MODERNIZATION OF THE FORESTRY WORKERS LIEN FOR WAGES ACT

CONSULTATION PAPER

OCTOBER 2012

Available online at www.lco-cdo.org
Disponible en français
ISBN: 978-1-926661-50-6

ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario ("LCO") was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Ontario law deans. It is situated at York University, housed in the Ignat Kaneff Building, home of the Osgoode Hall Law School.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government. It selects projects that are of interest to and reflective of the diverse communities in Ontario and is committed to engage in multi-disciplinary research and analysis and make holistic recommendations, as well as to collaborate with other bodies and consult with affected groups and the public more generally.

This Consultation Paper is available on the LCO's website at www.lco-cdo.org.

TABLE OF CONTENTS

I. INTRODUCTION 1
II. THE LOGGING INDUSTRY 1891 TO 2012: FROM SLEIGHS TO SKIDDERS 2
III. THE PRESENT LAW 6
A. What is a lien? 6
B. The Forestry Workers Lien for Wages Act 6
1. Persons entitled to a lien 7
2. Property that is subject to a lien 7
3. Filing requirements 7
4. Enforcement 8
5. Priority 8
C. Problems with the Act 8
1. Process for enforcement 9
2. Costs provisions 10
3. Definition of "labour" 10
4. Time for filing lien claims 11
5. Types of wood products covered 11
6. Application to sub-contractors 12
IV. OPTIONS FOR REFORM 15
A. Repeal 15
B. Retaining the Act 16
1. Updating the Act 16
2. Major Rewrite 17
C. Conclusion 18
D. Questions 18
V. ISSUES FOR CONSIDERATION 19
A. Scope of lien rights 19
1. Work qualifying for a lien 19
2. Property that can be liened 20
3. Persons entitled to a lien 20
4. Commencement of Lien 22
5. Questions 23
B. Filing and Registration 23
1. Registration requirements 23
2. Time for filing/registration 25
3. Questions 26
C. Lien Priority 26
D. Enforcement Process 28
1. Proving a lien 28
2. Realizing the lien 29

3. Questions 29
E. Compensation Fund 30
F. Other issues 31
1. Costs provisions 31
2. Geographical coverage 32
3. Payment from an Ontario bank 32
4. Separation of wood 32
5. Questions 33
VI. CONTRIBUTING TO THE PROJECT 34
APPENDIX A: SELECTED LEGISLATIVE PROVISIONS 36
APPENDIX B: COMPILED CONSULTATION QUESTIONS 38
ENDNOTES 39

I. INTRODUCTION

In this project, the Law Commission of Ontario (LCO) has undertaken law reform of the most classical type: the review of a statute enacted in 1891 that on its face is significantly outdated and possibly obsolete.

Under the *Forestry Workers Lien for Wages Act*[1] (the Act), forestry workers are entitled to claim a lien for wages on certain wood products. Since enactment, the forestry industry has changed significantly, yet the Act's terminology and procedures remain cast in 1891. Its frame of reference and procedural mechanisms can fairly be described as antiquated. The outdated drafting of the Act frustrates rather than assists parties' attempts to protect their supposed rights under it, as complex and costly litigation is required to determine the activities and products covered under the Act. The difficulties with the Act were drawn to the LCO's attention by Senior Regional Justice Pierce. Senior Regional Justice Pierce was required to apply a number of the outdated provisions in the Act in the *Buchanan* case, which revealed the difficulties involved in applying those provisions to the modern logging industry.[2]

This Consultation Paper considers the problems with the Act, canvasses the options for reform, and discusses the issues that any reforms must address. Chapter II briefly explains how the industry has changed from the time the Act was passed to the present day. Chapter III discusses the origin of the law of liens and the current state of the law. It also highlights the major problems with the Act. Chapter IV outlines the various options for reforming the statute, while Chapter V considers in greater detail the aspects of the statute that require attention, from the outdated definition of logging work to the prospect of a central lien registry.

Public input is an essential part of this reform process. The paper provides questions for feedback at the end of each chapter (collated in Appendix B). The LCO seeks comments in response to these questions or any other issues relevant to the Act. Comments can be provided in writing, including by email or in the comment box on our website, by telephone, by web conferencing and in person. More information on how to make comments and be part of the consultation process in this project is included at the end of this Consultation Paper in Chapter VI.

II. THE LOGGING INDUSTRY 1891 TO 2012: FROM SLEIGHS TO SKIDDERS

Although the *Forestry Workers Lien for Wages Act* has many problems, the core reason it is in need of reform is because the Northern Ontario logging industry today bears no resemblance to the logging industry in 1891, when the Act was passed.[3] This chapter briefly outlines the changes in the intervening 121 years. Ian Radforth has written extensively on the history of logging in Northern Ontario and a passage in the introduction to his book *Bush Workers and Bosses* neatly summarises the changes that have gone on in that time. Although the book was published in 1987, the observations about the changes in the logging industry still hold true today:

> Until the mid-twentieth century, the familiar image of the lumberjack – hardy axeman, knee-deep in snow, forcefully chopping at the trunk of a tall, straight pine – closely corresponded to the realities of the Ontario bushworker's calling. During the past three decades, however, the woods-worker has moved sharply away from the popular stereotype. A visit to the northern woods in the 1980s reveals few axes wielded by brawny men. Today's loggers fell trees with chainsaws or with gigantic, hydraulic-powered shears that cut down jack pines as easily as garden clippers snipping grass. Rather than shouting commands at the horses pulling sleighs loaded with hay, woodsworkers now operate powerful diesel equipment which carry heavy loads across muskeg and rock in summer and winter. No longer do most bushworkers spend Saturday nights sharing stories and playing cards in the bunkhouse; most now live with their families on weekends.[4]

In the late 1800s and early 1900s, around the time the Act was passed, logging work was seasonal in nature.[5] Workers would go into logging camps in the woods in the fall, fell limber all winter, and drive it down watercourses to the mill after the spring thaws. The workforce was drawn from three main sources: transient workers who relied on other short-term work when they were not logging; farmers on marginal land looking to supplement their incomes over the winter, and professional loggers who might try to find work at sawmills in the summer but would often live (very simply) off their winter's wages.[6]

During the winter, the loggers would live communally in rough logging camps. These camps would have everything needed for a long stay in the woods – a bunk house to sleep in, facilities for storing and cooking food, and even a blacksmith to maintain and repair logging equipment.[7] This is reflected in the fact that the Act still talks about liens

being available to cooks and blacksmiths.[8] Cooks were extremely important parts of camp life, with Radforth suggesting that a good cook was a very important part of attracting and retaining workers over the long, tough winters in the logging camps.[9] Likewise, a blacksmith was essential to ensure that all logging equipment and horse tack remained in good condition.

Standing timber was, early on, felled using axes.[10] Later, the axes were replaced with a team of men using a cross-cut saw.[11] Once felled, the trees would be delimbed (i.e., protruding branches would be removed) and then cut ("bucked") to the log length required.[12] The cut logs were then "skidded" – dragged out from the stump to the side of a logging road using horses.[13] These roads were roughly constructed at the start of the season, and typically required reinforcement by a winter frost to reach their best condition.[14] From here, logs were hauled out along the roads via sleigh to the dump site beside a frozen lake or river.[15] Once the watercourse thawed, logs were driven down it to the mill for processing.[16]

Virtually none of this type of logging occurs today. Logging has become a year-round activity, without the long stays in logging camps that were common when the Act was passed.[17] Camp cooks and blacksmiths no longer exist. Instead of saws and axes, trees are felled with massive harvesters (the most common of which is the feller buncher), which can extremely quickly fell and collect a number of whole trees.[18] Delimbing and bucking is now done mechanically,[19] although advances in technology mean that it is also common for timber not to be bucked – tree length logs or even whole trees are regularly harvested. Further, the introduction of mobile wood chippers means that now it is not uncommon for pulp wood to be chipped on site in the forest. Improvements in road construction technique and the use of mechanised skidders and forwarders eliminates the need to wait for freezing weather to take logs out to a dump site.[20] Once at the dump site, logs are now almost universally trucked out of the forest by road. The log drive down the river is almost entirely a thing of the past.

This mechanisation process has significantly increased the amount of timber harvested in Ontario while simultaneously completely transforming the workforce in the logging industry. With more efficient logging machinery, ever more timber could be harvested by ever fewer people. From the 1960s to the 1990s, the average area logged rose by over 50%, and the number of people employed in the industry almost halved.[21]

When the Act was passed, the work force was largely casual, with workers commonly not returning from season-to-season. Wages were not particularly good, and

the working conditions dangerous.[22] At the time the Act was passed, the lien it provided over the logs they cut was therefore the only assurance that loggers had that they would get paid. Particularly in years where the economy was good, attracting labour was a significant problem for lumber companies large and small.[23]

Unionization was slow to come to bushwork in Ontario, as the conditions in the industry (e.g., a largely low-skilled workforce, small work teams and a seasonal working environment) raised significant barriers.[24] A series of unions, mostly spearheaded by Finnish immigrants, had varying though always limited success in organising in the early part of the 20th century.[25] These included the Ontario arms of the One Big Union and Industrial Workers of the World, and the home-grown Lumber Workers Industrial Union of Canada.[26] In 1936 the Lumber and Sawmill Workers Union was formed, and this was to be the first long-standing union for logging workers in Ontario. At this point, unions began to have a significant presence in logging camps and mills, eventually becoming widespread after World War II.[27]

This labour structure, with a prominent union presence, persisted up until the late 1970s, when technological change began to affect labour structure significantly. Instead of owning logging equipment themselves and employing people to operate that machinery, mill owners began encouraging individual loggers to purchase or lease equipment on their own account.[28] The mills would then re-hire these owner-operators as contractors.[29] This process has continued over the last thirty years, and the LCO understands that now virtually the entire logging workforce consists of non-unionised contractors who own or lease their own equipment and work for one or more wood owners. Employees of contractors to unionised mills can still be organised, but such people are few and far between, as even large logging contractors tend to rely on sub-contractors more than employees.

If the story for logging workers has been unorganised workers to unionised workers to contractors, for wood owners it has been a matter of ever increasing concentration. Even at the time the Act was passed, large logging magnates (by the standards of the time) dominated the industry.[30] This concentration increased as time went on, via mergers and takeovers. By the mid 20th century, the vast majority of wood resources in Ontario were controlled by a few large corporations.[31] Foreign investment is also a long-standing feature of the industry, with concerns about American lumbermen paying logging workers prompting the Act in 1891,[32] and a huge influx of American capital into the pulp industry from the early 20th century.[33]

Today, these large players include a variety of companies, from the Quebec-based multinationals Resolute Forest Products and Eacom Timber Corporation to the USA-based multinational giant Weyerhaeuser. Small and medium-sized Ontario-based companies still play an important role in the industry, but the large players dominate.

