

BILL C-64

Wrecked, Abandoned or Hazardous Vessels Act

by Brad M. Caldwell

Introduction

On October 30, 2017 the Government of Canada tabled Bill C-64, to enact the *Wrecked, Abandoned or Hazardous Vessels Act*. The stated purpose of this proposed *Act* is to promote the protection of the public, of the environment, and of infrastructure, by regulating abandoned or hazardous vessels and wrecks in Canadian waters and, in certain cases, Canada's exclusive economic zone, and by recognizing the responsibility and liability of owners for their vessels.

As described on the Parliament webpage, the proposed *Act*:

- (a) implements the *Nairobi International Convention on the Removal of Wrecks, 2007*;
- (b) requires owners of vessels of 300 gross tonnage and above, and unregistered vessels being towed, to maintain wreck-removal insurance or other financial security;
- (c) prohibits vessel abandonment unless it is authorized under an *Act* of Parliament or of the legislature of a province, or it is due to a maritime emergency;
- (d) prohibits the leaving of a dilapidated vessel in the same place for more than 60 days without authorization;
- (e) authorizes the Minister of Transport or the Minister of Fisheries and Oceans to order the removal of a dilapidated vessel left on any federal property;
- (f) authorizes the Minister of Fisheries and Oceans to take measures to prevent, mitigate or eliminate hazards posed by vessels or wrecks and to hold the owner liable;
- (g) authorizes the Minister of Transport to take measures with respect to abandoned or dilapidated vessels and to hold the owner liable;
- (h) establishes an administration and enforcement scheme, including administrative monetary penalties; and
- (i) authorizes the Governor in Council to make regulations respecting such matters as excluding certain vessels from the application of the *Act*, setting fees and establishing requirements for salvage operations, the towing of vessels and the dismantlement or destruction of vessels.

The proposed *Act* also re-enacts, and revises provisions related to the *International Convention on Salvage, 1989* and to the Receiver of Wrecks. It also strengthens the protection of owners of certain wrecks in cases where the owner is unknown or cannot be located, and maintains regulatory powers related to the protection and preservation of wrecks having heritage value. It also contains consequential amendments to other *Acts*.

This article will review some of the proposals in *Bill C-64* related to derelict vessels and wrecks, and provide some suggestions to vessel owners on how to minimize their liability under this proposed *Act*.

Derelict and Abandoned Vessels

As most readers are likely aware, derelicts are a huge concern for harbour authorities, municipalities and shoreline property owners. Since the owners of these derelicts are often both difficult to locate and impecunious, harbour authorities and municipalities often end up spending considerable sums of money to deal with these problem vessels. In the past, they have found the current legislative regime to be less than satisfactory. As outlined above, Part 3 of the proposed *Act* provides some welcome tools for dealing with this problem. Part 3 starts by defining “dilapidated vessel” as a vessel that is significantly degraded or dismantled or is incapable of being used for safe navigation. The word “hazard” is also given a broad definition to include harmful consequences to the environment, coastlines, shorelines, infrastructure or any other interest, including health, safety, well-being and economic interest. The word “wreck” is also defined to mean a vessel, or part of a vessel that is sunk, partially sunk, adrift, stranded or grounded, including on the shore, and including equipment, stores, cargo etc. The proposed *Act* does not apply to vessels less than 5.5 m in length and designed to be primarily human powered or wind powered.

The proposed *Act* then prohibits the owner of a dilapidated vessel from leaving it stranded, grounded, including on the shore, anchored or moored in the same location or within a radius of three nautical miles, for a period in excess of 60 consecutive days.

The proposed *Act* also prohibits an owner from abandoning a vessel, regardless of whether it is dilapidated. If an owner leaves a vessel unattended for a period of two years, it will be presumed to be abandoned.

An owner is also prohibited from letting a vessel become a wreck by failing to maintain it or by knowingly causing it to sink or be stranded or grounded on the shore.

The proposed *Act* gives many powers to the Minister of Transport or the Minister of Fisheries or to both. For the purpose of this article, these powers will simply be referred to as powers granted to the Minister.

If a vessel is abandoned or deemed abandoned, the Minister may dispose of it, sell it, or destroy it. If the Minister reasonably believes a vessel poses a hazard, the Minister has many powers including the power to monitor, perform repairs, move, destroy, or sell it. The Minister may also direct any other person, such as a harbour authority, to take such measures.

With respect to dilapidated vessels, if the vessel is located on a public port or public port facility or on Federal Crown property the Minister may direct the authorized representative or in the absence of an authorized representative, the owner, to take a number of measures including repairing, removing or destroying the vessel. If such measures are not taken, the Minister may take those measures him- or herself or direct another person to do so. If the authorized representative and owner cannot be located, then upon 30 days written notice posted on a conspicuous part of the vessel, the Minister or a person authorized by the Minister may take possession of the vessel. If possession is taken under this provision the person given possession may register the vessel or obtain a pleasure craft licence for it without the owner’s consent.

