

**The New Ship Supplier's Maritime Lien:
A Made in Canada Solution**

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INTRODUCTION

Bill C-7, an Act to Amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other Acts, was a 97 page Bill which was passed by Parliament on May 14, 2009. The topic of this paper deals with one section which creates a maritime lien for Canadian "necessaries" suppliers over specific maritime property by way of amendment to the Marine Liability Act (MLA).

The CMLA made representations to and appeared before the Standing Committee on Transportation, Infrastructure and Communities (SCOTIC) and partially as a result of such the wording of the Section as set out in the original Bill underwent amendments as recently as May 8, 2009.

The text of the Maritime Lien section in the legislation is as follows:

Maritime Lien

1. *Definition of "foreign vessel"*

139. (1) *In this section, "foreign vessel" has the same meaning as in section 2 of the Canada Shipping Act, 2001.*

Maritime lien

(2) *A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise*

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

(b) out of a contract relating to the repair or equipping of the foreign vessel.

Services requested by owner

(2.1) *Subject to section 251 of the Canada Shipping Act, 2001, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.*

Exception

- (3) *A maritime lien against a foreign vessel may be enforced by an action in rem against a foreign vessel unless*
- (a) the vessel is a warship, coast guard ship or police vessel; or*
- (b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.*

Federal Courts Act

- (4) *Subsection 43(3) of the Federal Courts Act does not apply to a claim secured by a maritime lien under this section.*

The Bill also adds a new Section 140 to the MLA which establishes a new general limitation period of three years for proceedings taken under Canadian maritime law. This general limitation will apply to the new lien.

HISTORY

The creation of a maritime lien to secure the claims of Canadian ship suppliers is largely the response to the discussions and debate which were engendered by the issuance of the Transport Canada Maritime Law Reform discussion paper on International Marine Policy in May, 2005.¹ At that time the discussion paper proposed the creation of a maritime lien for Canadian ship suppliers by way of an amendment to the Federal Courts Act (FCA).

The mechanism was not disclosed but it was anticipated that amendments to paragraphs 22(2)(m) and possibly (n) in conjunction with changes to subsection 43(3) of the FCA would be the method of creating the maritime lien. By creating this new section of the Marine Liability Act which essentially repeats the claims which are covered in 22(2)(m) and (n) of the FCA (with the exception of construction) and coupling this with the exclusion of the application of ss 43(3) of the FCA a new lien is given life.

The reason for this exercise was to remedy the perceived inequity existing between the rights enjoyed by a ship supplier in the USA and those (not enjoyed) of a Canadian ship supplier. American ship suppliers (necessaries suppliers) under U.S. law are afforded a maritime lien by

¹ Transport Canada document T14370E
Although it is noted that in 1999 in *Fraser Shipyard & Industrial Centre Ltd. v Expedient Maritime Co. (The Atlantis Two)* (1999), 170 F.T.R. 1, rev'd (1999), 170 F.T.R. 57 ([The Atlantis Two] Prothonotary Hargrave at paras. 48-51 commented that legislative change would be needed to correct any perceived inequities between Canadian and foreign ship suppliers which did engender discussions

virtue of the *Commercial Instruments and Maritime Liens Act*, 46 U.S.C. 31342 (1994). This section reads as follows:

- “ss. 31342. Establishing Maritime Liens*
- (a) *Except as provided in subsection (b) of this Section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner*
- (1) *has a maritime lien on the vessel;*
 - (2) *may bring a civil action in rem to enforce the lien; and*
 - (3) *is not required to allege or prove in the action that credit was given to the vessel.*
- (b) *This Section does not apply to a public vessel.”*

Under Canadian law a supplier of necessaries to ships was accorded only a statutory right in rem.

The differences in these rights is well known to maritime lawyers but for the other 70,000 lawyers in Canada who do not regularly practise maritime law, the distinction between the rights arising from a claim secured by a maritime lien and a claim “secured” by a statutory right in rem should be briefly reviewed:

Maritime Lien:

“Maritime liens are the product of evolution of custom, statute and judicial decisions. To understand them, one must understand the history of maritime law.”²

The historical derivation and development of maritime liens is a study in itself but for the purposes of differentiating the maritime lien from the statutory right in rem, the following description found in *Thomas* is helpful.

