

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN CANADA

This Guide deals with the rights of seafarers of any nationality to arrest a ship for unpaid or underpaid wages in a port in Canada.

This document is not intended to be legal advice, nor does it constitute legal advice.

If a seafarer intends to arrest a ship in Canada, he is strongly advised to consult a lawyer qualified to practise in that country.

*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

- 1. Can a seafarer arrest a ship for unpaid wages regardless of his nationality and regardless of the flag of the ship?**
 - 1.1 A ship can be arrested in Canada by a seafarer of any nationality, and irrespective of the flag of the ship, although the Canadian courts will recognise sovereign immunity but not for government owned commercial ships.
 - 1.2 The Canada Shipping Act 2001 ('the CSA') recognizes a maritime lien against the vessel for claims that arise in respect of a seafarer's employment on the vessel both for Canadian vessels and for foreign vessels where a foreign jurisdiction recognizes a maritime lien against the vessel. The right to maintain an action against the vessel in the Federal Court of Canada ('the FCC') or any other court of competent jurisdiction, such as the Supreme Court of British Columbia ('the SCBC') by *in rem* procedure against the vessel is recognized by s. 86(3) of the CSA.
 - 1.3 The provisions of the Federal Courts Act ('the FCA'), the Federal Court Rules ('the FCR') and the Supreme Court Civil Rules of British Columbia ('the SCBCCR') provide for *in rem* actions against vessels, and in particular, recognize a right to proceed with an action *in rem* against a vessel by arresting the vessel for any claim by a master, officer or member of the crew of the ship for wages, money, property or other remuneration or benefits arising out of his employment.
 - 1.4 It should be noted that the Marine Liability Act creates a maritime lien for a person carrying on business in Canada against a foreign flagged vessel for goods, materials or services supplied for its operation or maintenance.

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2. What is the time limit within which a seafarer must start a claim for unpaid wages?

2.1 The FCA provides as follows:

'(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.'

2.2 Time limits in the FCC are governed by provincial legislation for any cause of action arising in that province.

2.3 A cause of action arising otherwise than in a province, such as a claim for wages on a foreign vessel, is governed by a six year limitation.

2.4 It should be noted that different provinces in Canada have different time limitations and that depending on the province in which an action is being started in Canada, even if it is in the FCC, there may be different time limits that are applicable. The new Limitation Act of British Columbia generally provides for a two year limitation on all actions, including those based on contract, although there are 'grandfather' provisions for causes of action arising before 1 June 2013. The limitation period for contractual matters arising prior to 1 June 2013 is six years.

2.5 Also, the Marine Liability Act provides that except as otherwise provided in the Marine Liability Act or any other act of parliament, no proceedings under Canadian maritime law in relation to any matter coming within the class of navigation and shipping may be commenced later than three years after the date on which the cause of action arises.

3. What documents are required to obtain an arrest of a ship?

3.1 In order to support a claim for a maritime lien, it will be necessary for the seafarer to provide evidence of the contract of employment and also the wages, benefits, and other emoluments that may be due pursuant to his contract of employment.

3.2 If in a foreign language, it will be necessary to have the contractual and supporting documents translated if they are to form the basis for the statement of claim in the

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FCC or the notice of civil claim in the SCBC. It may assist, but is not necessary, to have notarial copies of documents.

- 3.3 In order to obtain the arrest of a vessel, it is necessary to file a statement of claim and to provide an affidavit to lead warrant, which will satisfy the court as to the nature and substance of the claim and identify the vessel for which a warrant for arrest is being requested.
- 3.4 There are provisions in the rules of both the FCC and the SCBC for the issuing of a statement of claim or notice of civil claim and an affidavit to lead to a warrant, setting forth the cause of action and the nature of the claim.
- 3.5 It should be noted that while the SCBCCR and the FCR are similar with respect to admiralty matters, they are not identical. In *Hansen v The Trinity (Ship)*, the SCBC set aside the arrest of a ship under the admiralty jurisdiction rule on the ground that the plaintiffs did not make full and frank disclosure by failing to advise the court of a previous unsuccessful application for a Mareva injunction against the defendants in parallel proceedings in the SCBC. It appears the SCBC may have more stringent practical requirements for arresting a ship than the FCC and therefore a claim for a maritime lien for wages on a foreign vessel may be brought more appropriately in the FCC.

