**Dealing with Legal Issues Encountered by Marinas**

In order to appreciate the location that Marina’s find themselves on the legal map, a brief explanation of the applicable law is useful.

The law in Canada consists of two sources:

* Common Law meaning unwritten but general principles of the law that the country recognizes and
* Statutes meaning written laws, which may at times, vary the Common Law.

As well, our constitution divides areas of jurisdiction between Provincial and Federal Governments. For example, Property and Civil Rights are within the jurisdiction of the provinces to legislate the Shipping and Navigation is within the Federal Government arena to legislate. Both Provincial and the Federal Government have their own sets of written Statutory Laws and share the Common Law.

For practical purposes, there is a third source of law. That source is private law or contract. Persons by agreement whether it be oral or in writing, can agree to set the law that governs their particular circumstances. Sometimes their agreement may vary Statutes or Common Law. Those agreements may deal with matters that are not dealt with in the Statues or Common Law. For example, no Statute or Common Law determines what payment terms you make available to your customers. That is a matter of private law i.e., a berthage agreement. As well, there may be specific rules of operation that you wish to apply to your marina and include them in a policy manual, the contents of which are agreed to in the moorage agreement or other agreements that the Marina’s may have with their users.

1. **Moorage/Storage Contracts and Bylaws**

I recommend that you have a formal written moorage contract with every one of your customers. Such documents give the Marina rights that it would not have under Statute or Common Law. Moorage contracts typically deal with the following matters:

1. No commercial activities
2. No liveaboards
3. Require that vessel operated and maintained in a seamanlike manner
4. Ability to move the vessel to different berth
5. Require liability insurance
6. Control of pollutants
7. Obtaining credit reports
8. Permitted uses of Marina Services
9. What can be kept in a locker if a locker is available
10. That if the Marina is sued as a result of something done by the customer, the customer will indemnify that Marina
11. Early termination

Without a moorage or storage contract, none of the foregoing can be required of your customers.

Most Marinas in British Columbia also have a provision in their moorage contracts that they are not liable for any damage to the boat or the boat owner’s property or person or his/her guests, even if such damage occurs as a result of the negligence of the Marina’s employee or agent. A clause excluding liability does not always defeat a claim against party but may go a long distance in reducing its quantum.

A moorage contract is really only enforceable if it is signed, and a copy is kept by the Marina. Should there be any significant changes in the moorage contract from a previous one, the changes must be brought to the customers attention.

It is a very worthwhile matter to have a policy manual and/or a set of bylaws for the Marina, enforceable by the Harbor Master or his/her designate. The moorage contract is unlikely to deal with the matter such as disturbing the peace, conflicts between boat owners, vehicle parking issues, garbage removal issues and so on. As well, there are many operation matters that may change during a course of a year. If you rely upon the moorage contract to document the terms, you would have to have all your customers sign a new moorage contract every time the Marina makes a change in an operational matter.

Therefore, it is useful to have the moorage contract that the customer agrees to follow the Marina’s bylaws or policy manual as it may be amended from time to time and is available from the Marina office. Ideally, any changes in the bylaws or Marina policy should be posted on a bulletin board for all customers to view. We have had experiences where there have been disputes between boat owners resulting in violence and verbal abuse. Because of the provisions of the Marina policy manual, we have been able to establish the grounds to substantiate the eviction of the vessel and its owner from the Marina. It greatly strengthens the Marina’s hand to have such a policy manual or bylaws in place and it assists in dealing with its customers on a even handed basis. At the same time, your customers have a fair warning of the principles that they must follow. If a Marina policy is in writing and fairly available to the customers to read, a Court is much more likely to enforce its terms as opposed to an arbitrary and discretionary decision of a Harbor Master.

There are a myriad of matters that are useful to include in a policy manual – use of ramps and travel lifts, fees, noise control, garbage and pollution control. Causal uses of a Marina can be brought into the fold by posting of a sign which states that all use of the Marina is permitted only if the user agrees to be bound by the provisions of the Marina’s policy manual or bylaw, a copy of which is available from the Marina office. This is not as effective as a signed moorage agreement but does help.

Bylaws are also useful for the internal operations of a Marina. Specifically, the election and conduct of directors can be regulated by reasonable bylaws. The conduct of directors can arise with respect to conflicts of interest and the early termination of their term for things such as failure to attend meetings.

1. **Collections**

One of the reasons we are most often contacted by Marina Authorities is to assist with the collection of overdue accounts and to deal with vessel removal. Maritime collection matters are quite unique.

1. **Demand Letter**

The usual first step is to send a lawyer’s demand letter for payment and/or a suitable payment plan within a set number of days.

Therefore, there are a number of actions that may be pursued.