“A maritime lien may be described as:

- (1) *a privileged claim or charge,*
- (2) *upon maritime property,*
- (3) *for service rendered to it or damage done by it,*
- (4) *accruing from the moment of the events out of which the cause of action arises,*
- (5) *travelling with the property secretly and unconditionally, and*
- (6) *enforced by an action in rem.”³*

² Tetley, *Maritime Liens and Claims*, 2nd Ed., p. 60 (see pp 7-59 of this excellent work for an abridged version of the history of maritime lien law)

It has been described as a "*jus in re aliena*"...a subtraction from the absolute property of the owner of the thing".⁴

The secret nature of the lien and the fact that it remains attached to the maritime property into the hands of a new owner is the beauty and terror of the maritime lien. By contrast a statutory right in rem only gives the holder of such right an ability to proceed in rem against the particular maritime property in a court having jurisdiction to do so and only under specific circumstances. The statutory right in rem grants no specific privilege or property right in the res and is extinguished against the res upon a sale.

More critical for the Canadian ship supplier is the fact that with respect to competing claims, the holder of a maritime lien has as the result of its privileged status a priority ranking against the maritime property or the proceeds of sale of such property while a statutory right in rem ranks at the very bottom of the priority list.

The generally accepted priority ranking in Canada of in rem claims has been reiterated a number of times and is accepted to be as follows:

1. Disbursements of the Admiralty Marshal or Sheriff;
2. The costs of sale, including those of the plaintiff in an action arising out of arrest, appraisal and sale, or in the alternative, the claim of a party other than the plaintiff who has been instrumental in bringing the ship to sale;
3. Possessory liens pre-dating other liens;
4. Maritime liens;
5. Possessory liens arising after maritime liens;
6. Mortgages; and
7. Statutory rights in rem including for the supply of necessaries which rank *pari passu* amongst themselves.⁵

To fully understand the issue a short sidebar into conflicts of law is necessary. Since under U.S. law a necessaries supplier is granted a maritime lien but under Canadian law a necessaries supplier is not granted a maritime lien, why should the U.S. necessaries supplier's claim be given this status when it is pursued in the Canadian Admiralty courts?

³ Thomas; *Maritime Liens: British Shipping Laws*, Vol. 14, Stevens & Sons 1980 pp. 11, 12 [For general discussion of each of the characteristics see pp. 12, 13 and 14 *op cit.*]

⁴ Gorrell Barnes in *The Ripon City* [1897] P. 226 at para 242

⁵ See *J.P. Morgan Chase Bank v Mystras Maritime Corporation and the Ship Lanner*; 205 F.C. 864 at para. 39

The reason is the way in which Canadian courts determine whether the foreign necessities claim has the status of a maritime lien or not. Under Canadian conflict of laws rules whether a foreign necessities claim gives rise to a maritime lien is considered to be a matter of substantive law to be decided by the proper law of the transaction.⁶

Therefore, if the proper law of the transaction is a foreign law such as American and American law grants maritime lien status to the claim, a Canadian court will enforce the claim as a maritime lien and rank it according to the Canadian priority system. Thus when an American necessities claim is given, by the proper law of the transaction, the status of a maritime lien such status will be recognized under Canadian law, notwithstanding that the same facts arising in Canada would not give rise to a maritime lien.⁶

In the *Har Rai* Mr. Justice LeDain of the Federal Court of Appeal, as he then was, made this interesting comment at paragraph 11 of the decision:

"The fact that a claim for necessities furnished in Canada is not enforceable by action in rem unless the owner of the ship is personally liable is not a reason under Canadian law, any more than the fact that such a claim does not give rise to a maritime lien, for not recognizing a foreign maritime lien for necessities as enforceable by action in rem in the absence of liability in personam. The limitations applicable to a mere statutory right in rem are not in principle necessarily applicable to a maritime lien. They are two different things."

