Judicial Sale, Vessel Mortgages, Maritime Liens and Priorities

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The final step in a successful *in rem* claim against an arrested vessel is typically sale of the vessel itself and a determination of how the proceeds of sale should be paid out. The *Federal Courts Rules* provide various mechanisms for such sales. In theory, this process should be straightforward: the vessel is sold to a third-party, the proceeds of sale are paid to the plaintiff in the amount of the judgment, and any surplus is paid back to the defendant. In reality, however, judicial sales are complicated by the existence of multiple claims against a vessel, including vessel mortgages and liens. Because the total value of such claims often exceeds the value of the vessel, judicial sales can become intricate disputes over priorities. This paper reviews the mechanics of a judicial sale of a vessel and provides an overview of how the court determines priorities between competing claims, including mortgages, personal property security, and maritime liens.

1. The Judicial Sale

Rule 490 of the *Federal Courts Rules* provides the basis for the judicial sale of vessels. There are few internal limitations to the court's power to order a sale under this provision. It simply states that, on motion, the court may order the sale of arrested property in various ways. Therefore, the only formal requirement is the existence of an arrested vessel. For reference, Rule 490(1) reads as follows:

> SALE OF ARRESTED PROPERTY
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> Disposition of arrested property
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> **490** (1) On motion, the Court may order, in respect of property under arrest, that
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> (*a*) the property be appraised and sold, or sold without appraisal, by public auction or private contract;
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> (*b*) the property be advertised for sale in accordance with such directions as may be set out in the order, which may include a direction that
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> (i) offers to purchase be under seal and addressed to the sheriff,
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> (ii) offers to purchase all be opened at the same time in open court, that the parties be notified of that time and that the sale be made pursuant to an order of the court made at that time or after the parties have had an opportunity to be heard,
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> (iii) the sale not necessarily be to the highest or any other bidder, or
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> (iv) after the opening of the offers and after hearing from the parties, if it is doubtful that a fair price has been offered, the amount of the highest offer be communicated to the other persons who made offers or to some other class of persons or that other steps be taken to obtain a higher offer;
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> (*c*) the property be sold without advertisement;

(*d*) an agent be employed to sell the property, subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent as may be stipulated in the order;

(*e*) any steps be taken for the safety and preservation of the property;

(*f*) where the property is deteriorating in value, it be sold forthwith;

(*g*) where the property is on board a ship, it be removed or discharged;

(*h*) where the property is perishable, it be disposed of on such terms as the Court may order; or

(*i*) the property be inspected in accordance with rule 249.

The substance of Rule 490(1) therefore focuses on the various means by which a judicial sale of a vessel may occur. These means can include a private sale by contract, sale by public auction, or sale by broker. Various factors determine which of these mechanisms is the most appropriate in any given situation.

(a) Private Sale by Contract

Paragraph (a) of Rule 490(1) contemplates the possibility of a sale of the vessel through private agreement negotiated without the court's involvement. In other words, before applying under Rule 490, the claimant could negotiate an agreement with a third-party for the purchase of the vessel and simply ask the court to approve the agreement. However, courts have expressed reluctance to approve sales in this manner.

The basis of the reluctance to approve such sales is that privately negotiated agreements will rarely achieve the best possible price for the vessel. The Federal Court used this rationale for refusing to approve a private sale in *International Marine Banking Co. v. "Dora"*, [1977] 1 F.C. 603 (T.D.). Similarly, in *Sea-Tec Fabricators Ltd. v. Offshore Fishing Co.*, [1985] F.C.J. No. 235 (T.D.), the court held that it should only approve private sales where there has been no public advertisement where it is clear that the proposed sale represents the best possible price. There is therefore a substantial burden on a party attempting to obtain approval of a sale by private contract.