1. **Letter to a Lien Holder under the P.P.S.A.**

If there is a lien, we would send a letter to the lien holder advising them of the debt. Moorage dues would rank ahead of the lien holder if the vessel was sold, meaning the lien holder would be paid out after the Marina and all other claimants on a pro rate basis such as the lien holder. Nevertheless, Banks are often concerned that their security is at risk and may pay out the moorage debt and add that amount to the security agreement. This has worked a few times. A lien search will reveal the name and address of the lien holder.

1. **Remedies under the Fishing and Recreational Harbor’s Act (“the Act”)**

The Act provides that:

13. (1) All charges prescribed by regulations made under this Act for the use of any scheduled harbor constitute a debt to her majesty in right of Canada jointly and severally by the owner and any person in charge of the vessel or goods in respect of which the charges are payable.

15. Where an enforcement officer believes on reasonable grounds that
(a) any amount is due and payable under this Act for charges in respect of any vessel or goods, or
(b) any provision of this Act or the regulations relating to any vessel or goods has been contravened, the officer may seize and detain the vessel or goods.

The difficulty with relying on foregoing provisions is that the Marina Authorities’ moorage fees are not strictly under the Act as the Marina Authority is operating the Marina under a lease. Its fees may not be considered an amount due under the Act.

1. **Private sale of vessels**

The general principle is that all matters involving the vessels are subject to Federal Law only. This principle has only been emphasized by the Canadian Courts in the last twenty years or so. Prior to then, both Provincial and Federal laws are often used in boating cases. For example, when the vessel “KATHY K” ran into a barge in English Bay, the Court applied the Provincial Negligence Act to apportion liability. However, 12 years ago, the Supreme Court of Canada stated the Provincial law has got no place in maritime negligence actions and the Federal Common Law must be applied if Federal statutory legislation exists that would govern the situation.

The conflict between Maritime Law and Provincial Statutes is a matter of concern to the Marina Authorities as statues setting forth effective collection remedies are all Provincial. It is my view that Provincial Statutes cannot govern or apply to maritime collection matters. But there are few Federal equivalents to assist creditors.

Let me set forth a practical example. Under Common Law, a repairer to a vessel has a lien on it so long as it has possession of the vessel. As soon as possession is given up, the lien is lost and the repairer becomes a regular creditor and has no special priority. As well, at Common Law the possessory lien claimant has no right to sell the vessel.

Many years ago, the Provincial Repairers Lien Act was enacted to make lien remedies more effective. Under the Act, possession need no longer be maintained to preserve the lien, so as long as written acknowledgment of debt is obtained, and the lien is registered. Furthermore, a lien holder is entitled to sell the goods to enforce his/her lien rights. The Act gave lien holders effective remedies.

However, under the principles of constitutional law, the Repairers Lien Act (and likewise the Warehouseman’s Lien Act) cannot apply to vessels even though they purport to do so. Under maritime law (which remains the unaltered common law as there is no Federal equivalent to the Repairers Lien Act), a possessory lien is list if possession is relinquished, and a lien holder cannot sell the vessel.

There is another matter that must be taken into account when dealing with collections generally and particularly with respect to the sale of vessels.

There are two types of vessels. Registered vessels which have six-digit number and a formal name. the vessels are registered by name and post. Other vessels are called licensed. They have what is commonly known as a “K” number or the new “BC” number. Actually, the number may be any one of several combinations of letters and numbers. The 13K just happens to indicate the Vancouver Customs Office. This license is simply evidence that duty has been paid on the vessel. When I say “licensed”, to make it clear, I am not dealing with fishing licenses at all. Those are completely separate issue.

A registry is maintained for registered vessels recording changes in ownership and mortgages and there is an obligation to maintain correct registered information. However, there is no registry for licensed vessel changes.

Whether or not a vessel is licensed or registered is first determined by size. There are maximum size requirements for licensed vessels. However, many vessels that are even smaller than those maximums, may be registered for either obscure reasons of status or because the lender for the vessel wanted to take the security of a registered mortgage under the Canada Shipping Act.

It is clear under the Canada Shipping Act that title to a registered vessel can only change by one of three ways: bill of sale signed by the owner, bill of sale signed by the mortgagee, or by court order. Without one of those three authorizations, registered title to a vessel cannot transfer.

Matters with licensed vessels are much more loose. My view is that title to a licensed vessel can only change by bill of sale signed by the owner or by court order. Nevertheless, many claimants against such vessels have purported to sell them at bailiff auction. Because there is no registry or recording the ownership of licensed vessels, there are no real impediments to such a sale. Somebody who says that they own a licensed vessel can simply go to the ships’ registry and swear a statutory declaration that they are the titled owner of the vessel and need a replacement license. As well, with licensed vessels their value is usually such that there is no one to take a run at the validity of a vessel being sold by auction or by a lien claimant. Furthermore, in those circumstances the owner invariably does owe money and does not have much of a position to argue against the sale.