4. What are the costs of the arrest, including court expenses and other expenses?

- 4.1 The costs of the arrest of the vessel can be grouped in the following headings.
 - (1) With regard to lawyers' fees, it will be necessary to enter into a retainer agreement with lawyers to prosecute the action on behalf of the seafarer. A standard retainer letter of a lawyer would usually be based on hourly rates for services rendered by the lawyers, paralegals, and other law firm staff who may be engaged in preparing documents, doing research and prosecuting the claim. A lawyer will usually require a retainer which would cover anticipated fees and disbursements for the initial period of issuing the statement of claim in arresting the vessel, probably in the amount of CDN\$5,000.00. In some cases lawyers may be prepared to take the claim based on a contingency arrangement, that is, the lawyers' fees would be paid out of the proceeds of the claim when received, if successful. Usually a contingency fee arrangement would be in the range of 25% to 40% of the amount recovered plus any disbursements that have been expended to file court documents, pay for the

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sheriffs' costs of the arrest, and any other expenses that may be necessary to prosecute the claim.

- (2) With regard to court filing fees, in the FCC a statement of claim would be CDN\$150.00; in the SCBC a notice of civil claim would be CDN\$200.00.
- (3) With regard to sheriffs fees for the arrest, the cost will depend on the location of the vessel and the sheriff's fees and disbursements in the area of the arrest. The range will be CDN500.00 to CDN3,500.00 depending on how far the sheriffs has to travel to arrest the vessel and any costs related to that travel. The FCR tariff provides that the amount payable for the services of a sheriff shall be the amount permitted for similar services by the tariff of the superior court of the province in which the services were rendered. The SCBCCR provides a fee for a sheriff of CDN175.00 for a warrant to arrest a ship and CDN75.00 per hour for each sheriff involved in attending, investigating, taking and maintaining possession and preparing for sale.

5. Does the arresting party have to lodge counter security against wrongful arrest?

- 5.1 The posting of security for wrongful arrest on a wage claim would be rare. Under the FCR a defendant can bring a motion for security where a plaintiff is ordinarily resident outside of Canada, where there is reason to believe that the action is frivolous and vexatious, or that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if so ordered. The court has discretion as to whether to order the security and would generally be reluctant to do so. The FCC may refuse to order security for costs pursuant to FCR if the plaintiff demonstrates impecuniosity and the court is of the opinion that the case has merit. It should be noted that FCR provides that the security is not required pursuant to FCR where a seaman sues for wages or for the loss of clothing and effects in a collision. It is likely that a court would take the intent of that rule into consideration in any claim made by a seaman for wages and remuneration.
- 5.2 The Supreme Court of Canada has held that damages may be awarded for wrongful arrest, but only if the plaintiff's conduct amounts to malice or gross negligence.

6. Once a vessel has been arrested, will the court accept jurisdiction over the substantive claim?

- 6.1 Once the vessel has been arrested, the court will accept jurisdiction over the substantive claim unless there is an arbitration clause or jurisdiction clause in the governing documents, such as the contract of employment. The court will consider

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the governing documents and the law applicable to the vessel, which will usually be the law of the flag of the vessel unless otherwise specified in the contract of employment.

- 6.2 It is often the case that a vessel will be arrested in Canada for the purpose of obtaining security for payment of the claim or for the purpose of having the vessel sold. In the event that the vessel is released on the posting of security by way of bail bond or payment of money into court or a letter of undertaking from a P&I Club, the security will stand in place of the vessel and the maritime lien will attach to the security. Priority in the security will be according to the priorities granted to a maritime lien in the proceeds of sale, that is, a high ranking, following only the costs of arrest and judicial sale and salvage liens.
- 6.3 The proceedings in the FCC or SCBC may be stayed once the security has been posted, pending a decision of the tribunal having jurisdiction pursuant to an arbitration clause or a jurisdiction clause. The award of the tribunal having jurisdiction will usually be enforced as an order of the court upon application by a party to the award seeking to have it made a judgment of the court and holding the security for the vessel or having jurisdiction over the arrest of the vessel.

