

# the common lawyer

## repair and storage liens ... great tools, if used correctly

By Justin M. Jakubiak

**W**hat happens when you have been storing a vehicle, or have repaired one, and the owner refuses to pay? One step is to use the procedures set out in Ontario's *Repair and Storage Liens Act* (the "Act") and lien the vehicle. However, it is not always easy to know if there is a valid lien in place, and whether it can be enforced. Liens aren't overly complicated, but there can be some confusing aspects to the process and, as some recent Court of Appeal decisions demonstrate, even the courts don't always get it right.

### The Basics

A lien is a security right granted over a particular item, such as a vehicle. It means that you have a right to get the money you are owed from the value of the vehicle. If you have a right to a lien, you are referred to in law as a 'lien claimant'.

If you sell, finance, repair, tune-up, modify, tow, store, or if you hold vehicles for their owners for any reason, this Act likely applies to you. I regularly assist dealers, lenders, mechanics and tow truck operators with their lien rights and remedies under the Act.

### Liens and the Courts

In the recent Court of Appeal case *Connolly v. Advantagewon*, Advantagewon learned the hard way that a lien can't be

enforced if the Act doesn't apply.

Connolly purchased (but did not have installed) rims and tires for his vehicle from Xclusive Performance Group. He financed the purchase with an Advantagewon loan. The loan agreement stated that Xclusive would assign any lien rights to Advantagewon. When Connolly defaulted on his loan, Advantagewon attempted to seize the vehicle based on a non-possessory lien it believed Xclusive was entitled to under the Act.

The problem was that the Act only applies to vehicles which have been stored or repaired. The lower court mistakenly believed that Xclusive installed the tires and rims. Under the Act, "repair" is defined as spending money, labour, skills, or material on the vehicle for the purpose of altering, improving or restoring it. This also includes transportation for repairs, towing, or salvaging. As Xclusive did none of these things, there was no right to a lien, and therefore no lien which could be assigned to Advantagewon.

Despite the contract Connolly and Advantagewon had entered into, which explicitly stated that a repairer's lien would be created, the Court found that you can't create the right to a lien through a contract when you don't meet the criteria under the Act.



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### *Correia v. Smith*

In another recent Court of Appeal case, *Correia v. Smith*, Smith Trucking thought they had done everything right in order to enforce a lien, but the lower court disagreed. The lower court found that the notice (which is a requirement under the Act) was deficient in a number of ways.

The lower court found that while the notice was on company letterhead, it did not specify to whom payments were supposed to be made. The notice further stated that if payment wasn't received in twenty-five (25) days, Smith Trucking would sell the vehicle. The lower court found that this wasn't specific enough. The notice had been sent by registered mail and it was returned; the court further found as a result that the notice was not properly served. Finally, the court found that the sale price of the vehicle was too low.

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What was determined to be insufficient for the lower court was determined to be acceptable by the Court of Appeal and the decision was overturned. While this case was ultimately a victory for the lien claimant, it serves as a clear example that the enforcement of liens under the Act can be difficult and it is best to ensure that all of your paperwork is clear and strictly complies with the requirement of the Act.

### Steps in the Lien Process

#### **You have the car and the owner won't pay**

If a vehicle is in your possession for the purpose of storing or repairing it, there is an automatic lien placed against the vehicle for the amount agreed to. If an amount was not agreed to, then the lien amount is the fair value of the repairs, partial repairs, or storage costs. You are allowed to retain possession of the vehicle until that amount is paid.

#### **You don't have the car and the owner won't pay**

If, for example, you performed the repairs off-site, or the customer has already left with the vehicle without paying in full, you can put a non-possessory lien on the vehicle. This lien is not automatic and the process is more complicated. First, you must have some sort of signed acknowledgement of the debt from the owner, for example a signed invoice. Then, you must register a "Claim for Lien" with the Personal Property Security Registration system.

In order to register the lien, you will need the owner's name and address. It is also a good idea to get the owner's

date of birth in order to better search for other liens against him or her.

Be aware that if the vehicle is in the possession of another party that also has a lien on the vehicle, their debt will have priority over yours.

#### **You have a lien in place, now what? If the vehicle is in your possession**

Within sixty (60) days\* of receiving the vehicle, you must give notice of the lien to everyone you have reason to believe is an owner or a party with an interest in the vehicle. That means doing a search for anyone else who might have already registered a lien on the vehicle.

Sixty (60) days after you were entitled to be paid, and at least fifteen (15) days after notifying the owner and other parties, you are allowed to sell the vehicle and retain the amount you are owed. Instead of selling it, you can also keep the vehicle yourself, or if it is worth so little that selling it isn't worth the effort, you can donate the vehicle to charity. You have to notify the owner if you intend to keep the vehicle, but not if you intend to donate it.

#### **If the vehicle is not in your possession:**

You can bring your registered "Claim for Lien" to a Sheriff's office, along with a "Direction to Seize" form. The Sheriff can then seize the vehicle, and you will then have the same right to sell, keep, or donate the vehicle.

#### **Issues to be Aware of When Enforcing a Lien Liability in Court:**

If there is a dispute as to the amount of

the debt, or whether there is a debt at all, the owner can dispute your lien claim and start court proceedings. If you did something with the vehicle that you were not authorized to do, such as selling it without proper notice, the court can require that you pay the owner either \$200, or the amount they lost because of your actions, whichever is higher.

#### **Amount of Sale:**

If you are going to sell the vehicle, it must be for a "commercially reasonable" amount. If a court finds you sold it for below a reasonable price, you could owe the owner the difference. If the vehicle is sold for more than you are owed, you have to give the balance to the owner or any other lien holder.

#### **In Summary**

To avoid problems, make sure you collect as much information from your customers as you can upfront. A lien can be placed on a vehicle whether it's in your possession or not, but it's much easier to collect if it is in your possession. Make sure you speak with a lawyer to ensure that you don't end up with a lien that is unenforceable, or even worse, that you don't end up owing the owner money because you didn't follow the rules. If done properly, a lien is an incredibly valuable and important tool for dealing with customers who won't pay. **OD**

\* Amendments to the RSLA coming into effect July 1st will reduce the notice period to 15 days for vehicles registered under the Highway Traffic Act.

