

# **Report on the Uniform Liens Act**

## **British Columbia Law Institute**

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax:(604) 822-0144 E-mail: [bcli@bcli.org](mailto:bcli@bcli.org) WWW: <http://www.bcli.org>

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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## **Introductory Note**

The British Columbia Law Institute has the honour to present the following Report:

### **The Uniform Liens Act**

The law of liens provides a right to retain the property of another to secure payment of a debt or performance of an obligation. The law governing the commercial liens of repairers, storers and common carriers no longer provides appropriate security as it is out of date, inflexible and inefficient.

This Report embodies the recommendations of the British Columbia Law Institute to revise the law governing repairers', storers' and common carriers' liens. The principal recommendation is that the *Uniform Liens Act* prepared by the Uniform Law Conference of Canada be adopted to govern these liens. This Act provides a modern, comprehensive approach to commercial liens and effectively harmonizes this area of the law with *Personal Property Security Act* principles.

January, 2003

Gregory K. Steele  
Chair, British Columbia Law Institute

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## Report on the Uniform Liens Act

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### I. Introduction - Commercial Liens

The law of liens at its simplest is designed to provide a right to retain the property of another to secure payment of a debt or performance of an obligation. This Report will examine the commercial liens of repairers, storers and common carriers. These liens provide persons who have repaired, stored or transported goods with the right to hold that property to secure payment of the charges owed for the services provided.

The existing law governing the liens of repairers, storers and common carriers is in need of reconsideration as it is become outdated, inflexible and inefficient, with the result that it no longer provides an appropriate means of securing payment for outstanding obligations. Three examples are illustrative. First, the current law is unnecessarily complex as it does not adopt a consistent approach to procedures and enforcement measures despite the similar characteristics of these liens. Second, the integration of these liens with modern *Personal Property Security Act* legislation has been either inadequate or non-existent. Third, under the existing law valid liens have limited scope and may be easily lost. In light of these problems there is a need to modernize and rationalize this area of the law. This Report will summarize the applicable law and the areas of concern. It will then consider the *Uniform Liens Act* as an option for reform.

The liens of repairers, storers and carriers are reviewed together as they share the common characteristics of having a commercial basis and being capable of harmonization with *Personal Property Security Act* principles. An exhaustive examination of all of the other types of liens that exist is beyond the scope of this Report.

### II. Background

The background of each of the commercial liens addressed in this Report is briefly described in this section.

#### A. Repairers' Liens

The repairer's lien provides persons who repair property with the right to retain that property until paid for the work done. The rules that govern the liens of repairers grew out of both the common law and statute. The common law created the right to a possessory lien for an artisan who improved

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goods by bestowing labour, skill or expense upon or in respect of the goods.<sup>1</sup> The lien gave the claimant a passive right to retain possession of the goods if the owner who authorized the work did not pay for the services that had been provided. This common law lien was terminated if physical possession of the goods was lost or surrendered other than by fraud, theft or under a bailment or agency agreement.<sup>2</sup> This was a “particular lien” meaning that the lien claimant had the right to keep possession of the goods until payment was made with regard to the charges relating to those particular goods.<sup>3</sup> This can be contrasted with a “general lien” which entitles a person in possession of goods to retain them until all claims or accounts of that person against the owner of the goods are satisfied.<sup>4</sup>

In 1939 the *Mechanics’ Lien Act*<sup>5</sup> was amended to incorporate provisions that expanded the rights of repairers beyond those recognized at common law in two significant respects. The Act provided a repairer with the right to sell goods in order to satisfy a claim. In addition, through the introduction of the non-possessory form of lien it provided a mechanism for a repairer to surrender possession of goods without bringing the lien to an end.

It had become evident that it would benefit both the repairer and the owner if property could be released back to the owner while payment was owing. This would increase the ability of the owner to repay the debt in those cases where the goods could be used to earn income.<sup>6</sup> At the same time, in cases where it was impractical or costly to store the property for any significant length of time, it was in the repairer’s interest to surrender the goods. The non-possessory lien filled the gap by

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1. Alberta Law Reform Institute, Report for Discussion No. 13: *Report on Liens* (1992) at 9. Referred to hereinafter as the “Alberta Report.” For a recent discussion by the B.C. Court of Appeal on possessory liens see *Workers Compensation Board of British Columbia v. Canadian Imperial Bank of Commerce* (1998), 48 B.C.L.R. (3d) 27, 157 D.L.R. (4<sup>th</sup>) 193 (C.A.).
  2. Alberta Report, *ibid.*, at 6.
  3. *Ibid.*, at 7.
  4. *Halsbury’s Laws of England*, vol. 28, 4<sup>th</sup> ed. (London: Butterworths, 1980) at 359, para. 716. The Alberta Report gave the examples of liens in favour of bankers and stockbrokers as two cases of general liens: *Ibid.*, at 9.
  5. The *Mechanics’ Lien Act*, R.S.B.C. 1936, c. 170, was amended by the *Mechanics’ Lien Act Amendment Act*, S.B.C. 1939, c. 32.
  6. Harvey, C.C.J. in discussing the history of the Act in *Inland Kenworth Sales (Skeena) v. Wayside Service (1968) Ltd. et al.* (29 April 1975), Prince Rupert CC48-75 (B.C. Co.Ct.), observed that this was particularly true for commercial vehicles as in many cases the owner would lack the means of paying the garage keeper unless the repaired vehicle could be returned promptly for use in profitable employment.

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enabling a repairer to release the subject property without prejudice to lien rights so long as there was compliance with the statutory provisions. When first introduced the non-possessory lien was restricted to motor vehicles, but it was later extended to cover aircraft, boats and outboard motors.<sup>7</sup>

The provisions of the *Mechanics' Lien Act* applicable to garage keepers were subsequently incorporated into the *Repairers Lien Act* enacted in 1979.<sup>8</sup> The *Repairers Lien Act* remained substantially in its original form until 1990. In that year there were limited revisions made to the Act, the most noteworthy being the migration of the registration machinery for non-possessory liens to the Personal Property Registry set up under the *Personal Property Security Act* (“PPSA”) and the adoption of provisions establishing the priority of liens against competing interests.<sup>9</sup> Subject to these amendments there have been few other changes to the Act over the last two decades.

### B. Storage Liens

Storage liens provide warehousemen with the right to hold property deposited for storage until the debt due for the services provided has been satisfied. The *Warehousemen's Lien Act* was first introduced in British Columbia in 1920.<sup>10</sup> The current version of the Act is based on the *Uniform Warehousemen's Lien Act* adopted by the Uniform Law Conference of Canada in 1921.<sup>11</sup> There are only minor differences between the present *Warehouse Lien Act*<sup>12</sup> and the 1921 version.

The *Warehouse Lien Act* creates a lien on goods deposited for storage by the owner, or by any person entrusted with the possession of the goods by the owner or by the owner's authority, in favour of a warehouseman who is lawfully engaged in the business of storing goods as a bailee for hire. The lien is possessory, thus the warehouseman loses the lien if physical possession of the goods is surrendered. The lien secures the payment of fees for the storage and preservation of goods, expenses related to

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7. Aircraft were incorporated by the *Mechanics' Lien Act Amendment Act*, S.B.C. 1965, c. 24, and boats and outboard motors by the *Attorney-General Statutes Amendment Act*, S.B.C. 1977, c. 31, s. 11.

8. R.S.B.C. 1979, c. 363.

9. *Personal Property Security Amendment Act*, S.B.C. 1990, c. 11, ss. 96-103.

10. S.B.C. 1920, c. 101.

11. Conference of Commissioners on Uniformity of Legislation in Canada, “Model Acts Recommended from 1918-1961 inclusive” (1962) at 361.

12. R.S.B.C. 1996, c. 480.



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the goods and reasonable charges for giving notice and selling the goods. The Act confers a right of sale by public auction on the lien claimant to recover the outstanding debt.

The current form of the Act has largely escaped modernization. The most notable change that has occurred was a revision in 1990 to accommodate the PPSA concept of a security interest.<sup>13</sup> In most other respects the Act continues to reflect concepts that are more than 80 years old.

### C. Common Carriers' Liens

The common law possessory lien provides common carriers with the right to retain possession of property that has been transported or conveyed pending payment of the freight charges owing. A common carrier represents to the public a willingness to transport any person, or the goods of a person, prepared to engage the carrier's services.<sup>14</sup> Common carriers have a lien even if the true owner did not authorize the transportation of the goods. The lien provides a right to hold goods until charges are paid, but does not provide the lien claimant with a right of sale.<sup>15</sup> This lien is particular in nature as it secures only charges for the services provided with regard to the goods in the possession of the lien claimant. Private carriers, which are not under the same legal obligation to convey goods or persons, have no right to this carriers' lien.

