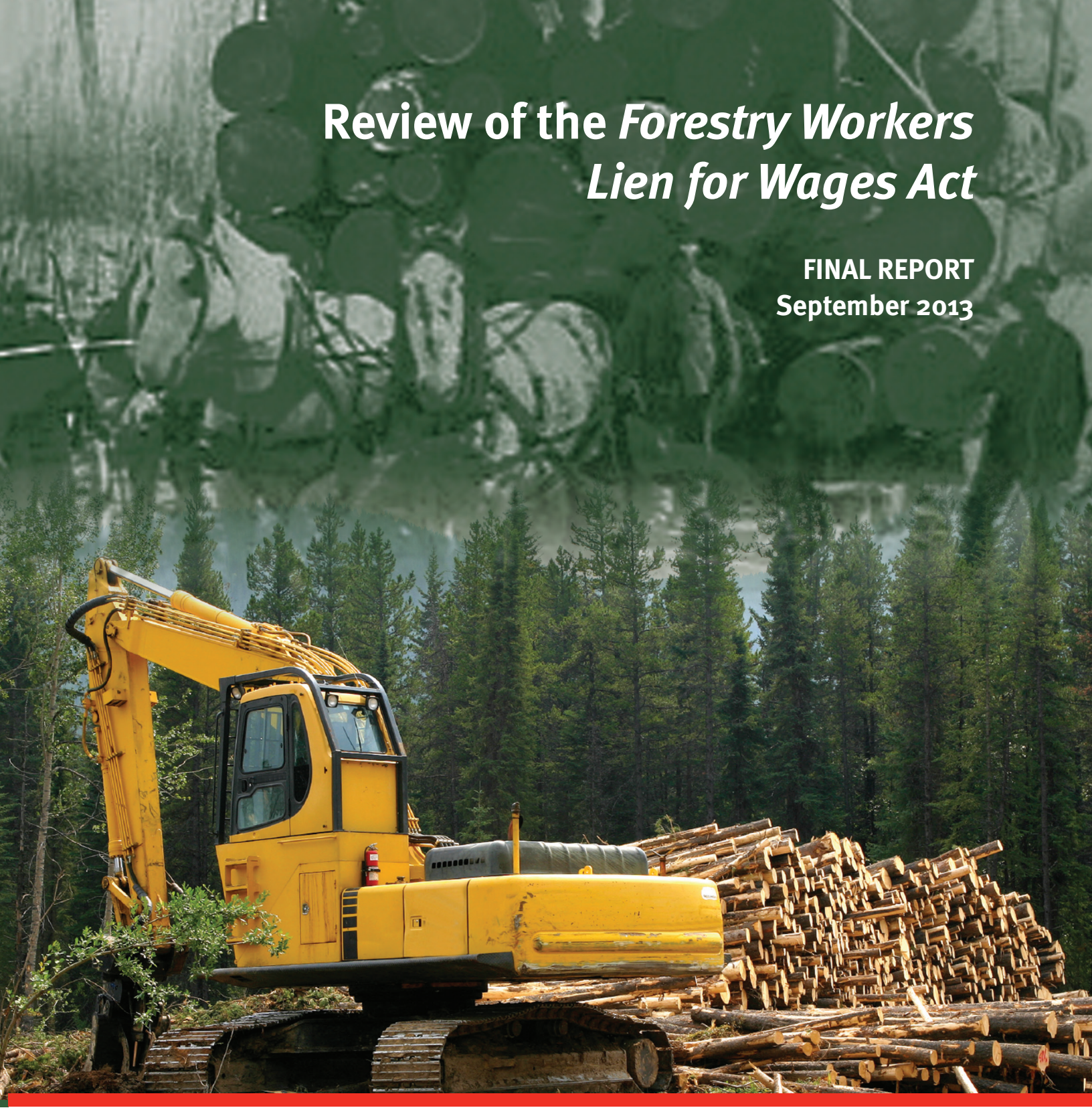
Review of the *Forestry Workers Lien for Wages Act*

FINAL REPORT
September 2013



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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 Law Deans of Ontario's law schools. York University also provides support to the LCO. It is located in the Ignat Kaneff School Building, home of Osgoode Hall Law School at York University.

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 and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has 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.

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Foreword

We are pleased to release this Final Report in the Law Commission of Ontario's Review of the *Forestry Workers Lien for Wages Act* project. This project is in many ways a "classic" law reform project: it has involved a review of a statute enacted in 1891 that is no longer applicable to current circumstances.

