

**LAW REFORM COMMISSION OF BRITISH COLUMBIA**

**Working Paper No. 68**

**Liens for Logging Work**

This Working Paper is circulated for criticism and comment. It does not represent the final views of the Commission.

It would be appreciated if comments could be submitted by February 1, 1993.

October, 1992

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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### *Introductory Note*

This paper discusses ideas and suggestions for changing the law.

Public consultation is an important part of preparing sound recommendations for changing the law. The Commission will not make its final recommendations for changes in the law in the topic under review in this paper until the public has a chance to comment.

We would like to have your views, criticism and advice. If the paper does not address your particular concerns, please tell us.

Comments we receive are treated as public documents, although you may request confidentiality.

Public consultation ends February 1, 1993. If you wish to comment, you should do so as soon as possible.

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## A. Introduction

The *Woodworker Lien Act*<sup>1</sup> is a provincial statute designed to protect or secure the interests of wage earners, and possibly other persons, engaged in aspects of the forest industry. It is the frequent target of calls for reform and modernization. Almost 25 years ago, Bull J.A. in *DeCook v. Pasayten Forest Products Ltd.* made the following observations:<sup>2</sup>

It would not seem amiss if our legislators could give thought to modernization of this remedial and protective statute for those who work in the leading industry of this Province to at least determine with some definitude the scope of its application in this involved and Integrated industry, as well as to clarify the extent to which people who work in it are intended to be covered and protected thereby.

More recently, the Commission invited submissions from the public and the legal profession as to appropriate topics for possible inclusion in its program. The *Woodworker Lien Act* generated the largest single number of complaints directed at a particular statute.

Even a quick reading of the *Woodworker Lien Act* makes it obvious why concerns are raised. The Act is a legal relic which embodies an archaic approach to statutory security. It is drafted in outmoded and inaccessible language. It establishes a registration scheme which achieves nothing. Procedures contained in the Act for the enforcement of the lien have escaped the modernization and rationalization that other aspects of civil procedure have received in recent years and a reading of the case law surrounding the Act raises further concerns over the scope of its operation.

## B. Some History

The first legislation aimed at securing wages in the forest industry was introduced in 1888. The *Protection of Workmen's Wages Act, 1888*<sup>3</sup> stipulated that persons entering into certain contractual arrangements to buy logs must require the production, by the supplier, of a receipted pay roll relating to the supplier's workers' wages. A failure to comply would subject the buyer to personal liability to workers for unpaid wages. The Act obliged the buyer to retain an amount equal to any unpaid wages for the benefit of the workers involved.

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<sup>1</sup> R.S.B.C. 1979, c. 436. The full text of the Act is set out as Appendix B to this paper.

<sup>2</sup> *DeCook v. Pasayten Forest Products Ltd.*, (1967) 58 W.W.R. 561, 60 D.L.R. 280 (B.C.C.A.).

<sup>3</sup> S.B.C. 1888, c. 40. These provisions have been carried forward into the current legislation. See Appendix B, ss. 37, 38, 39.

Seven years later a second Act was introduced. The *Woodmen's Lien for Wages Act, 1895*<sup>4</sup> created new rights for persons employed in the forest industry. The heart of the Act was set out in section 3:

3. Any person performing any labour, service, or services in connection with any logs or timber in the Province of British Columbia shall have a lien thereon for the amount due for such labour, service or services, and the same shall be deemed a first lien or charge on such logs or timber....

Other provisions defined relevant terms, and set out the procedures for perfecting and enforcing the lien created by section 3. Both Acts existed independently<sup>5</sup> until 1910 when they were joined into a single statute.<sup>6</sup>

The substance of the legislation has changed little since its introduction. Amendments made in 1905 and 1919 slightly enlarged the scope of the Act<sup>7</sup> and other amendments made minor revisions to the terminology employed by the Act and the enforcement procedures.<sup>8</sup> The Act is now almost 100 years old and seems never to have been the subject of any systematic review or analysis.

### C. This Working Paper

The aim of this Working Paper is to define a new legislative framework for statutory security to assist those who work in the forest industry. In the following chapter we describe the principal features of the Act and its operation in a relatively summary fashion,<sup>9</sup> along with our conclusions. This sets the stage for our proposals for new legislation described in subsequent chapters.<sup>10</sup>

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<sup>4</sup> S.B.C. 1895, c. 58.

<sup>5</sup> Although from 1897 to 1910 the Act of 1888 formed part of the *Mechanics' Lien Act*. See R.S.B.C. 1897, c. 132, ss. 26, 27, 28.

<sup>6</sup> See S.B.C. 1910, c. 54.

<sup>7</sup> See S.B.C. 1905, c. 57; S.B.C. 1919, c. 92.

<sup>8</sup> See S.B.C. 1928, c. 56; S.B.C. 1932, c. 61; S.B.C. 1935, c. 90; S.B.C. 1948, c. 107; S.B.C. 1962, c. 70; S.B.C. 1989, c. 40. The title *Woodworker Lien Act* has its origin in the statute revision of 1979.

<sup>9</sup> A more leisurely and comprehensive examination of the Act and the surrounding jurisprudence has been relegated to Appendix A.

<sup>10</sup> This paper will also briefly consider the *Tugboat Worker Lien Act*, R.S.B.C. 1979, c. 417, which also provides for a lien on forest products. This Act suffers most of the failings of the *Woodworker Lien Act* although it has not raised a similar level of concern. This is undoubtedly a reflection of its relative obscurity and a fact that it operates in a relatively narrow economic sphere. See Chapter IV.



**A. Principal Features of the Act**

## 1. Persons Entitled to a Lien

The question of who is entitled to a lien under the *Woodworker Lien Act* has been the most persistently litigated of the issues surrounding the Act. A recurring question concerns the status of so-called independent contractors. A review of the jurisprudence suggests that the right to claim a lien is governed by the following rules:

1. The claimant must be a wage earner.
2. For the purposes of 1 “wages” may be remuneration
  - (a) based on time worked or
  - (b) based on production (piecework) or
  - (c) based on *quantum meruit*.
3. A corporation may not be a claimant but an officer or shareholder who is a wage earner (from the corporation) may be entitled to assert a lien.
4. Supplying tools or equipment does not disentitle the claimant to a lien covering both labour and the use of equipment if labour and skill are substantial components in the arrangement.
5. No lien lies for the supply of equipment only or for the supply of equipment with the claimant as operator if the supply of equipment is the substance of the arrangement.
6. The “substance of an arrangement” depends on the facts of each case.
7. The claimant must have provided the labour or services personally and not employed others to do it.

## 2. What Work Will Give Rise to a Lien?

The Act gives a lien for “labour or services,” an expression defined in the Act to include most work usually associated with a timber harvesting operation. It also includes processing operations, giving millworkers status to claim liens.

## 3. What Property is Subject to the Lien?

The lien is against the “logs or timber” (also a defined expression) on which the work giving rise to the lien was actually done. Where those logs or timber have been mingled with other logs arising out of the same logging operation, the lien attaches to all the logs in the mass.<sup>1</sup>

## 4. Filing Requirements

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<sup>1</sup> The cases suggest that the lien may survive other kinds of mingling as well. See Appendix A.

The lien arises at the time labour or services are performed,<sup>2</sup> but the claimant who wishes to preserve its priority must file a statement of the lien in a registry of the Supreme Court.<sup>3</sup> The statement must describe the claim and the logs or timber against which the lien is asserted<sup>4</sup> and be filed within 30 days after the work was performed.<sup>5</sup>

## 5. Priority of the Lien

The Act gives a woodworker lien high priority. It is “deemed to be a first lien or charge on the logs or timber” with “precedence over all other claims or liens.”<sup>6</sup>

## 6. How is the Lien Enforced?

The most numerous provisions of the *Woodworker Lien Act* are those which set out the procedure for enforcing the lien. The Act provides a relatively complete, albeit complex, body of rules for the enforcement of lien claims. These are described at length in Appendix A.

The most distinctive feature of the procedural provisions is the Writ of Attachment which a lien claimant may cause to be issued *ex parte* directing the sheriff to seize logs or timber pending proceedings to enforce the lien.<sup>7</sup> The Writ of Attachment can act as originating process in an enforcement proceeding.<sup>8</sup>

## 7. Payroll Receipts

Sections 37 to 40 of the *Woodworker Lien Act* create an extraordinary remedy in favour of wage earners. It casts a duty on every person making payments under certain logging contracts to require the production of payroll records. If it appears by the records that any worker is unpaid that person is required to retain, for the use of the worker, the amount unpaid. A failure to do so renders the person liable to an unpaid worker for the wages due.

# B. Current Use of the Act

## 1. Registry Survey

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<sup>2</sup> See, *Warehouse Security Finance Co. v. Niemi (No. 4)*, [1944] 3 W.W.R. 567, 580 (B.C.C.A.).

<sup>3</sup> *Woodworker Lien Act*, R.S.B.C. 1979, c. 436, s. 3.

<sup>4</sup> *Ibid.* s. 4.

<sup>5</sup> *Ibid.* s. 5. Exactly when this time begins to run has been an issue in some cases.

<sup>6</sup> *Ibid.* s. 2. An exception to the first priority is made for claims of the Crown and certain other interests (timber slide companies). Problems, issues and unanswered questions which surround the priority of the lien are discussed in Appendix A.

<sup>7</sup>

<sup>8</sup>

As part of our background research on this study we attempted to obtain information concerning the way the Act is currently being used in practice. Our point of entry for this research was the Supreme Court registries where lien statements are filed under section 3 of the Act. With the co-operation of the Chief Registrar a questionnaire was circulated to all registries in the province requesting information for the years 1989, 1990 and 1991. The information sought included the total number of lien claims filed for each of those years, their total values and the value of the largest individual lien filed in that period. Information was also sought concerning the filing schemes adopted for recording woodworker liens and the frequency with which searches for liens are requested.

## 2. Number and Distribution of Filings

Responses to the survey were received from 33 Supreme Court registries. The numerical results are set out in tabular form below.

Registry	Number filed			Total	Value	of Liens	Largest Lien	Search Frequency
	89	90	91					
<i>Victoria</i>	0	0	5	\$0.00	\$0.00	\$140,744.00	\$58,400.00	almost never
<i>Creston</i>	0	0	1	\$0.00	\$0.00	\$36,617.00	\$36,617.00	never
<i>Vanderhoof</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Chilliwack</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Port Hardy</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Nanaimo</i>	0	3	2	\$0.00	\$173,000.00	\$3,969.00	\$134,000.00	never
<i>Prince George</i>	6	15	16	\$49,707.00	\$72,683.00	\$388,291.00	\$79,062.00	one per month
<i>Fort St. John</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Courtenay</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Smithers</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Port Alberni</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Rossland</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Quesnel</i>	2	0	0	\$11,982.00	\$0.00	\$0.00	\$6,790.00	never
<i>Duncan</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Prince Rupert</i>	3	1	0	\$236,617.00	\$1,673.00	\$0.00	\$224,516.00	rarely
<i>Vancouver</i>	0	35*	4	\$0.00	\$798,156.00	\$275,237.00	\$347,471.00	never
<i>Vernon</i>	2	0	0	\$22,634.00	\$0.00	\$0.00	\$13,150.00	never
<i>Campbell River</i>	3	2	2	\$31,000.00	\$14,100.00	\$12,000.00		never

<i>Terrace</i>	3	1	0	\$87,823.00	\$6,554.00	\$0.00	\$54,945.00	twice per year
<i>Penticton</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>New Westminster</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	very few
<i>Golden</i>	0	0	1	\$0.00	\$0.00	\$10,000.00	\$10,000.00	never
<i>Dawson Creek</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Fort Nelson</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Powell River</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Salmon Arm</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>100 Mile House</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Cranbrook</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Ashcroft</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Nelson</i>	0	1	1	\$0.00	\$6,371.00	\$25,413.00	\$25,413.00	once per year
<i>Grand Forks</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	never
<i>Kitimat</i>	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	twice per year
<i>Williams Lake</i>	0	1	0	\$0.00	\$30,000.00	\$0.00	\$30,000.00	very rare
<i>Totals</i>	19	59	32	\$439,763.00	\$1,102,537.00	\$892,271.00	\$347,471.00	
<i>Average Lien Claim</i>				\$23,145.42	\$18,687.07	\$27,883.47		
<i>Three Year Average</i>				\$22,132.46				
* 31 of the 35 claims filed in the Vancouver registry in 1990 were against the same "owner." This suggests that they arose out of a single insolvency.								

The following points might be noted. In absolute numbers, the volume of liens filed is not high.<sup>9</sup> In most registries no liens were filed in any of the three years under review. The heaviest consistent volume of usage seems to be by those who register in Prince George. There is no requirement for a connection between the registry in which the lien statement is filed and the location of the logs or timber or the site of the activity which gave rise to the lien claim. A lien may be filed in any registry of the Supreme Court.<sup>10</sup> Thus it is possible to file a lien statement in a registry on Vancouver Island for work carried out in the Kootenays and vice versa.<sup>11</sup>

<sup>9</sup> The statistics are somewhat distorted by the filing, in the Vancouver Registry, of a large number of claims which appear to arise out of a single insolvency.

<sup>10</sup> Before the County Court was abolished in 1989, lien statements were to be filed in the registry of the County Court for the County in which the work was performed.

<sup>11</sup> This is more than a hypothetical possibility. In our research we encountered a lien filed in the Vancouver Registry based on work carried out in the Prince George region.

### 3. Value of Individual Claims

One of the most striking features of the survey is the value claimed in many of the individual lien statements. Over the three-year period under review, the average lien claim is approximately \$22,000. Of the 12 registries which reported any liens filed at all, in nine of them the largest lien filed exceeded that average figure. Very large liens were not uncommon. Three liens were recorded in excess of \$100,000 and the highest of those claims was for \$347,471.<sup>12</sup>

### 4. Registry Practices

There is no common practice or system among the Supreme Court registries for filing and maintaining the records of woodworker liens. In some registries, the process consists merely of placing the lien statement on a “Shannon file” which is kept in the registry. In other registries, an attempt is made to integrate filings under the *Woodworker Lien Act* with the system used for civil litigation files. For indexing purposes this involves assigning a notional plaintiff and defendant to the file. This is a somewhat arbitrary exercise and, depending on the registry involved, the file might be indexed as:

*Woodworker Lien Act* v. [name of lien claimant]  
or  
*Woodworker Lien Act* v. [name of person indebted to lien claimant]  
or  
[name of lien claimant] v. [name of person indebted to lien claimant]

It is important to note that the person indebted to the lien claimant will not necessarily be the same person as the owner of the logs against which the lien is claimed. No registry appeared to maintain a system through which a prospective buyer of logs or timber could confidently do a search for liens using the owner’s name as a search parameter.

According to the responses to our survey, searches of the registry are seldom requested.

### 5. Contents of Individual Lien Claims

In the course of our research we examined between 40 and 50 statements of lien claim filed in the last three years. These included the claims filed in the Vancouver registry which were examined by a member of the Commission’s research staff as well as copies of typical lien claims which were sent to us by registry officials in response to the survey. The results of this part of our research do not lend themselves to quantification. They do, however, permit certain inferences to be drawn about the use being made of the Act.

(a) *Kind of Work on which Lien Claims are Based*

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<sup>12</sup> The highest claim was by a company in respect of heavy-lift helicopter air transportation and falling and bucking services.

The kinds of work for which liens are being claimed seem to be in respect of timber harvesting and associated activity. The Act does not appear to be used to any extent by those engaged in the processing end of the forest industry although millworkers and the like do have status to claim liens.

*(b) Who are Claiming Liens?*

It also seems fairly clear to us that large numbers of liens are asserted by claimants who probably do not have status according to the tests (derived from the cases) which were set out earlier in this chapter. In some cases, the lien statement itself speaks of “contracting.” In other cases, the claimant is an incorporated entity which has no status under the Act. In many cases the very size of the amount claimed suggests that the claim is based on something other than arrears of salary or wages. As pointed out above, the average lien claim over the period under review is in excess of \$22,000 and it is difficult to see how any worker could allow wages to fall into arrears to that extent.

*(c) Description of Logs and Timber*

The way in which the logs and timber are described allows other inferences to be drawn. First, the descriptions suggest that most liens are asserted against logs and timber which continue to be under the effective control of their owner or of a contractor engaged by their owner.<sup>13</sup> Although in theory the lien persists against the buyers of logs and timber<sup>14</sup> in practice lien rights do not appear to be asserted in these circumstances.

## **C. Principal Conclusions**

Our survey of the Act, the jurisprudence, and the current practice, brief at it is, leads to a number of conclusions that have implications for reform of the law in this area. The basic conclusion is that the Act is out of touch with current needs and practices and is deficient in a number of ways.

### **1. The Act is Obscurely Drafted**

The drafting is archaic and obscure. An example of the difficult and convoluted drafting of the Act is found in section 10:

10. Where an attachment issues in the first instance, the statement of claim and defence or dispute note, and proceedings to judgment, may be the same as provided above. Where a suit has been begun by writ or summons, and where an attachment issues after proceedings have been begun by writ or

---

<sup>13</sup> Some lien claimants, however, were not sure who owned the logs or timber against which the lien was claimed. Presumably they knew the identity of the person who engaged them, but not who engaged that person.

<sup>14</sup> *Supra* n. 3, s. 5.

summons, the proceedings shall continue and be carried to judgment under the writ or summons, except those that must be taken under the attachment.

Other provisions of similar difficulty can be cited. Although the Act appears to address the relevant issues in great detail, in reality many important issues surrounding the lien are left at large. A number of these are explored in the Appendix.

## 2. There is a Gap Between Law and Practice

In those areas where the law appears to be settled, there is a significant gap between that law and what actually occurs in practice. The best illustration concerns the status to claim a lien. The case law surrounding the *Woodworker Lien Act* suggests that only a relatively narrow group of individuals are entitled to claim liens. Limited companies, and most contractors, do not appear to have status. Our empirical research, however, suggests that large numbers of lien statements are filed by persons who do not have status.<sup>15</sup> There is obviously a demand for lien rights by those for whom the Act, in its current form, provides a very shaky and uncertain vehicle.

## 3. The Enforcement Procedures are Out-of-date

British Columbia has been very active over the past decade in modernizing the rules of civil procedure to provide effective machinery for dealing with disputes and claims. The focus of these reforms have been the *Rules of Court*. Procedural laws which are contained in individual statutes have escaped this modernizing process. The provisions of the *Woodworker Lien Act* are a case in point. While a lawyer or judge in the late Victorian era would probably have felt quite comfortable with the procedural features of the Act, today they constitute no more than a legal curiosity. Enforcement machinery more in keeping with contemporary needs and practices is clearly required.<sup>16</sup>

## 4. The Provisions Concerning Payroll Receipts are Unworkable

The oldest portion of the Act is also the most antiquated. We refer to sections 37 to 40 which concern payroll receipts. These provisions harken back to an age of quill pens and high stools. The kind of payroll sheet which the Act requires seems to be wholly incompatible with modern business procedures in which payrolls are processed by computer and payment is frequently made through a direct deposit into the worker's bank account. The survival of this measure merely constitutes a trap for persons obtaining logs and timber under contracts to which it applies.

## 5. The Act is Based on an Obsolete Economic Model

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<sup>15</sup> It is difficult to ascertain how often the status of the lien claimant is put in issue after a lien statement has been filed. In large numbers of cases, the court file consists merely of the lien statement and there is no evidence of further proceedings either to enforce the lien or to have the lien discharged.

<sup>16</sup> Perhaps one reason why most lien claims never proceed beyond the filing stage is the formidable challenge presented by the enforcement machinery.

The Act's greatest failing is that it was created to accommodate an economic model of the forest industry as it existed many years ago. This model is relatively simple. Logging operations were small and locally based. The person who owed the debt on which the lien claim was based was normally the owner of the logs or timber in issue, thus the existence of the lien did not normally work an unfairness on the owner. There were few competing interests likely to arise in the logs or timber so there was no obvious need for a detailed priority scheme.

Given the simplicity of the economic model it is not surprising that the legislature would respond with a simple scheme for statutory security. It probably suited the needs of the time very well for the statute simply to provide for a lien which was a "first charge" and call for its filing in the local County Court.<sup>71</sup>

Today the economic environment is vastly more complex. First, the ownership of a large proportion of the harvesting rights.<sup>18</sup> In the province has become concentrated in a small number of major forest companies with the balance being in the hands of "small operators." The contracting and sub-contracting of work within the forest industry has become a predominant pattern, even by the major forest companies who do not carry out all of their harvesting operations "in house." This may reflect either a business decision or a requirement imposed by the Crown as a condition of obtaining the timber harvesting rights. Forest work is often contracted out to a "full phase contractor" who assumes responsibility for all aspects of the timber harvesting operation. Particular tasks such as road building, hauling, and the like may, in turn, be sub-contracted to other operators and certain specialized functions may be sub-contracted even further.

The result is a pyramid shaped structure of linked contracts. At the apex of the pyramid is the person who owns the timber harvesting rights and who will be the owner of the logs and timber once they are cut. Below the owner may be the full phase contractor. Lower yet in the pyramid may be one or two layers of sub-contractors, with the actual workers and wage-earners at the base. In a large pyramid a worker may be as many as five contractual links removed from the owner of the logs or timber. Where the harvesting rights are owned by a smaller operator, the pyramid will be somewhat truncated.

An owner of logs or timber is liable (to the value of that property) to a person who is lower in, or at the bottom of, the pyramid. The fairness of this result depends on whether the pyramid is a shallow one or a tall one. In a shallow pyramid (the economic model envisaged in the *Woodworker Lien Act*) the result is unobjectionable since the owner will normally be the party who is in default of the obligations to the lien claimant. If the pyramid is a tall one, however, the current Act imposes liability on all owners of logs, whether or not they are in default. It provides no machinery which allows owners to limit their liability or otherwise protect their interests. The fairness of this may be questioned.

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<sup>17</sup> Filing in County Court ended with the merger of the County and Supreme Courts in 1989.

<sup>18</sup> A right to harvest Crown timber may take a number of forms. See, *Forest Act*, R.S.B.C. 1979, c. 140, s. 10.



## 6. Conclusion

It is our conclusion that the *Woodworker Lien Act* is beyond repair and no amount of revision or redrafting can save it. If legislation is to provide a form of statutory security for those who work in the forest industry, a wholly new and modern Act is required. The features of such an Act are described in the following chapter.

### A. Statutory Security Generally

We have given some consideration to the question whether the *Woodworker Lien Act* ought simply to be repealed and not replaced. The legislation was originally conceived as a measure for the protection of workers' wages and it may have been the only protection afforded forest workers in the first decades of this century. But that is no longer true. Wage earners are protected in other ways.

Perhaps the most important enactment which assists unpaid workers is the *Employment Standards Act*.<sup>1</sup> The Act nominates the Director of Employment Standards as a "watchdog" on behalf of workers with respect to wages. A number of collection measures may be taken under the Act.<sup>2</sup> In particular, an unsatisfied claim for wages may result in the issue of a "certificate" that, on filing in court, is enforceable in the same fashion as a judgment against the employer.<sup>3</sup> An important provision of the Act is section 15 which creates a lien over all an employer's property to secure unpaid wages.

