



**The Carrier's Lien in Canada:
Back In Black (-Letter Law)**

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I. INTRODUCTION

The carrier's lien is, of course, a well-known (and well-worn) right afforded to common carriers in respect of carriage services rendered. Like other common-law liens of its kind, the carrier's lien entitles a common carrier to retain possession of goods being carried, pending payment of freight charges incurred in respect of that carriage. The nature and scope of the common-law lien have evolved to varying degrees over time, but the essence of the remedy remains the same even today.

That said, the common-law lien is not without its shortcomings, and as a result is relatively little used in the modern commercial context. But not only does the carrier's lien remain a valid (and occasionally useful) legal tool, it is currently in the process of being revamped under Canadian statutory law. This process is ongoing (and far from complete), but will represent an evolution of the common-law lien into a more effective and useful remedy for carriers of goods.

In this paper, we will provide an overview of the state of the law of the carrier's lien in Canada. We will address the key features of the traditional common-law lien, and highlight some of the pros (and cons) in the use of the lien in the modern world. We will then canvass the changes being implemented in Canadian statutory law to modernize possessory liens, and the effects those changes will have on the use of carrier's liens in the commercial context.

II. THE COMMON-LAW CARRIER'S LIEN IN CANADA

As a class, commercial possessory liens are among the oldest common-law rights afforded to providers of services in respect of goods. As one might expect, however, liens originally recognized at common law were generally unsophisticated in nature, and their utility was constrained by the lack of key features seen in more modern security schemes (such as personal property security legislation). The traditional common-law carrier's lien was no exception, in that it:

- (a) did not provide any means to realize or compel payment on the security beyond merely retaining possession of the goods; and
- (b) could *only* be asserted in respect of freight charges owing, and not against storage or demurrage charges incurred while the cargo was being held pending payment.

Despite these constraints, the carrier's lien has nonetheless remained (subject to certain statutory modifications examined below) largely unchanged and undeveloped under the common law. As a result, carrier's liens are seldom actually asserted by modern-day carriers. Business is instead primarily conducted on the credit of the customer, subject to extensive contractual provisions and terms granting broader powers of security and execution in order to recover freight, storage charges and other related expenses.¹ Nevertheless, the common-law carrier's lien *per se* has remained good law in Canada, subject to a number of points to keep in mind when considering or exercising such a lien.

The first important point to bear in mind is that a lien asserted against a given cargo does so against the freight charges incurred on only that particular cargo. Tender by the owner of the freight due for that cargo discharges the lien outright,² and the lien will not in any event be tenable against unrelated, previously unpaid debts (such as unpaid freight on previous cargoes). As Krever J. stated in *Bad Boy Appliances & Furniture Ltd. v. T. Landry Ltd.*:

A common carrier has a lien on the goods which he carries for the freight payable on those very goods. That, however, is a particular lien in respect of those goods. In the absence of contract, express or implied, it does not extend to the right to retain the goods carried for the express purpose of delivery to third persons because of money not yet received from the consignor in respect of earlier carriage of other goods.³

Thus, under modern contractual arrangements for the serial carriage of goods over time (such as contracts of affreightment), the common law lien is, by itself, extremely limited in its ability to

¹ See, for example para. 14(a) of the Uniform Bill of Lading, which provides that “[i]f required by the carrier, the freight and all other lawful charges accruing on the goods shall be paid before delivery”. It is argued that unlike under the common-law lien, such additional charges would certainly include demurrage charges, storage fees and any charges incurred in the course of executing any of the procedures of s.16 of the *Uniform Bill of Lading* for dealing with undelivered goods. See McNeil, *Motor Carrier Cargo Claims*, 5th ed. (Thomson Carswell, 2007) at p. 320-1.

² See *Winchester v. Busby* (1889), 16 SCR 336 (SCC).

³ [1997] 1 ACWS 770 (Ont. HC).

compel payment from shippers for unpaid freight. Goods received on a subsequent shipment would not, on the rationale set out in *Big Boy, supra*, be subject to retention by the carrier to secure prior unpaid freight on previous shipments.