7. Will the crew and vessel be maintained/supported during the arrest?

- 7.1 When a vessel is arrested pursuant to a warrant for arrest in either the FCC or the SCBC, the costs of maintaining the vessel remain with the party who was in possession of the vessel prior to the arrest, that is, usually the owner or the charterer of the vessel, unless the court otherwise orders.
- 7.2 In the event that the vessel needs necessaries, it would be usual for a party to apply to the court seeking a court order for priority for the supply of any necessaries while the vessel is under arrest. The court would, on such application, usually grant a priority on the same level as costs relating to the arrest and judicial sale of the vessel for the specific sums advanced either for necessaries or to preserve the vessel without deterioration while it is under arrest and until it can be sold.
- 7.3 The responsibility for maintaining the vessel while it is under arrest remains with the party in possession of the vessel prior to the arrest, usually the owner or the charterer of the vessel. In certain circumstances, where it is necessary to obtain necessaries and/or supplies, or to pay the crew to ensure the safety and maintenance of the vessel, an application will be made by a party intending to supply funds after the arrest of the vessel for an order for priority for reimbursement out of the funds advanced from the proceeds of sale of the vessel in due course. This is often done by

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mortgagee or another interested party in the vessel where there is a desire to maintain the vessel to obtain the highest price possible in a judicial sale.

- 7.4 Arrest of the vessel does not mean that the crew is automatically disbanded. Wage claims of crew members who were kept on after the arrest of vessel have been upheld.
- 7.5 It is usual for the court which orders the arrest of the vessel to protect the party who advances the money after the arrest to provide for necessities, maintenance or crew wages by making an order to that effect. In the *Atlantis Two*, the FCC granted an order to permit a department of the Federal Government of Canada through an assignment of the proceeds of the maritime lien of the crew for wages to recover the costs which it had advanced to repatriate the crew.
- 7.6 The FCC may order the sheriff to take possession of arrested property on condition that a party assume responsibility for any costs of carrying out the order and to provide security for payment thereof.

8. Is the presence of the crew on board the vessel necessary during the course of the legal proceedings or can the crew be repatriated before the ship is sold?

- 8.1 Whether the presence of the crew on board the vessel is necessary during the legal proceedings will be dependent on what is required for the safety and maintenance of the vessel. It is often the case that the crew will be repatriated immediately and a watchman crew will be established following the arrest. This is usually determined by agreement between owners, charterers, mortgagees or others interested in the vessel or, in the absence of the agreement, by court order. Any steps taken with respect to the vessel while it is under arrest would require court approval or court order.
- 8.2 Generally, the parties interested in the vessel, (owners, charters, mortgagees and lien claimants), will endeavour to maintain the vessel while keeping costs at a minimum. This often will require the maintenance of the skeleton and crew on board the vessel until the vessel can be advertised for sale and sold. In such circumstances, there is usually an effort made to fund repatriation of the crew not needed to maintain the vessel, and a court order would be sought approving the payment of repatriation expenses and granting a priority to the party who paid those expenses either as part of the costs of sale or very high in the ranking in the distribution of the proceeds of sale of the vessel.

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- 8.3 The repatriation of the crew prior to the sale of the ship is usually dependent on an interested party stepping forward with sufficient funds to pay the cost thereof. A subrogation in the crew's lien for wages is effective under Canadian law only if it receives prior approval of a court.
- 8.4 It is noted that the CSA requires that authorized representatives of Canadian vessels are to ensure that arrangements are made to return the crew members to the place where they first came on board or to another place to which they have agreed to be returned and to pay the expenses of returning the crewmembers as well as all expenses, including medical expenses, that the crewmembers reasonably incurred before being returned.
- 8.5 If the authorized representative does not comply, the Minister of Transport may act in place of the authorized representative and any expenses incurred by the Minister of Transport constitute a debt due to Her Majesty in right of Canada by the authorized representative and may be recovered as such in a court of competent jurisdiction. This would only apply to Canadian vessels. It is unlikely that the Minister of Transport would be willing to incur the costs for repatriating a foreign crew while the vessel was arrested in Canada.
- 9. Do the seafarer's wages continue to accrue during the arrest?**
- 9.1 Seafarer's wages would continue to accrue during the arrest provided that they continue to perform services on the vessel. If there is any issue in this regard, an application can be made to the court to confirm that any wages accruing after the arrest would receive a high priority as the seafarers on board are effectively maintaining the safety and security of the vessel during the arrest.
- 10. How long on average does it take for the court to sell the vessel and then distribute the sale proceeds in settlement of the crew's claim?**
- 10.1 Each case will depend entirely on its circumstances. The normal procedure is that once the vessel has been arrested, steps will be taken to make sure that it is maintained and an application will usually be made to the court by the party who intends to advance funds to maintain the vessel, including the payment of any necessities, supplies and crew wages for that period.
- 10.2 Once the vessel's maintenance while under arrest is established, it would be usual for a party, often a mortgagee, to apply for conduct of sale. The court will be interested in maximizing the proceeds of sale of the vessel in the interests of all parties and will give the conduct of sale to the party who is most likely to advertise the vessel and