## III. Concerns with the Existing Law

The law which governs the liens of repairers, storers and common carriers has evolved little over the years with the result that it is antiquated, obscure and inflexible. In light of this the time has come to reconsider this area of the law and the problems associated with it.

### A. *Repairers Lien Act*

#### 1. Limitations on the Availability of a Lien

##### (a) Serial numbered goods restriction

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13. *Personal Property Security Amendment Act*, *supra* n. 9, ss. 114-116. These sections require a warehouse to give notice of both the existence of a lien and any intention to sell goods subject to a lien to persons who have a security interest in the goods where a financing statement with respect to the security interest has been registered at the date of the deposit of the goods.

14. Alberta Report, *supra* n. 1 at 8.

15. *Ibid.*, at 10.

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Under the *Repairers Lien Act*<sup>16</sup> non-possessory liens are not available except against motor vehicles, aircraft, boats and outboard motors. For services provided on goods outside of these four categories, the Act often fails to protect the legitimate interests of lien claimants. This is the case as repairers must choose between the burden of storing goods until payment is received or, alternatively, surrendering the goods and consequently losing the right to claim a lien for the charges owed. The statutory limitations on the availability of non-possessory liens can thus cause hardship for repairers.

The policy underlying this limitation is obscure. A 1985 Discussion Paper by the Ontario Ministry of the Attorney-General suggests a possible answer.<sup>17</sup> In that Discussion Paper it was observed that a vehicle identification number was required (to establish a non-possessory lien under provisions being considered for adoption in that province) for two reasons. Liens had to be integrated with the registration system which depended on the vehicle having a number that could be registered under that system, and a search by that number was the most convenient method for discovering the registration of a lien claim. Yet a search of the Personal Property Registry can be performed using the serial number for serial numbered goods or the debtor's name for other goods. In fact, it has been noted that searching by an identification number was an exceptional feature grafted onto a system that used, as the basic search term, the name of the debtor.<sup>18</sup>

As the Personal Property Registry system provides for the registration of a security interest in goods that do not have serial numbers, it could also accommodate the registration of a lien claimant's interest in such goods. Third parties would not be prejudiced as a search using the debtor's name would reveal any registered claims against the goods. At the same time, repairers and owners would benefit if the non-possessory form of lien was more broadly available. Thus, from a policy perspective it is difficult to justify why non-possessory liens should not be available for any goods, even those without serial numbers, so long as the property is registrable in the Personal Property Registry.

### (b) Prerequisite of possession

Another feature of the Act is that a non-possessory lien is available only if the lien claimant, before

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16. R.S.B.C. 1996, c. 404.

17. Ontario's Ministry of the Attorney-General, "Discussion Paper on Repair and Storage Liens" (March 1985) at 13 and 23.

18. A. Close, Q.C., "Commentary - Ontario Ministry of the Attorney-General: Discussion Paper on Repair and Storage Liens", [1985] 10 C.B.L.J. 359 at 364.

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surrendering the repaired goods, had the right to a possessory lien.<sup>19</sup> Repairers who provide work on the premises of the owner or a third party would not likely be considered to have had possession of the goods. Thus, the repairer who goes to the vehicle to do repairs, rather than having the vehicle brought to the garage, could not claim a non-possessory lien. This prerequisite effectively restricts the work for which a non-possessory lien can be claimed based on the irrelevant issue of where the work was done.<sup>20</sup> This limitation has little to do with the underlying purpose of a lien, which is to secure payment for services provided.

### 2. The Priority Provisions are Not Productive

The priority provisions under the *Repairers Lien Act* are flawed and, in some circumstances, can discourage repairers from providing services. Under the existing law in a competition between two or more non-possessory liens, the lien that is registered first in time takes priority.<sup>21</sup> As the work provided by the most recent repairer, in the many cases, enhances or preserves the value of the property to the benefit of all other persons with an interest in the property, it is arguable that this priority structure does not produce a fair or sensible result. If the most current repairs are not undertaken, there may be little or no value remaining in the property to satisfy earlier claims.<sup>22</sup> Thus, in order to encourage repairers to provide services and in recognition of the value added by the repairer, a reverse priority rule should be considered whereby in a competition between lien claimants priority would be given to the last person who carries out repairs.

### 3. The Act Fails to Address Important Issues

The *Repairers Lien Act* does not provide a comprehensive and effective approach to secure payment for services provided as it fails to address several important issues. It does not establish conflict of laws rules for non-possessory liens. This can cause confusion with regard to the enforcement of liens where lien property, such as a motor vehicle, is moved between provinces.

In addition, there are no provisions establishing whether a lien is assignable. The Alberta Report concluded that where no guidance is given in a statute the common law rule likely applies, under

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19. *Repairers Lien Act*, *supra* n. 16, s. 3(1).

20. A. Close, *supra* n. 18.

21. The priority provisions under the *Repairers Lien Act* are attached to this Report as Appendix C.

22. See commentary under s.13 of the *Uniform Liens Act*, attached to this Report as Appendix A, for an illustration of this point.

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which a lien is a personal right that cannot be assigned.<sup>23</sup> The failure to provide for the assignment of liens is inconsistent with modern commercial and economic realities on two fronts. First, it creates an obstacle to third party financing of repairs.<sup>24</sup> Second, it fails to accommodate the sale of a repair business as liens held by a seller cannot be transferred to a buyer.<sup>25</sup>

#### 4. The Language of the Act is Archaic

The *Repairers Lien Act* is drafted in archaic language which limits its effectiveness. This is particularly evident when looking at the notice of sale and sale provisions. The Act sets out that a garage keeper may issue a warrant addressed to a bailiff or sheriff of the county or district in which a motor vehicle, aircraft, boat or outboard motor subject to a lien is located. The warrant directs the bailiff or sheriff to seize the goods within 180 days after the date of the filing of the lien and return the goods to the garage keeper.<sup>26</sup> The seized goods may then be sold subject to certain conditions, such as the requirement that a repairer must give 2 weeks notice by advertisement in a newspaper published in the city, town or county in which the work was done or if there is no newspaper published in that city, town or county then in a newspaper published in British Columbia nearest to it.<sup>27</sup> These provisions are archaic, unnecessarily complex and inconsistent with modern sale and notice of sale provisions (such as those set out in the PPSA).

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23. *Supra* n. 1 at 57 and 82 (footnote 304). See also *Beaver River Community Futures Development Corp. v. Hansen* (1996), 144 Sask. R. 148, [1996], 7 W.W.R. 397 (Sask. C.A.).

24. For example, where a person needs goods repaired and does not have the ability to pay for the work a lien claimant may be unwilling to carry the cost of the repairs if the lien is not assignable. (For a further discussion of this issue see the commentary under s. 6 of the *Uniform Liens Act*, attached to this Report as Appendix A.)

25. Alberta Report, *supra* n. 1 at 58.

26. *Repairers Lien Act*, *supra* n. 16, s. 11.

27. *Ibid.*, s.2.

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### B. *Warehouse Lien Act*

#### 1. The Act Is Out Of Date

The purpose of the *Warehouse Lien Act* is to provide those persons engaged in the business of storing goods as bailees for hire with the right to claim a lien against stored property, and thereby secure payment for services provided. The Act does not effectively achieve this goal as it is out of date and does not reflect modern economic needs. This is best illustrated by the fact that there is no provision under the Act for non-possessory liens, forcing storers to keep possession of the goods in order to claim a lien. As discussed earlier it is often impractical for a service provider to rely on a possessory lien to secure payment owing for services provided. This can also cause hardship for the owner of the property who wishes to have the goods returned. Furthermore, there is no benefit to third parties in this regard. Third parties would not be prejudiced if non-possessory liens were made available to storers since the liens could be discovered by a search of the Personal Property Registry. Overall, the failure of the *Warehouse Lien Act* to provide for non-possessory liens can cause considerable difficulty and is in need of reconsideration.

#### 2. The Existing Procedures are Cumbersome

The existing procedural aspects of the *Warehouse Lien Act* are antiquated making the legislation cumbersome to use. This is clearly demonstrated by the following rules with regard to the right of sale. A warehouse is required, prior to sale, to give written notice of the intention to sell to: the debtor; the owner of the goods; any person with a security interest in the goods registered at the date of the deposit of the goods; and any other person known by the warehouse to have or claim an interest in the goods. The contents of the notice are specified in the Act. If the charges are not paid on the day set out in the notice the warehouse must advertise the sale at least once a week for 2 consecutive weeks in a newspaper circulated in the locality where the sale is to be held. The sale cannot be held less than 14 days from the date of the publication of the first advertisement.<sup>28</sup> The sale is then held by public auction.<sup>29</sup> These rules and procedures have largely escaped modernization and need to be re-examined in light of the current approach to enforcement procedures.<sup>30</sup>

### C. Common Carriers' Liens

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28. *Warehouse Lien Act*, *supra* n. 12, s. 4.