Ever since the Act was passed, and even before, forestry has been an important part of Ontario's economy. A problematic Act is therefore problematic for Ontario as a whole. Today, Ontario has 57 million hectares of productive forest area, most of it in Northern Ontario.[34] In 2007, 66,800 people were involved in the forestry industry, and in 2005 (the latest figures available) it paid out $3.2 billion in wages and salaries. At that date, manufactured wood products generated $18.3 billion, and the total value of wood product exports was $5.7 billion. Logging work is the first step in this chain of value, so it is important that the Act fulfils its purpose efficiently and effectively. Poorly drafted legislation applied to logging has the potential to harm the entire forestry industry.

As it stands, the structure of the logging industry now is arguably similar, at least broadly (i.e. largely un-unionised logging workers doing work for relatively large logging companies), to the logging industry of 1891. However, as the discussion above shows, the practical reality on the ground in terms of living conditions, logging techniques, and transport techniques has completely changed. These changes, without any significant corresponding change in the Act, mean that the law is now significantly out of step with the reality of the modern logging industry.

III. THE PRESENT LAW

This chapter briefly discusses the history and current state of the law of liens. It starts with an outline of liens at common law, then proceeds to discuss the key features of the *Forestry Workers Lien for Wages Act*.[35]

A. What is a lien?

The common law lien dates back to at least the 18th century.[36] At its core, such a lien consists merely of a right for a person to retain property already in his or her possession until a demand of some sort, usually for payment, has been satisfied.[37] Typically it is given to people who have preserved or improved the value of that property.[38] The common law provides only this right to retain – the lien holder cannot sell the property to satisfy any debt without first obtaining a court order.[39] Further, the lien is lost if the lien holder gives up possession of the property.[40] The common law lien is thus a relatively narrow, restrictive method for ensuring the payment of a debt. [41]

From the 19th century onwards, however, legislatures around the common law world expanded the scope and content of lien rights via statute. This was particularly common in North America, where a number of liens that bear very little resemblance to a classic common law lien were developed.

One of these new types of statutory lien was a lien for workers engaged in various primary industries such as agriculture, forestry and mining.[42] They were developed as an early form of worker protection, in industries where employers were short of cash and workers could not be sure of being paid their wages when work was completed.[43] This paper is concerned primarily with forestry liens, but the other forms of liens developed at this time provide useful points of comparison, both in terms of the original policy intent and in terms of how they have been reformed (or not reformed) over the past century, and are therefore discussed below.

B. The Forestry Workers Lien for Wages Act

The Forestry Workers Lien for Wages Act ("the Act") is a provincial statute designed to protect the financial interests of those engaged in logging work. It does this by giving logging workers a lien over timber they have worked on to secure monies that are owing

to them. It also sets out processes for the seizure and sale of timber and for dispute resolution by a court if necessary.

The Act is largely unchanged from its passage in 1891 as the *Woodsmen's Lien for Wages Act*.[44] This causes significant problems in the implementation of the Act, as its terminology and processes do not mesh well with the modern logging industry or the modern legal system. Perhaps due to its obsolete drafting, the Act is rarely used, with most of the activity in recent years arising out of one insolvency event.[45]

The key features of the Act are discussed below.

1. Persons entitled to a lien

Any person performing "labour" on logs or timber is entitled to a lien on those logs or timber for the amount owing for such "labour".[46] "Labour" is broadly defined to mean "cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber and includes any work done by cooks, blacksmiths, artisans and others usually employed in connection therewith".[47] Contractors who have "cut, removed, taken out or driven logs or timber" are also entitled to a lien.[48]

2. Property that is subject to a lien

Liens can be placed on "logs, cordwood, timber, cedar posts, telegraph poles, railroad ties, tan bark, pulpwood, shingle bolts, and staves…."[49] Recent court decisions have clarified that woodchips are also included in the type of wood products upon which liens can be placed.[50] The Act specifically states that sale of the logs or lumber does not extinguish a lien.[51] Once wood has been processed at a mill, however (into lumber, veneer or paper, for example), it is no longer able to be liened, and any existing liens are lost.[52]

3. Filing requirements

Liens are claimed by filling out the form required by the Act and verifying its details in an accompanying affidavit.[53] The form and affidavit are then filed at the Superior Court of Justice for the area in which the work for which a lien is being claimed was carried out.[54] The time allowed for filing depends on exactly when work was carried out, with a firm deadline of filing by the 30th of the next April applying to work done in the

autumn or winter, and a 30 day deadline after work is completed applying to spring or summer.[55]

4. Enforcement

The Act sets out a comprehensive though confusing mechanism for enforcing the lien.[56] Depending on the monetary value, enforcement actions can be taken in either the Small Claims Court or Superior Court of Justice.[57] However, even if the claim is filed in the Superior Court of Justice, the bulk of the process is required to follow, as closely as possible, the procedures of the Small Claims Court.[58]

Of particular note in the enforcement process is the ability to apply to the Court for a sheriff or bailiff to seize the logs or timber where the claimant is in danger of losing his or her claim.[59] Regardless of whether the logs have been seized or not, ultimately they can be sold to pay the money owing once a lien claim is proved in court.[60]

5. Priority

The Act gives extremely high priority to the liens it creates. It states that "the lien has precedence over all other claims or liens thereon", except for Crown liens for stumpage fees and the like and a very narrow priority given to the owners of timber slides or booms used in the transport of logs (this method of log transport is no longer used).[61]

C. Problems with the Act

As noted above, the Act is outdated and has had very little attention paid to it for a century. Since expanding lien rights to contractors in 1901 and a cosmetic restructure in 1907, almost nothing has been changed. This has led to an Act that is both legally and practically obsolete. It suffers from confusing and outdated processes for proving and enforcing liens, and has ineffective costs provisions. The biggest problem with the Act, however, is that it rests on assumptions about the logging industry that have not been true for decades.

As was discussed in more detail in Chapter II, when the Act was passed in 1891, logging crews would trek into the forest to semi-permanent logging camps at the start of the winter and stay there, cutting and doing some preparatory work on the logs, until the spring thaw. The camps would have everything that was needed for a long stay in

the forest, including cooks to prepare food for the woodsmen and blacksmiths to repair equipment.[62] The logs would then be driven out down the river to be processed at a mill downstream. This is no longer the case at all, with most logs now being trucked out of the forest along private bush roads and then along public roads to the mill.

This section discusses the most problematic parts of the Act, both in terms of the processes used and its disconnection from the modern logging industry.

1. Process for enforcement

The Act sets out a relatively comprehensive process for how liens should be filed and enforced. This process is confusing and is not appropriate for the sometimes very large liens being filed today. Lien claims of up to $25,000 are enforced by making an originating application in the Small Claims Court.[63] Lien claims over that amount must be enforced in the Superior Court of Justice.[64] However, regardless of the court in which the application is filed, the procedure must follow as closely as possible the procedures of the Small Claims Court.[65] Where the person in possession of the wood products[66] is not the wood owner,[67] notice of the originating application must be given to the owner, who may also apply to be joined as a defendant (or be directed to be so by the judge).[68]

To complicate the picture, if there is an imminent threat of the lien being defeated *before* an originating application has been filed (for example if it looks as if the wood is about to be processed or taken out of province), the lien claimant can start the process by obtaining a writ of attachment from the court and having the wood seized by a sheriff.[69] A writ of attachment can also be obtained *after* an originating application has been filed if it looks as if the lien will be defeated.[70] Wood cannot be seized while it is in transit, seemingly because interrupting a log drive would leave a river blocked and all the logs involved (as opposed to just those subject to a lien claim) tied up.[71] An owner or other defendant can have possession of seized logs restored and the liens discharged upon the payment of a bond, or deflect seizure and have the liens discharged by paying the amount claimed into court upon being served with a writ of attachment.[72] If the defendant does not accept the amount claimed, the defendant has up to 14 days from the date of being notified of the seizure to file a notice of dispute.[73] After this, the judge sets a date for a hearing to resolve all disputes and claims relating to the liened logs.[74] This hearing must be widely advertised.[75] Once all claims and disputes are resolved, the judge orders the payment of the amounts owing to the relevant parties and, if necessary, orders the sale of the logs to meet the amounts owed.[76]

This process is cumbersome, slow, and complicated, especially for a regime that was originally intended to be largely summary in nature and navigable without legal assistance.

2. Costs provisions

The costs provisions of the Act have not been updated in a century. As they stand, they prevent a successful lien claimant from fairly recovering the costs they incur in proving a lien claim. In particular, costs associated with proving a non-contentious lien are capped at $5 in the Superior Court of Justice and $2 in the Small Claims Court.[77] Where a claim is contested, costs are capped at $10 in the Superior Court of Justice and $5 in the Small Claims Court.

These limits were much more reasonable at the time the Act was passed, but are now patently absurd. As noted above in chapter III(C)(1) of this paper, even though the hearing for proving claims is a summary one, designed to proceed without lawyers, the Act is complicated enough that the assistance of a lawyer in preparing and filing the lien and preparing for the hearing is all but essential. To illustrate the absurdity of the costs provisions, $10 would pay for six minutes of a lawyer's time at the rate of a very junior legal aid lawyer(if legal aid were available).[78] The costs provisions therefore stop a lien claimant from recovering a reasonable proportion of the expenses incurred in proving their claim.

3. Definition of "labour"

The change in transportation methods from log drives to truck haulage makes it difficult to apply the Act in a modern context. Section 1 defines "labour" to include "driving, running, rafting or booming any logs or timber," none of which really describes hauling logs using modern forwarders or trucks. The definition of "labour" is exhaustive, calling into question whether persons who haul logs, which performs exactly the same function as log driving (i.e., getting cut logs to the mill), are entitled to a lien.[79]

To increase the confusion, the situation may be slightly different for contractors (as opposed to employed workers). Under section 3, a contractor is entitled to a lien where it has "cut, removed, taken out or driven logs and or timber". This wording is more flexible, and could certainly encompass hauling by road. However, the words "removed" and "taken out" are not included in the general definition of "labour" in section 1, meaning that they do not apply to those undertaking "labour" generally, only

contractors who come under section 3. This seems to be as a result of poor drafting rather than any particular legislative intent.

