

2000 Victoria, BC

## **Amending the Uniform Liens Act Background Materials**

**Prof. R.C.C. Cuming - Notes**

Excerpts from Cuming,

### **The Spreading Influences of PPSA Concepts: the Uniform Liens Act published in (1999), 15 Business and Finance Law Review 1**

The excerpts set out below refer to matters which, in my opinion, the Committee may want to consider. If you have specific thoughts on any of them and wish to discuss them with me, please feel free to do so by phone or e-mail. By the way, I will not be in the least offended if you think that any one or, indeed, all of the “issues” listed below are of no significance.

#### **Issue 1: (See note 1)**

Since a statutory lien arises by operation of law and not as a result of agreement between parties, it is necessary to identify the circumstances in which, for policy reasons, a lien should be given. The statutory lien that would be created by the Uniform Liens Act would attach when “services” including<sup>[1]</sup> labour and materials provided for the purpose of restoring, improving and maintaining, storage, transportation, carriage or towing of goods are rendered at the request of a person in possession of the goods

#### **Issue 2: (See note 2)**

Section 25 provides for the repeal of “any lien under the common law for which a remedy is provided under” the Act.<sup>[2]</sup> Section 27 provides for the repeal of common law and statutory hotel keepers’ liens, repairers’ and warehouse operators’ liens. An enacting jurisdiction should identify the circumstances, in addition to those provided in the Uniform Liens Act, under which a statutory lien is warranted and, if necessary, expand the scope of its new legislation and repeal all other liens that arise when services are performed in relation to goods. It is the authors view that, unless this is done, one of the benefits of the modernizing of this area of the law will be lost. A Lien Act, like the Personal Property Security Act,

should be the vehicle for the integration and rationalization of the area of the law to which it applies. There should be only one source of law applicable to liens for services.

### **Issue 3:**

The interface between section 5(4) and 10(2)(a) is not clear. As noted above, section 5(4) provides that a lien is not enforceable against a third party if a lien claimant acquires possession or the authorization or acknowledgment after a third party acquires an interest in the goods. Under section 10(2)(a) a lien has priority over a security interest that attaches before the lien attaches. In a situation where the security interest is taken before the lien attaches, section 5(4) can be read either as being inapplicable or as applicable in situations where the lien claimant who is not in possession of the goods has not obtained the requisite written authorization before providing the services. Under the latter interpretation, an acknowledgment or taking possession after the services have commenced would be “after a third party acquires an interest in the goods.” Under the former interpretation, section 5(4) would be read as referring to an interest acquired during the period of time between the date the lien attaches and the date on which the requirements of section 5(4) are met. It is the view of the author that this is the correct interpretation.

A similar problem arises when section 5(4) is applied in the context of section 13 which provides that priority among two or more liens is to be determined by the reverse order in which the services are provided. If the holder of the second lien who is not in possession of the goods delays complying with section 5(1)(b) for any period of time after the lien has attached, a prior lien holder who has complied with the section will have priority unless section 5(4) is read as not overriding the policy of section 13.

Another problem of interpretation arises in the context of execution creditors. It is not clear whether a judgment enforcement creditor is “a third party (who) acquires an interest in the goods” under section 5(4). If he or she is, section 5(4) gives priority to the creditor over the lien

claimant. If not, the lien claimant has priority even though he or she has an otherwise unenforceable lien.

#### **Issue 4: (See note 3)**

The value of any registry relating to legal rights depends upon its reliability when it is used by persons who use the information disclosed by the registry when making commercial decisions. It is important that a potential subsequent buyer of goods subject to a perfected lien or prospective lender to whom goods subject a perfected lien is offered as collateral be in a position to assess the legal risk of buying or lending on the security of the goods using information disclosed through a search of the registry. If a lien is registered using a serial number of the goods subject to the lien, few problems will be encountered. The potential buyer or lender who obtains a search result using the serial number as the search criterion will be informed of the registration. However, where the goods are of a type which has no serial number or no reliable serial number, it is not possible to require that a serial number be used as the registration criterion. The only alternative is to use a name as the registration-search criterion. But, whose name is to be required: the owner's name or the name of the person who requested the service? The service provider may not know the identity of the owner; the searching party may not know the identity of the person who requested the services.