The second key point is that the common-law lien is possessory in nature, and is lost once the goods in question are released in their entirety by the carrier; the carrier cannot reactivate or regain its lien rights by reclaiming possession of the goods.⁴ That being said, however, the whole of a given cargo is available against payment of the entire freight account to which it applies, and a carrier may release part of a cargo without losing its lien rights (i.e. the carrier may still withhold the remainder of the goods against any freight charges owing on the account).⁵

Also, it is important to note that where a carrier releases goods out of his possession to a consignee (and thus gives up his lien), it has previously been held that the transaction implied the existence of a promise by the consignee to pay freight charges, in consideration for delivery of the goods.⁶ On the other hand, it has also been found that the carrier was aware of the consignee's status of being no more than an agent for the cargo owner,⁷ or where an established course of dealing revealed no intention on the part of the carrier to collect freight charges (from, for an example, a subsequent carrier),⁸ no such liability for payment of freight was imposed.

The need to maintain possession in order to assert the lien can also have other unintended consequences for the carrier. For example, in *Ascher v. Grand Trunk Railway Co.*,⁹ goods in bond were deposited in the customs warehouse at the defendant's station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage *in transitu* to the railway company. After that notice was given, however, the company's agent nonetheless gave an order for delivery on payment of charges to another person, who made the entry and received

⁴ *Clisdell v. Kingston & Pembroke Rwy. Co.* (1909), 18 OLR 169; *Welch v. Scott*, [1920] 2 WWR 510 (BCCA).

⁵ *DeSenneville v. Baillargeon* (1909), 37 Que. SC 215.

⁶ *World Transport Co. v. Tealing & Co.*, [1936] 2 All ER 573; *Atomic Transfer Ltd. v. Alberta Horse Meat Packers Ltd.* (1961), 32 DLR (2d) 398 (Alta. Dist. Ct.).

⁷ *Champlain Sept-Iles Express Inc. v. Metal Koting Continuous Colour Coat Ltd.* (1982), 38 OR (2d) 182 (Ont. Prov. Ct.).

⁸ *BC Hydro & Power Authority v. Canadian Auto Carriers Ltd.*, [1984] BCJ No. 458 (BCSC), which distinguished *World Transport* and *Atomic Transfer, supra*.

⁹ [1875] OJ No. 46 (Ont. QB).

them from customs. The plaintiffs claimed damages against the railway for failing to stop the shipment *in transitu* as directed; the defendant maintained that as the goods were in the hands of the law in customs, they were powerless to stop the transit. The Court, however, found for the plaintiffs:

30 If the carrier refuses to deliver goods to the consignee until paid his freight, the right of the vendor to stop *in transitu* continues as long as the goods remain undelivered.

31 In *Crawshay v. Eades*, 1 B. & C. 181, Bayley, J., said at p. 184: "In order to divest the consignor's right to stop *in transitu*, there ought to be such a delivery to the consignee, as to divest the carrier's lien on the whole cargo.

32 Best, J., said, at p. 185: "Until the carrier parts with the possession of the goods, the special property which he has in that character remains in him; and it is clear, that he is entitled to retain possession of the goods until the freight due to him is tendered or paid. He may, however, assent to the consignee having possession of the goods without payment of the freight; but it is clear, in this case he never did so assent ... The freight, therefore, not having been tendered or paid, and the carrier not having intended to part with the possession, without payment of the freight, his lien still continued. The property, therefore, had not passed from him to the [36 UCR Page616] consignee, and, consequently, the consignor had a right to stop *in transitu*."

33 Here, there is no doubt that the defendants never intended to let the consignee, or the person to whom they transferred their interest, have possession until the lien of the Government for the duties was paid, and therefore neither actually nor constructively could the consignee have obtained possession until long after the demand to transfer to the plaintiffs.

The *Ascher* case has since been overruled as to when the *transitus* of goods ends, and cargo falls within the control of the consignee.¹⁰ Still, the case serves to illustrate the importance of recognizing that in asserting a possessory lien, a carrier must also acknowledge the corollary fact that delivery is not yet complete, which may produce other consequences to the carrier.

A third important point, as noted above, is that assertion of the lien does not extend under common law to secure storage or demurrage charges for the goods being held. The general principle underlying this rule is enunciated in the case of *Somes et al. v. British Empire Shipping Co.*¹¹ That case dealt with a repairer's lien, but the following principle articulated by the House of Lords (from the judgment of Lord Cranworth) is of equal application to carrier's liens:

¹⁰ See *Wiley v. Smith* (1877), 2 Can. SCR 1; *Re. Textile Trimmings Ltd.*, [1923] 3 DLR 730 (Ont. HC).

¹¹ *Somes v. British Empire Shipping* (1860), 8 HL Cas. 338.