29. Sale prices at public auctions may not result in a high level of recovery as prices are often lower and costs greater than at a private sale: Alberta Report, *supra* n. 1 at 101.

30. A modern approach to enforcement procedures is found under the PPSA legislation.

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### 1. The Common Law Rules Are Antiquated

There is no general statutory framework for carriers' liens.<sup>31</sup> Although in some cases the obligation to accept and carry freight has been codified in legislation, this is scattered throughout various statutes and tends to be oriented towards specific modes of transportation.<sup>32</sup> The lack of a cohesive statutory scheme in this area has left many carriers subject to the existing common law rules which are antiquated and ineffective.

A significant problem with the common law approach is that it is designed to give protection to common carriers by providing them with a lien on goods without providing this same protection to private carriers.<sup>33</sup> This came about due to the mandatory duty placed on common carriers to accept goods for carriage. It is doubtful whether restricting the availability of a lien based on whether a carrier has common carrier status is warranted. By transporting the goods to a buyer or to a location for sale the carrier has added to the value of the goods and the owner of the goods has received a benefit. This holds true whether or not the carrier was under a general public obligation to provide the services. Once the work is done it is difficult to justify providing a common carrier with the right to claim a lien while a private carrier, who has provided an identical service, is denied the same right. This distinction between common carriers and private carriers is in need of reconsideration.

### 2. The Existing Law Is Silent On A Number Of Issues

The present law governing common carriers' liens also falls short, with the result that it often fails to provide adequate protection, in the following areas. The lien is available only for freight charges and does not apply to other reasonable expenses, such as storage fees.<sup>34</sup> The lien is possessory with the result that if the goods leave the carrier's possession the lien is lost. The remedies of the carrier are restricted as the lien claimant can detain the goods while awaiting payment, but cannot sell the

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31. The *Carriers Act*, R.S.B.C. 1979, c. 43, which was considered obsolete and not revised with the 1996 edition of the *Revised Statutes of British Columbia*, did deal with carriers to the extent of limiting the loss covered for enumerated goods if transported by a common carrier, mail contractor or coach proprietor in certain circumstances, but made no reference to carriers' liens.

32. For example, a common carrier railway is defined in the regulations under the *Railway Act* (Part II: General Operating Regulations, B.C. Reg. 453/59).

33. Although a security interest under the PPSA could be available to the private carrier, this may be regarded as inadequate in that it would not give the carrier the same priority as conferred on a lien claimant. For a further discussion on this point see the Uniform Law Conference of Canada, Proceedings of the 1994 Annual Meeting, "Report on Commercial Liens." Referred to hereinafter as the "Report on Commercial Liens."

34. Alberta Report, *supra* n. 1 at 8.

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goods in order to satisfy a claim.<sup>35</sup> Further, the lien cannot be assigned to a third party.<sup>36</sup>

### IV. Need for Reform

The current state of the law governing repairers', storers' and common carriers' liens is antiquated, inflexible and uncoordinated. It cannot be regarded as either adequately meeting contemporary needs, nor fostering a sound commercial environment. Reform is required to rationalize and modernize this area of the law so that legitimate lien claims can be registered and enforced in a fair and effective manner. The harmonization of the rules applicable to liens would also simplify how liens are dealt with and in so doing help to lower the cost of doing business in this province.

### V. Survey

The *Repairers Lien Act* is the only Act among the statutes being considered in this Report that currently provides for registration of liens in a registry. In the course of the research for this Report, we contacted the Personal Property Registry to determine the extent to which the *Repairers Lien Act* is being used. Over the last five years the number of lien claims filed per fiscal year has ranged from 24, 015 to 30, 476. It is clear from these figures that the *Repairers Lien Act* cannot be considered an obsolete Act for which revision is unnecessary.

### VI. Uniform Liens Act

#### A. Background

In 1992 the Uniform Law Conference of Canada contemplated undertaking a project to harmonize commercial liens in light of the *Report on Liens* published that year by the Alberta Law Reform Institute.<sup>37</sup> A Committee was established and its work ultimately led to the development of the *Uniform Liens Act*.<sup>38</sup> The Act was adopted by the Uniform Law Conference of Canada in 1996. In

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35. *Ibid.*, at 10.

36. *Ibid.*, at 57.

37. *Ibid.*

38. It was recommended that a *Uniform Liens Act* be adopted rather than deeming liens to be security interests or purchase money security interests under the PPSA as, despite the security aspect of liens, fundamental differences do exist. In particular it was noted that, "the only way the lien is like a true security interest is that each secures payment of an obligation, but the similarity ends there." (Report on Commercial Liens, *supra* n. 33, Part VI.)(A)

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August 2000 minor amendments set out in the *Uniform Liens Amendment Act* were further adopted.

### **B. Principal Features of the *Uniform Liens Act***

A summary of the principle features of the *Uniform Liens Act* is set out below. For a more detailed review, the official version of the Uniform Act, with annotations, is set out as Appendix A of this Report.

#### *1. What is the purpose of the Uniform Liens Act?*

The *Uniform Liens Act* revises the law governing the liens of repairers, storers and common carriers. The Act brings the liens under one cohesive statute and unifies the rules with regard to the scope, priority and enforcement procedures applicable to these liens. It further modernizes this area of the law by integrating liens, to the extent possible, with PPSA principles and concepts.

#### *2. Who is entitled to a lien?*

A person is entitled to a lien on goods if the person provides labour and materials for the purpose of repairing goods, or storage, transportation, carriage or towage services in relation to the goods, at the request of a person in possession of the goods.<sup>39</sup> It is notable that the Act eliminates the antiquated distinction between common carriers and other types of carriers.

#### *3. How does the lien work?*

The lien works by securing the amount that has been agreed to be paid for the services or, if there is no such agreement, the fair value of the services rendered.<sup>40</sup> A lien is enforceable when either the lien claimant has possession of the goods or the person requesting services has, in a signed writing describing the goods, either acknowledged the obligation to pay for the services or authorized the services giving rise to the lien.<sup>41</sup> It should also be observed that

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copy of the *Uniform Liens Act* is available on the Uniform Law Conference of Canada web site at <<http://www.ulcc.ca/en/us>>.)

39. *Uniform Liens Act*, ss. 1 and 2.

40. *Ibid.*, s. 3.

41. *Ibid.*, s. 5.



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the Act provides for a right to assign a lien to a third party by an instrument in writing.<sup>42</sup>

### 4. *How is the lien perfected?*

A lien is perfected by the lien claimant having possession of the goods or by the registration of a financing statement in the Personal Property Registry.<sup>43</sup> The *Uniform Liens Act* expands upon the existing right to register a lien by permitting repairers, storers and carriers to claim non-possessory liens. It also provides for non-possessory liens to be registered against the serial number for serial numbered goods, or against the owner's name and the name of the person requesting the services for other goods.<sup>44</sup> There is no need for the lien claimant to have had possession before surrender in order for the lien to be perfected by registration.

### 5. *What is the priority scheme under the Act?*

Lien claimants are accorded a high priority recognizing that the service they have provided has likely preserved or enhanced the value of the property to the benefit of all persons with an interest in the property.<sup>45</sup> Thus, a perfected lien has priority over most other non-lien interests that are created after the lien attaches. A lien, whether perfected or not, has priority over security interests, writs of execution and charging orders that arise before the lien attaches. There are some exceptions to both of these priority rules.<sup>46</sup>

Priority among competing liens is determined in the reverse order to which services are

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42. *Ibid.*, s. 6.

43. *Ibid.*, s. 8.

44. Under the PPSA, for equipment that is serial numbered goods, the secured party can register the goods by serial number or against the debtor's name. This option accommodates those cases where serial numbers can be provided, as well as those where registration by serial number would be cumbersome, such as in the case of fleet financing. The method of registration affects the priority of the secured party's claim, with the maximum level of protection being provided in those cases where registration is by serial number. Under the *Uniform Liens Act* there is not the same flexibility. Serial numbered goods must be described by serial number when registered. The Alberta Report noted that the option of registering by the debtor's name or serial number is not extended to liens since it is reasonable to require the lien claimant to provide more specific information in the registration: *Supra* n. 1 at 94.

