



CCH

a Wolters Kluwer business

# Commercial Times

February 2008  
Number 487

## THE REPAIR AND STORAGE LIENS ACT: THE ONE TO WATCH OUT FOR

*This article was written by Glenn Grenier, a partner at Lang Michener LLP, and Shannon Seitz, an articling student at the same firm. Glenn carries on a commercial litigation practice with emphasis on construction litigation and construction lien enforcement and defence. He also has significant experience in the areas of aviation law and bankruptcy and insolvency. The article was originally published on the firm's Web site, www.langmichener.ca, and is the précis of a paper presented by Glenn on October 31, 2007 as part of "Remedies Fast Forward", an Ontario Bar Association Continuing Legal Education Conference. This article is reproduced with permission. © Lang Michener LLP.*

The *Repair and Storage Liens Act* ("RSLA")<sup>1</sup> covers the repair and/or storage of "articles", defined as "tangible personal property other than a fixture". A "repair" "means 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 condition ...". Though the term "storage" is not defined in the Act, a "storer" is "a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be".

To use the RSLA to full advantage, however, one must think creatively with respect to the foregoing definitions. If one believes the RSLA is confined to auto repairs and u-store outlets, the benefits of the RSLA will be lost. I once filed an RSLA lien on behalf of a company that was unpaid after having rented movie production equipment to a film producer. I took the position that the film negative was an "article" that had been altered and improved by the movie cameras and, thus, had been "repaired" within the meaning of the RSLA. (I will tell you how this ended later in the article, so keep reading.)

### Inside

"IP IS HOT!" .....	3
LEGISLATIVE UPDATE ...	5
<b>CASE SUMMARIES</b>	
Car Buyers Did Not Take Steps of Prudent Purchaser .....	6
Secured Creditor Not Entitled to Land Sale Proceeds .....	6
Bank Operating in Province Is Garnishee "in the Jurisdiction of the Court" .....	7
No Judgment Needed To Commence Action under <i>Statute of Elizabeth</i> .....	8
Defendants' Discharge Did Not Prevent Plaintiffs from Continuing Motor Vehicle Action .....	8
Ice-Maker Liable for Unlawful Interference with Contractual Relations and Price Discrimination .....	9
Class Action Certified against Automotive Resin Producer for Vertical Price-Fixing.....	9
Famous Luxury Goods Maker Entitled to Record Award.....	10

## Possessory and Non-Possessory Liens

The RSLA lien world is further divided into possessory liens and non-possessory liens. A possessory lien is automatically created when a repairer or a storer obtains possession of the article and commences an authorized repair or storage. The possessory lien continues until the amount for such services is paid or until possession of the article is surrendered. Thereafter, an unpaid repairer or storer has a non-possessory lien.

## Signed Acknowledgment of Indebtedness

In order for a non-possessory lien to be enforceable, the repairer or storer requires a “signed acknowledgment of indebtedness”. This term is not defined in the statute; however, the statute does state that the written acknowledgment *may* be on an invoice or other statement of account. Case law has held that this provision does not require that a specific or discrete amount has to be admitted as owing, but simply an acknowledgment that *some* amount is owing will be sufficient.<sup>2</sup>

The acknowledgment of indebtedness does not have to be signed by the owner of the article but may be signed by others on behalf of the owner. In the Ontario Court of Appeal decision *Royal Tire Service Ltd. v. Shelleby Transportation*,<sup>3</sup> an equipment lessee, and not the registered owner, executed the document relied upon as supporting the non-possessory lien. The Court of Appeal held that others in legal possession of the article had the authority to authorize repairs and to execute the required acknowledgment.

What is really surprising is that by simply carrying out its statutory duty to provide a listing of creditors of an insol-

vent person or corporation, a trustee or receiver can unwittingly provide a non-possessory lien claimant with the means to enforce his/her lien. It has been held that being enumerated on a “List of Creditors” in a Statement of Affairs signed by the trustee was sufficient to constitute a signed acknowledgment of indebtedness for the purposes of the RSLA.<sup>4</sup> Further, an RSLA lien claimant can then register his/her lien *after* a bankruptcy or receivership and, as a result, claim a higher interest in the article than any other interest, including that of the trustee or receiver.<sup>5</sup>

## Timing and Priority

A non-possessory lien claimant has no prescribed time limit under the RSLA to register a lien in the article. By filing a registration of a lien, a lien claimant is giving notice to all others of that non-possessory lien. A non-possessory lien becomes enforceable against third parties after registration. If a third party acquires an interest in an article *after* a non-possessory lien in that article has arisen but *before* the lien is registered, that third party will have priority over the non-possessory lienholder.

One of the primary incentives for a non-possessory lien claimant to register quickly is to ensure he/she does not lose priority to a third party who acquires some interest in the article *after* the lien arises and who would be otherwise unaware of the unregistered non-possessory lien (and granted priority as a result). Further, registration is required in order to allow the non-possessory lien claimant to utilize the seizure mechanism in the RSLA.

Priority in an article is not determined by the order of registration. A subsequently registered non-possessory lien will have priority over a previously registered security interest. Further, priority amongst non-possessory lien claimants is not determined by the order of registration, but by the reverse order of giving up possession, the last repairer or storer having priority.

## Tacking

Each individual repair or storage of an article must be registered as a separate lien, as the statute prevents the tacking of liens. For example, if lien claimant “A” acquired rights in January and March, and lien claimant “B” acquired rights in February, then section 16 provides that the priorities, in order, would be A (March repair), B (February repair), and A (January repair). If A were allowed to tack his/her January claim to the March claim, it would defeat B’s right to have the February claim have second priority, behind A’s March claim and before A’s January claim.