However, there have been notable cases where the court has granted an order approving a private sale. It appears that such sales may be appropriate in at least two circumstances: first, where the vessel is losing value and timing is essential to obtaining the best possible price; and second, where there is convincing evidence that prior efforts to sell the vessel have not lead to higher offers. The court approved a private sale agreement on the basis of the former circumstances in *Bank of Scotland v. "Nel"* (1997), 140 F.T.R. 271 (T.D.). In that case, timing was essential because the vessel was carrying corrosive cargo. Therefore, the court was satisfied that the proposed agreement represented the highest possible price in the circumstances. In more recent cases (*Franklin Lumber Ltd. v. "Essington II"*, 2005 FC 95 and *Nordea Bank Norge ASA v. "Kinguk" et al.*, 2006 FC 1290) the court approved private agreements to sell vessels where there was convincing evidence that the vessels had been marketed for sale for several years and would not likely receive a higher offer.

It is of course possible that other circumstances may exist where a court will be willing to approve the sale of a vessel by private agreement. However, the jurisprudence demonstrates this form of sale is the exception, not the rule.

(b) Sale by Tender or Public Auction

The most common form of judicial sale is through either a tendering process or a public auction. After the party wishing to have the vessel sold brings a motion for sale under Rule 490, the court will issue an order setting out the procedure that will be used after hearing submissions from interested parties. Whether a tender process or a public auction is ordered, the court will usually direct that advertisements be placed in major publications.

With a tender process, the advertisement will invite prospective purchasers to submit a sealed offer as well as a prescribed deposit. After the specified deadline passes, the highest offer will be accepted pending final approval by the court. A public auction follows a similar process. The advertisement will alert prospective purchasers to the time and date of the auction. At the auction, the highest bid will be accepted and the bidder will be required to pay a deposit.

With both tenders and auctions, it is usually a sheriff that will conduct the process and accept the highest offer. However, counsel for the interested parties may continue to have some involvement in the process, even considerable. As provided by Rule 490(2), the sheriff may take a commission from the sale.

Ultimately, the court must approve the final sale. Such approval is usually dependent on whether the accepted offer is close to the appraised value of the vessel. The court, as part of the procedure order, may order that the vessel be appraised prior to the bidding process. The appraisal should usually remain sealed until the process is concluded (see *Fraser Shipyard & Industrial Centre Ltd. v. Expedient Maritime Co.*, 1998 CarswellNat 1012 (F.C.)).

(c) Sale through Agent

As provided by Rule 490(1)(d), a similar option is to use an independent agent to sell the vessel. The order approving this form of sale can give specific directions to the agent. For example, the order could direct that the agent hold a public auction or tender offering after a period of time of active marketing of the vessel. In any case, as with the other options, any accepted offers will usually be subject to final approval by the court.

(d) Sale before Judgment

As noted earlier, the only formal requirement for a judicial sale under Rule 490 is the existence of an arrested vessel. There is therefore no requirement that the party wishing to sell the vessel have a judgment in its favour. It is therefore possible to apply for a sale before judgment (a sale *pendente lite*). However, the Federal Court has been understandably reluctant to grant such an extraordinary remedy except in unusual circumstances.

The court set out the principles to consider in deciding whether to exercise its discretion to order a sale *pendente lite* in *Brotchie v. "Karey T"* (1994), 83 F.T.R. 262. In that case, the court stated that it must consider (1) the value of the vessel compared to the amount of the claim; (2) the

existence of an arguable defence; (3) the likelihood that the vessel will be sold in any event; (4) whether there will be any diminution in the potential sale price of the vessel by delay; (5) whether the vessel will depreciate in quality by further delay; and (6) whether the is any other good reason for sale before trial. The court considered these factors in ordering a sale *pendente lite* in *Franklin Lumber Ltd. v. "Essington II"*, 2005 FC 95. In exercising its discretion in that case, the court found it significant that the value of the claims against the vessel by far exceeded its worth, that the owner was unable to continue financially, and that the vessel was not insured.

Therefore, although there may be circumstances in which a sale *pendente lite* may be justified, such circumstances will be rare.