45. See the discussion in Appendix A under the definition of "services" with regard to how these liens preserve or enhance the value of goods: *supra* n. 39, s.1.

46. *Ibid.*, ss. 10, 11 and 12.

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provided.<sup>47</sup> Although this alters the standard PPSA “first-in-time” priority rule, it is a logical scheme in light of the fact that the most recent lien claimant will have often improved or preserved the value of the goods.

### 6. *Are there provisions for dispute resolution and conflict of laws situations?*

The Act provides a dispute resolution process whereby a debtor or any person claiming a proprietary interest in the goods can apply to the court if a dispute arises and, in the interim, if the amount claimed by the lien claimant is paid into court or security posted with the court, the lien claimant must release the goods.<sup>48</sup> This limits a lien claimant’s ability to coerce excessive payment by refusing to surrender the goods to the debtor.

The Act also includes conflict of laws rules. It adopts the provisions of the enacting jurisdiction’s PPSA, with the result that the validity and perfection of a lien is governed by the law of the jurisdiction where the goods were situated when the lien was created.<sup>49</sup> It is possible, as well, to register and enforce an out-of-province lien in the same manner as an in-province lien.<sup>50</sup>

### 7. *How is a lien enforced?*

A lien claimant has the right to sell the goods 30 days after the outstanding debt becomes payable.<sup>51</sup> The sale is to be carried out in accordance with the provisions under Part V of the PPSA, which are substantially more flexible than the existing provisions as they allow property to be disposed of by private or public sale.

### 8. *What effect will this Act have on the existing law?*

The current legislation governing repairers’ and warehousemen’s liens would be replaced by the *Uniform Liens Act*. Any common law lien corresponding to a statutory lien created under the

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47. *Ibid.*, s. 13.

48. *Ibid.*, ss. 20 - 22. (There is also a mechanism for the lien claimant to file a notice of objection prior to the release of the goods.)

49. *Ibid.*, ss. 2(2) and 23. (Procedural issues that arise during enforcement are governed by the law of the jurisdiction where the collateral is located when the rights are exercised.)

50. *Ibid.*, s. 2.

51. *Ibid.*, s. 19.

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Uniform Act would also be abolished.<sup>52</sup>

The *Uniform Liens Act* further provides that the common law lien in favour of innkeepers is to be abolished and the statutory lien under the *Uniform Hotelkeepers Act* is to be repealed.<sup>53</sup> The drafters of the *Uniform Liens Act* made this recommendation as they questioned whether there was a continuing need for the hotelkeepers' lien. The two circumstances considered in which a lien arises were where a guest either requests storage of goods or leaves without paying and abandons property in the hotel room. The first situation would now be covered by the *Uniform Liens Act*. In the second scenario it was suggested that protection is already provided as most hotels are covered for charges owing by the practice of requiring an imprint of a credit card. It was, therefore, concluded that there was no need for a special hotelkeepers' lien. Nova Scotia and Saskatchewan, which have both recently passed statutes based on the *Uniform Liens Act*, have adopted this position in their legislation.<sup>54</sup>

Our concern is that replacing the law governing innkeepers' liens would, in those cases where goods are abandoned, extinguish an existing right to claim a lien without providing a replacement. Thus, while we are in favour of promoting uniformity of legislation among the provinces, we have concluded that this issue ought to be further considered in a separate project. Accordingly, it is our view that the current state of the law with regard to innkeepers' liens should be left unchanged at this time. In turn, we recommend that the provisions of the *Uniform Liens Act* that would abolish the existing common law lien and repeal the current statutory lien in favour of innkeepers should not be adopted.

### VII. Conclusion

A new legislative framework is required to address the problems which exist in relation to the liens of repairers, storers and common carriers. We recommend that the applicable legislation and common law be replaced by a single comprehensive statute that embodies a unified and contemporary approach to these liens. It is our view that the *Uniform Liens Act* would achieve this goal.

The incorporation of the *Uniform Liens Act* into the laws of British Columbia would also, to a large extent, harmonize our law with the laws of other provincial jurisdictions that have enacted modern

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52. *Ibid.*, ss. 25 and 27.

53. *Ibid.*

54. Saskatchewan *Commercial Liens Act*, S.S. 2001, c. C-15.1, ss. 26(2) and 35, and Nova Scotia *Liens Act*, S.N.S. 2001, c. 33, ss. 26(2) and 29. (The Nova Scotia Act has yet to be proclaimed.)

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liens legislation.<sup>55</sup> This will create a climate of efficiency and predictability that will make it easier for consumers and businesses to understand their rights and obligations with regard to these commercial liens.

### VIII. British Columbia Model

If the *Uniform Liens Act* is adopted the modifications set out below will be necessary to make the Act suitable for use in British Columbia.

#### Title

We recommend that the statute be renamed the “*Commercial Liens Act*” to reflect the scope of the legislation.

#### Section 1

Section 1 of the draft *Uniform Liens Act* defines the word “court” and in so doing refers to the “*superior court of the enacting jurisdiction*” and the “*provincial court*”. Those references can respectively be replaced with “Supreme Court” and “Provincial Court.” It is recommended that the draft language stating “*the monetary jurisdiction of the provincial court of the enacting jurisdiction*” be maintained, as opposed to setting out a numerical figure, in order to avoid having to keep the Act in accord with any future changes to that figure.

A further amendment to section 1 may be required. The *Forest Work Security Interest Act*<sup>56</sup>, which has had first reading before the Legislature will, if adopted, repeal and replace the *Tugboat Worker Lien Act*.<sup>57</sup> The *Forest Work Security Interest Act* deals, in part, with the protection of persons engaged or employed to provide towing services of forest products, who are owed money for that work. Two options exist for addressing the interaction between the *Forest Work Security Interest Act* and the *Uniform Liens Act*. The first is to modify the *Uniform Liens Act* by replacing the reference to towage under the definition of what constitutes “services” that are caught within the scope of the Act with the following phrase “*towage, except as otherwise dealt with under the Forest Work Security Interest Act.*” This will confine security for towage of forest products to the *Forest Work Security Interest Act* and avoid unnecessary duplication. The second option is to exclude towing from the definition of “forest work” under the *Forest Work Security Interest Act*.

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55. Legislation based on the *Uniform Liens Act* came into effect in Saskatchewan on March 1, 2002 and was passed, but is not yet proclaimed, in Nova Scotia in 2001: *ibid*. Ontario has also enacted a modern liens statute similar to but predating the *Uniform Liens Act* (*Repair and Storage Liens Act*, R.S.O. 1990, c. R. 25). The Yukon, New Brunswick and Newfoundland are considering modern liens legislation.

56. Bill M205, 2002, 3<sup>rd</sup> Sess., 37<sup>th</sup> Leg., British Columbia, 2002 (1<sup>st</sup> reading 14 May 2002).

57. The *Tugboat Worker Lien Act*, R.S.B.C. 1996, c.466, provides a lien for towage charges on logs or timber products owing to the tugboat owner who provided the towage services. (See: Law Reform Commission of British Columbia, *Report on the Tugboat Worker Lien Act*, Report No. 138 (June 1994), for a further discussion of this Act.)

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This would leave towage to be governed by the *Uniform Liens Act*. If the second option is favoured amendments to the *Forest Work Security Interest Act* would be necessary, but no change would be required under section 1 of the *Uniform Liens Act*.<sup>58</sup>

### Section 5

Section 5(5) is intended to accommodate agreement by electronic means. In British Columbia the recently enacted *Electronic Transactions Act*<sup>59</sup> makes the wording in subsection (5) unnecessary.

### Section 8

Both references in subsections (3)(b) and (3.1) to “*or other applicable regulations of the enacting jurisdiction*” can be deleted as the PPSA and the regulations thereunder set out the requirements necessary to register a financing statement.

### Section 10

The *Uniform Personal Property Security Act* section numbering differs from the corresponding provisions under the British Columbia *Personal Property Security Act*. Accordingly, the reference in section 10 (2) of the *Uniform Liens Act* to “sections 33(2) and (3) of the *Uniform Personal Property Security Act*” should be replaced with “sections 35(2) and (5) of the *Personal Property Security Act*.”

### Section 15

For the same reason as discussed under section 10, the reference in section 15 (4) to “section 57 of the *Uniform Personal Property Security Act*” should be replaced with “section 58 of the *Personal Property Security Act*.”

### Section 21

The reference to “*insert title of proper officer of the court*” should be replaced with “registrar.”

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58. It should be noted that while in some cases constitutional questions may arise as to the legislative competence of a provincial government to enact a statute governing the maritime issue of towage, an in-depth look at this issue is beyond the scope of this Report.

