

APPENDIX G

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UNIFORM LIENS ACT

Report on Amending the *Uniform Liens Act*

[1] In 1996 the Uniform Law Conference of Canada adopted the *Uniform Liens Act*. This is a comprehensive Act providing for a statutory lien for repairers, storers and carriers for liens. (The Act may be viewed or downloaded from the internet at

[2] There have been several suggestions come forward to amend the *Act*. Some amendments were mentioned by Saskatchewan or British Columbia commissioners. These and other suggestions are gathered together in an article written by Professor Ron Cuming Q.C. "*The Spreading Influence of PPSA Concepts: the Uniform Liens Act*" which is published in (1999), 15 Business and Finance Law Review 1. Excerpts from this article are attached.

[3] As a result of these suggestions, it was decided to constitute a Committee to consider the possibility of recommending amendments to the Act. As most of the members of the earlier Committee, other than Mr. Arthur Close, Q.C., are no longer active participants in the Uniform Law Conference, it was thought advisable to create a new committee adding Ms. Tona Heatherington and Mr. Darcy McGovern, who each had suggested amendments to the Act, as members. In addition, Ms. Andrea Buzbuzian, who is an advisor to the British Columbia registry, agreed to participate in the discussions. Professor Cuming, Q.C. and Mr. Close, Q.C. also served as members of the new Committee and Justice Georgina Jackson chaired its meetings.

[4] The substance of the amendments is explained in the Commentaries. If the Uniform Law Section adopts the proposed amendments, it may be advisable to incorporate them into the *Uniform Liens Act* by way of repeal and re-adoption of that *Act* in its amended form. New commentaries would be prepared so as to permit an enacting jurisdiction to access one Act rather than the Uniform Liens Act and an amending *Act*. The Committee would be pleased to assist in this task.

Submitted on behalf of the Committee by
Justice Georgina Jackson
July 10, 2000

Uniform Liens Amendment Act

Short title

1 This Act may be cited as *Uniform Liens Amendment Act*.

Uniform Liens Act amended

2 The *Uniform Liens Act* is amended in the manner set forth in this Act.

Section 1 amended

3(1) Section 1 is amended:

(a) by repealing the definition of lien and substituting the following:

“lien’ means, except where the context requires otherwise, a lien for services created by this Act, and includes a lien for services created in another jurisdiction in Canada for which a financing statement is registered in accordance with the personal property security legislation of that jurisdiction”;

(b) by repealing the definition of lien claimant and substituting the following:

“lien claimant’ means a person who has a lien on goods pursuant to section 2, and includes a person who has a lien on goods pursuant to legislation of another jurisdiction in Canada”; and

Commentary:

These two amendments are intended to make it possible for an out-of-province lien to be enforced in the same manner as an in-province lien.

Each definition has been amended by adding the underlined words. The former definition of “lien claimant” was confined to “a person who has a lien on goods pursuant to section 2”.

It is common for goods which are the subject of a repairer’s lien to be transported from one jurisdiction to another. Since the *Uniform Liens Act* adopts the conflict provisions of the enacting jurisdiction’s PPSA (see s. 23), the validity, perfection and effect of perfection or non-perfection of such a lien is governed by the jurisdiction where the collateral was situated when the lien was created (see s. 23(a) of the *Uniform Liens Act*). When the goods are moved, perfection continues for a certain period of days after the goods are brought into the province but there is currently no means for the lien claimant to register the lien. Without a means to register the lien, there is also no means to enforce it.

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Once registered the Uniform PPSA provides that the procedural issues which arise when a secured party enforces rights (which includes, by reference, a lien claimant under the *Uniform Liens Act*) are governed by the law of the jurisdiction in which the collateral is located when the rights are exercised.

Thus, this amendment makes it possible for the out-of-province lien claimant to register and, thereby, enforce the lien in the enacting jurisdiction.

No special provision for registering an out-of-province lien is required. An out-of-province lien claimant can register in the system in the same way as a lien claimant who is resident in the enacting jurisdiction.

Note that this proposal reflects a policy choice to permit the registration, and therefore, the enforcement of liens arising only in Canadian jurisdictions. This is consistent with other Uniform Acts.

(c) by repealing the definition of services and substituting the following:

“services’ means any of the following types of services rendered for consideration in relation to goods:

- (a) the provision of labour and materials for the purposes of restoring, improving and maintaining the condition and properties of goods and of salvaging goods;**
- (b) the storage of goods;**
- (c) the transportation, carriage and towage of goods”.**

Commentary:

The underlined words are new. The former definition of “services” uses inclusive language and reads “services rendered for consideration in relation to goods, and includes:”. By using the word “includes”, it suggests that “services” encompasses any services rendered for consideration in relation to goods and not just the types specifically enumerated. This was not intended. The statutory lien created by this Act attaches only when “services” of the type enumerated are rendered.

