

Myths of the *Repairers Lien Act*

Sure, automobile repairers can rely on BC's *Repairers Lien Act*, but when it comes to marine equipment, possession remains 90 per cent of the law.

Mariners, and businesses in the marine industry, should know that their rights and liabilities under the BC *Repairers Liens* are not what they once were, nor what they may assume. Indeed, it is now likely that the *Repairers Lien Act* has no legal application to vessels or to any equipment that is accessory to the motor for the purpose of propelling the boat.

For decades repairers have relied on the *Repairers Lien Act* to help them get paid for their work. Automobile repairers are the most common user of the *Act*, seizing and selling vehicles to recoup amounts on unpaid invoices. Repairers of aviation and marine equipment also rely on the *Act*. Every person in the marine industry is either a repairer or a client to a repairer, and often both. The changing rights of, and against, a repairer are therefore important to know.

In this *Legal Desk*, I will describe how the BC *Repairers Lien Act* is intended to help repairers, and why, in light of the expanding definition of Canadian maritime law, businesses should be extremely cautious in relying on the provisions of this provincial legislation.

Background on Liens:

Many mariners will appreciate that a lien is a claim against property. It is a legal charge that hovers invisibly over the property, be it real property (land) or personal property (chattels). Liens take various forms and provide various rights, depending on their type. A possessory lien, a lien where the repairer has actual possession of the item, is the strongest lien a repairer can have. It provides them priority over most other competing claims, such as mortgages and maritime liens (such as seaman's wages) that arise after possession was taken by the repairer.

The weakness of the possessory lien is that once you lose possession, you lose your lien. Trite as this may sound, frequently repairs are made to property where the property moves around just before the bill is paid in full. For example, an owner may wish to sea-trial their vessel before paying the bill and never return, or a rebuilt hydraulic motor is taken away before the cheque clears. When and how possession is actually lost is often vague. Historically, once possession over the item is lost, the repairer's options are reduced dramatically. To this end, the *Repairers Lien Act* was *intended* to give repairers special statutory rights in the event they relinquish possession of the property.

Provisions of the *Repairers Lien Act*

In a nutshell, the *Repairers Lien Act* is *intended* to provide the repairer with the following rights:

- A repairer who remains in possession of property that they have improved may sell the property if their bill has not been paid within 90 days of it being due;

- The repairer may give up possession of the property, and still maintain their lien, if they have the owner sign an acknowledgement of debt before the property is released. However, this lien only exists for 21 days after possession is lost, unless the repairer files a “financing statement” in the provincial Personal Property Registry. If the repairer attempts to file more than 21 days after giving up possession, the Registry will reject the financing statement and the lien is lost. The owner does not have to agree with the contents of the acknowledgement (for instance, the price claimed), but has to acknowledge that the claim is made — to this end, some owners may sign an invoice “under protest,” but the acknowledgement remains effective. If such an acknowledgment is not signed, the repairer loses their lien when they lose possession.
- The lien remains registered for 180 days after filing, and can be renewed an unlimited number of times. Once registration expires, the repairer’s lien is lost, provided he does not have possession.
- So long as the repairer’s lien exists, and provided the debt remains unpaid 90 days after it was due, the repairer has the right to seize and sell the item. The seizure is carried out by hiring a bailiff and having them serve a warrant and notice of seizure on the person in control of the property. The repairer may keep possession of the item until the owner pays the bill, or may sell the item publicly after having given two weeks notice of the sale in a newspaper in the city nearest to the repairer. Any balance left after applying the sale proceeds to the invoice must be returned to the owner of the property.

Importantly, while a marine repairer may still have the practical use of these provisions outside of a court action (bailiffs will still enforce repairers liens against marine equipment), it is now likely that an owner of such property would be successful in asking a Court to set aside the repairer’s lien, and any related act of seizure and sale.

Court Decisions — The Case Against Repairers Liens

The respected John A. Hargrave, at the time a marine lawyer and now Admiralty Court Prothonotar, first noted in the April 1989 edition of **Westcoast Mariner**, following the February 1989 decision in *Finning Ltd. v. Federal Business Development Bank*, that “to the extent that the *Repairers Lien Act* tried to create a form of possessory lien not recognized by Canadian (Federal) maritime law, and thereby affected the priorities as recognized by Canadian maritime law, the *Repairers Lien Act* could not maintain the priority of a possessory lien holder over a mortgagee, once actual possession has been relinquished by the lien claimant.” In principle, this is partly because the provincial government is precluded from legislating within the Federal Government’s constitutionally granted power over “navigation and shipping.”

BC log salvage regulation, as addressed by this author in the August 2004 **Mariner Life Legal Desk**, is another example of provincial legislation that is currently under review by the courts to determine whether it, or parts of it, infringe on the Federal Government’s exclusive jurisdiction, in that instance, over marine salvage.

The decision in the *Finning* case was later followed by Prothonotary Hargrave in the 1996 decision of *Scott Steel Ltd. v. The Alarissa*, which involved a repairer making a claim against a vessel registered in, of all places, Edmonton. The Court said “as to [the

repairer's] claim under Alberta's *Possessory Liens Act* and *Garagemen's Lien Act*, it is beyond the constitutional powers of the province to create a national form of possessory lien not recognized by Canadian maritime law thereby affecting the priorities under Canadian maritime law".

Neither the *Finning* case nor the *Scott Steel* case addressed directly the power of seizure under the provincial repairers lien legislation, rather these decisions address the constitutionality of provincial law varying the priorities under Canadian maritime law. More recently however, the Supreme Court of Canada decided *Ordon v. Grail*, a case involving the application of several provincial statutes in respect of a maritime negligence claim arising from a fatal accident. In stressing the importance of uniformity of laws effecting maritime issues, the Supreme Court held that it was unconstitutional for a provincial statute to regulate maritime negligence law. Indeed, the Court stated it will be relatively rare that a provincial statute could apply to an area of Canadian maritime law.

Implications for Mariners and Repairers

As a result of the decisions described above, the rights of repairers and the liabilities of owners in respect of marine property provided for under the BC *Repairers Lien Act* are likely unenforceable in a court of law. However, until the provincial legislation is amended to remove references to marine repairs, bailiffs will continue to seize and sell property under the *Act* and owners will have to drag repairers to court for redress. Marine repairers may still utilize the *Repairers Lien Act* to have a bailiff seize and sell without a court order, but if challenged in court, these rights will likely be held to be unlawful.

What then can repairers do to account for these gradual changes in the law? Here are two tips:

- Always retain possession of the repaired item until you have been paid in full — possession remains 90 per cent of the law. You may choose to use the remedies under the *Repairers Lien Act*, but do not rely on them as your only security. Maintaining possession until paid will provide you with a true possessory lien, and a high priority against other claims made against the property;
- Amend the acknowledgement of debt that you may currently use (typically on a work order or invoice) to provide that the property owners agrees that, in the event the repairer loses possession of the item, the repairer has a *contractual* lien and right to seize the item. Once the item is seized pursuant to the contractual right, the repairer puts themselves back in the strong position of having a possessory lien. Note, however, that this contractual right is only effective against the party signing the document (the owner) and not against third parties — therefore, the repairer could not seize the item from the possession of a third party (such as another repairer).

Repairers liens, and liens in general, are a complex and fluid area of marine law. Repairers and owners are cautioned not to rely on this article alone when making decisions about property, and are encouraged to seek legal advice.[BAT]

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PULL-QUOTE:

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