59. S.B.C. 2001, c. 10.

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### Section 22

The references to “*proper officer of the court*” should be replaced with “registrar.”

### Section 23

For the same reason as discussed under section 10, section 23 should be amended to read:

23. Except as otherwise provided in this Act, the following provisions of the *Personal Property Security Act* apply, with any necessary modification, to a lien created by this Act as though the lien were a security interest

section 1(2) (knowledge);

section 5 (law applicable: general rules for goods and collateral in possession of secured party);

section 6 (law applicable: parties intend goods to be removed from jurisdiction);

section 7 (law applicable: mobile goods, intangibles, etc.);

section 8 (law applicable: substance and procedure);

section 17 (rights and obligations of secured parties in possession of collateral);

section 18 (acquisition of information from secured parties);

Part IV (registration);

Part V (rights and remedies on default);

section 68 (supplementary law);

section 69 (consequences of non-compliance with Act);

section 71 (extension of time for compliance);

section 72 (service of statements, notices and demands).

### Section 24

Section 24 is a draft provision setting out the power to make regulations. In referring to local policies on regulation-making powers, the following provision should be added as section 24(1):

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(1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

The existing wording in section 24 should form subsection (2), with the addition of the following opening phrase, “Without limiting subsection (1).”

### Section 25

Section 25(2) states that, “The lien arising under the common law in favour of an innkeeper with respect to the goods of a guest of the innkeeper is abolished.” As discussed earlier we have concluded that further consideration is necessary before taking this action. Therefore, we recommend that the existing law be retained, rather than adopting subsection (2) at this time.

### Section 26

In subsection (1) the definition of “prior law” has a reference stating “*insert definition appropriate for legislation of enacting jurisdiction*”. This should be replaced with the phrase “the law in force immediately before *Month Day Year*.” (The italicized date reference will be replaced with the date that the Act comes or is deemed to come into force.)

In subsection (3) the reference to “*any repairer’s or garagekeeper’s legislation extant in the enacting jurisdiction*” should be replaced with “*the Repairers Lien Act*.”

### Section 27

Section 27(1) provides that “*Sections 8 and 9 of the Uniform Hotelkeepers Act are repealed*.” For the reasons set out in the discussion under section 25 we recommend that the existing law be retained, rather than adopting section 27(1) at this time.

Under subsection (2) the reference to [*any repairer’s or garagekeeper’s legislation extant in the enacting jurisdiction*] should be replaced with “*Repairers Lien Act*.”

In subsection (3) the reference to “*Uniform Warehousemen’s Lien Act*” should be replaced with “*Warehouse Lien Act*.”

### References to the Uniform Personal Property Security Act

In the following sections the reference to the “*Uniform Personal Property Security Act*” should be replaced by the phrase “*Personal Property Security Act*”: 1, 8, 10, 15, 19, 20, 23 and 24.

**IX. Acknowledgement**

The Institute wishes to acknowledge the contribution of Caroline Carter, Staff Lawyer, who undertook the preparation of this Report.



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### Appendix A

#### *Uniform Liens Act, 2000*

##### *Definitions*

1. In this Act,

“court” means the [superior court of the enacting jurisdiction], or where the value of the goods does not exceed [the monetary jurisdiction of the provincial court of the enacting jurisdiction] includes the [provincial court];

**Commentary:** This definition, in addition to using the jurisdiction of the superior court, contemplates the use of the small claims procedure for claims in relation to assets that do not exceed the monetary jurisdiction of the small claims court. For most jurisdictions in Canada, this will expand the authority of the provincial court to include the exercise of powers under the jurisdiction’s personal property regime.

“financing statement” means a financing statement as defined in the *Uniform Personal Property Security Act*;

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

“lien” means, except where the context requires otherwise, a lien on goods pursuant to section 2;”

**Commentary:** This Act does not apply to all liens, but only those which have a commercial base and can be considered to have value. This point is more fully canvassed under section 2. The need to qualify the definition arises because sections 25 and 26 refer to liens that are not created by this Act. Section 25 abolishes liens arising at common law; section 26 is a transitional provision.

“lien claimant” means a person who has a lien on goods pursuant to section 2;

“secured party” means a person who has a security interest;

“security interest” means an interest in goods that secures payment or performance of an obligation;

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

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

**Commentary:** This is a key definition. Coupled with section 2, this definition determines the Act’s scope. The three types of liens contemplated by this Act are: (i) the repairer’s lien; (ii) the storer’s lien; and (iii) the carrier’s lien. An enacting jurisdiction may choose to expand the list. The commonality among these liens is that each has a commercial base and each can be said to have preserved or enhanced the value of the goods. Some explanation in relation to this latter point is required. The repairer’s lien being a lien where a person has provided services for the purpose of improving, restoring or maintaining the condition or properties of goods is self-explanatory. A storer’s or a carrier’s lien also preserves or adds value, but examples are needed to better explain this principle. A storer adds value in the sense that the goods are maintained by storage. Transportation adds value on the assumption goods are transported from one place to another where they are needed or will be capable of being sold or repaired. If not transported, the value of the goods is diminished if they cannot be sold for the best price or cannot be repaired. This definition also removes the distinction between carriers and common carriers. All carriers are brought within the framework of the Act.

There is no requirement that a bill of lading must be issued in order that a carrier may claim a lien.

“sheriff” includes any person appointed by a sheriff pursuant to section 14.

**Commentary:** This Act contemplates the use of a sheriff to seize the goods covered by a lien. An enacting jurisdiction may wish to use a different system of enforcement.

### NATURE AND EXTENT OF LIEN

#### *Person who has a lien*

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

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- (2) A person who, pursuant to legislation of another jurisdiction in Canada, has a lien on goods for services provided by that person in relation to the goods at the request of a person in possession of the goods is deemed to have a lien on goods created by this section if the lien is registered in accordance with the personal property security legislation of that jurisdiction.

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

This section does not create a lien analogous to a hotelkeeper's lien. With the repeal of sections 8 and 9 of the *Uniform Hotelkeepers Act* and the enactment of subsection 25(2) of this Act, the hotelkeeper's lien will be abolished.

Subsection (2) addresses out of province liens. It is common for goods which are the subject of a repairer's lien to be transported from one jurisdiction to another. Since the Uniform Liens Act adopts the conflict provisions of the enacting jurisdiction's PPSA (see s. 23), the validity, perfection and effect of perfection or non-perfection of such a lien is governed by the jurisdiction where the collateral was situated when the lien was created (see s. 23(a) of the Uniform Liens Act). When the goods are moved, perfection continues for a certain period of days after the goods are brought into the province but there is currently no means for the lien claimant to register the lien. Without a means to register the lien, there is also no means to enforce it.

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

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

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

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

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consistent with other Uniform Acts.

### *Amount of lien*

- 3.(1) Subject to subsection 4(1), a lien secures the amount that the person requesting the services agrees to pay for the services.
- (2) If no amount is agreed on, the lien secures the fair value of the services rendered.

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

### *When lien attaches*

- 4.(1) Subject to subsection (2), a lien attaches to goods on the commencement of the services giving rise to the lien but, until completion of the services, secures only the fair value of the services provided.
- (2) Where the lien claimant repudiates the agreement before completion of the services provided for in the agreement, the attachment of the lien ends.

**Commentary:** To permit a lien to attach on commencement of the services, as subsection 4(1) does, represents a revision to the common law which required work to have been completed before a lien would attach. To balance this, it was decided to build in some safeguards for the owner of the goods. The first safeguard is to ensure that if the services are not completed only the fair value is secured by the lien. The committee decided upon “fair value” recognizing that in some instances the parties may have agreed on a figure that was either more or less than what the fair value might indicate. Fair value will normally be determined by reference to market value. The second safeguard is that contemplated by subsection 4(2) which will ensure the lien claimant does not have a lien where it has repudiated the contract.

### *When lien enforceable*

- 5.(1) Subject to subsection (4), a lien is enforceable only where
  - (a) the goods are in the possession of the lien claimant; or
  - (b) the person requesting the services has, at any time:
    - (i) authorized the services giving rise to the lien in a signed writing that includes a

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description of the goods that are subject to the lien, or

- (ii) acknowledged an obligation to pay for the services giving rise to the lien in a signed writing that includes a description of the goods that are subject to the lien.

**Commentary:** This subsection establishes when a lien is enforceable. There is no writing requirement if the goods are in the possession of the lien claimant, but if they are not, there must be a written authorization for the services or a written acknowledgment of the obligation to pay. The authorization or acknowledgment may be obtained at any time, including after the goods are released to the person who has requested the services. Failure to obtain an authorization or acknowledgment renders the lien unenforceable against both the person who has requested the services and third parties.