This can be contrasted with the position which prevails in the United Kingdom and many Commonwealth and former British colonies where English Admiralty law prevails.⁷

Under UK conflicts of law principles the determination of the status of a foreign claim for necessities, enforcement of which being sought in the UK, is determined on the basis that such questions relate to procedural remedies rather than substantive rights. They are therefore to be determined by the application of the *lex fori* and not the "proper law" of the transaction.

Therefore under UK conflicts of law principles no foreign maritime lien will be recognized unless the facts which support the claim would also give rise to a maritime lien under UK law. Under UK domestic law the supply of necessities does not give rise to a maritime lien.

⁶ The modern locus classicus in Canada is *The Ioannis Daskalelis* (Todd Shipyards Corporation v *Altama Compania Maritima, S.A.* [1974] S.C.R. 1248 See also *Marlex Petroleum Inc. v the Ship Har Rai and the Shipping Corporation of India Ltd.* (1984) 53 N.R. 1, F.C.A. Confirmed [1987] 1 SCR 57

⁷ See generally Professor Wm. Tetley; *Maritime Liens in the Conflict of Laws*, published in *Law and Justice in a Multi-State World: Transnational Publishers Inc. Ardsley N.Y.* 2002 at pp. 439-457

favoured.¹¹ It was also recognized that implementing this change would not remedy the fact that Canadian ship suppliers' claims remain at the lowest of priorities, both in Canada and elsewhere. Thus in order to enhance the priority of the ship suppliers claim the creation of the made in Canada maritime lien was the only viable alternative.

The Discussion paper asked for recommendations on three issues.

1. What should be the scope of a maritime lien for ship suppliers?
2. Who would have authority to bind the vessel for ship supplies?
3. What would the ranking be of the new maritime lien?

The CMLA struck a sub-committee to deal with these questions and formulate a response. (Canadian Bar Association as well as others also responded to this initiative)

The response of the CMLA made the following recommendations.

1. The lien should encompass claims previously referred to in subsections 22(2)(m) and (n) of the FCA. Although this was broader than the "traditional" definition of necessities it was more akin to what is encompassed by the American "preferred" maritime lien.
2. Not wanting to follow the American model of listing those persons who are presumed to have authority to bind the vessel it was recommended that the current test for liability in rem for the matters set out in 22(2)(m) and (n) be retained. Essentially if the facts supported the current right in rem then these same facts would now give rise to a maritime lien. This would therefore not introduce any changes in practice. Inherent in this is the fact that to support a right in rem for the supply of necessities the credit of the owner of the vessel must be engaged. As stated by Justice Marceau in the *Jensen Star*¹² to determine if this requirement is met

"Is it not a fact that there are three possibilities which have to be reckoned: the owner may have contracted himself, or he may have authorized someone to contract on his personal credit, or he may have expressly or implicitly authorized a person, in possession and control of a ship, to contract on the credit of the ship (rather than on the entirety of his personal assets). But, I essentially

¹¹ The BC Maritime Law Section of the CBA in 2003 thought this was the proper solution and in 2003 formally opposed the creation of a maritime lien.

¹² *Mount Royal/Walsh Inc. v Ship Jensen Star* 99 NR 42 at p. 50

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agree that liability as a result of some personal behaviour and attitude on the part of the owner is required.”

3. As for ranking, no changes were recommended and the new maritime lien was recommended to be ranked essentially in fourth position below a possessory lien which predated the maritime lien.

Transport Canada analyzed the responses given to the discussion paper and in 2007 determined that it would recommend to government the creation of a restrictive lien against (1) foreign flagged vessels only. The lien would be for the same claims set out in subsection 22(2)(m) of the Federal Courts Act. (2) The lien would rank before a ship's mortgage but (3) would be extinguished 60 days after a bona fide sale of the vessel. Finally (4) the requirement that the lien would arise only if the ship owner or someone acting under the ship owner's authority bound the vessel.

