

SHIP ARREST IN CANADA

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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 swear an affidavit describing the claim. Then law the 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 solicitor upon information and belief.
- c. Warrant for Arrest 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 and Sheriff fees and the legal costs to prepare the documentation. If the matter is straightforward, an arrest can be done 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 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) Towage;
- (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 irrespectively of her flag?

Yes, although the Canadian Courts will recognize sovereign immunity but not for government- owned commercial ships.

7. Can you arrest a ship irrespectively 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 virtually be identical to establish the right to claim. Should a creditor arrest a sister ship to obtain security with respect to a maritime lien as against the offending ship, the claim will only rank as a statutory right in rem against the sister ship behind any mortgage. Section 43(8) provides only a statutory right in rem against sister ships.

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

Subject to the exceptions described in 7, above, if a claimant is pursuing a claim for necessities ordered by the charterer of a bareboat or time chartered vessel, the claimant bears the onus to prove that the charterer was acting as agent of the owner in order to advance a claim in rem. This is obviously easier to establish with bareboat-chartered vessels. As well, with respect to stevedoring services, it is deemed by domestic legislation 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 bareboat charterer.

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

Countersecurity is not required for the arrest. However, if the plaintiff is a foreign entity without any assets in the jurisdiction, the defendant will often seek an order requiring the foreign entity to post security for costs of the litigation in case that party lose the case and be ordered to pay costs to the defendant.

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

The procedure is the same. However, in the case of a maritime claim which does not give rise to a maritime lien, if ownership of the ship has changed subsequent to the cause of action in rem arising but before commencement of the action, the in rem liability of the ship is extinguished (subject to certain statutory exceptions).

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

Canada recognizes the traditional English maritime liens but is not a party to a Convention with respect to them. Canada also recognizes maritime liens for pilotage and for the Canadian supply of goods, materials or services to, or a contract for repair or equipment (but not construction) of, a foreign vessel. If a foreign claim constitutes a maritime lien under the applicable foreign law, Canada will recognize the lien even though the same claim would not constitute a lien under Canadian law.

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

If we are provided with all the documents or information evidencing the debt or claim enabling the solicitor

to swear the Affidavit to Lead Warrant, and the vessel is located in the port of Vancouver during normal business hours we can arrest in as little as 90 minutes. Otherwise, it can require up to 24 hours depending on the ship's location in Canada.

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

No, but to swear the Affidavit to Lead Warrant, we need written or oral advice directly from the claimant or his representative of the specific amount owing and the reason for the claim.

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

No original documents are required to arrest. Should the matter eventually proceed to a trial, original documents may then be required.

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

Subject to an application from the defendant on the basis of forum conveniens, the Court will generally retain jurisdiction over the case. If the Court agrees to stay the proceeding in favour of forum conveniens, it will generally require that the arrest security be transferred to that alternate jurisdiction so that the plaintiff is not prejudiced. In the instance of an arbitration agreement, the Court may order a stay to enforce the arbitration agreement, but again, will usually order as a condition of the stay that the arrest security remain available wherever the arbitration is taking place. For cargo claims, Canada exercises Hamburg Rules - style jurisdiction, subject again to arguments of forum conveniens.

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

Unless a caveat against release from arrest has been filed, arrested property may be released by

- 1) Consent of the arresting party,
- 2) Discontinuance or dismissal of the related action, or
- 3) Upon:
 - a) payment into Court of the amount claimed;
 - b) the appraised value of the arrested property; or
 - c) where cargo is arrested for freight only, the amount of the freight.

Alternatively, bail may be posted, the amount of which shall be agreed between the parties or set by the Court. Upon service of a release from arrest document issued by the Court to the sheriff and payment of any related costs or fees of the sheriff, the property is released. The Court may also, upon motion, order the release the ship at any time, without bail.

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

Unless the parties privately agree upon a P&I LOU as security, the Rules of Court provide that security or bail may be in the form of a bank guarantee, surety company bond or bail bond in the Court approved form, or cash paid into Court.

19. Does security need to cover interest and costs?

The appropriate security is based on the plaintiff's "best arguable case" including interest and costs, but limited by value of the arrested property. Typically the allowance for interest and costs is 25% to 50% of the claimed amount.

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

While not technically sufficient under the Rules of Court in Canada, P&I LOUs are routinely negotiated and accepted by plaintiffs as sufficient security to prevent or release an arrest.

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

Practically, an arrested ship can be released forthwith upon the express consent of the plaintiff and is free to sail. However, the Court must issue a release from arrest document and the Sheriff be paid all fees in full before the release is technically effective. If the arrest is contested and a motion to Court to release the arrest warrant is sought, it can take at least 1-2 days or more depending on the urgency and the Court's schedule and willingness to hear it on a rush basis.

22. Is there a procedure to contest the arrest?

Yes, the contesting party may bring a motion in Court seeking an order to quash or set aside the arrest and release the property on the basis that the arrest was done without proper jurisdiction or grounds, or was otherwise wrongful. On occasion the parties will agree upon an interim measure of security pending Court resolution of the validity of the arrest so that the vessel may sail and to mitigate any possible claim for damages for wrongful arrest.

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

Canada's Marine Liability Act requires that, unless another statutory limitation period applies, claims for all maritime matters be commenced no later than three years after the day on which the cause of action arose. Whether limitation periods of less than three years agreed upon by contract will be upheld under the Marine Liability Act is not yet clear. By statute Canada also applies the time limitations found in the Athens Convention, LMCC, Hague Visby Rules, Bunker Convention and others. These specific time limitations will trump the general 3-year provision.

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

Canadian law on wrongful arrest follows that of the UK. Damages for wrongful arrest can be awarded only when the owner of the arrested ship proves that the action was commenced with malice or gross negligence.

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

Canadian Courts will generally respect the corporate veil except in the instances of fraud.

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

The Court will consider sales pendente lite, especially if the ship is a deteriorating asset that the interested parties are not maintaining, and is likely to be sold in any event. The length of time to sell is largely determined by the degree of resistance from the ship interests. It can be done in as little as two months – the Court order must be obtained for the sale, the ship appraised, the sale advertised and bids accepted and Court approval of the specific sale granted.

*Shelley has practiced maritime law for almost 25 years and has been involved in dozens of ship arrests and priority disputes. She is co-leader of the firm's Maritime and Transportation practice groups. Her practice includes all aspects of maritime law, both litigation and commercial. She is the Western Vice-President of the Canadian Maritime Law Association and is recognized by Best Lawyers, LEXPERT and Who's Who in Shipping as one of the top shipping lawyers in Canada. She is ranked Band 1 for Shipping law in Canada by Chambers Global, as is the firm's maritime practice group.

*Andrew is a member of Bull Housser's maritime team and acts for clients in a wide range of maritime, transport and insurance matters. He is active in the Canadian Maritime Law Association and an executive member of the Plimsoll Club, Vancouver's shipping and transportation industry association. He is also called to the bar in Ontario and once worked in the Shanghai office of a leading British shipping law firm.