(e) After the Sale

Once the sale is concluded, the next stage of the process is the adjudication of competing claims to the proceeds of sale. The funds from the sale will usually be paid into court, and will be paid out to creditors following a priorities hearing. However, before engaging in a discussion about how the court goes about adjudicating priorities, it is first necessary to explain the various unique claims to a vessel that must be prioritized. These include vessel mortgages, personal property security charges, and various forms of liens – maritime liens, statutory *in rem* liens, and contractual maritime liens.

2. Differences between vessel mortgages and other personal property security charges

A vessel mortgage is a common form of financing the construction of a vessel or a means of obtaining debt financing for shipowners. It therefore serves essentially the same purpose as other forms of personal property security instruments by helping to secure the repayment of a loan. In fact, loans that are secured by ownership of a vessel can take two forms: a vessel mortgage registered pursuant to the *Canada Shipping Act, 2001,* S.C. 2001, c. 26 (the "*CSA*"), or an ordinary personal property security interest registered pursuant to applicable provincial legislation.

(a) Vessel Mortgages under the *Canada Shipping Act, 2001*

The *CSA* provides a statutory basis for the registered owner of a vessel to grant a mortgage in respect of the vessel and have it registered in a centralized registration system. Only vessels that are registered in the Canadian Registry of Ships can have a mortgage registered under the *CSA*. Registration occurs by filing a mortgage document with the registrar. The registrar will record the time and date of registration. This is important because priorities between registered mortgages are determined based on the date of registration, regardless of whether the mortgagee has notice of unregistered interests.

The *CSA* makes it clear that a registered mortgage does not have the effect of making the mortgagee an owner of the vessel, "except to the extent necessary to make the vessel... available as security under the mortgage" (s. 68). It also states that the mortgagee has an "absolute power, subject to any limitation set out in the registered mortgage, to sell the vessel..." (s. 69(1)).

Therefore, upon default or impairment of the mortgagee's security in the vessel, the mortgagee is entitled to take possession of the vessel on the basis of the mortgage agreement. From that point,

the mortgagee has two options. It can either opt for a private sale of the vessel by finding a purchaser itself, or it can opt for a judicial sale under Rule 490, following the procedures outlined above. The primary advantage of a private sale is that it is faster and less costly (since there is no need to pay sheriff's fees or court fees, etc.) However, the difficulty with a private sale is that the mortgagee must sell the vessel as is, and subject to any other charges or interests in respect of the vessel. This can make it difficult to find a willing buyer. By contrast, a judicial sale under Rule 490 allows the mortgagee to sell the vessel free from all encumbrances. Charge holders simply become creditors that must have their interests adjudicated at the priorities hearing. Therefore, it is often easier to find willing purchasers through judicial sales, which can make the extra time and expense worthwhile.

(b) Provincial Security Registration

Even where a creditor is unwilling or unable to secure a loan through a vessel mortgage under the *CSA*, it is still possible to register a security interest in a vessel under provincial personal property security regimes. Because vessels constitute moveable personal property, the provinces have concurrent jurisdiction over secured interests in vessels. Therefore, secured interests in vessels may be registered pursuant to provincial personal property security legislation.

The personal property security legislation is essentially uniform throughout the provinces (with the exception of Quebec). Such legislation applies to all transactions that create a security interest in personal property to secure payment or performance of an obligation (except where the transaction is subject to federal legislation such as the *CSA*, in which case the federal legislation would be paramount). Unlike under the *CSA*, registration alone is not sufficient to create an enforceable security interest. The personal property security legislation sets out three requirements before such enforcement can occur: agreement, attachment, and perfection.

Agreement is satisfied by the execution of a contract that provides for the security in personal property that is sufficiently described in the instrument. Attachment occurs when the secured party gives value and when the debtor has rights in the collateral. Perfection occurs upon registration of the security agreement once the first two conditions are satisfied. Therefore, in the context of a security interest in a vessel, assuming the creditor pays out the funds at a time when the debtor has actual ownership of the vessel, perfection occurs at the time when the security agreement is registered in the provincial registry.

Perfected security interests always take priority over unperfected security interests. However, amongst perfected security interests, priority is determined based on the time of registration. Therefore, as with mortgages registered under the *CSA*, the timing of registration is essential.