We thus have an obsolete and inconsistently applied definition of "labour," which makes the scope of work that gives rise to a lien difficult to determine and apply. In addition, the inclusion in the definition of "labour" of jobs such as cooks and blacksmiths reflects an obsolete economic model which, as discussed in Chapter II above, bears no resemblance to the modern logging industry.

4. Time for filing lien claims

The filing times set out in the Act are also tied to an obsolete picture of the logging industry. Under section 5(4), if work is undertaken between 1 October and 1 April, a lien claim must be filed by the end of that April. This corresponds to the time where woodsmen would typically be living in the forest long-term, and thus unable to file a lien claim until they had driven timber to the mill in the spring. If, on the other hand, work is undertaken between 1 May and 30 September, a lien must be filed within 30 days of the completion of the work. The assumption here appears to be that during the late spring and summer, when they were not in the forest (perhaps working on a log drive or at a mill), it would be easier for woodsmen to file liens in a timely fashion. This difference in filing times no longer makes sense, and can produce unfair results. For example, a logger who completes work at the end of October will have six months to file a lien, while anyone completing work between April and September will have only 30 days.

The picture is further complicated by yet another rule that applies to contractors but not employed workers. Under section 5(3), contractors must file their claim by 1 September, regardless of when the work was undertaken. Thus contractors can have anywhere between 1 year and 1 day to file lien claims, clearly a bizarre result. This provision may have made sense in the days of semi-permanent logging camps and logs drives, but it certainly does not make sense today.

5. Types of wood products covered

In addition to the outdated idea of *how* lumber is harvested discussed above, the Act also has an outdated view of *what* is harvested. For example, the list of wood products defined as "logs or timber" includes "tan bark" and "shingle bolts". Tan bark is a particular sort of bark that is used in some of the more old-fashioned processes for tanning leather. Shingle bolts are pieces of wood from which wooden shakes are split. Neither tan bark nor shingle bolts are produced to any significant extent in the modern

logging industry. Their specific inclusion in the definition of "logs and timber" (as opposed to being covered by a category such as "or any other wood products) is now arguably unnecessary.

A larger problem is that some current wood products did not exist when the Act was passed, and thus were not included in the definition of "logs or timber". In particular, the invention of mobile chippers has meant that pulpwood can be chipped on site instead of at the mill. This was not possible when the Act was passed, and therefore woodchips are not specifically covered by the Act. The issue of whether woodchips could in fact be liened was raised in the most recent series of cases concerning liens under the Act. In *Re Buchanan Forest Products Ltd*, Regional Senior Justice Pierce was required to determine a number of issues preliminary to a full lien claim, including whether "logs and timber" included pulpwood that had been chipped in the forest.[80] She determined that pulpwood chips were covered, stating that

> [43] Wood chips result when pulpwood logs are chipped either in the forest or at the mill site. Chips are not different in substance from pulpwood. It would be an absurd result if claimants received priority under the Act for pulpwood cut large but not for a pulp log cut very small. There is no rational reason for including "pulpwood" in the definition of "logs or timber" yet excluding wood chips that are a form of pulpwood.
>
> [44] In my view, the size of pulpwood is not material to the application of the Act. Wood chips constitute pulpwood for purposes of the Act.

This ambiguity in the definition of "logs or timber" illustrates the difficulty of construing the Act in modern circumstances.

6. Application to sub-contractors

As the preceding discussion makes clear, the Act applies to contractors, albeit in a confusingly different way than to wage earners. The application to subcontractors, however, is not so clear. On the plain words of section 3(2), there is no reason why subcontractors could not be covered. The section states that liens are available to a contractor "who has entered into any agreement under the terms of which the contractor personally or by others in the contractor's employ have cut, removed, taken out or driven logs or timber." There is no reference to the contract having to be with the wood owner or the holder of the forestry licence, meaning that a person contracted by a lead contractor to do a portion of the work ought to be allowed to lien.

Complicating the picture, however, is a Supreme Court of Canada case from 1928, *Keenan Bros Ltd* v. *Landgon*.[81] This case, the sole consideration of the Act by the Supreme Court, considered the meaning of "contractor" in section 3(2). Writing for the Court, Mignault J stated:

> The contractor contemplated is a contractor who has entered into any agreement to do this work. An agreement with whom? Obviously with the person for whom the wood is to be cut, that is to say, in my opinion, with the owner of the timber.…But it is a totally different proposition to say that the "contractor" can give a sub-contract, and that the sub-contractor has the same lien as the contractor. Were that the true construction of the subsection, it would follow that, although the owner had paid the contractor, or discharged any lien belonging to him, he would not be secure against a claim made by a sub-contractor. In effect, this is what has been decided in the present case. [82]

Mignault J's concern was that a lien may be placed on logs multiple times for the same work – once by the lead contractor and again by a sub-contractor who actually performed the work. This could lead to the situation where the owner of some wood could pay the lead contractor all that was owed for work done but then, due to a failure of the lead contractor to pay his or her subcontractors, still have a lien placed on the wood.

Such a situation is clearly unfair, and Mignault J's concern is understandable. However, the narrow construction of the contractor provision in section 3(2) laid down in *Keenan Bros* is problematic in the context of the modern logging industry. In *Buchanan*, for example, the logging contractors were engaged by one of two companies wholly owned by Buchanan, but which did not technically own the wood. Does this mean that the logging contractors in *Buchanan* are unable to lien at all, because they technically do not have a contract with the wood owner? Although the issue ultimately was not decided in *Buchanan*, there is certainly some doubt as to whether liens are available in such a situation.

In addition, allowing liens only when there is a direct contractual relationship between the logging contractor and the timber owner would bar a large number of contractors from seeking protection under the Act. When the Act was drafted, extensive networks of contracts and subcontracts were not common. Nowadays, however, subcontractors are extremely common, and even large, "stump to dump" full-service contractors typically employ subcontractors to perform at least some of the work involved in the process of getting wood from the forest to the mill. These subcontractors are just as vulnerable as a lead contractor, and excluding them from the

coverage of the act seems just as unjust as the risk of double liability on the part of wood owners.

The application of the Act to sub-contractors (and logging contractors engaged by shell companies) is therefore extremely murky. Further, even if subcontractors are entitled to file liens, the Act's processes result in an injustice to the wood owner. This part of the Act clearly does not work.

IV. OPTIONS FOR REFORM

The previous section demonstrated that the *status quo* is not an option. The Act is disconnected from the modern logging industry, its coverage is uncertain, and its procedures are difficult to use. It is clearly no longer fit for purpose, and reform is needed.

The simplest option for reform would be to simply repeal the Act and not replace it. If the Act is to be retained, it could either be "tweaked" in order to make it more appropriate to a modern environment, or essentially redrafted from the ground up, preserving only the underlying policy goal of protecting vulnerable logging workers. This section briefly outlines what is involved in each of these options and offers some examples from other jurisdictions where each option was taken.

A. Repeal

Repeal is appropriate if the underlying policy behind the Act is no longer appropriate. That is, if the Act's goal of protecting logging workers no longer makes sense. At the time it passed, logging was mostly undertaken by employed individuals, who might be owed three or four months' wages, totalling in today's terms several thousand dollars. In the modern industry, there are virtually no employees conducting logging, with almost all of it being undertaken by contractors, almost all of which, even small, one person operations, are corporations. With the advent of mechanized logging using heavy equipment, enormous amounts of lumber can be cut by such contractors in a relatively short of time. Accordingly, the amounts at issue are also considerable larger, with many of the liens claimed in the *Buchanan* case amounting to hundreds of thousands of dollars each, some nearly a million.[83]

Although smaller lien claims from small contractors do still exist, this context is clearly very different than that envisioned by the drafters of the Act. Arguably, the situation of corporations with heavy machinery placing liens on millions of dollars of wood is so radically different that the Act's original purpose is no longer relevant to the logging industry. Are these really the people the Act is designed to protect? In addition, giving high-ranking liens to logging contractors arguably disrupts the comprehensive regimes set up in the *Personal Property and Security Act* and the *Bankruptcy and Insolvency Act* by the provincial and federal governments respectively by purporting to

reallocate priority outside the rules set out in those Acts. Does the protection of logging contractors justify such disruption?

In 2000, Michigan's legislature reached the conclusion that its log lien law no longer served any useful purpose. Michigan's law was cited as a point of comparison in the passage of the Ontario Act in 1891; the two laws are comparable though not identical. The repeal was carried out as part of a general effort by a legislative taskforce to get rid of outdated and unused laws.[84] Other laws repealed as part of the project were a ten cent bounty on rat heads and an appropriation of $150 per year to fund equipment for county cream testers.[85]

The process of repeal was remarkably non-contentious. There appeared to be little or no debate in the legislature, no detailed policy justifications for repeal were recorded, and only two Representatives voted against repeal.[86] Michigan's log lien law was clearly seen as straightforwardly obsolete. This does not mean that this is the right thing for Ontario to do, but the Michigan Legislature's actions illustrate that simple repeal is a reasonable option that must be considered.

B. Retaining the Act

If the Act is retained, it could simply be modernized under the existing template or redrawn from first principles. There are examples of recent lien reform that follow both of these models.

1. Updating the Act

A relatively confined approach to updating the Act would be to retain its overall structure, but update its drafting to address some or all of the problems identified in the previous chapter. This approach was recently used by Yukon in updating its *Miners Lien Act* and by the Manitoba Law Reform Commission in recommending updates to Manitoba's *Stable Keepers Act*.[87]

The scope of the Manitoba Law Reform's report was deliberately kept narrow, with the aim being "to make recommendations for modernizing *The Stable Keepers Act* while enhancing its quality as a relatively user-friendly and flexible instrument".[88] It did not address some of the wider issues addressed by reports such as the Alberta Law Reform Institute's *Report on Liens* (discussed further below), and largely did not recommend radical changes to the law.[89] Instead, it recommended that the general scheme of the

original Act be re-enacted in an updated format that followed modern drafting rules and fit in with the reality of the modern animal care industry.

Yukon's approach in revising its *Miners Lien Act* was similar in its scope. Like a lien under the Act, a Miners Lien secures the work done by miners by granting a lien over mine property until the amount owed to them is paid. Although the legislative debates did not explicitly state that the intention of reform was merely to update obsolete parts of the Act, this was certainly the approach taken. The structure and general policy of the original Ordinance from the early 1900s was left in place, with terminology, definitions and filing times being updated.[90]

It is certainly possible to at least partially address most of the issues raised in section II with piecemeal revisions to the current statutes. Definitions of "labour" and "logs and timber" can be updated, the process for proving a lien can be simplified, and the application of the Act to subcontractors can be clarified.

