



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

Submission to
**The Ministry of Government and Consumer
Services**
from
the Ontario Bar Association
on
Reform of the *Repair and Storage Liens Act*

Submitted on *May 26, 2008*

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About the Ontario Bar Association

Ontario Bar Association (OBA), an autonomous provincial branch of the Canadian Bar Association, was founded in 1896. OBA is a voluntary membership organization, representing more than 17,000 Ontario lawyers, judges and law students. OBA has the following objectives:

- (a) to promote and encourage law reform throughout the Province of Ontario;
- (b) to improve the availability, accessibility and quality of legal services to all residents of Ontario;
- (c) to uphold the standards of the profession of law;
- (d) to encourage high standards of legal education, training and ethics; and
- (e) to preserve the independence and integrity of the judiciary

About the Submission

This Submission constitutes the comments and recommendations of the Ontario Bar Association (“OBA”) with respect to the *Repair and Storage Liens Act, R.S.O., 1990, c.R.25*, as amended (the “*RSLA*” or the “Act”). It has been prepared by the Personal Property Security Law Subcommittee (the “PPSL Committee” or “Committee”) of the Business Law Section of the OBA and approved by OBA Executive on May 22, 2008.

PPSL Committee

The PPSL Committee has been actively engaged for over 25 years in a variety of matters pertaining to the *Personal Property Security Act* (“*PPSA*”), the *RSLA* both before and after its passage in 1989, and related commercial law legislation. Over the years, the Committee has worked closely with representatives of the Ontario Ministry of Government and Consumer Services (the “Ministry”) with a view to the development and improvement of the *PPSA*, the *RSLA* and the enhancement of the day-to-day functioning of the Personal Property Security Registry (the “PPS Registry”). The Committee has made a number of submissions to the Ministry.

Our most recent submissions were made pertaining to (i) the *PPSA*, the *Ontario Business Corporations Act* and the *Executions Act* regarding consequent amendments proclaimed into force on January 1, 2007 to enable implementation of the *Securities Transfer Act, 2006*, and (ii) further updating amendments to the *PPSA* proclaimed into force on August 1, 2007 as part of *An Act to Modernize Various Acts administered by or affecting the Ministry of Government Services, S.O. 2006, c.34*, contained in Schedule E.

One of the key roles of the Committee is to alert the practising bar to case law and other developments concerning the *PPSA* and related legislation and to provide practice tips and other educational assistance to practising lawyers. This is done primarily through a newsletter called Imperfections - which has been published regularly since 1982 - and through conference and seminar presentations by the Committee and individual members.

The Committee has invited comments from the practising bar, academics and others with respect to problems experienced under the *RSLA* and with respect to amendments to the current legislation which might be necessary or desirable. In response, the Committee has received comments highlighting shortcomings or vagaries in the legislation. Based on such communications and our continuing study of the *RSLA*, we have concluded that it is necessary to make some substantive amendments to the *RSLA*.

A list of the current members of the Committee, together with a list of the Ministry representatives who are Observers, is attached as Appendix A. The Committee is a volunteer committee. Members of the Committee bring to bear considerable expertise and many years of experience in matters pertaining, among other things, to the *PPSA* and *RSLA*.

The comments and recommendations in this Submission reflect the views of the Committee as a whole but they do not necessarily reflect in all cases the views of each individual member of the Committee.

Recommendations

The Committee makes the following recommendations to amend the *RSLA*:

1. Notification of Owner by Storers

Section 4 of the *RSLA* requires that where a storer “knows or has reason to believe” that an article has been received from someone other than the owner of the article or someone with the authority of the owner, the storer must notify the owner within 60 days of receiving the article. Failure to do so, in these circumstances, will restrict the storer’s claim for lien to the 60-day period. No storage charges beyond this time are enforceable.

Granting a storer 60 days in which to notify the owner of stored property raises concerns that storers may use the provision to their advantage and to the prejudice of secured creditors. A storer could intentionally refrain from contacting the owner of property until the 60-day period has almost expired, with a view to running up the storage costs. In the automotive sector, this issue is periodically the subject of concern expressed by members of the Used Car Dealers Association of Ontario and the Canadian Finance & Leasing Association.