The provincial personal property security legislation sets out various mechanisms for enforcement. However, unlike the *CSA* which provides the mortgagee with an "absolute power" of sale, there are various restrictions under provincial legislation such as notice and redemption periods. Therefore, registration of a mortgage under the *CSA* may give creditors more power than registration under provincial personal property security legislation, subject to the terms of the mortgage agreement.

3. Maritime Liens

The ranking of priorities in maritime law is complicated by the existence of another set of unregistered charges that may exist against vessels: maritime liens. A "maritime" or "marine" lien is not a term of art and is used generically in practice. Three main categories of liens or claims exist in the maritime law context, including: maritime liens, contractual or possessory liens, and statutory rights *in rem*. There are also other liens and claims that are established by statute.

(a) Jurisdiction of the Federal Court

The jurisdiction of the Federal Court to hear maritime lien claims was considered by the Supreme Court of Canada in *Holt Cargo Systems Inc. v. ABC Containerline N.V.*, [2001] 3 S.C.R. 907 ("*Holt Cargo Systems*"). An American creditor had commenced the proceedings in Canada, while the bankrupt shipowner and the trustee in bankruptcy were located in Belgium. Many of the creditors were located in other countries, as were the owner's assets. The only connection to Canada was that the ship was arrested in Halifax. Binnie J., for the court, held that the "real and substantial connection" test must account for the transient nature of ocean-going vessels. Thus, the location of the *res* in Canada is sufficient to establish the jurisdiction of a Canadian court grounded *in rem*. Binnie J. also quoted an earlier Supreme Court of Canada decision, *Antares Shipping Corp. v. The Ship "Capricorn,"* [1977] 2 S.C.R. 422, in which the court recognized that vessels engaged in international maritime commerce often lack a substantive connection to any particular jurisdiction, including their home ports.

The jurisdiction of the Federal Court to adjudicate maritime lien claims, and the court's authority to recognize foreign maritime liens is supported by the definition of Canadian maritime law found in section 2 of the *Federal Courts Act,* R.S.C. 1985, c. F-7, and the grant of jurisdiction over navigation and shipping, found in section 22(1) of that *Act*.

(b) What is a Maritime "Lien"

A maritime lien is a security for a claim over maritime property including a vessel, its cargo, or its freight. These *in rem* claims are protected and enforced irrespective of the jurisdiction in which the claim was generated. The following are the basic elements of a maritime lien: a privileged claim, attaching to maritime property, for service done to that property or injury caused by that property, arising from the moment when the claim attaches, travelling with the property unconditionally, and enforced by means of an *in rem* action. Professor William Tetley, Q.C., defines the Canadian maritime lien as follows:

> A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritime*). It is a privileged against property (a ship) which attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret lien which has no equivalent in the common law; rather it fulfills the concept of a "privilege" under the civil law and the *lex mercatoria.*[1]

[1] William Tetley, *Maritime Liens and Claims,* 2d ed. (Montreal: Yvon Blais, 1998) at 59-60.

Maritime liens developed as the law recognized the need to protect persons providing fundamental services to a vessel, as well as victims of a maritime tort that must be compensated by the negligent vessel. These types of people were seen as vulnerable because of the ability of a vessel to move between jurisdictions and continue to incur liabilities to the disadvantage of existing creditors. [2] As a result, the maritime lien developed to give priority to those interests that needed protection due to the transient nature of maritime assets.

There are a number of types of maritime liens, each of which has peculiarities that are beyond the scope of this paper. Specific types of maritime liens include the following: bottomry and respondentia, where a master pledges the vessel or its cargo as security to obtain a loan to allow the vessel to complete its voyage; collision liens, which arise when a vessel damages another vessel as a result of negligence in the navigation of the former; salvage liens, which arise when salvage services are rendered with respect to maritime property; liens for unpaid master and crew wages; and liens for master's disbursements.