There was a lien upon any chattel in respect of work done upon it, but that did not extend to give to the person who exercised such right of lien authority to charge the other party for the exercise of a right which was not for the benefit of that party but of himself.¹²

The same principle was applied to the situation of a carrier in the decision of the Supreme Court of Canada in *Winchester v. Busby*,¹³ a case dealing with a carriage of coal by boat. Strong J. states at p. 339:

For the charges incidental to such landing and warehousing, the master must, however, look to the personal liability of the cargo owner, his right of retention by way of lien being at common law confined strictly to the amount due for freight.

The above passages from the *Somes* and *Winchester* cases have been oft applied in Canadian cases, including in *Canada Steel and Wire Co. v. Ferguson*,¹⁴ and more recently in *Paccar Financial Services Ltd. v. TGW Holdings Ltd.*¹⁵ They confirm the extremely confined scope, even today, of the charges and expenses to which a common-law lien may respond.

Another area in which the Canadian common-law carrier's lien remains sorely lacking is in providing effective means upon which the lien may be realized. This appears to have been one of the primary forces behind the creation of recent draft uniform lien legislation (as discussed below). Prior to that effort, however, neither the case law nor any modern statute had set out any effective mechanics for a carrier, in possession of cargo under a lawful carrier's lien, to sell or otherwise transfer title in the goods to a third party in order to satisfy an unpaid freight account. As noted above, this is currently most often remedied in modern commerce through the use of specific contractual provisions. The lien itself, however, remains largely toothless in that respect.

As a result, carriers have occasionally instead tried to characterize their role post-transportation as that of a warehouseman, which can confer its own separate and distinct lien rights with respect to warehousing or storage expenses. For example, statutes such as the Ontario *Repair and*

¹² *Ibid.* at 345.

¹³ *Supra* note 2.

¹⁴ (1915), 21 DLR 771 (Man. CA).

¹⁵ 2002 SKQB 467 (CanLII).

*Storage Liens Act*¹⁶ or the B.C. *Warehouse Lien Act*¹⁷ provide for the sale by auction of goods under lien (subject to reasonable prior notice to the indebted owner), by which sale title in the goods will pass to the purchaser. However, care must be taken in trying to assert both liens simultaneously. In *Bad Boy, supra*, the Court recognized that a “coincidental status” of warehouseman and carrier could exist, but careful attention was given to the circumstances under which the carrier took possession of the goods in order to determine whether a valid sale of the goods could take place as per the *Warehouseman’s Lien Act*. In that case, the owner of the goods had admitted its liability to pay freight to the carrier, but claimed that the goods had been delivered to the carrier for the sole purpose of being delivered to a third party.

The Court in *Bad Boy* found that while the carrier’s act of depositing the goods essentially turned the carrier into a warehouseman for the purposes of the Act (and thus enabled the carrier to exercise that statute’s sale provisions), it also breached the terms of the contract to deliver the goods, and amounted to a conversion of the goods for which the carrier was found liable in damages.¹⁸

James McNeil, in his text on Canadian motor carrier claims¹⁹, similarly argues at p. 322 that:

...the carrier is treading dangerous water where, even if there were a genuine deposit in which the carrier constituted himself as warehouseman, there is an attempt to exercise the provisions of the *Warehouseman’s Lien Act* by way of satisfying both the warehouseman’s lien and the carrier’s lien simultaneously. A tender of the amount due in respect of warehousing charges would require the carrier to abandon those proceedings, and were the carrier to continue by way of sale to secure payment of its freight charges, a conversion would probably be found.

It is instead suggested that absent any statutory or contractual provision upon which the carrier may act, a carrier holding goods under a carrier’s lien may simply apply for directions from the Court pursuant to its equitable jurisdiction regarding the sale of chattels on hand. Alternatively,

¹⁶ RSO 1990, c. R-25.

¹⁷ RSBC 1996, c. 480.

¹⁸ *Bad Boy, supra* note 3.

¹⁹ McNeil, *supra* note 1.

the carrier may simply proceed to judgment on the freight debt itself, and then execute on the judgment against the goods being held. If, however, the indebted owner of the goods has other judgment creditors against it as well, execution against the debtor might empower all such creditors to seek a share of the value of the goods under creditors' remedies statutes, such as s. 3 of the Ontario *Creditors' Relief Act*.²⁰

But despite the above shortcomings, the common-law lien does still have some attractive attributes. The first is that it arises as a matter of law in the course of carriage, and requires no registration or other procedures to perfect. Another is the high priority afforded to lienholders against other secured creditors who might also seek to realize upon the goods in question. At common law, a possessory lien for the improvement of chattels defeated the interests of all third parties (the rationale being that the lienholder is not an ordinary creditor, in that the lienholder typically enhances the value of the article in question); this was also the case for common carriers.