As a comparison with the characteristics of a maritime lien, the new lien was a less robust version in that it was limited to certain maritime property, the ranking appeared to be one step below the traditional ranking of maritime liens in Canada, and the extinguishment after a bona fide sale of the vessel was directly in contrast with the maritime lien's most significant characteristic. However, the necessity of having the ship owner or someone acting on his behalf enter into the transaction giving rise to the lien was in keeping with the accepted jurisprudence that there must be involvement of the owner in the transaction (express or implied) for the court to exercise its jurisdiction in rem against the vessel, a concept which has been consistently applied in Canada.¹³

However, when the legislation was drafted and the Bill introduced the Section eliminated the mention of ranking, removed the concept of extinguishment of the lien after a bona fide sale, and had added the claims described in subsection 22(2)(n) of the FCA (less construction) to the class of claims covered by the lien and most disturbing eliminated the necessity of any involvement by the owner.¹⁴

More consultation at the Committee level occurred and further representations were made to SCOTIC and ultimately oral representations were made before the Committee by both the CMLA and the CBA Maritime Law Section. Changes were made to the language by the Committee¹⁵ which now resulted in the reintroduction of some owner's involvement by the

¹³ See *Wescan Stevedoring Ltd. v Armar* [1973] F.C. 1232; *Feoso Oil Ltd. v the Ship Sarla* (1995), 184 N.R. 307; *Maritima de Ecologia S.A. de C.V. and Secunda Marine Services Ltd. et al* and the ship *Maersk Defender* 2007 F.C.A. 194 CanLii

¹⁴ See Appendix I for the language initially set out in Bill C-7

¹⁵ See Appendix II for the Third Report of the Committee (May 7, 2009)

addition of subsection 2(1) in the final text. However, this “owner’s involvement” was not applicable to all claims. Furthermore, the claims for stevedoring and lighterage had the additional characteristic of being subject to Section 251 of the *Canada Shipping Act, 2001*.¹⁶

CONCLUSION (Tentative)

The result is the text appearing at the beginning of this paper. The following observations may be made with respect to the final wording.

We now have a multi-faceted system for enforcement of claims which are encompassed by subsections 22(2)(m) and (n) of the FCA, with the exception of construction claims which remains unaltered.

A Canadian business person has:

- [A.] A maritime lien for claims against a foreign vessel if such claims arise out of the supply (wherever) of goods, materials or services regardless of the involvement of the owners;
- [B.] A maritime lien for a claim arising out of a contract to equip or repair a foreign vessel, regardless of the involvement of the owner (but it is unclear if this equipping or repairing has to take place in Canada);
- [C.] A maritime lien for stevedoring and lighterage, services supplied to a foreign vessel but only if requested by the owner or authorized person and subject to Section 251 of the CSA (note that stevedoring includes trimming and lighterage and the supply of goods in relation to stevedoring, trimming and lighterage as well);

Although apparently these services can be supplied anywhere when one reviews Section 251 of the CSA it is noted that only a right in rem is granted for stevedoring claims and the vessel appears to have to be in Canada. There is also, in the case of a bareboat chartered vessel, requirements somewhat akin to those set out in subsection 43(3) of the FCA with the addition that a bareboat charterer has to be joined in personam. Whether the simpler requirements to obtain a lien on a foreign vessel trumps these more restrictive requirements will likely be the subject matter of a future Federal Court decision;

- [D.] A statutory right in rem for a claim arising out of supply of goods, materials or services to a Canadian vessel or a foreign pleasure craft as provided in Section 22(2)(m) of the FCA subject to the services having been rendered on the authority of the owners and also provided that the conditions of subsection 43(3) of the FCA are met; (no change)

¹⁶ See Appendix III attached for statutory references

- [E.] A statutory right in rem against a Canadian vessel or a foreign pleasure craft for equipping or repairing as provided in Section 22(2)(n) of the FCA subject to the services having been rendered on the authority of the owners and also provided that the conditions of subsection 43(3) of the FCA are met. (no change)

Some other observations:

The practical effects on the repairer who has a possessory lien might be that he will readily give up his possessory lien if he has a maritime lien for his claim. If he does not the prudent legal advice would be not to give up possession unless he has cash in hand or a demand stand-by letter of credit from a friendly bank to satisfy his claim.¹⁷

Interesting questions arise if a vessel changes its status. If a foreign vessel over which the lien has arisen becomes Canadian before the action is started, has the lien expired? Presumably it cannot be enforced if the vessel changes its identity to any of the classes set out in subsection (3) but what about a vessel that once was but no longer is foreign.

