

SHIP ARREST IN CANADA (QUESTIONS 1 TO 9)

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1. Please give an overview of ship arrest practice in your country.

Ship arrest in Canada is usually simple and relatively inexpensive. The claimant must provide its law firm with the facts which evidence the nature of the claim and its amount (by providing a letter and/or orally) so that the solicitor can prepare an affidavit describing the claim. Then the law firm must prepare three documents:

- a. Statement of Claim to commence the action setting out the relevant facts which establish *in rem* jurisdiction.
- b. Affidavit to Lead Warrant, attesting to the facts of the claim, which can be sworn by the claimant or by its solicitor upon information and belief.
- c. Warrant for Arrest to be issued by the Court to the Sheriff.

In Canada, it is not required that the Sheriff go into possession of the ship following arrest unless specifically ordered by the Court. Therefore, the only costs to arrest are Court, Sheriff fees and the legal costs to prepare the documentation. If the matter is straightforward, an arrest can be effected for as little as Cdn.\$4000 to \$5000.

2. Which International Convention applies to arrest of ships in your country?

Canada has not acceded to the Arrest Conventions. The grounds for arrest are found in domestic legislation.

3. Is there any other way to arrest a ship in your jurisdiction?

There is no other way to arrest a ship but it may be seized through other processes described in the next answer.

4. Are there alternatives e.g. saisie conservatoire or freezing order?

In appropriate circumstances, Canadian Courts may grant *Mareva* Injunctions freezing a defendant's assets within the jurisdiction. A vessel may also be seized and sold as an asset of a judgment debtor to satisfy a judgment against the debtor.

5. For which types of claims can you arrest a ship?

Arrest is available for a wide range of claims for which there is *in rem* jurisdiction including, per s. 22(2) of the *Federal Courts Act*, claims for or involving:

- (a) Possession or ownership of a ship or proceeds of sale of a ship;
- (b) Questions between co-owners of a ship with respect to possession, employment or earnings of a ship;
- (c) Mortgage or other charges, bottomry or respondentia;
- (d) Damage, or loss of life or personal injury, caused by a ship;
- (e) Damage to or loss of, a ship including its cargo or equipment;
- (f) Carriage of goods on a ship under a through bill of lading;
- (g) Loss of life or personal injury occurring in connection with the operation of a ship;
- (h) Loss of or damage to goods carried in or on a ship including loss of or damage to passengers' baggage;
- (i) Agreements relating to the carriage of goods or charter parties;
- (j) Salvage;
- (k) Towing;
- (l) Pilotage;
- (m) Necessaries for the operation or maintenance of the ship including stevedoring and lighterage;
- (n) Contracts relating to the construction, repair or equipping of a ship;

- (o) Wages of master, officer or crew of a ship;
- (p) Claims by master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;
- (q) General average contribution;
- (r) Marine insurance; and
- (s) Dock charges, harbour dues or canal tolls.

6. Can you arrest a ship irrespective of her flag?

Yes. We also note that Canadian Courts will recognize sovereign immunity of government owned ships, but not if they are operated as a commercial ship.

7. Can you arrest a ship irrespective of the debtor?

As a general principle, other than for maritime liens and certain special statutory liens, the ship owner itself must be liable for the debt in order to arrest the ship. One exception is if the charterer acts as the ship owner's agent when incurring the debt. Additionally, if the law of the contract governing the supply of ship's necessities grants a maritime lien to the supplier, then the supplier can arrest in Canada to enforce the lien even if that same claim would not otherwise constitute a maritime lien under Canadian law. Canadian repairers and suppliers of goods, materials or services (other than stevedoring and lighterage) to foreign ships now may also claim a maritime lien even if the debt was incurred by the charterer of the ship. See also the answer to Question 9 below.

8. What is the position as regards sister ships and ships in associated ownership?

Section 43(8) of the *Federal Courts Act* permits sister ship arrest. However, absent fraud, the ownership interests of the two ships must be virtually identical to establish the right to such a claim. Section 43(8) provides only a statutory right *in rem* against sister ships. This means that a claim which would rank as a maritime lien as against the offending ship, may only rank as a statutory right *in rem* (behind any mortgage) as against its sister ship.

9. What is the position as regards Bareboat and Time-Chartered vessels?

Subject to the exceptions described in Question 7, above, in order to advance a claim *in rem* for necessities ordered by the charterer of a ship, the claimant must show that the charterer was acting as the agent of the owner when such necessities were ordered. This is obviously easier to establish with bareboat-chartered vessels.

With respect to stevedoring services, domestic legislation provides that the creditor may arrest the ship for unpaid services incurred by a bareboat charterer, so long as the ship remains under charter to the same bareboat charterer.

***Shelley** is the head of Norton Rose Fulbright's shipping team in Canada. She has practiced maritime law for more than 25 years and has been involved in dozens of ship arrests and priority disputes. Her practice includes all aspects of maritime law, both litigation and commercial. She is the Vice-President of the Canadian Maritime Law Association and is recognized by Best Lawyers, LEXPERT, Legal 500 and Who's Who in Shipping as one of the top shipping lawyers in Canada. She is also ranked Band 1 by Chambers Global for Shipping law in Canada alongside the firm's Shipping team, which is also ranked Band 1.

***Andrew** is a partner in Norton Rose Fulbright's Vancouver shipping team. His litigation practice emphasizes transportation, shipping and insurance disputes. He has extensive experience with matters involving casualty and emergency response (including dealing with the Transportation Safety Board and other regulatory agencies), oil spills and other pollution, maritime collisions and claims, cargo claims, bodily injury, and property loss. Andrew has represented clients in proceedings before the courts of British Columbia, Ontario and Alberta as well as the Canadian Federal Courts and various tribunals. He has also achieved a number of successful results for clients through mediation. In 2017 Andrew was recognized by Chambers Canada as a leading lawyer in the area of transportation: shipping.