Most articles, which become the subject of storers’ liens, are “vehicles” as defined in the *Highway Traffic Act*. It is relatively simple and inexpensive to determine the registered owner of a vehicle in Ontario. The Committee, therefore, submits that for vehicles registered in the Ontario Ministry of Transportation’s Vehicle Registry System (“VRS”), the 60-day period be reduced to 15 days. The Committee wishes to emphasize that the shorter window proposal is restricted to articles (vehicles) that are required by law to be recorded in a registry to which the public has easy access.

The identity of the owner of a vehicle registered in the VRS is a matter of public record, available at any Ministry Driver and Vehicle Licencing Office or Ontario government computer kiosk. Though the address of the owner is generally not publicly accessible, a Used Vehicle Information Package, available to anyone at a cost of \$20.00, will show the city in which the registered owner resides or carries on business. Other means of locating the vehicle’s owner also exist, such as performing a search of the Personal Property Security Registry (“PPSR”) against one or both of the VIN or the name of the registered owner.

Whether the period is set at 15 days or 60 days, storers have an obligation to notify owners of property being stored in order to claim storage costs. Reducing the period to 15 days, in the case of vehicles, will simply require storers to be more expeditious in attempting to locate and notify the vehicle owners.

The Committee, therefore, recommends adding a new subsection 4(4.1) as follows:

Despite subsection (4), in the case of a vehicle as defined in the Highway Traffic Act, registered in the Ministry of Transportation Vehicle Registry System, the storer shall give written notice to the registered owner of the vehicle within fifteen days after the day of receiving the article.

A corresponding change would also need to be made in subsection 4(6), where the 60-day period is also used.

2. Time Within Which to Register Repair Liens

In 1993, the PPSL Committee recommended that where an unpaid repairer releases an article, any claim for lien should be extinguished if a lien was not registered in the PPSR within 90 days of the non-possessory lien arising.

The Committee wishes to follow up on this proposal and amend it slightly. The Committee recommends introducing a maximum time limit in which a non-possessory lien claimant must register its lien. However, the Committee recommends that such a limit go to lien priority, rather than lien validity. Where a repair lien is registered outside of the prescribed time following the release of possession of the property, the lien would remain valid as against the debtor, but be subordinate to any pre-existing perfected security interests or liens.

Subsection 10(1) of the *RSLA* currently requires registration of a claim for lien in order to make a non-possessory lien enforceable against third parties. The lien remains at all times valid against the original debtor. The introduction in this section of a time limit on registration would not have the effect of invalidating a claim for lien against the debtor or any third party interest obtained subsequent to the late registration of the lien.

So long as the debtor maintains ownership or lawful possession of the article, the lien claimant will maintain the rights granted by the *RSLA* to enforce its claim for lien. However, if a third party subsequently acquires rights in the article, those rights will supersede the rights of a lien claimant who has not properly registered the lien.

In the interests of achieving relative uniformity with other jurisdictions, including with regard to the time period for registration, the Committee submits that the time limit for maintaining priority over third parties be set at 20 days.

Amended subsection 10(1), with the recommended changes noted in bold text, would read as follows:

A non-possessory lien is enforceable against third parties, who hold a perfected interest in or title to an article at the time the non-possessory lien arises, only if a claim for lien has been registered within twenty days of the non-possessory lien arising, and, where a person acquires a right against an article after a non-possessory lien arises, the right of the

person has priority over the non-possessory lien of the lien claimant if a claim for lien was not registered before the person acquired the right.

3. No Tacking

Section 26 of the *RSLA* is commonly interpreted as prohibiting tacking. Accordingly, a separate claim for lien would need to be registered whenever a new lien arises. A lien claimant would need to register three separate liens were it to repair and release the same vehicle three times in order to have its claim for liens recognized.

It is submitted that tacking of a lien for unpaid repairs to one article onto a pre-existing lien against another article, should not be permitted. However, where a single article has been repaired and released more than once, the Committee sees no reason to prohibit a single claim for lien from being registered to cover each of the repairs to that one article.