The purpose of the *Forestry Workers Lien for Wages Act* was to provide loggers with a lien over the wood they cut to protect them when they did not receive the agreed upon compensation for their work. The Act reflects logging as it was 120 years ago when individual loggers often worked for jobbers from across the border who failed to pay them and when they stayed in the bush for months at a time and cut logs using relatively simple tools. Logging is a very different enterprise today. Most loggers are independent contractors, small (perhaps family) businesses that own or are buying highly sophisticated equipment and their relationships with forestry companies far less risky. Much about the Act was outdated, whether in referring to a type of wood product that no longer exists, in the amount that could be awarded in costs by the court or in the roles it identified as being involved in logging, as well as in other ways. The Act came to the LCO's attention as a result of an insolvency case in which the judge needed to interpret the Act, a process which highlighted how obsolete it is.

Our first thinking about the Act focused on its language, its portrayal of logging and the significant changes in how logging is undertaken today. These aspects, we speculated, could be amended. However, as we proceeded with the project, it became clear that the Act is fundamentally at odds with how the forestry industry is now being structured and with the contemporary commercial landscape and could not easily be reconciled with them. As a result, we concluded that the preferable option was to repeal the *Forestry Workers Lien for Wages Act* as no longer applicable to modern circumstances.

The Board of Governors, comprised of appointees of the founding partners, the judiciary and members at large, approved this Final Report in September 2013. The Board's approval reflects its members' collective responsibility to manage and conduct the affairs of the Law Commission of Ontario, and should not be considered an endorsement by individual members of the Board or by the organizations to which they belong.

Bruce P. Elman, Chair, Board of Governors

Patricia Hughes, Executive Director

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EXECUTIVE SUMMARY

In this project, the LCO was faced with a classic law reform challenge – determining how best to adapt antiquated legislation to the legal and social conditions of modern-day Ontario. The *Forestry Workers Lien for Wages Act* was enacted in 1891 as a wage recovery mechanism for logging employees harvesting the forests of northern Ontario. The Act provides loggers with a lien over the logs or timber they work on for the amount owing to them for their work.

These days, there are relatively few liens filed under the Act. However, a number of liens were filed in 2009 in connection with the Buchanan Forest Products Ltd. insolvency. The lien claimants brought an application before Senior Regional Justice Pierce to interpret the Act and in her decision she noted the difficulties caused by the Act's archaic language and procedures. This decision inspired the LCO to develop a project proposal and ultimately to undertake this project.

The Report first describes the outdated features of the Act that prevent it from effectively protecting loggers in the modern industry. It then examines the historical context to the Act and identifies a number of important differences between the logging industry of 1891 and today's industry. These include fundamental changes to the nature of logging work, the relationship between loggers and the forest product companies hiring them and the forest licencing regime and its impact on business relationships in the industry.

Next, the Report examines how the Act fits into the surrounding commercial law framework. The Act is poorly coordinated with contemporary statutory wage protections in both Ontario and federal legislation. Although the Act is strictly compatible with Ontario secured transactions law and federal bankruptcy and insolvency law, it undermines certain policies underlying these regimes. In particular, contrary to the philosophy of the *Personal Property Security Act*, the Act does not provide for a central registry allowing third parties to determine if liens are registered against property in which they have an interest.

The Report proceeds to examine several more specific design challenges that would have to be addressed in reforming the Act. Some of these are not easily resolvable. Logging work is regularly contracted out to subcontractors and one challenge would be to design the Act to protect subcontractors without exposing licencees to multiple lien claims arising from the same contract. Another significant issue is determining what priority lien claimants should have over other claims in the wood, particularly in insolvency situations.

Each of the above factors has implications for the continued viability of the Act and, in aggregate, they suggest that a forestry workers lien regime may no longer be commercially or legally appropriate for Ontario's modern economy.

The Report turns to an examination of other statutory commercial lien regimes as possible comparators for reforming the Act. The most analogous statutory regime is British Columbia's 2010 *Forestry Service Providers Protection Act*. This statute is a plausible model for Ontario reform. However, the BC industry is distinguishable from the Ontario industry in several respects and one crucial element of the BC Act, a compensation fund for loggers in insolvency situations, is not likely to be a successful strategy for Ontario.

The Report concludes that, in some circumstances, the best course is *not* to adapt antiquated legislation to modern social and legal conditions at all. In the case of the *Forestry Workers Lien for Wages Act*, it seems that the need for the legislation has passed away with the historical industrial conditions that it was designed to address. Today's logging contractors and subcontractors are no longer akin to the casual logging employees of the 1890s and the financial risk borne by modern loggers is no longer comparable to the economic circumstances experienced by their historic counterparts. In these circumstances, it is preferable to repeal the Act rather than to perpetuate an outdated lien regime. The LCO recommends that the Act be repealed.

