

Report on Commercial Liens 1994

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Civil Section Documents - Report on Commercial Liens

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ALBERTA REPORT RECOMMENDATIONS WITH COMMITTEE RESPONSE

At the meeting of the 1992 Uniform Law Section, the Section considered the possibility of embarking on a project to harmonize commercial liens. With this project in mind, the Section was referred to the work of Professor Rod Wood. Prof. Wood had prepared, on behalf of the Alberta Law Reform Institute, a major report entitled *Report on Liens*. With this work before it, the Uniform Law Section passed a resolution establishing a Committee

to study the issues arising out of the Alberta Report and prepare recommendations for the Section. The current members of the Committee are Mr. Arthur Close, Q.C., Professor R.C.C. Cuming, Q.C. and Mr. Gérald Tremblay, Q.C. with Justice Georgina Jackson as the Chair. (Mr. Basil Stapleton, Q.C. provided comments on an earlier draft.) Prof. Wood has also provided comments on the Committee's work. All references to the Québec *Civil Code* have been provided by Mr. Gérald Tremblay. As part of its mandate, the Committee consulted with the Canadian Conference on Personal Property Security Law which body has been working for some years to achieve uniformity of secured transactions law.

Since the Alberta Law Reform Institute released the Alberta Report, the Law Reform Commission of British Columbia released a report regarding wood workers' liens entitled *Working Paper No. 68-Liens for Logging Work* which also included a draft *Act*. In the course of working on this Report, the B.C. Law Reform Commission released its final Report on the *Woodworker Lien Act* (June, 1994). The B.C. Working Paper will be referred to in this paper.

In addition to the Alberta Report and the B.C. Working Paper, the Committee referred to *An Act to revise and consolidate the law related to Repairers' and Storer's Liens* S.O. 1979, c. 17. That *Act* brought together and expanded the traditional warehouse keeper's liens and the liens of those who improve chattels, and, as such, marked the first major Canadian reform in this area. Mr. Arthur Close, Q.C. prepared a commentary on the discussion paper leading up to the *Repairers' and Storer's Liens Act* which is found at (1985) 10 C.B.L.J. 359. This commentary has also been a reference document for the Committee.

There are two preliminary points which must be kept in mind as one reads this *Report on Commercial Liens*. First, this is not intended to be an exhaustive study of all liens. For example, this report does not address Crown liens or liens for wages or other deemed interests. Rather, it addresses only those liens which share these characteristics: (i) they exist now in several provinces; (ii) they have a commercial basis; and (iii) they have a rational link to the *PPSA*.

Secondly, this report must be read in conjunction with the Alberta Report (referred to above). There was no significant debate on many issues canvassed by the Alberta Report. It contemplates a modernization of repairers', storers', common carriers', woodworkers', threshers', agisters' and hotelkeepers' liens based, in large measure, on modern *PPSA* principles. In that respect, the Alberta Report cannot be challenged. All the above liens need to be modernized and rationalized. Thus, if an issue has not been raised in this report it can be taken that the Alberta Report's treatment of the issue has been accepted by the Committee. For ease of reference, appendix "A" reproduces the Alberta Report's recommendations and summarizes the Committee's recommendations in relation thereto.

A threshold issue considered by the Committee was whether the special status of a lienholder should continue to be conferred at all. As one of the Committee members expressed it, one of the purposes of the commercial lien is to assist in the collection of a debt. If that is the main purpose of the lien, perhaps modern commercial law should abolish

commercial liens leaving lienholders to their own devices which could include the taking of a security agreement. If it was thought necessary the various *PPSAs* could be amended to give a lienholder a status similar to that of a purchase-money secured party. For example, some of the new *PPSAs* contain a provision which some call a "value added security interest." In B.C. this is s. 34(9) of the *PPSA* and it reads as follows:

34.(9) A perfected security interest in fowl, cattle, horses, sheep, swine or fish or the proceeds of any of them given for value to enable the debtor to acquire food or drugs to be fed to or placed in the animals or fish has priority over any other security interest in the same collateral given by the same debtor other than a perfected purchase money security interest.

The Committee considered whether this provision, or something similar, could be expanded to accommodate many, if not all the liens, discussed in this report. However, that is not the approach taken in Ontario, or recommended by either the Alberta or B.C. Working Papers, and after full discussion by the Committee and with the Canadian Conference on Personal Property Security Law it was decided there was a rational basis to retain separate rights for those who improve or add value to chattels and to keep a separate statute for such liens as distinct from deeming such liens security interests under the *PPSA*. Persons who improve or add value are generally not in the same position as persons who lend money or sell property. This policy choice will be canvassed further in this report.

The Committee noted that in Civil Law the device which most closely resembles the commercial lien is the privilege conferred upon the person who exercises a right of retention. The right of retention is known as a statutory right which allows the creditor, so long as he or she is not paid, to retain a thing owned by the debtor, notwithstanding the fact that the thing was not received by way of a contract of pledging. Any right of retention always carries with it a privilege: the holder of a right of retention can refuse to return the thing, so long as the holder has not been fully paid. But the holder does not generally have the right to sell the thing withheld. To give up possession of the article is to lose the right of retention, unless the loss of possession was the result of a false representation. The *Civil Code* will be referred to in this report wherever comparisons can be made.

The Committee took the Alberta Report (supplemented by the B.C. Working Paper and the *Repairers' and Storers' Liens Act*) as the starting point for its discussions on liens. While accepting many of the recommendations contained in the Alberta Report, the Committee identified the following issues for further discussion:

1. is uniformity of treatment essential for all liens considered by the Alberta Report (i.e., should some of the liens be governed by local option only);
2. on what basis do we want to confer special status on the commercial enterprises that these liens represent (i.e., should any of these liens be considered obsolete);
3. should the remaining liens be allowed to exist as non-possessory liens;
4. should the lien of a common carrier be expanded to provide lien protection to those who transport goods, but do not have common carrier status;

5. should the scope of the repairer or "value-added" lien be expanded to permit the creation of a lien even if the person repairing the article has never had possession of it;
6. should the lien be deemed to be a security interest and tie into the *PPSA* as another form of a security interest (as is provided in the B.C. proposal regarding forestry workers' security interests);
7. should the relevant *PPSA* provisions be incorporated by reference only or be repeated in the new statute as the Alberta Report recommends;
8. whether the priority rule suggested by the Alberta Report for resolving disputes between secured creditors and lienholders is the appropriate one;
9. what should be the priority rules between competing lien claimants;
10. what are the appropriate conflicts of laws rules; and
11. should a lienholder be able to give the item liened to charity where the realization costs exceed the value of the item?

I. ARE THERE SOME LIENS CONSIDERED BY THE ALBERTA REPORT FOR WHICH UNIFORMITY CANNOT BE CONSIDERED ESSENTIAL SUCH THAT THEY SHOULD BE GOVERNED BY LOCAL OPTION ONLY?