Maritime liens are invisible charges on the *res,* and although they survive the transfer of the *res* to a subsequent owner (except in the case of judicial sale under Rule 490), they may also be extinguished in some circumstances. The lien will be extinguished upon the payment and acceptance of the amount of the claim. The lien will also be extinguished where the lien-holder elects to take security for the amount of the lien, as opposed to cash. When bail is given into court, the arrested vessel that is the subject of the claim may be released, and cannot be arrested again for that cause of action. If the lien arises by the operation of statute, it may also be extinguished by operation of a limitation period found in that statute.

(c) Contract or Possessory Liens

In maritime law, possessory liens arise in the context of claims of shipbuilders and ship repairers, claims of shipowners for freight, claims of cargo owners for general average contribution, claims of salvors in relation to the award for the salved *res,* and some claims by necessaries suppliers. In order for the lien to continue, the lien holder must remain in possession of the goods. The lienholder's "possession" of the goods functions as security for the unpaid debt, and loss of that possession is tantamount to loss of the security.[3] A possessory lien entitles its holder to proceed *in personam* but not *in rem* against a vessel. The rights of a possessory lienholder will, however, be recognized by a court once the vessel has been arrested in another proceeding.[4]

The interplay between mortgages and possessory liens is sometimes fraught with difficulty. If the mortgagee sells the vessel, or somehow causes the repairer or supplier of necessaries to lose possession of the goods prior to the discharge of the lien, the possessory lien will be extinguished. Courts have held, however, that the mortgagee is liable to pay for the discharge of the lien: *Greeley v. Tami Joan (The)* (1997), 135 F.T.R. 290, affirmed, 2001 FCA 238.

(d) Section 139 of the *Marine Liability Act*

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[2] Edgar Gold, Aldo Chircop & Hugh Kindred, *Maritime Law* (Toronto: Irwin Law, 2003) at 267.
[3] Gold, *supra* note 2 at 288.
[4] Tetley, *supra* note 1 at 654.

Until 2009, necessaries services provided by Canadian businesses did not give rise to maritime liens under Canadian law, rather such services only gave rise to a statutory right *in rem.* Such claims would have been outranked by a mortgage, as discussed below. In 2009, however, section 139 was added to the *Marine Liability Act,* S.C. 2001, c. 6 (the "*MLA*"), providing maritime lien status to necessaries suppliers for services provided in respect of a foreign vessel.[5]

This section was enacted to remedy the perceived inequity existing between American necessaries suppliers, who enjoyed maritime lien status, and Canadian necessaries suppliers, who did not enjoy maritime lien status. Under U.S. law, a claim for necessaries is given the status of a maritime lien. When a Canadian court is faced with a maritime lien that was established in a foreign jurisdiction, the court will look first to the *lex loci* (in these circumstances, the foreign law) to determine whether the right is legitimate (substantive), and then to the *lex fori* (in these circumstances, Canadian law) to grant a remedy (procedural). This was confirmed by the Supreme Court of Canada in *Strandhill (The) v. Walter W. Hodder Co.,* [1926] S.C.R. 680.

Because Canadian courts determine the *lex loci* and then apply the *lex fori,* American necessaries providers formerly enjoyed higher priority through their liens, even when the forum was Canada. Since the 2009 amendments to the *MLA,* however, any Canadian necessaries suppliers providing services to foreign vessels enjoy maritime lien status.

In *JP Morgan Chase Bank v. Kent Trade and Finance Inc. (The Lanner),* 2008 FCA 399, leave to appeal refused [2009] S.C.C.A. No. 48, the Federal Court of Appeal enforced several choice of jurisdiction clauses determining that U.S. law applied to those claims. The Court of Appeal heard an appeal from the decision of Gauthier J. regarding priorities of various claims against a Liberian vessel. The vessel was arrested in Halifax and sold by the Federal Court through an *in rem* admiralty action. Claims against the vessel were made by fuel oil suppliers, bunker fuel suppliers, and combustion catalyst suppliers. All of the suppliers' contracts included choice of law provisions that stipulated U.S. law as the governing law. The court upheld these provisions, and the necessaries suppliers were determined to hold maritime liens pursuant to U.S. law. These maritime liens were then enforced according to Canadian priorities. This decision is significant in that it gives necessaries suppliers a tool to gain priority over the interest of banks in Canada.