Section 5 amended

4 Subsection 5(4) is repealed and the following substituted:

“(4) If the conditions mentioned in subsection (1) have not been met when 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 the third party.

“(4.1) For the purposes of subsection (4), a person described in clause 11(2)(a) is a third party who acquires an interest in the goods”.

Commentary:

The former subsection 5(4) reads:

5(4) If a lien claimant acquires possession of goods, an authorization in writing or an acknowledgment of the provision of services with respect to goods after a third party acquires an interest in the goods, the lien is not enforceable against the third party.

Subsection 5(4.1) is new.

The former subsection 5(4) contains an error which, if not corrected, will lead to confusion. It provides that a lien is not enforceable against a third party if a lien claimant acquires possession or the authorization or acknowledgment after the third party acquires an interest in the goods. Under clause 10(2)(a) a lien has priority over a security interest that attaches before the lien attaches. Where the security interest is taken before the lien attaches, the existing subsection 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.” It was intended that subsection 5(4) would refer to an interest acquired during the period of time between the date the lien attaches and the date on which the requirements of subsection 5(4) are met. The new reformulation, which is based largely on Alberta’s Report on Liens, makes this clear.

New subsection 5(4.1) ensures that a judgment enforcement creditor is “a third party (who) acquires an interest in the goods.” Without this amendment, a lien claimant would have priority over a judgment enforcement creditor in circumstances where the lien claimant has an essentially unenforceable lien.

Section 8 amended

5 Subsection 8(3) is repealed and the following substituted:

“(3) Registration of a financing statement in the Personal Property Registry perfects a lien when:

(a) the goods are described by their serial number, if the goods are ‘serial numbered goods’ as defined in the regulations made pursuant to the Uniform Personal Property Security Act [or other applicable regulations of the enacting jurisdiction]; or

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(b) both the owner of the goods that are subject to the lien and the person requesting the services are identified as debtors in the financing statement, if the goods are not ‘serial numbered goods’ as defined in the regulations made pursuant to the Uniform Personal Property Security Act [or other applicable regulations of the enacting jurisdiction]; and

(c) all other requirements of the regulations made pursuant to the Uniform Personal Property Security Act [or other applicable regulations of the enacting jurisdiction] have been met.

(3.1) For the purposes of subsection (3), “owner” includes a buyer, a lessee or a consignee under a transaction to which the Uniform Personal Property Security Act applies”.

Commentary:

Section 2 of the *Uniform Liens Act* and accompanying commentary read as follows:

2 A person has a lien on goods for services provided by that person in relation to the goods at the request of a person in possession of the goods.

Commentary:

This section creates the lien for the services as defined in section 1. It reflects a conscious policy choice to permit the creation of the lien at the request of the person in possession of the goods. This is the position under the western Garagekeepers’ Acts and is intended to permit the widest possible lien creation without considerations of apparent authority or ownership. At common law, a storer could claim a lien against goods entrusted to the debtor by the owner. A common carrier who was by its nature obliged by law to provide services to those willing to pay had a lien on the goods carried.

As the commentary indicates, the section reflects a policy choice: a lien is created on the goods serviced, stored or carried, regardless of who the owner is. If someone requests services and they are provided, the lien is created. The assumption is made that the value of the goods will be enhanced — in the majority of cases — such that the owner should suffer little as a result. This is a policy choice in favour of the person servicing the goods. Once this policy choice is made, the question becomes how best to alert persons who deal with the owner in relation to the goods of the existence of the lien.

The present subsection 8(3) leaves this question open-ended. It reads:

8(3) Registration in the Personal Property Registry of a financing statement with respect to goods perfects a lien on the goods.

In most cases, this will mean that registration will be by way serial number—for those goods which carry a unique number. It does not address the more fundamental problem which is what is the obligation of the lien claimant to describe the owner when someone other than the owner requests the services which result in the lien arising and the goods are not capable of being described by serial number.

The current solution chosen by some jurisdictions has been to require the repairer to register the lien in the name of the owner. For example, in Saskatchewan, *The Personal Property Security Regulations* R.R.S. c. P-6.2 Reg 1, s. 2(1)(h) defines “debtor” for the purposes of *The Garage Keepers Act* to mean “the owner against whose interest in a motor vehicle or aircraft, a lien is claimed pursuant to that Act”. This is so even though the Act creates the lien at the request of the person in possession of the goods. But even this provision does not define what owner means.

In a system of registration like that established by the *Personal Property Security Acts*, a person must have certain minimum rights in order to grant a security interest. Priority rules are developed around this rule. In order for the *Uniform Liens Act* to dovetail with this system and for priority rules to interact in a priority regime with security interests, lien registrations should be made against the owner’s name as well as the name of the person requesting the services in any case where the goods are not serial numbered goods and where the nature of the security agreement is one to which the *Personal Property Security Acts* would apply. “Owner” for these purposes would mean a person who has granted a security interest securing all or part of the purchase price, i.e., the buyer under what used to be called the “conditional sales contract” or the lessee or consignee under an instrument which secures all or part of the purchase price. These latter interests would be considered disguised sales contracts. It also would include true leases for a term greater than one year and true consignments.

