

Personal Property Security Act and Repair Storage Lien Act Priorities

Jonathan Fleisher, Carla Potter

March 19, 2018

A constant issue that arises with a number of our finance clients is the interaction between priorities created under the *Personal Property Security Act* (Ontario) (PPSA) and the *Repair and Storage Lien Act* (RSLA). The simple question is whether a prior registration under the PPSA has priority over a subsequent registration under the RSLA in the same collateral. The answer to this question is straightforward but may seem counterintuitive to a strict reading of the Personal Property Registry (PPR) results.

Subject to specific enumerated exceptions, the general rule under the PPSA is that the first party to register has a security interest ranking in priority to subsequent registrations in the same collateral. The clear exception to the foregoing under the PPSA, is a purchase money security interest. Complicating this rule is that RSLA registrations are also registered under the PPR system and as such, search results show both PPSA and RSLA registrations on the same report organized by time of filing. Given this, the priority of the RSLA registration versus the PPSA registration is determined not by which party registers first, but through the interaction of the PPSA and RSLA.

There are two types of liens created under the RSLA: possessory liens and non-possessory liens. A possessory lien is a lien created when the repairer and/or storer of a particular asset has possession of that asset. A non-possessory lien is one where the party who either stored or repaired a particular asset has released the asset to the customer. A possessory lien has priority over all other liens and need not be registered under the PPR to establish priority.

A non-possessory lien arising pursuant to the RSLA must be registered under the PPR in order to be perfected and for a repairer/storer to be able to enforce its obligation as against third parties. Subsection 7(3) of the RSLA is clear that if such a registration is undertaken, this registration has priority over all other lien claimants, including secured parties with prior registrations under the PPSA (or a bankruptcy trustee), except a possessory lien claimant. However, Section 10(1) of the RSLA adds a further layer of complication to the above-noted priority scheme, which has caused some uncertainty within the finance community. This section provides that if a party holding a non-possessory lien does not register its financing statement on the date that the non-possessory lien arose, then any subsequent secured party who registered under the PPSA or RSLA *after* the non-possessory lien arose but *before* the non-possessory lien claimant registered under the PPR, would have priority over the non-possessory lien claimant. The result of this is that the non-possessory lien claimant, once registered, would have priority over secured parties that registered under the PPR before the non-possessory lien arose but not against secured parties that registered under the PPR

Cassels

after the non-possessory lien arose, but before it was registered. By way of example:

- A bank (Bank 1) on day one registers a claim under the PPSA against an asset (the Asset).
- The customer on day seventy five brings the Asset to be repaired.
- On day eighty and the Asset was released by the repairer to the customer with an amount due to the repairer.
- The repairer did not register a financing statement under the RSLA on its release of the Asset.
- On day one hundred twenty a second bank (Bank 2) registers a financing statement under the PPSA.
- The repairer then registered its lien on day 150.

Under these facts, the repairer would have a superior interest to Bank 1 pursuant Section 7 of the PPSA but would rank subsequent to Bank 2 as it did not register its lien before Bank 2 took its security interest in the asset. This result would have been different if the repairer had registered its financing statement under the RSLA on the day it released the Asset to the customer, as in that case, it would have been registered ahead of Bank 2 and the provisions of Section 10 would not be effective.

The practical advice to repairer is to register their claim under the RSLA forthwith upon releasing asset to the customer and that a delay in such registration may cause a potential risk. However, it is also clear that if a RSLA lien claimant does register its financing statement in a timely manner, it will have priority over any prior secured creditor.

For more information, please contact Jonathan Fleisher, Carla Potter or any member of our Banking, Lending & Specialty Finance Group.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.