It is significant that a worker who intends to look to forest products owned by the employer to satisfy unpaid wages, and relies on the lien created by section 15, is in a better position than if the claim had been asserted under the *Woodworker Lien Act*. Woodworker liens are subordinate to Crown claims<sup>4</sup> while a lien under the *Employment Standards Act* has priority over them.

As important as the substantive rights given to workers by the *Employment Standards Act* is the administrative assistance they receive. The Director actively pursues the available remedies on behalf of the workers. The worker does not bear the burden of actively enforcing the claim, as is the case under the *Woodworker Lien Act*.

Workers also enjoy priority under various other statutes in respect of wages.<sup>5</sup> It might, therefore, be argued that the *Woodworker Lien Act* adds so little to other schemes of wage earner protection that it is not worth retaining for that reason only. Those who participate in the forest industry other than as wage earners might view the repeal of the Act as a loss, but as the Act is currently framed their right to assert lien claims rests on a very dubious and fragile basis. To the

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<sup>1</sup> S.B.C. 1980, c. 10.

<sup>2</sup> *Ibid.*, ss. 12 to 25.

<sup>3</sup> *Ibid.*, s. 14. The Act also has a self-contained procedure for the attachment of debts. Sees, 16.

<sup>4</sup> *Woodworker Lien Act*, R.S.B.C. 1979, c. 436, s. 2(1).

<sup>5</sup> See, *Creditor Assistance Act*, R.S.B.C. 1979, c. 80, s.36; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s.46; *Company Act*, R.S.B.C. 1979, c. 59, s. 95; *Estate Administration Act*, R.S.B.C. 1979, c. 114, s.114(1)(c).

extent that these participants are able to use the legislation as a lever to induce payment, it might be asked why they should be entitled to a coercive collection device which is denied other players in the economy. This line of argument also suggests that repeal may be appropriate.

While we would welcome submissions directed at this issue, our provisional view is that some form of statutory security should continue to be available for those who work in the forest industry. They work in an environment where consensual security is not widely used and it is only fair that both workers and contractors have protection of a kind that the *Woodworker Lien Act* provides.

It is important to recognize that expressly protecting contractors will result in a very significant shift in the kinds of interests the law will seek to protect. Developing legislation that extends to contractors requires balancing a different set of interests, with a different set of trade-offs than is found in an Act intended solely for the protection of workers' wages. While workers will continue to be protected, the new paradigm will be the contractor.

## **B. A New Conceptual Framework**

The perceptive reader will note that the expression “statutory security” has been used in preference to “lien” in describing new legislation. This reflects our conclusion that new legislation should, as far as possible, build on the *Personal Property Security Act*<sup>6</sup> (PPSA). The PPSA was enacted in 1989 and provides a new legal framework for the operation of a whole range of distinct security devices which formerly led a separate legal existence. Devices such as conditional sale agreements, chattel mortgages and a variety of corporate instruments have been brought within a single unifying concept, the “security interest” which is the basic intellectual unit of reckoning on which the PPSA operates. Once a particular arrangement is identified as a security interest most of its characteristics and attributes can be determined with reference to the PPSA. The PPSA defines the priority enjoyed by the security interest in relation to other security interests in the same property. It also defines the legal position of persons who buy the property from its owner.<sup>7</sup>

We propose that a new legislative framework be firmly tied to the *Personal Property Security Act*. Incorporating the PPSA by reference into new legislation will provide a central conceptual pillar which can then be altered or modified as may be needed to meet the exigencies of forest work. This will also permit legislation which is relatively short and uncluttered. In the next section we set out such an Act.

In this paper we can do no more than sketch the roughest outline of the *Personal Property Security Act* and its application. The PPSA provides an extremely detailed and sophisticated legal

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<sup>6</sup> *Personal Property Security Act*, S.B.C. 1989, c. 36.

<sup>7</sup> See the discussion in part E. of this chapter.

regime and those who wish to have more specific information about it should consult one of the many specialized sources available.<sup>8</sup> As Appendix E to this paper we set out those provisions of the PPSA which are of particular significance to our proposals.

### **C. A Draft *Forest Work Security Act***

## **Forest Work Security Act**

### **Interpretation**

1. (1) In this Act

“forest products” means logs or timber which have been cut and trimmed but not further processed,

“forest work” means all work incidental to a timber harvesting operation, whether carried out at a harvesting site or a handling site and includes hauling,

“forest work security interest” means a security interest arising under section 2,

“forest worker” means a person engaged or employed to do forest work and includes a person engaged under a contract who supplies equipment or employs others to do forest work,

“handling site” means a place where forest products are held for storage, sorting, booming or transporting, whether located at the harvesting site, a processing site, or some intermediate location and, where the site serves numerous owners, the forest products of each owner are physically segregated,

“harvesting site” means the place where logs and timber are cut and trimmed,

“hauling” means transporting forest products

- (a) within a harvesting site,
- (b) between a harvesting site and a handling site, or
- (c) between two handling sites,

“obligor” means a person who owes money to a forest worker in respect of forest work,

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<sup>8</sup> See, Cuming and Wood, *British Columbia Personal Property Security Act Handbook* (1990); McLaren, *Secured Transactions in Personal Property in Canada* (2nd ed., 1989). See also Law Reform Commission of British Columbia, *Report on Personal Property Security* (LRC 23, 1975).

“owner” when used with reference to forest products means the owner of the forest products at the time a forest work security interest attaches,

“security interest” has the same meaning as in the *Personal Property Security Act*.

### **Security interest for work**

2. To secure the payment of money owed to a forest worker for forest work, the forest worker has a security interest in all forest products
  - (a) located at the harvesting site or handling site where the forest work was performed, and
  - (b) located at any handling site to which forest products are normally hauled from a place referred to in paragraph (a)that are
  - (c) owned by the obligor, or
  - (d) owned by a person that engaged the obligor to carry out the forest work.

### **Attachment of security interest**

3.
  - (1) A forest work security interest attaches when the forest work for which the money is owed is performed.
  - (2) A forest work security interest does not attach to the proceeds of forest products.
  - (3) A forest work security interest that attaches to forest products described in paragraph (d) of section 2 is limited to the amount owed from time to time by their owner to the obligor.
  - (4) For the purposes of subsection (1), hauling is deemed to be performed at its point of origin.

### **Perfection and priority of security interest**

4.
  - (1) The priority of a forest work security interest must be determined in accordance with the *Personal Property Security Act*.
  - (2) For the purposes of subsection (1) a forest work security interest is deemed to be

- (a) a purchase money security interest given by the owner of the forest products, and
  - (b) perfected upon attachment as if the forest worker had registered a financing statement under the *Personal Property Security Act* and had given notice to other interested persons under section 34(2) of that Act before the owner obtained possession of the forest products.
- (3) Despite subsection (1), where there is a competition between two or more forest work security interests, all the competing forest workers are entitled to share ratably in any funds that become available as a result of one or more of the forest work security interests whether through an enforcement measure taken by any of them against the forest products subject to the security interests, or otherwise.

### **Termination of security interest**

5. (1) A forest work security interest in forest products becomes unattached and unperfected when
- (a) the forest products cease to be located at either
    - (i) the place they were located when the security interest attached, or
    - (ii) a handling site to which forest products are normally hauled from a place referred to in subparagraph (i), or
  - (b) the forest products cease to be forest products through processing.
- (2) Despite subsection (1), a forest work security interest remains attached and perfected while the forest products are being hauled.

### **Remedies**

6. (1) A forest work security interest may be enforced under Part 5 of the *Personal Property Security Act*, but any remedy involving the physical seizure of forest products must be exercised only through a person authorized to act under a writ of seizure and sale to which the *Court Order Enforcement Act* applies.
- (2) A person who has a forest work security interest may apply *ex parte* for an injunction restraining the owner of the forest products from any act
- (a) that would result in a loss of priority under the *Personal Property Security Act*, or
  - (b) that would cause the forest work security interest to become unattached and unperfected under section 5.

(3) Where a forest work security interest has attached to forest products described in paragraph (d) of section 2, and the obligor is in default, the forest worker may give to the owner of the forest products a notice, setting out particulars of

- (a) the identity of the obligor and the forest worker,
- (b) the forest products to which the security interest has attached, and
- (c) the default and the amount claimed.

(4) Unless the court otherwise orders, where a forest worker has given a notice under subsection (3)

- (a) no subsequent payment by the owner to the obligor operates to reduce the amount owed by the owner to the obligor for the purposes of section 3(3), and
- (b) the owner may, without liability to the obligor, refuse to make any further payments to the obligor

until the default specified in the notice is cured.

### **Application of *Personal Property Security Act***

- 7. (1) The *Personal Property Security Act* applies to a forest work security interest.
- (2) Section 72 of the *Personal Property Security Act* applies to notices given under section 6(3).
- (3) If there is a conflict between this Act and the *Personal Property Security Act*, this Act prevails.

### **Repeals**

- 8. (1) The *Woodworker Lien Act* is repealed.
- (2) The *Tugboat Worker Lien Act* is repealed.<sup>9</sup>

## **D. An Overview of the Proposed Act**

- 1. General

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See Chapter IV.

Section 1 defines the pivotal concepts used in the Act. Two key expressions which go to the scope of the Act are “forest work” and “forest worker.” “Forest worker” identifies the persons who are entitled to claim a security interest under the Act. It expressly includes a person engaged under a contract.<sup>10</sup> “Forest work” describes the activity that will give rise to a security interest under the Act. That is defined with reference to timber harvesting work carried out at either a “harvesting site” or a “handling site,” both defined terms. “Forest work” also includes “hauling.”

The concept of the harvesting site and the handling site recur in section 2 of the Act. Section 2 is the provision which actually creates the security interest in favour of the forest worker. Paragraphs (a) to (d) of section 2 identify the forest products which become subject to the security interest.<sup>11</sup> These are defined with reference both to their location and ownership.

Section 3 goes on to describe some features of the creation of the security interest. It uses the term “attachment” to denote the concept of logs and timber becoming the subject of a security interest.<sup>12</sup> Subsection (2) and (3) place some limitations on the security interest.

The Act is linked to the PPSA at a number of levels. The formal linkage occurs in section 7(1) which provides in general terms for its application. The application of the PPSA on particular issues or in particular circumstances is also stipulated. For example, section 4(1) provides that the priority of a security interest arising under the Act is determined in accordance with the PPSA. Section 4(2) characterizes, for the purposes of the priority rule, the statutory security interest as being a “purchase money security interest”<sup>13</sup> that is deemed to be perfected<sup>14</sup> upon its attachment. This characterization has a very important consequence. It results in a security interest with a very strong claim to priority. It should defeat most competing secured parties.<sup>15</sup> This priority is achieved, moreover, without any need to register the security interest. That is the effect of deeming the security to be perfected upon attachment.

The existence of a security interest of such high priority, which is not the subject of any recording or registration, poses an obvious danger if the forest products subject to it are allowed to enter the stream of commerce. The policy of the draft Act, therefore, is to terminate the security interest once the forest products subject to it no longer have a physical link to the

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<sup>10</sup> “Person” includes a corporation: *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29.

<sup>11</sup> In the terminology of the PPSA, the property that is the subject of a security interest is the “collateral.”

<sup>12</sup> “Attachment” is a term of art used in the PPSA to denote the time at which a security interest comes into existence. It is not a defined term and its meaning and significance arise by inference out of its usage. *See Cuming and Wood, Supra* n. 8 at 83. A security interest that has attached is normally enforceable against the debtor although it may not be enforceable against other persons unless it is also “perfected.” *See infra* n. 14.

<sup>13</sup> The “purchase money security interest” (PMSI) is a defined expression in the PPSA. *See* Appendix E. A PMSI receives high priority.

<sup>14</sup> “Perfection” is an undefined term of art used in the PPSA. A security interest is said to be perfected when it is enforceable against third parties. A security interest is normally perfected by registration in the registry established under the PPSA or by the secured party taking physical possession of the collateral. *See Cuming and Wood, supra* n. 8 at 115.

<sup>15</sup> In effect this preserves the strong priority of woodworker liens under the current legislation.



harvesting operation. that is the function of section 5 which terminates the security interest once the forest products are no longer at a “harvesting site” or a “handling site” as defined. <sup>6</sup><sub>1</sub>

Before the security interest terminates, however, it may be necessary to enforce it. One advantage to incorporating the PPSA by reference is that this brings in a complete and detailed code of remedies which is set out in Part 5 of the PPSA. The *Forest Work Security Act*, therefore, need say nothing about remedies except to vary or supplement those which flow automatically from the PPSA. One modification is found in section 6(1). The PPSA authorizes secured parties to take possession of collateral (the property subject to a security interest) on default. This is, essentially, a self-help remedy. Where security has not been the subject of an agreement between the parties, unrestricted self-help may be inappropriate. Section 6(1), therefore, requires that self-help remedies be exercised only through individuals who normally execute analogous court process. This should avoid any breaches of the peace that might otherwise flow from enforcement under the PPSA.

Section 6(2) expressly authorizes a forest worker with statutory security to apply for an injunction to preserve rights arising under the Act. It serves a function similar to that of the Writ of Attachment under the *Woodworker Lien Act*.

## 2. Privity Issues

One of the less straightforward features of the draft *Forest Work Security Act* is the set of trade-offs that recognize and attempt to accommodate the pyramid structure of contracting within the forest industry described in the previous chapter. The challenge is to construct a legislative scheme which does not result in an injustice to the owner of logs or timber that are subject to the statutory security. Injustice can arise when the owner’s property becomes subject to security and the owner is not in default. This is a problem, of course, that can arise under the current Act.

One possible approach is to limit the statutory security to logs and timber that are owned by the person who is in default of obligations owed to the forest worker that claims the security. The functional effect of this would be that only those forest workers who are in a contractual relationship with the owner could take advantage of the statutory security. Persons at the third level from the top of the “pyramid,” or lower, would derive little comfort from the Act. An act that adopted this approach would, in practice, be of limited utility. <sup>7</sup><sub>1</sub>

An alternative might be to allow any forest worker at any level of the pyramid to assert a right to security, but to require that the owner retain a holdback which, by definition, would be sufficient to discharge the security. Our *Builders Lien Act*<sup>18</sup> provides a precedent for a structure of

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<sup>16</sup> This reflects our perception of the way in which the *Woodworker Lien Act* is currently used in practice.

<sup>17</sup> This approach operates more acceptably in the areas of garagekeepers’ liens where the owner of the object of the lien and the debtor are usually the same person.

<sup>18</sup> R.S.B.C. 1979, c. 40.

rights along these lines, but it is not a happy precedent. Everyone seems to agree that the holdback mechanism under that Act has serious deficiencies,<sup>19</sup> but there is less agreement as to the proper approach. Structural revisions to the *Builders Lien Act* have been on this province's reform agenda for over 20 years although very little change has emerged.

We seriously doubt that anyone in the forest industry would welcome a legislative scheme as complex and intrusive as the *Builders Lien Act* to regulate the flow of money and govern property rights among the participants. We have therefore rejected this option.

The approach adopted in the proposed *Forest Work Security Act* is to allow a forest worker to claim security in forest products owned by the person who has defaulted on obligations to the forest worker (the "obligor" in the Act) and in forest products owned by the person who engaged the obligor. In the latter instance, however, the amount secured by the forest products is limited to the amount owed by their owner to the obligor.<sup>20</sup> Simply put, the Act permits a person at the third step of the pyramid to assert a (potentially) limited claim to security without exposing the owner of the logs or timber to an unfair risk.

At first blush this scheme appears to leave some forest workers unprotected, but we hope that its functional effect will be to concentrate the protection where it is most needed. While we do not claim that our empirical research provides clear or definitive answers as to which segments of the forest industry tend to generate the largest volume of lien claims,<sup>21</sup> the actual claims filed which we inspected tend to support a view that problems arise more often in those operations where the timber harvesting rights are held by small operators. The larger pyramids where some parties may go unprotected will tend to be those that have one of the major forest companies at its apex. While defaults may occur lower in these pyramids on occasion, none of the lien statements we inspected asserted a claim against logs or timber owned by any of the major forest companies.<sup>22</sup>

## **E. Application of the PPSA: Two Issues**

Two aspects of the PPSA, in their application to the proposed *Forest Work Security Act*, call for special comment.

### **1. Buyers of Forest Products**

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<sup>19</sup> In particular the single holdback" restricts the flow of money from the top of the pyramid to the bottom and may, in fact, lead to insolvencies. See Law Reform Commission of British Columbia, *Report on the Mechanic's Lien Act* (LRC 7, 1972). Legislative Assembly of British Columbia, Select standing Committee on Labour, Justice and Intergovernmental Relations, *Report on Builders Lien Act* (First Report - May 31, 1990; Second Report - July 26, 1990).

<sup>20</sup> *Sees*, 3(3). See also ss. 6(3) and 6(4) which gives a forest worker the right to deliver a notice after default that would maintain the value of the security in the face of payments from the owner to the obligor that would otherwise reduce it.

<sup>21</sup> The overall volume of lien claims is quite low. See Chapter II, Part B(2).

<sup>22</sup> In a number of cases, however, the person claiming the lien was not sure who owned the logs and timber against which the lien was claimed.

A deficiency in the current *Woodworker Lien Act* is that it does not adequately safeguard the legal position of persons who may buy, from their owner, logs or timber that are subject to a lien. The lien persists against forest products even though they may have been acquired for value by a bona fide purchaser in the ordinary course of the seller's business. This is quite contrary to expectations in today's marketplace.<sup>23</sup>

The PPSA serves the needs of commerce by providing protection for bona fide buyers of property that is subject to a security interest. According to section 30(2) a buyer of goods sold in the ordinary course of the seller's business takes free of any perfected or unperfected security interest in the goods given by the seller.

## 2. Remedies on Default

An earlier portion of this Chapter referred to the rights and remedies provided in Part 5 of the PPSA which are available to the secured party on default. Those provisions of greatest significance to the enforcement of rights under the proposed *Forest Work Security Act* are set out at length at Appendix E.

The most important remedy will be the seizure and sale of the forest products that are subject to the forest work security interest. Section 58 authorizes the secured party (the forest worker acting through an agent as provided in section 6(1) of the proposed Act) to take possession of the "collateral" on default. In some circumstances, collateral may be seized and disposed of without removal from the owner's premises.<sup>24</sup>

Section 59 sets out the Rules that govern the disposal of the collateral. It may be disposed of by private sale, public sale and either as a whole or in commercial units or parts. Whatever method of disposition is chosen, it must be "commercially reasonable."<sup>25</sup> No less than 20 days before the disposition of the collateral occurs, the secured party must give notice of the disposition to the debtor (which may include both the owner and the obligor) and any creditor or person with a security interest in the collateral that is subordinate to the forest worker's interest. Identifying the latter persons will require a search of the Personal Property Registry. Other persons may also be entitled to notice.<sup>26</sup>

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<sup>23</sup> The only concession the *Woodworker Lien Act* makes to market expectations is the exception which protects the buyer of "sawn timber sold in the ordinary course of business" referred to in s. 5. It is not clear whether this protects all sales of "sawn timber ..." or only those which occur within the time limited for filing the lien statement.

<sup>24</sup> *Supra* n. 6, ss. 58(2)(a) and (b).

<sup>25</sup> *Ibid.* s. 68(2).

<sup>26</sup> *Ibid.* s. 59(6).

## A. Introduction

The first thing to note about the *Tugboat Worker Lien Act*<sup>1</sup> is that its title is misleading. A lien under the Act secures towage charges payable to the tugboat owner. It does not secure wages owed to persons such as the tugboat crew members. Moreover, it does not secure towage services of all kinds. It secures only money owed for the towage of “logs or timber products.”

The background to the *Tugboat Worker Lien Act* is obscure. It was first enacted in 1927 as the *Tug-boat Men’s Liens Act*.<sup>2</sup> The original goal of the Act appears to have been to aid small logging operators rather than tugboat operators. Contemporary newspaper accounts suggest small loggers, operating up the Pacific coast, found it difficult to obtain towage services to transport their logs to processing sites or markets. The Vancouver-based towage companies would require that towage fees be paid or secured in advance before sending a tug for the logs. The Act encouraged tugboat owners to extend credit to these small logging operators by giving the owners, subject to some exceptions, a first lien over the tow.<sup>3</sup> Since 1927 there have only been minor amendments to the Act.<sup>4</sup>

Since this Act has a similar focus to that of the *Woodworker Lien Act* it seemed appropriate to consider it in the context of this project.

## B. What Does the Act Do?

Briefly stated, the *Tugboat Worker Lien Act* provides the owner of a tugboat who performs any towage of logs or timber products (the “tow”) a lien on the tow.<sup>5</sup> The lien lapses in thirty days unless the owner causes an affidavit setting out particulars of the lien claim to be filed in the “proper office.”<sup>6</sup> Although it purports to be a “first lien” except for “debts or liens in favour of the Crown”<sup>7</sup> the priority of certain other interests is also preserved. These include woodworker liens,

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<sup>1</sup> R.S.B.C. 1979, c. 417. The full text of the *Tugboat Worker Lien Act* is set out as Appendix D.

<sup>2</sup> S.B.C. 1926-27, c. 73.

<sup>3</sup> The *Vancouver Morning Star*, January 19, 1927 and January 28, 1927.

<sup>4</sup> It acquired its present title at the time of the 1979 statute revision. Some amendments were made to the Act in 1989 consequential on the merger of the County and Supreme Courts.

<sup>5</sup> *Supra* n. 1, s. 4.

<sup>6</sup> *Ibid.*, s. 5. The “proper office” is the main registry of the Supreme Court in the county where the towage terminated.

<sup>7</sup> *Ibid.*, s. 4.

*Bank Act*<sup>8</sup> (Can.) security and “any lien or rights which the owner of a tugboat may have in respect of towage by virtue of the common law.”<sup>9</sup>

The last exception brings clearly into focus a principal question raised by the *Tugboat Worker Lien Act*. What does it add to the variety of highly specialized rights and remedies that exist under maritime law? Our exploration of this question is contained in Appendix C. The short answer seems to be “very little.” Apart from the Act a tugboat owner may have a maritime “carrier’s lien” and be entitled to claim a statutory right “in rem” for the towage.<sup>10</sup>

### C. Is the *Tugboat Worker Lien Act* Used?

In our survey of the Supreme Court registries carried out with respect to the volume of filings under the *Woodworker Lien Act* we also sought corresponding statistics with respect to filings under the *Tugboat Worker Lien Act*. Only a single filing was reported. A lien was filed in the Vancouver registry in 1990. This suggests to us that the Act is not extensively relied on by those in the tugboat industry.

### D. Is the *Tugboat Worker Lien Act* Constitutionally Valid?

The legislative competence of the provincial government to enact the *Tugboat Worker Lien Act* is far from clear.<sup>11</sup> The province cannot, of course, enact a statute beyond the legislative competence given to it by the *Constitution Act*.<sup>12</sup> Sections 91 and 92 of that Act set out the distribution of legislative powers between the provincial and federal governments. To be constitutionally valid, the *Tugboat Worker Lien Act* must rest on one of the classes of subject assigned to the provinces in section 92.