2. Major Rewrite

If the policy underlying the Act is still thought to serve a useful purpose, but the problems with its current drafting seem too severe to remedy with minor amendments, a full rewrite from first principles may be the most sensible course of action. This approach was recommended by the Law Reform Commission of British Columbia in its *Report on the* Woodworker Lien Act 1994.[91] Though not taken up by the government at the time, the BC Legislature did eventually move to do a major rewrite of its own, albeit not entirely following the recommendations of the Law Reform Commission.[92]

Both approaches involved a radical rethink of the way log liens worked. The Law Reform Commission proposed a regime that integrated forestry liens very closely into the general structure of BC's *Personal Property Security Act*. The *Forestry Service Provider Protection Act* ("FSPP Act") passed by the Legislature in 2010 also made use of the BC PPSA (though not exactly as recommended by the Commission) and set up a compensation fund to help mitigate the impact of licence holder bankruptcy on logging contractors.[93] Reflecting the changes in the structure of the industry, the FSPP Act also only applied to contractors, with the thinking being that employees are sufficiently protected by other provincial and federal legislation.[94]

An even more ambitious complete restructure was recommended in the ALRI *Report on Liens*. This report reviewed all the standalone lien Acts in force in the province,

recommended the repeal of obsolete liens, and the integrating of every other lien into a single statute.[95] The proposed statute had comprehensive PPSA-style registration provisions and revised enforcement and dispute resolution processes.[96] The Report's recommendations have not been acted on as yet, but it remains useful as an example of what an extremely bold rethink of liens looks like.

C. Conclusion

All of the options discussed above have been used by at least one comparable jurisdiction in reforming at least one comparable lien Act. All ought to be considered in deciding how the Act should be reformed. The LCO is very keen to hear from those in the industry on what sort of reform would be best.

D. Questions

1).	*Do you agree that the Act still serves a useful purpose? Why or why not?*
2).	*If you agree the Act should be retained in some form, what sort of reform do you think would be best: a minor update of obsolete terminology and procedures, or a complete rewrite?*

V. ISSUES FOR CONSIDERATION

If the Act is to be retained, there are several issues that need to be considered in working out which reforms are needed to make the Act, or any replacement Act, as fair and efficient as possible. This section discusses some of these issues, and seeks feedback on how they are best addressed.

A. Scope of lien rights

In reforming the Act, one of the major issues that needs to be considered is how wide lien rights should be. Several factors are relevant in determining the scope of lien rights. This section considers the three major factors: the type of work that should qualify for a lien, the sort of property to which a lien should be able to attach, and who exactly should be entitled to a lien.

1. Work qualifying for a lien

As discussed above, the definition of what kind of work qualifies for a lien in the Act is outdated, including work such as cooking, blacksmithing, and log driving down watercourses.[97] It also fails to specifically include some types of work, such as mobile chipping and truck haulage, that are integral parts of the modern logging industry.

The LCO's initial view is that work on every part of the process of getting logs from the forest to the mill should create a right to a lien. This should include the aforementioned chipping and haulage, and the construction of logging roads. This approach would be consistent with that taken in BC's FSPP Act, which defines "services" (its equivalent of the Ontario Act's "labour") as "felling, bucking, yarding, skidding, processing, chipping, grinding, decking, loading, hauling, unloading, dryland sorting, logging road construction and maintenance, and any other prescribed activity".[98] Such a change would prevent some of the workers to whom the application of the Act is uncertain being unfairly denied liens.

2. Property that can be liened

As set out in chapter III, the current definition of "logs and timber" is obsolete. It specifically lists types of wood products that are no longer in common use (tan bark, shingle bolts, barrel staves), while failing to specifically include other, arguably less processed products such as wood chips. If the general concept of the Act as providing a lien on logs is to be retained, the definition of "logs and timber" therefore needs to be updated.

However, this is not the only option. Under Yukon's *Miners Lien Act*, a lien is placed against not only minerals or ore that a person worked on, but on *all* ore produced from the mine in question *and* over the assets of the mine itself.[99] This avoids the problem of having to identify particular pieces of property over which a lien is held, but would move a forestry lien further away from what is typically thought of as a lien and closer to a general security interest under the PPSA. In the event of default, it could also give rise to complex disputes as to exactly which assets would be sold to pay the amount owing. Procedures would be needed to determine which logs would be sold or even whether mill assets would be sold to repay the amount owed. Such a process risks being complicated and placing undue burden on licence holders.

3. Persons entitled to a lien

Currently, both employees and contractors are entitled to file a lien to protect work that they have done in relation to logs and timber. As discussed above, the position of subcontractors is unclear. The modern logging industry is dominated by contractors working for various mills, so obviously they ought to be covered. The case for covering employees and subcontractors is not as clear.

Employees who undertake logging work are already offered protection by a number of statutes which did not exist when the Act was passed in 1891. In particular, the *Employment Standards Act* provides for unpaid wages to have priority over all unsecured creditors to the extent of $10,000 per employee.[100] Further, although this provision does not apply to distributions under the federal *Bankruptcy and Insolvency Act*, that Act also provides enhanced priority for unpaid wages to the extent of $2,000 per employee in both bankruptcy and receivership.[101]

Given this relatively extensive protection for wage earners, is there still a case for allowing employees to file liens? Both the British Columbia Law Reform Commission

and, later, the British Columbia government proposed that liens be restricted to contractors only. However, during legislative debate on the FSPP Act, there was significant resistance to the proposed restriction.[102] The Government therefore left the old *Woodworker Lien Act* in place.

Subcontractors give rise to a different problem, as discussed above in chapter III(C)(6) of this paper. If they are not allowed to lien, a large percentage of people working in the logging industry cannot access lien protection. If they are allowed to file liens, however, there is a risk that a wood owner can fully settle an account with the lead contractor and still be vulnerable to liens from subcontractors if the lead contractor fails to pay them.

Lien reforms in other jurisdictions have proposed several methods for dealing with this problem. Under the provisions of the enacted but not in force FSPP Act in British Columbia, only lead contractors would be allowed to secure the debt owed to them over the wood owner's property.[103] Subcontractors, on the other hand, would be given a general charge over the lead contractor's assets.[104] This way, the interests of all parties would be at least partially protected.

The Alberta Law Reform Institute ("ALRI") and British Columbia Law Reform Commission recommended a different approach in their reports. They recommended that subcontractors be allowed to place liens on logs even when they have not been employed by the wood owner, but such a lien would secure only that amount owed to the contractor who engaged the sub-contractor at the time the owner was notified of the lien.[105] After being notified of the lien, any payments made to the lead contractor would not affect the lien of the subcontractor until that lien is discharged. Put another way, once notified of a subcontractor's lien, the owner could not reduce the overall amount owed for the work done on its wood until the subcontractor has been paid by the lead contractor and the lien discharged. This structure would incentivize both the owner and lead contractor to ensure that the subcontractor is paid, thus allowing the lead contractor to be paid and the owner to be fully relieved of any liability. It is, however, an added complication to a lien regime that is supposed to be simple and easy to use.

A similar problem applies to the way subcontractors are dealt with under the *Construction Liens Act* in Ontario. Under that Act, the problem of contractors and subcontractors being paid is dealt with by requiring a 10% holdback on all payments to those further down the 'chain' of contracts.[106] This amount must be retained until the

time for filing liens has expired, at which point it may be paid out to the contractor from whom it was held back.[107] If liens arise before this time, however, the holdback fund is used to (at least partially) satisfy such liens. This process can get extremely complicated and intrusive in regulating the flow of money, and the ALRI and BC Law Commission both rejected using their provinces' construction lien regimes as models for that reason.[108]

The LCO understands that another method has for practical reasons been used recently in several Ontario lien claims, despite not being provided for in the Act. That is, to allow a wood owner to pay the amount claimed by a subcontractor lien holder directly to them and set it off against any amount owed to the lead contractor, or to pay the amount claimed into escrow. This has the advantage of allowing the wood owner to deal with the wood unencumbered by a lien, but does involve the owner paying out, at least into escrow, before a lien is proved. It does, however, have the virtue of being both simple and quick, and therefore ought to be considered as an option for inclusion in the Act.

An additional issue is the way these various terms – employee, contractor, subcontractor – are defined in the Act. None of these terms is currently defined, and the addition of definitions may add further clarity to this difficult issue. For example, does an individual in business on his or her own account, but not incorporated, who is engaged by a contractor to do logging work count as a subcontractor or as an employee of the contractor? This is not entirely clear under the Act, and has not been clarified by case law. Statutory definitions of these terms are therefore needed to provide certainty in exactly who is entitled to a lien.

4. Commencement of Lien

At common law, liens typically arise when work is complete.[109] This could be problematic if, for example, the licence holder employing a logging worker or contractor becomes insolvent part way through a job. In such circumstances, it would seem unreasonable to require a worker or contractor to complete their work before a lien can be claimed. Justice Pierce ruled in *Buchanan* that the lien arises at the time work commences.[110] The LCO agrees that this position is sensible, and should be clearly stated, which the Act does not do. The Act should therefore be amended to clarify that a lien arises at the time work is commenced.

5. Questions

3).	*What sort of work do you think ought to create lien rights?*
4).	*What sort of wood products do you think ought to be lienable?*
5).	*Who do you think should be eligible for a lien? Should employees be eligible?*
6).	*How do you think the issue of subcontractor liens is best resolved?*
7).	*Do you agree that a lien should commence as soon as work is begun?*

B. Filing and Registration

There are two broad issues to consider when it comes to filing and registration of liens. First, what system of registration (if any) makes most sense for forestry liens and secondly the time allowed for logging workers to file lien claims.