I. INTRODUCTION

A core function of law reform is to ensure that law evolves in step with social, economic and technological change. The *Forestry Workers Lien for Wages Act* (FWLWA or the Act) is a classic example of legislation that has fallen victim to changing times.[1] The Act provides forestry workers with a lien over the wood they work on for the amount owing to them for their work.[2] The Act dates back to 1891 and was intended as a form of wage protection for loggers cutting timber in the northern Ontario bush.[3] Today, the Act remains essentially in original form, although almost every assumption underlying it has changed. It is no longer clear that lien protection for loggers remains necessary or appropriate in the modern legal and commercial landscape.[4]

For example, in 1891, loggers were seasonal employees hired by mills to spend the winter in the bush harvesting wood. Wood lay in the bush often for months until the spring melt when it could be driven downriver to mills for processing. Logging wages were low and sometimes were not paid out until the end of the season, after loggers had invested months of labour. Loggers were physically isolated and had little or no financial reserves. Mills were often undercapitalized and prone to insolvency. In some instances, logs were delivered across the border before loggers could take steps to recover their wages. The Act provided loggers with a lien that attached to the harvested wood which could then be seized in the bush and sold in order to recover unpaid wages.

In contrast, today's loggers are predominantly independent contractors who own their own equipment and charge a contract price reflecting the use of this equipment in addition to labour costs. These contractors are still frequently hired by mills but some loggers harvest and sell logs on their own account and are not "hired" at all. The modern industry has also developed a widespread practice of subcontracting out parts of the harvesting process. Subcontractors may be several contractual links away from the licencee holding a property interest in the harvested wood. Technology has evolved so that the industry operates year round and wood is usually processed within a matter of a few weeks rather than months. These industry changes affect the viability of an ongoing lien regime and call into question whether modern logging contractors and subcontractors remain vulnerable in the sense originally contemplated by the Act.

The Law Commission of Ontario (LCO) was made aware of the Act as a result of a 2009 court proceeding involving a number of forestry worker lien claims filed in the Buchanan Forest Products Ltd. insolvency.[5] In the *Buchanan* decision, Madam Justice Pierce noted the Act's archaic language and enforcement procedures but chose a liberal interpretation of the Act consistent with its purpose to protect forestry workers. The LCO reviewed this decision and, after conducting some preliminary research, launched this project to review the Act.

The LCO released a Consultation Paper in September 2012 that was posted on the LCO's website and distributed to stakeholders. The Consultation Paper listed three options for reform: simply repealing the Act as obsolete, reforming the language of the Act and substantially rewriting the Act. At that time, the LCO expected that the Act could be amended to reflect the changes to the industry.

The main body of consultations took place between September 2012 and January 2013 with a wide range of stakeholders from the logging industry, government and the legal community. We consulted with the relevant government ministries, including the Ministry of Natural Resources who declined to provide comments. In November 2012, the LCO travelled to

Thunder Bay for two days of meetings with forest product company representatives, forest management companies and individual logging contractors. The project benefited enormously from the generosity of these individuals who took the time to explain the complexities of the modern logging industry and Ontario's forest licencing regime. Also crucial to the project was the input of several commercial law experts on how the Act affects Ontario secured transactions law and federal bankruptcy and insolvency law. The LCO extends its appreciation to everyone who participated in the consultations process.

With the notable exception of the *Buchanan* case, it appears that few forestry worker liens are filed these days.[6] The LCO conducted an informal phone survey of several court registry offices in northern Ontario. In most cases, staff reported not having seen any liens in recent memory. In a couple of cases, staff indicated that there might have been one or two liens filed in the last few years. It is difficult to verify the number of liens being filed because they are not indexed as lien claims but, rather, according to party name.[7]

We heard from practitioners that loggers may be dissuaded from filing claims because the language of the Act creates uncertainty as to its scope and application. The court proceedings necessary to resolve these ambiguities are beyond the financial means of most. The Buchanan claims proceeded only because the large number of claimants made it possible to share legal costs. Therefore, a concern for access to justice was a key factor motivating the LCO to undertake this project. However, it may also be that there is less need to resort to the Act in the modern industry. In consultations, several stakeholders commented that forest product companies and contractors usually fulfill their obligation to pay the contractors and subcontractors working for them. Liens are more likely to be filed where insolvency causes a mill to shut down, although the *Buchanan* decision is the only such decision actually reported in recent years. Whatever the case, the infrequent use of the Act supported the need for review.

This Report considers the policy rationale behind the Act in light of the changes to the logging industry over the last century and identifies numerous legal issues raised by the Act in the context of the modern industry and Ontario's commercial law framework. It examines several statutory lien regimes as possible models for reforming the Act but finds a number of features which distinguish the Act from each of these analogues. As a result of all of these circumstances, the LCO has reached the conclusion that the Act is commercially, as well as legally, obsolete. Rather than reforming the Act as originally contemplated, the better option is to repeal the Act in its entirety. Accordingly, the Report concludes with the LCO's recommendation that the Act be repealed.