This is a departure from the policy choice of the *PPSA*, which provides that a failure to obtain a security agreement signed by the debtor only renders the security agreement unenforceable against third parties. For liens, the acknowledgment fulfils the additional requirement of specifying the required services and the agreed amount in an effort to avoid disputes.

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

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

- (3) An acknowledgment of an obligation to pay pursuant to subclause (1)(b)(ii) is without prejudice to the right of the person requesting the services or any other person to dispute the amount the lien claimant is owed.

**Commentary:** A person who signs an acknowledgment of indebtedness should not be prevented from disputing the amount of the lien. It simply reflects the amount due. If it were otherwise, a person requiring immediate use might be coerced into signing the acknowledgment to obtain the release of the lien. A dispute mechanism is provided in section 20 of this Act.

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

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

**Commentary:** Subsection 5(4) refers to an interest acquired during the period of time between the date the lien attaches and the date on which the requirements of subsection 5(4) are met. Subsection 5(4.1) ensures that a judgment enforcement creditor is “a third party (who) acquires an interest in the goods.” Without this provision, a lien claimant would have priority over a judgment enforcement creditor in circumstances where the lien claimant has an essentially unenforceable lien.

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

[(5) For the purposes of subsection (1), the authorization or acknowledgment is deemed to be in writing and signed by the person requesting the services when it is in the form of a tangible authenticated record.]

**Commentary:** This subsection is intended to accommodate agreement by electronic means. In those enacting jurisdictions where “writing” is given an extended meaning, this provision may be unnecessary.

### *Lien may be assigned*

6. Where the debt secured by a lien is assigned, the lien claimant may, in writing, assign the lien to the person to whom the debt is assigned.

**Commentary:** At common law a lien could not be assigned (see: *Beaver River Community Futures Development Corporation v. Joe Hansen and Kalinowski Trucking Ltd* (Sask.Q.B.)). This can present difficulties particularly when a business owning certain claims is sold. Assignability may also be useful in the financing of repairs. There may be cases where the person requiring services cannot immediately pay for the repairs and the lien claimant is unable to carry the cost. Knowing that the ultimate lien is assignable may induce the lien claimant to make the repairs.

The reference to the writing requirement is consistent with legislation providing for the assignment of choses in action that provides that every debt and every chose in action arising out of contract shall be assignable at law by any form of writing.

### *Effect of credit and taking of security*

7.(1) The granting of credit by a lien claimant for the payment of the debt to which a lien relates

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- (a) does not affect the attachment, enforceability, perfection or priority of the lien; and
- (b) does not extinguish the lien.

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

- (2) A lien claimant who takes a security interest in goods that are subject to a lien in order to secure the amount of the lien is deemed to have taken the security interest in substitution for the lien.

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

### PERFECTION AND PRIORITY OF LIEN

#### *Perfection*

- 8.(1) Possession of goods by a lien claimant or by a person acting on behalf of a lien claimant perfects a lien on the goods.
- (2) For the purposes of subsection (1), a lien claimant or a person acting on behalf of a lien claimant does not have possession of goods if
  - (i) the goods are in the actual or apparent possession or control of the person requesting the services or that person's agent; or
  - (ii) the goods are being held as a result of a seizure or repossession.

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

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

- (a) either:

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- (i) in the case of serial numbered goods, the goods are described in the financing statement by their serial number; or
  - (ii) in the case of goods that are not serial numbered goods, both the owner of the goods and the person requesting the services, if that person is not the owner, are identified as debtors in the financing statement; and
- (b) all other requirements of the regulations made pursuant to the Uniform Personal Property Security Act [or other applicable regulations of the enacting jurisdiction] have been met.”

“(3.1) For the purposes of subsection (3):

- (a) ‘owner’ includes a buyer, a lessee or a consignee under a transaction to which the Uniform Personal Property Security Act applies;
  - (b) ‘serial numbered goods’ means serial numbered goods as defined in the regulations made pursuant to the Uniform Personal Property Security Act [or other applicable regulations of the enacting jurisdiction].”
- (4) Part IV of the *Uniform Personal Property Security Act* applies, with any necessary modification, to financing statements registered pursuant to subsection (3).

**Commentary:** A lien may also be perfected by registration. Registration may occur at any time, and, as will be seen, if the lien claimant is not registered it will be defeated by certain interests. In order for the *Uniform Liens Act* to dovetail with this system and for priority rules to interact in a priority regime with security interests, lien registrations should be made against the owner’s name as well as the name of the person requesting the services in any case where the goods are not serial numbered goods and where the nature of the security agreement is one to which the Personal Property Security Acts would apply. “Owner” for these purposes would mean a person who has granted a security interest securing all or part of the purchase price, i.e., the buyer under what used to be called the “conditional sales” contract or the lessee or consignee under an instrument which secures all or part of the purchase price. These latter interests would be considered disguised sales contracts. It also would include true leases for a term greater than one year and true consignments. In addition to addressing serial numbered goods, these subsections provide that registration of a financing statement against the name of the owner of the goods and the person requesting the services perfects a lien on the goods. It should be acknowledged that this could result in the subordination of a lien in circumstances beyond the control of the lien claimant. As between the lien claimant and a subsequent buyer or secured party



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who relies on the registry, however, it is the lien claimant who is in the best position to prevent the problem from arising. He or she can demand proof of ownership of goods with respect to which services are being requested. A buyer or searching party has no way, other than through information in the registry, to determine whether goods offered for sale or as security are subject to a lien. The owner may not be aware of the existence of the lien or may be prepared to act dishonestly in not disclosing the fact that services provided in connection with the goods were contracted for by someone else. Hence, the policy choice reflected in this section. (Note that “owner” is defined in this section as it does not appear elsewhere in the Act.)

- (5) Where the perfection of a lien is not continuous, the date of perfection to be considered in determining the priority of the lien is its most recent date of perfection.
- “(6) With respect to a lien mentioned in subsection 2(2), registration of the lien pursuant to the personal property security legislation of another jurisdiction does not constitute perfection of the lien for the purposes of this Act, but the lien may be perfected by any of the methods set out in this section.”

**Commentary:** This provision is intended to clarify that registration in another province does not equate to perfection through registration in the jurisdiction of proposed enforcement. The lien claimant is simply entitled to pursue perfection in the jurisdiction of enforcement in accordance with the terms of this Act.

### *Grace period for registration*

9. (1) Where a lien is perfected by possession, returning the goods to the control of the person requesting the services does not affect the perfection of the lien if the lien claimant registers a financing statement with respect to the goods within the first 15 days after returning control of the goods to that person.
- (2) Where a lien claimant does not have possession of goods when a lien attaches to the goods and the lien claimant registers a financing statement with respect to the goods within the first 15 days after completion of the services, the lien is deemed to be perfected during that 15-day period.

**Commentary:** This Act provides for two methods of perfection: possession and registration. If the lien claimant has possession of the goods and the goods are then returned to the person requesting the services, the lien claimant has a 15-day grace period in which to register to continue the perfected status. If the lien claimant never has possession (as a result of providing the services on site), the only method of perfection provided in this Act is registration. In this case, subsection (2) gives the lien claimant a 15-day grace period to register.

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### *Priority of liens over other interests*

- 10.(1) *Except as provided in this Act or any other Act, a perfected lien has priority over an interest that is created after the lien attaches.*

**Commentary:** Including this section reflects a policy choice to state the priority rule between lienholders and others, including secured parties, in the Act. It establishes the residual rule and repeats the common law for possessory liens and the existing statutory law for non-possessory liens.

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

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

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

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

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

- (2) Notwithstanding subsections 33(2) and (3) of the *Uniform Personal Property Security Act*, a lien, whether perfected or unperfected, has priority over
- (a) a security interest that attaches before the lien attaches, and
  - (b) a writ of execution that is issued or a charging order that is granted before the lien

## Report on Uniform Liens Act

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attaches.

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

A departure from the *PPSA* structure should be noted. Under subsection 33(2) of the *PPSA*, a perfected security interest securing future advances will defeat the interests of secured creditors who seize the collateral and the interests of their representatives. Subsection 33(3) of the *PPSA* provides that if future advances are made while a security interest is perfected, the security interest has the same priority with respect to the future advance as it had with respect to the first advance. No such special rule exists between the prior secured party making a future advance and the lien claimant.

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

A secured party making future advances in relation to inventory is not likely to be severely prejudiced by a lien that encumbers one of many items of collateral.

