Reform of the *Repair and Storage Liens Act*

Date: **April 2013**

Submitted to: **The Ministry of Government Services and the Ministry of Consumer Services**

Submitted by: **The Ontario Bar Association, Secured Transactions Committee of the Business Law Section**

ONTARIO BAR ASSOCIATION
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Une division de l'Association du Barreau canadien

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The Ontario Bar Association ("OBA") is pleased to be able to provide advice to the Ministries of Consumer Service and Government Services (the "Ministries") on necessary reforms to the *Repair and Storage Lien Act* ("RSLA"). We have enjoyed a productive relationship with the Ministries on several varied issues this year, including Cash Collateral, *Condominium Act* reform and the *Not-for-Profit Corporations Act.* We look forward to working with you on this issue of growing importance.

The OBA

General Background

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing 18,000 lawyers, judges, law professors and law students. We advocate both in the interests of the profession, and, as in this case, in the interests of the public.

The Personal Property Security Law Committee

The OBA's Business Law Section has nearly 2000 members and its Personal Property Security Law Committee (the "Committee") includes the leading experts in personal property security law, including repair and storage liens. The Committe members would count among their clients several of the relevant stakeholders, including vehicle financers, owners, borrowers and lien claimants. The OBA's Business Law Section and the Committee have assisted government with virtually every reform in the area of personal property security law.

Previous Input

The Committee has previously provided advice on RSLA reform to the Ministries and their predecessors. As the advice given then remains relevant, we have attached the relevant portion of these submissions as Appendix "A" (1993 Submission) and Appendix "B" (2008 Submission).

Renewed Calls for Reform

The concerns for the profession and the public that motivated previous calls for reform have grown in significance over the last decade. In fact, the Auto Insurance Anti-fraud Taskforce established by the Ministry of Finance has identified the repair and storage lien regime as an area

in which reform may be necessary to avoid illegitimate insurance costs. The OBA's recommendations for reform outlined below address this and other growing concerns.

Recommendations

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

1. Notification of Owner by Storers

Issues with the Current Notice Provisions

(a) Lengthy Notice Period Creates Opportunity for Abuse and Increased Costs

One aspect of the current RSLA regime that allows for illegitimate increases in storage costs is the amount of time that one can store an article before even having to notify the owners and other creditors that the article is being stored.

To take an example: where a leased or financed vehicle has been involved in an accident, a tow truck operator may tow it to a "storage facility". The storer begins to charge immediately. The lessor who owns the vehicle or the secured-creditor who has financed the vehicle is usually unaware that the vehicle is being stored or that storage costs are mounting, despite the fact that the lessor or creditor will likely be responsible for paying these costs. The current RSLA allows the storer to hold the vehicle for 60 days before notifying the actual owner. An unscrupulous storer will wait until the last moment to provide notice. The lessor or its insurer will be responsible for up to two months of storage costs before they even know the vehicle is in storage. The storer is able to acquire a lien in respect of the vehicle such that the storage costs must be paid to secure the release of the vehicle for repair, sale or other purposes. This lengthy notice period has been identified as a lucrative opportunity for the unscrupulous storer, and those associated with him, as well as an illegitimate increase in costs to Ontario businesses, insurance companies and their clients.

It is noted that, where there is a dispute about the amount owed, Section 24 of the RSLA does allow anyone who has the right to possession of an article to pay the amount claimed by the storer/lien claimant into court in order to recover the article before further storage fees accumulate. However, if 60 days of storage can be claimed in the notice sent by the storer, the amount required to be paid into court can become prohibitive.

(b) Statutory Provisions and Case Law

Subsection 4 (4) of the *RSLA* currently provides that:

> Where the storer knows or has reason to believe that possession of an article subject to a lien was received from a person other than,
>
> (a) its owner; or
>
> (b) a person having its owner's authority,
>
> the storer, within sixty days after the day of receiving the article, shall give written notice of the lien,
>
> (c) to every person whom the storer knows or has reason to believe is the owner or has an interest in the article, including every person who has a security interest in the article that is perfected by registration under the *Personal Property Security Act* against the name of the person whom the storer knows or has reason to believe is the owner; and
>
> (d) in addition to the notices required by clause (c) where the article is a vehicle,
>
> (i) to every person who has a registered claim for lien against the article under Part II of this Act,
>
> (ii) to every person who has a security interest in the vehicle that is perfected by registration under the *Personal Property Security Act* against the vehicle identification number of the vehicle, and
>
> (iii) if the vehicle is registered under the *Highway Traffic Act*, to the registered owner. R.S.O. 1990, c. R.25, s. 4 (4).

Most Canadian jurisdictions have similar provisions with identical timelines (generally through Warehousemen's Lien Acts, or similarly named legislation). While, the OBA recognizes that consistency with other Canadian legislation is often desirable, the current 60 day window in Ontario has resulted in, and continues to result in, abuse by unscrupulous storers who are able to use this provision to their advantage and to the prejudice of secured creditors, by intentionally refraining from providing the required notice until the permitted 60-day period has almost expired. Their intent is to run up storage costs.