The Alberta Report reviews the legislative history of the following types of personal property lien:

- (a) garagekeeper's and mechanic's lien (linked together in the Alberta Report as "repairer's" lien);
- (b) warehouse keeper's lien (called in the Alberta Report "storer's lien");
- (c) common carrier's lien;
- (d) hotelkeeper's lien;
- (e) agister's lien;
- (f) woodworker's lien;
- (g) thresher's lien; and
- (h) beet lien.

I will now describe each of these liens.

(a) Repairers' liens:

The repairer's lien exists now in two forms in most jurisdictions in Canada: (i) possessory liens for the improvement of chattels generally; and (ii) non-possessory liens for the repair of vehicles and airplanes. Most jurisdictions have a statute of the first type dealing generally with "liens for the improvement of chattels". In Saskatchewan this is the tag-end section of *The Mechanics' Lien Act* R.S.S. 1978, c.M-7, S.61. This lien requires the lienor to have and keep possession until sale. Similarly, in New Brunswick there exists an Act entitled the *Liens on Goods and Chattels Act* R.S.N.B. 1973, Chap. L-6, which is similar to Saskatchewan's *Mechanics' Lien Act* referred to above, but also provides a particular possessory lien for: (i) a wharfinger for his lawful charges "on the goods entrusted to his keeping"; and (ii) a gratuitous bailee of goods "on the goods for the reasonable charges for

caring for them after the expiration of the time mentioned in a notice given by the bailee to the bailor to take possession of the goods". Other jurisdictions have similar statutes.

The second type of repairer's lien that exists in western Canada is the garagekeeper's lien which allows the repairer to give up possession of vehicles and airplanes and to subsequently register the lien in the Personal Property Registry within a prescribed time period. In Alberta, the *Garagemen's Lien Act*, R.S.A. 1980, c. G-1 extends to most farm equipment (see: ss. 1(a) & 2). In British Columbia, this lien also applies to boats and outboard motors (see: the *Repairers Lien Act*, R.S.B.C. 1979, c. 363, s. 3).

Ontario's *Repairers' and Storers' Liens Act* brought the "mechanic's lien" and the "garagekeeper's lien" together conceptually and dealt with them in the same statute. Before this Act, Ontario had the same provision Saskatchewan had in its mechanics' lien legislation, but did not have garage keepers' lien legislation.

In Québec, a right of retention is given to the person who makes improvements or additions to moveable property. This right of retention is in fact an illustration of the right of accession in relation to moveable property. Article 974 of the *Civil Code* (proclaimed in force January 1, 1994) provides that "[t]he person bound to return the new thing [i.e., the thing so repaired] may retain it until its owner pays him the compensation he owes him." There is no right of sale or ability to release the property to the owner and still retain rights over the property.

(b) Storers' liens:

This encompasses the traditional warehouse keepers' lien and is expanded by the Alberta Report to include all persons who store the goods of another. The storer's lien has its origin in the *Uniform Warehousemen's Lien Act* passed by the ULC in 1921 and was enacted in all jurisdictions in Canada except Quebec. The warehousemen's lien was a possessory lien only. It existed only as long as the warehouse keeper has possession.

Ontario's *Repairers' and Storers' Liens Act*, referred to above, (which also expands the old warehousemen's lien into a storer's lien) states that anyone who stores goods (assuming the necessary agreement exists) has a lien for storage costs. The requirement that the warehouse keeper be "a person lawfully engaged in the business of storing goods as a bailee for hire", which exists now in the various warehouse keeper's Acts, is gone. The "storer" simply has to store the goods or store and repair the goods.

The Civil Law concept which most resembles that of the storer is the concept of depositary who, according to article 2293, has a right of retention for expenses similar to those incurred by a storer:

2293. The depositor is bound to reimburse the depositary for any expenses he has incurred for the preservation of the property, to indemnify him for any loss the property may have caused him and to pay him the agreed remuneration. The depositary is entitled to retain the deposited property until he is paid.

Again there is no right to release or to sell.

(c) Common carriers' liens:

This lien is given to those persons, who may not refuse a fare or the transportation of goods, to enable the collection of fees out of the goods transported. Unlike the above liens, which have a statutory base, the common carrier's lien is a common law lien. Section 2(4) of the Alberta Draft Act recommended that a "common carrier has a lien on goods for carriage charges in respect of which a bill of lading has been issued."

Pursuant to Article 2058 of the *Civil Code* provides that "the carrier may retain the property carried until the freight, the carriage charges and any reasonable storage charges are paid." The extension of this right to any reasonable storage charges is new to the 1994 *Civil Code*.

(d) Hotel keepers' liens:

This lien is given to those who run hotels and motels to collect the cost of lodging from luggage or other items left behind or kept in satisfaction of the bill. At one time, the innkeeper's lien existed solely at common law and for the same reasons as the common carrier's lien, i.e., the innkeeper was engaged in a common calling and was required to provide lodging. Alberta, Saskatchewan, the Yukon and the N.W.T. derive their statutes from the *Hotel Keepers' Ordinance*, O.N.W.T. 1884, No. 34. The Alberta Report advises us (see p. 24) that this Act is based on the *Innkeepers Act*, 1878, 41 & 42 Vict., c. 38 which gave an innkeeper a right of sale. The *Uniform Hotel Keepers Act* was passed in 1962.

The equivalent *Civil Code* provision is Article 2302 which permits an innkeeper to retain, as security for payment of the cost of lodging and services, the effects and baggage brought into the hotel by a guest, except personal documents and effects of no market value. Articles 2303, 944 and 955 permit sale by public auction or by agreement after 90 days. A thing that cannot be sold may be given to a charitable institution, or if that is not possible, the thing may be disposed of, as the innkeeper sees fit.

(e) Agisters' liens:

This is a stable keeper's lien given to anyone who feeds and keeps livestock of another. Agisters' liens exist in Saskatchewan through an add-on section tucked into *The Animal Products Act* S.S. 1982, c. A-20.2. Section 15.1 was placed into this statute after *The Stable Keepers' Act* was repealed and inadvertently not re-enacted as part of the new statute. It creates a possessory lien for an animal keeper for the price of "food, care, attendance, accommodation, treatment or services" furnished to animals. In Alberta this lien is created by the *Stable Keepers' Act* which creates a lien for "stabling, boarding and caring" for animals.

The animal keeper's lien is treated in the Alberta Report like a repairer's lien and is included in s. 2(1) of the draft Act as the lien of a "person who has expended labour or skill for the purpose of improving, restoring or maintaining its condition or properties".

There is no *Civil Code* equivalent of this lien.

(f) Wood workers' liens:

This lien is given to those who perform any labour or provide services in connection with logs or timber, and creates an interest in the logs and timber in favour of the lienholder. Where those logs or timber have been mingled with other logs arising out of the same logging operation, the lien attaches to all logs in the mass.

Wood workers' liens exist now as non-possessory liens in those jurisdictions that have created these liens (see, for example, *The Lien for Wages Act*, R.S.O. 1990, c. F-28, the *Woodmen's Lien Act*, R.S.N.S. 1973, c. W-12, the *Woodmen's Lien Act*, R.S.M. 1987, c. W190, *The Woodmen's Lien Act*, R.S.S. 1978, C. W-16, *The Woodworker Lien Act*, R.S. B.C. 1979, c. 436 and the *Woodmen's Lien Act*, R.S.A. 1970, c. W-14).