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<sup>8</sup> S.C. 1991, c. 46, s. 427.

<sup>9</sup> *Supra* n. 1, s. 3.

<sup>10</sup> We also understand that most contracts for towage provide for consensual security. The standard form contract used by one of the major towboat firms in the Vancouver area contains the following provision:

15. LIEN

In addition to its *in personam* rights and regardless of when freight is to be paid, the Carrier shall have a general lien on the goods or any part thereof, whether or not the services under his Contract of Carriage have been completed and a right to sell such goods by any means for freight, dead freight, demurrage, detention, salvage, average, duties, fines or penalties and for all other charges and expenses whatsoever, which are for account of the goods or of the Shipper, and Shipper. This lien may be exercised notwithstanding the Carrier has parted with possession of the goods and the Carrier shall at all times stand authorized by the Shipper to give such notices to any persons for the time being in possession of the goods as may be required to give effect to these provisions.

<sup>11</sup> In fact, members of the legislative assembly first questioned the *vires* of the legislation during the second reading of the tugboat worker lien Bill on December 11, 1924. *See*, Appendix C.

<sup>12</sup> *The Constitution Act*, 1867.

Our more detailed consideration of this issue is contained in Appendix C. Our conclusion is that, if it were subject to a serious challenge in the courts, the *Tugboat Worker Lien Act* would probably not be upheld.

## **E. Our Conclusion**

It is our tentative conclusion that there is little need to retain the *Tugboat Worker Lien* as a separate statute. In its current form it is seldom, if ever, used and would likely be struck down on constitutional grounds if seriously challenged. Moreover, the original reasons which led to the passing of the Act have disappeared. It was originally conceived as a mechanism to aid small struggling logging operators who were unable to obtain towage services. The Act is a product of economic conditions which no longer prevail.

Even if nothing replaced it, the rights which tugboat owners have under general law and the consensual security they obtain probably satisfies all their needs. It is worth noting, however, that our proposed *Forest Work Security Act* defines forest work to include “hauling” and provides a very broad definition of that term. If that Act were to become law, there is nothing to prevent a tugboat owner, in an appropriate case, from claiming a security interest under the new legislation.

It is clear to us that the *Woodworker Lien Act*, in its current form, has serious deficiencies and should not be retained. It is less clear whether reform should take the form of the outright repeal of the Act or the development of a new and modern statute.

The purpose of the *Woodworker Lien Act*, both as originally conceived and as identified in the cases construing it, is the protection of workers' wages. Today, however, this purpose is served more comprehensively and efficiently by other legislation. The protection of workers' wages is, of itself, not a sufficient reason to continue to legislate in this area.

Practices have evolved, however, which result in lien claims being asserted by persons other than wage earners. To these persons, the Act serves as a useful collection device even if the underlying validity of a claim to a lien is in doubt. If there is a role for legislation like the *Woodworker Lien Act* it is to serve the needs of those who work in the forest industry as contractors rather than wage earners.

In this Working Paper we have attempted to describe what a modern regime of statutory security for all forest workers might look like. It is one based on the concepts found in the *Personal Property Security Act* and adopts many features of that body of law. Our aim has been to create legislation which operates "invisibly" in the sense that it intrudes as little as possible on the day-to-day operation of the forest industry. Comment on the proposed *Forest Work Security Act* is invited.

We have not closed the door on a consideration of the simple repeal of the *Woodworker Lien Act*. We would also invite those who respond to this Working Paper to weigh and comment upon the desirability of repeal without replacement as an alternative to new legislation.

## APPENDIX A

### A DETAILED CONSIDERATION OF THE *WOODWORKER LIEN ACT*

#### A. The Scope of the Act

##### 1. Who Is a “Person” Entitled to a Lien?

###### (a) Introduction

The *Woodworker Lien Act* gives a lien to a “person” who provides labour or services in connection with logs. “Person” is defined in section 1(2):

(2) “Person” in section 2 includes cooks, blacksmiths, artisans and all others usually employed in connection with labour or services, and physicians, surgeons<sup>1</sup> and others entitled to receive payments from or out of any fund made up from deductions by an employer from the wages of those cooks, blacksmiths, artisans and others, arising from the labour or services, and set apart for payment of medical or surgical attendance and service on those employees.

While the language of sections 1 and 2 seems neutral on the issue, a persistent controversy has surrounded the status of so-called independent contractors under the Act. Clearly, the worker who supplies only labour and is paid a wage based on the time worked is protected by the Act. Difficulties have arisen, however, where a “person” has supplied tools or machinery, has been paid on a production or piecework basis or has employed others to perform the labour involved, either in whole or in part.

###### (b) The Status of “Contractors” Before 1966

It was held very early that a person who supplied equipment only was not entitled to a lien under the Act. The narrow approach of Harvey C.J. in *Muller v. Shibley*<sup>2</sup> foreshadowed the interpretation which this aspect of the Act received in later years:<sup>3</sup>

The short title of the Act, “Woodmen’s Lien for Wages Act.” Indicates that it only protects the worker himself, the wage earner....[O]nly actual labourers have a lien.

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<sup>1</sup> The reference to physicians and surgeons in that definition is fortified by s. 2(2):

(2) Where, under the *Employment Standards Act*, or otherwise, an employer deducts from the wages of his employees, being persons performing labour or services in connection with logs or timber in the Province, a sum for the payment of or for medical or surgical attendance and services on and for the employees, a physician, surgeon or other person entitled to receive the sum or a part of it or to payment from it has a lien on the logs or timber for the amount due him from the fund, which shall be deemed a first lien or charge on the logs or timber and has precedence over all other claims or liens on them...

<sup>2</sup> (1908) 13 B.C.R. 343.

<sup>3</sup> *Ibid.* at 344.



The 1920's saw a relative flood of litigation on this issue. Generally speaking the Supreme Court and Court of Appeal adopted a restrictive view of the Act's scope and denied protection to all but wage earning labourers. The case most often cited in support of the narrow approach is *Stephens v. Burns*<sup>4</sup> in which a woodworker who claimed a lien had entered into a contract to cut logs, at a given price per thousand feet, and furnishing the necessary supplies and tools. According to Gregory J.:<sup>5</sup>

In all these cases the decision must rest entirely upon the wording of the statute. One must endeavour to discover from the language of the Act itself the evil aimed at, and to construe the Act as liberally as possible to give effect to the correction of such evil.

Section 1 of our Act is: "This Act may be cited as the 'Woodman's Lien for Wages Act.'" The title at the head of the chapter is the same. The interpretation section, as amended in 1919, again refers to wages. Section 8 requires that a Judgment declaring a lien "shall declare that the same is for wages." etc. Section 37 deals with persons making contracts for the supply of logs, and requires that he shall, before making any payment under such contract, require the person to whom payment is to be made to furnish a pay-roll or sheet of the wages and amount due, etc. and by section 38, if he pays without requiring such pay-roll or sheet, he becomes liable at the suit of any workman or labourer engaged under the contract for the amount of pay so due. Schedule B provides a form for such pay-roll, and it provides for the number of days employed and the rate of pay per day. Schedule A furnishes the form for statement of claim of lien and the only suggestion shewing the amount due is "... per month or day as the case may be."

Any one of these references, taken alone, might mean very little, but taken together seem to me to indicate that the persons sought to be benefitted by the Act were wage-earners. Contractors were clearly thought of, as shewn by sections 37 and 38, and it may well be that the Legislature overlooked the fact that very humble individuals might take a contract and intend to do all the work himself, and a contract by such a person, in which it was provided that the employer was to furnish all material, supplies and machinery for handling the logs, and in which it was quite clear that the contractor was only being paid for his manual labour, even if at a certain rate per thousand feet. might be held to fall within the statute. But it is well known that the logger does not live at home and walk to his work daily. He goes out into the woods, has to be supplied with food, axes, and other means of handling his logs. If his contract requires him to supply these, as in the present case, then his remuneration, or contract price, covers such costs as well as the cost of his actual labour. It is one sum covering all items, and there is no means of dividing it and ascertaining "the amount due for such labour," etc. as required by section 3. There is no amount due for labour alone; there is only one amount due, and that covers all the services rendered and all the material supplied, and it is not divisible.

The lien claim was denied.

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<sup>4</sup> (1921) 30 B.C.R. 60 (B.C.S.C.).

<sup>5</sup> *Ibid.* at 62.

A similar view was adopted by the Court of Appeal in *Sheepwash v. Deer Mountain Lumber Co.*<sup>6</sup> In that case a person who had both performed labour and hired other labourers was denied a claim:<sup>7</sup>

With respect to the alternative submission that a contractor who works himself is a “person performing any labour or services” within the meaning of sections 2 and 3, I can find nothing to support such a view; on the contrary, the special provision in section 8 that the court in its “Judgment shall declare that the same is for wages, the amount thereof and costs,” etc., directly negatives such an intention, which is, moreover, foreign to the whole spirit of the Act.

In *Nelson v. Person*<sup>8</sup> similar reasoning led Macdonald J. to reject claim by workmen who were to be remunerated on a piecework basis.

The superior courts deviated only once from the narrow view of the Act. In *Rotheray v. Northern Construction Co.*<sup>9</sup> two woodworkers had been hired to work at a daily rate of pay, on the understanding that they supply the teams of horses they would use. The Court of Appeal held that they were entitled to liens even though their remuneration included the services provided by the horses and the horses had been hired from a third person.

The judges of the county courts in the 1920’s were somewhat more adventurous in extending lien privileges to those whom the Supreme Court and Court of Appeal regarded as independent contractors. In *Ross v. McLean*,<sup>10</sup> a contractor had been retained to work on a piecework basis, and had hired others to assist. It was held that the contractor was entitled to a lien for the difference between the contract price and the wages paid to the employees.<sup>11</sup> In *Boyd & Anderson v. Superior Spruce Mills Ltd.*<sup>12</sup> the remuneration of piecework contractors, who had to supply their own tools and team,<sup>13</sup> was held to be “wages” within the meaning of the Act which entitled the claimants to a lien. Finally, in *Schmidt v. Stuckey*,<sup>14</sup> the claimant supplied a team and hauled poles for payment at a fixed amount per foot. The right to claim a lien was upheld.

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<sup>6</sup> (1925) 37 B.C.R. 418.

<sup>7</sup> *Ibid.* at 422 *per* Martin J.A.

<sup>8</sup> [1927] 3 W.W.R. 161 (B.C.S.C.).

<sup>9</sup> [1921] 30 B.C.R. 324 (B.C.C.A.).

<sup>10</sup> [1921] 1 W.W.R. 1108 (Co. Ct.).

<sup>11</sup> *Ross* was decided before *Stephens*, *supra* n. 4 and was criticized in the latter case.

<sup>12</sup> [1927] 2 W.W.R. 54 (Co. Ct.).

<sup>13</sup> Which was rented from the defendant with whom they had contracted.

<sup>14</sup> [1928] 1 W.W.R. 913 (Co. Ct.).

While the results of the cases of the 1920's are diverse, the relatively narrower view of the superior courts seems to have prevailed. In all later cases up to 1966, at all levels, a pattern emerges of rejecting claims by "contractors."<sup>51</sup>

(c) *The DeCook Case*

The issue of the scope of the Act again came before the Court of Appeal in 1966. In *DeCook v. Pasayten Forest Products*,<sup>16</sup> there were two lien claimants. The first was the owner-operator of a log-loading crane who was engaged to load felled and bucked logs on trucks on the basis of \$15 per load with a guaranteed minimum of 33 loads per week. The second claimant had been engaged to supply and operate a bulldozer,<sup>17</sup> to skid logs and repair roads at \$9.50 per hour. Both claimants had been engaged by the same logging company and were subject to the general direction and supervision of the company foreman.

The lien claims were allowed at trial<sup>18</sup> and the owner of the logs appealed. The appellants argued that the respondents were independent contractors and that, because the use of equipment was involved, their remuneration could not be characterized as "wages" within the meaning of the Act. This argument was dealt with by Bull JA. in the following terms:<sup>19</sup>

A considerable part of the argument before us was directed as to whether an independent contractor performing "labour or services" on "logs or timber" had any entitlement to a woodmen's lien under the statute. There is a body of law in this province, going back to the turn of the century, that either holds or strongly indicates that "contractors" as such have no lien rights and that the rights given are only for the protection of the "labourer" or the "worker himself, the wage earner" with respect to his unpaid wages....

In my opinion the right to a woodmen's lien does not stand on the often fine line that lies between an "independent contractor" and a "servant," but rather the test is whether the claimant himself has performed any labour or services in connection with logs or timber, within the meaning of the Act, and whether the money for which he seeks a lien can fairly be described as wages for such labour or services. In the context of the Act that word means more than the remuneration payable by a master to his servant or employee, but it still connotes money payable for services personally rendered, although not necessarily exclusively for labour. In *Rothery v. North*. Const. C.... it was held that remuneration of \$9 a day for one man and his team, and \$7 a day for another man and his horse to skid logs was wages for which a lien would lie; it could hardly be said that the per diem allowance for man and horses was wages in the narrowest sense of that term.

The determination as to whether a claimant's relationship under his engagement is that of servant or employee of a master or of an independent contractor depends in the main on the extent of control

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<sup>15</sup> See *MacSween v. Nault*, (unreported, 1953) 11 Advocate 243 (Co. Ct.); *Swetlikoff v. Goloff* (unreported, 1958) 17 Advocate 90 (Co. Ct.); *Chittaro v. Windsor River Logging Ltd.*, (1961) 26 D.L.R. (2d) 582 (Co. Ct.); *Leroy v. Gold Standard Logging Ltd.*, (unreported, 1963) 22 Advocate 30 (B.C.S.C.).

<sup>16</sup> (1966) 58 W.W.R. 561 (B.C.C.A.).

<sup>17</sup> The bulldozer was in fact owned by a "private" company in which the claimant was the principal shareholder.

<sup>18</sup> *DeCook v. Pasayten Forest Products Ltd.*, (1966) 56 W.W.R. 292 (B.C.5.C.).

<sup>19</sup> *Supra*, n. 15 at 564.

exercisable over him and other considerations which in many cases are irrelevant to his entitlement or otherwise to a lien. Although the Act is manifestly Intended to protect the ordinary servant or employee workman in the industry, it is my opinion that in addition persons who may well be independent contractors in law will be entitled to a lien if in other respects they meet the statutory requirements.

Having rejected the narrow legal test of a master-servant relationship as determinative of status under the Act, Bull J.A. set out the Court's of the appropriate criteria<sup>20</sup>

But not every independent contractor will be able to comply with the terms of our Act and so become entitled to a lien. A contractor who has assumed obligations which he will have to employ others to perform, clearly cannot comply with the requirement of the Act; the supplying of machinery or equipment, with or without an operator. will not entitle the claimant to a lien; but the performance of labour or services personally by the claimant with tools, equipment or machinery for remuneration unapportioned between labour and equipment may do so, if the labour and skill of the claimant are the substantial components of the arrangement. But if the supplying of the use of machinery and equipment along with the claimant as operator to effect that use is the substance of the arrangement no lien will be created. The substance will be the determining matter and that must depend upon the circumstances of each case.

Applying that test to the facts of the case it was held, somewhat reluctantly, that both claimants were entitled to liens. Bull J.A. described the case as “borderline” and conceded that “the value of the user of the equipment.. must have been the largest element in the rates of pay.”<sup>21</sup> But the findings of the trial judge stressed the “skill” of the claimants and that

[The claimants had been] sought out and hired because through their intelligent use of their machines their arms are extended to perform labour which quickly produces value on a large scale

This appeared to carry the day.

(d) *Cases After 1966*

(i) *Generally*

Although *DeCook* appears to have enlarged the scope of the Act, no further extensions have emerged since 1966. More recent decisions<sup>22</sup> follow the test set out in *DeCook*. The facts of each case determine which contracts meet the test and fall within the scope of the Act. Two cases illustrate the way in which the test is applied.

In *Woodley v. Drew Sawmills Ltd.*,<sup>23</sup> the plaintiffs were engaged to perform skidding, loading, cat work and “high led logging,” using their own equipment. High led logging is a

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<sup>20</sup> *Ibid.*, at 565.

<sup>21</sup> *Ibid.* at 566.

<sup>22</sup> See *Woodley v. Drew Sawmills Ltd.*, (1983) 47 B.C.L.R. 227; *Desilets v. Shertam Industries*, [1982] B.C.D. Civ. 2575.1-01; and *Pedersen et al v. Ponderosa Lumber Sales*, (1979) 97 D.L.R. (3d) 69.

<sup>23</sup> *Ibid.*

specialized form of logging which requires sophisticated equipment. The plaintiffs asserted that the substance of the contract was the skill and experience which they provided and that they were entitled to rely on the Act. The defendant argued that the contract was for the high led logging equipment, skidder and its operators and that the substance of the contract was for the machinery. The court's "marginal conclusion"<sup>24</sup> was that, on balance, the plaintiffs were engaged because of their apparent skill and previous experience. Because the high led logging aspect of the contract was simply one component of the total services to be performed, the plaintiffs had status to make the claim.

In *Pedersen v. Poriderosa Lumber Sales Ltd.*<sup>25</sup> logging was to be carried out on extremely soft land. It was believed that this required special equipment known as an F.M.C. trac-skidder. The defendant engaged the plaintiff to skid lumber on the job site. The contract provided that the defendant would advance the first month's payment on the F.M.C. trac-skidder and pay the plaintiffs an hourly salary for skidding timber. Although the plaintiffs had never operated an F.M.C. trac-skidder, they were skilled woodsmen and had experience with rubber-tired skidders. The plaintiffs alleged that the contract was for skilled, experienced workmen who could, based on experience, successfully operate an F.M.C. trac-skidder. The defendants argued that the substance of the contract was for specialized equipment with competent operators only. The court accepted the defendant's argument and denied the lien claims.

The cases illustrate the difficulty that the test found in *DeCook* its to both the court and potential lien claimants. Except in the obvious cases, the dividing line between a contract for equipment and one for skill and experience is blurred.

(ii) *Companies and Officers*

(A) *Companies*

The "contractors" issue has also arisen in later cases in the discrete context of claims by corporations. *Conroy Forest Products v. Michand*<sup>26</sup> and *MacLean v. Twin Valley Contracting*<sup>27</sup> both involved lien claims asserted by a limited company for services performed. In *Conroy*, Munroe J. quoted at length from *DeCook* and concluded:<sup>28</sup>

Applying those principles, I am of opinion that the plaintiff is not entitled to the lien claimed ... because the plaintiff itself has not personally performed any labour or services in connection with the logs or timber, within the meaning of the Act, and the money for which it seeks a lien cannot fairly be described as wages for such labour or services. The obligations assumed by the plaintiff under the

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<sup>24</sup> *Ibid* at 230-231.

<sup>25</sup> *Supra*, at n. 9.

<sup>26</sup> (1969) 71 W.W.R. 553 (B.C.S.C.).

<sup>27</sup> [1975] 6 W.W.R. 138 (B.C. Co. Ct).

<sup>28</sup> *Supra*, n. 26 at 556.

contract required it to employ others to perform same. It is perhaps not without significance that the word “person” is defined in the *Mechanics’ Lien Act...* to include corporations, but the definition of the word “person” in the *Woodmen’s Lien for Wages Act* makes no such provision.

In *MacLean*, Harvey C.C.J. regarded *Conroy* as binding regarding the status of corporate lien claimants and concluded:<sup>29</sup>

To accede to the argument on behalf of the corporate plaintiffs. I would have either to reject this authority, which I cannot do, or find some elusive and, I think, non-existent distinction. Furthermore, I would have not only to vastly extend what was decided in *DeCook* but to ignore the limitations and caveats expressed therein. Finally I think it would be doing violence to the language of the Act to hold that a body corporate was a “person” to whom a claim of lien was accorded. I therefore hold that the corporate plaintiffs have no enforceable claims of lien.

Hence corporations seem clearly to be outside the protection of the Act.<sup>30</sup>

### (B) Officers

Although a company may, *per se*, be precluded from asserting a lien claim, is it open to enforce a lien claim indirectly through its officers or shareholders if they have done work themselves and would otherwise qualify to claim a lien?

The only case<sup>31</sup> in which this appears to have been considered is *Lewans v. Powder Mountain Development Ltd.*<sup>32</sup> The lien claimant was the principal shareholder in a company which had contracted with the defendant to provide services in connection with the defendant’s logs and timber. The claimant worked personally in fulfilling the terms of the contract. The claim failed because the claimant was unable to establish an agreement by the company to pay the claimant for his services.<sup>33</sup> The tenor of the judgment suggests that the claim would have succeeded had the company agreed, either implicitly or explicitly, to pay reasonable remuneration.

### (e) Summary

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<sup>29</sup> *Supra*, n. 27 at 142. *See also MacSween v. Nault supra*, n. 15.

<sup>30</sup> This might be contrasted with the law of New Brunswick which appears to permit lien claims by corporations. *See, Acadia v. Fleming Gibson Industries Ltd.*, 31 N.B.R. (2d) 482. The case turned on the definition of “person found in the New Brunswick Interpretation Act. R.S.N.B. 1952, c. 114, s. 38(37). Alberta also appears to permit lien claims by contractors and corporations. *See Weldwood of Canada v. Alberta Export Mills Corp.*, (1992) 85 Alta. L.R. (2d) 228 (Q.B.).

<sup>31</sup> The status of liens claimed by company officer-shareholders arose in the early case of *Vipond v. Galbraith*, (1922) 31 B.C.R. 58 (C.A.) but the events were so tainted by the claimants’ fraud, it is difficult to ascertain from the judgment whether the lien claims would have succeeded in its absence.

<sup>32</sup> [1971] 2 W.W.R. 456 (B.C.S.C.).

<sup>33</sup> The claimant, who had no formal contract of employment with the company, drew money from time to time and “acknowledged that the salary he would make at the end of the job would depend on the profit the had made.” It was common ground that any claim which the plaintiff might have against the company must be based on *quantum meruit* Alkins J. (as he then was) accepted that a lien may properly be claimed for wages on *quantum meruit* but he was unable “to find that any agreement may be implied between Lewan’s company and Mr. Lewan that the former pay the latter a reasonable remuneration for his services....” At best, the claimant had hopes and expectations.

The right to claim a lien under the Act would appear to be governed by the following rules:

1. The claimant must be a wage earner.
2. For the purposes of 1. "wages" maybe remuneration (a) based on time worked or (b) based on production (piecework) or (c) based on *quantum meruit*.
3. A corporation may not be a claimant but an officer or shareholder who is a wage earner (from the corporation) may be entitled to assert a lien.
4. Supplying tools or equipment does not disentitle the claimant to a lien covering both labour and the use of equipment if labour and skill are substantial components in the arrangement.
5. No lien lies for the supply of equipment only or for the supply of equipment with the claimant as operator if the supply of equipment is the substance of the arrangement.
6. The "substance of an arrangement" depends on the facts of each case.
7. The claimant must have provided the labour or services personally and not employed others to do it.

The question of what activities constitute "labour or services" is examined below.

