

Maritime Law & the Marina Operator

SHELLEY CHAPELSKI
Bull, Housser & Tupper LLP
Canadian Maritime Law Association - June 7, 2013

The purpose of this paper is to provide some practical guidance with respect to the maritime law issues that marinas frequently face. The comments are culled from 22 years of experience in assisting marinas with managing delinquent, derelict and even dangerous boats and boat owners. The paper is intended to suggest practical solutions and to explain why sometimes maritime law is deficient when a marina operator most needs to rely upon it.

While this paper is aimed particularly at marinas including yacht clubs, many of the same issues arise at Harbour Authorities and Port Authorities. However, the latter two operations have public or government characteristics that provide additional dimensions to some of the challenges.

This paper should be read in conjunction with that of Arie Odinocki delivered at the same event.

1. What are the Sources of a Marina's Legal "Rights"?

A. Contracts

a. Oral and Signage (course of conduct) Contracts

It is trite that contracts do not need to be written. They can be oral or even created by conduct.

Consider the pay parking lot. There is no oral or written agreement. You drive up, see the sign and by leaving your car on the property, agree to the terms posted on that sign. In order to be enforceable, the terms on the sign must be easily understood and visible.

The challenge with dealing with breaches of an oral contract or one created by signage, is proof of reasonable notice of its terms. It is pretty easy to enforce a term written on a sign that says use of the marina is subject to the payment of moorage fees of so much per foot. However, if the marina wants to have additional terms such as the right to sell the boat if moorage remains unpaid or to rely upon an exclusion from liability, without having a signed moorage agreement with the moorage holder, proving the terms of the contract to the satisfaction of the court becomes more difficult. Not impossible, just more and more difficult as the terms become more onerous.

However, it is entirely reasonable for a marina to have signage stating that the use of the marina is subject to all of its policies and subject to the standard terms of its standard moorage agreement, a copy of which is posted in public place or is readily available.

Lots of appropriate signage is a necessary expenditure for marinas. If there is no sign at the dock stating that its use is subject to payment of moorage fees and a person comes up in the middle of the night and ties up his boat, especially if it is a dock with a public characteristic, the marina is going to be hard pressed to charge moorage fees until such time as marina staff has actually gone to speak to the boat owner to tell him about the terms of use of the dock. If a marina starts off with good signage defining the broad terms of the services it offers and the limits to those services, it will be well positioned to manage new and transient users.

Consider signage as a shield to protect the marina operations - its purpose is to try to create a contract, the terms of which are agreed to by conduct. If the marina can then get a written moorage agreement signed by the marina user, then the marina has a sword as well as a shield.

b. Written Contracts

As described, without a written moorage agreement there is a contract in place between the marina and its customer, but it is an oral agreement with very few terms and even fewer remedies for the marina. With a written moorage agreement a marina can potentially write any terms it wants into that contract.

There are limited enforcement remedies available to marinas at common law. By contract a marina can potentially create any remedy that it desires. A marina can exclude liability for damage that may incur even as a result of its employees' negligence. A marina can demand that boats using its docks carry liability insurance. A marina can get its customers to agree that should their employees or guests cause any damage they will pay for the same. A marina can get its customers to agree that should they breach the moorage agreement the marina can even sell their boat (subject to what I later have to say about the difficulties in doing so).

Mr. Odinocki's paper well describes the challenges that must be overcome in a written moorage contract in order to make some of its terms enforceable.

B. Federal Common Law and Provincial Statutory Law

a. Historical Background

I frequently hear frustration from some maritime clients, that federal maritime law is lacking some of the creditors' remedies that are available under provincial law.

As Mr. Odinocki describes, a marina has both land and water aspects. The land operations are generally governed by provincial law – the *Occupier's Liability Act* for example.

With respect to the water and vessel aspects, the Supreme Court of Canada has done its best to ensure that maritime matters (usually) fall solely within the purview of the Federal Government and the constitutional head of shipping and navigation.

However this clear direction has only existed for 15 or 20 years, which is, in legislative terms, a blink of time.

This is the explanation that I provide to my clients who complain about the deficiencies in federal law:

The Constitution divides up the various types of management necessary to run the country between Provincial jurisdiction and Federal jurisdiction. Provincial responsibility includes the management of property and civil rights. As a result, almost every province in the country provides remedies to make the economic affairs of their citizens easier to manage. For example, prior to remedial Provincial legislation being enacted, if a warehousemen was owed money with respect to goods stored on his property, he had no independent right to sell those goods to collect on his debt. He had to go to court and get judgment before he could sell the goods. This is an expensive and cumbersome process. So the provinces enacted remedial legislation and now a warehouseman can simply publish notice in the paper of the intention to sell the goods if the debt is not paid and then proceed to do so by auction. A motor vehicle repairman can register a lien under PPSA legislation and expect to be paid in due course. Creditors' remedies are faster and ideally, cheaper.