1. Registration requirements

The Act has no centralized system for registering liens. Instead, liens are filed in the Superior Court of Justice closest to where the work to which the lien relates was carried out.[111] This arguably makes it difficult for licence holders, and possible wood buyers, to know whether a lien has been filed against wood (although it is obviously in the best interests of lien claimants to provide notice to licence holders to ensure than the wood is not processed before the claim can be enforced). This is contrary to the policy enshrined for most other forms of security in the PPSA. As the ALRI put it when discussing liens in that Alberta:

> Many of the policies underlying the present law of liens are in conflict with the underlying policies of the PPSA. The most obvious example is the creation by statute of non-possessory liens that are not subject to a registration requirement. … This is completely at odds with the PPSA philosophy that third parties should have a means of discovering the existence of a security interest. [112]

One of the other lien regimes in Ontario – that under the *Storage and Repairers Lien Act* – co-opts aspects of the PPSA to set up a standalone registry.[113] This is also the approach recommended in the ALRI Lien Report. However, both of these lien regimes operate in contexts where a large number of liens will be registered – the ALRI proposal was to provide a registry for *all* commercial liens in the province, while repair and storage liens are relatively common liens. Log liens, on the other hand, appear to be very uncommon. The LCO understands that, before the flurry of lien registrations associated with the Buchanan Group insolvency, it was common for Superior Court offices to see only one lien filing a year, sometimes none.

With such potentially small numbers of lien claims, setting up a central registry may be an unjustified expense with little practical utility. This appears to have been the view taken in Yukon in revising its *Miners Lien Act*. Although a comprehensive review of the *Miners Lien Act* was undertaken, no central registry was adopted. Instead, liens are still filed in one of four local offices of the Mining Recorder, as was the case when the Act was passed in the early part of the 20th century.[114]

Further, one of the key advantages of a central registry is that it is easy for people to search and discover if property they may be looking to acquire an interest in is encumbered. This is simple for serial-numbered property or vehicles. It is also relatively simple for other property that has obvious distinguishing features – valuable jewelry, for example. Logs and other wood products are not so easy to identify. Logging workers do mark the logs they have worked on, but not all logs are marked by the person who cut them, marks would be lost if wood is chipped, and the people not directly involved in the felling process may have no mark at all. Wood products worked on by different people may also be mixed together. In short, it is extremely difficult to identify specific wood products.

There is case law suggesting that identifying the type of wood and the place and time it was logged is sufficient identification to claim a lien.[115] This is a sensible position in terms of determining eligibility for a lien, but still does not provide much useful notice to any third parties who might be dealing with the wood some months after it was logged. It is therefore debatable whether the benefits of a central registry fully apply to wood and wood products. For these reasons, the *status quo* of filing in local court offices remains an option that ought to be considered.

2. Time for filing/registration

As discussed above, the current rules on when liens can be filed are irrational. Depending on when work is carried out, filing times can be as short as one day after work is complete or as long as one year. This system is clearly inadequate, but there remains a need for some limitation on how long a logging worker has to file (or register, if a central registry is developed) a lien. The absence of any limits could create a significant amount of uncertainty for wood owners. In a way, any limitation on the right to file a lien is arbitrary, but there are several examples from other jurisdictions which can be drawn on in determining the appropriate time limit in these circumstances.

One option, which was recommended by ALRI, is to not have any time limit for filing or registering a lien, but making an unregistered lien unenforceable against third parties.[116] This means that any transfer of ownership from the original wood owner before a logging worker files or registers a lien will make any subsequent lien unenforceable. Similarly, if a lien is not filed or registered, there is nothing to stop a wood owner processing the wood at a mill, which could also render the lien unenforceable. While not a formal time limit for filing, this approach would certainly encourage logging workers to file within a reasonable time.

Another approach, used in the Yukon *Miners Lien Act* and the Ontario *Construction Liens Act* is to set a time limit after work is completed for liens to be filed.[117] While this initially seems simple, the context of the logging industry makes this solution somewhat more problematic than it is in a construction setting.

Logging subcontractors, particularly those involved in the early parts of the logging process, often do not know exactly when the wood they have worked on will be delivered to the mill. The delay between that early work and delivery can in some cases be measured in months, and the LCO understands that there will not necessarily be an expectation of payment before the wood is delivered. If the time for filing commences at the time work is completed, these early subcontractors could be left in a position where their right to file a lien expires before the wood owner is even in default. Such a situation is counterintuitive.[118] Further, any premature lien claims prompted by a too-short limitation period could damage ongoing relationship between a wood owner and a contractor. Given that the LCO understands that most contractors rely on a small number of wood owners for their work, such ongoing tension could severely affect their livelihood.

Another option would be to have the limitation period start running from the time wood is delivered to the mill (i.e., the time from which payment could reasonably be expected). This will technically give those contractors and workers involved in the earlier part of the logging process, such as the constructors of logging roads and harvester operators, longer to file than, for example, the contractor who actually hauls the wood to the mill. The practical comparative disadvantage for such later contractors and workers seems minimal, however.

3. Questions

8). Do you think a central register for wood liens is a good idea?

9). What do you think the standard of identification for wood products should be?

10). What time limit, if any, do you think should be applied to lien filing or registration?

C. Lien Priority

Currently, liens under the Act have priority over essentially all other interests other than government stumpage fees. There is nothing necessarily wrong with leaving this priority intact, but as it stands the Act completely ignores Ontario's main avenue for securing financial interests in property – the *Personal Property and Security Act*. Some effort needs to be made to reconcile the policy behind the Act and the policy behind the PPSA. One of these policy issues was discussed above – the issue of whether registration ought to be required in order to inform third parties about any security interests [119]

One of the other broad policy intents is that priority of security interests ought to be determined by perfection and the time a security interest arises, in that order.[120] "Perfection" is a concept used in the various PPSAs in Canada to help determine priority. Typically a security interest is perfected by registering a financial statement in the Personal Property Security Register, but other methods (such as perfection via possession) are available.[121] Thus, under the PPSA the earliest unperfected interest has priority over all later unperfected interests, and the earliest perfected interest has priority over all later perfected interests *and* all unperfected interests, regardless of when the unperfected interests arose.

The current position under the Act disrupts this position by providing first priority to lienholders, regardless of when the lien arose in relation to other security interests. Is there a reason to disrupt the ordinary course of operation under the PPSA? The PPSA does contemplate liens disrupting this ordinary course of operation, with section 31 stating that:

> 31. 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 the person has in respect of the materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have such priority.

Logging workers and contractors clearly provide services in relation to lumber as part of the ordinary course of their businesses. There is no limitation on their priority under the Act. Under the PPSA, log liens therefore currently trump all secured interests, perfect and unperfected. Be that as it may, the *status quo* is not a justification for continued special priority. The *Repair and Storage Lien Act*, for example, specifically provides that a lien under that Act does not have priority over any third party interest that arose after the lien but before it was registered.[122] In keeping with the rest of this project, we must ask whether the *status quo* is justified. Is there any policy justification in continuing to give enhanced priority to log liens?

If one exists, it is one founded in the first principles of both liens and the Act. First, as noted in chapter III(A) of this paper, a lien was traditionally given to a person whose work improved or maintained the value of property. Logging workers fulfill this criteria, because felled, delimbed (sometimes cut or chipped) timber transported to a mill yard is worth more than standing timber miles from anywhere. This increased work will benefit other creditors, as the assets of the debtor are rendered more valuable. Secondly, the Act was designed to protect a particular class of worker. As discussed above, if logging workers and contractors are still seen to be particularly in need of protection and without other recourse, the disruption of normal priority rules makes sense.

There are therefore arguments to retain increased priority for log liens. If, however, these arguments are not seen as convincing, there are two broad options for change. First, some limits on the lien priority can be prescribed, as is the case in the RSLA. Secondly, log liens could be treated simply as security interests. This would mean that they are governed by the standard priority rules under the PPSA, without any special preference. This second approach is the one the unimplemented BC regime will take when it comes into force in the next few months.[123]

Regardless of priority given to the lien, there are limits to the degree to which provinces can affect the order of priority under the BIA. It is certainly possible for a province to make lienholders first-ranking among secured creditors (because personal property regulation is a provincial responsibility). The BIA's priority provisions list secured creditors as a group, and the ranking within that group is up to the province. However, any attempt to 'leap frog' beyond that, and grant priority over things such as employee wages is beyond provincial authority (in that it disturbs the ranking of creditors in bankruptcy, which is a federal responsibility).[124]

D. Enforcement Process

As discussed above, the current enforcement process is complicated. Everything from how actions are started to how liens can be discharged to how sale is carried out lacks clarity. Court involvement is needed at several stages throughout the process, which adds expense and delay. While courts will almost certainly need to be involved in some capacity, ideally more should be able to be handled without judicial recourse. This section discusses some of the major issues that the process for enforcement ought to address.

1. Proving a lien

As discussed in chapter III, the current process for proving a lien is confusing, outdated and requires reform.[125] In general, what is required is the ability to file and serve a lien claim on the owner (and possessor, if different) of the wood, quickly resolve any disputes as to its validity and, if necessary to preserve the lien (e.g., if the wood is to be sold or processed) seize the wood. A simple process for the wood owner to have the lien discharged (and possession restored, if the wood has been seized) by paying a bond into court, whether or not the wood has been seized, is also essential. This allows the wood owner to continue its normal business and also ensures that the lien claimant will be paid for work done if the lien is ultimately proved. The exact details of the process will differ depending on whether the current decentralized court filing system is retained or a central PPSR-style registry is used, but the broad outcomes required remain the same.

The big difference between a log lien under the Act and other non-possessory liens is that no agreement or acknowledgement of indebtedness is required for a log lien.

Other non-possessory lien regimes, such as that which operates under the RLSA, require a written acknowledgement of indebtedness before a non-possessory lien can be registered and goods can be seized.[126] Such an acknowledgement is not conclusive, and the property owner can still dispute the amount owed via the processes under the Act, but it provides the court (and the sheriff) some *prima facie* basis for seizure.[127] Without such an acknowledgement of indebtedness, or the traditional security agreement, something else is needed. An affidavit from the claimant setting out the work done, amount owed, and circumstances of default could serve the same purpose, but still only provides one side of the story. A claim form and affidavit providing this sort of information is required under the Act, but the content requirements are somewhat outdated.[128] A possible method to counterbalance the problem of a one-sided affidavit is a simple bond-and-discharge process as discussed above, coupled with financial penalties for lien claimants who groundlessly or maliciously file liens.

2. Realizing the lien

Once a lien is proved, it needs to be easy to realize. That is, sale needs to proceed relatively quickly, costs which deplete the amount that can be paid to lien claimants (e.g the cost of the sheriff's time and storage costs) need to be minimized, and the process of distributing funds to all lien claimants needs to be simple. Speed is particularly important in the context of the logging industry, where the LCO understands that many contractors rely on the amounts owed to them by wood owners to keep up with financing payments on their equipment. Significant delay could result in a total loss of livelihood. The Act is not clear as to whether the costs of the sale can be paid out of the lien fund or whether they must be met by claimants. Even if the costs provisions do allow lien claimants to recover, this amount is drastically limited by a hard cap costs recoverable (discussed further below). The new FSPP Act in BC (albeit not in force yet) provides an example of the sort of sale process that might be used. The relevant parts of this Act are excerpted in Appendix A.