There is no *Civil Code* equivalent of this lien.

(g) Threshers' liens:

This is a lien on harvested grain given to those who swath or combine crops. As the Alberta Report tells us (see: p. 28), the *Threshers' Lien Ordinance*, O.N.W.T. 1895, No. 24 gave Alberta, Saskatchewan and the territories their first Acts in this area.

There is no *Civil Code* equivalent of this lien.

(h) The Beet Lien:

The history of this Act is described at pp. 37 and 38 of the Alberta Report. The beet lien was developed in 1926 to provide protection to sugar beet harvesters to secure their wages by a lien on the harvested product and to those who provided capital in this industry.

There is no *Civil Code* equivalent of this lien.

After a detailed analysis of each of these liens, as they exist in Alberta, the Alberta Report recommended the retention of all such liens except the beet lien.

The Committee agreed with the Alberta Report's decision to examine the need to retain these liens but decided, for the purposes of the development of a *Uniform Liens Act*, the liens should be divided into two categories:

(a) those for which the nature of the activity was such it could be said to exist in all of Canada therefore making uniform treatment desirable;

(b) those for which the nature of the activity, and the need to protect it by means of a lien, could be said to be more local in nature, and for which it would not be justified for the Uniform Law Conference to recommend uniform legislation.

In the first category, the Committee placed the liens of repairers, storers, common carriers and hotelkeepers. In the second category, the Committee placed the balance: the liens of agisters, woodworkers and threshers and the beet lien. The liens in the second category could be said to concern issues that are more local in nature and should not be part of the proposed *Uniform Liens Act*. By necessity, the inclusion of warehousemen's liens in this

proposed new legislation means that the *Uniform Warehousemen's Lien Act* is no longer required.

1. RECOMMENDATION:

(1) The Uniform Law Conference should only consider liens reform with respect to the liens of repairers, storers, common carriers and hotelkeepers.

(2) The *Uniform Warehousemen's Lien Act* should be withdrawn.

II. ON WHAT BASIS DO WE WANT TO CONTINUE TO CONFER SPECIAL STATUS ON THE COMMERCIAL ENTERPRISES THAT THESE LIENS REPRESENT?

Of the remaining liens, some Committee members questioned the

continuing need for the hotelkeepers' lien. Practically speaking most hotels require an imprint of a credit card to secure payment. In those cases where this is not done, we concluded that the usual enforcement mechanisms to secure payment of an unsecured debt should be utilized.

2. RECOMMENDATION:

The *Uniform Hotel Keepers Act* should be amended to strike out those provisions granting a lien to hotel keepers.

III. WHETHER THE REMAINING TYPES OF LIENS SHOULD BE CONTINUED AS NON-POSSESSORY LIENS AFTER POSSESSION IS RELINQUISHED?

The Alberta Report recommended that the liens of repairers, storers, common carriers, agisters, hotel keepers, threshers and wood workers be placed in one statute and be allowed to exist even though the lienor does not have possession of the item that is the subject of the lien. The purpose of this part is to explore that decision in relation to the liens of repairers, storers and common carriers which are the only liens remaining with which the Committee is now to be concerned.

Of this group and prior to the enactment of the *Repairers' and Storers' Liens Act*, the only non-possessory lien recognized in Canada was the garagekeeper's lien. Storers, other types of repairers and carriers were required to retain possession in order to maintain the lien. When the garage keepers' Acts were passed, the justification for allowing the garage keeper to give up possession was to allow the chattel to be put back into use in the community. This was considered to be especially important where the item repaired was itself a means of earning money. Another justification was to compensate for the fact that most garage keepers do not have storage facilities for the large ticket items they repair. But, as the *Repairers' and Storers' Liens Act* and the Alberta Report recognized, if an appropriate mechanism can be developed to protect third parties, the reasons to permit release of

collateral in the context of garagekeeper's legislation are equally applicable to all chattels which have been stored, improved or repaired. Furthermore, the Alberta Report recommended that anyone who repairs or improves any type of chattel should be entitled to a lien. With this extension of the lien, it is appropriate to extend the garage keepers' concept of allowing the lienor, if it wishes to do so, to give up possession and register its lien with respect to any type of goods. This is a logical extension of the garagekeeper's lien.

Like the repairer's lien above, the Alberta Report recommended that the storer (i.e., the warehouse keeper) who gives up possession may register a lien if the lienor obtained a signed acknowledgement of the indebtedness. Again, no objection to this extension of the existing warehouse keeper's lien has been identified. It is left entirely to the discretion of the storer whether possession will be restored to the person who engaged the storer's services. It can be conducive to harmonious business relations to return the goods to such person, and from time to time, the item so released will be an item capable of generating money. It also allows a repairer who has storage charges to collect the debt for the repair and for storage in the same way.

This approach is also consistent with the *Repairers' and Storers' Liens Act*, which provides that any person who "alters, improves, restores or maintains" personal property is entitled to a lien on the personal property regardless of the nature of the personal property, and may perfect that lien by registration if possession is relinquished (see the *Repairers' and Storers' Liens Act*, ss. 7(1) and (5)).

A common carrier and a storer play similar roles in relation to the goods of others. Common carriers transport goods but also store during transit and until pick-up. Common carriers should be treated the same as storers in the proposed legislation.

3. RECOMMENDATION:

The lien of a repairer, storer or common carrier should exist as a non-possessory lien after the item is released.

IV. WHETHER THE LIEN OF A COMMON CARRIER SHOULD BE EXPANDED TO PROVIDE LIEN PROTECTION TO THOSE WHO TRANSPORT GOODS WITHOUT HAVING THE STATUS OF A COMMON CARRIER?

The Alberta Report recommended an expansion of two traditional categories of liens: repairers and storers. This expansion has prompted the question whether the lien of the common carrier should be extended to those who transport goods.

While the common carrier's right to a lien is based on the requirement that the carrier take "all comers", it is difficult to justify a distinction between a storer and a carrier or, for that matter, a repairer and a carrier. In all cases, the value of the goods involved has been notionally enhanced. Transport of goods to a new market has an effect on their value. While it might be argued that a "private" carrier can negotiate for a security interest, the matter

of priorities cannot be addressed through agreement. Since a carrier's claim should have priority over security (and other) interests, it will be necessary to create a statutory lien having this priority.

4. RECOMMENDATION:

The distinction between common carriers and other types of carriers should be eliminated in favour of a statutory transporters' lien.