This Final Report was approved by the LCO Board of Governors on September 12, 2013 and is posted on the LCO's website at www.lco-cdo.org.

II. THE *FORESTRY WORKERS LIEN FOR WAGES ACT* IN CONTEXT: THEN AND NOW

A. Introduction to the *Forestry Workers Lien for Wages Act*

Although 122 years old, the *Forestry Workers Lien for Wages Act* (FWLWA or the Act) remains in almost original form.[8] It provides that persons performing labour on logs or timber may claim a lien over those logs or timber to secure their wages.[9] However, the passage of time has rendered the definitions in the Act ineffectual, leaving its scope unclear.[10]

"Labour" is defined in the language of 19th century logging practices to include anachronistic functions such as running, rafting and booming logs, as well as work done by bush camp personnel such as cooks and blacksmiths who have now virtually vanished from the industry.[11] The Act provides protection to both logging employees and logging contractors but is unclear as to whether it also covers subcontractors. Given the fragmented nature of the industry, this leaves the application of the Act to a large proportion of contemporary Ontario loggers in doubt.

"Labour" is defined in the language of 19th century logging practices to include anachronistic functions such as running, rafting and booming logs, as well as work done by bush camp personnel such as cooks and blacksmiths who have now virtually vanished from the industry.

The Act defines "logs or timber" as a list of items including telegraph poles, railroad ties, tan bark, pulpwood, shingle bolts and staves.[12] This definition is no longer meaningful. Some of the included items, such as tan bark, are commercially obsolete and some important outputs of modern logging, such as woodchips and biomass, are missing from the definition.[13] The definition also has the effect of limiting the life of the lien to the period during which the "logs or timber" remain in identifiable form. Once the logs are processed at the mill, a lien can no longer exist under the Act.[14] This provision may have made sense at the turn of the century when logs lay in the bush over the winter months. However, now that logs are processed much more quickly (sometimes even while they are still in the bush), the provision significantly restricts the scope of the Act and the value of a lien.

The procedures in FWLWA are equally anachronistic. The claimant must file a lien claim and an affidavit verifying the claim in the local office of the Superior Court of Justice but there is no reliable means for third parties to become aware of these claims. The Act's filing deadlines assume that logging remains a seasonal practice. For example, the deadline for logging employees doing winter labour is the April 30th after the work is done, whereas the deadline for logging employees doing summer labour is 30 days after the work is done.[15] The presumption here is that loggers working in the bush over the winter have difficulty leaving camp to file a lien claim. Complicating matters further, a different deadline is specified for logging contractors filing a claim. This deadline is the September 1st after the work is done.[16]

After filing a lien claim, the Act provides that loggers have 30 days to bring an action to enforce the lien. An action may be filed either in the Superior Court of Justice or the Small Claims Court, depending on the amount at stake.[17] In both cases, the relatively informal procedures of the Small Claims Court are to be adopted where possible.[18] While this provision might have been appropriate for wage recovery in 1891, it does not take into account the large amounts that may be claimed by contemporary logging contractors. Small Claims Court Rules are designed for claims less than $25,000 and provide for an abbreviated discovery process in order to facilitate access to justice.[19] The drafters of the original Act presumably did not contemplate lien claims approaching $1 million.[20]

The Act also provides that, where there is good reason to believe that the logs or timber are about to be removed from Ontario or sold or cut so as to be no longer identifiable,

the Court may issue a writ of attachment and direct the sheriff to seize the logs.[21] In this circumstance, the owner of the logs may regain possession of them by posting a bond covering the amount of the lien plus costs.[22]

The Act provides that lien claims have priority over all other claims or liens except for certain Crown claims such as a claim for unpaid stumpage fees.[23] Although perhaps sensible in 1891, it is unusual today for a non-possessory commercial lien to leapfrog over almost all other interests in the property in the absence of a registration requirement. The Act also provides that liens are effective against ordinary course sales to third party purchasers.[24] This too is inconsistent with the modern convention which is to encourage the free exchange of goods by enforcing third party sales in the ordinary course.

Several other provisions of FWLWA are also outdated. For example, the Court is severely limited in the costs that it may award in relation to a lien proceeding. For uncontested claims in the Superior Court of Justice, costs are capped at $5 where a solicitor is employed. This increases to $10 for a contested claim.[25] Even lower amounts are provided for where the action is brought in Small Claims Court.[26]

Another provision provides that lien claimants may take proceedings under the *Lakes and Rivers Improvement Act* to procure the separation of logs seized by the sheriff from other logs with which they have been intermixed. This provision seems to have been orphaned since no such procedure remains in the current version of the *Lakes and Rivers Improvement Act*.[27]

The Act applies only to the County of Haliburton and to the territorial districts in northern Ontario. This boundary excludes a significant area of commercial logging operations currently taking place in the southern part of the province.

