

Draft Uniform Liens Act 1995

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Civil Section Documents - Draft Uniform Liens Act

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DEFINITIONS

1 In this Act,

"consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

Commentary

This definition is included solely for the purposes of subsection 14(2), which permits a buyer or lessee for value and without knowledge of a lien to take the goods free of that lien.

"court" means the [superior court of the province, or the provincial court where the value of the asset does not exceed \$10,000];

Commentary

This definition, in addition to using the jurisdiction of the superior court, contemplates the use of the small claims procedure for claims in relation to assets that do not exceed \$10,000 in value.

"debtor" means the person who is indebted to the lien claimant;

Commentary

Self-explanatory

"financing statement" means a financing statement as defined in the *Personal Property Security Act*;

Commentary

This definition reflects a decision to register the liens created by this Act in the registry established under the *Personal Property Security Act*. [Please note that all references to the PPSA in this Act are to the Uniform Act.]

"lien" means a lien created by this Act;

Commentary

This Act does not apply to all liens, but only those which have a commercial base and can be considered to have value. This point is more fully canvassed under section 2.

"lien claimant" means a person who has a lien on goods pursuant to this Act;

"sheriff" includes a sheriff's agent and any person appointed by a sheriff.

NATURE AND EXTENT OF LIEN

Persons who have liens

2(1) A person has a lien on goods with respect to which that person has provided services for the purpose of improving, restoring or maintaining the condition or properties of those goods.

(2) A storer has a lien on goods that have been stored.

(3) A common carrier has a lien on goods for carriage charges with respect to which a bill of lading has been issued.

Commentary

The types of lien covered by the Act are liens that have a commercial base and liens with respect to which the lien claimant can be said to have preserved or enhanced the value of the goods. A lien where a person has provided services for the purpose of improving, restoring or maintaining the condition or properties of goods is self-explanatory.

A storer's or a common carrier's lien also preserves or adds value, but examples are needed to better explain this principle. A storer adds value in the sense that the goods are maintained by storage. Transportation adds value on the assumption goods are transported from one place to another where they are needed or will be capable of being sold or repaired. If not transported, the value of the goods is diminished if they cannot be sold for the best price or cannot be repaired.

Purpose of lien

3(1) A lien secures the amount that the debtor agreed to pay for the services.

(2) If no amount has been agreed on, the lien secures the fair value of the services rendered.

Commentary

The lien only secures the amount agreed or, if not agreed, the fair value of the services. Thus, these are particular as opposed to general liens.

When lien attaches

4(1) A lien attaches to goods on the commencement of the services giving rise to the lien.

Commentary

This represents a revision to the common law, which required work to have been completed before a lien would attach.

(2) A lien attaches only to the debtor's interest in the goods or the interest in the goods of a person who has authorized the debtor to obtain the services giving rise to the lien.

(3) For the purposes of subsection (2), a secured party is not considered to be the owner of goods subject to a security interest.

Commentary

The above two subsections require the owner to have authorized the work before a lien will attach. It changes the law for storers in that, at common law, storers could claim a lien against goods entrusted to the debtor by the owner and for common carriers who were obliged by law to provide services to those willing to pay. For all other liens, the rule is that stated. We can see no justification for a special position for storers and carriers and this section reflects this choice.

When lien enforceable

5(1) Subject to subsection (4), a 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 an indebtedness, which includes a description of the goods subject to the lien.

Commentary

This subsection establishes when a lien is enforceable. There is no writing requirement if the goods are in the possession of the lien claimant, but if they are not, there must be a written acknowledgment of indebtedness. The acknowledgment may be obtained at any time, including after the goods are released to the debtor. Failure to obtain an acknowledgment renders the lien unenforceable against both the debtor and third parties.

This is a departure from the policy choice of the *PPSA*, which provides that a failure to obtain a security agreement signed by the debtor only renders the security agreement

unenforceable against third parties. For liens, the acknowledgment fulfils the additional requirement of specifying the required services and the agreed amount in an effort to avoid disputes.