In *World Fuel Services Corp. v. Nordems (Ship),* 2011 FCA 73, the Federal Court of Appeal again considered the issues of priority of necessaries liens and choice of law. The claimant had supplied bunker fuel to the vessel, which was registered in Cyprus, while the vessel was located in South Africa. The vessel was owned by a German company, but was chartered to a Korean company. The claimant bunker fuel supplier dealt only with the Korean charterer, who went bankrupt without paying the supplier. There was no privity of contract between the shipowner and the necessaries provider. As such, the choice of law provision in the contract, and the clause stating that the shipowner had the authority to bind the vessel with a maritime lien, were insufficient to establish U.S. law as the governing law in the circumstances. Thus, maritime lien status was not granted.

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[5] The *Marine Liability Act* was amended by Bill C-7, an Act to Amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other Acts. Bill C-7 was passed on May 14, 2009. Section 139 came into force 90 days after the date of Royal Assent.

Cameco Corp. v. MCP Altona (The Ship), 2013 FC 23 involved the ranking of claims following a stow collapse of radioactive uranium cargo during a trans-Pacific voyage. The cargo owner spent $8 million discharging and reprocessing the radioactive cargo, and decontaminating the vessel. The cargo owner then arrested the vessel as security for its damages as well as discharge and remediation costs. The court rejected the cargo owner's claim that it rendered stevedoring services to a foreign vessel, thereby engaging the statutory maritime lien conferred by section 139 of the *MLA*. The court so held because no contract existed between the cargo owner and the shipowner, its agents, or the charterer, for the remediation of the cargo. Thus, the requirements for a maritime lien pursuant to section 139 were not met.

In *Comfact Corporation v. Hull 717 (Ship),* 2012 FC 1161, affirmed 2013 FCA 93, the courts were again faced with a claim for a maritime lien. The defendant vessel was being built in Canada for a Norwegian corporation. The shipbuilder sub-contracted the welding services to Comfact and then went into bankruptcy protection. Comfact claimed *in rem* against the vessel for its welding work, arguing that the claim was a preferred one, secured by a maritime lien. At trial, Harrington J. dismissed the claim, holding that section 139 of the *MLA* did not apply to the provision of labour to a shipbuilder for the construction of a vessel. The Federal Court of Appeal upheld the decision of Harrington J. The Court of Appeal was not persuaded that the provision of such services amounted to providing services for the "operation or maintenance" of a vessel, within the meaning of the *MLA*.

(e) Statutory Rights *in Rem*

A statutory right *in rem* is established by statutes conferring jurisdiction on an admiralty court.

There are three differences between a statutory right *in rem* lien and a maritime lien: (1) the statutory right *in rem* arises on the day of the arrest of the vessel, and is subject to claims that already exist against the vessel; (2) the statutory right *in rem* is usually defeated by a transfer of title to the vessel, unless the statute provides otherwise; and (3) the owner must be personally liable.

The *Federal Courts Act,* in section 22(2), sets out a number of maritime claims over which the Federal Court has jurisdiction. Many of the claims listed in section 22(2) are statutory rights *in rem*. Some statutory claims are defeated by a transfer in title. These types of claims are set out in section 43(2) and 43(3) of the *Federal Courts Act,* and include rights *in rem* against the vessel, cargo, and freight. Other claims listed in section 43(3) are not defeated by transfer of title, and these claims effectively convey survivability of the claims, without making them maritime liens.