The Committee has adopted the 1993 PPSL Committee recommendation for re-submission to the Ministry. The 1993 recommendation read as follows:

This section (section 26) has been interpreted to mean that, in effect, a separate claim for lien must be registered under the *Liens Act* each and every time a lien arises: *General Electric Capital Equipment Finance Inc. v. Transland Tire Sales & Service Ltd., 2 P.P.S.A.C. (2d) 223*. However, the reason apparently underlying such requirement – namely, that it would be impossible to determine priorities between different claimants if a series of non-possessory lien claims could be made effective simply by stating the cumulative total of the aggregate claims in a single claim for lien – does not appear to be correct when section 16 is borne in mind. That section contemplates that priority will be in reverse order to the order in which lien claimants gave up possession. Thus extrinsic evidence as to the time possession is given up, will be required in any event in order to establish priorities.

The recommendation of the Committee in 1993 was to add a new subsection 26(3) to read:

One claim for lien may be registered for one or more non-possessory liens, which have arisen and taken effect prior to the date of registration of the claim for lien.

4. Out of Province Liens

Unlike the *PPSA*, the *RSLA* contains no conflict of law provisions to protect lien claimants who have registered their interest against property in another jurisdiction. Since a significant amount of, perhaps most, property that is typically subject to repair liens is mobile, it is not uncommon for it to be moved from one jurisdiction to another. With no provision to continue, in Ontario, the perfection of a lien arising in another jurisdiction or for the lien to even be registered here, out-of-province lien holders currently have no way of enforcing their lien if the property finds its way into Ontario.

The Committee suggests that this could be rectified by applying sections 5, 6, 7, 8 and 8.1 of the *PPSA*, to the *RSLA*. Essentially, these sections would be incorporated into the *RSLA*, with necessary amendments, such as changing the words “security interest” to “lien”. Subsection 5(1)(b), which deals with possessory security interests in intangibles, and subsection 5(5), dealing with the narrow issue of revendication rights of unpaid sellers in Quebec, would not be included.

The inclusion of these provisions would make it possible for an out-of-province lien claimant to register and enforce its lien in Ontario.

The Committee recommends the addition of new subsections 2.1 to 2.4 as follows:

2.1 (1) Except as otherwise provided in this Act, the validity of:

- (a) a possessory lien; and
- (b) a non-possessory lien

shall be governed by the law of the jurisdiction where the article subject to the lien is situated at the time the lien arises.

(2) A non-possessory lien registered under the law of the jurisdiction in which the article is situated at the time the lien arises but before the article is brought into Ontario is deemed, for the purposes of this Act, to have been continuously registered in Ontario if it is registered in Ontario before the article is brought in, or if it is registered in Ontario:

- a) within sixty days after the article is brought in;
- b) within fifteen days after the day the lien claimant receives notice that the article has been brought in; or
- c) before the date that registration ceases under the law of the jurisdiction in which the article was situated at the time the lien arose

whichever is the earliest, but the lien is subordinate to the interest of a buyer or lessee of the article who, primarily for personal, family or household purposes, acquires the article from the owner or owner’s successor in title in good faith and without knowledge of the lien and before the lien is registered in Ontario.

(3) Subsection (2) does not apply so as to prevent the registration of a lien after the expiry of the time limit set out in that subsection.

(4) Where a lien mentioned in subsection (1) is not registered under the law of the jurisdiction in which the article was situated at the time the lien arose and before being brought into Ontario, the lien may be registered under this Act.

2.2 (1) Subject to section 3, if the parties to the repair contract or storage contract (as the case may be) understand at the time a non-possessory lien arises that the article will be kept in another jurisdiction and the article is moved to that other jurisdiction for purposes other than transportation through the other jurisdiction, within 30 days after the lien arose, the enforceability of the lien against third parties shall be governed by the law of the other jurisdiction.

(2) If the other jurisdiction mentioned in subsection (1) is not Ontario, and the article is later brought into Ontario, the lien is deemed to be one to which subsection 2.1(2) applies if it was registered under the law of the jurisdiction to which the article was removed.

2.3 (1) The validity, and priority, of a non-possessory lien against an article of a type that is normally used in more than one jurisdiction if the article is equipment or inventory leased or held for lease to others by the person who contracted for the repair or storage of the article (as the case may be) shall be governed by the law of the jurisdiction where that person is located at the time the non-possessory lien arises.