There is also a geographic restriction built into FWLWA. The Act applies only to the County of Haliburton and to the territorial districts in northern Ontario.[28] This boundary excludes a significant area of commercial logging operations currently taking place in the southern part of the province. Loggers working in northern Ontario may claim a lien under the Act but loggers doing the same work in Mazinaw-Lanark, for example, may be excluded from protection.

B. Historical Backdrop to Forestry Worker Lien Legislation in Ontario

The introduction to FWLWA above illustrates how important the historical context is to understanding the policy behind the enactment of a forestry worker lien regime in Ontario, as well as the legal structure chosen for the Act. We provide some of that historical context in this section.

When the predecessor to the Act was first introduced in 1891, the logging industry was a central component of Ontario's economy. It fed the saw mills which, in turn, produced lumber essential to building the railways and other infrastructure of a young country. During the second half of the 19th century, the industry experienced rapid growth. A raft of timbers worth approximately $12,000 mid-century was worth $100,000 by the turn of the century.[29] Lumber barons capitalized on this growth and built large scale sawmills to process the timber. Among these were Michigan mill owners who hired Ontario contractors known as "jobbers" to oversee logging operations and, then, to tow huge booms of these logs to mills across Lake Huron.[30]

Logging was strenuous physical work. Carrying or dragging logs required twice the energy necessary for drilling coal and three times the energy needed for bricklaying.[31] Early in the season, workers known as "beavers" would cut trees and clear the bush for logging roads. Next, choppers would go into the bush in teams of three to fell trees using axes

and crosscut saws. They would strip the trees of branches and then buck them into logs. Skidding crews would use horses and chains to drag the logs out to the roadside. Rollers would stack the logs onto the skidway. Mid-season, once the logging roads were well iced, haulers would load the logs onto a sleigh and deliver them to a landing beside a river, or even directly onto the frozen surface of a lake, to await the spring river drive. Come spring, these logs were rolled into the water and directed downstream using long hooks. On arrival at a lake, the logs were tied together in huge booms and raftsmen towed them to their destination. Except for the use of saws, axes and horse-drawn sleighs, these tasks were carried out manually.

Logging was also dangerous work, rivaling mining as the most dangerous industry in the province.[32] Injuries resulted from falls, accidents with axes, rolling logs, falling trees and log jams.[33] Injured loggers had little government support before 1914 when the *Workmen's Compensation Act* was introduced.[34]

Loggers spent much of the year living in the bush in logging camps with rudimentary accommodations and few comforts. Wage rates were low – often too low to support a family.[35] Nevertheless, winter logging work was in demand as a means of supplementing other seasonal occupations such as farming and construction.[36] As a result, mill owners had their choice of workers and loggers had little bargaining power to negotiate improved conditions.[37] The demand for logging work, the isolated location of logging camps and the independent nature of bushworkers prevented unionization from taking hold in the early years.[38]

...[L]oggers were sometimes required to invest months of labour with only a promise of payment.

Loggers were hired seasonally.[39] Employment contracts set out the wage, length of employment (i.e., until spring) and other terms of employment. Wage rates were generally standardized depending on experience.[40] Loggers were paid a monthly rate, although in later years piece-work became more common.[41] Employment terms tended to favour the employer.[42]

Contracts sometimes provided that wages were not payable until the raft of logs reached its destination regardless of whether or not the logger was still on staff.[43] One reason for this was the relative scarcity of working capital in the early days of the lumber industry. Lumber companies were occasionally unable to meet payroll until they received the proceeds from selling the lumber at the end of the season.[44] A second reason to withhold wages was to prevent loggers from "jumping" mid-season to another camp in search of better food or working conditions.[45]

As a result, loggers were sometimes required to invest months of labour with only a promise of payment.[46] And when wages were not forthcoming, loggers had few avenues of recourse. They could seek a legal judgment in debt from the local magistrate. However, where lumber companies or jobbers became insolvent (which happened frequently even then), this judgment was of little use. In some circumstances, where loggers delivered the logs to the buyer, a practice developed that they would only release the logs if the buyer agreed to be responsible for their wages. In at least one case, this arrangement was enforced by the courts on the reasoning that the sale agreement between the buyer and the lumber company would have anticipated this practice and a certain amount withheld to cover the wages.[47]

C. Adoption of Forestry Worker Lien Legislation in Ontario

It was in this historical context that the predecessor to FWLWA was introduced in 1891. It seems clear that the intent of the original Act was to protect 19th century loggers from the financial risk associated with the logging industry at that time. This was the purpose accepted by the court in *Buchanan*: "Implicit in the legislature's desire to protect forestry

claims is a recognition that forestry workers are vulnerable."[48] But it is less clear whether this legislative intent was a general one or whether the legislators were targeting a particular mischief.