The only case on point seems to indicate some confusion in the absence of a specific legislated direction. In *General Electric Capital Equipment Finance Inc. v. Inland Kenworth Ltd.*(1993) 5 P.P.S.A.C. (2d) 272 (B.C.S.C.) Tysoe J. was required to choose the appropriate debtor from between the owner and the lessee who was the registered owner according to the motor vehicles registration. He chose the latter notwithstanding *The Repairers Lien Act* of B.C. required that the name of the owner be included in a financing statement.

In sum, the current *Uniform Liens Act* leaves the choice of the debtor name to the regulations. Given the difference between the *Uniform Liens Act* and the *Personal Property Security Act* which permits a debtor under a security agreement to authorize services which may result in a lien under the former Act, the Committee believes it is preferable to provide a uniform legislated solution.

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In addition to clarifying the position with respect to serial numbered goods, these amendments provide that registration of a financing statement against the name of the owner of the goods and the person requesting the services perfects a lien on the goods.

It should be noted that the Committee is aware that this could result in the subordination of a lien in circumstances beyond the control of the lien claimant. As between the lien claimant and a subsequent buyer or secured party who relies on the registry, however, 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 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. Hence, the policy choice reflected by the proposed amendments.

(Note that “owner” is defined in this section as it does not appear elsewhere in the Act.)

Section 12 amended

6 Subsection 12(2) is amended by striking out “lien perfected by registration” and substituting “perfected lien”.

Commentary:

The present subsection 12(2) reads:

12(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any lien perfected by registration whether or not the buyer or lessee has knowledge of the lien.

This amendment is intended to address the situation where a buyer pays in advance for goods, but does not take possession before the lien attaches and is perfected by possession. Under the existing formulation, the buyer gets no protection even though title in the goods has passed to him or her under sale of goods law. The practical effect of the amendment is that a lien claimant cannot defeat a buyer or lessee of goods in the hands of an inventory seller if the lien claimant permits the inventory seller to take possession of the goods. This is the same rule as exists in the Uniform Personal Property Security Act and all of the Personal Property Security Acts except that of Ontario.

Section 20 amended

7 Subsection 20(1) is repealed and the following substituted:

“(1) The person requesting the services or any other person claiming a proprietary interest or a contractual right to possession of the goods that are subject to a lien 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 right of the lien claimant to take or retain possession of the goods”.**

Commentary:

The existing subsection 20(1) reads:

20(1) The person requesting the services or any other person entitled to goods that are subject to a lien 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 subsection 13(2);**
- (c) the right of the lien claimant to take or retain possession of the goods.**

There are two proposed amendments to this subsection. First, the portion of subsection 20(1) preceding clause (a) is amended by striking out “entitled to goods” and substituting “claiming a proprietary interest or a contractual right to possession of the goods”. The reason for this amendment is that under section 20, the person requesting the services “and any other person entitled to the goods” 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. It is not clear, however, who falls into the category of “person entitled.” The amendment ensures that only those persons who have a proprietary or contractual, i.e., possessory right may apply.

The second amendment addresses a clerical error which crept into the section. Clause 20(1)(b) was inadvertently retained in the Act after the Uniform Law Conference decided that the reverse priority 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. As a result of this decision, the proposed subsection 13(2) was not enacted which makes clause 20(1)(b) meaningless as there is no s.13(2) in the Act.

Section 21 amended

8 Subsection 21(1) is amended by striking out “by the person requesting the services”.

Commentary:

The existing subsection 21(1) reads:

21(1) Where, in an application under section 20 by the person requesting the services, the amount claimed by the lien claimant is paid into court or security for this amount is posted with the court, the [insert titled of proper officer of the court] shall issue to the applicant a certificate setting out the details of the payment or security.

This subsection should apply regardless of who applies under section 20—not just the person requesting the services. Deletion of the words “by the person requesting the services” accomplishes this objective.

Section 25 amended

9 Subsection 25(1) is repealed and the following substituted:

“(1) Any lien arising under the common law of the kind that arises under this Act is abolished”.

Commentary:

Subsection 25(1), as currently enacted, provides for the repeal of “any lien under the common law for which a remedy is provided under” the Act. Since the Act does not provide a remedy for common law liens but only for liens arising under the statute, it might be argued the provision has no effect. The new formulation avoids this possible criticism and potential problem.

(As an aside, it should be noted that 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 by defining services more broadly and repeal all other liens that arise when services are performed in relation to goods. Unless this is done, one of the benefits of modernizing this area of the law will be lost. A Lien Act, like a Personal Property Security Act, should be the vehicle for the integration and rationalization of the area of the law to which it applies. If possible, there should be only one source of law applicable to liens for services.)