Author's Note

As this paper was being finalized (actually about an hour before final typing) it was discovered that the Senate Committee reviewing the legislation has invited further representation concerning the Bill as a whole. It is understood that this further review, which would include the Maritime Lien Section might occur on June 16th.

June 15, 2009

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¹⁷ For a discussion of issues surrounding possessory liens see *Montreal Drydocks and Ship Repairing v Halifax Shipyards Ltd.* (1920) 60 S.C.R. 359. It appears equity will play a role in these decisions.

APPENDIX I
ORIGINAL LANGUAGE IN BILL C-7

Section 12

The Act is amended by adding the following sections in numerical order (*Marine Liability Act*).

139(1) In this section, "foreign vessel" has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.

(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

(a) in respect of goods, materials or services wherever supplied to a foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; and

(b) out of a contract relating to the repair or equipping of a foreign vessel.

(3) A maritime lien against a foreign vessel may be enforced by an action in rem against a foreign vessel unless

(a) the vessel is a war ship, coast guard ship or police vessel; or

(b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

(4) Subsection 4 3(3) of the Federal Courts Act does not apply to a claim secured by a maritime lien under this section.

APPENDIX III
Statutory References

Canada Shipping Act, 2001, S.C. 2001, c. 26

STEVEDORING

Actions in rem

251. (1) A person who has contracted with the authorized representative or a bare-boat charterer of a vessel in Canada to provide stevedoring may maintain an action *in rem* in the Federal Court, or any court of competent jurisdiction whose rules provide for *in rem* procedure in respect of vessels, for a claim in respect of the stevedoring.

Limitation

(2) The right of action *in rem* referred to in subsection (1) may be exercised only while the vessel is chartered to the bare-boat charterer and only if the bare-boat charterer is joined as a defendant.

Does not affect other rights

(3) For greater certainty, nothing in this section limits the right of a person to maintain an action *in rem* for stevedoring under Canadian maritime law, within the meaning of subsection 2(1) of the *Federal Courts Act*.

Definition of "stevedoring"

(4) In this section, "stevedoring" includes trimming, lighterage and the supply of any goods or services in relation to stevedoring.

Section 2 Definitions

"Authorized representative" means, in respect of a Canadian vessel, the person referred to in subsection 14(1) and, in respect of a foreign vessel, the master

"Canadian vessel" means a vessel registered or listed under Part 2 (Registration, Listing and Recording)

"foreign vessel" means a vessel that is not a Canadian vessel or a pleasure craft

“government vessel” means a vessel that is owned by and is in the service of Her Majesty in right of Canada or a province or that is in the exclusive possession of Her Majesty in that right

“Master” means the person in command and charge of a vessel

“pleasure craft” means a vessel that is used for pleasure and does not carry passengers, and includes a vessel of a prescribed class

“prescribed” means prescribed by regulations made by the Governor in Council

“vessel” means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class.

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Bob Jette was born in Minto, NB and received his BA and LLB from the University of New Brunswick and was admitted to New Brunswick Bar in 1973.

He is a member and past President of the Canadian Bar Association New Brunswick Branch; three term Councilor of the Law Society of New Brunswick; member and former member of the Council of the Saint John Law Society; member and Eastern Vice President, Canadian Maritime Law Association; member of the Canadian Board of Marine Underwriters; associate member of the Association of Maritime Arbitrators of Canada, the Nautical Institute and the Canadian Association of Average Adjusters.

An adjudicator under the Small Claims Act of the Province of New Brunswick, Bob is also a Director of the Canadian Bar Insurance Association and was recently appointed Honourary Royal Norwegian Consul for New Brunswick.

Bob represents major international protection and indemnity insurers and is noted in Lexpert as a leading counsel in New Brunswick in maritime law.

Bob and his wife, Patricia, reside in Rothesay, N.B. and are the parents of two daughters.