The 1891 debates in the Legislative Assembly leading up to the passage of the original Act are sparse. However, they suggest some specific factors motivating the creation of a logging lien. When the Bill was first introduced in the House, the Minister responsible indicated that it would provide lumbermen working in the shanties with the same protection given to mechanics under the *Mechanics' Lien Act*.[49] That Act provided construction contractors and subcontractors the right to assert a lien against the owner of land for the price of materials furnished and improvements made to the land, the object being "to prevent an owner from obtaining the benefit of the labour and capital of others without compensation".[50]

When the logging lien bill came up for second reading, it was described in a bit more detail:

> Mr. Hardy explained that it applied to the districts of Algoma, Thunder Bay and Rainy River. Logs were got out in those places by jobbers who through lack of money sometimes could not pay the wages to the men they engaged. The object was to give a lien upon the logs with a view to securing these wages.[51]

...[T]he immediate mischief motivating the original Act appears to have been under-capitalized jobbers (whether foreign or not) hiring loggers without the means to pay them, as well as foreign companies operating in Ontario without local assets.

Similarly, a member explained in a later session:

> The bill...is intended to secure the payment of lumbermen's wages and one of the difficulties – perhaps the principal one – it is intended to meet is that unscrupulous foreign employers sometimes run their logs over to the American side leaving the lumbermen without any means of recovering payment for his labor in getting the timber out.[52]

This concern for American involvement in the Ontario logging industry was also reflected in another provision (remaining in the current Act) which made it illegal for wages to be paid by cheques drawn on foreign banks.[53] According to historian Ian Radforth, Michigan lumbermen were particularly active in harvesting timber in northern Ontario during the 1890s.[54] This had been identified as a problem and lawmakers were in the process of developing legislation prohibiting the practice. Eventually the Ontario government passed the "manufacturing condition" which prohibited the export of Ontario logs.[55]

In any event, the immediate mischief motivating the original Act appears to have been under-capitalized jobbers (whether foreign or not) hiring loggers without the means to pay them, as well as foreign companies operating in Ontario without local assets. These two particular circumstances contributed to a more general concern for protecting loggers in the same way that construction workers were protected under the *Mechanics' Lien Act*.

Early discussion of the purpose behind Wisconsin's logging lien legislation provides further clues to the rationale behind passage of the orginal Ontario Act.[56] One Wisconsin court emphasized the vulnerable financial position of loggers as follows:

> ...[the] legislation was passed for the protection of laboring men who, by reason of their exigencies, are generally neither able to investigate or insist upon the credit of their employers, nor, without suffering, endure the loss of the wages upon which they depend for existence, and is therefore to receive liberal construction.[57]

Wisconsin courts also acknowledged the importance of loggers to the industry and the labour-intensive nature of their work. James Willard Hurst summarized this idea:

> The law must recognize the critical, operational importance of the continued readiness of laborers to lend the industry their strength and skill; these laws were 'for the protection of those whose labor constitutes the greater part of the value of this kind of property.'[58]

These early statements of legislative purpose suggest that the original logging lien acts were intended to address the economic vulnerability of loggers in somewhat different circumstances than exist today. This becomes apparent by contrasting these early conditions with the development of the modern industry as described in the following section.

D. Transformation of the Logging Industry

Today, the logging industry has been transformed in ways that impact the operation of the Act both directly and indirectly. The logging industry is now a mature industry contained, for the most part, within Ontario's borders.[59] Meanwhile, the Ontario economy has diversified. Manufacturing and the service sector have outpaced the role of primary industries in Ontario just as they have in Canada as a whole.[60]

Rural communities situated within or near forests are particularly dependent on the forest industry for their economic base. Logging is also an important source of work for Aboriginal Ontarians.

Nevertheless, the forest industry remains important to Ontario's economy, particularly in the North. In 2010, revenues from Ontario wood products amounted to more than $11 billion.[61] In 2011, the forest industry provided 53,500 jobs, making up approximately 1.2 per cent of all Ontario jobs.[62] Rural communities situated within or near forests are particularly dependent on the forest industry for their economic base.[63] Logging is also an important source of work for Aboriginal Ontarians. In 2005, it was estimated that between one-half to two-thirds of Ontario First Nations were actively involved in forest sector activities.[64]

The process of tree harvesting bears little resemblance to that in 1891. Logging was gradually mechanized after the Second World War. First to be introduced was the chainsaw which dramatically increased the productivity of cutters. These early chainsaws tended to be temperamental and companies found that selling them to loggers provided loggers with the incentive to keep them in good repair. Loggers were willing to buy them because of the increased piece-work earnings to be made.[65]

The introduction of mechanical skidders followed and these changed the logging industry forever. No longer were loggers reliant on winter conditions in order to transport logs. Skidding and hauling could take place year round. In fact, the high cost of these machines made it essential to use them for as much of the year as possible. As a result, the seasonal cycle of logging passed away and logging became a permanent career.[66] Loggers increasingly established homes in the north with their families. For the most part, bush camps became a thing of the past.