(2) For the purposes of clause (1)(a), a lien claimant is deemed not to have possession of goods that are in the apparent possession or control of the debtor or the debtor's agent.

Commentary

There is a comparable provision in the *PPSA* that provides that a secured party is not considered to be in possession of goods that are in the apparent or visible possession of the debtor.

(3) An acknowledgment of an indebtedness pursuant to clause (1)(b) is without prejudice to the right of the debtor or any other person to dispute the amount the lien claimant is owed.

Commentary

A debtor who signs an acknowledgment of indebtedness should not be prevented from disputing the amount of the lien. It simply reflects the amount due. If it were otherwise, a debtor requiring immediate use might be coerced into signing the acknowledgment to obtain the release of the lien. A dispute mechanism is provided in section 27 of this Act.

(4) If the conditions mentioned in subsection (1) have not been met at the time a third party acquires an interest in the goods, a subsequent acquisition of possession or a signed acknowledgment of indebtedness by the lien claimant does not render the lien enforceable against that third party.

Commentary

There can be no prejudice from this feature that might be of assistance to lien claimants where periodic repairs are performed.

Demand for information

6(1) The debtor, a creditor, a sheriff or a person with an interest in the goods, by a demand in writing containing an address for reply and delivered to the lien claimant, may require the lien claimant to send to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following

- (a) a copy of any acknowledgment of indebtedness mentioned in subsection 5(1);
- (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.

(2) The lien claimant shall comply with the demand not later than 10 days after the demand is made, and if the lien claimant fails to do so without reasonable excuse or if the reply is incomplete or incorrect, the person making the demand may apply to the court for an order requiring the lien claimant to comply with the demand.

(3) On application, the court may order the lien claimant to comply with the demand and if the order is not complied with, may

(a) order that the lien is unperfected or extinguished and that any related registration be discharged; and

(b) make any other order it considers necessary to ensure compliance with the demand.

(4) On application by the lien claimant, the court may exempt the lien claimant in whole or in part from complying with subsection (2), or may extend the time for compliance.

Lien may be assigned

7 A lien claimant may, in writing, assign a lien.

Commentary

At common law a lien could not be assigned. This presented certain difficulties in the sale of a business. In addition, assignability may be useful in the financing of repairs.

Effect of credit and taking of security

8(1) A lien is not extinguished by reason only that the lien claimant has allowed a period of credit for the payment of the debt to which the lien relates.

Commentary

To permit credit is consistent with the concept of the non-possessory lien.

(2) If a lien claimant takes a security interest in goods subject to a lien in order to secure the amount of the lien, the lien claimant is deemed to have taken the security interest in substitution of the lien.

Commentary

A lien claimant loses its lien rights when a security interest is taken respecting the goods.

Lien claimant's obligations re care of goods

9(1) A lien claimant shall use reasonable care in the custody and preservation of goods in the lien claimant's possession, unless a higher standard of care is imposed by law.

(2) Unless otherwise agreed, if the goods are in the possession of the lien claimant or a sheriff

(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 commingled.

- (3) Subject to subsection (1), a lien claimant may use the goods
- (a) in the manner and to the extent provided in any agreement with the debtor;
 - (b) for the purposes of preserving the goods or their value; or
 - (c) pursuant to an order of the court.

PERFECTION AND PRIORITY OF LIEN

Perfection by possession

10(1) Possession of the goods by the lien claimant or by a person acting on behalf of the lien claimant perfects a lien.

(2) For the purposes of subsection (1), a lien claimant does not have possession of goods if

- (a) the goods are in the actual or apparent possession or control of the debtor or the debtor's agent; or
- (b) the goods are being held as a result of a seizure or repossession.

Commentary

This Act relies on *PPSA* terminology, which uses the concept of perfection to distinguish the validity of the lien from the notification steps needed to protect a lien against third parties. A lien may be perfected by possession, but in order to fulfil the function of providing notice, which is a necessary component of perfection, the lien claimant's possession must be visible and apparent. Hence, the necessity to disallow perfection where possession is effected by seizure or the goods are in the possession of the debtor.