Until about 15 to 20 years ago however, it was assumed that wherever there was no Federal legislation governing an issue in navigation and shipping, i.e. a gap, Provincial legislation, could be used to fill in the gap. The Courts now have generally said that, that is not the case. As a result, the Provincial law remedies that maritime creditors sometimes used are not available.

There are some court cases that continue to rely upon Provincial legislation in maritime law, but it is my opinion, that constitutionally, such legislation should not apply. However, as I will explain later in this paper, there are some ways by which provincial laws might be used to their advantage to deal with at least some types of debts incurred by boats.

b. Useful Statutory Laws for Marinas

To the surprise of many marina owners, there are few federal statutes available to assist them in efficiently managing their operation and deal with debts or abandoned boats. There is no means to register a lien against a boat for unpaid repairs or moorage or a sanctioned statutory method by which to sell a boat without a court order.

Without any such statutory laws being applicable to vessels, it is very important to include wide contractual remedies in the moorage agreements. Contracts can even incorporate provincial law by reference. A marina never wants become a "bailee" of a vessel (which means that the marina must take care of the vessel as if it were the owner). Nevertheless, a marina can provide in its moorage contract that even though it is not a bailee, the boat owner agrees that the marina has the right to sell a boat as if it were a warehouseman of the boat and use the procedures set forth in the provincial statute. (The ability to incorporate provincial statutes by

reference into a contract was recognized in *False Creek Harbour Authority v. Shodan (The)*, 2002 FCT 275 (2002)

2. General Marina Management Issues

A. Marina Policy Manual

A marina must have a binder of written policies readily available to its customers. These policies will be about managing garbage and pollution, use of the various facilities that the marina may offer, what entitlements any given class of vessel owners may enjoy and some general rules about not causing a nuisance at the marina or disturbing other marina users.

With general written policies about not creating a nuisance or not engaging in disturbing behaviour, a marina will usually have a useful tool to rely upon should a marina be put in the position of trying to evict a troublemaker from the premises. Without written policies, a moorage contract needs to be many, many pages long to include all of the possible matters which benefit from “rules”.

In order to make the policies enforceable, the moorage agreement must incorporate it by reference and state where it is available to be reviewed. Ideally, when any policies are changed, notice of that change should also be broadcast to all customers so that they are binding on them.

Keep in mind that marinas, harbour authorities and especially yacht clubs are full of over educated and/or over opinionated users.

They will not let a marina impose any procedure to regulate their behaviours at the facility unless they are satisfied that they are bound to obey it. Put it in writing and make it readily available to all customers so that they have no excuse not to know about the policies.

B. Getting Rid of Difficult Customers

A marina has to prioritize its objectives when evicting troublemakers or people in breach of the moorage agreement.

Marina managers are known to call and say that there is a person who is a problem, he has not paid his moorage and we want him gone but we want the moorage paid up in full before he leaves. I press such marina managers to identify their prime objective: getting the moorage payments paid up to date or getting the vessel gone?

To manage customers' behaviour, you need to use both a stick and a carrot. If you say to a vessel owner we want your overdue moorage paid up to date and you gone by the end of the week what incentive does that vessel owner have to comply with your demand? If on the other hand, you are prepared to say to the vessel owner that if you are gone from our marina by the

end of the week and you agree not to return without advance written permission, we will waive your last three months of past due moorage, then you can open up that valuable moorage space for another vessel owner who is prepared to pay on time.

So, I strongly recommend that when you are dealing with a troublesome marina user, you identify your prime objective, whether it be money, eviction, or compliance, and tailor your "sticks" and "carrots" to suit.

The reality is that getting rid of difficult customers can be extremely challenging and costly. If the carrot and stick remedy will not work, and the boat is not actually abandoned, then the following Catch, Release and Compliance options exist, none of which are appealing:

a. Catch:

The marina hires a company to remove the boat from the marina and store it. However, the marina will be required to indemnify the company for any liability exposure and the marina will become a bailee – and liable to care for the boat as if it was the owner. Furthermore, the marina will have to pay the removal, storage and insurance costs until the debtor pays up (if ever).

b. Release:

The marina releases the mooring lines on the boat and lets it drift free. However, then the marina will be liable for any damage caused to third parties by the drifting boat, as well as for any damage to the boat itself

c. Compliance by means of Barbed Hooks:

The marina seeks a mandatory injunction order from the Court to have the vessel removed by the vessel's owner and sold or destroyed if the owner refuses to do so. It will likely take a minimum of three months – more likely six to nine months – even if the order is unopposed. It will cost \$15,000 to \$25,000++ unless the owner responds promptly to the initial statement of claim. Much of the cost is just arresting the boat and then buying the ads in the legal section of the newspaper advertising the boat for sale and then for claimants to file their notices of claim against the sale proceeds.