V. WHETHER THE LIENOR NEED NEVER HAVE HAD POSSESSION AS A REQUIREMENT TO CREATE THE LIEN?

When the Ontario draft *Repairers' and Storers' Lien Act* was first released for public comment, it contemplated that the repairer, in order to claim a lien, would have to have possession before a non-possessory lien could be granted. As indicated above Mr. Arthur Close, Q.C. provided a commentary on the proposal (see: (1985) 10 C.B.L.J. 359). On the issue of whether the repairer should at some point have possession as a condition of lien protection, he said this (at p. 364):

The second observation that might be made about s. 7(1) is that in order to claim a non-possessory lien, the lien claimant must once have had a possessory lien. This is a serious limitation on the scope of Part II. There are many situations in which work will be carried out on the premises of the owner. An example is where a piece of heavy equipment breaks down at a remote work site and it is wholly impractical to relocate it to the repairer's premises. It is doubtful whether the person who performs repairs at a place which is under the effective control of the owner of the property being repaired can ever be said to have possession of the property sufficient to support a lien. Yet to deny him a non-possessory lien creates a wholly artificial distinction between work which is lienable and work which is not, depending on the essentially irrelevant issue of where the repairs are made.

These words fell on fallow ground, and the legislation, when introduced, removed the requirement that the repairer have possession as a prerequisite to lien status.

The *Repairers' and Storers' Liens Act* provides that a lien claimant who gives up possession of an article without having been paid in full has, in place of the possessory lien, a non-possessory lien (see: s. 7(1)). But s. 3(4) of the *Repairers' and Storers' Liens Act* states that a repairer who commences the repair of an article not in the repairer's actual possession "shall be deemed to have gained possession of the article when the repair is commenced and shall be deemed to have given up possession when the repair is completed or abandoned".

Similarly, the Alberta Draft Act does not require the lienor to have had possession as a condition of claiming lien protection. Section 2 provides who is entitled to a lien. Section 5(1) then states that a lien [other than a thresher's lien or a forestry worker's lien] is "enforceable against the debtor or a third party only where (a) the goods are in the possession of the lien claimant, or (b) the debtor has signed an acknowledgment of the indebtedness which includes a description of the goods subject to the lien." This avoids the

statutory reference to possessory and non-possessory liens which occurs in the *Repairers' and Storers' Liens Act*.

The legitimacy of Mr. Close's comments cannot be denied. His view is also consistent with the *PPSA*, which allows a secured party to seize an item in the debtor's possession simply by rendering the item unusable. The logic is the same. One concern may relate to low ticket consumer items like washers and dryers and also to repairs of small dollar value. Should it be possible for a lien claimant to repossess items of this type? To do so may increase costs to the consumer relative to the value of the repaired item. The Committee considered this possible problem and decided to leave the issue to exemptions reform, if necessary. Good business practices dictate such repossessions will be rare. Furthermore, no such concern exists in the *PPSA*. The *PPSA* permits a secured party to repossess an item where the amount secured is small, as long as the secured party behaves in a commercially reasonable manner in doing so. Similarly, a secured party is permitted under exemption legislation to repossess exempt consumer goods if it holds a purchase-money mortgage which is somewhat akin to a repairer's lien.

5. RECOMMENDATION:

The lien claimant should not be required to have possession of the lien article before claiming a non-possessory lien.

VI. SHOULD THE LIEN BE DEEMED TO BE A SECURITY INTEREST AND TAKE ITS PLACE IN THE PERSONAL PROPERTY SECURITY RÉGIME?

Given our decision to limit uniform reform to the liens of repairers, storers and common carriers, it is unnecessary to consider woodworkers' liens in general, but the B.C. Working Paper recommended a new method of characterizing woodworkers' liens, which should be considered with respect to the remaining liens. The B.C. Working Paper proposed the creation, by legislation, of a "security interest for forest work" to secure "the payment of money owed to a forest worker for forest work". The B.C. Working Paper then recommended the incorporation of this security interest as much as possible into the *PPSA*. For example, priority is to be governed by the *PPSA*. The only provisions included in the B.C. Draft Act are those necessary to modify the *PPSA* rules to meet the needs of the forest industry.

The proposed B.C. Draft Act integrates the "security interest for forest work" into the priority structure of the *PPSA* by deeming it a purchase-money security interest that is perfected upon attachment *without registration*. This means it will defeat most competing security interests. The B.C. Working Paper described this priority at p. 22 (footnote 15) as preserving the strong priority existing under the woodworkers' lien legislation. The purchase-money security interest terminates as soon as the forest products which are subject to the interest no longer have a physical link to the harvesting site. This protects subsequent third parties who would be unable to rely on the register.

The Alberta Report considered whether to deem liens generally to be security interests under the *PPSA* (see: p. 64). It recognized that the *PPSA* deems other interests to be purchase-money security interests: true leases, non-security assignments of accounts and commercial consignments. However, the Alberta Report rejected the deemed inclusion of liens as purchase-money security interests under the *PPSA* because of a reluctance to modify what is essentially becoming a model régime for secured transactions in Canada outside of Quebec. Enough change has been wrought by the *PPSA* and it should not try to accomplish this initiative as well. However, what B.C. proposed involves no changes to the *PPSA*, but simply ties into it.

As previously indicated, this was clearly the most difficult issue facing the Committee. The attraction to deem a lien to be a security interest or a purchase-money security interest cannot be denied. To do so also would resolve other issues like the selection of the appropriate priority and conflict of laws rules.

On the other hand, the only way the lien is like a true security interest is that each secures payment of an obligation, but the similarity ends there. A true security interest represents an agreement of the parties reached before or at the time value is given. The secured party protects its interest in collateral usually before value is given or shortly thereafter.

The deemed security interests, i.e., true leases, non-security assignments of accounts and commercial consignments, share the need to register to protect a property interest in priority over others. There is a separation of ownership and possession which fits easily into the *PPSA* registration régime, but again, like the true security interest, enforcement of the deemed security interest is not the main goal as it is with a lien.

The holder of the lien has no agreement with the owner of the collateral to grant a lien. Rather the agreement between the depositor of the goods and the repairer, storer or common carrier, is to provide services in exchange for payment. Only after services are provided and the bill not paid does the lienholder consider the lien as a means of collecting the unpaid debt.

It has also been argued that if the legislature deems a lien to be a purchase-money security interest, it will run afoul of the law surrounding the deeming of certain Crown interests as security interests (see, for example, *Deloitte Haskins & Sells Limited v. Workers' Compensation Board*, (1985) 55 C.B.R. (N.S.) 241 (S.C.C.); *Federal Business Development Bank v. Commission and De la Sante* [1988] 1 S.C.R. 1061; *R. v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1 (S.C.C.) and *Clarkson, Gordon Inc. (Trustee of Robinson, Little & Co. Limited), v. Saskatchewan*, [1990] 1 W.W.R. 354 (Sask. C.A.)).

It is settled law that the province cannot by legislation alter the scheme of distribution under the *Bankruptcy Act*. At the present time, a lien takes priority under the *Bankruptcy Act* according to whether the lienor can come within the definition of secured creditor. The fear is that if the traditional character of the lien is lost, it could lose this status.