Nevertheless, should such a sale occur and be challenged by the owner as an illegitimate sale, I expect that the courts would agree. At Common Law a lien holder has no right to sell the vessel and Provincial Law cannot modify this. The potential measure of damages would be twofold. The difference in the vessels value between what was achieved at the sale and its true market value. Ideally, if the vessel was sold on a well-advertised competitive basis, then this measure of damages should be minimal as the vessel would have been sold for its true market value. In certain cases, it is recommended to obtain a survey.

On the odd occasion, clients have actually been able to obtain a signed bill of sale from an owner in return for the agreement to have Marina Authority handle the same and not to claim any deficiency on the debt if the sale proceeds are not enough to cover it.

My conclusion is that it is impossible for a Marina Authority to sell a registered vessel and while it may get away with selling a licensed vessel, there are risks in doing so that should be taken into account.

1. **Lawsuits and arrest**

Except for the cost, creditors generally prefer court ordered sales as they provide clear title. This means that all claims against the vessel are extinguished when the new owner does not have to worry about any unknown claims. At the time, a court ordered sale can seldom be achieved for less than $3,000.00 to $4,000.00 in legal fees and disbursements (assuming that the debtor does not fight the action). The advertising costs alone are often $1,000.00 or more.

In maritime law, there are certain claims that are extinguished when ownership of a vessel changes unless a lawsuit is commenced before the transfer takes place. Dock charges are not but other land storage charges and services to a vessel would be. A lawsuit can be started against a vessel. It is very useful to do so if a vessel is about to be sold. The new owner will likely insist that the claim be paid out of the purchase proceeds. There are most likely, additional costs to negotiate the satisfaction of the debt.

Another step that can be taken is having the vessel sued and arrested. If the vessel is arrested, it cannot be moved without consent of the parties or court order. It will be released from arrest if the claim is paid or if about two times the amount of the claim is posted with the court as security. There are additional costs for initiation the legal action and bailiff fees.

1. **Removal of vessel**

This is a difficult matter for every marina and harbor. The Receiver of Wreck is a Coast Guard appointee who prefers to avoid taking custody of vessels and will only do so in limited circumstances. A Marina could have a vessel towed away to another location. However, it must be prepared to assume great responsibility. As soon as the Marina Authority seizes the vessel, it becomes a bailee. A bailee is responsible for taking good care of that vessel as if it were the owner. It should worry that the bailiff has insurance to protect the vessel and potential pollution problems. It should have the vessel surveyed in advance so that it cam prove that it (and its agent bailiff) has done nothing to change the condition of the vessel.

One way to deal with the problem in the futures is to include in the moorage agreement a provision that If moorage is due for more than a certain period of time, the owner’s consent to the sale of the vessel by Marina Authority. By private contract law, the parties can agree to vary federal common law which does not include this right. Some owners, however, may refuse such a provision. More problematic is that it does not solve the problem that for registered vessels, titles can only be transferred by bill of sale signed by the owner, by the mortgagee or by the client.

**Conclusion**

The foregoing only deals with some of the legal matters faced by Marina Authorities. However, they are the ones common to every operation.

**WAREHOUSE LIEN ACT**

**[RSBC 1996] CHAPTER 480**

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| ***Contents*** |
|  | [1](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section1) | [Definitions](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section1) |
|  | [2](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section2) | [Warehouse lien](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section2) |
|  | [3](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section3) | [Notice of lien](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section3) |
|  | [4](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section4) | [Enforcement of lien by sale of goods](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section4) |
|  | [5](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section5) | [Substantial compliance](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section5) |
|  | [6](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section6) | [Disposition of proceeds of sale](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section6) |
|  | [7](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section7) | [Duty of warehouser if charges paid before sale](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section7) |
|  | [8](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section8) | [Manner of giving notices](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section8) |
|  | [9](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section9) | [Construction of Act](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96480_01#section9) |

**Definitions**

**1**  In this Act:

**"goods"** includes personal property of every description that may be deposited with a warehouser as bailee;

**"security interest"** means an interest in goods that secures payment or performance of an obligation;

**"warehouser"** means a person lawfully engaged in the business of storing goods as a bailee for hire.

**Warehouse lien**

**2**   (1)Subject to section 3, every warehouser has a lien on goods deposited with the warehouser for storage, whether deposited by the owner of the goods or by the owner's authority, or by any person entrusted with the possession of the goods by the owner or by the owner's authority.

(2)The lien is for the amount of the warehouser's charges for all of the following:

(a)all lawful charges for storage and preservation of the goods;

(b)all lawful claims for money advanced, interest, insurance, transportation, labour, weighing, coopering and other expenses in relation to the goods;

(c)all reasonable charges for any notice required to be given under this Act, and for notice and advertisement of sale, and for sale of the goods if default is made in satisfying the warehouse lien.

