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Notes and Comments

LET THE BOAT BUYER BEWARE

By A. J. STONE, Q.C.*

In the purchasing of any item of used personal property, the usual care must be taken by the purchaser in satisfying himself that the title to the property is good at the time he acquires it. But more than usual care is required in the purchase of a used pleasure boat for not only must the purchaser satisfy himself that the "title" to the boat is good, he must also be certain that the boat is free of all of a number of marine "liens" that are peculiar to boat operation and use and which arise out of a variety of circumstances.

Registered and Unregistered Charges

Thus, the intended purchaser of a pleasure boat faces a dual problem — firstly, that of effective acquisition of title free and clear of all registered encumbrances, and secondly, that of acquisition of the boat free of any unregistered encumbrances, principally marine liens. Although both of these problems present difficulties, the second is perhaps more troublesome, for while registered encumbrances are visible and therefore afford the purchaser the opportunity to protect himself, liens are largely hidden and hence much more difficult to detect — let alone protect against at the time of purchase. The normal garden variety of registered encumbrances consists of such pledges as marine mortgages, bills of sale and chattel mortgages, as well as conditional sales contracts. For the most part, these can be readily examined and taken account of by search of appropriate public registries. But a marine lien, although just as certainly a charge on the boat as any registered pledge agreement, requires no public registration for either its validity or its enforcement. By far the most important of these is the *maritime lien*, a unique invention whose ancestry lies deeply rooted in the maritime law of England and which occupies a correspondingly prominent position in the maritime law of Canada. Such a lien can arise under a variety of circumstances¹ but it most commonly

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¹ For example, it can arise with respect to damage claims, crew's wages, salvage, *respondentia* and bottomry (the latter two claims being now more or less obsolete). Formerly, a ship's master held a maritime lien for unpaid wages but this is no longer so in Canada. Additionally, the *Federal Court Act*, S.C. 1970, c. 1, places an unpaid owner of a dock facility, or a harbour or canal authority for unpaid harbour, dock or canal charges, in a position roughly similar to the holder of a maritime lien (with important differences) with the result that such "quasi-maritime liens" are now enforceable against the ship itself regardless of any intravening change of ownership. (See Section 22 (2) and (1) and (s) as well as Section 43 of the *Federal Court Act*). Finally, a "ship" may be made the subject of action *in rem* concerning her title ownership and possession, as well as for enforcement of mortgages under the *Federal Court Act*.

arises as a result of damages from the collision of the boat or "ship" (including a pleasure boat) with another object or person.² The nature of the lien is such that it comes into existence at the moment the damage is done or the debt incurred. It is an invisible charge and (subject to extinguishment by effluxion of time under limitation statutes³ and for other extraordinary reasons) it remains attached to the boat, even after it is acquired by a new owner acting in good faith and without notice.⁴ As will be seen, such a lien is of great significance to the intended purchaser of a pleasure boat who will want to assure himself (as best he can) either that it does not exist, or, if it does, that he has protected himself against its consequences to the extent that it is possible to do so.

Two other liens are of almost equal importance to the intended purchaser. The so-called *statutory lien* is universally recognized and arises in Canada under statute law.⁵ For example, it permits an unpaid equipment supplier or a repairman the right to secure his claim against a boat that benefitted from the installation of equipment or from repairs so long as that boat remains the property of the owner who incurred the debt.⁶ Finally, in limited though important circumstances, the maritime law of Canada recognizes and provides for the attachment and enforcement of the common law *possessory lien* on ships, including pleasure boats, chiefly for repairs but only while the boat remains in the repairman's possession.⁷

Canadian constitutional requirements necessitate the examination of these subjects from two other points of view. Depending on its nature and its size, a boat may or may not require licencing or registration in accordance

² The jurisdiction provision is found in Section 22 of the *Federal Court Act*, *supra*, note 1 and in particular in Section 22 (2) (d) read together with Section 43 and with the definition of "collision" in Section 43 (8) of that Act.