(3) A lien perfected by possession remains perfected for the first 15 days after the goods come under the control of the debtor.

Commentary

This subsection establishes a "grace" period for registration.

Perfection by registration

11 Registration in the Personal Property Registry of a financing statement perfects a lien.

Commentary

A lien may also be perfected by registration. Registration may occur at any time, and, as will be seen, if the lien claimant is not registered it will be defeated by certain interests.

Priority of lien

12(1) Except as provided in this Act or any other Act, a perfected lien has priority over an interest that was acquired after the lien attaches.

Commentary

This subsection establishes the residual rule and repeats the common law for possessory liens and the existing statutory law for non-possessory liens. Including this section reflects a policy choice to state the priority rule between lienholders and others, including secured parties, in the Act. The above rule is consistent with the applicable common and statutory law.

At common law, a possessory lien for the improvement of chattels defeated the interests of all third parties. This was also the case for common carriers.

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

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

For those jurisdictions with garagekeepers' 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. The lienholder's interest is subordinate to the interest of anyone whose interest arises after possession is given up but before the lienholder'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.

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

(2) An unperfected lien has priority over a security interest that attaches before the lien attaches.

Commentary

This subsection grants priority as against a prior secured party to the unregistered lien claimant. It is consistent with the common law and existing statutory liens.

This changes the priority given to future advance financiers under the *PPSA*. Under subsection 33(2) of the *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. Subsection 33(3) of the *PPSA* provides that if future advances are made while a security interest is perfected, the security interest has the same priority with respect to the future advance as it had with respect to the first advance.

It was the Committee's opinion that 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 that 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 that have garagekeepers Acts and in the Ontario *Repairers' and Storers' Liens Act*.

Where lien subordinate or ineffective

13(1) If a lien is unperfected at the time a person mentioned in clause (a) or (b) delivers a writ of execution to the sheriff, that lien is subordinate to the interest of

(a) a person who causes the goods to be seized under legal process to enforce a judgment;

(b) an execution creditor entitled by law to participate in the distribution of goods or their proceeds seized under legal process; and

(c) a representative of creditors, but only for the purposes of enforcing the rights of a person mentioned in clause (a).

(2) A lien is subordinate to

(a) the interest of a transferee who gives value and acquires the interest without knowledge of the lien and before the lien is perfected; and

(b) a security interest that attaches after the lien attaches and that is created or provided for in a security agreement executed after the lien attaches and before it is perfected.

(3) A lien is not effective against

(a) a trustee in bankruptcy if the lien is unperfected at the date of bankruptcy; or

(b) a liquidator appointed pursuant to the *Winding-Up Act* (Canada) if the lien is unperfected at the date the winding-up order is made.

Commentary

This priority rule is equivalent to that contained in s. 19(1) of the *PPSA* for security interests.

Exceptions

14(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any non-possessory lien on the goods whether or not the buyer or lessee has knowledge of the lien.

(2) A buyer or lessee of goods that are acquired as consumer goods takes free of any lien on the goods if the buyer or lessee

(a) gave value for the interest acquired; and

(b) had no knowledge of the lien.

(3) Subsection (2) does not apply to a lien on goods where the purchase price exceeds \$1,000 or, in the case of a lease, where the market value of the goods exceeds \$1,000.

(4) A buyer or lessee takes free of a lien that is temporarily perfected pursuant to section 10 during the 15-day period, if the buyer or lessee

(a) gave value for the interest acquired; and

(b) had no knowledge of the lien.

Commentary

Again, this is equivalent to the priority positions between secured parties and buyers or lessees under the *PPSA*.

Priority between liens

15(1) Priority between two or more perfected liens that have been continuously perfected is to be determined

(a) where the services performed by one or more of the lien claimants have resulted in an increased market value of the goods, by the reverse order of perfection but only to the extent of that increase; and

(b) in all other cases, by the order of perfection.

Commentary

This is consistent with the common law and statute law.

(2) For the purposes of subsection (1), an increased market value of goods may be determined by methods other than an actual sale of the goods.