## 2. What Is "Labour or Services?"

The lien given by section 2 of the Act is for "labour or services performed in connection with "logs or timber." Those expressions are defined in section 1(1):

"labour or services" includes cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming logs or timber, and any work done by cooks, blacksmiths, artisans and others usually employed in connection with it, and any work done by engineers and all other persons employed in any capacity in or about a mill or factory where lumber of any description is manufactured;<sup>34</sup>

"logs or timber" includes logs, timber, piles, posts, telegraph and telephone poles, ties, mining props, tan bark, shingle bolts and staves, or lumber of any description manufactured from them.<sup>35</sup>

The cases have added little to the statutory definition.<sup>36</sup>

There is surprisingly little authority on whether the construction and maintenance of logging roads is "services" within meaning of the Act. This issue was raised in *Conroy*<sup>37</sup> but the was decided on other grounds. In *DeCook* the bulldozer opera successful claim was based, in part, on road repairs but possibility that this might not be "services" does not appear to have been argued.

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<sup>34</sup> The reference to mill and factory workers was added by S.B.C. 1905, c. 57, apparently in response to *Davidson v. Frayne*, (1902) 9 B.C.R. 369 in which it was held that millworkers were not entitled to claim liens under the Act.

<sup>35</sup> "Logs or timber" also includes cordwood. See *Hahn v. Siebel*, (1920) 28 B.C.R. 387 (Co. Ct.).

<sup>36</sup> It has been held that cutting car stakes, freighting gasoline, and demolition work are not "services" which will support a lien: *Haglund v. Derr*, (1927) 38 B.C.R. 435 (Co. Ct.). Similarly, purchasing and transporting groceries to a logging camp is not labour or services": *Rodrigue v. Magee*, [1985] B.C.D. Civ. 2595-04 (Co.Ct.)

<sup>37</sup> *Supra*, n. 26.

Even if “services” does not extend to road construction so as to support a woodworker lien, some protection may be offered by the *Builders Lien Act*.<sup>38</sup> In *Bank of Nova Scotia v. O & O Contractors Ltd.*<sup>39</sup> the applicability of that statute was considered. O & O was a subcontractor who had contracted to build a logging road and the issue was whether it was entitled to priority, as against a secured lender, to certain monies by virtue of the statutory trust imposed by section 3 of the *Mechanics’ Lien Act*, as it was then titled. Maclean J.A. stated:<sup>40</sup>

The contract entitled Tidewater to receive money from Tsimpsean for the former’s “work and services.” The “work and services” consisted of road building and logging.

It has been argued that the contract between Tsimpsean and Tidewater is a “logging contract,” and that the only statute applicable is the *Woodmen’s Lien for Wages Act* .... However, part of the contract involves an obligation of one party to build a road (an “improvement”) and the corresponding obligation of the other party to pay for it. In this latter sense the contract is one to which the *Mechanics’ Lien Act* is applicable.

Furthermore, the respondent (a subcontractor of Tidewater) is a person who has done work on an “improvement,” and but for the fact that the land is owned by the crown, would have been entitled to file a lien under the *Mechanics’ Lien Act*. The fact that no lien has been filed nor could be filed does not make sec. 3 (the trust fund section) inapplicable....

In my view, sec. 3 of the *Mechanics’ Lien Act* is applicable to the fund in question....

While the status of logging road builders under the *Woodworker Lien Act* is uncertain they may well receive a substantial measure of protection under the *Builders Lien Act*.

## **B. The Lien**

### **1. To What Does the Lien Attach?**

Section 2 provides that “a person performing labour or services in connection with logs or timber” has a lien<sup>41</sup> on “them” for the “amount due.”<sup>42</sup> Read literally this would mean that different individuals would have liens on different logs within the same operation. The difficulties created by a literal reading are obvious. A woodworker claiming a lien would normally be unable to identify the particular logs upon which labour was performed.

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<sup>38</sup> R.S.B.C. 1979, c. 40.

<sup>39</sup> (1965) 55 W.W.R. 103 (B.C.C.A.).

<sup>40</sup> *Ibid* at 107.

<sup>41</sup> We have omitted a detailed analysis of the basic legal nature of the lien. Such a discussion may be found in *Warehouse Security Finance Co. v. Niemi (No. 2)*, [1944] 3 W.W.R. 567 (B.C.C.A.). See also *Hahn v. Seibel*, (1920) 28 B.C.R. 387, 392 (Co. Ct.); cf. *Vipond v. Galbraith*, (1922) 31 B.C.R. 58, 64 (B.C.C.A.).

<sup>42</sup> The “amount due” is the amount payable at the date of trial. This may be a greater amount than the amount due at the time the lien statement is filed. See *Brown v. Tay-M Logging Ltd.*, [1987] B.C.D. Civ. 2575.3-02 (Co.Ct).



A literal reading of section 2 was rejected in *McLellan v. Watanbe*:<sup>43</sup>

A workman has a lien (if he obeys the rules) on all logs which he has helped to cut, and this includes logs which he has not individually cut, otherwise he would have to mark individual logs, which is absurd. Similarly he has a lien on all booms towards which he has contributed his services, notwithstanding that such booms may include logs cut after his services have been discontinued, because it is not possible to sever the boom up into so many logs cut by this worker and so many cut by that. If a boom of logs on which he has filed a lien has been sold before the lien has been filed, the owner is so much to the good on account of the difficulty of following the sold boom, not because the lien is not legally enforceable against such boom: see section 6 of the Act, which says:

No sale....previous to the filing thereof....shall in any wise affect such lien.

A lien filed within 30 days of quitting work attaches to all logs on the timber limit cut or being cut or assembled in booms with logs cut during the period of employment of the lien-holder.

A lien claimed by an individual woodworker may attach to more than the particular logs on which the work was performed. Subject to difficulties of tracing,<sup>44</sup> it at least extends to a mass of logs arising out of the same logging operation so long as that mass contains logs to which the claimant has contributed “labour or services.”

Whether a lien can be claimed against logs from different operations for work done on one of them has arisen in two cases. In *Lucas v. Moore Timber Co.*,<sup>45</sup> the lien claimants had worked for their employer at two separate locations and claimed a lien on logs produced at the second location for unpaid wages relating to the first location. The lien claims were rejected.

In *Woodley v. Drew Sawmills Ltd.*<sup>46</sup> the plaintiff claimed a lien on logs in the defendant’s yard. The logs were from three different areas and subsequently intermingled in the yard. The plaintiff worked on logs taken from one area only. The Court held that the logs were identifiable for the purposes of the Act:

[N]either the plaintiff nor the defendants can make a precise identification of each of the logs upon which the plaintiffs performed labour or services but all parties would agree that the logs lie within the confines of the specific identifiable area, that they are of an identifiable species and that they were produced during the specified period.

The lien attached to the commingled mass of logs. The fact of the commingling appeared to distinguish this type of case from *Lucas*.

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<sup>43</sup> (1923) 33 B.C.R. 61, 63 (Co. Ct.) *per* Cayley Co. J.

<sup>44</sup> By “tracing” in this context we mean the identification of specific logs as logs which were subject to a lien in the hands of a former owner or the identification of specific units of products manufactured from logs which were subject to a lien.

<sup>45</sup> [1938] 1 W.W.R. 556 (B.C.S.C.).

<sup>46</sup> *Supra*, n. 22.

*Smith v. Marine Sawmills Ltd.*<sup>47</sup> involved claims by millworkers who had sawn timber belonging to a number of different owners. The sawing was done for the owners under contract by the mill which employed the claimants. They sought to assert a lien for all unpaid wages against timber of one owner. It was held:<sup>48</sup>

The parties ... seek determination of a preliminary point of law, namely: Does the lien for all wages of the workmen attach to all the timber belonging to Douglas D. Dixon and can such lien be satisfied in full out of the amount realized from the sale of such timber, notwithstanding the fact that portions of such wages were earned in doing work on timber which did not belong to Dixon?

I am of the opinion that the lien filed by the plaintiff for himself and the 17 other workmen, all employees of Marine Sawmills Ltd., for wages attached itself to all of the timber of the defendant, Douglas D. Dixon, and that all the wages claimed by the said workmen can and should be satisfied in full out of the timber belonging to Douglas D. Dixon that has been seized, notwithstanding that portions of such wages earned were, in fact, earned in doing work for Marine Sawmills Ltd. on timber which did not belong to the said Douglas D. Dixon.

This decision seems to create a kind of joint and several liability among owners (at least in the processing context) which renders the property of one owner vulnerable to liens securing debts incurred through work done on the property of other owners.

## 2. Filing Notice of the Lien

The lien created by section 2 attaches at the time the labour or services are performed<sup>49</sup> but the worker who wishes to preserve its priority must take further steps. Section 3 provides:<sup>50</sup>

3. A lien arising under section 2 is void unless a statement of it in writing, verified on oath by the person claiming the lien, or some person duly authorized on his behalf, is filed in the office of a registrar of the Supreme Court.

The contents of the statement are prescribed by section 4.

4. The statement shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims and a description of the logs or timber on or against which the lien is claimed, and may be in the form in Schedule A. or to the like effect.

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<sup>47</sup> (1965) 51 W.W.R. 187 (B.C.S.C.).

<sup>48</sup> *Ibid.* at 188.

<sup>49</sup> *See, Warehouse Security, supra* n. 41 at 580.

<sup>50</sup> Permitting the filing of a lien statement in any Supreme Court registry is an innovation which resulted from an amendment to the Act consequent on the merger of the Supreme and County Courts. The Act formerly required some nexus between the place the work was done and the place of filing. This section formerly provided:

A lien arising under section 2 is void unless a statement of it in writing, verified on oath by the person claiming the lien, or some person duly authorized on his behalf, is filed in the office of a registrar of the County Court for the county in which the labour or services or some part thereof have been performed.

Now a lien statement for work done in the interior of the province could be filed in a registry in Vancouver Island. This presents obvious difficulties for the person who wishes to carry out a search to see if particular logs encumbered by liens.

The courts have not been zealous in calling for strict adherence to the technical requirements of section 4 and Schedule A:<sup>51</sup>

It is now well established that in cases of this sort at least a substantial and not a meticulous compliance with the statute is what the court will require, the test being, were the parties concerned misled in the circumstances?

That principle has been affirmed in numerous cases.<sup>52</sup>

The statement must be filed within 30 days after the last day labour or services were performed.<sup>53</sup> A question as to when the 30 day time limit starts to run has been raised in several cases.<sup>54</sup> A strict and literal reading of the relevant provision has the potential to create problems where the last day the worker actually performs labour or services is before the contract terminates. It might require that the prudent worker file a lien after every block of labour or services performed for fear of missing the limitation period.

In *Beldessi v. Rain Forest Logging Ltd.*<sup>55</sup> the plaintiff filed a lien on February 14, 1980. The plaintiff performed labour or services for the defendant during late summer of 1979 to December 29, 1979 and then again on February 11, 1980. Although no labour or services were performed between the end of December, 1979 and early February, 1980 the plaintiff argued that a contract existed. Because of the contract, the time limit should only start to run when the contract was lawfully terminated. In this case, the lien would be for the amount of all work performed during late summer of 1979 to February 11, 1980. The defendant argued that, irrespective of the contract, the plaintiff had run out of time and could not claim a lien for the labour or services performed prior to February 11, 1980. The only amount that could be claimed was for the work completed on February 11.

The Court applied earlier authority<sup>56</sup> and held that the lien, so far as it related to work performed before December 29, 1979, was invalid. The Court then refused to sever the claim to reflect the work performed on February 11, 1980 as it was not possible to calculate the amount owing on the evidence available.

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<sup>51</sup> *Douglas v. Mill Creek Limber Co.*, (1923) 32 B.C.R. 13, 18 (B.C.C.A.) per Martin J.A.

<sup>52</sup> *Foreman v. Mutch*, (1923) 33 B.C.R. 100 (C.A.); *Nelson v. Person*, *supra*, n. 8; *Chittaro v. Windsor River Logging Ltd.*, (1961) 26 D.L.R. (2d) 582 (B.C. Co., Ct.). It has also been suggested that s. 8 gives the court power to amend deficient lien claim. See *Montreal Trust Co. v. Canadian Lumber Yards Ltd.*, (1928) 39 B.C.R. 325, 331 (B.C.C.A.) per Martin J.A.

<sup>53</sup> *Woodworker Lien Act*, R.S.B.C. 1979, c. 436, s. 5.

<sup>54</sup> In the simplest case the time limit would start to run after the last day actual work had ceased: *Heaney v. Lobley*, (1909) 11 W.L.R. 545.

<sup>55</sup> (1980) 20 B.C.L.R. 241.

<sup>56</sup> *Stavast (Star Contracting) v. Island Shake and Shingle Co.*, (1979) 16 B.C.L.R. 344 (Co.Ct.) and *Heaney v. Lobley*, *supra*, n. 54.

In *Desilets v. Shertam Industries*<sup>57</sup> the Court recognized potential problems faced by workers in requiring strict compliance with the Act.<sup>58</sup>

If the *Beldessi* decision were to be extended beyond the particular facts of that case, I'm sure it would lead to an absurd result. A logger or scaler as in this case could be laid off for a week or other periods of time in less than 30 days and if he did not file a lien within 30 days, he would lose his entitlement to a lien under the Act for all of his outstanding wages for labour and services regardless of the percent of time involved even though there was no intention by either party to terminate the relationship. Any further extension of the *Beldessi* decision would not recognize the present day realities of the logging industry.

In this case the claimant worked as a scaler for the defendants from August to September 2, 1981. He did not return to work again until October 14, 15 and 16. A lien was filed for the full period on October 20, 1981. The Court refused to follow *Beldessi* and stated a different test for determining when the limitation period starts to run.<sup>59</sup>

[T]here must be a continuous working relationship that was intended by both parties to continue until such time as it is terminated, and it is from the dates of termination as established by the fact[s] from which the 30 day limitation period is calculated.

The claimant was entitled to file a lien for the entire time.

The two decisions were considered in *Tilsner v. Whonnock Industries Ltd.*<sup>60</sup> In *Tilsrier* the claimants performed work for the defendants in late October, 1986 and then again on December 2, 1986. The claimants filed liens on December 12, 1986. *Beldessi* was distinguished on the basis that the evidence was insufficient to allow the Court to determine whether a continuing working relationship existed between the two dates. If appropriate evidence had been led in *Beldessi*, the Court might have arrived at a similar decision as in *Desilets*.<sup>61</sup>

Prior to the *Desilets* case strict compliance with Section 5 of the Act was required. Recent cases display a more flexible approach to the 30 day limitation period. When time begins to run now seems to depend on the facts of each case and the nature of the contractual relationship.

### 3. The Priority of the Lien

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<sup>57</sup> *Supra*, n. 22.

<sup>58</sup> *Ibid* at 11 *per* Arkell J.

<sup>59</sup> *Ibid* at p. 12.

<sup>60</sup> [1989] B.C.D. CIV. 2593-02 (Co.Ct.).

<sup>61</sup> The Court in *Tilsner* faced a similar evidentiary problem. It had to consider the facts before it to determine whether the work performed in December "was merely to enable the plaintiffs to revive their lien rights" or "if there was a continuous working relationship [that] was intended by both parties to continue until termination." The Court held that there was not sufficient evidence to determine whether the lien was filed in time.

The policy of the Act is to give a woodworker's lien high priority. Section 2 provides that the lien:

...shall be deemed a first lien or charge on the logs or timber, and has precedence over all other claims or liens on them, except a lien or claim which the crown may have on the logs or timber for or in respect of any dues or charges, or which a timber slide company, or owner of slides and booms, may have on them, for or in respect of tolls.<sup>62</sup>

Section 2 must be read in conjunction with section 5 which provides:

5. The statement shall be filed within 30 days after the last day the labour or services were performed; but a sale or transfer of the logs or timber on which a lien is claimed under this Act during the time limited for the filing of the statement of claim, and previous to the filing of it, or after the filing of it and during the time limited for the enforcement of it, shall not in any way affect the lien, which shall remain and be in force against the logs or timber in whose possession they are found, except sawn timber sold in the ordinary course of business.

These provisions create a security interest of great priority strength.<sup>63</sup>

Section 2, taken alone, seems to create a superior interest which is capable of defeating any competing interest except those specified. This is because the lien attaches to the logs themselves irrespective of who has title to them at the time the work is done and the lien is not disturbed if title changes hands. For example:

- May 10: A woodworker (W) employed by L Co. provides labour with respect to certain logs owned by M Co.
- June 1: W ceases to work for L Co. and is owed 2 months wages.
- June 30: W files a lien claim under section 3.

The language of section 2 suggests that any transaction after May 1 by M Co. would not affect W's lien which attached on that date. Thus if M Co. sold the logs to B Co. on May 15 W's lien on them would continue. A similar result would flow if the logs were sold on June 15. The only significance of the filing on June 30 is to prevent the lien from becoming "void" (per section 3), that is, to continue its effect.

What is the effect of section 5? Its purpose seems to preclude any argument that the lien only acquires priority upon filing. But this seems unnecessary in the light of section 2. So far as a sale of the logs on June 15 is concerned no problem is created as section 5 adds nothing to section

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<sup>62</sup> In *Prembo v. Pacific Slope Lbr. Co.*, (1915) 7 W.W.R. 1195 (B.C.S.C.) "timber slide company" was held to include a tugboat proprietor whose lien was given priority over that of a woodworker. It may be questioned whether this case retains any force in the light of the subsequently enacted *Tugboat Worker Lien Act*. S.3 provides that a woodworkers lien is not affected by the lien of a tugboat owner given by the Act.

<sup>63</sup> A woodworker's lien appears to have priority over security given to a bank under s. 427 of the *Bank Act*. See *Woodley v. Drew Sawmills Ltd.*, *supra* n. 22.

3. But what if there is a sale of the logs on May 15?<sup>64</sup> What if M Co. saws the logs into dressed lumber and sells it to B Co. in the ordinary course of business on May 15 or June 15?<sup>65</sup> Here the rights of the parties are less than clear and there appear to be no cases which provide any guidance.

## C. Enforcing the Lien

### 1. Introduction

While the most important provisions of the *Woodworker Lien Act* are those which create the lien, specify its perfection and priority, and define its scope, the most numerous<sup>66</sup> are those concerned with setting out the procedure for enforcing the lien. The Act, in fact, purports to set out a virtually complete set of rules for the enforcement of lien claims, although the court practice may be relied on with respect to matters upon which the Act is silent. Section 35 provides:

The procedure regulating the practice in actions brought in the Supreme court shall, so far as it is not inconsistent with this Act, regulate proceedings under this Act.

### 2. Jurisdiction and Time Limits

The jurisdiction to enforce lien claims is vested in the Supreme Court. Section 6(1) provides that a lien “may” be enforced “in the Supreme Court where the statement of lien is filed.”<sup>67</sup> The Act imposes a very strict limitation period for the enforcement of claims. Enforcement proceedings must be commenced within 30 days of filing.<sup>68</sup>

### 3. The Enforcement Action

The Act provides two ways of commencing a proceeding to enforce a woodworker lien. First, a lien may be enforced “by suit” in the Supreme Court.<sup>69</sup> This procedure contemplates the

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<sup>64</sup> Because s. 5 specifies the lien’s priority over rights acquired under transactions during the time limited for filing” (e.g., 30 days following the last day labour was performed: in the example June 1 to June 30) and thereafter it might be argued that a different priority rule prevails -- one which conflicts with s. 2.

<sup>65</sup> Here the sections are clearly in conflict.

<sup>66</sup> *Supra*, n.53, ss. 6 to 36.

<sup>67</sup> The meaning of this provision, again a product of merger of the Supreme and County Courts, is unclear. There is only one Supreme Court so the reference to “the Supreme Court where...” is ambiguous. Is it meant to require the enforcement proceedings to be commenced in *the registry* where the lien was filed? A kind of “local venue rule” would be understandable except that the provision is framed in permissive rather than mandatory terms and there is no necessary connection between the registry where the lien is filed and the place where the logs are located or the work was done.

<sup>68</sup> Section 6(1) provides:  
The lien claim ceases to be a lien upon the property named in the statement unless the proceedings to enforce it are commenced within 30 days after the filing of the statement, or after the expiry of the period of credit.  
As to “period of credit” see *Wilson v. Doble*, (1910) 13 Western L.R. 290 (B.C. Co. Ct.).

<sup>69</sup> *Supra*, n. 53 s. 6(1). The second procedure is an attachment remedy provided in the Act. This is discussed below.

issue of a writ of summons and “the person liable for the payment of the debt or claim shall be made the party defendant.”<sup>70</sup> The requirement that the primary debtor be made a party seems obvious,<sup>71</sup> but it is curious that there is no requirement that the owner (if a person other than the primary debtor) be joined since it is the owner’s property against which the lien may be enforced. In practice the owner is joined as a defendant.

The Act sets out a few rules on the conduct of an enforcement action. Most of these duplicate more modern provisions now found in the *Rules of Court*.<sup>72</sup> A departure from this pattern is a provision for simplified pleading:

6 (2) There shall be attached to or endorsed upon the writ or summons in such suit a copy of the lien claim filed as hereinbefore provided; and no other statement of claim or particulars is necessary unless ordered by the court...

Strict compliance with this provision is not required so long as the defendant is not prejudiced.<sup>73</sup> The successful claimant will, at the conclusion of the litigation, obtain a judgment in the form stipulated in section 7:<sup>74</sup>

...the judgment shall declare that it is for wages, the amount of them and costs, and that the plaintiff has a lien for them on the property described when that is the case.

The claimant who obtains a judgment will wish to realize upon the logs over which a lien has been declared. Although the Act is not completely clear on this point it appears to contemplate that the lien claimant will issue a writ of execution and direct the sheriff to seize the logs<sup>75</sup> (assuming there has been no prior attachment under the Act).

Section 8 provides:

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<sup>70</sup> *Ibid.* s. 6(1). *Cf.* s. 14.

<sup>71</sup> It was not quite so obvious to the court in *Tilsner v. Whonnock Industries Ltd.*, *supra* n. 60, where the employer is liable to the claimants for wages. The named defendant in the action was the owner of the logs and not the employer. The Court suggested there was nothing in section 6(1) that made it mandatory for the employer as well as the owner to be named as defendants. Because the *Act* gives the worker a right *in rem*, the lien exists even though the amount of the claim is not yet payable. The Court went on to suggest that the owner was the only party liable for the lien, since the employer had no proprietary interest in the logs. This approach is difficult to reconcile with the clear language of section 6(1).

<sup>72</sup> *E.g.* the court has a broad power to order amendments, particulars, and the addition of parties: s. 7. If there is a failure to defend, default judgment may be taken: s.6(2). This empowers the court registrar to sign a default judgment declaring the lien. *See, Warehouse Security*, *supra* n. 41. A judgment may be set aside and leave to defend given: s. 7.

<sup>73</sup> In *Gretchin v. Osachoff* [1988] B.C.D. Civ. 2598-03 (Co.Ct.), the defendants applied for an order declaring that the lien was invalid because the claimant failed to attach a copy of the lien claim to the Writ of Summons or to endorse it on the Writ of Summons as required by section 6(2). The defendants were not deprived of property rights and their interest was not affected by the claimant’s oversight. Particulars of the claim had been set out in the Statement of Claim. The Court relied on s. 35 of the Act and Rule 14 of the *Rules of Court* to cure the claimant’s oversight.

