions judge was correct in finding that the matter fell under federal jurisdiction, but held that the motions judge was incorrect in concluding that he was empowered to extend, suspend, or interrupt the statutorily prescribed limitation period. The appeal was, therefore, allowed, and the action was dismissed as it was time-barred.

Russell, Island Coast Boat Tours Inc., and Russell v. MacKay, 2007 NB CA 55, June 28, 2007 (N.B.C.A.).

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