Finally, the legislative choice in favour of lienholders in this situation has already been made in those jurisdictions that have *Garagekeepers' Acts* and in the *Ontario Repairers' and Storers' Liens Act*.

### *Where lien subordinate or unenforceable*

- 11.(1) In this section, “seized under legal process” includes seizure under a writ of execution and the issue of an equitable execution or charging order affecting the goods subject to the lien.
- (2) If a lien is unperfected when the goods are seized under legal process to enforce a judgment, the lien is subordinate to the interest of
  - (a) a person who causes the goods to be seized;
  - (b) a creditor entitled by law to participate in the distribution of the seized goods or their proceeds; and
  - (c) a representative of creditors, but only for the purposes of enforcing the rights of a person

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mentioned in clause (a).

**Commentary:** The language of this provision comes from clause 19(1)(b) of the *PPSA*.

(3) A lien is subordinate to

- (a) the interest of a buyer or lessee of the goods who gives value and acquires the interest without knowledge of the lien and before the lien is perfected; and
- (b) a security interest that attaches after the lien attaches and that is perfected after the lien attaches and before the lien is perfected.

(4) A lien is not enforceable against

- (a) a trustee in bankruptcy, if the lien is unperfected at the date of bankruptcy; or
- (b) a liquidator appointed pursuant to the *Winding-Up and Restructuring Act* (Canada), if the lien is unperfected at the date the winding-up order is made.

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

It dates priority for the execution creditor from the date of seizure. It also expands the meaning of “seizure under legal process” as has been done in the modern *PPSA*’s. Note that in order for a transferee to defeat a lien, the transferee need not take delivery of the goods. This is consistent with all the Canadian *PPSA*’s except for Ontario where the transferee must take delivery of the goods in order to defeat a lien. A security interest arising after the lien attaches may only defeat a lien if it is perfected before the lien is perfected.

### *Exceptions to priority of liens*

12.(1) In this section, “consumer goods” means goods that are used or acquired for use primarily for personal, family or household purposes.

- (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 lien whether or not the buyer or lessee has knowledge of the lien.
- (3) A buyer or lessee of goods that are acquired as consumer goods takes free of any lien on the goods if the buyer or lessee

## Report on Uniform Liens Act

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- (a) gives value for the interest acquired; and
  - (b) has no knowledge of the lien.
- (4) Subsection (3) does not apply to a lien on goods where the purchase price exceeds \$1,000 or, in the case of a lease, where the market value of the goods exceeds \$1,000.
- (5) A buyer or lessee takes free of a lien described in section 9 if, during the 15-day period mentioned in that section and before the lien is perfected by registration, the buyer or lessee
- (a) gives value for the interest acquired; and
  - (b) has no knowledge of the lien.

**Commentary:** Again, this is equivalent to the priority positions between secured parties and buyers or lessees under the *PPSA*. A buyer or lessee of goods will not defeat the lien if the goods are in the possession of the lien claimant. The definition in subsection (1) is included solely for the purposes of subsection (3), which permits a buyer or lessee for value and without knowledge of a lien to take the goods free of that lien.

### *Priority among liens*

13. Priority among two or more liens is to be determined by the reverse order in which the services are provided.

**Commentary:** A first to register priority rule for lien claimants is unfair to subsequent lien claimants who add value and but for their value the first lien claimant may claim little or nothing. Assume a fact situation where a vehicle has been repaired at a cost of \$5,000 and, as a result, is worth \$10,000. The vehicle is involved in an accident requiring \$6,000 worth of repairs. The repairs are effected. The vehicle is again worth \$10,000. But for the intervention of the second repairer, the first repairer would not have been able to satisfy its bill, but with a first in time priority rule the first repairer will be fully paid before the second repairer.

With this scenario in mind, the Act includes a rule that gives priority to the last lien claimant to provide services. This rule reflects the reality that in almost all cases the later lien claimant enhances or preserves the value of the goods and so confers a benefit on the earlier lien claimants. Priority would be for the full amount secured by the claim as provided in section 3.

### ENFORCEMENT

#### *Appointment to exercise sheriff's powers*

14. A sheriff may appoint one or more persons to exercise any of the powers of the sheriff that are conferred by this Act, and the exercise of any of those powers by a person so appointed is deemed to be an exercise of the power by the sheriff.

#### *Seizure by sheriff*

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

- (a) the amount secured by the lien remains unpaid; and
- (b) any period granted for repayment has expired.

**Commentary:** The lien claimant has the right to instruct the sheriff to seize the goods as long as it remains unpaid and is otherwise entitled to do so. Priority disputes will be resolved in the ordinary way using the dispute resolution mechanisms provided by the *PPSA*.

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

**Commentary:** Under the western garagekeepers Acts, any asset to be seized had to be seized by the sheriff. As a general rule, a garagekeeper would have little experience in the seizure of goods. There was also no security agreement alerting the person who requested the services to the possibility of seizure. By having the sheriff seize the goods, it was thought disputes arising from these two factors could be prevented. It should be noted that sheriff in this Act is defined to include a person appointed by a sheriff to exercise the powers of the sheriff.

- (3) The sheriff shall not seize goods unless the lien claimant or an agent of the lien claimant has executed and delivered a warrant in the form prescribed in the regulations to the sheriff who is to carry out the seizure.
- (4) In effecting a seizure, a sheriff may exercise any powers given to a secured party pursuant to section 57 of the *Uniform Personal Property Security Act*.
- (5) A seizure by a sheriff does not affect the interest of a person who, pursuant to this Act or any other law, has priority over the rights of the lien claimant.

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### *Sheriff may require security*

16. A sheriff may refuse to make or continue a seizure of goods unless the sheriff is furnished with security sufficient to
- (a) cover the sheriff's fees and expenses; and
  - (b) indemnify the sheriff for anything done in relation to a seizure, including indemnification for claims by the person requesting the services or any third party.

**Commentary:** The requirement of security is consistent with sheriffs' practice.

### *Sheriff may appoint bailee*

- 17.(1) Where a lien is perfected by registration, the sheriff may, at any time after making a seizure, appoint any person in possession of the goods seized as bailee of the sheriff if the person executes an undertaking in the prescribed form
- (a) to hold the goods as bailee for the sheriff; and
  - (b) to deliver up possession of the goods to the sheriff on demand.
- (2) Seized goods held by a bailee appointed by the sheriff are deemed to be held under seizure by the sheriff.

**Commentary:** There will be occasions when the sheriff believes that the goods are better left in the possession of the person who requested the services or any other person in possession of the goods. As long as the lien has been perfected by registration, this section permits the sheriff to do so.

### *Surrender of possession to lien claimant*

- 18.(1) A sheriff may surrender possession or the right of possession of the goods seized to the lien claimant or a person designated in writing by the lien claimant.
- (2) Before or after a seizure of goods, a sheriff may give a written notice to the lien claimant named in the warrant under which the seizure is made, indicating that the seizure is to be released at a date specified in the notice unless the lien claimant takes possession of the seized goods before that date and pays all sheriff's costs associated with the seizure.

## Report on Uniform Liens Act

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**Commentary:** By means of this subsection, the sheriff can compel the lien claimant to receive the goods.

- (3) If the person to whom the notice is given does not take possession of the goods mentioned in the notice on or before the date specified, the sheriff may release the seizure.
- (4) If the sheriff releases a seizure pursuant to subsection (3), the lien ceases to exist when the seizure is released.

**Commentary:** This subsection provides a consequence if the lien claimant fails, following the sheriff's request, to take possession of the seized goods.

- (5) After a surrender of possession or the right of possession pursuant to subsection (1) or a release of seizure pursuant to subsection (3), the sheriff is not liable for any of the following that occur after the surrender or release
  - (a) loss of or damage to the goods, or
  - (b) unlawful interference with the rights of the person requesting the services or any other person who has rights in or to the goods.

### *Lien claimant may dispose of goods*

19. If the person requesting the services fails to pay the debt within 30 days after the day on which it becomes payable, the lien claimant may realize on the goods in accordance with Part V of the *Uniform Personal Property Security Act*, and the lien claimant has all the rights and obligations of a secured party under Part V of that Act.

**Commentary:** A lien claimant has the right, by virtue of this section, to sell the goods 30 days after the debt becomes due, in accordance with Part V.

### *Court may resolve dispute*

- 20.(1) The person requesting the services or any other person claiming a proprietary interest in, or a contractual right to possession of, the goods that are subject to a lien may apply to the court to have a dispute resolved where the dispute concerns:
  1. the existence of a lien or the amount secured by a lien; or
  2. the right of the lien claimant to take or retain possession of the goods.