<sup>74</sup> For an appropriate form of judgment *see Warehouse Security*, *supra*, n. 41 at 576.

<sup>75</sup> *See Foreman v. Mutch*, (1923) 33 B.C.R. 100, 102 (B.C.C.A.) *per* Martin J.A.; *Warehouse Security*, *supra*, n. 41 at 585.

8. Where an execution has issued and has been placed in the sheriff's hands for execution, and no attachment has been issued, the proceedings for the enforcement of the lien shall be by sale under the execution. The proceedings relating to proof of other claims, and the payment of money into court, and the distribution of the money, and otherwise, shall, as far as practicable, be the same as is hereinafter provided for proceedings on and subsequent to an attachment.

The proceedings "subsequent to an attachment" have the effect of making applicable sections 16 and 19 to 28.

#### 4. Attachment Proceedings

The Act provides a special remedy to the claimant who is concerned that the lien is about to be defeated or prejudiced by an action of the owner or debtor. Whether or not an enforcement action has been commenced the claimant may, in appropriate circumstances, have the logs seized through a writ of attachment. Section 12(1) provides:

12. (1) On the production and filing of the statement mentioned in section 3 or a copy of it, and an affidavit made and sworn by the claimant of the amount of the claim due and owing, and showing that it has been duly filed, and stating that

- (a) he has good reason to and does believe that the logs or timber are about to be removed out of the Province;
- (b) he has good reason to and does believe that the logs or timber are about to be removed out of the district or locality in which they then lie;
- (c) the person indebted for the amount of the lien has absconded from the Province with intent to defraud or defeat his creditors; or
- (d) the logs or timber are about to be cut into lumber or other timber so that they cannot be identified; and
- (e) he is in danger of losing his claim if an attachment does not issue,

and if affidavits corroborating the affidavit of the plaintiff in respect of paragraph (a), (b), (c) or (d) are also filed, the registrar of the court having jurisdiction in the matter shall issue a writ of attachment directed to the sheriff, commanding him to attach, seize and take and safely keep the said logs or timber, or the portion of them that may be necessary to satisfy the amount claimed and the costs of the suit, and of the proceedings to enforce the lien.<sup>76</sup>

The Act also provides for additional seizures under a writ of attachment<sup>77</sup> and for concurrent writs.<sup>78</sup> The Act contains a special provision relating to the attachment of logs in transit or held for delivery.<sup>79</sup>

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<sup>76</sup> Notwithstanding the requirement for corroborating "affidavits" it appears that a single corroborating affidavit is sufficient. *See Re Thorlakson's Sawm Lumber*, (unreported, 1951) 10 Advocate 86 (B.C. Co. Ct.).

<sup>77</sup> *Supra*, n. 53 s. 12(2).

<sup>78</sup> *Ibid*, s. 13.

<sup>79</sup> S. 15, *ibid*, provides:  
15. A sheriff or bailiff shall not seize or detain logs or timber under this Act when in transit from the place where cut to the place of destination when the place of destination is within any of the districts in which proceedings have been commenced, but if the logs or timber are so in transit, or are in the possession of a booming company or other person for



If an enforcement action has not been commenced at the time of the attachment, the writ of attachment is treated as originating process which is served on the defendant and owner summoning them to appear before the court out of which the attachment issued.<sup>80</sup> The defendant or owner may enter a notice of dispute<sup>81</sup> and in default of doing so judgment may be entered as if the proceedings had been commenced by writ of summons.<sup>82</sup>

A formal trial need not take place. A summary procedure is provided by section 9:

9. (1) Whether commenced by writ, summons or attachment, the court may direct that any proceeding shall be disposed of summarily without waiting for the regular sittings of the court, on the terms as to notice and otherwise that the order provides.

(2) The court may also summarily dispose of an application to set aside an attachment or seizure, or to release logs or timber that have been seized.

## 5. Proceedings after Seizure

A number of provisions set out procedures to be followed after a seizure under a writ of attachment or (by virtue of section 8) execution. One of these relates to substitute security. Under section 16 the owner of logs can obtain release of the logs by posting an appropriate bond with the court registrar.

The bond procedure provided by section 16 is available only after there has been a seizure of the logs. So long as the logs remain in the custody or control of the owner, the Act provides no way in which the lien can be removed by providing substitute security. The Act also contemplates a payment into court:

19. The defendant may at any time after service of the writ of attachment, and before the sale of the logs or timber, pay into court the amount for which a lien is claimed in the suit, together with the amount for which a lien is claimed in any other suit, together with the costs of the proceedings on them to the date of payment, taxed by the registrar of the court if so required. The person making the payment is then entitled to a certificate vacating the lien, and on the certificate being filed with the registrar of the court

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the purpose of being driven or sorted and delivered to the owners, or to satisfy a statutory lien, then attachment of the logs or timber may be made by serving a copy of the attachment on the company or person driving or holding them, who shall from the time of service be deemed to hold them, both on its or his own behalf and for the sheriff to the extent of the lien, until the logs or timber can be driven and sorted out: and when driven or sorted out the sheriff may receive the logs or timber from the company or person. and the statutory lien of the company or person shall not be released by the holding of the sheriff or other officer.

The extent to which this provision applies to a seizure under a writ of execution issued in an enforcement action is uncertain.

<sup>80</sup> *Ibid.*, s. 14(1). Substitutional service is provided for in s. 14(3).

<sup>81</sup> *Ibid.*, s. 17.

<sup>82</sup> *Ibid.*, s. 18. Section 10 of the Act provides:

10. Where an attachment issues in the first instance, the statement of claim and defence or dispute note, and proceedings to judgment, may be the same as provided above. Where a suit has been begun by writ or summons, and where an attachment issues after proceedings have been begun by writ or summons, the proceedings shall continue and be carried to judgment under the writ or summons, except those that must be taken under the attachment.

The effect of this section is not clear so far as it concerns the subsequent procedures to be followed when an attachment is used as originating process.

in which the original statement was filed, the lien is vacated and all further proceedings on it shall cease, and the person making the payment is entitled to an order directing the delivery up of the logs or timber seized under the attachment, or the cancellation of any bond given under section 16.

The effect of a payment into court is uncertain. Nothing in the language of section 19 or any other provision suggests that it is substitute security which stands in place of the logs to await the outcome of the trial of an issue. Its effect seems to be an acquiescence to the lien claim -- but there appears to be no provision of the Act which authorizes that the money be paid out of court to the lien claimant.

Assuming no bond is posted and there is no payment into court, what is the next step? Section 20(1) provides:

20. (1) After the expiration of the time for entry of a notice of dispute, the court shall, on the application of the claimant, issue an appointment naming a day on which all persons claiming a lien on the logs or timber shall appear in person, or by their solicitor or agent, before the court for the adjustment of their claims and the settlement of accounts. The appointment shall, if the court directs, be served on the defendants and on the owner, and shall also, if the court directs, be published once a week for 2 weeks before the day named in the appointment in a newspaper published in the judicial district in which proceedings are pending, if a newspaper is published there, and if not, then in a newspaper circulating in that district.

Subsequent sections provide for service of the appointment by registered mail.<sup>83</sup> the hearing and proof of claims.<sup>84</sup> At the conclusion of the hearing the court is directed to make a “report and order” which directs payment into court of the amounts found due and costs within 10 days and that in default the logs be sold by the sheriff,<sup>85</sup> The sale must take place within 20 days of default and the general law of sale under execution is made applicable.<sup>86</sup> The proceeds of the sale are to be paid into court and the claimants may thereafter apply for payment out.<sup>87</sup> If the proceeds are not sufficient to satisfy all claims the claimants are to be paid pro rata<sup>88</sup> and are entitled to a certificate (enforceable as a judgment) for the deficiency.<sup>89</sup> Any surplus is to be paid to the party entitled to it.<sup>90</sup>

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<sup>83</sup> *Ibid*, s. 20 (2).

<sup>84</sup> *Ibid*, ss. 21, 22.

<sup>85</sup> *Ibid*, s. 23. The court may also order that the logs be sold forthwith.

<sup>86</sup> *Ibid*, s. 24(1).

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*, s. 24(2).

<sup>89</sup> *Ibid*, s. 25.

<sup>90</sup> *Ibid*, s. 28.

The procedures described above, which concern the disposition of logs seized under an attachment, are made applicable to seizures made under an execution where the enforcement proceeding was “by suit” under section 6. Section 8 provides:

8. ...The proceedings relating to proof of other claims, and the payment of money into court, and the distribution of the money, and otherwise, shall, as far as practicable, be the same as is hereinafter provided for proceedings on and subsequent to an attachment.

The application of this provision was explained by Robertson J.A. in *Warehouse Security*:<sup>91</sup>

It is obvious that the only purpose of issuing a writ of attachment in such cases is that the sheriff may seize and safely keep the logs subject to the order of the court. Sec. 9 provides that the enforcement of the lien is to be by sale under a writ of execution where no attachment has issued. But the latter part of the section brings in the procedure set out in sec. 21 to sec. 26; so that *no sale can be made until the proceedings mentioned have been taken*. There may be other lien claimants who have commenced actions, who may prove their claims (sec. 22(1)) and the logs may be sold to realize the amount to cover these claims as well as the amount for which execution was issued, or there may be no lien claimants. In either event, after the hearing the Judge makes his report and orders the logs to be sold (sec. 24). It seems to me therefore that *while the sale takes place under the execution it cannot take place until there is an order for sale by the Court*, that is “a disposition of the thing,” as said by Blackburn J., *supra*. The purpose of the writ of execution is, in the first instance, to get the logs in the sheriffs hands, just as a writ of attachment does, and that afterwards, after an order for sale has been made, the logs may be sold by the sheriff.

Thus an inquiry under section 20 is a necessary part of every enforcement proceeding if the ultimate remedy of sale of the logs is to be pursued.<sup>92</sup>

## 6. Assignments

When lien claims are small, it may be convenient for one of a number of claimants (or a third party) to consolidate them by taking an assignment of lien claims for the purpose of enforcing rights under the Act. This practice is recognized and sanctioned by the Act:

32. Any number of lien holders may join in taking proceedings under this Act, or may assign their claims to any person, but the statement to be filed under section 3 shall include particular statements of the several claims of persons so joining, and shall be verified by their affidavits or those of a person duly authorized on their behalf, or separate statements may be filed and verified as provided by this Act, and one attachment issued on behalf of all the persons so joining.

An assignment must be strictly proved and notice given to the obligor.<sup>93</sup>

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<sup>91</sup> *Supra*, n. 41 at 586 (emphasis added).

<sup>92</sup> But in *Allain v. Canadian Pacific Lumber Ltd.*, (unreported 1955) 13 Advocate 158 (B.C.S.C.) it was held that the s. 20 procedures were not available if enforcement proceedings were commenced by writ. The case is of doubtful authority as *Warehouse Security* was not cited to the court.

<sup>93</sup> *Sheepwash v. Deer Mountain Lumber Co.*, (1925) 37 B.C.R. 418 (C.A.). Cf. *Dempsey v. Kurek*, [1923] 3 W.W.R 1007 (Co. Ct.).

## D. Payroll Receipts

### 1. Introduction

In sections 37 to 40 the *Woodworker Lien Act* creates an extraordinary remedy in favour of wage earners:

37. Every person entering a contract, engagement or agreement with another person for the furnishing, supplying or obtaining of logs or timber by which it is requisite and necessary to engage and employ workers and labourers in the obtaining, supplying and furnishing the logs or timber shall, before making any payment for, or on behalf of, or under the contract, engagement or agreement of a sum of money or in kind, require the person to whom payment is to be made to produce and furnish a payroll or sheet of the wages and amount due and owing and of the payment of them, which payroll or sheet may be in the form in Schedule B, or, if not paid, the amount of wages or pay due and owing to all the workers or labourers employed or engaged on or under the contract, engagement or agreement at the time when the logs or timber are delivered or taken in charge for, or by or on behalf of, the person making the payment and receiving the timber or logs.

38. A person making a payment under the contract, engagement or agreement without requiring production of a receipted payroll or sheet as mentioned in the preceding section is liable, at the suit of a worker or labourer so engaged under the contract, engagement or agreement. for the amount of pay so due and owing to that worker or labourer under the contract, engagement or agreement.

39. The person to whom the payroll or sheet is given shall retain, for the use of the workers or labourers whose names are set out in the payroll or sheet, the sums set opposite their respective names which have not been paid and the receipts of the workers or labourers shall be a sufficient discharge for them.

40. Sections 37, 38 and 39 do not apply to the purchase of manufactured lumber purchased in the ordinary course of business.

The scheme set out is a simple one. Essentially, it casts a duty on every person making payments under certain logging contracts to require the production of payroll records. If it appears by the records that any worker is unpaid that person is required to retain, for the use of the worker, the amount unpaid. The person who fails to require production of payroll records is liable to the unpaid worker for the wages due. Curiously, the worker is not specially given an action against a person who requires production of payroll records and fails to retain unpaid wages or against a person who retains unpaid wages but fails to pay them to the worker.

### 2. The Scope of Section 37

#### (a) *Who is Protected?*

The issue of who is entitled to the protection of section 37 appears to have been considered in only one case. In *McDonald v. Brunette Saw Mill Co.*,<sup>94</sup> the woodworkers had agreed to accept remuneration on a production (piecework) basis. It was held that the type of “wages” protected

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<sup>94</sup>

(1922) 31 B.C.R. 77 (Co. Ct.).

were only those in the “daily or monthly form” and in any event (consistent with the lien cases of the time) the woodworkers were independent contractors who were outside the Act.

It should be noted, however, that sections 37 to 40 exist quite independently of the lien provisions of the Act,<sup>95</sup> and have a separate legislative history.<sup>96</sup> Caution is required in applying cases construing the latter to situations arising under the former, particularly since different language is employed.

The lien provisions protect “persons” who perform “labour or services.” Both expressions are defined. Section 37 protects “workers and labourers” engaged in connection with “obtaining, supplying, and furnishing” logs or timber. Those expressions are not defined. It may be that wages of cooks and blacksmiths are not protected by section 37. On the other hand, it might be argued that section 37 is broader and catches everyone who might appear on the payroll of a logging operation, even if they are not a “person” or performing “labour or services” which would entitle them to a lien under section 2.

(b) *To What Contracts Does it Apply?*

Section 37 applies to contracts “for the furnishing, supplying or obtaining logs or timber by which it is requisite and necessary to engage and employ workers and labourers in obtaining.. .the logs or timber.” What sorts of contracts are contemplated by section 37? One exception appears in section 40 which provides that it has no application to contracts for the purchase of manufactured lumber made in the ordinary course of business.

A further limitation on section 37 was described in *Mills v. Smith Shannon Lumber Co.* by Macdonald C.J.A.:<sup>97</sup>

S. 37 provides that every person entering into an agreement with another for supplying or obtaining logs by which it is necessary to employ workmen, shall, before making any payment, require the production of the employer’s pay-roll. And s. 38 provides that where the preceding section has not been complied with a workman shall have a right of action for his wages against the person for whom the logs were supplied under the contract. In a proper case these sections would enable the work man to sue the purchaser in a personal action as if he were the employer and debtor, but in my opinion the sections apply only to contracts which contemplate the employment of labour after the date of the contract. The contract in question here was for the purchase of logs already manufactured and ready to be taken possession of by the purchaser....

Hence section 37 applies only to executory contracts contemplating labour.

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<sup>95</sup> Although it appears that a woodworker who proceeds with a lien claim is estopped from proceeding under section 38. See *Wake v. Canadian Pacific Lumber Co.*, (1902) 8 B.C.R. 358 (B.C.S.C., Full Court).

<sup>96</sup> See Chapter a of this Working Paper.

<sup>97</sup> (1916) 10 W.W.R. 454, 455 (B.C.C.A.).

The scope of section 37 was again considered by the Court of Appeal in *Ure v. MacGregor and Genoa Bay Lumber Co.*<sup>98</sup> In that case, M was the owner of a timber tenure and entered into an agreement with a logging company, G, whereby M was given the right to use G's equipment and machinery in connection with logging the tenure and G received a right of first refusal to buy the logs produced by M. Logs were produced by M and bought by G and no receipted payrolls were produced. M's unpaid workmen sued G, relying on section 38. Martin J.A. first considered the provisions in general terms:<sup>99</sup>

In my opinion the kind of contract contemplated by the Act is one by which one of the parties is obligated to furnish, supply or obtain logs," and the other is obligated to take them, the words for the purpose" of so doing indicate this because that means a "purpose which is fixed and definite in its result, and not one which may have no result whatever. A careful perusal of the action shows that many kinds of contracts to "obtain, supply or furnish" logs are not within its scope: e.g., a contract by which A agreed to lend machinery to B so that B could "obtain" logs off Blackacre, and then sell them to c, would clearly be outside the section as regards A because though the purpose" would be to obtain and supply logs to c yet A could not be called upon to make "any payment.... under such contract.... in money or by kind," and therefore he was not required or entitled to call for a pay-roll and so was not liable for wages under section 38, and much less is a contract within the section by which A simply lends machinery to B for the purpose of "obtaining" logs from Blackacre so that B could sell them in the open market.

and continued:<sup>100</sup>

The "purpose" of the contract must be determined at its date of execution and here, at that date, the "purpose" was not more than if MacGregor "obtained" logs by means of the company's loaned machinery then the company might or might not buy them from him. I do not think that this indefinite "purpose," freed from any obligation on the part of MacGregor to "obtain" even one log, or on the part of the company to buy that log if obtained, can be said to be a "purpose which would produce any definite or fixed result under the section, and the fact that later on the company did exercise its option in favour of buying the logs does not alter the original "purpose" of the transaction in its true statutory sense, or throw it back, so to speak, into a different interpretation.

This was supported by Galliher J.A.:<sup>101</sup>

Under the document, there is nothing binding MacGregor to produce logs, and even when produced, there is nothing binding on the company to accept them, and only on production and acceptance can it be said to become a contract such as is referred to in section 37.

...

The work then has been all done before we can say there is a binding contract.

...

I have considered this phase of the question--as to whether the production having been started, men hired and work done under the agreement, when it becomes a complete contract by acceptance, could it

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<sup>98</sup> (1923) 32 B.C.R. 122 (C.A.).

<sup>99</sup> *Ibid.* at 124.

<sup>100</sup> *Ibid.* at 125.

<sup>101</sup> *Ibid.* at 126.

be said to relate back to the date of the agreement so as to bring it within the Act, but I am unable to convince myself that such would be the case, and can find no authority for such a proposition.

Thus a contract providing only for a right of first refusal would seem to be outside section 37, but it has been suggested that an advance may bring the contract within the section:<sup>102</sup>

The making of an advance to a first refusal supplier against specific logs and the acceptance of such advance by the supplier could constitute a contract within the meaning of Section 37. If this is the correct position, then no payment should be made after the first advance on these logs without obtaining a receipted payroll. If at the time of the advance the logs are in the water ready for delivery, subject only to scaling, it would probably be unnecessary to obtain a receipted payroll before making any payment subsequent to the first advance. However, a receipted payroll should be obtained if work will be done on the logs between the making of the advance and the delivery of the logs.

The problem of “advances” leads to the broader issue of what is a “payment” for the purposes of section 37.

(c) *What is a Payment?*

It is often the case that logging operations are funded by advances made by the ultimate buyer or owner of logs to the person actually carrying on the operation.<sup>103</sup> If an advance is made at the time a contract is entered into, or before any work has been done there would appear to be no need to require production of the payroll. But what about a subsequent advance after work has been done? It was suggested in the passage quoted above that it would be a “payment” with respect to which a payroll should be produced. But that would be true only *if* the advance could be characterized as being “for, on behalf of, or under the contract.” That test may be satisfied if the contract contemplates or requires such advances. But if the contract is silent on the matter it may be open to a court to treat the advance as a simple loan transaction to which the Act does not apply.

A simple loan by a financier, such as a bank, should not be caught by the Act, just as the equipment supplier, in the example cited by Martin J.A. in *Ure*,<sup>104</sup> is outside its scope. There seems to be no reason, in principle, for treating a buyer-financier any differently than an independent financier with respect to money provided to enable a logger to carry on operations.

The rights of the parties are complicated, however, by the decision in *Young v. West Kootenay Shingle Co.*<sup>105</sup> where it was held that a book credit given toward the discharge of a pre-existing indebtedness is a “payment” under section 37. It is open to the log buyer-financier to call

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<sup>102</sup> G.N. Monro, *Woodmen’s Liens*, *British Columbia Annual Law Lectures*, 1967, 36, 38.

<sup>103</sup> Occasionally the “financier” will pay the logger’s workers directly. This is not a payment which violates s. 37: *Von Koughnet v. Quair* [1930] 1 W.W.R. 214 (B.C. Co. Ct.).

<sup>104</sup> *Supra* n. 98.

<sup>105</sup> (1905) 11 B.C.R. 171 (S.C.).

for production of the payroll before giving the credit but what is there to “retain” under 39 if wages are unpaid?

### 3. The Nature of the Right

It seems clear that what is created by section 37 to 40 is a mere personal right of action. Moreover, that right of action has been characterized as one for a “penalty or forfeiture” and not for debt.<sup>106</sup> A failure to comply with section 37 appears to create no interest, in favour of unpaid workers, in money owing by a log buyer to their employer, although if money is retained pursuant to section 39 the workers may have priority to it as against other creditors of the employer.<sup>107</sup>

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<sup>106</sup> *Dillon v. Sinclair*, (1900) 7 B.C.R. 328 (S.C.)

<sup>107</sup> *See generally, Powell v. Norgren*, [1940] 1 W.W.R. 272 (B.C.C.A.)



## APPENDIX B

### *WOODWORKER LIEN ACT*

R.S.B.C. 1979, c. 436

#### **Interpretation**

1. (1) In this Act

“labour or services” includes cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming logs or timber, and any work done by cooks, blacksmiths, artisans and others usually employed in connection with it, and any work done by engineers and all other persons employed in any capacity in or about a mill or factory where lumber of any description is manufactured; “logs or timber” includes logs, timber, piles, posts, telegraph and telephone poles, ties, mining props, tan bark, shingle bolts and staves, or lumber of any description manufactured from them.

(2) “Person” in section 2 includes cooks, blacksmiths, artisans and all others usually employed in connection with labour or services, and physicians, surgeons and others entitled to receive payments from or out of any fund made up from deductions by an employer from the wages of those cooks, blacksmiths, artisans and others, arising from the labour or services, and set apart for payment of medical or surgical attendance and service on those employees.

#### **Lien on logs or timber**

2. (1) A person performing labour or services in connection with logs or timber in the Province, or his assignee, has a lien on them for the amount due for the labour or services, which shall be deemed a first lien or charge on the logs or timber, and has precedence over all other claims or liens on them, except a lien or claim which the Crown may have on the logs or timber for or in respect of any dues or charges, or which a timber slide company, or owner of slides and booms, may have on them, for or in respect of tolls.