Mechanized harvesters were introduced in the 1960s and 1970s. These also resulted in dramatic changes to the nature of logging work. Cutters who had once wielded a saw now sat in a huge vehicle and manipulated levers and joysticks while mechanical claws and enormous cutting shears did the work of felling trees. Increasingly, companies looked for employees with the manual dexterity and depth perception to operate the machinery as well as the mechanical skills to repair it.[67] Logging became an occupation not dissimilar to factory work.[68] Fewer workers were needed and the number of Ontario loggers gradually dropped from approximately 40,000 in the late 1940s to just over 7,000 in 2006 and only 3,700 in 2010.[69]

Between the 1950s and 1980s, loggers increasingly became owner-operators of their machinery and began to contract with lumber companies as independent contractors rather than employees.[70] Lumber companies encouraged loggers to purchase their own skidders much as they had done with chainsaws. This reduced the capital outlay required to mechanize skidding operations and was thought to promote higher productivity in workers. It also allowed companies to avoid the cost of employee benefits and reduced the cost of supervising a workforce. Owner-operators were offered higher piece rates and, in some cases, companies gave owner-operators preferred stands (areas of forest within which to harvest). This was intended to partially offset the risk associated with the new machines. Because of the higher investment assumed by owner-operators, they also tended to receive preferred tenure (they were hired first and fired last).[71]

The transition from logging employees to independent contractors was not uncontroversial. In the late 1970s and early 1980s, the Lumber and Saw Union fought the trend, arguing that loggers would become "slaves to their machine".[72] From the companies' perspective, the issue was whether owner-operators would be sufficiently commercially sustainable (in spite of high interest rates and uncertain contracts) to provide a reliable supply of lumber.[73]

Today the vast majority of Ontario loggers operate as independent contractors. These are typically small incorporated businesses that are family-run with the help of a few employees.[74] Businesses own their own equipment subject to equipment loans. The high cost of the equipment and the need to maintain monthly loan payments means that many loggers have few capital reserves.

As independent contractors, loggers no longer receive a wage for their labour but, rather, a contract price based on the amount of wood that they deliver to the mill.

It is unclear exactly how many logging employees remain in the industry. The mills do not employ many loggers directly. Those that remain tend to be unionized but unionization is gradually dying out. Some forest product companies have hired contractors to supervise their remaining unionized logging employees as a first step in outsourcing their logging operations. However, it is clear that these remaining employees are the exception and the logging industry is predominantly made up of independent contractors.

As independent contractors, loggers no longer receive a wage for their labour but, rather, a contract price based on the amount of wood that they deliver to the mill. It has been estimated that labour represents approximately 20 to 30 per cent of this contract price with the remainder covering equipment costs.[75]

The industry has become fragmented with general contractors hiring subcontractors to carry out specific functions in the harvesting process. Typically, there is not a significant difference in the business structure of these contractors and subcontractors. Large contractors will own most of the equipment and will subcontract work to individuals and smaller businesses owning, perhaps, one machine. However, general contractors tend to be in the bush as well, either doing part of the work directly or supervising the subcontractors.

The risk of non-payment assumed by modern logging contractors is quite distinct from the risks assumed by 19th century loggers. Working capital is no longer as scarce in the modern industry. Forest products companies are frequently large multinational corporations able to access financing at competitive rates. And these companies have mills operating in Ontario. No longer is there a risk of wood being taken across the border into Michigan or elsewhere.[76] Furthermore, modern loggers need not wait until the end of the season for payment. The process of wood being cut, skidded, chipped and delivered to the mill typically takes less than a week. Contractors are usually paid within a couple of weeks afterwards.

However, modern loggers continue to be of critical, operational importance to the industry and they do face other commercial risks. They are still ill-equipped to cover their losses should they not receive payment. And payment may take longer depending on the logger's position in the supply chain. Since payment is typically due only on delivery of the wood to the mill gate, subcontractors involved early in the harvesting process may end up waiting several weeks for payment. Furthermore, mills sometimes reserve the right to reject wood at the mill gate and, therefore, may have no obligation to pay the general contractor until the wood is accepted.