It is similarly clear that a lienholder may assert and exercise a carrier's lien outside of any bankruptcy of the cargo owner. In *Totalline Transport Inc. v. Caron Belanger Ernst & Young Inc.*,²¹ the plaintiff held and stored a truckload of goods owned by the bankrupt defendant. The plaintiff claimed, *inter alia*, a common-law shipper's lien on the goods for shipping charges owed. The defendant trustee in bankruptcy claimed that the goods belonged to the bankrupt, and therefore to the trustee. The Ontario Court found that the plaintiff did not require leave to exercise its security pursuant to a carrier's lien, and was entitled to exercise that lien outside of the bankruptcy. The Court held that the plaintiff was a secured creditor that could exercise on its security pursuant to s.69.3(2) of the federal *Bankruptcy and Insolvency Act*, and that the goods held by the plaintiff making up that security did not form part of the bankrupt's property that could be seized by the trustee.²²

²⁰ RSO 1990, c. C-45.

²¹ [1999] OJ No. 660 (Ont. Gen. Div.).

III. STATUTORY REDEVELOPMENT OF THE CARRIER'S LIEN

As noted above, there have been efforts in the last fifteen to twenty years to modernize the law governing common-law liens (including carrier's liens), and to try to standardize uniform improvements to the way in which the liens may be asserted and used. While progress has been made in that respect, uniform legislation has yet to be implemented or enacted by nearly all of Canada's provinces, and remains far from universal application across the country.

The foundational effort to modernize the world of common-law liens came in the 1990s, with the Alberta Law Reform Institute Report on Liens.²³ That document called for "a major reformulation to the law of liens", proposing that the law governing all liens in personal property be codified in a single statute:

The statute would define the nature and extent of the lien and set out the steps needed to protect the lien against claims of third parties. The statute would provide a set of priority rules for determining contests between a lien claimant and other third parties who claim an interest in the goods subject to a lien. The statute would also provide a uniform set of rules regulating the remedies of the lien claimant.²⁴

The recommendations of the Alberta report were subsequently considered by the Uniform Law Conference of Canada, which produced a draft uniform enactment known as the *Uniform Liens Act, 2000* (the "ULA 2000").²⁵ That enactment called for a number of sweeping changes to the current Canadian common-law scheme, including:

- (a) clearly defining the classes and types of liens (including the carrier's lien) to which the enactment would apply;

²² *Ibid.* at para. 14.

²³ Alberta Law Reform Institute, *Report on Liens*, Report for Discussion No. 13, September 1992, ISBN 0-8886-4177-X.

²⁴ *Ibid.*, p. 8.

²⁵ A copy of the *ULA 2000* is attached to this paper.

- (b) simultaneously abolishing the common-law liens themselves and/or repealing previous statutes governing such liens, so as to promote a uniform legal scheme for asserting and enforcing all liens recognized under the enactment;
- (c) codifying a number of features of the common-law lien, including the need to retain possession of the goods in question, and the priority of the lienholder's claim against other secured interests in the goods;
- (d) adding a number of provisions designed to harmonize the treatment and pursuit of possessory liens in the same manner as that of secured interests under provincial PPSA legislation. These include:
 - i. provisions governing the perfection of lien interests (including the ability to register a lien interest in the provincial Personal Property Registry);
 - ii. the priority of lien interests against other secured creditors of the debtor (subject to the special common-law rights of lienholders as mentioned above); and
 - iii. perhaps most importantly, the use of PPSA mechanisms to realize or execute upon the security in question;
- (e) the ability to apply the province's Small Claims jurisdiction, to deal efficiently and economically with smaller lien claims; and
- (f) in the specific context of carrier's liens, removing any distinction between "carriers" and "common carriers", with the aim of thereby bringing all carriers under its application.

To date, only one Canadian province – Saskatchewan – has made wholesale steps to adopt the *ULA 2000* into law. The *Commercial Liens Act*²⁶ (the "CLA") incorporates most of the provisions of the *ULA 2000*, including the abolition of the common-law carrier's lien and defining lienable "services" as including "the storage of goods" and "the transportation, carriage and towage of goods".²⁷

²⁶ SS 2001, c. 15-1.

²⁷ *Ibid.*, s. 2.