Commentary

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 that 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.

(3) Priority between a lien that has not been continuously perfected and an earlier lien is determined by the order of perfection of the liens.

Commentary

This is self-explanatory.

(4) A perfected lien has priority over an unperfected lien.

(5) Priority between unperfected liens is determined by the order of attachment of the liens.

Commentary

These two subsections are self-explanatory and are consistent with their *PPSA* equivalents.

ENFORCEMENT

Seizure by sheriff

16(1) A lien claimant may cause goods that are subject to a lien to be seized where

(a) the goods are under the control of a debtor;

(b) the lien claimant remains unpaid; and

(c) any period of credit has expired.

(2) Only a sheriff may seize goods to which a lien has attached.

Commentary

Under the Western garagekeepers acts, any asset to be seized had to be seized by the sheriff. As a general rule, a garagekeeper would have little experience in the seizure of goods. There was also no security agreement alerting the debtor of the possibility of seizure. By having the sheriff seize the goods, it was thought disputes arising from these two factors could be prevented. It should be noted that sheriff in this Act is defined to include sheriff's agent.

(3) The sheriff shall not seize goods unless the lien claimant or an agent of the lien claimant has executed and delivered a warrant in the prescribed form to the sheriff who is to carry out the seizure.

(4) In effecting a seizure, a sheriff may exercise any powers given to a secured party pursuant to section 57 of the *Personal Property Security Act*.

(5) A seizure by a sheriff does not affect the interest of a person who, pursuant to this Act or any other law, has priority over the rights of the lien claimant.

Sheriff may require security

17 A sheriff may refuse to make or continue a seizure of goods unless the sheriff is furnished with security sufficient to

- (a) cover the sheriff's fees and expenses; and
- (b) indemnify the sheriff for anything done in relation to a seizure, including indemnification for claims by the debtor or any third party.

Commentary

The requirement of security is consistent with sheriffs' practice.

Sheriff may appoint bailee

18(1) At any time after making a seizure, the sheriff may appoint the debtor, or any other person in possession of the goods seized, as bailee of the sheriff if the debtor or other person executes an undertaking in the prescribed form to

- (a) hold the goods as bailee for the sheriff; and
- (b) deliver up possession of the goods to the sheriff on demand.

(2) Seized goods held by a bailee appointed by the sheriff are deemed to be held under seizure by the sheriff.

Commentary

There will be occasions when the sheriff believes that the goods are better left in the possession of the debtor. This section permits the sheriff to do so.

Third party may request list

19 Where the sheriff seizes goods, the sheriff, on the written request of a person who on reasonable grounds claims to have an interest in or a right to those goods, shall deliver to that person a list of items seized that fall within the general description of goods in which or to which that person claims to have an interest.

Surrender of possession to lien claimant

20(1) A sheriff may surrender possession or the right of possession of the goods seized to the lien claimant or to a person designated in writing by the lien claimant.

Commentary

By means of this section, the sheriff can compel the lien claimant to receive the goods.

(2) Before or after seizure of goods, a sheriff may give a written notice to the lien claimant named in the warrant under which the seizure was made indicating that the seizure is to be released at a date specified in the notice unless the lien claimant takes possession of the seized goods before that date.

(3) If the person to whom the notice is given does not take possession of the goods mentioned in the notice on or before the date specified, the sheriff may release the seizure.

(4) After surrender of possession or right of possession as provided in subsection (1) or release of seizure as provided in subsection (2), the sheriff has no liability for loss or damage to the goods, or for unlawful interference with the rights of the debtor or any other person who has rights in or to the goods, occurring after the surrender or release.

Lien claimant may dispose of goods

21 If the debtor fails to pay the debt within 30 days from the day it was due, the lien claimant may

- (a) dispose of the goods in accordance with section 22; or
- (b) retain the goods in satisfaction of the obligation owed in accordance with section 25.

Commentary

A lien claimant has the right, by virtue of this section, to sell the goods 30 days after the debt becomes due.