(2) Where, under the *Employment Standards Act*, or otherwise, an employer deducts from the wages of his employees, being persons performing labour or services in connection with logs or timber in the Province, a sum for the payment of or for medical or surgical attendance and services on and for the employees, a physician, surgeon or other person entitled to receive the sum or a part of it or to payment from it has a lien on the logs or timber for the amount due him from the fund, which shall be

deemed a first lien or charge on the logs or timber and has precedence over all other claims or liens on them, except the liens or claims provided for in subsection (1).

### **Filing**

3. A lien arising under section 2 is void unless a statement of it in writing, verified on oath by the person claiming the lien, or some person duly authorized on his behalf, is filed in the office of a registrar of the Supreme Court.

### **Contents of statement**

4. The statement shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims and a description of the logs or timber on or against which the lien is claimed, and may be in the form in Schedule A, or to the like effect.

### **Statement to be filed within 30 days**

5. The statement shall be filed within 30 days after the last day the labour or services were performed; but a sale or transfer of the logs or timber on which a lien is claimed under this Act during the time limited for the filing of the statement of claim, and previous to the filing of it, or after the filing of it and during the time limited for the enforcement of it, shall not in any way affect the lien, which shall remain and be in force against the logs or timber in whose possession they are found, except sawn timber sold in the ordinary course of business.

### **Enforcing lien**

6. (1) A person having a lien on or against logs or timber may enforce it by suit in the Supreme Court where the statement of lien is filed. The lien claim ceases to be a lien on the property named in the statement unless the proceedings to enforce it are commenced within 30 days after the filing of the statement, or after the expiry of the period of credit. The person liable for payment of the debt or claim shall be made the party defendant in the suit.

(2) There shall be attached to or endorsed on the writ or summons in the suit a copy of the lien claim filed as provided above, and no other statement of claim or particulars is necessary unless ordered by the court. If no defence or dispute note is filed, judgment may be signed and execution issued according to the practice of the court.

## **Procedure**

7. The court may order particulars to be given, or proper or necessary amendments to be made, or may add or strike out the names of parties at any time, and may set aside any judgment and permit a defence or dispute note to be entered or filed, on the terms that the court considers proper. The writ or summons shall be in the form, as nearly as may be, in use in the court in which it is issued, and the practice shall follow, as nearly as may be, the practice of that court. Writs or summonses may be served anywhere in the Province in the same manner as in other cases, and the judgment shall declare that it is for wages, the amount of them and costs, and that the plaintiff has a lien for them on the property described when that is the case.

## **Sale under execution**

8. Where an execution has issued and has been placed in the sheriff's hands for execution, and no attachment has been issued, the proceedings for the enforcement of the lien shall be by sale under the execution. The proceedings relating to proof of other claims, and the payment of money into court, and the distribution of the money, and otherwise, shall, as far as practicable, be the same as is hereinafter provided for proceedings on and subsequent to an attachment.

## **Summary hearing**

9. (1) Whether commenced by writ, summons or attachment, the court may direct that any proceeding shall be disposed of summarily without waiting for the regular sittings of the court, on the terms as to notice and otherwise that the order provides.  
  
(2) The court may also summarily dispose of an application to set aside an attachment or seizure, or to release logs or timber that have been seized.

## **Where attachment issues**

10. Where an attachment issues in the first instance, the statement of claim and defence or dispute note, and proceedings to judgment, may be the same as provided above. Where a suit has been begun by writ or summons, and where an attachment issues after proceedings have been begun by writ or summons, the proceedings shall continue and be carried to judgment under the writ or summons, except those that must be taken under the attachment.
11. [Repealed 1989-40-214.]

### **Seizure, when allowed**

12. (1) On the production and filing of the statement mentioned in section 3 or a copy of it, and an affidavit made and sworn by the claimant of the amount of the claim due and owing, and showing that it has been duly filed, and stating that
  - (a) he has good reason to and does believe that the logs or timber are about to be removed out of the Province;
  - (b) he has good reason to and does believe that the logs or timber are about to be removed out of the district or locality in which they then lie;
  - (c) the person indebted for the amount of the lien has absconded from the Province with intent to defraud or defeat his creditors; or
  - (d) the logs or timber are about to be cut into lumber or other timber so that they cannot be identified; and
  - (e) he is in danger of losing his claim if an attachment does not issue,

and if affidavits corroborating the affidavit of the plaintiff in respect of paragraph (a), (b), (c) or (d) are also filed, the registrar of the court having jurisdiction in the matter shall issue a writ of attachment directed to the sheriff, commanding him to attach, seize and take and safely keep the said logs or timber, or the portion of them that may be necessary to satisfy the amount claimed and the costs of the suit, and of the proceedings to enforce the lien.

(2) Where additional claims are made, or the amount of claim is increased, or a sufficient seizure has not been made, a second or subsequent seizure may be made either under execution or attachment.

### **Concurrent writs**

13. The plaintiff may, at any time within 6 months from the date of the original writ of attachment, issue from the office from which the original writ issued one or more concurrent writs of attachment, to bear test on the same day as the original writ, and to be marked by the officer issuing the same with the word “concurrent” in the margin, which concurrent writs of attachment may be directed to any sheriff other than the sheriff to whom the original writ was issued, and need not be sued out in duplicate or be served on the defendant, but shall operate merely for the attachment of the logs or timber in aid of the original writ.

### **Writ of attachment as summons**

14. (1) The writ of attachment shall also, where no writ or summons has issued, summon the defendant to appear before the court out of which the attachment has issued. A copy of the writ of attachment shall be served on the defendant, and if he is not the owner of the logs or timber described in the writ, then a copy of the writ shall also be served on the owner of the logs or timber, or on the person or agent in whose possession, custody or control they may be found, for him
- (2) Where the defendant or owner of the logs or timber cannot be found within the jurisdiction of the court, and there is no one in possession of the logs or timber, then a copy of the writ of attachment shall be forwarded to any sheriff or other constable or other competent person in the Province within whose jurisdiction the defendant and owner, or either of them, as the case may be, resides or may be found. The copy of the writ of attachment may be served by that sheriff, constable or person on the defendant or owner of the logs or timber. The owner may, on his own application or by discretion of a court, be made a party defendant at the trial.
- (3) If the defendant or owner cannot be found in the Province, or the owner cannot be ascertained, and no agent or person is in possession for the owner, the writ may be served in the manner the court directs; but where the writ is served on an agent or other person in possession as stated above, the order of the court allowing the service shall be necessary.
- (4) Where the service has not been personal on either the defendant or owner, and a proper defence has not been made, the court may, in its discretion, admit them, or either of them, to make full defence, and may make any order that is reasonable and just to all parties.
- (5) The sheriff, constable or person is, before making service, entitled to demand payment of a sum sufficient to cover the amount of his necessary disbursements in effecting it.

#### **Attachment of logs or timber in transit or held for delivery**

15. A sheriff or bailiff shall not seize or detain logs or timber under this Act when in transit from the place where cut to the place of destination when the place of destination is within any of the districts in which proceedings have been commenced, but if the logs or timber are so in transit, or are in the possession of a booming company or other person for the purpose of being driven or sorted and delivered to the owners, or to satisfy a statutory lien, then attachment of the logs or timber may be made by serving a copy of the attachment on the company or person driving or holding them, who shall from the time of service be deemed to hold them, both on its or his own behalf and for the sheriff to the extent of the lien, until the logs or timber can be driven and sorted out; and when driven or sorted out the sheriff may receive the

logs or timber from the company or person, and the statutory lien of the company or person shall not be released by the holding of the sheriff or other officer.

### **Bond**

16. In case of an attachment, if the owner of the logs or timber, or a person in his behalf, executes and files with the registrar of the court out of which the attachment has issued a good and sufficient bond to the person claiming the lien, executed by 2 sureties and approved by the registrar, and conditioned for the payment of all claims, damages, costs, charges, disbursements and expenses that may be recovered by the claimant in the proceedings, together with the amount for which a lien is claimed in any other suit, the registrar shall issue an order to the sheriff having in charge the logs or timber directing their release, and on service of the order on the sheriff he shall release them.

### **Dispute note**

17. A person who has been served with a copy of the writ of attachment under the preceding sections, and who desires to dispute it, shall within 14 days after the service enter in the court in which proceedings are pending a notice that he disputes the claim on the lien in whole or in part.

### **Default judgment**

18. If a notice of dispute is not entered under the last preceding section, judgment may be entered as in the case of default, and the practice or procedure may be the same as in a suit begun by writ or summons.

### **Payment into court**

19. The defendant may at any time after service of the writ of attachment, and before the sale of the logs or timber, pay into court the amount for which a lien is claimed in the suit, together with the amount for which a lien is claimed in any other suit, together with the costs of the proceedings on them to the date of payment, taxed by the registrar of the court if so required. The person making the payment is then entitled to a certificate vacating the lien, and on the certificate being filed with the registrar of the court in which the original statement was filed, the lien is vacated and all further proceedings on it shall cease, and the person making the payment is entitled to an order directing the delivery up of the logs or timber seized under the attachment, or the cancellation of any bond given under section 16.

### **Appointment and notice of hearing**

20. (1) After the expiration of the time for entry of a notice of dispute, the court shall, on the application of the claimant, issue an appointment naming a day on which all persons claiming a lien on the logs or timber shall appear in person, or by their solicitor or agent, before the court for the adjustment of their claims and the settlement of accounts. The appointment shall, if the court directs, be served on the defendants and on the owner, and shall also, if the court directs, be published once a week for 2 weeks before the day named in the appointment in a newspaper published in the judicial district in which proceedings are pending, if a newspaper is published there, and if not, then in a newspaper circulating in that district.

(2) A copy of the appointment shall be mailed by registered letter to every holder of a claim known to the plaintiff as a holder at least 2 weeks before the day named in the appointment, directed to the post office address of the claimant where it is known, and if not known, then to his last known address.

### **Hearing**

21. (1) On the day named in the appointment and advertisement the persons served with a copy of it, and all other persons claiming a lien on the logs or timber who have prior to that date filed with the registrar of the proper court a notice claiming a lien on the logs or timber and stating the nature and amount of the claim, shall attend before the court named in the appointment and advertisement.

(2) Where claims are brought in pursuant to notice they may be established by affidavit, but any party interested shall be at liberty to cross examine the deponents, and may require that the claim be established in open court as in other cases.

### **Duties of court on hearing**

22. The court shall hear all parties and take all accounts necessary to determine any amounts due to them, or any other holders of liens who may be called on by the court to prove their lien, and shall review their costs and determine who shall pay them and settle their priorities, and generally determine all matters necessary to adjust the rights of the several parties.

### **Court's report and order**

23. At the conclusion of the inquiry the court shall make its report and order, which shall state its findings and direct the payment into the court in which proceedings are

pending of any amounts found due and the costs, within 10 days thereafter, and in default of payment, that the logs or timber shall be sold by the sheriff for satisfaction of the amounts found due to the several parties on the inquiry and costs. If the court is satisfied, having regard to the saving of costs or necessity of expedition of a sale, that the interests of all parties before the court as well as of all the creditors will be better served, he may order that the logs or timber shall be sold without delay by order of the court to the purchaser and at the price agreed to by the parties before the court.

### **Sale of logs**

24. (1) In default of payment into court under the last preceding section within the time named in the order, the logs or timber shall, within 20 days after that, be sold by the sheriff holding them, in the same manner and subject to the same law as goods seized or taken in execution, unless the court directs that additional publicity be given to the sale. The amount realized by the sale shall, after deducting the expenses of it payable to the sheriff, be paid into the court in which the proceedings are pending, and shall, on the application of the several parties found to be entitled to it under the order of the court, be paid out to them by the registrar of the court.

(2) Where the amount realized on the sale is not sufficient to pay the claims in full and costs, the court shall apportion the amounts realized *pro rata* among the different claimants.

### **Balance remaining due after distribution**

25. If after the sale and distribution of proceeds under section 24 an amount remains due to a person under the order of the court, the registrar of the court shall, on application of that person, give him a certificate that the amount remains due, which may be entered as a judgment in any court having jurisdiction against the person by whom the claim was directed to be paid, and execution may be issued on it as in the case of other judgments in the court.

### **Order discharging liens where nothing found due**

26. Where nothing is found due on the several claims filed as mentioned in section 21, or on the liens with respect to which proceedings have been taken, the court may direct by its order that the liens be discharged and the logs or timber released, or the security given for them be delivered up and cancelled, and shall also by that order direct immediate payment of any costs which may be found due to the defendant or the owner of the logs or timber.



## **Costs**

27. The costs to be taxed to a party shall, as far as possible, be according to the tariff of costs in force for other proceedings in the court in which proceedings under this Act have been taken.

## **Excess money paid into court**

28. Where more money is paid into court as the proceeds of the sale of logs or timber than is required to satisfy the liens which are proved, and interest and costs, the court may order payment out of the remaining money to the party entitled to it.

## **Application to dismiss for want of prosecution**

29. A person affected by proceedings taken under this Act may apply to the court to dismiss them for want of prosecution, and the court may make the order on the application as to costs or otherwise that is just.

## **Adding parties**

30. The court may at any stage of proceedings under this Act, on the application of a party or as it sees fit, order that a person who may be deemed a necessary party to the proceedings be added as a party to them or be served with a process or notice provided for by this Act, and the court may make an order as to the costs of adding the person or as to service that is just.

## **Alternate remedies**

31. This Act shall not be deemed to disentitle a person to another remedy than that afforded by this Act for the recovery of an amount due in respect of labour or services performed on or in connection with logs or timber, and where a suit is brought to enforce a lien but no lien is found due, judgment may be directed for the amount found due as in an ordinary case.

## **Lien holders may join in proceedings**

32. Any number of lien holders may join in taking proceedings under this Act, or may assign their claims to any person, but the statement to be filed under section 3 shall include particular statements of the several claims of persons so joining, and shall be verified by their affidavits or those of a person duly authorized on their behalf, or

separate statements may be filed and verified as provided by this Act, and one attachment issued on behalf of all the persons so joining.

### **Consolidation of causes**

33. If more than one suit is commenced under this Act in respect of the same logs or timber, the defendants, or any of them, shall apply to have the causes consolidated, and, failing to do so, he or they shall pay the costs of the additional suits.
34. [Repealed 1989-40-215.]

### **Procedure**

35. The procedure regulating the practice in actions brought in the Supreme Court shall, so far as it is not inconsistent with this Act, regulate proceedings under this Act.

### **Who may take affidavits**

36. Affidavits and affirmations under this Act may be sworn before a commissioner for taking affidavits.

### **Payrolls of woodmen's wages to be produced**

37. Every person entering a contract, engagement or agreement with another person for the furnishing, supplying or obtaining of logs or timber by which it is requisite and necessary to engage and employ workers and labourers in the obtaining, supplying and furnishing the logs or timber shall, before making any payment for, or on behalf of, or under the contract, engagement or agreement of a sum of money or in kind, require the person to whom payment is to be made to produce and furnish a payroll or sheet of the wages and amount due and owing and of the payment of them, which payroll or sheet may be in the form in Schedule B, or, if not paid, the amount of wages or pay due and owing to all the workers or labourers employed or engaged on or under the contract, engagement or agreement at the time when the logs or timber are delivered or taken in charge for, or by or on behalf of, the person making the payment and receiving the timber or logs.

### **Person not requiring production liable to workmen**

38. A person making a payment under the contract, engagement or agreement without requiring production of a receipted payroll or sheet as mentioned in the preceding

section is liable, at the suit of a worker or labourer so engaged under the contract, engagement or agreement, for the amount of pay so due and owing to that worker or labourer under the contract, engagement or agreement.

### **Sums unpaid to be retained**

39. The person to whom the payroll or sheet is given shall retain, for the use of the workers or labourers whose names are set out in the payroll or sheet, the sums set opposite their respective names which have not been paid and the receipts of the workers or labourers shall be a sufficient discharge for them.

### **Manufactured lumber purchased in ordinary course of business**

40. Sections 37, 38 and 39 do not apply to the purchase of manufactured lumber purchased in the ordinary course of business.

### **Fees**

41. No fees in stamps or money are payable to a judge or other officer in a suit brought to enforce a lien under this Act or on a filing, order, record or judgment, or other proceeding, in that suit, except that every person shall, on filing his statement of claim where he is a plaintiff, pay in stamps \$2 on every \$100 or fraction of \$100, of the amount of his claim up to \$1,000.

## **SCHEDULES**

### **SCHEDULE A**

#### **STATEMENT OF CLAIM OF LIEN**

A.B. [name of claimant], of [here state residence of claimant] (if so, as assignee of) [here state name and address of assignor], under the Woodworker Lien Act, claims a lien on certain logs or timber of [here state the name and residence of the owner of logs or timber on which the lien is claimed, if known], composed of [state the kinds of logs and timber, such as fir, sawlogs, cedar or other posts or railway ties, shingle bolts or staves, etc., also where situate at time of filing of statement], in respect of the following work, that is to say [here give a short description of the work done for which lien is claimed], which work was done for [here state the name and residence of the person on whose credit the work was done], between the [month, day], 19 , and the [month, day], 19 , [per month or day, as the case may be]. The amount claimed as due [or to become due] is the sum of [when credit has been given] (the work was done on credit, and the period of credit will expire on [month, day], 19 ).

Date at [month, day], 19 .

(Signature of claimant) \_\_\_\_\_

AFFIDAVIT TO BE ATTACHED TO STATEMENT OF CLAIM

I, , make oath and say that I have read [or have heard read] the foregoing statement, and I say that the facts set forth in it are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me in giving credit for all sums of money for goods or merchandise to which the said [naming the debtor] is entitled to credit as against me.

Sworn before me at on [month, day], 19 .

\_\_\_\_\_  
A commissioner, etc.

SCHEDULE B  
PAYROLL

[Omitted]

## APPENDIX C

### LIENS FOR TUGBOAT AND TOWAGE SERVICES

The legal significance of the *Tugboat Worker Lien Act*<sup>1</sup> can only be understood in the larger context of maritime law and the special body of rights and remedies that tugboat owners may pursue when they have not been paid for their services. The first part of this Appendix describes these rights and remedies.<sup>2</sup> It then proceeds to consider the *Tugboat Worker Lien Act* and its relationship to the owner's other remedies. The Appendix concludes with a discussion of the Constitutional status of the Act.

#### A. The Law of Tug and Tow

##### 1. Background - the Nature of Towage Services

Towage was originally regarded as a form of salvage because disabled sailing vessels were towed out of danger. With the advent of steam power, however, sailing vessels increasingly used tugs to expedite their voyage. Towage became distinct from salvage and developed its own definition and body of law.<sup>3</sup>

[Towage is] the employment of one vessel to expedite the voyage of another, when nothing more is required than ... accelerating her progress.

The definition of towage expanded further to include the use of tugs to tow cargo on board barges or other vessels.

##### 2. Breach of a Towage Contract - *Rights in Rem*

A maritime lien is a privileged lien in at least three respects. The lien is a right against the "thing" (property) itself and arises the moment the event that creates it occurs.<sup>4</sup> Once the action against the property is commenced the lien relates back to the period when it first attached.<sup>5</sup> Second, a maritime lien travels with the property and the person asserting the lien need not retain possession of the property. The lien takes no cognizance of the actual owner of the property upon

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<sup>1</sup> R.5.B.C. 1979, c. 417

<sup>2</sup> For a more detailed discussion of the law of tug and tow see Parks, *The Law of Tug, Tow and Pilotage*, 1982 and Bucknill, *The Law Relating to Tug and Tow*, 1913.

<sup>3</sup> *The Princess Alice*. (1849) W.Rob. 138, 166 E.R. 914, 915.

<sup>4</sup> E.g., the lien arises upon the performance of salvage services.

<sup>5</sup> The lien goes on title as of the date it arose and takes priority over other liens and claims that may have been registered between the date the lien arose and the date the action is commenced.

which it is attached. The owner need not be the “shipper” (the person who contracts with the tugboat operator). Third, the lien is a right in specific property that is good against the world.<sup>6</sup> A maritime lien is a very strong security and much Court attention has been devoted to the question whether it is available for simple towage.<sup>7</sup>

(ii) *Does a Maritime Lien Exist for Towage?*

During the 19th century, a number of early maritime law cases recognized a maritime lien upon the tow for nonpayment of the towage services.<sup>8</sup> This reflected, in part the blurring of claims based on towage and claims based on salvage.<sup>9</sup> As the nature of towage changed and expanded a reconsideration was required. This occurred in 1890 in *Westrup v. Great Yarmouth Steam Carrying Co.*<sup>10</sup> where it was definitively held that no maritime lien existed for towage claims.

(b) *Statutory Right In Rem*

(i) *What is a Statutory Right In Rem?*

A statutory right *in rem*<sup>11</sup>, which provides a right against the “thing” (property), is inferior to a maritime lien in at least two respects. The right *in rem* accrues upon the commencement of the action *in rem* and is subject to any claims subsisting at that time.<sup>12</sup> Additionally, property is subject to a right *in rem* only if the owner of the property is connected to the cause of action.<sup>13</sup> The right *in rem* is not available, for example, if a good faith buyer purchases the property before the action is commenced. In contrast, a maritime lien relates back to the time when it first attached and is not lost through changes in ownership or possession of the property.

(ii) *Does a Statutory Right In Rem for Towage Exist?*

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<sup>6</sup> See, *The Heinrich Bjorn*, (1885) 10 P. 44, 54, *aff'd* (1886) 11 App.Cas. 270.

<sup>7</sup> Claims in the nature of towage and for salvage came under the jurisdiction of the High Court of Admiralty as early on as 1840. See, *The Admiralty Court Act of 1840*, 3 & 4 Vict., c. 65. s. 6.

<sup>8</sup> See, e.g., *The St. Lawrence*. (1880) 5 P. 250 and *The Constancia*. , (1846) 4 Note of Cases 512.

<sup>9</sup> Also, a mistaken belief developed that a remedy *in rem* carried with it a maritime lien. Since the *Admiralty Court Act 1861*, 24 & 25 Vict., c. 10, established that a claimant could proceed either *in rem* or *in personam*, it was believed that a maritime lien existed for towage.

<sup>10</sup> (1890) 43 Ch.D. 241; see also, *The Minerva*, [1933]P. 224, 46 Lloyds L.R. 212; *Carow Towing v. The Ed McWilliams*, (1919) 18 Ex.C.R. 470.

<sup>11</sup> A statutory right *in rem* is sometimes called a statutory lien.

<sup>12</sup> See, *The Two Weelens*, (1872) LR 4, P.C. 161; *Benson Bros. v. “Miss Donna”*, [1978] 1 F.C. 379 (F.C.).

<sup>13</sup> In other words, the right *in rem* can only be exercised if the owner of the property could be held accountable at the time when the facts giving rise to the cause of action occurred. The right can not be exercised against property owned by someone who is not connected with the cause of action. This is largely due to the theory adopted by English Courts which presumed that rights *in rem* were procedural in nature and only used to compel an appearance by the defendant. See *The Beldis*, [1936] P. 51 and *The Monica S.*, [1968] 2 W.L.R. 431.