**Notice of lien**

**3**   (1)If the goods on which a lien exists were deposited, not by the owner or by the owner's authority, but by a person entrusted by the owner or by the owner's authority with the possession of the goods, the warehouser must, within 2 months after the date of the deposit, give notice of the lien to

(a)the owner of the goods, and

(b)a person who has a security interest in the goods if a financing statement with respect to the security interest is registered at the date of the deposit of the goods.

(2)The notice must be in writing and contain the following:

(a)a brief description of the goods;

(b)a statement showing the location of the warehouse where the goods are stored, the date of their deposit with the warehouser, and the name of the person by whom they were deposited;

(c)a statement that a lien is claimed by the warehouser in respect of the goods under this Act.

(3)If the warehouser fails to give the notice required by this section, the lien, as against the person to whom the warehouser has failed to give notice, is void after the period of 2 months from the date on which the warehouser has knowledge of the person to whom the warehouser has failed to give notice.

**Enforcement of lien by sale of goods**

**4**   (1)In addition to all other remedies provided by law for the enforcement of liens or for the recovery of warehouser's charges, a warehouser may sell by public auction, in the manner provided in this section, any goods on which the warehouser has a lien for charges which have become due.

(2)The warehouser must give written notice of the warehouser's intention to sell to the following persons:

(a)the person liable as a debtor for the charges for which the lien exists;

(b)the owner of the goods;

(c)any person who has a security interest in the goods where a financing statement with respect to the security interest is registered at the date of the deposit of the goods;

(d)any other person known by the warehouser to have or claim an interest in the goods.

(3)The notice must contain the following:

(a)a brief description of the goods;

(b)a statement showing the location of the warehouse where the goods are stored, the date of their deposit with the warehouser and the name of the person by whom they were deposited;

(c)an itemized statement of the warehouser's charges showing the sum due at the time of the notice;

(d)a demand that the amount of the charges as stated in the notice and further charges as may accrue must be paid on or before a day mentioned, not less than 21 days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination according to the due course of mail if it is sent by mail;

(e)a statement that, unless the charges are paid within the time mentioned, the goods will be advertised for sale and sold by public auction at a time and place specified in the notice.

(4)If the charges are not paid on or before the day mentioned in the notice, an advertisement of the sale, describing the goods to be sold, and stating the name of the person liable as debtor for the charges for which the lien exists and the time and place of the sale, must be published at least once a week for 2 consecutive weeks in a newspaper published in British Columbia and circulating in the locality where the sale is to be held.

(5)The sale must be held not less than 14 days from the date of the first publication of the advertisement.

**Substantial compliance**

**5**  If a notice of lien under section 3 or a notice of intention to sell under section 4 has been given, but those sections have not been strictly complied with, if the court before which any question respecting the notice is tried or inquired into considers that those sections have been substantially complied with, or that it would be inequitable that the lien or sale would be void by reason of the noncompliance, no objection to the sufficiency of the notice must be allowed to prevail so as to release or discharge the goods from the lien or vitiate the sale.

**Disposition of proceeds of sale**

**6**   (1)From the proceeds of the sale the warehouser must satisfy the warehouse lien and must pay over the surplus, if any, to the person entitled to it.

(2)The warehouser must, when paying over the surplus, deliver to the person to whom the warehouser pays it a statement of account showing how the amount has been computed.

(3)If the surplus is not demanded by the person entitled to it within 10 days after the sale, or if there are different claimants or the rights to it are uncertain, the warehouser must pay the surplus into the Supreme Court on its order.

(4)The order referred to in subsection (3) may

(a)be made on an application without notice to anyone and on the terms and conditions as to costs and otherwise as the court may direct, and

(b)direct to what fund or name the amount of the surplus must be credited.

(5)At the time of paying the amount of the surplus into court the warehouser must file in court a copy of the statement of account showing how the amount has been computed.

**Duty of warehouser if charges paid before sale**

**7**   (1)At any time before the goods are sold, any person claiming an interest or right of possession in the goods may pay the warehouser the amount necessary to satisfy the lien, including the expenses incurred in serving notices and advertising and preparing for the sale up to the time of the payment.

(2)The warehouser must deliver the goods to the person making the payment if that person is the person entitled to the possession of the goods on payment of the warehouser's charges on them, otherwise the warehouser must retain possession of the goods according to the terms of the contract of deposit.

**Manner of giving notices**

**8**  If by this Act any notice in writing is required to be given, the notice must be given by delivering it to the person to whom it is to be given, or by mailing it in the post office, postage paid and registered, addressed to the person at the person's last known address.

**Construction of Act**

**9**  This Act must be interpreted and construed to give effect to its general purpose of making uniform the law of those provinces that enact it.