## Report on Uniform Liens Act

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- (2) In addition to the powers conferred on a court under the *Uniform Personal Property Security Act*, on hearing an application pursuant to subsection (1), the court may make any order that it considers appropriate in the circumstances.

**Commentary:** This section provides an express ability for any person claiming a proprietary interest in goods that are the subject of a lien to access the courts for dispute resolution.

### *Payment into court*

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

- (2) On the receipt of the certificate, the lien claimant shall
- (a) release the goods; or
  - (b) not later than three days after receiving the certificate, file a notice of objection with the court stating that additional or alternative security should be posted with the court prior to release of the goods.
- (3) Where an objection mentioned in subsection (2) has been filed and the applicant has posted the additional or alternative security demanded by the lien claimant, the lien claimant shall release the goods.
- (4) If the court concludes that the lien is not valid or that the additional or alternative security mentioned in subsection (2) is not justified, the court shall order the lien claimant to pay to the applicant as damages any loss suffered or cost incurred by the applicant as a result of having to pay money into court or post security or additional or alternative security.

### *Where goods released*

- 22.(1) Where goods are released after a certificate is issued by the court, the lien is discharged and is replaced by a charge on the amount paid into court or on the security posted.
- (2) The charge is discharged 90 days after the goods are returned by the applicant unless the lien claimant accepts the applicant's offer of settlement or commences an action to recover the amount claimed.

## Report on Uniform Liens Act

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- (3) After the expiry of 90 days, the [*proper officer of the court*] shall return to the applicant the money paid into court or the security posted if the applicant files with the [*proper officer of the court*] an affidavit confirming that the lien claimant has not accepted the applicant's offer of settlement or commenced an action to recover the amount claimed.

**Commentary:** Overall sections 20 to 22 provide an effective dispute resolution mechanism to balance the lien claimant's power of retention and seizure where there is a dispute about services, quality, price or similar matters.

Sections 20 to 22 are taken from the Alberta Institute's Report, recommendation #34, which in turn is modeled after Rule 469 of the Alberta Rules of Court, but there are some differences. The proposed section 21 removes the requirement to pay the amount claimed into Court as a pre-condition to bringing an application under section 20. The person who requested the services may want to contest the lien while leaving the goods in the hands of the lien claimant. There is no justification for the lien claimant demanding more than the amount of the debt owing. The only objection that should be made is as to the amount and kind of security.

There is no automatic consequence for abusing the system by providing that no order under subsection 21(4) should be less than a set sum. Such a requirement seemed to tie the discretion of the Court and appeared unwarranted in commercial dealings.

## GENERAL APPLICATION OF THE UNIFORM PERSONAL PROPERTY SECURITY ACT

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

23. Except as otherwise provided in this Act, the following provisions of the *Uniform Personal Property Security Act* apply, with any necessary modification, to a lien created by this Act as though the lien were a security interest

section 4 (validity and perfection of foreign lien on goods);

section 5 (choice of law where parties understand goods are to be taken to another province or territory);

section 6 (validity, perfection and effect of perfection or non-perfection liens in mobile goods);

section 7 (choice of law for procedural and substantive issues relating to goods);

section 16 (care of collateral);

## Report on Uniform Liens Act

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section 17 (information to be provided by the lien claimant);

Part IV (registration);

Part V (default - rights and remedies);

section 62 (application to the court);

section 64 (rights to be exercised in a commercially reasonable manner);

section 65 (extension of time);

section 66 (remedial provision);

section 67 (service of notices);

section 68 (notice or knowledge).

**Commentary:** This section gathers together the *PPSA* provisions that will be applicable to a lien under this Act. To restate those provisions in this Act would create a risk that at some future date its provisions would cease to parallel those of the *PPSA* as the latter is amended. Enacting jurisdictions might wish to consider preparing a detailed pamphlet for the purpose of educating lien claimants as to the interface between this Act and the *PPSA*.

### *Regulations*

[24. For the purpose of carrying out this Act according to its intent, the Lieutenant Governor in Council may make regulations

- (a) defining, enlarging or restricting the meaning of any word or expression used in this Act, including words and expressions defined in this Act, and any word or expression used in a regulation adopted pursuant to clause (b), whether or not the word or expression is defined in the regulation;
- (b) adopting, as amended from time to time or otherwise, any regulations made pursuant to the *Uniform Personal Property Security Act* and amending them or otherwise providing for any necessary modifications to them for the purposes of this Act;
- (c) prescribing any matter or thing required or authorized by this Act to be prescribed in the regulations;

## Report on Uniform Liens Act

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- (d) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of this Act.]

**Commentary:** Enacting jurisdictions will wish to refer to local policies on regulation-making powers. The regulation-making power under the local PPSA should provide an appropriate point of departure in framing this provision.

### *Common law liens abolished*

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

- (2) The lien arising under the common law in favour of an innkeeper with respect to the goods of a guest of the innkeeper is abolished.

**Commentary:** The common law lien of an innkeeper often arises without a request from a guest to store the goods of the guest, as when the guest abandons property in the room that he or she has occupied and leaves without paying for the accommodation. The request made by a guest is normally a request for accommodation, not for storage of goods. Without a specific repeal of the innkeeper’s common law lien, arguably this type of lien would continue.

In some circumstances, a guest may also request storage of goods (for example, requesting safekeeping of valuables in the hotel safe, requesting storage of luggage between checkout time and a late-in-the-day flight). In those circumstances, section 2 would probably apply.

### *Transition*

26.(1)In this section, “prior law” means [*insert definition appropriate for legislation of enacting jurisdiction*].

- (2) This Act applies to every lien created under prior law that has not been terminated in accordance with prior law before the coming into force of this Act.
- (3) A lien created under prior law that is validly registered pursuant to [*any repairer’s or garagekeeper’s legislation extant in the enacting jurisdiction*] is deemed to be registered pursuant to this Act for the unexpired portion of the registration, and may be continued by registration pursuant to this Act.

**Commentary:** This represents the only transition provision thought to be necessary.

## Report on Uniform Liens Act

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### *Repeal*

27.(1) Sections 8 and 9 of the *Uniform Hotelkeepers Act* are repealed.

(2) The [*any repairer's or garagekeeper's legislation extant in the enacting jurisdiction*] Act is repealed.

(3) The *Uniform Warehousemen's Lien Act* is repealed.

## Report on Uniform Liens Act

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### Appendix B

#### Legislation to be Amended

The adoption of the *Uniform Liens Act* will require consequential amendments to other provincial statutes that make reference to the *Repairers Lien Act* or the *Warehouse Lien Act* including the following:

*Highway Act*, R.S.B.C. 1996, c. 188, section 16(4);

*Motor Vehicle Act*, R.S.B.C. 1996, c. 318, sections 104.4, 104.5, 105, 105.4, 188 and 192;

*Personal Property Security Act*, R.S.B.C. 1996, c. 359, Schedule and Regulations;<sup>60</sup>

*Transport of Dangerous Goods Act*, R.S.B.C. 1996, c. 458, section 9(4).

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60. An example of the type of amendments to be made to the Regulations can be found under Saskatchewan's PPSA Regulations.

## Report on Uniform Liens Act

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### Appendix C

#### Select Provisions of the *Repairers Lien Act*

R.S.B.C. 1996, c. 404

#### **Garage keeper's lien on motor vehicle, aircraft, boat or outboard motor**

**3** (1) If a garage keeper, before surrendering possession of a motor vehicle, aircraft, boat or outboard motor, obtains from the person at whose request the garage keeper has bestowed money, skill or materials on it, an acknowledgment of debt by requiring that person to sign an invoice or other statement of account, the garage keeper does not, by surrendering possession of the motor vehicle, aircraft, boat or outboard motor, lose any lien on it.

...

#### **Priority of lien**

**10** After possession of the motor vehicle, aircraft, boat or outboard motor has been surrendered by the garage keeper, the garage keeper's lien on it is postponed to

- (a) the interest of a buyer acquired in good faith, for value and without knowledge of the lien of the garage keeper after the surrender and before a financing statement relating to the lien is registered as provided under this Act,
- (b) a security interest acquired in good faith, for value and perfected under the *Personal Property Security Act* after the surrender and before a financing statement relating to a lien is registered under this Act,
- (c) another repairer's lien under section 3 if
  - (i) the money, skill or materials to which the other lien relates was bestowed in good faith and without knowledge of the first lien, and
  - (ii) a financing statement relating to the other lien is registered as provided under this Act before a financing statement relating to the first lien is registered, and
- (d) the lien of a repairer who has retained possession, if the money, skill or materials to which the other lien relates was bestowed in good faith, without knowledge of the first lien and before a financing statement relating to the first lien is registered under this Act.

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