On balance, the Committee concluded that the characteristics and priority of the lien claimant's interest should be defined using *PPSA* concepts and terminology, but that the lien

or liens created or continued by the *Uniform Lien Act* should not be a deemed security interest under the *PPSA*. This does not mean the security aspect of the lien is irrelevant. The lien, as indicated, shares many of the same characteristics as a security interest created by the *PPSA* and, it should be recognized, by adopting such features of the *PPSA* as the ability to assign the lien makes third party financing of repairs possible. This change alone has the potential to move the lien from the realm of cash transactions to that of lender credit. Nonetheless, the Committee believes the aspects of the lien which make it unique justify a separate statute and a distinct concept.

6. RECOMMENDATION:

The lien or liens created or continued should not be deemed security interests under the *PPSA*.

VII. SHOULD THE RELEVANT *PPSA* PROVISIONS BE INCORPORATED BY REFERENCE OR SHOULD THE PROVISIONS BE REPEATED AS THE ALBERTA REPORT RECOMMENDS?

The Alberta Report considered the option of incorporating the relevant *PPSA* provisions by reference at p. 64. It rejected this approach in favour of one which repeats the various provisions of the *PPSA* which would be applicable (other than the rule determining priority between secured creditors and lienholders). The reason given is that to incorporate by reference only would require the lien claimant to "sift through two statutes in order to determine the applicable law" and there are many provisions of the *PPSA* which are not applicable to liens. Accordingly, the Alberta Report opted for a mechanism that would precisely identify which provisions of the *PPSA* are intended to apply.

On balance, the Committee disagreed with the Alberta approach. Actual incorporation of the *PPSA* provisions will make the statute lengthy and when the *PPSA* is amended, failure to amend the *Uniform Liens Act* may result in a discrepancy between the two statutes. The primary matter with which a lienholder is concerned is registration and enforcement. The former would be governed by the *PPSA* in any event.

The Committee proposed that all provisions of the *PPSA* should be incorporated by reference by means of a schedule appended to the *Uniform Lien Act*. The schedule will identify the applicable provisions of the Uniform *PPSA*. Enacting jurisdictions will be invited to substitute the corresponding provisions of the local *PPSA*, but to maintain the concept of a schedule.

7. RECOMMENDATION:

The proposed *Uniform Lien Act* should incorporate the appropriate provisions of the *PPSA* by reference only and not repeat them.

VIII. WHETHER THE PRIORITY RULE BETWEEN LIEN CLAIMANTS AND SECURED PARTIES AS SELECTED BY THE ALBERTA REPORT IS THE APPROPRIATE ONE?

The existing priority rules for each of the identified liens are:

(a) Repairer's Lien:

A lien for the improvement of chattels in a *PPSA* jurisdiction (outside of Ontario) derives its priority from a section in the *PPSA* like s. 30 of the *Uniform PPSA*:

Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has in respect of those materials or services has priority over a perfected security interest unless an Act in force in the Province provides that the lien does not have priority.

For those jurisdictions with garage keepers' legislation, the rule is that the lien takes priority over prior secured parties and subsequent secured parties who acquire their interest after the lien is registered. As soon as possession is relinquished, the lienor has 21 days to register and the lienor is subordinate to the interest of anyone whose interest arises after possession is given up but before the lienor's interest is registered. The lienholder may obtain an extension of time to register late and the priority of the lienholder continues throughout this extended time.

The rule in the Ontario *Repairers' and Storers' Act* is similar to that in the garage keepers Acts.

(b) Storer's Lien:

As long as the warehouseman gives notice to the owner of the goods, which includes a conditional seller, a chattel mortgagee and a grantee under a bill of sale, the warehouseman would take priority over all such interests regardless when such interest may have arisen.

(c) Common carrier's lien:

At common law, the common carrier's interest was a possessory lien and would defeat the interest of secured parties.

The Alberta Report (at p. 89) recommended that the equivalent of section 30 in the various *PPSAs* (quoted above) should continue to govern the priority between secured creditors and lien claimants according to the Report. Thus, the Alberta Report intends that the *PPSA* would give the lien claimant priority over secured parties except insofar as the new Alberta Draft Act took priority away.

With the advent of the non-possessory lien, there is a greater likelihood of conflicts arising, i.e., it is more likely that a secured party will grant a security interest on chattels which have been returned to their owner. Hence the necessity of providing some form of public record for non-possessory interests to permit prospective lenders to discover such liens. One issue that arises is the length of the grace period and the priority during the grace period. The Alberta Draft Act allows the lienholder to register within 15 days, and, if registration occurs within this period, the lienholder has priority over prior creditors. The

Alberta Draft Act removes priority against prior creditors if the lien claimant fails to register within the time provided. This marks a departure from the *Repairers' and Storers' Liens Act* which subordinates an unregistered lien only against third parties who acquire their interests after the lien arises. The Alberta Report states (at p. 89) that the approach taken in the *Repairers' and Storers' Liens Act* invites uncertainty, because it is unclear if prior secured creditors who make future advances are protected. It opts instead for a priority rule similar to that for creditors who take purchase-money security interests in the collateral. Purchase-money secured parties lose their super priority status against prior creditors if they fail to register in time.

Two issues arise out of the Alberta Report. One is of form and the other of substance. They are:

- (i) should the new Lien Act continue to rely on the *PPSA* to state the priority between secured creditors and lienholders or should the rule be stated expressly in the Lien Act; and
- (ii) should a lienholder lose priority as against prior creditors if the lienholder fails to register within the time provided.

With respect to the first point, the *Uniform Liens Act* should not rely on the *PPSA* to state the priority rule between secured creditors and lienholders. Section 32 is obscure and easily missed in determining the appropriate rule. The priority rule operative between lienholders and secured creditors should be stated expressly in the proposed new *Act*.

The second issue is more difficult. Imagine a scenario where a lender advanced \$10,000 on a truck secured by a registered security interest. (The truck's value is \$12,000.) The truck breaks down and requires \$5,000 worth of repairs. If default under the security interest occurred before repairs are undertaken, there will be insufficient value to satisfy the secured obligation. Assuming that the repaired truck would again be worth more than \$10,000, it is to the secured party's advantage to have the truck repaired. If the repairer loses its lien by failing to register within the time required (whether that will be 15 or 21 days has not yet been debated), the prior secured party will receive a windfall. This concern would seem to dictate that the Ontario approach is preferable to that proposed by the Alberta Report.

The Alberta Report is concerned for the secured creditor who makes future advances. Under s. 20(2) of the Uniform *PPSA*, a perfected security interest securing future advances will defeat the interests of secured creditors who seize the collateral and the interests of their representatives. Under s. 35(4) of the Uniform *PPSA*, if future advances are made while a security interest is perfected, the security interest has the same priority with respect to the future advances as it had with respect to the first advance.