³ Claims for salvage and for damage from collision between ships are subject to a two year limitation period contained in Section 536 and 645 respectively of the *Canada Shipping Act*, R.S.O. 1970, c. S-9. However claims for other damage, for unpaid wages and for other contractual debts survive for longer periods, e.g. in Ontario, generally six years under *The Limitations Act*, R.S.O. 1970, c. 246.

⁴ This outstanding feature of the maritime lien is recognized in the jurisdictional provisions bearing on its enforcement by way of an action *in rem* in the Admiralty Court. See Section 43 of the *Federal Court Act*, *supra*, note 1.

⁵ For example, claims for damage to goods carried on a ship, for goods (e.g. provisions, equipment, apparel) and services supplied to a ship, for repairs, construction, personal injuries, towage and charter, all fall under this head. Provision for enforcement of such claims by way of actions *in rem* in the Admiralty Court is also found in Section 22 of the *Federal Court Act*, *supra*, note 1.

⁶ This important qualification is recognized under Section 43 of the *Federal Court Act*, *supra*, note 1. Unlike maritime liens and the quasi-maritime liens referred to in note 1, statutory liens do not constitute a charge on the ship until *in rem* proceedings are instituted and such proceedings are not sustainable unless the person who incurred the debt was owner of the ship at that time and remains so at the time the proceedings are instituted.

⁷ See e.g. *The Tergeste* [1903] P. 26, and also *The Montreal Dry Docks and Ship Repairing Co. v. The Halifax Shipyards Ltd.* (1920), 60 S.C.R. 359 at 370. Also, the *Mechanics Lien Act*, R.S.O. 1970 c. 267 s. 48.

with the *Canada Shipping Act*.⁸ If the boat is "propelled by oars", it need not be registered;⁹ if it is not propelled by oars, it will be subject to the registration requirements of the *Canada Shipping Act*,¹⁰ unless exempted therefrom.¹¹ Registration is by that Act primarily intended for large boats or "ships" for the statute specifically exempts from registration "pleasure yachts not exceeding twenty tons register tonnage",¹² provided the craft meets the statutory definition,¹³ but such a "pleasure yacht" will be subject to the licencing requirements of the Act¹⁴ regardless of how it is propelled.

The distinction between a registered pleasure boat and one that is merely licensed is an important one with different consequences flowing therefrom. If the boat be registered, particulars of its registration including registered mortgages against it will be found in a public registry situate at the port of registration. Examination and transfer of legal title to a registered boat is thus much simplified. Theoretically, at least, the state of the boat's title can thus be ascertained and can be transferred to the purchaser upon delivery and registration of "Bill of Sale" in statutory form. If, on the other hand, the boat be merely licensed (or is neither registered nor licensed), the transfer and acquisition of title becomes somewhat more complicated. The *Canada Shipping Act* makes no provision for either the transfer or pledging of such boats with the result that both questions are left to be dealt with under relevant provincial laws as a matter of property and civil rights. In Ontario, for example, such boats fall into a broad category of personal property which in matters of title, transfer and pledging is governed by statutes of general application such as *The Sale of Goods Act*,¹⁵ *The Bills of Sale and Chattel Mortgages Act*,¹⁶ *The Conditional Sales Act*¹⁷ and the *Retail Sales Tax Act*.¹⁸

This need to resort to provincial laws raises additional difficulties for the purchaser, and these difficulties are accentuated where provincial legislation permits the registration of charges on boats either in the place where the boat is situate or where its owner resides.¹⁹ Such a registration system now prevails in Ontario but should shortly be displaced by new legislation²⁰ which, when fully in force, will provide for a central office for registration of charges of the kind discussed above. However, until the new legislation is in full effect, it will continue to be necessary to search for such charges both where the vendor resides and where the boat is situate from time to time. Recent proposed amendments to the *Canada Shipping Act* are similar in effect to Ontario's central registry legislation, and if adopted ought also to ease the purchaser's problem in searching for both federally and provincially registered charges against pleasure boats.²¹

⁸ *Supra*, note 3. Registration is basically provided for in Sections 6 to 22 of the Act, while licencing is provided for in Section 108, and in the regulations made thereunder. Section 6 of the Act sets forth important ownership qualification provisions as well as registration requirements. Mortgaging of registered ships is provided for in Sections 45 to 64 of the Act. See also, note 21, *infra*.