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obtain the highest price on the sale. It is usual for the court to order that the vessel be listed in appropriate publications for period of at least two months and for the offers of purchase to be presented to the court by sealed bids. The sealed bids are then opened on the date the court sets for the approval of the sale. In some circumstances, where a provident private sale can be arranged expeditiously, this period can be shortened.

- 10.3 The time for completing the sale of the vessel and distributing the proceeds of sale will be entirely dependent on the current market for the vessel. In reality, a minimum of six months to two years or more may pass before the vessel is sold and the priority hearing can be scheduled before the court to determine how the proceeds of sale are to be distributed.

11. How are the lawyer's fees for arresting the ship paid?

- 11.1 The seafarer will make arrangements with a lawyer to prosecute his claim. Often the seafarer has an association with a union. The union may fund the lawyer on the understanding that the legal fees and expenses will be paid by the union and recovered from the ultimate judgment and disbursement of the proceeds of sale in the event that a maritime lien claim is successful.
- 11.2 As part of the prosecution of the claim, it would be usual to claim legal costs as priority from the proceeds of sale on the same basis as the maritime lien for wages. Legal costs will usually be awarded by the court in favour of the successful lien claimant, however, depending on the circumstances, the legal costs may only amount to a court tariff amount which could be in the range of 25% to 40% of the actual legal costs. Disbursements that are reasonably incurred will usually be reimbursed as part of the legal costs.

12. Are there any other procedures to enforce a seafarer's wage claim?

- 12.1 Sections 43(3) and 43(8) of the FCA provide for sister ship arrests. Sister ship arrest in Canada has been narrowly construed by Canadian courts. The right applies only to ships owned by the defendant at the time the action is commenced and only where the plaintiff has an *in rem* claim against one of the defendant's ships.
- 12.2 It is assumed that usually the crew will be on board the vessel at the time of arrest and their maritime lien for wages, which will rank after only costs of arrest and judicial sale and salvage liens, will be satisfied from the sale proceeds of the vessel.
- 12.3 A word of caution is necessary with respect to sister ships arrest for a claim for unpaid wages. Not only is sister ship arrest difficult to establish in Canada due to the narrow

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interpretation of 'beneficial owner' contained in FCA s. 43(3) and (8), but the claim against the sister ship may not be recognized as a true maritime lien with high priority, but only as a statutory right *in rem* with a low priority attached thereto.

- 12.4 As a practical matter, often the mere threat of arresting a vessel and detaining it, due to the significant expenses and the costs of a lawsuit that the shipowner or charterer will suffer, will be enough to have wages paid and it may not be necessary to go to the extent of arresting the ship.
- 12.5 If the owners of the vessel are within the jurisdiction of Canadian courts, there are procedures for garnishment both prior to and after judgment in the event that the defendant party responsible for the payment of wages has bank accounts and assets within the jurisdiction.
- 12.6 There may also be a claim against freight payable for cargo carried. It should be noted that the maritime lien for wages of a seaman was not traditionally a lien against the cargo. It was, however, a charge against freight earned and could have priority in the event that there are moneys owing to the shipowners/charter by a cargo owner. Each situation would have to be looked at on its particular circumstances in order to evaluate whether there was the possibility of garnishment or seeking to tie up the freight or other assets of the owners/charterer within the jurisdiction.
- 12.7 The FCR provides for a FCC order for the payment of money to be enforced by a writ of seizure and sale or garnishment proceedings. Prejudgment garnishment is not available in the FCC.
- 12.8 Although a claim for seamen's wages is governed by Canadian maritime law, garnishment proceedings to enforce a judgment depend on the garnishee's liability to the judgment debtor, which is governed by provincial law.