It was the Committee's opinion, the special status to be conferred on lienholders by the proposed *Uniform Liens Act* justifies changing the priority given to future advance financiers by the *PPSA*. The lienholder is not an ordinary creditor. The lienholder enhances the value of the article. Moreover, future advance financing is not a factor in relation to collateral which would normally be subject to a lien. It plays a role with respect to inventory or accounts financing, but is rare with respect to a single item of collateral. A secured party making

future advances in relation to inventory is not likely to be severely prejudiced by a lien that encumbers one of many items of collateral with respect to a future advance. Finally, the legislative choice in favour of lienholders in this situation has already been made in those jurisdictions which have garage keepers' *Acts* and in the Ontario *Repairers' and Storers' Liens Act*.

8. RECOMMENDATION:

- (1) The priority rule for liens should be stated expressly in the *Act*.
 - (2) A lien claimant should be required to register within a fixed number of days from when the work was completed or abandoned or from giving up possession (if the lien claimant had possession) in order to defeat subsequent buyers and creditors.
 - (3) A lienholder should take priority over a prior secured party even if the lienholder fails to register or allows the registration to lapse.
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IX. WHAT SHOULD BE THE PRIORITY RULES BETWEEN COMPETING LIEN CLAIMANTS?

The Alberta Report recommended that the priority among perfected lien claimants should be determined in reverse order to the order in which the liens were created (see: pp. 90 and 91). This marks a departure from the Western Garage keepers Acts which grant priority according to which lien was registered first, but does follow the Ontario *Repairers' and Storers' Liens Act*, s. 16. (Indeed, the Ontario approach received favourable comment on this point from Mr. Close in his article referred to earlier (see pp. 368-71).) The Alberta Report justified its recommendation on two grounds. First, it permits a lien claimant to provide services without being required to conduct a search of the Registry. Second, the repairs or services usually result in an enhancement of, or preservation, of value of the goods. The Alberta Report went on to say the reverse order rule would only apply if the lien was continuously perfected.

Some reservations to this approach were expressed by some members of the Committee. Issue was taken primarily with the assumption that all work enhances or preserves value. It was said a reverse order priority rule encourages careless or negligent repair. The last repairer need have no regard for the relationship between the repair and the value. With such a rule, prior repairers would remain vulnerable to subsequent repair over which they have no control. It would also be a reversal of the standard *PPSA* priority rule which relies on the registry to determine priority.

Having said this, a first to register priority rule for lien claimants is unfair to subsequent lien claimants who add value and but for their value the first lien claimant may claim little or nothing. Assume a fact situation where a vehicle has been repaired at a cost of \$5,000 and, as a result, is worth \$10,000. The vehicle is involved in an accident requiring \$6,000 worth of repairs. The repairs are effected. The vehicle is again worth \$10,000. But for the

intervention of the second repairer, the first repairer would not have been able to satisfy its bill, but with a first in time priority rule the first repairer will be fully paid before the second repairer. With this scenario in mind, the Committee decided to recommend a modified priority rule which would favour a first in time priority rule except where a subsequent repairer enhances the value, in which case, the subsequent repairer would have priority to the extent of the increase in value brought about by its repairs.

A further complication arises when determining priority among lien claimants where one or more lien claimants fails to register or allows its registration to lapse. As indicated, the Alberta Report would determine priority on the basis of the order of perfection (registration or possession) and, if both or all liens are unperfected, according to the order of attachment. The Committee agreed with this approach subject to the caveat above referred to regarding a repairer which enhances value.

9. RECOMMENDATION:

(1) Priority among lien claimants should follow the priority structure of the *PPSA* as closely as possible.

(2) In a competition between two lien claimants, the first will take priority according to the time of registration, unless it can be proven that the second lien claimant has enhanced the value of the collateral, in which case, the second repairer will take priority to the extent of the increased value.

(3) Subject to the recommendation immediately stated above, if the lien is not continuously perfected, priority should be based on the order of perfection. A perfected lien should have priority over an unperfected lien. Priority between two unperfected liens should be determined by the order of attachment of the liens.

X. WHAT ARE THE APPROPRIATE CONFLICTS OF LAWS RULES FOR LIENS?

A useful adjunct to the Alberta Report in the context of a *Uniform Liens Act* is the establishment of conflict of laws rules for non-possessory liens. One possible approach is to include the *PPSA* conflict of laws with the other provisions to be incorporated by reference into the *Uniform Liens Act*. This would make applicable those provisions of the *PPSA* pertaining to security interests in goods. The inclusion of the applicable Uniform *PPSA* conflicts of laws provisions would mean:

(a) the validity, perfection and effect of perfection or non-perfection of the lien would be determined by the law of the jurisdiction where the collateral was situated when the lien arose (see: *UPPSA* s. 4(1));

(b) a lien which arose prior to goods being brought into a province would continue perfected in the province as against a buyer in good faith if the lien was registered in the province prior to acquisition (see: *UPPSA*, s. 4(2)(a));

(c) a lien in goods registered under the law of the jurisdiction in which the goods were situated before the lien attached would continue in the province as against all other persons, if the lien was registered in the province:

(i) within 60 days after the day the goods were brought into the province;

(ii) within 15 days after the day the lienholder received notice that the goods had been brought into the province; or

(iii) prior to the day that registration ceased under the law of the jurisdiction in which the goods were situated when the lien attached;

whichever is earliest. (see: *UPPSA*, s. 4(2)(b));

(d) a lien that was not registered may be otherwise registered under the *Act* (see: *UPPSA*, s. 4(3) & (4)); and

(e) a choice of law is made in favour of the jurisdiction for procedural matters affecting enforcement and for the proper law of the contract for substantive matters affecting enforcement (see: *UPPSA*, s. 7).

On balance, this would seem to be an acceptable approach to liens.

10. RECOMMENDATION:

The conflict of laws rules in the *PPSA* dealing with security interests in goods should be incorporated by reference to the *Uniform Lien Act*.

XI. SHOULD A LIENHOLDER BE ABLE TO GIVE THE ITEM LIENED TO CHARITY WHERE THE COST OF REALIZATION EXCEEDS THE VALUE OF THE ITEM?

The *Repairers' and Storsers' Liens Act* allows a lien claimant, who has retained possession of an article for 12 months after the right to sell the article arose, to give the article to a registered charity if the cost of disposal and the amount of lien exceed the fair market value of the article (see: s. 19). For example, where shoes are repaired by a shoemaker and not picked up within the time provided the shoemaker may give the shoes to charity. This is a low cost practical solution and should be included in the new Lien Act.

11. RECOMMENDATION:

Section 19 of the *Repairers' and Storsers' Liens Act* should be included in the *Uniform Liens Act*.

DATED at Regina, Saskatchewan, July 14, 1994 (revised for publication, October 6, 1994).

ALBERTA REPORT RECOMMENDATIONS WITH COMMITTEE RESPONSE

ALTA. RECOMMENDATION 1 -- ONE STATUTE

Non-consensual liens in personal property should be governed by a single statute. The statute should set out a unified set of rules concerning the nature and extent of the lien, the priority of the lien against third parties and the procedure for its enforcement. The statute would replace the following legislation:

- Garagemen's Lien Act
- Innkeepers Act (ss 2-6)
- Livery Stable Keepers Act
- Possessory Liens Act
- Threshers' Lien Act
- Warehousemen's Lien Act
- Woodmen's Lien Act

The same rules would apply to the various types of liens unless there is a good reason that justifies a difference in treatment.