⁹ This results from the definition of "ship" contained in Section 2 of the *Canada Shipping Act*, *supra*, note 3, which, in general, applies only to a "vessel" (also defined in Section 2) used in navigation that is "not propelled by oars".

¹⁰ *Supra*, note 3.

¹¹ The exemption is provided for in Section 108 read together with Section 8 and with the definition of "pleasure yacht" in Section 2 of the *Canada Shipping Act*, *supra*,

note 3. The Small Vessel Regulations, March 4, 1969, S.O.R./69-97 contains in Section 2 a somewhat more detailed definition of "pleasure yacht".

¹² Section 8 of the *Canada Shipping Act, supra*, note 3.

¹³ This definition is found in Section 2 of the *Canada Shipping Act, supra*, note 3, which provides that a "pleasure yacht" means a "ship however propelled that is used exclusively for pleasure and does not carry passengers." See also the definition contained in the Small Vessel Regulations, S.O.R./69-97.

¹⁴ Section 108 of the *Canada Shipping Act, supra*, note 3. By Section 7 of the Small Vessel Regulations, S.O.R./69-97, licencing is required of every vessel "principally maintained or operated in Canada" that, *inter alia*, does not exceed twenty tons register tonnage and is equipped permanently or temporarily with a motor of ten horsepower or with more than one motor, the aggregate horsepower of which is ten horsepower or more. Section 10 of the same Regulations permits the voluntary licencing "of any vessel not required to be licenced by these Regulations."

¹⁵ R.S.O. 1970, c. 421.

¹⁶ R.S.O. 1970, c. 45.

¹⁷ R.S.O. 1970, c. 76.

¹⁸ R.S.O. 1970, c. 415.

¹⁹ For example Section 22 of the *Ontario Bills of Sale And Chattel Mortgages Act*, R.S.O. 1970, c. 45, provides generally for registration in the county or district "in which the property mortgaged or sold is at the time of execution thereof"; and Section 2 of the *Ontario Conditional Sales Act*, R.S.O. 1970, c. 76, provides for registration in the county or district "in which the purchaser resided at the time of the sale".

²⁰ *The Personal Property Security Act*, R.S.O. 1970, c. 344.

²¹ These amendments in fact consist of a proposed new *Maritime Code Act* which was introduced in Parliament as Bill C-216 on July 23, 1973 but has not progressed to enactment. Its provisions on registration and licensing, if adopted, will replace those presently contained in the *Canada Shipping Act, supra*, note 3. The Bill differentiates between a "Canadian registered ship" and a "Canadian registered small craft" roughly along the lines of the present Act's distinction between registered and licensed ships. Section B II — 24 of the Bill provides for creation of "a central office for the filing of documents" respecting both classes of vessels. Additionally, Section B II — 73 provides:

Where, with respect to a Canadian registered small craft, a chattel mortgage or like document is filed or registered in accordance with the law of a province, a notice of such mortgage or like document shall be filed with the Registrar by the person who filed or registered the mortgage or like document, and such notice shall be in prescribed form and shall contain such particulars of the mortgage or like document as are prescribed.