There has been relatively little jurisprudence to date concerning the interpretation of the *CLA*. In one case, however, it appears that the common-law rule precluding recovery of storage charges under a carrier's lien may also apply under modern legislation such as the *CLA*, or other future provincial statutes similarly derived from the *ULA 2000*. In *Paccar Financial Services Ltd. v. TGW Holdings Ltd.*,²⁸ the Saskatchewan Court of Queen's Bench disallowed the right to collect storage charges in the exercise of a possessory lien, either at common law (as per the *Somes* analysis described above) or under the new *CLA*. In respect of the latter regime, the Court held as follows:

[16] Western implicitly submitted that s. 2 of the *CLA* entitles it to charge a fee for storing Paccar's truck and s. 3 entitles it to a lien for unpaid storage fees that accrue while it asserts a possessory lien thereon. I reject both submissions.

[17] In my view, the inclusion of "storage" as a service under s. 2 of the *CLA* does not automatically create a right to levy fees for such service, or a right to assert a lien claim under s. 3. Two prerequisites must be met. Namely, the person having legal possession of the subject good must expressly or implicitly request (a) that the good be stored, and (b) expressly or implicitly agree to pay a fee for such service...

(...)

[18] In the instant case neither Paccar nor Tri-Line Expressways requested Western to store the truck or agreed to pay a storage fee should Western assert a possessory lien thereon. Nor did an implied contract arise by virtue of Western having communicated to Paccar or Tri-Line Expressways by letter, posted signs, endorsements on its work orders and invoices, or other acceptable means, its intention to levy a fee for storing the truck while it remained in its possession. The only communication to that effect occurred after it asserted the possessory lien. In the result, no contractual obligation exists on the part of Paccar or Tri-Line Expressways for the storage fees levied by Western. Hence, no debt obligation exists upon which Western could assert a lien for storage charges. I further conclude that in the absence of a contractual obligation, the fair value provisions of s. 4(2) do not apply.²⁹

The obvious corollary, however, is that storage charges incurred pursuant to the exercise of a carrier's lien may be made payable via contract. This was indeed the result in *Air Express International (Canada) Ltd. v. 740510 Ontario Ltd.*,³⁰ where the carrier's invoice contained a provision that storage charges would apply to uncollected goods. That provision was held by the Court to entitle the carrier to payment for storage even where the cause for such charges was

²⁸ *Supra* note 15 at para. 13 *et seq.*

²⁹ *Ibid.* at paras. 16-18.

through the exercise of the carrier's lien for unpaid freight charges. However, the Court in that case was careful to limit the carrier's recovery to "reasonable" storage charges where the terms and rate of such storage had not been discussed or specifically agreed to prior to the carriage. Accordingly, the Court found that a daily storage rate of over \$50 smacked more of a penalty to encourage speedy payment than a *bona fide* storage charge, and limited the carrier's recovery in that respect to \$200 instead of the some \$27,900 in "storage charges" it had originally sought.

To date, the *CLA* remains the only statute of its type in force in Canada; no other provinces have adopted the provisions of the *ULA 2000* in nearly the same sweeping manner. That being said, legislation similarly based on the *ULA 2000* has also been enacted (but is as yet unproclaimed) in Nova Scotia, and other such legislation is under consideration in Alberta, New Brunswick and Newfoundland.³¹

In the meantime, other provinces have made less comprehensive statutory modifications to their laws concerning possessory liens. For example, the Alberta *Possessory Liens Act*³² and the New Brunswick *Liens on Goods and Chattels Act*³³ each contain certain provisions for the realization on lien security where no other statute applies to a lien. Unlike the *ULA 2000*-based statutes, however, it is unclear on the face of either of these enactments whether a carrier's lien falls under their application.

IV. CONCLUSION

The law of liens in Canada is currently in a state of evolution, from a nebulous state of common-law being into a comprehensive, uniform and codified statutory scheme. It remains to be seen to what extent the new provisions will continue to be adopted across Canada. In time, however, those reforms may well give the carrier's lien a new lease on life in Canadian commercial usage, in a predictable and uniform fashion across all Canadian jurisdictions. Either way, the carrier's

³⁰ [1995] OJ No. 3266 (Ont. Gen. Div.).

³¹ See Uniform Law Conference of Canada, *Status of Uniform Acts Recommended by the Commercial Law Strategy*, March 2008 (as updated).

³² RSA 2000, c. P-19.

³³ RSNB 1973, c. L-6

lien remains today a viable and useful remedial tool to carriers in enforcing freight accounts in Canadian commerce.