3. Questions

11). What features do you think are essential for a fair process for proving a lien?

12). How do you think the sale of wood to realize a lien should be handled?

13). Should the sale be conducted by the lien holder or by an officer of the Court (such as a sheriff)?

E. Compensation Fund

As discussed above, in 2010 British Columbia passed a major reform of its log lien law, the bulk of which is awaiting implementation. That unimplemented part will integrate log liens into the province's PPSA and limits the priority given to the lien. To counterbalance this loss of priority, the new FSPP Act sets up a fund to compensate logging contractors who suffer losses as a result of a forestry licence holder becoming insolvent.

The part of the FSPP Act allowing for the compensation fund to be set up came into force on March 30, 2012.[129] On the same day, the BC government set up the fund by Regulation, vesting it with an initial amount of $5 million.[130] The Minister was also authorized to engage an authority to administer the fund. The LCO understands from discussions with the BC Ministry of Forests, Lands and Natural Resource Operations that an interim administrator has been engaged, with a permanent one to be appointed in the near future.

The Parliamentary debates preceding the FSPP Act suggest that the fund will be an insurance or trust-type scheme, with contributions paid by industry participants (i.e. logging contractors, forestry licence holders, or both).[131] The fund is based on the province's travel assurance fund, which is currently run under BC's *Business Practices and Consumer Protection Act*.[132] Discussions with the BC Ministry of Forests, Lands and Natural Resource Operations confirm that this is the general model. However, the identity of contributors to the fund has not yet been set, and therefore the Government's $5 million seed funding remains the fund's sole source for compensation at this stage.

Whether funded by government, industry contributions, or a mixture of both, the idea of a compensation fund deserves some consideration. A central fund could speed up the process of ensuring that logging contractors and workers are paid for work done, and has the potential to reduce the transaction costs involved in the somewhat arduous process of claiming, proving, and realizing a lien via the sale of wood products. It would also mean that a contractor or worker's ability to get paid in the event of a wood owner's insolvency would not depend as much on his or her ability to afford to pursue a

lien. However, any levies required to populate the fund would increase the costs imposed on everyone in the logging industry, including those logging contractors and workers who never needed to claim, and those wood owners who never became insolvent. Similarly, any government funding would result in an increased burden on taxpayers.

The LCO has no firm views on the desirability or otherwise of a compensation fund, but is keen to hear what those working in the industry think about the idea.

> *14). Do you think a compensation fund is a good way to deal with the problem of vulnerable logging workers and contractors?*
>
> *15). If so, who should contribute to the fund? Under what conditions should it pay out?*

F. Other issues

While the issues discussed above are the most crucial in developing a fair, effective new Act, there are several other matters which ought to be considered. This section discusses these various issues.

1. Costs provisions

As noted above, the costs provisions of the Act are inadequate, allowing at most $10 of the costs associated with filing and proving a lien to be recovered.[133] Aside from not having been updated in a century, this extremely low cost cap can be explained by the fact that the process of proving a lien is intended by the Act to be conducted largely without a lawyer.[134] If this was ever realistic, it certainly is no longer. The current costs provisions mean that, if a lien is disputed or any difficult issues arise in proving the lien, the lien claimant could be left significantly out of pocket. New costs provisions are needed.

In the LCO's view, this issue can be addressed relatively simply. The Act already provides that the costs tariff of the court in which the lien is enforced applies,[135] but then immediately restricts this application by imposing the costs caps mentioned above. A simple way to fix this issue would simply be to repeal the costs caps.

2. Geographical coverage

Somewhat oddly, the Act only applies to the Territorial Districts of Ontario and the County of Haliburton.[136] The "Territorial Districts" consist of that part of the province North of (and including) the Parry Sound and Nipissing Districts.[137] As this area contains the vast majority of Ontario's commercial logging activity, this geographical restriction in application does not appear to have caused many issues. From the debate reports, the choice of coverage appears to have been a result of contemporary politics – those were the districts that had asked for, and been consulted about, the Act.[138] The County of Haliburton was added in a later amendment, seemingly at the prompting of an individual MPP.[139] There does not seem to be any principled reason why lien protection should not be available to those undertaking logging activities elsewhere in the province. As such, the LCO's initial view is that the restriction on the Act's geographical coverage should be repealed.

3. Payment from an Ontario bank

Section 32 of the Act is somewhat unclear, but appears to make it an offence for any payment of wages for logging work to be paid with any instrument (i.e., cheque, promissory note or money order) drawing on funds held by any bank outside Ontario. The intent of this provision made some sense at the time it was passed. Hon A S Hardy stated when introducing the Bill that the intent of the provision was to prevent Michigan-based log buyers from paying with cheques drawn on Michigan banks.[140] The hardship caused by such a practice was that, such cheques were significantly depreciated in value in Ontario, due to the difficulty at the time in actually getting to the Michigan bank to cash the cheque.[141]

In the modern banking world, this fear of depreciation would no longer seem to be an issue. In the LCO's view, section 32 therefore no longer serves a useful purpose.

4. Separation of wood

One of the things that is needed to seize and/or sell wood is the ability for wood products to which a lien relates to be separated from other wood products. The Act does have a power supposedly allowing a sheriff to do so, under section 17. However, section 17 only allows a sheriff to "take any proceedings that the owner of any logs or timber may take under the *Lakes and Rivers Improvement Act* for the purpose of procuring the separation of any logs or timber".

The current iteration of the *Lakes and River Improvement Act* does not appear to provide the owner of logs or timber with any such rights. Indeed, the only power relating to logs and timber appears to be that of persons under the Minister's direction to remove logs that are part of a dam from a lake or river.[142] Even if this was a power given to owners, it clearly contemplates logs being driven downriver rather than hauled by road. It is therefore clearly out of date, and the separation power needs to be updated.

5. Questions

16). *What process do you think ought to be used to determine the costs recoverable by successful lien claimants?*

17). *Do you agree that any revised Act should apply to the whole province?*

18). *Do you agree that it is no longer necessary to require payment of logging workers or contractors from an Ontario bank account?*

19). *What sort of power to separate logs do you think a sheriff should be given?*

20). *Are there any other issues that the LCO should consider in reforming the Act?*

VI. CONTRIBUTING TO THE PROJECT

Many people from different sectors have something of value to contribute to the LCO's work in this project. We want to hear from you, whether you are a logging contractor, a mill worker, a mill owner, a forestry licence holder, or in any other way interested in the issues raised in this report.

There are many ways to express your views or help us hear from those affected by this project:

- Send us your comments in writing, by fax, in an email or in our online comment box. We are particularly interested in answers to the consultation questions asked in this paper, but welcome comment on any aspect of the forestry lien regime.
- Give us a call and arrange a time to talk about your experiences in person or on the telephone.
- Help us arrange a focus group of your peers.
- We can arrange to travel to different parts of the province or to set up web consultations.
- You may have other suggestions for how you can best express your views or help others tell us their experiences.

We will make every effort to have consultations in appropriate languages; however, the LCO's resources are not extensive and we would appreciate suggestions about how to address this issue.

Submissions will be accepted until **December 14, 2012.**

CONTACT INFORMATION FOR THE LAW COMMISSION OF ONTARIO

Tel: 416.650.8406
Toll-Free Tel: 1.866.950.8406
TTY: 416.650.8082
Toll Free TTY: 1.877.650.8082
Fax: 416.650.8418
lawcommission@lco-cdo.org

Explain that you are interested in talking about the Forestry Workers Lien for Wages project and someone will discuss with you how you can participate in a way that works for you.

APPENDIX A: SELECTED LEGISLATIVE PROVISIONS

Sale provisions of the Forestry Service Provider Protection Act (not in force)

Seizure and sale of forest products

17 (1) On application of one or more lienholders, the court, by order, may instruct a sheriff to seize and sell forest products subject to a contractor's lien.

(2) On an application referred to in subsection (1), a court may do one or more of the following:

(a) determine the persons who are to receive notice of the application;

(b) take evidence on, hear and summarily dispose of any question as to the validity of the lien or the priority of a third party claim to the forest products subject to the lien;

(c) direct a trial of an issue;

(d) make an order as to costs of the application, including an order for payment of costs out of the fund.

(3) When enforcing a lien under a court order,

(a) a sheriff must seize and sell the forest products in the same manner as property is seized and sold by a sheriff under a writ of execution,

(b) a sheriff has the powers and immunities of an officer of the court, and

(c) the sale must have the same effect as a sale of the property under the authority of a writ of execution.

Distribution of lien fund

18 (1) On receipt of money from the sale of the forest products subject to a contractor's lien under section 17, the sheriff must deduct the sheriff's costs and create a fund by depositing the balance in a separate, designated account.

(2) On receipt of money paid to the sheriff under section 3, the sheriff must deduct the sheriff's costs and include the balance in the fund referred to in subsection (1) of this section or, if a fund has not been created under subsection (1), in a fund created for the purposes of this subsection.

(3) On application of one or more persons claiming entitlement to money in a fund created under subsection (1) or (2), the court, by order, may designate the lienholders entitled to share in the applicable fund.

(4) On an application referred to in subsection (3), a court may do one or more of the following:

(a) determine the persons who are to receive notice of the application;

(b) take evidence on, hear and summarily dispose of any question as to the validity of the lien or the priority of a third party claim to the forest products subject to the lien;

(c) direct a trial of an issue;

(d) make an order as to costs of the application, including an order for payment of costs out of the fund.

(5) Subject to subsection (7), on the expiry of 30 days following the date an order under subsection (3) is issued, the sheriff must pay out of the fund an amount not exceeding

(a) the amount secured by the lien or liens, and

(b) the amount of the costs ordered by the court

to the lienholders or third parties referred to in subsection (4) (b) specified in the order or orders directing payment of the fund.

(6) If, before the expiry of the period referred to in subsection (5), the sheriff is given notice that one or more additional lienholders have made an application to the court respecting the fund, the sheriff must not distribute the amount of the fund as provided by subsection (5) or (7) unless ordered to do so by the court.