Upon 30 days notice, the Minister may dispose of a vessel or wreck. This notice must be provided to the public, authorized representative (if known), owner (if known), or holder of any charges (if known). Under some circumstances, notice is not required. The power of the Minister to dispose of a vessel also includes the power to sell it. In doing so, the Minister can give the purchaser valid title free of any mortgage or lien. If necessary, the Minister may apply to the Federal Court for directions on distributing any surplus funds left over after the vessel is sold. In most cases where the Minister is authorized to direct third parties to take measures on his or her behalf, the Minister is required to pay those parties compensation.

The owner of a vessel or wreck is in most cases liable for costs incurred by the Minister or his appointees with respect to measures taken against wrecks and derelicts. If there is more than one owner, in most cases each owner is liable for the full cost on a joint and several basis. The proposed *Act* also allows for the making of regulations that could impose liability upon masters on a joint and several basis for the payment of fees imposed in the administration of provisions of the *Act*.

The proposed *Act* also has a compliance section that applies to the entire *Act*, which includes powers of search, seizure and an administrative monetary penalty regime.

Wreck Removal

Part 1 of the proposed *Act* incorporates parts of the *Nairobi International Convention on the Removal of Wrecks* into law in Canada. In addition to creating a compulsory insurance regime for wreck removal as briefly described above, the incorporated provisions of the *Convention*, along with additional provisions in the proposed *Act*, do the following:

- 1) Impose reporting requirements upon the master and operator of a vessel involved in a marine casualty that results in a wreck (*Act*, s. 19(1);
- 2) Impose marking requirements upon the owner of a wreck;
- 3) Impose an obligation on the registered owner to remove a vessel determined to constitute a hazard (*Convention*, Art, 9(2); and
- 4) Impose liability on the registered owner for: (a) the costs of locating, marking and removing the wreck (unless it can be proved the casualty was caused by a few narrow exceptions); (b) costs incurred in determining whether a wreck poses a hazard (*Act*, s. 23); and (c) any other loss or damage caused by measures taken under the *Act*.

Article 10 of the *Convention* states that it does not affect the right of a registered owner to limit its liability under the *Convention on Limitation of Liability for Marine Claims, 1976* as amended. However, Part 3 of the *Marine Liability Act*, excludes the application of the *Limitation of Liability Convention* to “[c]laims in respect of the raising, removal, destruction, or rendering harmless of a ship that is sunk, wrecked, stranded or abandoned ...”.

Accordingly, registered owners of wrecks will be liable for 100 percent of these costs.

Summary and Comments

The proposed *Act* provides a number of long-awaited tools that will be useful for dealing with the many wrecks and derelicts littering our coasts. These tools will be particularly welcomed by the harbour authorities and municipalities that are currently doing most of the heavy lifting in dealing with derelicts. They will also be useful in funding the costs of raising wrecks that pose a hazard to navigation and the environment.

From the perspective of vessel owners, the many new obligations placed upon authorized representatives and owners create traps for the unwary. One particularly large trap is the potential liability of a person who sells a vessel, but does not ensure that the bill of sale has been registered with the applicable ship's registry or small vessel licence registry. In the event a derelict or wreck is found, the first person the Minister will likely be contacting is the registered owner or authorized representative as shown at the Ship's Registry. If a bill of sale has not been filed by a new owner, a past owner may have difficulty in resisting a direction or a demand for compensation from the Minister. In sale transactions where lawyers are involved, a bill of sale is often registered as a precondition for payment. However, in small sale transactions where lawyers are not involved, bills of sale often do not get registered. In these cases, vendors would be prudent to register the bill of sale themselves. However, to do so, it will be necessary for the vendor to get the purchaser to sign and provide the vendor with additional documents such a statement of qualification in the case of a registered vessel. There is also a fee of \$150.00 for the registration of a bill of sale at the Ship's Registry in Ottawa. These registrations can be done by faxing or e-mailing documents to the Ship's Registry along with a credit card authorization. For additional proof that the vessel has been sold, it would also be prudent to store a copy of the bill of sale and any sale agreement in a safe place.

With respect to liability for wreck removal costs of vessels that have not been sold, a good insurance policy with wreck removal coverage is also essential. This is generally standard coverage in protection and indemnity policies. For owners of fleets of vessels, having each vessel owned by a separate corporation could also be useful. However, tax and accounting advice should be obtained before doing so.

This is a slightly revised copy of an article published by Brad M. Caldwell in the January 2017 issue of Western Mariner Magazine. Brad M. Caldwell is lawyer with the firm of Caldwell & Co. in Vancouver, B.C. His practice is primarily devoted to maritime, fisheries, and insurance matters. He can be contacted at 604 689 8894; bcaldwell@admiraltylaw.com. Previous articles written by Mr. Caldwell can be viewed on the fisheries page of admiraltylaw.com (papers and articles section).