In the automotive sector, this issue has long been the subject of concern expressed by members of the Used Car Dealers Association of Ontario and the Canadian Finance & Leasing

Association. The issue has recently become the focus of closer scrutiny on the part of secured lenders, lessors and, as mentioned above, insurers and those reviewing the issue of insurance fraud.

A recent judicial decision also highlighted the problem. *Ally Credit Canada Limited* v. *All Ontario Towing and Storage Inc.*, Court File No. 11-0691 (S.C.J.) *("All Ontario"),* a summary of which is attached as Appendix "C", provides an example of how the 60 day notice period can be abused.

This *All Ontario* case involves storage liens claimed by a company that MacKinnon J. found "is not in the business of storage, but rather …. whose business purpose is to profit from individual and corporate bankruptcy."

In this case the "storer" held three vehicles for over a month and provided notice of pending sale for payment of the storage charges to a secured creditor only after the creditor's bailiff had discovered that the vehicles in question were in the "storer's" possession. Had the bailiff not discovered the vehicles, it seems likely that the "storer" would have waited the full 60 days, or close to it, before sending the notice of pending sale.

(c) Lengthy Notice Period is Unnecessary

In addition to creating a moral hazard into which an increasing number of storers are falling, the 60-day notice period is also clearly unnecessary in a world that is, technologically and otherwise, very different from the one into which this RSLA provision was introduced. As was the case in *All Ontario* most articles which become the subject of storers' liens, are "vehicles" as defined in the *Highway Traffic Act*. Service Ontario makes it relatively simple, inexpensive and fast for storers to determine the registered owner of a vehicle in Ontario - it does not legitimately take anything approaching 60 days to do so.

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. This "UVIP" packages includes a *Personal Property Security Act* ("PPSA") search result for the vehicle identification number of the subject vehicle which reveals the names and addresses of creditors and others with an interest in that vehicle.

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.

(d) Outdated Means of Providing Notice

Efficient and speedy notice to owners could also be effected by providing for more modern means of sending notices. The *Personal Property Security Act* was amended in 2006[1] to allow for notices required under that Act to be sent by electronic transmission. The RSLA has yet to be modernized in this way. The current RSLA service provisions do not even provide for service by facsimile, let alone electronic transmission. Updated service provisions would be particularly useful for institutional owners (like leasing companies) whose e-mail addresses and facsimile numbers are readily available.

Recommended Changes

(i) Shorter Notice Period

The OBA, therefore, submits that, for vehicles registered in the Ontario Ministry of Transportation's Vehicle Registry System ("VRS") or Off-Road Vehicle Registry System ("OVRS"), the 60-day period to provide notice be reduced to 15 days. The OBA wishes to emphasize, once again, that this shorter window should be restricted to articles (vehicles) that are required by law to be recorded in a registry to which the public has easy access.

While, there has been some suggestion that even the 15 day period may be too long and lead to abuse, the OBA recommends that reducing the notice period further could cause undue hardship for legitimate storers attempting to determine the address of a vehicle's owner. As noted above, unlike the identity of the registered owner, the owner's address is not as easily determined.

The OBA recommends that 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, while still providing a reasonable time for legitimate storers to provide the notice.

The OBA 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 or Off-Road Vehicle Registry System, the storer shall give written notice within fifteen days after the day of receiving the vehicle**.

[1] *Personal Property Security Act*, R.S.O 1990, C-10, subsections 68(1) and 68(2) and (3).

A corresponding change would also need to be made in subsection 4(6), where the 60-day period is also referred to, in limiting the amount of storage that the storer can claim against anyone entitled to receive the notice.

(ii) Electronic Service of Notice

It is recommended that the service provisions of the RSLA mirror the more modern notice provisions of the PPSA. Notice provisions under the two pieces of legislation serve similar goals. The amended RSLA provision would read:

Service of documents

27. (1) A document required to be given or that may be given under this Act is sufficiently given if it is:

a. given personally to the intended recipient;

b. sent by certified or registered mail or prepaid courier to the intended recipient at,

i. the intended recipient's address for service if there is one;

ii. the last known mailing address of the intended recipient according to the records of the person sending the document, where there is no address for service, or

iii. the most recent address of the intended recipient as shown on a claim for lien or change statement registered under this Act or as shown on a financing statement or financing change statement registered under the *Personal Property Security Act*

c. sent by telephone transmission of a facsimile, or

d. sent by electronic transmission.

Other potential solutions to be investigated by the Ministries

While it is beyond the mandate of the Committee to make recommendations regarding establishing a cap on storage rates, we urge the Ministries to look very seriously at addressing this concern, as we understand from our industry clients and from lawyers' files, that the instances of storage fee abuse are becoming more common and that the rates of storage being claimed by unscrupulous storers are also becoming higher.

2. Time in which to Register Repair Liens

In applicable circumstances, repairers have the right to a non-possessory lien over the repaired article. This lien arises and is effective against the debtor from the date the article is released and

is effective against third parties after the non-possessory lien is registered. Subsection 10(1) of the RSLA provides:

> **10.** (1) A non-possessory lien is enforceable against third parties only if a claim for lien has been registered, 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.