In England, statutory right *in rem* for towage arose under various admiralty statutes as early as 1840.<sup>14</sup> The Canadian *Admiralty Act*<sup>15</sup> adopted the maritime law of England, including the right *in rem.*, in 1891. The Canadian *Admiralty Act* subsequently conferred the jurisdiction of the British High Court of Admiralty on the Exchequer Court of Canada.<sup>16</sup> This jurisdiction is now vested in the Federal Court of Canada.<sup>17</sup> In Canada, therefore, a tugboat operator may pursue a statutory right *in rem* in the Federal Court of Canada for unpaid towage charges.<sup>18</sup>

### (iii) *Limitations on a Statutory Right In Rem*

A right *in rem* arising out of towage cannot be claimed until the towage contract is completed. If, for example, the shipper sells the property to a third party before the contract is completed, the tugboat operator loses the right *in rem*. Further, the owner of the property must be connected to the cause of action. No right *in rem* exists if the shipper is someone other than the owner of the property.<sup>19</sup> The priority position of the right *in rem* is weak. Its holder is vulnerable to claims subsisting at the time the action was commenced.

## 3. Possessory Liens for Freight

Services performed under towage contracts are often similar to contracts for the carriage of goods. Carriers, however, enjoy additional rights and a distinction has emerged between two types of towage contract. A towing agreement is characterized either as a “simple towage contract” or a “towage contract in the nature of affreightment” (hereafter a “contract for

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<sup>14</sup> See, e.g., the *Admiralty Court Act*, (1840) 3 & 4 Vict., c. 65 and (1861) 24 & 25 Vict., c. 10

<sup>15</sup> S.C. 1891, c. 29. ss. 3, 4.

<sup>16</sup> The Canadian *Admiralty Act* of 1891 provides:

3. In pursuance of the powers given by “*The Colonial Courts of Admiralty Act, 1890*” [it] is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said *Act* and by this *Act*

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, [and] all persons shall [have] all rights and remedies in all matters, (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under “*The Colonial Courts of Admiralty Act, 1890.*”

<sup>17</sup> The *Federal Court Act*, S.C. 1985, c. F-7, provides:

2. “Canadian Maritime Law” means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* ... or any other statute, or that would have been so administered if that court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as the law has been altered by this or any other Act of Parliament of Canada.

22.(1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian Maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

<sup>18</sup> Further, s. 43(3) of the *Federal Court Act* mirrors the traditional maritime law limit on statutory rights *in rem* by providing that the defendant must beneficially own the subject of the right *in rem* at the time when the *cause of action arises*.

<sup>19</sup> E.g., A. the owner of the property, may contract with B to transport the property to Vancouver. B, may then contract with T, the tugboat owner, to tow the property. If B does not pay T after the contract is completed, T may sue B for breach of contract, but, T does not possess a statutory right *in rem* because the owner of the property is not accountable for the breach of contract. Nevertheless, a statutory right *in rem* may exist if B acted as an agent for A. the owner.

freight”<sup>20</sup>). The distinction seems to turn on who supplies the tow. The courts seem most willing to characterize a towage contract to be one for freight when the tugboat operator also supplies the barge (or other thing) that forms the “tow.”<sup>21</sup>

The characterization is important because it determines the nature of the tugboat operator’s remedies for unpaid charges. In addition to a statutory right *in rem*, a towage contract characterized as contract for freight provides the tugboat operator with a common law possessory lien for freight upon delivery of the goods. A possessory lien gives a person who is owed freight the right to retain<sup>22</sup> the goods carried until the freight is paid.<sup>23</sup> The lien attaches to the goods carried as cargo even if the shipper is not the owner of them.<sup>24</sup> The possessory lien is lost once the goods are delivered to the consignee or owner.<sup>25</sup>

A key question is whether the towage of logs and timber products gives rise to a possessory lien. That depends on whether a court is prepared to characterize the towage as a contract for freight. Where the forest products are transported on board a barge that is supplied by the tugboat operator the arrangement, quite clearly, is a contract for freight. A different characterization results when the barge is supplied by the shipper rather than the tugboat operator. This would seem to be a simple towage contract and not a contract for freight.

Typically, however, logs and timber products are collected in *booms*, or are tied together to resemble a raft or crib and they are towed in that form. The similarities between towage in this form and the carriage of goods on board a barge is no longer as apparent. The logs and timber products are not “carried on board” the tow. They *form* the tow. Analytically, the towage of a log boom appears to be in the nature of a simple towage contract, rather than a contract for freight.<sup>26</sup>

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<sup>20</sup> In its technical sense, *freight* is the amount recoverable pursuant to a contract for the carriage and delivery of goods.

<sup>21</sup> E.g., a contract providing both a tug and a barge to haul cargo carried on board the barge is a contract for freight, while a contract to haul a barge loaded with cargo is simply a towage contract. See Tetley, *Maritime Liens and Claims* (1985) 299-300; Parks, *The Law of Tugs, Tow, and Pilotage*, (2nd ed., 1982). Although both authors accept the general principle and apply it to all contracts for towage, they refer to U.S. case law only. No Canadian case has been found that specifically states this proposition.

<sup>22</sup> A right of retention is the only right conferred by a common law possessory lien. The lienholder acquires no property rights in the goods and, unless authorized by an enactment, has no right to sell the goods to satisfy the claim.

<sup>23</sup> Freight is payable to the person with whom the contract of affreightment is made. As such, freight is usually payable to the shipowner (tugboat owner) when the goods are ready for delivery. However, if the shipowner sells or assigns the craft to someone else prior to the completion of the contract, the right to freight transfers to the new owner or the assignee. If the shipper contracts with a charter party instead of the shipowner to carry the goods, whether the charterer or the shipowner is entitled to freight depends on the contract between them. For an in depth analysis of the law of carriage, see, Ridley, J., *The Law of the Carriage of Goods by Land, Sea and Air* (6th ed., 1982) and Carver, T.G., *Carver’s Carriage By Sea* (13th ed. 1982). The liability to pay freight rests with the person the shipowner or charterer contracted with to carry the goods. The actual shipper is usually liable, unless someone else is clearly the contracting party. E.g., a charterer who has agreed to pay freight to the shipowner is liable.

<sup>24</sup> See, *Fox v. Nott*, (1861) 6 H.&N. 630, 158 E.R. 260.

<sup>25</sup> See, *Pigeon River Lumber Co. v. Mooring*, (1909) 13 O.W.R. 190, 196. See also, Tetley, *Maritime Liens and Claims*, 1985 at 334. But if the cargo is placed in the custody of a warehousekeeper or a wharfinger, with written notice that it is to remain subject to the lien, the cargo remains bound by it. See, *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 597.

<sup>26</sup> A handful of older cases dating from the turn of the century suggest that the towage of booms of logs or timber can give rise to a claim for “freight” and the possessory carrier’s lien associated with it. See, *Pigeon River Lumber Co. v. Mooring*, (1909) 13 O.W.R. 190; *Prembo v. Pacific Slope Lumber Co.*, (1915) 7 W.W.R. 1195; *Pacific Towing Co. v. Moms*, (1904) 11 B.C.R. 173. Whether a modern court would arrive at a similar conclusion is uncertain.



In summary, tugboat operators who have contracted to tow logs and timber products have, at the very least, a statutory right *in rem* to secure payment. If the operator also supplies the vessel towed, such as a barge, the contract will also result in a claim for “freight” and a carrier’s lien. There is also some authority that “freight” and a carrier’s lien may be claimed for the towage of logs or timber in the form of a boom.<sup>27</sup>

## **B. The Tugboat Worker Lien Act**

In British Columbia, tugboat owners can use the *Tugboat Worker Lien Act*, in addition to a statutory right *in rem* and, possibly, a carrier’s lien, to secure payment for their services. A brief examination of the Act follows.

### 1. The Scope of the Act

The Act gives a lien for “towage” which is defined as the:

1. [transporting] of logs or timber products from one place to another within the Province by towing the same through the water by tugboat, whether towed in booms, rafts, or cubs, or on board scows, barges or vessels.

The Act does not distinguish between contracts for freight and simple towage contracts. The Act gives a lien for the towage both of logs carried on a barge and of logs collected in a boom. It treats all towage contracts as contracts for freight.

The scope of “towage” and of the Act itself also turns on the meaning of “logs or timber products.” This is a defined term,<sup>28</sup> but the definition leaves a very important question unresolved. Products like wood chips, sawdust, and other kinds of wood waste are commonly transported by barge. It is uncertain whether these products are “logs or timber products,” the towage of which will support a lien under the Act.

### 2. The Nature of the Lien

The Act provides the owner of a tugboat who performs any towage of logs or timber products (the “tow”) a “first lien” on the tow except for “debts or liens in favour of the Crown.”<sup>29</sup>

4. Except as otherwise provided in this Act, every owner of a tugboat who performs any towage for any person has a lien on the logs or timber products towed for the amount of money payable for the towage, which shall be deemed a first lien and has precedence over all other liens, claims, charges or encumbrances on them, whether registered or unregistered, other than debts or liens in favour of the crown and prior liens existing under this Act.

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<sup>27</sup> *Ibid.*

<sup>28</sup> The definition in s. 1 provides:  
“logs or timber products” means logs, piles, poles, bolts, cordwood and other similar products of the forest;  
Other defined terms are “tugboat” and “owner” which are self-explanatory.

<sup>29</sup> Other exceptions to the “first lien” priority arise out of s. 3. These are discussed below.

A feature which distinguishes this statutory lien is its non-possessory character. The common law carrier's lien is a possessory lien whose availability requires that the tugboat owner have possession of the tow.<sup>30</sup> The *Tugboat Worker Lien Act* eliminates the requirement for continuous possession. The lien is lost, however, if the filing requirements of section 5 are not met.

### 3. Filing Notice of the Lien

Section 5 provides:

5. The lien shall lapse and cease to exist at the expiration of the period of 30 days after the last day on which the towage was performed, unless within that period the owner of the tugboat files or causes to be filed in the proper office prescribed in the Schedule an affidavit of the owner, or of some person having personal knowledge of the facts deposed to, setting out

- (a) the name and address of the owner claiming the lien, and the name of the tugboat by which the towage was performed;
- (b) the name and address of the person who contracted with the owner for the towage of the logs or timber products towed;
- (c) a description of the logs or timber products towed, including the registered timber marks or other marks of identification on them, if any;
- (d) the names or other descriptions of the places from and to which the towage was performed;
- (e) the last day on which the towage was performed; and
- (f) the amount of money claimed for the towage.

The lien lapses “30 days after the last day *towage was performed*” unless an affidavit is filed in the proper Supreme Court registry.<sup>31</sup> The language of the section refers to *performance* rather than *entitlement*. In some cases a tugboat owner, to receive the protection of the Act, may have to file an affidavit claiming a lien before the entitlement to payment has arisen.<sup>32</sup>

Section 6 addresses contracts that involve towage in stages. The tugboat owner may claim a single lien, even where the towage was performed at different times and by more than one tugboat, as long as it was performed under one contract and by the same tugboat owner. The affidavit must, however, contain the information required by section 5 on each individual tow.<sup>33</sup>

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<sup>30</sup> *But see, Canada Shipping Act, supra n. 25, s. 597.*

<sup>31</sup> The *proper* Supreme Court registry depends on where the lien arose, namely where the towage terminated. The Schedule attached to the *Act* lists the registries.

<sup>32</sup> For instance where the towage contract provides for payment more than 30 days after performance.

<sup>33</sup> S. 6 provides:

6. Where the towage in respect of which a lien is claimed under this Act was performed by the same owner under the same contract of towage, the lien is enforceable notwithstanding that the towage was performed by the owner, in stages, at intervals, by more than one tugboat, or by different tugboats at different times; but the affidavit filed in respect of the lien pursuant to section 5 shall include the full particulars of all stages, intervals and tugboats.

Arguably the language of s. 6 also permits the filing of a single affidavit where a single contract involves the towage of many booms or barges by one or several tugs.

#### 4. Priority of the Lien

It appears to be the policy of the Act to give its lien high priority. Section 4 provides that the lien:

...shall be deemed a first lien and has precedence over all other liens, claims, charges or encumbrances on them, whether registered or unregistered, other than debts or liens in favour of the Crown and prior liens existing under this Act.

This gives the lien priority over most consensual security interests regulated by the *Personal Property Security Act*,<sup>34</sup> (PPSA). The “first lien” status is eroded considerably by section 3:

3. Nothing in this Act affects
  - (a) any lien created by virtue of the Woodworker Lien Act, or by virtue of any statute of Canada respecting navigation and shipping;
  - (b) any rights existing by virtue of the Bank Act (Canada);<sup>35</sup>
  - (c) any lien or rights which the owner of a tugboat may have in respect of towage by virtue of common law.

Paragraphs (a) and (c) appear to preserve the high priority enjoyed by woodworker liens and maritime carriers’ liens.<sup>36</sup> The effect of the reference to the *Bank Act* is less clear.

The *Bank Act* provides a unique form of security to chartered banks.<sup>37</sup> The effect of taking security under the *Bank Act* is to give the lender rights and powers similar to those of the holder of a warehouse receipt or bill of lading covering the collateral. In taking this approach the *Bank Act* has cast the secured party’s rights in a conceptual mould quite different from that of other legislation which provides for or regulates the taking of security. The result has been much complexity and uncertainty respecting the relationship of *Bank Act* security to that arising under a range of provincial laws.

In the context of liens the most recent attempt to state a general rule respecting priority is by Bradley Crawford in *Crawford and Falconbridge on Banking and Bills of Exchange*.<sup>38</sup> He first notes that:<sup>39</sup>

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<sup>34</sup> S.B.C. 1989 c. 36. The PPSA has no application to the lien. 5. 4 provides:  
4. ... this Act does not apply to ... a lien, charge or other interest given by a rule of law or by an enactment unless the enactment contains an express provision that this Act applies:

<sup>35</sup> S.C. 1991, c. 46.

<sup>36</sup> It is questionable whether a provincially enacted statute can subordinate the priority of a security governed by maritime law, an area of federal jurisdiction. In *Prembo v. Pacific Slope Lumber Co.*, *Supra*, n. 26 it was held that a maritime carrier’s lien could not be interfered with by the *Woodman’s Lien Act*, a local statute.

<sup>37</sup> *Supra* n. 35, s. 427.

<sup>38</sup> Crawford and Falconbridge, *Banking and Bills of Exchange* (8th ed., 1986).

<sup>39</sup> *Ibid.*, at 436.

...bank security may come into conflict with... lien claims based on provincial legislation or case law establishing a privilege or property interest in favour of persons such as repairers, woodmen, drovers and the like.

Later he states:<sup>40</sup>

Competition may also arise between the bank security and liens in favour of particular creditors under competent provincial legislation. Since the Supreme court determined that such liens do not trench upon the paramount rights under the federal legislation the issue has become a simple one of priority. If the rights of the lienor have arisen before the bank takes its security or arise routinely in the processing of inventory in the ordinary course such that the bank must be deemed to have consented to them then they rank in priority to the bank security.

While priorities are not clear beyond doubt, it seems likely that if paragraph 3(b) was not present in the *Tugboat Worker Lien Act* the *Bank Act* security would be subject to the lien created by the Act. The lien arises from a routine dealing with logs and timber to which the bank must be taken to have consented.<sup>41</sup> Does paragraph 3(b) alter the position? It is difficult to see what other effect it could have been intended to have. It is likely, therefore that the statutory lien is subordinate to *Bank Act* security.<sup>42</sup>

A final list of possible claims to logs and timber that have been towed, and their priority relative to a lien under the *Tugboat Worker Lien Act* is set out below:

#### Claims with priority over a tugboat worker lien

Debts and liens in favour of the Crown.  
Maritime carrier's lien.  
*Woodworker Lien Act* lien.  
*Bank Act* security.

#### Claims that are subordinate in priority to a tugboat worker lien.

#### Security interests governed by the PPSA Statutory right *in rem*<sup>43</sup>

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<sup>40</sup> *Ibid.*, at 454. Cited in support of the last limb of that rule are *Bank of Nova Scotia v. McLaughlin*, (1980) 28 N.B.R. (2d) 688 (Q.B.T.D.); *Canada Trust Co. v. Cenex Ltd.*, (1982) 131 D.L.R. (3d) 479 (Sask. C.A.).

<sup>41</sup> The lien created by the *Woodworker Lien Act* appears to have priority over *Bank Act* security. See *Woodley v. Drew Sawmills Ltd.* (1983) 47 B.C.L.R. 227.

<sup>42</sup> This creates the spectre of a circular priority problem. As a general rule a PPSA security interest that is created and perfected before a *Bank Act* security interest has priority over it. If this competition is joined by a lien under the *Tugboat Worker Lien Act* the following result may occur:

1. The *Bank Act* security has priority over the *Tugboat Worker Lien Act* lien.
2. The tugboat worker lien has priority over the PPSA security interest.
3. The PPSA security interest has priority over the *Bank Act* security.

The deference to Crown claims shown in s. 4 may also create circularity problems in some cases.

<sup>43</sup> The priority position of a statutory right *in rem* falls below the *Tugboat Worker Lien Act* because a right *in rem* is subject to claims subsisting when the proceeding *in rem* is commenced. In contrast, the tugboat worker lien arises as soon as the towage is performed. Assuming the claim has been preserved by an appropriate filing, the lien will be a subsisting claim at the time the proceeding *in rem* is commenced.

Other registered or unregistered interests.

## 5. Enforcement of the Lien

The jurisdiction to enforce the lien is vested in the Supreme Court. Where an affidavit claiming a lien is filed, section 7(1) provides that it “may” be enforced “by action in the Supreme Court within the territorial limits of which the towage terminated.”<sup>44</sup> The Supreme Court has the jurisdiction “to order, either before or after judgment, the custody and sale of the logs or timber products towed for the enforcement and realizing of [the] lien.” Further, the Court has the general jurisdiction to order what it thinks proper given the facts of the case to carry out the intent and purpose of the Act.<sup>45</sup>

### C. The Constitutional Validity of the *Tugboat Worker Lien Act*

The competence of a provincial government to enact a statute like the *Tugboat Worker Lien Act* may be in question.<sup>46</sup> Sections 91 and 92 of the *Constitution Act*<sup>47</sup> describe the distribution of powers between the provincial and federal governments. Provisions in the *Constitution Act* dealing with navigation and shipping, forestry, and property and civil rights may all be relevant to the validity of the *Tugboat Worker Lien Act*. This Part briefly explores the constitutional issues.

#### 1. Section 91(10) - Navigation and Shipping

Section 91(10) confers jurisdiction over navigation and shipping to the federal government.<sup>48</sup> As such, the federal government enjoys legislative competence over navigable waters and a large body of maritime or admiralty law inherited from the United Kingdom, including towage.

In *B.C. Marine Shipbuilders Ltd. v. Wire Rope Industries of Canada*,<sup>49</sup> the Supreme Court of Canada held that Canadian maritime law encompasses claims involving the breach of towage contracts and that the substantive law relating to the claims (i.e. breach of the towage contract) falls within federal legislative competence under section 91(10) of the *Constitution Act*.

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<sup>44</sup> The action must be brought within 30 days after the filing of the lien. By consent, this period can be extended to 60 days; s. 7(2).

<sup>45</sup> The action may also be disposed of summarily: s. 9.

<sup>46</sup> In fact, members of the B.C. legislative assembly first questioned the *vires* of the legislation during the second reading of the tugboat worker lien Bill on December 11, 1924. Because some members felt the Bill dealt with matters under Federal and Imperial maritime law, the Bill was held over to a later session. See, *The Daily Province*, Vancouver, December 12, 1924.

<sup>47</sup> *The Constitution Act*, 1867.

<sup>48</sup> S. 91(10) does not authorize the federal government to regulate intraprovincial shipping. See, Hogg, *Constitutional Law in Canada*, (2nd ed., 1985). This may have been in the back of the drafter’s mind when the definition of “towage” was created. “Towage” only refers to the transporting of logs or timber products from one place to another within the province.”

<sup>49</sup> [1981] 1 S.C.R. 363

On its face, the *Tugboat Worker Lien Act* appears to be invalid on the basis that only the federal government is competent to legislate with respect to towage.<sup>50</sup> The Act is valid only if its subject matter can be characterized as something other than towage -- something that is within provincial jurisdiction.

## 2. Section 92a - Forestry Resources

Section 92A gives jurisdiction over nonrenewable natural resources to the provinces. As such, the provincial government enjoys legislative competence over the development, conservation and management of forestry resources in the province, including logging activities, such as towing logs to a sorting site. It might be argued that a statute dealing with towage performed in relation to logging activity is justified under section 92A even though this activity overlaps with federal jurisdiction over navigation and shipping.

## 3. Section 92(13) - Property and Civil Rights

Under section 92(13) the province has jurisdiction over enjoys property and civil rights. This Includes the right to make laws Ody of concerning local trade. It might be argued that the regulation of the, log towage industry. so far as it involves towage commencing and ending within the province, falls under provincial legislative competence.

## 4. Conclusion

The arguments that can be raised in support of provincial jurisdiction to enact legislation such as the *Tugboat Worker Lien Act* are unconvincing. The better view is that the Act is beyond the legislative competence of the province.

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<sup>50</sup>

Further, towage activity often takes place within harbours. It is fairly well settled that any legislation aimed at regulating or controlling navigation or shipping activities in a harbour is within federal legislative competence. See, *Hamilton Harbour Commissioners v. City of Hamilton*, (1979) 21 O.R. (2d) 459 (Ont. CA.); see also. Hogg, *Constitutional Law of Canada*, supra n. 48 at 495.

## APPENDIX D

### *TUGBOAT WORKER LIEN ACT*

R.S.B.C. 1979, c. 417

#### **Interpretation**

1. In this Act

“logs or timber products” means logs, piles, poles, bolts, cordwood and other similar products of the forest;

“owner”, in respect of a tugboat, includes the charterer, lessee or other operator of the tugboat;

“towage” means the transporting of logs or timber products from one place to another within the Province by towing the same through the water by a tugboat, whether towed in booms, rafts or cribs, or on board scows, barges or vessels;

“tugboat” includes any vessel propelled by steam, combustive, electrical or other similar motive power, whether used exclusively in towage or not.

#### **Towage on board foreign going vessels**

2. This Act does not apply to the towage of logs or timber products on board any vessel which, at the time of the towage, is either beginning or ending a voyage to or from a place outside the Province.

#### **Liens and rights not affected**

3. Nothing in this Act affects
  - (a) any lien created by virtue of the *Woodworker Lien Act*, or by virtue of any statute of Canada respecting navigation and shipping;
  - (b) any rights existing by virtue of the *Bank Act (Canada)*;
  - (c) any lien or rights which the owner of a tugboat may have in respect of towage by virtue of common law.

#### **Lien for towage**

4. Except as otherwise provided in this Act, every owner of a tugboat who performs any towage for any person has a lien on the logs or timber products towed for the amount of money payable for the towage, which shall be deemed a first lien and has precedence over all other liens, claims, charges or encumbrances on them, whether

registered or unregistered, other than debts or liens in favour of the Crown and prior liens existing under this Act.

