

The Powerful Protections of the Ontario Repair and Storage Liens Act

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An equipment finance company finances the purchase of a truck and registers a purchase-money security interest (a “PMSI”) pursuant to the *Personal Property Security Act* (Ontario) (the “PPSA”) to protect its interest. The truck breaks down and is taken in for repairs. While the truck is in the shop, the debtor defaults under its lending arrangements with the equipment finance company.

The lender is aware of the PMSI provisions under the PPSA, and knows that its PMSI offers it “super-priority” against most prior security interests. Can the lender, or a receiver appointed by the lender, seize and sell the truck, and be first in line for the proceeds?

Many are surprised that the answer to this question is “no,” as a result of the powerful protections offered to “repairers” and “storers”¹ under the *Repair and Storage Liens Act* (Ontario) (the “RSLA”).

Under the *RSLA*, a repairer or a storer who repairs or stores equipment or other items of tangible personal property other than fixtures (an “article”),² may be entitled to a lien over that article to the extent of the repair or storage cost, as calculated under the framework set out in the *RSLA*.³ These *RSLA* liens can take priority over a competing security interest, even a PMSI that is otherwise afforded super-priority under the PPSA. The policy rationale behind this powerful priority interest is that it is generally advantageous to all parties to ensure that the providers of repair and storage services are protected, since the availability of such services is often necessary to maintain or increase the value of a debtor’s collateral.

A repair and storage lien claimant will be entitled to what is called a “possessory lien” for so long as it has possession of the article. Under the *RSLA*, a possessory lien takes priority over the interest of any other secured creditor (including a PMSI).⁴

If a repairer or storer returns the article to its owner, but remains unpaid, it may alternatively enforce a “non-possessory lien,” subject to certain requirements.⁵ A valid non-possessory lien will take priority over all other security interests, except for valid security interests that are perfected during the window of time after the non-possessory lien arises, but before it is registered.⁶

Lien priority under the *RSLA* is generally not affected by receivership proceedings, bankruptcy proceedings or proceedings under the *Companies’ Creditors Arrangement Act* (the “*CCAA*”). However, these proceedings may affect *RSLA* lien claimants’ ability to enforce their rights. For example, an *RSLA* lien claimant must give up possession of lien articles to a court-appointed receiver, but this loss of possession does not prejudice existing *RSLA* lien rights (and indeed, *RSLA* lien claimants can register their non-possessory liens even after the appointment of a receiver or an assignment in bankruptcy).⁷ Non-possessory lien claimants may also be required to file proofs of claim with a receiver or trustee-in-bankruptcy.

Although receivership, bankruptcy or *CCAA* proceedings will not improve a secured creditor’s priority position as against an *RSLA* lien claimant, such claimants will be stayed from exercising their self-help remedies (i.e., selling the lien article). This may not necessarily put the lienholder at a disadvantage; collaboration with a court-appointed officer (i.e., receiver or trustee) may help maximize value. For example, if the court officer is selling the debtor’s other property, it may be more cost-efficient and/or generate better results if the court officer includes the lien article in its sales efforts.

The broad definition of “repair” under the RSLA creates a number of non-obvious scenarios where priority contests come into play between secured creditors and repairers and storers, beyond the traditional example of the financed truck in the shop. If they are not already familiar with the power of this legislation, creditors and insolvency professionals should be aware of the significant protections offered to repairers and storers under the RSLA.

¹ Under the RSLA, a “repairer” is defined as a person who makes a repair on the understanding that the person will be paid for the repair, and a “storer” is defined as a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage and/or storage and repair, as the case may be.

² “Article” is defined under the RSLA to mean “an item of tangible personal property other than a fixture.”

³ The quantum of the lien is determined according to sections 3(1) (repairs) and 4(1) (storage) of the RSLA, unless Part VI of the *Consumer Protection Act, 2002* (Ontario) applies, in which case see sections 3(2.1) and 4(3.1), respectively.

⁴ s. 31 of the PPSA, which provides that any valid lien of a repairer (i.e., someone who furnishes materials or services with respect to goods) will take priority over a security interest “unless the lien is given by an Act that provides that the lien does not have such priority.” Under s. 6 of the RSLA, it is clear that a valid possessory lien “has priority over the interests of all other persons.” See also s. 4(1)(a) of the PPSA.

⁵ These requirements include registering the lien (s. 7(5) of the RSLA) and obtaining an acknowledgement of indebtedness from the debtor in writing (s. 10(1) of the RSLA).

⁶ s. 10(1) of the RSLA.

⁷ *General Electric Capital Canada Inc. v. Interlink Freight Systems Inc.* (1998), 42 O.R. (3d) 348 at paras 5 and 17, 14 PPSAC (2d) 198 (Ont. C.J. [Gen. Div.]).

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