(7) If, after allocating an amount in the fund for third party claims referred to in subsection (4) (b) that have priority over the lien or liens, the amount in the fund is not sufficient to discharge the amount owing to the lienholders referred to in subsection (5) and to pay the costs referred to in subsection (4) (d), the amount in the fund must be distributed to the lienholders in the proportion that each obligation bears to the amount of the fund or as otherwise ordered by the court.

APPENDIX B: COMPILED CONSULTATION QUESTIONS

1). Do you agree that the Act still serves a useful purpose? Why or why not?

2). If you agree the Act should be retained in some form, what sort of reform do you think would be best?

3). What sort of work do you think ought to create lien rights?

4). What sort of wood products do you think ought to be lienable?

5). Who do you think should be eligible for a lien? Should employees be eligible?

6). How do you think the issue of subcontractor liens is best resolved?

7). Do you agree that a lien should commence as soon as work is begun?

8). Do you think a central register for wood liens is a good idea?

9). What do you think the standard of identification for wood products should be?

10). What time limit, if any, do you think should be applied to lien filing or registration?

11). What features do you think are essential for a fair process for proving a lien?

12). How do you think the sale of wood to realize a lien should be handled?

13). Should the sale be conducted by the lien holder or by an officer of the Court (such as a sheriff)?

14). Do you think a compensation fund is a good way to deal with the problem of vulnerable logging workers and contractors?

15). If so, who should contribute to the fund? Under what conditions should it pay out?

16). What process do you think ought to be used to determine the costs recoverable by successful lien claimants?

17). Do you agree that any revised Act should apply to the whole province?

18). Do you agree that it is no longer necessary to require payment of logging workers or contractors from an Ontario bank account?

19). What sort of power to separate logs do you think a sheriff should be given?

20). Are there any other issues that the Commission should consider in reforming the Act?

ENDNOTES

[1] *Forestry Workers Lien for Wages Act*, RSO 1990, c F28 ["*Forestry Lien Act*"].

[2] *Buchanan Forest Products Ltd (Re)*, 2009 CanLII 50222 (ON SC), <http://canlii.ca/t/25qv7> retrieved on 2012-07-16 ["*Buchanan*"].

[3] This history focuses on Northern Ontario because the Act's coverage is geographically restricted to only Northern Ontario (i.e. north of the French River) and the District of Haliburton. See *Forestry Lien Act*, note 1, s 2.

[4] Ian Radforth, *Bush Workers and Bosses*: *Logging in Northern Ontario 1900-1980* (Toronto: University of Toronto Press, 1987) 3 [*Bushworkers*]. This book focuses on logging in the 20th century. For a comprehensive discussion of 19th century Ontario logging, see Radforth "The Shantymen" in *Labouring Lives: Workers: Work and Workers in Nineteenth-Century Ontario* (University of Toronto Press: Toronto, 1995) 204.

[5] *Bushworkers*, note 4, ch 2, esp 26-27; C Ross Silversides and Richard A Rajal, *Broadaxe to Flying Shear: the Mechanization of Forest Harvesting East of the Rockies* (Ottawa: National Museum of Science and Technology, 1997) 126-127 [*Broadaxe*].

[6] *Bushworkers*, note 4, 27-32.

[7] *Bushworkers*, note 4, ch 5.

[8] *Forestry Lien Act*, s 1.

[9] *Bushworkers*, note 4, 98-99.

[10] *Broadaxe*, note 4, 128.

[11] *Broadaxe*, note 4, 128, *Bushworkers* 53-54.

[12] *Bushworkers*, note 4, 54-57.

[13] *Bushworkers*, note 4, 57-59.

[14] *Bushworkers*, note 4, 49; 60.

[15] *Bushworkers*, note 4, 60-62; *Broadaxe*, note 4, 129.

[16] *Broadaxe*, note 4, 129-130; *Bushworkers*, note 4, 63-66.

[17] *Broadaxe*, note 4, 145; *Bushworkers*, note 4, 172-175.

[18] For an extremely comprehensive discussion of the mechanisation of the logging industry over the twentieth century, see *Broadaxe*, note 4, Part I. For specifics on the introduction of harvesters, see *Bushworkers*, note 4, 214-218.

[19] See *Broadaxe*, note 4, Part I..

[20] For discussion of the introduction of power skidders, see *Bushworkers*, note 4, 206-214.

[21] "Ontario's Forest Industry: Where Have all the Loggers Gone?" online: Wildlands League <http://www.wildlandsleague.org/attachments/Where%20Have%20Loggers%20Gone%20FS1.pdf>

[22] *Bushworkers*, note 4, 42-44.

[23] *Bushworkers,* note 4, 37-40. As James Willard Hearst wrote in the context of Wisconsin (his observations also appear applicable in the Ontario context), one of the effects of the log lien laws was that lien rights gave workers some confidence that they would get paid at the end of the season, even if their employer suffered financial difficulties. Log liens thus performed necessary economic functions for both employers and employees. James Willard Hearst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915* (Cambridge, MA: Belknap Press, 1964) 391-392.

[24] *Bushworkers*, note 4, 107-108.

[25] *Broadaxe*, note 4, 137.

[26] *Broadaxe*, note 4, 137-139.

[27] See discussion of the growth of unionism in chapters 6 and 7 of *Bushworkers*, note 4.

[28] See *Bushworkers*, note 4, 230-236.

[29] See *Bushworkers*, note 4, 230-236.

[30] *Broadaxe*, note 4, 134.

[31] *Broadaxe*, note 4, 143.

[32] Ontario, Legislative Assembly, *Newspaper Hansard*, 7th Parl, 2nd Sess, (3 April 1891) (Hon A S Hardy).

[33] *Broadaxe*, 133-134, note 4.

[34] Statistics in this paragraph drawn from Forest Products Association of Canada, *Economic Backbone: Interactive Map*. Online: http://www.fpac.ca/index.php/en/economic-backbone/ (last accessed August 17 2012).

[35] *Forestry Lien Act*.

[36] See for example *Ex parte Deeze* (1748) 1 Atk 228; 26 ER 146 (Ch), regarding the existence of a lien for packers. For a general discussion of the nature of liens, see generally Alfred H Silverton, *the Law of Lien* (Butterworths, London, 1988); CED (Ont 4th) vol 37, title 94.

[37] *Dempsey* v. *Carson* (1861) 11 UCCP 462 (UCCP); *Tappenden* v. *Artus* [1964] 2 QB (CA).

[38] See discussion of this issue in Silverton, note 36, chapter 3.

[39] *Rust* v. *McNaught* (1918) 144 LT Jo 440 (CA).

[40] *Jones* v. *Pearle* (1736) 1 Srt 557 93 ER 698. Note however that the lien is not lost if the loss of possession was the result of fraud or theft – see *Wallace* v. *Woodgate* (1824) Car & P 575 171 ER 1323.

[41] Liens can be either general or particular. The distinction between the two is described well in the Alberta Law Reform Institute's 1992 *Report on Liens* as follows:

> A particular lien gives the claimant the right to keep possession of goods until payment of charges relating to those goods. A general lien is wider in that it also secures charges that relate to goods which are no longer in the possession of the lien claimant. For example, the lien of a repairer is a particular lien which only secures repairs that relate to the goods in the possession of the lien claimant. … The general lien of a stockbroker secures charges that relate to securities in the possession of the stockbroker as well as previous charges that relate to securities that have been surrendered or sold.

(Alberta Law Reform Institute, *Report on Liens* (Edmonton: Alberta Law Reform Institute, 1992, 7) ["ALRI *Report on Liens*"] The liens which will be discussed in this paper are, for the most part, particular liens.

[42] See for example the *Forestry Lien Act,* note 1, *Livestock Lien Act* RSBC 1996 c 272, *Threshers' Lien Act* CCSM c T60. These liens were preceded by the similar Mechanics liens, supposedly adopted for the first time in North America (drawing on European practice) at the instigation of Thomas Jefferson in 1791. These liens secured payment for tradespeople working in construction and were as much about encouraging those people to help build towns and cities in a rapidly expanding country as they were about protecting workers. See discussion in Samuel Louis Phillips, *A Treatise on the Law of Mechanics' Liens on Real and Personal Property (*Washington, DC: Little, Brown, 2ed, 1883). Mechanics lien legislation was passed in Ontario in 1873 (*An Act to establish Liens in favour of Mechanics, Machinists and others* SO 1873 c 27), and is the forerunner to the modern *Construction Lien Act* RSO 1990 c C-30.

[43] See discussion of the economic environment and early attempts at wage protection in Ontario in Jeremy Webber "Labour and the Law" in *Labouring Lives: Workers: Work and Workers in Nineteenth-Century Ontario* (University of Toronto Press: Toronto, 1995) 144-146.

[44] *Woodman's Lien for Wages Act* SO 1891 c 22.

[45] The Buchannan group of companies became insolvent in February 2009, and 28 lien claims were advanced. Preliminary issues relating to these liens were litigated in *Buchanan*. This is one of two cases the LCO could identify which invoked the Act in the last 40 years, the other one occurring in 1994 –

Canadian Imperial Bank of Commerce v. Levesque Lumber (Hearst) Ltd. [1994] OJ No. 2610 (Ont Ct Gen Div).

[46] *Forestry Lien Act,* note 1, s 3(1).

[47] *Forestry Lien Act,* note 1, s 1.

[48] *Forestry Lien Act,* note 1, s3(2).

[49] *Forestry Lien Act,* note 1, s 1. "Tan bark" is tree bark that is later processed to be used in the leather tanning process. "Shingle bolts" are blocks of wood from which wooden shingles used to be produced. "Staves" are the individual pieces of wood from which barrels are made.

[50] *Buchanan*, paras 38-45.

[51] *Forestry Lien Act*, note 1, s 7.

[52] Implied by *Forestry Lien Act*, note 1, s 13(d).

[53] *Forestry Lien Act*, note 1, ss 5(1) and (2).

[54] *Forestry Lien Act*, note 1, ss 6.

[55] *Forestry Lien Act*, note1, ss 5(3) and (4)

[56] A more comprehensive outline of the enforcement process is set out in chapter III(C)(1) of this paper.

[57] *Forestry Lien Act*, note 1, s 8(1)

[58] *Forestry Lien Act*, note 1, s 9(3)

[59] *Forestry Lien Act*, note 1, ss 13 and 14.

[60] *Forestry Lien Act*, note 1, s 23.

[61] *Forestry Lien Act*, note 1, s 3(1).

[62] This is reflected in the definition of "labour" in *Forestry Lien Act*, note 1, s 1, which specifically includes work done by "cooks, blacksmiths, artisans and others usually employed in connection therewith [i.e. in connection with logging work]".