Section 8(3) answers this question. When it is amended as proposed by Uniform Law Conference committee, it will provide that registration of a financing statement against the name of the owner of the goods perfects a lien on the goods.[3] It is the view of the author that this is the correct approach, notwithstanding that it could result in the subordination of a lien in circumstances beyond the control of the lien claimant. The basis for this conclusion is that, as between the lien claimant and a subsequent buyer or secured party who relies on the registry, it is the lien claimant who is in the best position to prevent the problem from arising. He or she can demand proof of ownership of goods with respect to which services are being requested. A buyer or searching party has no way, other than through information in the registry, to determine whether or not goods

offered for sale or as security are subject to a lien. The owner may not be aware of the existence of the lien or may be prepared to act dishonestly in not disclosing the fact that services provided in connection with the goods were contracted for by someone else.

**Issue 5:**

A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free from a lien perfected by registration whether or not the buyer has knowledge of the lien. A buyer or lessee of consumer goods that, in the case of a sale have a price of \$1,000 or less, and, in the case of a lease have a market value of \$1,000 or less, takes free from any lien on the goods if the buyer or lessee gives value and acquires an interest without knowledge of the lien. While these provisions have been modeled on provisions found in PPSAs, they are not mere copies. One important difference is that, in the case of a sale or lease in the ordinary course of business, the buyer or lessee takes priority only when the lien is perfected by registration and not through possession of the goods. The result is that a buyer who pays in advance for goods and who does not take possession before the lien attaches and is perfected by possession of the lien claimant gets no protection even though title in the goods has passed to him or her under sale of goods law.[4] Where low value consumer goods are involved, a different approach is taken. The buyer or lessee is protected whether the lien is perfected by registration or through possession of the goods.

**Issue 6:**

A clerical error resulted in section 20(1)(b) being retained in the Act after the Uniform Law Conference decided that the reverse priority of rule of section 13 should apply to the entire claim of the service provider and not to the amount to which the market value of the goods involved increased as a result of the services.

**Issue 7: (See notes 5 and 6)**

Under this section, the person requesting the services “and any other person entitled to the goods”[5] may apply to a court to have a dispute

resolved where it concerns the existence of a lien, the amount secured by a lien or the right of a lien claimant to have goods seized by a sheriff or a claim to take or retain possession of them. What is not found in a PPSA is the system provided by sections 21-22 of the Uniform Act under which a person requesting the services[6] can obtain possession of goods seized by paying into court either the amount of the claim secured by the lien or sufficient security for this claim.

[1] The definition of “services” in section 1 suggests that the term encompasses any services rendered for consideration in relation to goods and not just the types specifically enumerated. Clearly, this was not intended.

[2] There is some ambiguity in this provision, although its intent is clear. Since the Act does not provide a remedy for common law liens but only for liens arising under the statute, it might be argued that this provision has no effect.

[3] This amendment will be put before the Uniform Law Conference at its next meeting. If it is adopted, the current section 8(3) will provide as follows: “Registration in the Personal Property Registry of a financing statement against the name of the owner with respect to goods perfects a lien on the goods.” Section 8(3.1) will be added so as to refine the term “owner” so that it includes title retention sales agreements, lessees and consignees under transactions that are security agreements under the substance test of a Personal Property Security Act. See, *e.g., supra*, note 22, s. 3(1). A, possibly unintended, by-product of this provision is the conclusion that both the serial number of serial numbered goods and the owner’s name need not be included on the financing statement. Compare, *supra*, note 22, s. 43(6).

[4] Under Saskatchewan law, the buyer would be protected from an inventory financier’s security interests as soon as the goods are appropriated to the sales contract. See *The Royal Bank v. 216200 Alberta Ltd.* [1987] 1 W.W.R. 545 (Sask.C.A.) Under Ontario law, the buyer is

protected as of the moment the sales contract is executed.

See *Spittlehouse v. North Shore Marine* (1997), 7 P.P.S..A.C. (2d) 67 (Ont. C.A.)

[5] It is not clear who falls into this category. Presumably, “entitled” refers to any right in the goods, whether ownership or possessory right, that might be affected by enforcement of the lien.

[6] While the wording of the section refers only to such person, there is no reason why the owner of the goods, if other than this person, should not be able to invoke the system.