Difficulties are created by the fact that subsection 10(1) does not contain a deadline for registration. Repairers may register a non-possessory lien months or even years after it arises and it will be effective against third parties and enjoy priority over those whose rights existed before the non-possessory lien arose. So, as a secured creditor whose interest was perfected before the non-possessory lien arose, you may go year without knowing that your priority was threatened and yet have it vanish in an instant upon registration of a long-existing non-possessory lien. Introducing a time limit on the registration of a non-possessory lien will not create any significant hardship for repairers and will give much more current information to those searching liens – they will be provided with information on all liens except very recent non-possessory liens. The introduction of a time limit on registration would not have the effect of invalidating a claim for lien against the debtor or against any third party whose interest is obtained subsequent to the registration of the lien, even if that registration is outside the time limit. Where a repair lien is registered outside of the prescribed time following the release of the property, the lien would remain valid as against the debtor but be subordinate to any pre-existing perfected security interests or liens.

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.

Most, though not all, Canadian jurisdictions similarly require liens for unpaid repairs to be registered within a specified period. This is generally 15 or 21 days from the date the lien arose. In these jurisdictions, failure to register within the prescribed period does not only go to priority, it invalidates the lien claim completely.

The Committee suggests 15 days is sufficient time for an unpaid lien claimant to register its lien. However, the Committee recommends that, in order to preserve the proper balance, failure to register the lien within this prescribed time should not invalidate the claim for lien but rather should affect only its enforceability against third parties with security interest in the article that were perfected before the late registration.

A 15 day registration window would be consistent with the Purchase Money Security Interest ("PMSI") priority provisions contained in Section 33 (2) the PPSA. The two sections perform similar functions (protecting rights of those who surrender possession over an article)

It would also match the 15 day notice window for storers proposed in Recommendation 1, above.

Section 10(1) should be amended as follows:

> A non-possessory lien is enforceable against third parties **who held a perfected interest in, or title to, an article at the time the non-possessory lien arose,** only if a claim for lien has been registered **prior to the expiry of a fifteen day period after the non-possessory lien arose**, 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. 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. In order to have its claims for lien recognized, a lien claimant would need to register three separate liens if it repaired and released the same vehicle three times.

The no tacking provision continues to pose a concern for repairers who service and repair commercial vehicle fleets. Repairs to fleet vehicles are typically charged to an account that the fleet operator has established with the repairer. The need to register separate liens each time a vehicle is serviced or repaired and released to the customer is a significant inconvenience for repairers with this type of fleet customer as the customer does not pay for each repair at the time the vehicle is returned. The failure to register individual liens each time a vehicle is serviced or repaired can jeopardize claims for significant unpaid repair invoices in the event that the fleet operator becomes bankrupt or otherwise ceases to operate.

Burden on businesses and the registration system would be alleviated by permitting non-possessory lien claimants to amend existing lien registrations to add subsequent unpaid amounts to lien claims registered against a specific article. This amendment would only apply where the original lien is registered against a single article, generally a motor vehicle or trailer.

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, there is no public policy reason to prohibit a single claim for lien from being registered to cover each of the repairs. As future repairs are completed and the article is released, an amendment to the original lien registration would still be required to record the increased amount of the lien being claimed.

As the OBA has previously advised:

> "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."

We recommend that the following subsection be added

> **26(3) One claim for lien may be registered for one or more non-possessory liens that 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 OBA recommends that this could be rectified by copying sections 5, 6, 7, 8 and 8.1 of the *PPSA*, in 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 OBA recommends the addition of new subsections 2.1 to 2.4 to read 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.

24. (1) Despite Subsections 2.1, 2.2 and 2.3,

(a) procedural matters 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 matters 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.

5. Finding Minister's Orders and Registrar's Orders

The RSLA was amended in 1998 to add, at section 31.1, the power for the Minister to make orders. The regulations passed pursuant to the RSLA were repealed in 1998 and replaced with Minister's orders that were published once in the *Ontario Gazette* dated August 22, 1998. The same is true for virtually all of the *Personal Property Security Act* ("PPSA") regulations which were almost all repealed in 1998 and the subsequent minister's orders issued pursuant to section 73.1 of the PPSA and published once in the same issue of the *Ontario Gazette*.

Ontario Bill 55, the *Strong Action for Ontario Act (Budget Measures), 2012*, amends both the PPSA and the RSLA to allow for registrar's orders.

The issue is that the existing Minister's orders are not readily available to the public on the Ontario government's e-Laws website or the websites of either the Ministry of Government Services or the Ministry of Consumer Services.

These orders deal with, among other items, the information that is mandatory for properly completing a financing statement or claim for lien. Failure to include the mandatory content may cause the party making the filing to be unperfected and unsecured against other creditors or trustees in bankruptcy. These orders contain vital information that the public must be able to obtain readily.

With some effort, PPSA and RSLA Minister's orders can currently be found at www.ontario.ca/en/services_for_business/access_now/ONT04_020917.html, but the link is difficult to find and there is no link from the e-laws site or any simple direct linkage to either Ministry's web site.

We recommend that all Minister's orders and registrar's orders be published on the e-Laws website to allow the public to easily find the law and be able to comply with it.