SHIP ARREST IN CANADA (QUESTIONS 10 TO 26)

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10. Do your Courts require counter-security in order to arrest a ship?

No, the Federal Court of Canada does not require counter-security in order to arrest a ship.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

No, there is no difference in respect to arresting a ship for a maritime claim and a maritime lien. From a procedural standpoint, the arrest procedure is the same.

Nevertheless, the arresting party must bear in mind that if the maritime claim did not arise as a consequence of a maritime lien, then the vessel's ownership must have remained the same from the moment the cause of action arose to when it was arrested. In these cases, a change in ownership of the vessel could prove to be fatal to the in rem liability of the Ship.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes, Canada recognizes traditional English maritime liens. However, Canada is not a party to the International Convention on Maritime Liens and Mortgages. In accordance with the *Marine Liability Act*, Canada also recognizes maritime liens for Canadian suppliers of necessaries (bunkers, goods, materials and services) to a foreign vessel. In addition, Canadian Courts will recognize foreign claims constituting a maritime lien under foreign law, even though the claimant does not enjoy a maritime lien under Canadian law.

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

Arresting a ship can be done very expeditiously provided that the claimant has provided us with all of the documents and particulars required to evidence the debt. The Solicitor will prepare a Statement of Claim, an Affidavit to Lead Warrant and a Warrant of Arrest. If the Vessel to be arrested is at the Port of Montreal, we are able to arrest within approximately two (2) hours.

14. Do you need to provide a POA or any other documents of the claim to the Court?

No, a Power of Attorney is not required. Other than those listed at Question 13, there are no documents to provide.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

The Federal Court of Canada does not require any original or copied documents for the arrest of a vessel. However, documents will be required at a further stage in the litigation process.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Yes, Canadian Courts typically retain jurisdiction over the case.

17. What is the procedure to release a ship from arrest?

The arrested ship under caveat will not be released. If there is no caveat binding the ship then the ship may be released in the following circumstances: 1) if the claim is satisfied because the amount claimed has been paid into Court, 2) if bail has been given in an amount fixed by the Court, 3) if the party who has initiated the arrest consents in writing to release the ship (for example upon receipt of

an acceptable P&I LOU) and 4) if there is a discontinuance or dismissal of the action in respect of which the ship was arrested.

18. What type of security needs to be placed for the release?

Parties may agree upon an LOU as security. Otherwise, the Federal Court Rules allow for the giving of bail to release arrested property. Once bail is given, property may be released. The parties may agree to the form of bail, failing which a guaranty or bond (as provided for under the Federal Court Rules) will be required. It is left to the designated officer of the Court to determine the sufficiency of bail.

19. Does security need to cover interest and costs?

As per the Federal Court Rules, the fixing of security is based upon the principle that a Plaintiff has a right to security measured by its "reasonably arguable best case" capped at the value of the vessel. The "best case" will often be the amount the Plaintiff asserts to be owing in its Statement of Claim.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

As a matter of practice, P&I LOUs are customarily negotiated and accepted between the Parties. However, it is worth noting that P&I LOUs are not considered sufficient guarantees under the Federal Court Rules.

21. How long does it take to release the ship?

The release of the arrest vessel will occur very swiftly once the parties have negotiated a P&I LOU and once the arresting party has prepared the "Release from Arrest" proceeding.

22. Is there a procedure to contest the arrest?

Yes, there is a procedure to contest the arrest. The arrest can be contested in any case where the claimant deems that the vessel was either wrongfully arrested or that the arrest was carried out in an inappropriate jurisdiction.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

In Canada, the legal action on the merits is taken simultaneously to the arrest proceeding as a Statement of Claim must be filed along with the Warrant of Arrest and Affidavit to lead warrant.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes, Canadian Courts acknowledge wrongful arrest. If the ship owner can prove that the ship was arrested as a result of gross negligence or malice, the Courts may award damages in its favour.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Canadian Courts are extremely reluctant when presented with requests to pierce and lift the corporate veil, as this principle is considered sacrosanct under Canadian law. Therefore, as a general rule, Canadian Court will respect the corporate veil unless the corporate entity has used the corporate structure for fraudulent purposes.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

The Federal Court may consider to have the ship sold pendente lite in certain circumstances. The Court will assess the following elements to determine whether there are ground to have the ship sold pendent lite: 1) the value of the vessel compared with the amount of the claim, 2) whether there is an arguable defence, 3) whether it is reasonable to assume that there will be a sale at some point, 4) whether there could be a diminution in value or sale price by reason of delay, 5) whether the vessel will depreciate by further delay ("wasting asset") and 6) whether there is any good reason for a sale before trial.

***Marc de Man** is a founding partner of the Montreal law firm De Man Pillet. Marc was born in Antwerp, Belgium and lived several years in Buenos Aires, Argentina as well as in Santiago, Chile. Marc has extensive experience in maritime and transportation law, international trade and commercial law, arbitration and mediation, with more than 40 years of practice. He acts as counsel to a varied clientele in the maritime industry comprised of P&I Clubs, cargo underwriters, shipowners, charterers, ship suppliers, as well as shippers and consignees of cargo. In commercial matters, Marc represents banking institutions, shipping and trading companies. Marc's practice has led him to represent interests from North America, Central and South America, Europe, Asia and Australia. He is fully trilingual in French, English and Spanish, which enables him to deal directly and efficiently with his international clientele. Marc is also a guest lecturer at McGill University and a sought-after speaker at various conferences and seminars, both in Canada and throughout the world.