However, with some boat owners there are no other options than to go this route, especially if the boat owner is suffering from health (especially mental health) challenges. Some fight against the injunction application based on a belief that they have been unjustly treated.

It is my experience that the Courts are loathe to grant interlocutory mandatory injunctions over matters that just involve unpaid debts, even when the claim amounts to trespass by the boat owner over the premises of a privately owned marina.

The best way to proceed to get a mandatory injunction in those cases is to establish that the employer's duty to provide a harassment free workplace to his employees is being threatened. If the boat owner is fighting removal because of mental health issues or a belligerent personality, employees usually bear the brunt of the painful relationship.

Even if it is the case, a marina is unlikely to ask its good customers to provide affidavits that a difficult boat owner is being a nuisance to them. And a Judge may give such affidavits little credit in any event.

However, a Court must take employee safety very seriously as well as the safety of the public generally including the risk of pollution. Therefore, if you need to seek a court order to evict a troublesome marina customer, I strongly recommend approaching it from a safety aspect – what must the marina do to ensure that its customers are safe, that the environment is preserved and that the employees have a harassment free work place? Draft the affidavits in support of these objectives to make a compelling case for an interlocutory injunction.

More often than not, once you pass the hurdle of obtaining an interlocutory injunction, the problem boat owner will disappear.

C. Vessels under arrest at the marina

If there is a vessel under arrest at the marina must be extremely wary about unpaid moorage.

Unless there is an extraordinary Court order otherwise, the arrest of the vessel does not change responsibility for it or management of it. In other words, the arresting party is NOT responsible for the continued moorage unless they specifically agree with the marina that they will pay it. The party whose boat is arrested is likely to start walking away from its debts. So a marina needs to be ready to protect itself.

If a vessel is sold by Court Order, proceeds get distributed in this general order:

- (a) Sheriff and Sale Costs
- (b) Unpaid seamen's' wages, collision damages, salvage awards
- (c) Possessory lien claimants (must be a repairer in possession)
- (d) Mortgage
- (e) All other claims equally INCLUDING MOORAGE.

When a vessel is arrested it CANNOT be moved without a Court Order or consent of the parties. This can be very unfair to a marina if unpaid moorage runs up. Therefore, the Court permits you to seek an Order moving your moorage claim while the vessel is under arrest from "e" to "a" as a Sheriff cost. However, unless the parties agree to this jump, a marina NEEDS a court order.

3. Collection Issues/Abandoned & Derelict Vessels

To effectively deal with collection issues and abandoned vessels, it is important to appreciate the legal framework that is at play.

A. What is a Vessel?

A vessel "includes every description of ship, boat, craft, floating home or other structure used or capable of being used solely or partly for aquatic navigation without regard to method or lack of propulsion."

B. Is it "Licensed" or "Registered"?

All Canadian commercial vessels with engines of 10 HP or more must be registered with the Canadian Register of Vessels or Commercial Small Vessel Register. All Canadian pleasure craft with 10 HP engines must be registered with the Canadian Register of Vessels, or alternatively, simply licensed at the owner's option. A pleasurecraft owner will sometimes register his boat instead of just licensing it to have the prestige of a "blue book" or to enable a marine mortgage to be registered against the vessel.

Registration and licensing are not the same. When it comes time to pursue debt collection, the difference can be very important.

C. Licensed Vessels

If a boat is licensed it has what we refer to in B.C. as a "13 K" number. Traditionally, the K indicates B.C. and the "13" refers to Vancouver. (There are other letters of the alphabet used to indicate the other provinces and various numbers to indicate the cities within that province.) Under the standard numbering system now being used to licence pleasure crafts, licenses take the following form, for example, "BC#####"

All the license number does is establish that duty and/or taxes have been paid on the vessel when it was either imported into Canada or first licensed in Canada.

This license is a completely separate from whether or not a vessel has a got a valid fishing license (CFV License) which is a plate and a number that is secured on the side of its vessel.

No current database with respect to the ownership of licensed vessels is maintained that is accessible to the public.