In the *Canadian Imperial Bank of Commerce v. Kawartha Feed Mills Inc.*<sup>6</sup> case, Justice Ferrier explained that aggregating lien claims was only a concern between competing non-possessory lien claimants, and not between a

### COMMERCIAL TIMES

Published monthly, as the newsletter complement to the CANADIAN COMMERCIAL LAW GUIDE by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

For CCH Canadian Limited:

CHARMAINE TIERNEY, LL.B., Senior Editor  
(416) 224-2224, ext. 6366  
e-mail: Charmaine.Tierney@wolterskluwer.com

SHARI ZINMAN, B.A., M.A., Editor  
(416) 224-2224, ext. 6376  
e-mail: Shari.Zinman@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial  
Legal and Business Markets  
(416) 228-6128  
e-mail: Cheryl.Finch@wolterskluwer.com

FARIDA KARIM, B.A., Marketing Manager  
(416) 228-6138  
e-mail: Farida.Karim@wolterskluwer.com

© 2008, CCH Canadian Limited  
90 Sheppard Ave. East, Suite 300  
Toronto, Ontario M2N 6X1

non-possessory lien claimant and a prior *Personal Property Security Act* claimant.

## Seizure

Once a non-possessory lien is registered, a lien claimant can provide a copy of the registered lien to the local sheriff or a licensed bailiff and direct that the article be seized. Upon receipt of the registered lien and direction, the sheriff shall seize the article wherever it may be found and deliver it to the lien claimant. Note that in doing so, the lien claimant is not required to start any court proceeding nor obtain a court order.

To conclude my film story, after registering the lien, I provided a copy to the local sheriff who was directed to seize the negative, which happened to be in the possession of another firm which was developing the negative. That firm could have asserted a possessory lien and resisted my sheriff under the RSLA, but it did not know it had such rights and thus did not assert them. Following seizure and upon having possession of the film negative, I was able to secure funds for my client, who otherwise would have remained unpaid as an unsecured creditor, hopelessly seeking funds from an insolvent movie production company.

## Conclusion

The following should be noted with respect to the RSLA:

- the priorities enjoyed by lien claimants over other interests;
- the fact that such priorities can be registered and asserted after an insolvency; and
- the fact that self-help remedies can be asserted quickly, simply, and initially, without any court oversight.

## Notes:

<sup>1</sup> R.S.O. 1990, c. R.25.

<sup>2</sup> *Altruck Transportation Services (c.o.b. Kirby International Trucks Ltd.) v. Barry Humphrey Enterprises Ltd.* (1993), 101 D.L.R. (4th) 470, 5 P.P.S.A.C. (2d) 81 (Ont. Gen. Div.); *Alexandrov v. 1030999 Ontario Ltd.* (1994), 8 P.P.S.A.C. (2d) 152 (Ont. Gen. Div.).

<sup>3</sup> (1999), 124 O.A.C. 66, 1 B.L.R. (3d) 250, 14 C.B.R. (4th) 149, 15 P.P.S.A.C. (2d) 39 (C.A.).

<sup>4</sup> *1538565 v. Leggat Aviation Ltd.* (November 17, 2004), Newmarket File No. 69918/04 (Ont. S.C.J.); *Fountain Tire Corp. v. Sturgeon Timber Ltd. (Receiver of)* (2007), 34 C.B.R. (5th) 37 (Ont. S.C.J.).

<sup>5</sup> *Fountain Tire Corp. v. Sturgeon Timber Ltd. (Receiver of)* (2007), 34 C.B.R. (5th) 37 at paragraph 38 (Ont. S.C.J.).

<sup>6</sup> (1998) 41 O.R. (3d) 124, 14 P.P.S.A.C. (2d) 35 (Gen. Div.).

## “IP IS HOT!”

## Highlights from the 12th Annual Intellectual Property Law – The Year in Review

By Charmaine Tierney, LL.B., Senior Legal Editor, Legal & Business Markets, CCH Canadian Limited. © CCH Canadian Limited.

So exclaimed intellectual property lawyer Ronald E. Dimock at the Law Society of Upper Canada’s “12th Annual Intellectual Property Law – The Year in Review”. This popular CLE program was held in Toronto on January 17, 2008 (January 18 in Ottawa) and explored the latest developments in trade-marks, copyright, and patents law.

The half-day event was hosted by Andrea Rush of Heenan Blaikie LLP, and included the following erudite speakers:

- Donald H. MacOdrum of Lang Michener LLP, on patents law;
- Sheldon Burshtein of Blake, Cassels & Graydon LLP, on copyright law;
- Cynthia Rowden of Bereskin & Parr LLP, on trade-marks law;
- Darlene Carreau, Acting Chair of the Trade-marks Opposition Board, on the new procedures at the Board;
- the Honourable Mr. Justice Marc Nadon of the Federal Court of Appeal, who moderated a panel on whether intellectual property rights are out of control;
- the Honourable Mr. Justice William J. Vancise of the Saskatchewan Court of Appeal and Chairman of the Copyright Board of Canada, on copyright law and the challenges of the Board;
- Barry B. Sookman of McCarthy Tétrault LLP, on copyright law and the tensions faced by the courts;
- Mr. Dimock of Dimock Stratton LLP, on the Supreme Court of Canada versus intellectual property rights, and how to win IP clients and impress others;
- R. Scott Jolliffe of Gowlings Lafleur Henderson LLP, on public policy in the Supreme Court of Canada and IP conflicts of interest;
- Leonora Hoicka, Senior Counsel at IBM Canada Ltd., who moderated a panel on IP practice and its people;