[63] *Forestry Lien Act*, note 1, s 8(1). An originating application is the legal document which commences a legal proceeding.

[64] *Forestry Lien Act*, note 1, s 8(1).

[65] *Forestry Lien Act*, note 1, s 9(3).

[66] "Wood products" is the generic term used in this paper for all forestry products produced during the logging process, from felled full trees to chips produced by mobile chippers in the forest. It does not include anything processed in by a mill (e.g. veneer, sawn lumber etc).

[67] "Wood owner" is the generic term used in this paper for the person who has the original legal right to cut and process wood products. In Ontario, this will typically be the holder of the relevant forestry licence under the *Crown Forest Sustainability Act* SO 1994 c 25. The longstanding regime under that Act provided for Forest Resource Licences (under section 27) and Sustainable Forestry Licences (under section 26). The recent *Ontario Forest Tenure Modernization Act* SO 2010 c10 introduced a shift to Enhanced Sustainable Forestry Licences, and introduced a pilot project for Local Forestry Management Companies. LFMCs are intended to be governed by a predominantly local board of directors responsible for managing Crown forests and overseeing the marketing and sale of the timber in a given area. For further discussion of forestry tenure in Ontario see the Ministry of Natural Resources' tenure website at: www.mnr.gov.on.ca/en/Business/Forests/2ColumnSubPage/STDPROD_091579.html

[68] *Forestry Lien Act*, note 1, ss 8(3) and (4).

[69] *Forestry Lien Act*, note 1, s 11(1).

[70] *Forestry Lien Act*, note 1, s 11(2).

[71] *Forestry Lien Act*, note 1, s 16.

[72] *Forestry Lien Act*, note 1, ss 18 and 20.

[73] *Forestry Lien Act*, note 1, s 19.
[74] *Forestry Lien Act*, note 1, s 21(1).
[75] *Forestry Lien Act*, note 1, ss 21(2) and (3).
[76] *Forestry Lien Act*, note 1, s 23.
[77] *Forestry Lien Act*, note 1, s 25(2).
[78] See Ontario, Legal Aid Ontario, *Tariff & Billing Handbook* (Toronto: Legal Aid Ontario) chapter 2. Online at: http://www.legalaid.on.ca/en/info/tariff_billing.asp
[79] In *Buchanan*, Justice Pierce found that the Act did apply to (most) haulage work, bush road construction, and wood chipping – *Buchanan*, note 2, paras 50-58. However, this required a degree of interpretation that should not be necessary simply to determine the application of the Act to forms of work that are integral to the modern logging industry. The definition of "labour" still needs to be revised.
[80] *Buchanan*, note 2, paras 37-45
[81] [1928] SCR 203 ["*Keenan*"]
[82] *Keenan*, note 81, 206.
[83] See the list of liens eventually paid out under Buchanan's CCAA settlement, set out in Schedule B to the vesting order of Justice Morawetz, available online at: http://documentcentre.eycan.com/eycm_library/Project%20Pick%5CEnglish%5CCCAA%202009%5CCourt%20Orders%5CApproval%20&%20Vesting%20Order%20of%20Justice%20Morawetz,%20dated%20September%2013,%202010.pdf
[84] Nedra Pickler "Task force recommends outdated laws to come off the books" *Associated Press* (28 December 1999) (Factiva).
[85] Pickler, note 84.
[86] For the vote record see Michigan, *Journal of the House* (90th Legislature, 2000, No 67) 2438-2439. Online: http://www.legislature.mi.gov/%28S%2842wa5c452ubypbqmrjnlo155%29%29/documents/1999-2000/Journal/House/pdf/2000-HJ-11-30-067.pdf. For the (lack of) policy analysis see Michigan, *House Legislative Analysis of Senate Bill 1124* (Lansing: House Legislative Analysis Section, 2000). Online: http://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/pdf/1999-HLA-1124-A.pdf
[87] *Miners Lien Act* RSY 2002 c 151 as amended by SY 2008 c 17 [*Miners Lien Act*]; *Stable Keepers Act* CCSM c S200.
[88] Manitoba Law Reform Commission, *The Stable Keepers Act* (Winnipeg: Manitoba Law Reform Commission) 1. Online: http://www.manitobalawreform.ca/pubs/pdf/124-full_report.pdf
[89] Manitoba Law Reform Commission, note 81, 1.
[90] For discussion of the policy intent of the *Miners Lien Act* amendments see Yukon, Legislative Assembly, 32nd Leg, 1st Sess, No 122 (26 November 2008) at 3539-3540 (Hon Archie Lang).
[91] British Columbia Law Reform Commission, *Report on the* Woodworker Lien Act (Victoria: Ministry of the Attorney General, 1994). See also British Columbia Law Reform Commission, *Working Paper on Liens for Logging Work* (Victoria: Ministry of the Attorney General, 1992).
[92] The British Columbia Government's approach is discussed further below in chapter V(E) of this paper.
[93] *Forestry Service Provider Protection Act* SBC 2010 c 16 ["FSPP Act"]. As some operative provisions of the Act are not in force, see the Act as passed at third reading; online: http://www.leg.bc.ca/39th2nd/3rd_read/gov21-3.htm.
[94] FSPP Act, note 93, Part 1 (not in force). For text of this Part, see the 3rd reading version of the Bill. Online: http://www.leg.bc.ca/39th2nd/3rd_read/gov21-3.htm. Complicating the picture further, during debate on the Bill the existing *Woodworkers Lien Act* was allowed to stand, and only the compensation fund portion of the new FSPP Act has come into force at this stage.

[95] The only statute for which repeal was recommended was the *Beet Lien Act* SA 1926 c B-3. The *Beet Lien Act* was ultimately repealed in 1994.
[96] See ALRI *Report on Liens*, note 41, 118-135.
[97] See discussion above in chapter III(C)(3) of this paper.
[98] FSPP Act, note 93, s 1(1) (not in force).
[99] *Miners Lien Act*, note 87, s 2.
[100] *Employment Standards Act* SO 2000 c 41 s 14(1).
[101] *Bankruptcy and Insolvency Act* RSC 1985 c B-3 ss 81.3 and 81.4 ["BIA"].
[102] British Columbia *Debates of the Legislative Assembly (Hansard)* 39th Parl, 2nd Sess, Vol 18 No 6 (25 May 2010) 5677-5680; 5717.
[103] FSPP Act, note 93, s 2 (not in force).
[104] FSPP Act, note 93, s 11 (not in force).
[105] ALRI *Report on Liens*, note 41, 76.
[106] *Construction Lien Act*, note 41, s 22(1).
[107] *Construction Lien Act*, note 41, s 22(1).
[108] *Working Paper on Liens for Logging Work*, note 91, 23-24; ALRI *Report on Liens*, note 41, 76.
[109] ALRI *Report on Liens*, note 41, 80.
[110] *Buchanan*, note 2, paras 60-63.
[111] *Forestry Lien Act*, note 1, s 6(1)
[112] ALRI *Report on Liens*, note 41, 61.
[113] *Repair and Storage Liens Act* RSO 1990 c R25 ["RSLA"]
[114] *Miners Lien Act*, note 87, s 4.
[115] See *Buchanan*, note 2, paras 65-70.
[116] ALRI *Report on Liens*, note 41, 86-87.
[117] The time limit under the both the *Miners Lien Act* (*Miners Lien Act*, note 41, s 6) and the *Construction Lien Act* (*Construction Lien Act*, note 41, s 31) is 45 days.
[118] There may be a case for *allowing* a lien to be filed before a debtor is in default, but effectively *requiring* such pre-emptive filings is absurd.
[119] See chapter V(B)(1) of this paper.
[120] *Personal Property Security Act* RSO 1990 c P10, s 30 ["PPSA"].
[121] See PPSA, note 120, ss 22 to 27.
[122] RSLA, note 113, s 10(1).
[123] From discussions with the BC Ministry of Forests, Lands and Natural Resource Operations, the LCO understands that Part 1 of the FSPP Act, which deals with security for logging contractors and subcontractors, will come into force as soon as regulations setting out the mechanics of registration are drafted. The security given under part 1 is relatively low ranking, meaning that contractors may not be fully paid in the event of insolvency on the part of a licence holder. To counterbalance the low ranking of the security provided by part 1, part 2 of the FSPP Act sets up a compensation fund for logging contractors who may be affected by a licence holder insolvency. This fund is discussed further below in Chapter V(E) of this paper.
[124] The scheme of distribution for the property of the bankrupt is set out in s 137 of the BIA, note 101, subject to various 'superpriorities' such as that for wages under s 81.3.
[125] See chapter III(C)(1) of this paper.
[126] RSLA, note 113, s 7(5).
[127] RSLA, note 113, s 7(6).

[128] *Forestry Lien Act,* note 1, Forms 1 and 2.
[129] FSPP Act Proclamation, 29 March 2012 (2012) BC Gaz II 133.
[130] BC Reg 64/2012, s 2.
[131] British Columbia *Debates of the Legislative Assembly (Hansard)* 39th Parl, 2nd Sess, Vol 18 No 6 (25 May 2010) 5690 (Hon Patrick Bell).
[132] British Columbia *Debates of the Legislative Assembly (Hansard)* 39th Parl, 2nd Sess, Vol 18 No 6 (25 May 2010) 5690 (Hon Patrick Bell).
[133] See discussion above in chapter III(C)(2) of this paper.
[134] See *Buchanan Forest Products Ltd* (Re), 2010 ONSC 2378 (CanLII) at paras 7-10 <http://canlii.ca/t/29db6> retrieved on 2012-07-17.
[135] *Forestry Lien Act,* note 1, s 25(4).
[136] *Forestry Lien Act,* note 1, s 2.
[137] See *Division of Ontario into Geographic Areas*, O Reg 180/03, Schedule 2
[138] Ontario, Legislative Assembly, *Newspaper Hansard*, 7th Parl, 2nd Sess, (3 April 1891).
[139] Ontario, Legislative Assembly, *Newspaper Hansard*, 8th Parl, 2nd Sess, (28 Feb 1896) (J H Carnegie).
[140] Ontario, Legislative Assembly, *Newspaper Hansard*, 7th Parl, 2nd Sess, (3 April 1891) (Hon A S Hardy).
[141] Ontario, Legislative Assembly, *Newspaper Hansard*, 7th Parl, 2nd Sess, (3 April 1891) (Hon A S Hardy).
[142] *Lakes and Rivers Improvement Act* RSO c L3 s 24.