The Registry and appointment of the Registrar are provided for in Sections B II — 21 to Section B II — 31 of the Bill. This proposed registry system for pleasure boats as Canadian registered small crafts in place of the current licensing system will, for the first time, enable provision under Federal legislation for mortgaging and transfer of title of such crafts. Transfer of title will be by Bill of Sale (provided for in Section B II — 54 of the Bill) while mortgaging will be in the statutory form of marine mortgage (provided for in Section 4 (1) of the Bill and being a consequential amendment to Section 47 of the *Canada Shipping Act*). Presumably, the federal authority intends by this legislation to occupy the field so far as concerns the mortgaging and transfer of ships to which it applies. But the mandatory application of the legislation to pleasure boats is limited. Section B II — 16 requires registration as a Canadian registered small craft only if the ship "does not exceed ten metres in length". Section B II — 17 lists several exceptions to this requirement namely that registration as a Canadian registered small craft is not required of,

- (a) ships propelled solely by oars or paddles;
- (b) sailing ships of not more than six metres in length that have no auxiliary propulsion by mechanical means;
- (c) life boats and other survival craft; and
- (d) ships propelled by detachable motors of a horsepower that does not exceed such maximum horsepower as is from time to time prescribed by regulations for the purposes of this section.

Enforcement of Marine Liens and Mortgages

As already mentioned, the detection of marine liens presents special difficulties, for they are not to be found registered in public offices. The anomaly of this is at once apparent for the purchaser will suffer as much or more from failure to detect an outstanding lien as from failure to take account of an outstanding registered mortgage. In both cases, the boat will be subject to the charge. This is all the more anomalous when one considers how marine liens and mortgages are enforced under maritime law. Enforcement is by way of *in rem* proceedings in the Admiralty Court²² against the boat itself and may include the arrest of the boat in the same proceedings. While the boat owner can secure release of the boat from arrest by paying the claim or by putting in bail, this is troublesome and may be of little comfort. During the period of the boat's arrest, it cannot be moved or used except with the permission of the Court which has custody though not normally possession of it.²³ If the boat is not released from arrest²⁴ judgment may be pronounced against it with the result that, unless the judgment is otherwise answered, the boat itself may be sold by the Court and its net proceeds applied to answer the judgment. All of this, of course, is of no comfort to the owner who did not incur liability in the first place and is all the more reason why he should seek in every way possible to protect himself against such claims prior to completion of the purchase. While marine liens and claims are not registered on title, evidence of their existence may be found in appropriate Court records and by general inquiry, and accordingly a thorough search of such records for outstanding actions, and general inquiries in the appropriate geographical area, are advised. If actions *in rem* are disclosed, they will bear importantly on the acquisition regardless of whether they involve a maritime, statutory or possessory lien claim. In any case, the boat will normally be subject to the lien and all of its consequences. Unfortunately, the non-existence of outstanding *in rem* proceedings will not automatically mean that no liens exist, for as mentioned above, a maritime lien may exist even though no action *in rem* has been commenced to enforce it.²⁵

Purchaser's Checklist — Acquisition of Title and Protection Against Charges

As will be appreciated from the above discussion, attempts at formulation of any exhaustive checklist for the intended purchaser of a pleasure boat would be rather dangerous as well as misleading. Subject to that general caution, what follows may be of some practical assistance to both lawyers and laymen in matters of this kind. For convenience it is divided according

²²Throughout this note the term "Admiralty Court" has reference to the Federal Court of Canada which exercises exclusive admiralty jurisdiction in Canada pursuant to the *Federal Court Act*, *supra*, note 4.

²³ See Rule 1003 (9) of the *Federal Court Rules*, S.O.R./71-68.

²⁴ Release of ships from arrest is provided for in Rules 1004-1006 of the *Federal Court Rules*, S.O.R./71-68.