Disposal of goods

22(1) Goods subject to a lien may be sold in their existing condition or after any repair, processing or preparation for sale, and the proceeds of sale are to be applied in the following order

(a) the reasonable expenses of enforcing the lien, holding, repairing, processing or preparing for sale and selling the goods and any other reasonable expenses incurred by the lien claimant; and

(b) the satisfaction of the obligations secured by lien.

(2) The goods may be sold

(a) by private sale;

(b) by public sale, including public auction or closed tender; or

(c) as a whole or in commercial units or parts.

(3) Not less than 20 days prior to the sale of the goods, the lien claimant shall give notice of sale to

(a) the debtor or any other person who is known by the lien claimant to be an owner of the goods;

(b) a creditor or person with a security interest or lien in the goods whose interest is subordinate to that of the lien claimant and

- (i) who has, prior to the date that the notice of sale is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the goods when it is required or permitted for registration; or
- (ii) whose security interest or lien is perfected by possession at the time the secured party seized or repossessed the goods; and

(c) any other person with an interest in the goods who has given notice to the lien claimant prior to the date that the notice of sale is given to the debtor.

(4) The lien claimant may buy the goods only at a public sale and only for a price that bears a reasonable relationship to the market value of the goods.

(5) When a lien claimant sells goods to a good faith buyer for value who takes possession of them, the buyer acquires the goods free from the following whether or not the requirements of this section have been complied with by the lien claimant

(a) the interest of the debtor;

(b) an interest subordinate to that of the debtor;

(c) an interest subordinate to that of the lien claimant.

Commentary

The realization procedure for liens is rationalized by this procedure which, unlike the existing system, will be the same for all liens covered by this Act. It is substantially the same as the modern PPSA systems with one difference. The lien claimant must wait for 30 days which will increase the redemption possibilities.

Notice requirements

23(1) The notice mentioned in subsection 22(3) is to contain

(a) a description of the goods;

(b) the amount required to satisfy the indebtedness secured by the lien;

(c) the amount of the expenses mentioned in clause 22(1)(a) or, where that amount has not been determined, a reasonable estimate;

(d) a statement that, on payment of the amounts due pursuant to clauses (b) and (c), any person entitled to receive the notice may redeem the goods;

(e) a statement that, unless the goods are redeemed, the goods will be disposed of and the debtor may be liable for any deficiency; and

(f) the date, time and place of any public sale or the date after which any private sale of the goods is to be made.

(2) The notice may be given in accordance with section 67 of the *Personal Property Security Act*.

(3) The notice is not required if

(a) the goods are perishable;

(b) the lien claimant believes on reasonable grounds that the goods will decline substantially in value if not immediately sold;

(c) the cost of care and storage of the goods is disproportionately large relative to their value;

(d) the court, on *ex parte* application, is satisfied that a notice is not required; or

(e) after default, every person entitled to receive a notice consents to the disposition of the goods without notice.

Commentary

The notice of sale must be given by the lien claimant to the debtor and to interested third parties at least 20 days prior to sale. It must include a description of the collateral and the amount owed. The method of sale must be described.

Disposition of proceeds

24(1) Where a lien secures an indebtedness and the goods have been disposed of in accordance with section 22, any surplus, unless otherwise provided by law or by the agreement of all interested persons, is to be accounted for and paid in the following order to

(a) a person who has a subordinate security interest or lien in the goods;

- (i) who has, prior to the distribution of the proceeds, registered a financing statement according to the name of the debtor or according to the serial number of the goods where it is required or permitted for registration; or
- (ii) whose interest was perfected by possession at the time the goods were seized;

(b) any other person who has an interest in the goods, if that person has given a written notice of the interest to the lien claimant prior to distribution of the proceeds;

(c) the debtor or any other person who is known by the lien claimant to be the owner of the goods.

(2) The priority of the interest in the surplus of a person mentioned in clause (1)(a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

(3) Where there is a question as to who is entitled to receive payment pursuant to subsection (1), the lien claimant may pay the surplus in to court and the surplus shall not be paid out except on an application by a person claiming an entitlement to the surplus.