Committee Recommendation:

Adopt this recommendation, but confine it to garage keepers liens, repairers, storers and transporters liens.

ALTA. RECOMMENDATION 2 -- NON-APPLICATION OF PROPOSED STATUTE

The statute should not apply to Crown liens or other non-consensual security interests given to public or quasi-governmental bodies, to general liens, to the landlord's right of distress for unpaid rent or to an unpaid seller's lien governed by the Sale of Goods Act.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 3 -- TRANSITION

The proposed statute should apply to liens that were created before its coming into force. A non-possessory lien under the Garagemen's Lien Act should be considered registered until the registration expires. The proposed statute should provide that a garageman's lien may be re-registered in the Personal Property Registry before the registration expires.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 4 -- ABOLITION OF OBSOLETE LIENS

The Beet Lien Act should be repealed.

Committee Recommendation:

The committee has no comment on this other than to indicate that this is an example of the type of lien best governed by local option.

ALTA. RECOMMENDATION 5 -- ENTITLEMENT TO A LIEN

The following classes of lien claimants should be recognized:

- (a) a person has a lien on goods in respect of which the person has expended labour or skill for the purpose of improving, restoring or maintaining its condition or properties;
- (b) a storer has a lien on goods that have been stored;
- (c) a common carrier has a lien on goods for carriage charges in respect of which a bill of lading is issued;
- (d) an innkeeper, boarding house keeper or lodging house keeper has a lien on the goods brought on to the premises;
- (e) a thresher has a lien on any grain that has been cut or threshed.
- (f) a forest worker has a lien on logs or timber in respect of which labour or services are rendered and any logs or timber which have been mixed with logs or timber in respect of which the labour or services have been rendered.

Committee Recommendation:

Adopt this recommendation, but confine it to garage keepers liens, repairers, storers and transporters liens.

ALTA. RECOMMENDATION 6 -- OBLIGATION SECURED BY LIEN

The claim secured by the lien should be restricted to the amount agreed to be paid for the services relating to the property against which the lien is claimed. If no amount has been agreed upon, the lien should secure the fair value of the services rendered.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 7 -- GOODS BELONGING TO THIRD PARTY

A lien should attach only to goods owned by the debtor or goods in respect of which the owner has authorized the debtor to obtain the services giving rise to the lien. A secured party should not be considered an owner for the purposes of this provision. A forestry worker's lien should not be subject to this restriction. However, a forestry worker's lien should only secure the amount owing by the owner to a contractor after the owner has been

notified of the lien. The owner should be liable for any amounts paid to the contractor following notification.

Committee Recommendation:

Agreed except that the *Uniform Liens Act* will not deal with forestry workers' liens.

ALTA. RECOMMENDATION 8 -- ENFORCEABILITY

A lien should be enforceable against the debtor or third parties only if the goods are in the possession of the lien claimant or the debtor has signed an acknowledgment of the indebtedness. A lien claimant should be deemed not to have taken possession of goods that are not in the apparent possession or control of the debtor or the debtor's agent. If a lien claimant has not complied with the enforceability requirements at the time a third party acquires an interest in the goods, subsequent compliance by the lien claimant should not render the lien enforceable against the third party. The signing of the acknowledgment should be without prejudice to the right of the debtor or other person to dispute the amount. The requirement for enforceability should not apply to a thresher's lien or a woodworker's lien.

Committee Recommendation:

The Committee is in substantial agreement with this recommendation except that the *Uniform Liens Act* will not deal with thresher's liens or woodworker's liens. In addition, the Committee thought the concept of "an acknowledgement of the indebtedness" was too narrowly conceived. Acknowledgement of the indebtedness should not be a pre-condition to release of the item or to the creation of a lien. What is required is some document recognizing that the authorization of work gives rise to a lien, but leaves room to dispute the amount of the lien. The lien claimant registers for the full amount claimed, but the amount may be disputed. Drafting work is required on this point.

ALTA. RECOMMENDATION 9 -- ATTACHMENT OF LIEN

A lien should attach to the goods on the commencement of the services giving rise to the lien.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 10 --CARE OF GOODS IN POSSESSION OF LIEN CLAIMANT

A lien claimant or a sheriff who has possession of goods subject to a lien shall be under a duty to use reasonable care in the custody and preservation of the goods unless a higher standard is imposed by some other law. Unless the parties otherwise agree, the parties should be subject to the following implied terms:

(a) reasonable expenses in obtaining, maintaining and preserving the goods are chargeable to the debtor and secured by the lien;

(b) the risk of loss to the extent of any deficiency in any insurance coverage is on the debtor; and

(c) the lien claimant or sheriff shall keep the goods identifiable, except that fungible goods may be co-mingled.

A lien claimant should be permitted to use the goods in accordance with any agreement with the owner, for the purpose of preserving the goods or pursuant to an order of a Court.

Committee Recommendation:

Agreed except that it would be the committee's approach to incorporate the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 11 -- REQUEST FOR INFORMATION

The debtor, a creditor, a sheriff or a third party who has an interest in the property should have the right to demand the following information from a lien claimant:

(a) a copy of any acknowledgment of indebtedness;

(b) a statement in writing of the amount of the indebtedness;

(c) a written approval or correction of an itemized list of goods attached to the demand indicating which goods are subject to the lien.

The person making the demand should have the right to obtain a court order requiring disclosure if the lien claimant fails to respond. The court should have the power to order that lien be extinguished or a registration discharged if the lien claimant does not comply with the demand. The Court should also have the power to exempt a lien claimant from compliance and to extend the time for compliance.

Committee Recommendation:

Agreed except that it would be the committee's approach to incorporate the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 12 -- ASSIGNMENT OF LIEN

A lien should be capable of assignment by an instrument in writing.

Committee Recommendation:

Agreed. It is the Committee's view this provision should be expressly stated in the *Uniform Liens Act* because of its potential importance to the possibility of financing of repairs.

ALTA. RECOMMENDATION 13 -- TERMINATION OF LIEN

A lien should not be lost by reason only that the lien claimant has allowed a period of credit for the payment of the debt. If a lien claimant takes a security interest in goods subject to a lien in order to secure an obligation which includes the amount of the lien, the lien claimant should be deemed to have taken the security interest in substitution of the lien.

Committee Recommendation:

Agreed. The Committee noted that a security interest so taken would not succeed to the super priority of the lien which renders it unnecessary to contain an express statement on this point.

ALTA. RECOMMENDATION 14 -- PERFECTION OF LIEN

A lien should be capable of being perfected by possession or by registration. A lien claimant should be deemed not to have possession of goods in the actual or apparent possession of the debtor or the debtor's agent.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 15 -- TEMPORARY PERFECTION

A lien should be temporarily perfected for 15 days after the lien claimant delivers possession of the goods to the debtor. Temporary perfection should not be effective against a buyer or lessee who gives value for the interest without knowledge of the lien.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 16 -- EFFECT OF NON-PERFECTION

An unperfected lien should be subordinate to a person who causes the collateral to be seized under legal process, a trustee in bankruptcy or liquidator and a buyer or other transferee who acquires the interest for value and without knowledge of the lien.