(2) If the person changes location to Ontario, a lien that is registered in the other jurisdiction continues to be enforceable against third parties in Ontario if it is registered in Ontario,

(a) within sixty days from the date the person changes location;

(b) within fifteen days from the day the lien claimant receives notice that the person has changed location; or

(c) prior to the day that registration ceases under the law of the jurisdiction referred to in subsection (1),

whichever is the earliest.

(3) A lien that is not registered as provided in subsection (2) may be otherwise registered under this Act.

(4) For the purposes of this section, a person shall be deemed to be located at the person's place of business if there is one, at the person's chief executive office if there is more than one place of business, and otherwise at the person's principal place of residence.

- 2.4. (1) Despite sections 2.1, 2.2 and 2.3,
- (a) procedural issues affecting the enforcement of the right of a lien claimant are governed by the law of the jurisdiction in which the article is located at the time of the exercise of those rights; and
 - (b) substantive issues affecting the enforcement of the rights of a lien claimant against an article are governed by the proper law of the contract of repair or the contract of storage (as the case may be).
- (2) For the purposes of sections 2.1 to 2.4, a lien shall be deemed to be registered under the law of a jurisdiction if the lien claimant has complied with the law of the jurisdiction with respect to the creation and continuance of a lien that is enforceable against the other party to the repair contract or storage contract (as the case may be) and third parties.
- (3) For the purposes of sections 2.1 to 2.4, a reference to the law of a jurisdiction is reference to the internal law of that jurisdiction, excluding its conflict of law rules.

The proposed section 2.3 (4) is based on section 7(3) of the *PPSA*. When section 7(3) of the *PPSA* is repealed and replaced by the new location of debtor rules for individuals and for different types of debtors and other related provisions, including the proposed transition rule in section 7.2 (each of which has been enacted but not yet proclaimed into force), section 2.3(4) will need to be revised to conform with those new provisions in the *PPSA*.

5. Definition of “Repair”

The Committee engaged in considerable discussion regarding the definition of “repair” in the *RSLA*. There has been growing concern that the existing definition was leading to an expanded interpretation of what would commonly be considered to be a repair.

For example, claims that the installation and financing of a car stereo system and the installation of software into a computer system were repairs pursuant to the *RSLA*, have been recognized in Ontario court decisions (see *VFC Inc. v. Tomax Corp.*, 14 P.P.S.A.C. (2d) 90 and *Anritsu Co. v. Microsys Technologies Inc.*, 48 OR (3d) 759).

In 2001, another case (*GMAC Leaseco Ltd. v. Tomax Credit Corp.*, 3 P.P.S.A.C. (3d), 15) was heard which reviewed the relationship of the *RSLA* to the installation of items into a motor vehicle. The Committee agreed with the analysis of the judge in this case, and in light of it, determined that, rather than attempting to redefine repair in the *RSLA*, the matter should be deferred to the courts to decide on a case by case basis.

For reference, it was felt that a brief analysis of this decision and the Committee’s view of it should be included. This analysis appears in Appendix B to this Submission.

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APPENDIX B: Definition of “repair”

The definition of “repair” in subsection 1(1) of the *RSLA* reads as follows:

An expenditure of money on, or the application of labour, skill or materials to, an article for the purpose of altering, improving or restoring its properties or maintaining its conditions and includes,

- (a) the transportation of the article for purpose of making a repair,
- (b) the towing of an article,
- (c) the salvage of an article.

This definition could be read to include the fitting to goods of an “accession” as defined in subsection 1(1) of the *PPSA*. The overlap between the priority rules for accessions in section 35 of the *PPSA* and the priority rules for repairers’ liens in the *RSLA* has been identified as potentially posing a significant problem. Several approaches have been discussed each of which would involve amending the definition of “repair” in an effort to limit its scope. However, as a result of a 2001 court decision which dealt with this specific issue, the Committee feels that the need to amend the definition of “repair” may no longer be as pressing.