(4) Within 30 days after receipt of the written notice of a person mentioned in subsection (1), the lien claimant shall provide to that person a written accounting of

- (a) the amount realized from the sale pursuant to section 22;
- (b) the manner in which the goods were sold;
- (c) the amount of expenses deducted pursuant to section 9;
- (d) the distribution of the amount received from the sale; and
- (e) the amount of any surplus.

(5) Unless otherwise agreed, or unless otherwise provided in this Act or any other Act, the debtor is liable for any deficiency.

Commentary

One does not normally think in terms of a deficiency with respect to liens, but there may be more justification with respect to liens than with secured interests where the secured creditor has more control over the process. For a warehousekeeper, there may be little control over product value in relation to the value of the services rendered.

A surplus must in turn be distributed in accordance with the PPSA.

Retention of goods

25(1) The lien claimant may propose to retain the goods in satisfaction of the indebtedness, and shall give a notice of the proposal to

(a) the debtor or any other person who is known by the lien claimant to be the owner of the goods;

(b) a creditor or person who has a security interest or lien in the goods whose interest is subordinate to that of the lien claimant and

- (i) who has registered a financing statement according to the name of the debtor or according to the serial number of the goods where it is required or permitted for registration; or
- (ii) whose interest was perfected by possession at the time the goods were seized;

(c) any other person with an interest in the goods who has given a written notice to the lien claimant of an interest in the goods prior to the date that notice is given to the debtor; and

(d) the sheriff, unless possession has been surrendered or seized goods released by the sheriff.

(2) If any person who is entitled to notification pursuant to subsection (1) and whose interest in the goods would be adversely affected by the lien claimant's proposal gives to the lien claimant a written notice of objection not later than 15 days after the giving of the notice pursuant to subsection (1), the lien claimant shall dispose of the goods in accordance with section 22.

(3) If no notice of objection is made, the lien claimant, at the expiry of the 15-day period mentioned in subsection (2), is deemed to have irrevocably elected to retain the goods in

satisfaction of the indebtedness secured by it, and is entitled to hold or dispose of the goods free from all rights and interest of the debtor and any person who is entitled to receive a notice and has received notice

(a) pursuant to clause (1)(b); or

(b) pursuant to clause (1)(c) and whose interest is subordinate to that of the lien claimant.

(4) The notice required pursuant to subsection (1) or (2) may be given in accordance with section 67 of the *Personal Property Security Act*.

(5) The lien claimant may require any person who has made an objection to furnish proof of that person's interest in the goods and, unless the person furnishes the proof not later than 10 days after the lien claimant's demand, the lien claimant may proceed as if no objection had been received from that person.

(6) On application by a lien claimant, the court may determine that an objection to the proposal of a lien claimant is ineffective on the grounds that

(a) the person made the objection for a purpose other than the protection of that person's interest in the goods; or

(b) the market value of the goods is less than the total amount owing to the lien claimant and the costs of sale.

(7) Whether or not the requirements of this section have been complied with by the lien claimant, where a lien claimant sells the goods to a good faith buyer for value who takes possession of them, the buyer acquires the goods free from

(a) the interest of the debtor;

(b) any interest subordinate to that of the debtor; and

(c) any interest subordinate to that of the lien claimant.

Commentary

A lien claimant who elects to retain the goods becomes the owner of the goods and the debt is thereby extinguished eliminating the possibility of claiming a deficiency. Notice is given to the debtor and interested third parties so as to prevent the lien claimant from using this procedure to claim a surplus it would not otherwise be entitled to.

Redemption of goods

26(1) At any time before the lien claimant has disposed of the goods or contracted for their disposal pursuant to section 22 or before the lien claimant is deemed to have irrevocably elected to retain the goods pursuant to section 25, any person entitled to receive a notice of disposition may redeem the goods unless otherwise agreed in writing.

(2) Goods may be redeemed by tendering fulfilment of all obligations secured by the lien together with payment of an amount equal to the reasonable expenses of seizing, holding,

repairing, processing and preparing for disposal and any other reasonable expenses incurred by the lien claimant.