In any event, many changes in ownership of licensed boats are not recorded. The name of the first owner when the vessel is licensed is listed somewhere but the chances of obtaining that information are slim to none and there is no way to determine if the information is still current.

D. Registered Vessels

A registered vessel is one which has a six digit official number and has its official name "carved" on its hull, along with its port of registry. There is the database on the internet that lists all of the vessels that are registered <http://www.tc.gc.ca/marinesafety/Ships-and-Operations-Standards/registry.htm>. Alternatively it has a "C" designating commercial use, followed by digits if it is recorded on the Small Vessel Register (Commercial).

Changes in ownership of a registered vessel must be recorded by the registry maintained by Transport Canada. It is similar to the land title registry, although registration is not conclusive evidence of ownership to the vessel.

It used to be that once ownership in a vessel was registered nothing need more be done to maintain the registry so long as there was no change in ownership. A registration now expires every few years. What exact legal ramifications flow from the vessel getting dropped from the registry have not yet been determined.

E. Why Does it Matter Whether a Vessel is Licensed or Registered?

The distinction between licensed vessels and registered vessels is critical when it comes to creditors' remedies because of how title to them can be transferred.

Under the *Canada Shipping Act, 2001* ownership to a registered vessel can only essentially be changed by means of a) a signed Bill of Sale from the owner (or estate representative); b) a Bill of Sale signed by the mortgagee; or c) Court Order.

If a Bailiff purports to sell a registered vessel, he cannot transfer title to it. He has no right to sign the Bill of Sale and the ship's registry is not supposed to accept it as evidence of transmission of the title to the vessel.

With respect to licensed vessels, however, because there is no formal registry of ownership kept, such boats can arguably be sold by a creditor without a court order. I state "arguably" because there is no specific provision under Federal law to allow this. At the same time, there is no express impediment.

A Bailiff can sign a bill of sale to a licensed boat. The new owner can access government services and swear a statutory declaration that he has bought the boat. Service Canada will then likely issue the new owner a license for the boat in that owner's name.

Therefore, should an owner of a licensed boat whose boat was sold by auction by a Bailiff choose to challenge the sale under a constitutional basis that there is no authority to authorize the sale, he may be successful. Having said the foregoing, a constitutional challenge is an expensive lawsuit and when a vessel is finally actually sold, the owner often owes a great deal of money, perhaps more than what the vessel is worth.

It is critical to remember that as soon as a marina takes possession of a boat, even if just to briefly move it or with the intention of destroying it, it becomes a "bailee". A bailee is liable to take care of the property as if it were the owner. If the boat is already a wreck (and the marina can easily prove it) then the required standard of care towards the boat is obviously very low. But if there is any value to the boat, and especially if the value is greater than the debt owed to the marina, then the marina must take care of that boat as if the marina were a diligent owner.

The marina would be wise to include in its written moorage agreement that it is not liable for any damage that occurs if and when a bailment situation arises when enforcing its creditors' remedies.

If a marina is sued for wrongfully damaging a boat as a result of it being moved, or selling or destroying a boat, the marina needs to understand that its exposure to damages could be:

- (a) the fair market value of the boat (or the cost of repairs if the boat is just damaged and not sold or destroyed); and
- (b) any lost legitimate (and foreseeable) business opportunities.

However, assuming that the boat has incurred considerable debt to a marina and the marina has an independent surveyor backing up its low or worthless value and if it was sold, that the Bailiff got the best price possible, then the boat owner's damages should be zero. But to prove its case, the marina needs a good survey report and lots of photos/videos of the boat's poor condition. It is even better if the marina has log books recording how many times it has had to pump out the vessel or otherwise keep it from sinking or being damaged. The log would help prove the poor condition of the boat and the marinas efforts could constitute a claim for salvage services and increase the debt owed to the marina.

It is also important to take all reasonable measures to tell the owner in advance that the marina is about to move, sell or destroy the boat. That will help defeat any claim for lost business opportunity that the owner may have pursued with the boat.

If the marina proceeds to move, sell or destroy a boat after giving lots of notice, and the boat owner sues, the Court is unlikely to have sympathy with the boat owner and if the boat owes the marina more money than it was worth, the boat owner's damages are worth zero.

Remember that if the marina has used a Bailiff and the boat owner sues the Bailiff, the marina will likely have to also defend the Bailiff as their contractual terms include such an indemnity provision. So the marina must make sure the Bailiff does a good job and gets the best possible price for the licensed boat and does not cause any damage.

If it is a registered vessel or you do not want to run the risk of a sale that may not withstand a constitutional challenge, what are your options?