In *GMAC Leaseco Ltd. v. Tomax Credit Corp.*, 3 P.P.S.A.C. (3d) 15, Tomax financed the installation in a motor vehicle of a stereo system, an electronic door locking system and a security system. GMAC held a perfected security interest in the vehicle. When the customer defaulted on payment, Tomax claimed an *RSLA* lien over the vehicle. GMAC argued that Tomax did not have a valid repair lien because the installations were not “repairs” within the meaning of the Act. Cameron J. found in favour of GMAC with respect to the stereo system, but not the electronic door locking system or the security system.

One of the key passages in the judgment reads as follows:

In view of the paramountcy of the *PPSA* under s. 73 of that Act, the definition of “repair” in the *RSLA* must be read so as to give reasonable meaning to the definition of an “accession” in the *PPSA* and the priorities provided under s.35 (1) of the *PPSA*.

Cameron J. goes on to say:

A radio is not an integral part of a vehicle. Many new vehicles do not contain a radio. A radio installed in a vehicle is not a repair under the *RSLA*. It does not alter, improve or

restore the properties of the vehicle. It is different from tires, windows, brakes, transmission, exhaust system, dented fenders, scraped paint, etc. A vehicle continues to operate as a vehicle, a safe, efficient and presentable means of transportation when the radio is removed. A radio merely increases the user's pleasure while occupying the vehicle. A radio can exist and operate separate from the vehicle. It is an addition to the vehicle, not an alteration, improvement or restoration of the properties of the vehicle.

Cameron J. identified a distinction between a radio and a door locking system:

On the other hand, I find the electronic door locking system and security system to be an improvement to the properties of the vehicle. A locking system is a part of every vehicle and is useless except as a part of a vehicle. These costs are secured by the *RSLA* lien in priority to GMAC's claim.

He concludes:

As a matter of commercial expediency, vehicle owners benefit from repairs. However, they cannot protect their interests from the addition and removal of accessions. Those who deal in accessions and seek a non-possessory security interest therein must accept the priorities of *PPSA* s. 35 or search title and security interests to ensure they obtain the priority they seek in the asset to which the accession is attached.

Cameron J. seems to have used both a "utility" test and a "functionality" test to determine whether the installation of what could easily be considered to be accessions (a stereo, a door locking and security system), constituted a repair for the purposes of the *RSLA*. Cameron J. reasoned that the door locking system went to the utility or usefulness of the vehicle and so its installation qualified as a repair under the *RSLA*. The same was true of the security system. On the other hand, he held that the radio did not affect the utility of the vehicle and so its installation was not a repair. While not necessarily agreeing with the end result as far as the door locking and security systems are concerned, the Committee does concur with the analytical process used by Cameron J. in his attempt to resolve the *PPSA/RSLA* overlap problem.

Cameron J's analysis of the functionality of the item installed also helped him in his decision. He viewed the stereo as being independently functional. A sound system is operative without installation in the vehicle. On the other hand, the door locking and the security system were useless unless installed in a vehicle. They had no independent functionality.

Partly, this was also an analysis of the expenses for these items. The evidence before the court showed that the cost of the stereo system was more than \$4,000, for a vehicle that sold without the stereo system at auction for only \$7,200. One would not normally expect to spend more than half the value of the vehicle on an item that did not restore the properties of the vehicle or its condition.

The reasoning of Cameron J. in reaching his decision reinforces the logic behind the accession rules of the *PPSA*. At the same time, it makes proper allowance for the providers of legitimate repairs to vehicles and other property to claim a repairer's lien over the property and to benefit from the rights granted by the *RSLA*. Following the reasoning of this case would seem to alleviate the need to amend the definition of "repair".

This case was discussed and followed in like circumstances by Farley J. in *GMAC Leaseco Ltd. v. Best Audio Design Inc.* ([2004] O.J. No. 520, 6 P.P.S.A.C. (3d) 385 (S.C.J.)), who referred to Cameron J.'s decision in the Tomax case to distinguish between repairs and accessions. At paragraph 2, Farley J. also looked at the costs involved to determine this issue and wrote:

The issue here is whether the (extensive and expensive) addition of an audio system into the vehicle constitutes a "repair" within the meaning of the *Repair and Storage Liens Act*. In my view it does not.

At this time, therefore, the Committee recommends making no change to the definition of "repair" in the *RSLA*.