4. Priority in Ranking

The ranking of priorities in Canadian maritime law is not governed by statute, nor is it governed by any ratified convention. Canadian courts have substantial equitable discretion when it comes to ranking of priorities. This discretion may only be exercised, however, in special circumstances where the normal ranking of priorities would lead to an unjust result. Generally, the ranking of priorities in Canadian maritime law is as follows:

- Marshal's expenses of arrest;

- Costs of selling the ship, including sheriff's disbursements;
- Possessory liens arising earlier in time than maritime liens;
- Maritime liens (including special statutory liens);
- Possessory liens arising later in time than maritime liens;
- Mortgages, in the order of their registration; and
- Statutory *in rem* claims.[6]

Marshal's expenses are generally afforded the highest priority. Marshals almost never come into possession of an arrested ship, however, and therefore do not use public funds to maintain the ship. The shipowner usually bears the cost of maintaining the arrested ship. If the shipowner is insolvent, the creditor or creditors will pay to maintain the ship. Creditors may apply to court for payment of specific expenses. However, such expenses will not be reimbursed unless they were preauthorized by the court.

The costs of selling the vessel often include party and party costs of the party that has applied to court for a sale order. Also included in costs of selling the vessel are the disbursements and fees incurred by the moving party to the sheriff, advertising costs, appraisal fees, and commission fees.

Maritime liens rank before possessory liens, except when a possessory lien accrued before the maritime lien came into effect. Another interesting feature of maritime liens is that Canadian courts recognize maritime liens arising under foreign law, even in circumstances where a similar claim made under Canadian law would fail. Since the addition of section 139 to the *MLA*, however, Canadian necessaries liens claimed against foreign vessels no longer rank below American necessaries lien claims, as they once did. When there are insufficient funds to pay out all the maritime liens, the remaining funds are divided *pari passu* amongst the lien holders.

In *Cameco, supra,* the Federal Court of Appeal had occasion to consider the ranking of priorities and the types of claims that are properly characterized as maritime liens. The court rejected the cargo owner's claim for a maritime lien arising pursuant to section 139 of the *MLA* for stevedoring services rendered to the foreign vessel, as discussed above. The court also rejected the cargo owner's maritime lien claim for salvage, because the claimant had not acted as a volunteer in discharging the cargo, and because the danger was over when the ship returned to a safe berth in Vancouver. The Salvage Convention 1989, in force in Canada, did not change the two fundamental requirements of traditional salvage law: peril and voluntary action. This case confirms that the court will be hesitant to alter the usual ranking of priorities in maritime lien claims, and that the court will also be hesitant to relax the traditional requirements for maritime liens.

Possessory liens rank after maritime liens but before mortgages. However, an exception was made in *Tergeste (The),* [1903] P. 26, in the case of a shipbuilder who had possession prior to the

[6] Gold, *supra* note 2 at 796.

attachment of the maritime liens. As discussed above, when a possessory lien holder's lien is lost due to the sale or change in possession of the vessel, the mortgagee is liable to pay for the discharge of the lien (*The Tami Joan, supra*). There is generally no issue of ranking amongst possessory liens, because possession is generally exclusive. Establishing the sequence of possession is usually straightforward.

Mortgages rank below maritime liens and possessory liens in the order they were registered under the *CSA,* as discussed above. If mortgages are not registered, and there are competing mortgage claims, the order of priority depends on the statute governing them. It is rare for the proceeds of a judicial sale to cover even the claim based on the amount of the first mortgage.

Statutory liens, whether possessory or non-possessory, do not affect priorities in Canadian maritime law, as they rank behind mortgages. They fall to the bottom of the list of priorities. In the rare case that funds remain after the payment of mortgages, the statutory liens would likely be distributed *pari passu.*

Another legislated exception to the general ranking of priorities is section 122 of the *Canada Marine Act,* S.C. 1998, c. 10, which dictates that certain claims enjoy priority over other claims. For example, section 122 provides that certain claims by federal port authorities are afforded priority over all other claims. The priority set out in this section is subordinate to claims for crew wages under the *CSA*, however.

This discussion of mortgages, liens, and claims in the maritime law context would not be complete without brief reference to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "*CCAA*"). Recently, in *Re Worldspan Marine Inc.,* 2013 BCSC 1593, the court confirmed that administrative charges under the *CCAA* enjoy a "super-priority" status. *CCAA* claims trump the normal ranking of claims in Canadian maritime law. Leave to appeal has been granted in this case, however.