Regretfully, you need a court order to sell the boat or you need to convince the mortgagee to cover the debt. Although all of the registered vessels are listed on the government web page, that web page does not disclose the details of mortgages. You have to go to the registry itself to get these details.

We have had success in a few instances in writing a letter to the bank that holds the mortgage advising them that the boat is in arrears and at risk of being sold on a fire sale basis. The bank has written a cheque for the outstanding moorage and simply added it to the mortgage amount. However, if the mortgages are seriously in arrears or, are held by a private company, this route will not be very successful.

Likewise a licensed boat may also be subject to a bank loan - each province will have a registry of personal property loans and you can ask a lawyer to search the license number on the vessel and the owner's name to see if any loans have been filed against the vessel.

One client that took over an old operation asked the owners of old junky registered vessels littering the property to simply sign blank Bills of Sale. The owners owed more money than their vessels were probably worth and could not be bothered or were incapable of arranging a sale of the boats. For those owners it was a relief when the marina agreed to arrange a sale and excuse any remaining debt. The marina must make sure that the sale is **as is** and **where is** and should check that there is no mortgage registered against it. Whoever buys the boat may assume many liabilities of the boat as well, which fact should be disclosed to the prospective purchaser. The marina should not transfer the boat into its own name before selling it. Otherwise it may assume the boat's liabilities, including pollution and the marina will have to pay taxes on the purchase. And obviously the marina must agree to abandon its moorage claims that exceed the sale proceeds.

DELINQUENT, DERELICT & ABANDONED VESSELS MANAGEMENT STRATEGIES

The list below summarizes the strategies. They are not one size fits all and which one is best is driven to a large extent by whether the vessel is licensed or registered, whether it has any value and whether the owner will respond.

1. Offer to waive unpaid moorage if and only if the vessel leaves marina by certain date and agrees to not return. Most effective if you can identify a carrot and a consequence as well as a stick.
2. If there are no mortgages on vessel, have owner sign a blank Bill of Sale in exchange for a waiver of moorage and sell "where is as is". Make sure that the new owner knows that the marina is not making any representations about title or debts against the vessel. Do not transfer the vessel into the marina's name, as taxes would be payable and it would create potential liability to the marina for any pollution or liability caused by the vessel. There are some risks, but it can work if the owner is simply incapable of organizing the sale himself and wants to get rid of the vessel.

3. Have vessel towed overland to and left on owner's property. Have it well surveyed first and take photographs before and after delivery. Remember the marina would be liable for any damage that occurs during the delivery because it becomes a bailee.
4. If the vessel is mortgaged, send a letter to the mortgagee. Get mortgage details from Ship's Registry (if a licensed vessel, check Personal Property Registry by "K" No. or HIN). The mortgagee may deal with unpaid moorage to avoid a fire sale of vessel or the owner may be embarrassed into dealing with the debt.
5. If the vessel is licensed (not registered) the Bailiff may be prepared to sell. The Bailiff generally cannot transfer title to a registered vessel without a Court Order. However, licensed vessels are often sold at Bailiff's sale without a Court Order. The marina can be sued for the loss of the vessel but hopefully the marina can prove that its value was less than the debt that was owing.
6. Arrest the vessel and seek a Court ordered removal or sale, or seek mandatory removal Order. However, this is costly (\$15,000 to \$25,000+++) and if the owner refuses to obey the Order, you are still left with cost of destruction. This method is only useful if there is decent value to vessel to recover the costs, let alone the debt.
7. If a vessel is arrested at your dock by another creditor, either get a Court Order that moorage from the date of the arrest ranks #1, along with the costs of arrest, or get the parties to agree to this. The Court almost always grants this Order, so the parties will often agree to this voluntarily. A vessel under arrest can only be moved by Court Order or agreement of the parties. When a vessel is "arrested", custody of it remains with the owner. Therefore, the party arresting is not liable for the moorage. So your customer is still on the hook for the moorage and, if he owes money to other creditors, there may be nothing left for moorage. Therefore, getting an Order to rank ongoing moorage #1 is important. If a vessel is sold, claim your moorage from the new owner.
8. Haul the vessel to the junkyard. It is absolutely critical to record its condition inside and outside and get a surveyor to confirm its lack of seaworthiness and value. The marina can be sued for the loss of the vessel but hopefully the marina can prove that its value was less than the debt that was owing.
9. Consider seeking a Wreck Removal Order from Navigable Waters if the vessel has sunk and is an obstruction. However, this only works if the owner responds to the Order.
10. Report pollution or potential pollution to the CCG-ER, so they can order the owner to take remedial steps, and if it is sinking and polluting or in imminent danger of doing so, the CCG-ER may haul it off.