²⁵ While the existence of maritime liens must be of prime concern, as pointed out in footnote 1, the security of the boat is acquired for claims giving rise to statutory liens as soon as the *in rem* proceedings are instituted. Possessory liens may also be protected by the Court in other *in rem* proceedings (see footnote 7). Otherwise neither of these "liens" will be of any concern.

to the problems discussed above, but as can be seen these problems in fact, dovetail and in a real sense must be dealt with together.²⁶

1. *Registered Charges*

- (1) Determine whether the boat is licensed or registered under the *Canada Shipping Act*;
- (2) If the boat be registered
 - (a) order an abstract of title from the Registrar of Shipping or Collector of Customs at the port of registration;
 - (b) examine the title and ascertain the identity of the registered owner and other particulars, including particulars of all registered mortgages;
 - (c) if the title is in order secure a properly executed Bill of Sale in statutory form;
 - (d) present the Bill of Sale (and other appropriate documents) to the appropriate Registrar of Shipping or Collector of Customs for registration.
 - (e) before closing, be sure all relevant taxes, such as retail sales tax, are provided for, and make a final search for registered mortgages. This should include a search for executions outstanding against the registered owner.
- (3) If the boat be licensed (or is neither registered nor licensed),
 - (a) ascertain the place of ownership and/or licensing, its owner's identity and other particulars including information regarding owner's place of residence and geographical area of the boat's operation;
 - (b) conduct searches for provincially registered bills of sale and chattel mortgages as well as for conditional sales contracts and other provincially registered charges²⁷ in appropriate provincial registry offices;
 - (c) require delivery of a duly executed deed of transfer and transfer of license (if any) containing all pertinent particulars such as identification of the hull, equipment, etc.

²⁶ This checklist will have no application to purchase of a pleasure boat in proceedings pursuant to an order of the Admiralty Court. In such cases, the purchaser will normally acquire good title as against the whole world (see *The "Acrux"*, [1962] 1 Lloyd's 405). This may be subject to any revenue claims such as customs duties and sales taxes applicable to a boat which is "imported" into Canada by virtue of its sale in the proceedings to a Canadian resident.

²⁷ Because occasionally a pleasure boat belonging to a corporation will be pledged as security for a debt of the corporation, it is desirable to conduct a search of corporation securities affecting the boat registered pursuant to statute. See e.g. *The Corporation Securities Registration Act*, R.S.O. 1970, c. 88.

- (d) before closing, be sure all relevant taxes such as retail sales tax, are provided for, and make a final search for provincially registered charges. This should include a search for executions outstanding against the owner.

2. *Unregistered Charges*

Whether the boat be registered, licensed or neither,

- (a) make general inquiries in the geographical area of ownership and operation of the boat as to the possible existence of outstanding marine liens, i.e. unpaid repair, supply and equipment accounts, crews' wages, damage claims, salvage, etc.
- (b) examine Admiralty Court records for outstanding actions *in rem* pending against the boat, particularly such records at the local registry of the Court situate in the province in question and at the Court's offices at Ottawa.
- (c) before closing, make a final search for outstanding marine claims and liens.

3. *General Warranty and Indemnity*

Apart from these specific suggestions, it is generally prudent to provide for as much protection as is available in the terms of the purchase contract itself. For instance, it is advisable for the purchaser to include in the contract that the boat shall, to his satisfaction and that of his legal counsel, be free and clear of charges and encumbrances at the time of purchase, failing which the purchase will not be completed and any deposit will be refunded. Additionally, the contract should contain a warranty on the part of the seller that at the time of the purchase the boat will be free and clear of all undisclosed charges and encumbrances, including maritime, statutory and possessory liens and is not the subject of any legal proceedings for the enforcement of any such lien or for enforcement of any other claim against the boat. Finally, it is suggested that the purchaser exact an indemnification covenant from the seller under which the seller agrees to indemnify the purchaser against loss, costs and expenses arising out of the breach of the above warranty. Provision for the warranty and indemnification covenants may be included in the purchase contract itself, but if they are, care should be taken that provision also be made in that contract specifying that such covenants will survive the closing of the purchase transaction. Hopefully, it will be unnecessary to call for performance of such binding covenants, for the prospective purchaser who may find it necessary to do so should remember that these kinds of covenants are worth no more than the person who gives them.