### **Lapse of lien in default of filing affidavit**

5. The lien shall lapse and cease to exist at the expiration of the period of 30 days after the last day on which the towage was performed, unless within that period the owner of the tugboat files or causes to be filed in the proper office prescribed in the Schedule an affidavit of the owner, or of some person having a personal knowledge of the facts deposed to, setting out
  - (a) the name and address of the owner claiming the lien, and the name of the tugboat by which the towage was performed;
  - (b) the name and address of the person who contracted with the owner for the towage of the logs or timber products towed;
  - (c) a description of the logs or timber products towed, including the registered timber marks or other marks of identification on them, if any;
  - (d) the names or other descriptions of the places from and to which the towage was performed;
  - (e) the last day on which the towage was performed; and
  - (f) the amount of money claimed for the towage.

### **Lien where towage performed in stages**

6. Where the towage in respect of which a lien is claimed under this Act was performed by the same owner under the same contract of towage, the lien is enforceable notwithstanding that the towage was performed by the owner in stages, at intervals, by more than one tugboat, or by different tugboats at different times; but the affidavit filed in respect of the lien pursuant to section 5 shall include full particulars of all stages, intervals and tugboats.

### **Enforcement of lien by action**

7. (1) Where an affidavit in respect of the lien has been filed under section 5, the person entitled to the lien may enforce it by action in the Supreme Court within the territorial limits of which the towage terminated. That Supreme Court has jurisdiction to hear and determine the action, and to make orders, either before or after judgment, for the custody and sale of the logs or timber products towed for the enforcement and realizing of the lien, and generally for carrying out the intent and purpose of this Act as the court thinks proper.
  - (2) Unless action to enforce the lien is brought within the period of 30 days after the filing of the affidavit pursuant to section 5, the lien shall at the expiration of that period lapse and cease to exist; but if before the expiration of the period of 30 days a consent in writing, signed by the owner of the logs or timber products subject to the



lien, consenting to an extension of the lien for a period named in the consent, not exceeding 60 days after the filing of the affidavit, is filed in the office in which the affidavit was filed, the existence of the lien and the time for bringing action for its enforcement shall be extended accordingly.

(3) In an action brought to enforce a lien it is a sufficient compliance with this section in respect of the party defendant to the action if the person who contracted with the owner of the tugboat for the towage of the logs or timber products is named as the defendant.

8. [Repealed 1989-40-204.]

### **Summary hearing**

9. An action brought to enforce a lien under this Act may be disposed of summarily by a judge of the Supreme Court in Chambers without waiting for the regular sittings of the court, on terms as to notice and otherwise the judge may direct.

### **SCHEDULE**

The proper office for the filing of the affidavit in respect of any lien, pursuant to section 5, shall be the office of the registrar designated in this Schedule opposite the name of the Supreme Court within the territorial limits of which the towage, out of which the lien arose, terminated, namely:

The County of Victoria -	The office of the registrar of the Supreme Court at Victoria
The County of Nanaimo -	The office of the registrar of the Supreme Court at Nanaimo
The County of Vancouver -	The office of the registrar of the Supreme Court at Vancouver
The County of Westminster -	The office of the registrar of the Supreme Court at New Westminster
The County of Yale -	The office of the registrar of the Supreme Court at Kamloops
The County of Cariboo -	The office of the registrar of the Supreme Court at Prince George
The County of Prince Rupert -	The office of the registrar of the Supreme Court at Prince Rupert
The County of East Kootenay -	The office of the registrar of the Supreme Court at Cranbrook
The County of West Kootenay -	The office of the registrar of the Supreme Court at Nelson

## APPENDIX E

### PERSONAL PROPERTY SECURITY ACT

S.B.C. 1989, C. 36

#### A. Preface

This Appendix is intended to provide only the most truncated and summary overview of the *Personal Property Security Act*. Reproducing the Act in full would have added a further 65 pages to this document and it is unlikely that the result would have achieved anything more than to bewilder the non-specialist reader. The version of the Act set out in this Appendix seeks to reproduce only those provisions which will give the reader some sense of the structure and operation of the PPSA and which are likely to have significant application to the forest work security interest proposed in this paper.

Preparing this Appendix involved an editorial process which operated at a number of levels. Provisions dealing with a variety of important topics were omitted entirely. These topics include the conflict of laws rules, the registration machinery, and rules concerning transition from the former legislation. Also, no attempt has been made to reproduce the provisions which concern security interests in specialized types of collateral. The provisions in this Appendix, therefore, are silent on security interests in accounts, intangibles, chattel paper, securities and so on. Carrying this through has meant omitting entire sections or deleting subsections, clauses, paragraphs or particular words from other provisions which have been retained in part. We have also deleted provisions which deal with the application of the PPSA in particular circumstances that are not likely to arise in connection with a forest work security interest.

With respect to certain provisions, we have included enough text to illustrate its general thrust and purpose, while omitting numerous sub-sections or clauses which work through particular aspects in detail. (*See, e.g.*, section 18.)

In all cases, where a deletion is made from the Act, the deletion is indicated with ellipses [...].

#### B. Selected Provisions

##### PART 1

##### Interpretation and Application

##### 1. (1) In this Act

“collateral” means personal property that is subject to a security interest; court” means the Supreme Court;

“debtor” means

- (a) a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral,...
- (e) in sections 17, 24, 26, 58, 59 (14), 61(8) and 69, a transferee of or successor to the interest of a person referred to in paragraph (a), or
- (f) if the person referred to in paragraph (a) and the owner of the collateral are not the same person,
  - (i) where the term debtor is used in a provision dealing with the collateral, an owner of the collateral,
  - (ii) where the term debtor is used in a provision dealing with the obligation, the obligor, and
  - (iii) where the context permits. both the owner and the obligor;

“default” means

- (a) the failure to pay or otherwise perform the obligation secured when due, or
- (b) the occurrence of an event or set of circumstances that, under the terms of the security agreement, causes the security interest to become enforceable;

“goods” means tangible personal property ... but does not include ... trees ... until the trees are severed

“inventory” means goods that are

- (a) held by a person for sale or lease, or that have been leased by that person as lessor,
- (b) to be furnished by a person or have been furnished by that person under a contract of service,
- (c) raw materials or work in progress, or (d) materials used or consumed in a business;

proceeds” means

- (a) identifiable or traceable personal property, fixtures and crops
  - (i) derived directly or indirectly from any dealing with collateral or the proceeds of collateral, and
  - (ii) in which the debtor acquires an interest,

purchase” means taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;

purchase money security interest” means

- (a) a security interest taken in collateral to the extent that it secures payment of all or part of its purchase price,
- (b) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights,...

registry” means the personal property registry established under section 42;

secured party” means

- (a) a person who has a security interest,...

security agreement” means an agreement that creates or provides for a security interest and, if the context permits, includes...

- (b) writing that evidences a security agreement;

security interest” means

- (a) an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation.

2. (1) Subject to section 4, this Act applies

- (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
- (b) without limiting the generality of paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper where they secure payment or performance of an obligation...

4. Except as otherwise provided in this Act, this Act does not apply to the following:

- (a) a lien, charge or other interest given by a rule of law or by an enactment unless the enactment contains an express provision that this Act applies;...

## **PART 2**

### Validity of Security Agreements and Rights of Parties

9. Subject to this and any other enactment, a security agreement is effective according to its terms.

10. (1) ...[A] security interest is only enforceable against a third party where

- (a) the collateral is in the possession of the secured party, or
- (b) the debtor has signed a security agreement that [describes the collateral in a specified fashion]...

12. (1) A security interest ... attaches when

- (a) value is given,
- (b) the debtor has rights in the collateral, and
- (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under section 10,

unless the parties have specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement...

- (3) For the purposes of subsection (1), a debtor has no rights in...
- (d) trees ... until they are severed.
- 13. (1) ... [A] security agreement that provides for a security interest in after acquired property attaches to that property in accordance with the terms of the agreement without any need for a specific appropriation by the debtor...
- 18. (1) The debtor, a creditor, a sheriff, a person with an interest in personal property of the debtor or an authorized representative of any of them may, by a demand in writing containing an address for reply and delivered to the secured party,
  - (a) where an address is in the records of the registry,
    - (i) at the secured party's most recent address in a registered financing statement that relates to the property, or
    - (ii) at an address of the secured party, whether or not in the records of the registry, that is more recent than the address referred to in subparagraph (I), or
  - (b) where no address is in the records of the registry, at the current address of the secured party,

require the secured party to send or make available 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, any of the information specified in subsection (2).

(2) The information that may be demanded under subsection (1) may be one or more of the following:

- (a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;
- (b) a statement in writing of the amount of the indebtedness and of the terms of payment of that indebtedness as of the date specified in the demand;
- (c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items in the demand are collateral as of the date specified in the demand;
- (d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
- (e) sufficient information as to the location of the security agreement or a copy of it, as specified in the demand, so as to enable a person entitled to receive a copy of the security agreement to inspect it at that location.

... [a further 17 subsections provide detailed guidance as to the demand for and disclosure of information]

### **PART 3** Perfection and Priorities

19. A security interest is perfected when
- (a) it has attached, and
  - (b) all steps required for perfection under this Act have been completed regardless of the order of occurrence.
20. A security interest
- (a) in collateral is subordinate to the interest of
    - (i) a person who causes the collateral to be seized under legal process to enforce a judgment ...,
 if that security interest is unperfected at the time
    - (v) the interest of a person referred to in subparagraph (i) ... arises
  - (b) in collateral is not effective against
    - (i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy
  - (c) in ... goods is subordinate to the interest of a transferee who
    - (i) acquires an interest under a transaction that is not a security agreement,
    - (ii) gives value, and
    - (iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.
24. (1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in
- (b) goods,...
- except where possession is a result of seizure or repossession.
25. Subject to section 19, registration of a financing statement perfects a security interest in collateral.
28. (1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest
- (a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing, and
  - (b) extends to the proceeds,
- but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.
30. (1) In this section

“buyer of goods” includes a person who obtains vested rights in goods under a contract to which the person is a party as a consequence of the goods becoming a fixture or accession to property in which the person has an interest;

“seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is party to a contract with the buyer; “the ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials.

(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 perfected or unperfected security interest in the goods given by the seller or lessor ... whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

32. A lien on goods that arises as a result of the provision in the ordinary course of business, of materials or services in respect of the goods, has priority over a perfected or unperfected security interest unless the lien arises under an enactment that gives priority to the security interest.

34. (1) Subject to section 28, a purchase money security interest in

- (a) collateral or its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or
- (b) an intangible or its proceeds that is perfected not later than 15 days after the day the security interest in the intangible attaches has priority over any other security interest in the same collateral given by the same debtor.

(2) Subject to ... section 28, a purchase money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if

- (a) the purchase money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,
- (b) the secured party gives a notice to any other secured party who has, before the time of registration of the purchase money security interest, registered a financing statement containing a description that includes the same item or kind of collateral,
- (c) the secured party gives notice to any other party who has, before the time of registration of the purchase money security interest, registered a security agreement providing for a prior security interest on the same item or kind of collateral,
- (d) the notice referred to in paragraph (b) states that the person giving the notice expects to acquire a purchase money security interest in inventory of the debtor and describes the inventory by item or kind, and
- (e) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

35. (1) Where this Act provides no other method for determining priority between security interests,
- (a) priority between perfected security interests in the same collateral is determined by the order of the occurrence of the following:
    - (i) the registration of a financing statement without regard to the date of attachment of the security interest;
    - (ii) possession of the collateral in accordance with section 24 without regard to the date of attachment of the security interest;
    - (iii) perfection under lone of the provisions of the PPSA that permit perfection with neither registration nor possession],
- whichever is the earliest,
- (b) a perfected security interest has priority over an unperfected security interest, and
  - (c) priority between unperfected security interests is determined by the order of attachment of the security interests.
39. (1) A perfected security interest in goods that subsequently become part of product or mass continues in the product or mass if the goods are so manufacture processed, assembled or commingled that their identity is lost in the product.
- (2) ... [W]here more than one perfected security interest continues in the sar product or mass under subsection (1), and each was a security interest in separa goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum the obligations secured by all security interests.
40. A secured party may, in a security agreement or otherwise, subordinate his security interest to any other interest and the subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of a class of persons for whose benefit the subordination was intended.

#### **PART 4** Registration

42. (1) There shall be a registry known as the personal property registry for the purposes of registrations under this Act and for registrations that are permitted or required under any other enactment to be made in the registry.

#### **PART 5** Rights and Remedies on Default

56. (1) In this section “secured party” includes a receiver.
- (2) Where the debtor is in default under a security agreement,
- (a) except as provided in subsection (3), the secured party has against the debtor only



- (i) the rights and remedies provided in the security agreement,
  - (ii) the rights, remedies and obligations provided in this Part and in sections 36 to 38, and
- (b) the debtor has against the secured party the rights and remedies provided in the security agreement, the rights and remedies provided by any other statute or rule of law not inconsistent with this Act, and the rights and remedies provided in this Part and in section 17.

(3) Except as provided in [specified sections], no provision of sections ... 58 to 69, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

58. (1) In this section “secured party” includes a receiver.

(2) Subject to subsection (3) and to sections 36 to 38, on default under a security agreement,

- (a) the secured party has unless otherwise agreed the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,
- (b) where the collateral is goods of a kind that cannot be readily moved from the debtor’s premises or of a kind for which adequate alternative storage facilities are not readily available, the secured party may seize or repossess the collateral without removing it from the debtor’s premises in the same manner by which a sheriff may seize without removal, if the secured party’s interest is perfected by registration,
- (c) where paragraph (b) applies, the secured party may dispose of the collateral on the debtor’s premises, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal,

59. (1) In subsections (2), (5), (14) and (17) “secured party” includes a receiver. (2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repairing it and the proceeds of the disposition shall be applied in the following order to

- (a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses of enforcing the security agreement incurred by the secured party, and
- (b) the satisfaction of the obligations secured by the security interest of the party making the disposition,

and any surplus shall be dealt with in accordance with section 60.

(3) Collateral may be disposed of

- (a) by private sale,
- (b) by public sale, including public auction or closed tender,
- (c) as a whole or in commercial units or parts, and
- (d) if the security agreement so provides, by lease.

(4) Where the security agreement so provides, the payment for collateral disposed of under subsection (3) may be deferred.

(5) The secured party may delay disposition of the collateral in whole or in part. (6) Not less than 20 days before the disposition of the collateral the secured party shall give notice of disposition to

- (a) the debtor or any other person who is known by the secured party to be an owner of the collateral,
- (b) any creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party
  - (i) who has registered a financing statement using the name of the debtor or according to the serial number of the collateral if the goods are defined in the regulations as serial numbered goods, or
  - (ii) whose security interest is perfected by possession at the time the secured party seized or repossessed the collateral, and
- (c) any other person with an interest in the collateral who has given notice to the secured party of his interest in the collateral before the day that notice of disposition is given to the debtor.

(7) The notice of disposition referred to in subsection (6) shall contain (a) a description of the collateral,

- (b) the amount required to satisfy the obligation secured by the security interest,
- (c) the sum actually in arrears, exclusive of the operation of an acceleration clause in the security agreement and a brief description of any default other than non-payment and the provision of the security agreement the breach of which resulted in the default,
- (d) the amount of the applicable expenses referred to in subsection (2) (a) or, where the amount of the expenses has not been determined, a reasonable estimate,
- (e) a statement that on payment of the amounts due under paragraphs (b) and (d), any person entitled to receive the notice may redeem the collateral, ...
- (g) a statement that, unless the collateral is redeemed or, where permitted, the security agreement is reinstated, it will be disposed of and the debtor may be liable for a deficiency, and
- (h) the date, time and place of any sale by public auction or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted or after which any private disposition of the collateral is to be made.

(8) Where the notice required by subsection (6) is given to a person other than the debtor, it need not contain the information specified in subsection (7) (c), (f) and (g) and where it is given to a debtor who is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in subsection (7) (c) and (f).

(9) A statement referred to in subsection (7) (g) shall not contain reference to any liability on the part of the debtor to pay a deficiency if under this Act or any other applicable law the secured party does not have the right to collect the deficiency from the debtor.

(10) Not less than 20 days before the disposition of the collateral, a receiver shall give a notice to

- (a) the debtor, and where the debtor is a corporation, a director of the corporation,
- (b) any other person who is known by the secured party to be an owner of the collateral,
- (c) a person referred to in subsection (6) (b), and
- (d) any other person with an interest in the collateral who has given notice to the receiver of the person's interest in the collateral before the day that notice of disposition is given to the debtor.

(11) The notice referred to in subsection (10) shall contain

- (a) a description of the collateral,
- (b) a statement that unless the collateral is redeemed it will be disposed of, and
- (c) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted or after which any private disposition of the collateral is to be made.

(12) The notice required by subsection (6) or (10) may be given in accordance with section 72 or, where it is to be given to a person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(13) The secured party may purchase the collateral or any part of it at a public sale, as referred to in subsection (3) (b), but only for a price that bears a reasonable relationship to the market value of the collateral.

(14) When a secured party disposes of collateral to a purchaser who in good faith acquires his interest for value and who takes possession of the collateral, the purchaser acquires the collateral free from

- (a) the interest of the debtor,
- (b) an interest subordinate to that of the debtor, and
- (c) an interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are, as regards to the purchaser, deemed performed for the purposes of [specified] sections...

(17) The notice referred to in subsection (6) or (10) is not required where (a) the collateral is perishable,

- (b) the secured party believes on reasonable grounds that the extent to which the debtor's obligation is secured at the time of default will diminish if the collateral is not disposed of immediately after default either because the collateral will decline substantially in value or for any other reason,
- (c) the cost of care and storage of the collateral is disproportionately large relative to its value,

- (d) for any other reason, a court on an ex parte application is satisfied that a notice is not required, or
- (e) after default, each person entitled to receive a notice of disposition consents in writing to a disposition of the collateral without compliance with the notice requirements of subsections (6) or (10).

60. (1) In this section “secured party” includes a receiver.

(2) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57, or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid in the following order to

- (a) a person who has a subordinate security interest in the collateral
  - (i) who registers a financing statement, using the name of the debtor or according to the serial number of the collateral if the goods are defined in the regulations as serial numbered goods, or
  - (ii) whose interest was perfected by possession at the time the collateral was seized,
- (b) any other person with an interest in the collateral if that person has given a notice of his interest to the secured party before the distribution, and
- (c) the debtor or any other person who is known by the secured party to be an owner of the collateral,

but the priority of the claim of a person referred to in paragraph (a), (b) or (c) is not prejudiced by payment to anyone in accordance with this section.

(3) The secured party shall give a written accounting of

- (a) the amount received from the disposition of collateral or the amount collected under section 57,
- (b) the manner in which the collateral was sold,
- (c) the amount of expenses as provided in sections 17, 57 (3) and 59,
- (d) the distribution of the amount received from the disposition or collection, and
- (e) the amount of any surplus

to a person referred to in subsection (2) within 30 days after receipt of a written demand for an accounting.

(4) Where there is a question as to who is entitled to receive payment under subsection (2), the secured party may pay the surplus into court and the surplus shall not be paid out except on an application under section 70 by a person claiming an entitlement to it.

61. (1) After default, a secured party may propose to take the collateral in satisfaction of the obligation secured by it and shall give a notice of the proposal to

- (a) the debtor or any other person who is known by the secured party to be an owner of the collateral,

- (b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party
  - (i) who has registered a financing statement using the name of the debtor or according to the serial number of the collateral when it is required or permitted for registration, or
  - (ii) whose security interest is perfected by possession at the time the secured party seized or repossessed the collateral, and
- (c) another person with an interest in the collateral who has given a written notice to the secured party of an interest in the collateral before the date that the notice is given to the debtor.

(2) If any person, who is entitled to a notice under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal, gives to the secured party a notice of objection within 15 days after the notice under subsection (1) is given, the secured party shall dispose of the collateral under section 59.

62. (1) At any time before the secured party or receiver has disposed of the collateral or contracted for its disposition under section 59, or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61,

- (a) a person entitled to receive a notice of disposition under section 59 (6) or (10) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of the obligations secured by the collateral, or
- (b) where the collateral is consumer goods, the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears exclusive of the operation of an acceleration clause in the security agreement and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with a sum equal to the reasonable expenses incurred by the secured party or receiver in seizing, repossessing, holding, repairing, processing or otherwise preparing the collateral for disposition.

63. (1) In this section "secured party" includes a receiver.

(2) ... [O]n application of a debtor, a creditor of a debtor, a secured party, a sheriff or a person with an interest in the collateral, a court may make one or more of the following orders:

- (a) an order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or ... [specified provisions];
- (b) an order giving directions to a person with respect to the exercise of his rights or the discharge of his obligations under this Part or ... [specified provisions];
- (c) an order relieving a person from compliance with the requirements of this Part or ... [specified provisions], but only on terms that are just and reasonable to all parties affected;
- (d) an order staying enforcement of rights provided in this Part or [specified provisions];
- (e) an order necessary to ensure protection of the collateral.

**PART 6**  
Miscellaneous

68. (1) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.
- (2) All rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests shall be exercised or discharged in good faith and in a commercially reasonable manner.
- (3) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.
69. (1) In this section “secured party” includes a receiver.
- (2) A person to whom a duty or obligation is owed under this Act has a cause of action against any person who, without reasonable excuse, fails to discharge the duty or perform the obligation.
- (3) . . . [I]n an action under subsection (2), the plaintiff is entitled to recover damages from the defendant for losses that are reasonably foreseeable as being liable to result from the failure to discharge the duty or perform the obligation.
72. (1) A notice or a demand under this Act, other than a demand under section 18 may be given to
- (a) an individual, by leaving it with the individual or by sending it by registered mail addressed to
- (i) the individual by name at the individual’s residence, or
- (ii) where the individual is the sole proprietor of a business, the name of the individual at the address of the business,
- (b) a partnership
- (i) by leaving it with
- (A) one or more of the general partners, or
- (B) a person having at the time the notice is given control or management of the partnership business, or
- (ii) by registered mail addressed to
- (A) the partnership,
- (B) any one or more of the general partners, or
- (C) any person having, at the time the notice is given, control or management of the partnership business at the address of a partnership business,
- (c) a corporation
- (i) by leaving it with an officer or director of the corporation or a person in charge of any office or place of business of the corporation,
- (ii) by leaving it with or by sending it by registered mail addressed to the registered or head office of the corporation, or

- (iii) where the corporation has its registered or head office outside the Province, by leaving it with, or by sending it by registered mail addressed to, the attorney for service for the corporation,
  - (d) a municipal corporation, by leaving it with, or sending it by registered mail addressed to, the principal office of the corporation or to the chief administrative officer of the corporation,
  - (e) an association
    - (i) by leaving it with an officer of the association, or
    - (ii) by sending it by registered mail addressed to an officer of the association at the address of the officer, and
  - (f) Her Majesty the Queen in right of the Province in the manner provided by the *Crown Proceeding Act*.
- (2) A notice or demand sent by registered mail is deemed to be given on the earlier of
- (a) the date the addressee actually receives the notice, or
  - (b) except when postal services are not functioning, the expiry of 10 days after the date of registration.
73. ... [I]f there is a conflict between this Act and any other Act, this Act prevails unless the other Act contains an express provision that it, or a provision of it, applies notwithstanding the *Personal Property Security Act*.