Commentary

Only redemption as opposed to reinstatement of the goods is permitted, but third parties may also redeem the goods. In addition to satisfying the lien amount, the person redeeming the goods must also pay seizure and storage costs.

Court may resolve dispute

27 A debtor or other person entitled to any goods may apply to the court to have a dispute resolved where the dispute concerns

- (a) the existence of a lien or the amount secured by a lien;
- (b) the increased market value of goods mentioned in clause 15(1)(a); and
- (c) the right of the lien claimant to take or retain possession of the goods.

Payment into court

28(1) An application to the court to resolve a dispute is to include the full amount claimed by the lien claimant or security posted with the court for that amount.

(2) Where money is paid into court or security is posted with the court, the clerk of the court shall issue a certificate to the applicant setting out details of the payment, security or offer of settlement.

(3) The applicant shall serve the certificate on the lien claimant, who shall

- (a) release the goods; or
- (b) file a notice of objection with the court not later than three days after receiving the certificate claiming that an additional amount should be paid into court.

(4) Where an objection has been filed with the court, the applicant may pay into court or post security for the additional amount claimed by the lien claimant.

Where goods released

29(1) Where goods are released after a certificate has been issued by the court, the lien is discharged and is replaced by a charge on the amount paid into court or the security posted.

(2) The charge is discharged 90 days after the goods are returned by the applicant unless the lien claimant has accepted the applicant's offer of settlement or commenced an action to recover the amount claimed.

(3) After the expiry of 90 days, the clerk of the court may return to the applicant the money paid into court or the security posted if the applicant files with the clerk an affidavit confirming that the lien claimant has neither accepted the applicant's offer of settlement nor commenced an action to recover the amount claimed.

Commentary

Sections 27 to 29, which are taken from the Alberta Institute's Report, recommendation #34, are modeled after Rule 469 of the Alberta Rules of Court. This rule provides an effective dispute resolution mechanism to balance the lien claimant's power of retention and seizure where there is a dispute about work quality or price or similar matter.

GENERAL APPLICATION OF THE *PERSONAL PROPERTY SECURITY ACT*

Application of *Personal Property Security Act*

30 Except as otherwise provided in this Act, the following provisions of the *Personal Property Security Act* apply to a lien created by this Act as though the lien were a security interest

- (a) section 4 (validity and perfection of foreign lien on goods);
- (b) section 5 (choice of law where parties understand goods are to be taken to another province);
- (c) section 6 (validity, perfection and effect of perfection or non-perfection liens in mobile goods);
- (d) section 7 (choice of law for procedural and substantive issues relating to goods);
- (e) section 16 (care of collateral);
- (f) Part IV (registration);
- (g) section 62 (application to the court);
- (h) section 64 (rights to be exercised in a commercially reasonable manner);
- (i) section 65 (extension of time);
- (j) section 66 (remedial provision);
- (k) section 67 (service of notices);
- (l) section 68 (notice or knowledge);
- (m) section 74 (regulation-making power).

Commentary

This gathers together the *PPSA* provisions that will be applicable to a lien under this Act.

Transition

31(1) This Act applies to every lien that has not been terminated in accordance with prior law before the coming into force of this Act.

(2) A lien that is validly registered pursuant to [*any repairer's or garagekeeper's legislation extant in the province*] is deemed to be registered pursuant to this Act for the unexpired portion of the registration and may be continued by registration pursuant to this Act.

Commentary

This represents the only transition provision thought to be necessary.

Repeal

32 The following are repealed

- (a) [*any repairer's or garagekeeper's legislation extant in the province*];
- (b) the *Uniform Warehousemen's Lien Act*; and
- (c) sections 8 and 9 of the *Uniform Hotelkeepers Act*.

The Committee acknowledges with gratitude the drafting and research of Prof. Rod Wood and the Alberta Law Reform Institute contained in the REPORT ON LIENS, Report for Discussion No. 13, which forms the basis of the research in the above commentaries and the drafting.