Committee Recommendation:

Agreed except that it would be the committee's approach to incorporate the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 17 -- PRIORITY AGAINST BUYERS

A buyer or lessee of goods from a seller who sells it in the ordinary course of business should take free of any lien. A buyer or lessee of consumer goods of a value that does not exceed \$1000 should take free of a lien if the buyer or lessee gave value and was without knowledge of the lien.

Committee Recommendation:

Agreed except that it would be the committee's approach to incorporate the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 18 --PRIORITY AGAINST SECURED CREDITORS

A lien should be subordinate to a security interest that is perfected during a time when the lien is attached but unperfected.

Committee Recommendation:

This recommendation was not followed by the committee. The committee recommendation is that a lienholder should take priority over a prior secured party even if the lienholder fails to register or allows the registration to lapse.

ALTA. RECOMMENDATION 19 -- PRIORITY AMONG LIEN CLAIMANTS

Priority among perfected lien claimants should be determined in reverse order to the order in which the liens were created. If the lien is not continuously perfected, priority should be based on the order of perfection. A perfected lien should have priority over an unperfected lien. Priority between two unperfected liens should be determined by the order of attachment of the liens.

Committee Recommendation:

Please see Committee Recommendation 9 contained in the accompanying Report.

ALTA. RECOMMENDATION 20 -- REGISTRATION OF LIEN

Registration of a lien should be accomplished by registration of a financing statement at the Personal Property Registry. The registration should have a life of one year and it should be renewable for further periods of one year.

Committee Recommendation:

The Committee agreed with the first part of this recommendation, but proposed flexible registration for liens as being more in keeping with the security aspect of liens.

ALTA. RECOMMENDATION 21 -- CONTENTS OF REGISTRATION

A financing statement relating to a lien should provide for the name and address of the debtor, the name and address of the lien claimant, and should require that the goods be described by item or by kind. Goods classified as "serial number goods" should be required to be registered by serial number. Information contained in a financing statement should be capable of being changed by registration of a financing change statement.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 22 -- DUTY TO PROVIDE FINANCING STATEMENT

A lien claimant should be required to give a copy of a financing statement or verification statement to each person named as debtor.

Committee Recommendation:

The *Uniform Liens Act* should follow the *PPSA* of the jurisdiction on this point.

ALTA. RECOMMENDATION 23 -- EFFECT OF ERRORS IN REGISTRATION

The validity of a registration should not be affected by an error unless it is seriously misleading. It should not be necessary to demonstrate that anyone was actually misled by the error.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform PPSA.

ALTA. RECOMMENDATION 24 -- DISCHARGE OF LIEN

The debtor or any person with an interest in the goods should be able to give a written demand requiring the lien claimant to amend or discharge a registration if the indebtedness has been paid or if the lien claimant is not entitled to claim a lien on the described goods. The lien claimant should then be required to amend or discharge the registration or provide the Registrar with an order of the Court confirming the registration. If the lien claimant fails to comply with the demand, the debtor or other person should be entitled to register a financing change statement amending or discharging the registration.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform PPSA.

ALTA. RECOMMENDATION 25 -- SEIZURE OF GOODS SUBJECT TO A NON-POSSESSORY LIEN

A seizure of goods under a non-possessory lien should be effected by a sheriff or a person appointed by a sheriff. The procedure should be substantially the same as the procedure for seizure of collateral under a security agreement.

Committee Recommendation:

Agreed.

ALTA. RECOMMENDATION 26 -- SALE OF GOODS SUBJECT TO LIEN

A lien claimant should have the right to sell the goods 30 days after the debt becomes due. The lien claimant should be required to give notice of the intended sale not less than 20 days prior to the disposition of the goods. The notice should contain a description of the collateral, the amount of indebtedness including any expenses for storage and disposition, and a statement that the goods may be redeemed, and should set out the particulars of the intended sale. The goods may be disposed of by private or public sale, but the lien claimant may not purchase the goods in the case of a private sale.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform PPSA.

ALTA. RECOMMENDATION 27 -- COSTS OF REALIZATION SECURED BY LIEN

The lien should secure reasonable costs of seizure and sale, including costs of storage after default in payment.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 28 -- SURPLUS OR DEFICIENCY

A debtor should be liable to the lien claimant for any deficiency following sale. A surplus should be distributed first to any subordinate secured parties or lien claimants who have perfected their interests, then to any other person who has notified the lien claimant, and then to the debtor or any other person known to be the owner. The lien claimant should be entitled to pay the surplus into Court where there is a question concerning entitlement to the money.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 29 -- RETENTION OF GOODS IN SATISFACTION OF OBLIGATION

A lien claimant should have the right to propose to retain the goods in satisfaction of the obligation. The lien claimant should be required to give a notice of intention to the debtor and other interested parties. If the debtor or other interested party objects, the lien claimant should be required to conduct a sale or obtain an order of a Court dispensing with the objection.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 30 -- REDEMPTION OF GOODS

A debtor or other interested party should have the right to redeem the goods by satisfying the amount of the lien and any reasonable costs of storage and seizure.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 31 -- SUPERVISORY POWER OF COURT

The Court should be empowered to make orders to ensure compliance with the Act, to give directions, relieve compliance or stay enforcement, to determine questions of priority or to

make any other order that is necessary to ensure protection of the interests of any person in the goods.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 32 -- GOOD FAITH AND COMMERCIAL REASONABLENESS

The parties should be under a duty to exercise or discharge all rights, duties or obligations in good faith and in a commercially reasonable manner. A person to whom an obligation or duty is owed should have a right to recover damages for loss that was reasonably foreseeable as liable to result from a failure to meet this standard.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 33 -- DEEMED DAMAGES

A lien claimant who without reasonable excuse fails to comply with the duty to provide the debtor with a copy of the financing statement or the duty to amend or discharge a financing statement is liable to pay deemed damages to the person named as debtor. The right to claim deemed damages should also be available to a debtor where consumer goods are involved. The amount of the deemed damages should be the same as the amount of deemed damages prescribed under the *PPSA*.

Committee Recommendation:

Agreed except that it would be the committee's approach to refer to the applicable provisions from the Uniform *PPSA*.

ALTA. RECOMMENDATION 34 -- DISPUTE RESOLUTION

Where there is a dispute about the amount of the lien or the right of the lien claimant to take or retain possession of the goods, the owner should be entitled to pay into Court the full amount claimed by the lien claimant. Upon doing so, the owner should be entitled to a release of the goods if retained by the lien claimant and the lien is discharged. In its place, the lien claimant should have a charge on the money paid into Court. The owner should be permitted to include an offer of settlement in the application. The charge on the money paid into Court should be discharged if an offer of settlement is not accepted or the lien claimant does not commence action to recover the money within 90 days.

Committee Recommendation:

Agreed.