Like many commodity-based industries, the health of the forest industry fluctuates with the economy. From approximately 2005 to 2008, Ontario's forest industry experienced a significant downturn as a result of a number of factors including the increased value of the Canadian dollar, the US housing crisis, and a reduction in demand for newsprint. The downturn affected every segment of the industry including logging. For example, between 2004 and 2008, annual harvesting levels in Ontario dropped by 43 per cent. In 2008, only 13 million cubic metres of wood was harvested from Ontario forests out of an available 31 million cubic metres.[77] During this period, forest-related employment (including wood product and pulp and paper manufacturing) deteriorated and approximately 67 forest-based communities were put at risk.[78] Logging work was affected particularly hard. Canada-wide statistics show a 6.4 per cent annual decrease in forestry services and logging employment between 2001 and 2011.[79] During this downturn, a number of forest product companies became insolvent and this resulted in several mill closures. The industry has rebounded since that time. However, the possibility of insolvency remains the primary risk of logging contractors not being paid.

Because logs are transformed into wood products so quickly, a lien over specific logs has a limited lifespan and its value may be negligible.

E. Impact of the Modern Logging Industry on the *Forestry Workers Lien for Wages Act*

Certain characteristics of the modern logging industry are of particular significance in considering a future role for FWLWA in Ontario. This section discusses three of these: the technologically advanced harvesting practices now employed, the different commercial relationship existing between loggers and forest product companies and the forest licencing regime regulating the management of Crown forests and the sale of timber in the province. Each of these impacts the continued viability of a forestry worker lien regime.

1. The Applicability of a Lien Remedy to Modern Harvesting Practices

A lien is a charge on a property interest and, as such, is only as valuable as the property to which it attaches. The scheme of the Act is for a lien to attach to specific logs or timber worked on by the logger claiming the lien. This was a valuable remedy in 1891 when logs lay in the bush for months waiting for the spring thaw and then would be driven downstream to the mill for processing. The logs remained in original form and were identifiable for a substantial period of time during which the logger could assert his lien. However, the mechanization of logging has meant that logs no longer lie in the bush for a significant length of time. Hauling is an ongoing, year round practice and logs are typically delivered to the mill within a week or so.[80] The introduction of mobile "chippers" has meant that some wood processing takes place in the bush immediately after harvesting. Because logs are transformed into wood products so quickly, a lien over specific logs has a limited lifespan and its value may be negligible.[81]

The limitations of a proprietary lien remedy in the modern logging industry were evident in the *Buchanan* case. Some of the wood at issue in that case had been processed in the bush

into woodchips. The "logs or timber" over which the logger could assert a lien claim had effectively disappeared. Madam Justice Pierce interpreted the definition of "logs or timber" to include the woodchips, thereby preserving the lien. However, in doing so, she was required to stretch the Act by characterizing wood chips as pulpwood "cut very small".[82]

The status of woodchips under the Act was resolved in the *Buchanan* decision. However, the case reflects a larger problem with the Act. Is a statutory lien regime still appropriate protection for loggers where their output may be identifiable property only for a short time?

Forestry worker liens may disappear more quickly than they once did, but they also may come into being later than they once did. As noted above, mills sometimes reserve the right to reject wood depending on their needs from time to time. Therefore, a mill may not have any obligation to pay for the general contractor's services until the wood is accepted at the mill gate. If so, a lien remedy will be of little use to the contractor. The situation is a bit different with subcontractors since payment will typically become due when the subcontract is complete or, in other words, before the wood reaches the mill.

2. The Changed Relationship Between Forest Product Companies and Loggers

In Buchanan*, the amounts claimed by logging contractors ranged from just under $20,000 to almost $1 million.*

The trend for forest product companies to outsource logging work to independent contractors gives rise to questions about whether loggers continue to need the protection provided by the Act now that they are, for the most part, small business owners.

From a legal perspective, logging contractors are true independent contractors. They control their work conditions and their output, they own their own equipment, they hire their own employees or subcontractors, and they bear the financial risk that their work will be profitable.[83] In many cases, the logger is incorporated and is carrying a large equipment loan. Therefore, a contract to harvest wood may resemble a supply contract more than it does a labour contract and a logger may resemble a trade creditor more than a labourer as originally contemplated by the Act. This is also apparent in the magnitude of the amounts involved which may be far in excess of a typical claim for unpaid wages. In *Buchanan*, the amounts claimed by logging contractors ranged from just under $20,000 to almost $1 million.[84] These contract prices typically cover the supply of machinery, other supplies and profit in addition to labour costs.

However, logging contractors continue to be exposed to commercial risk. Transportation costs prevent them from delivering wood to a wide market. Therefore, they are economically dependent on one or more local mills with which they may develop long-term relationships. A Quebec study found that more than 80 per cent of logging subcontractors relied on three or fewer customers for their entire turnover.[85]

Furthermore, logging businesses often operate fairly close to the margin. They typically carry large equipment loans which increases their reliance on the mills hiring them. They are paid only on delivery of wood but, meanwhile, they may generate high receivables in a short time. One contractor commented during consultations that they are earning less today than they were 15 years ago. Rising fuel costs was a particular complaint. For many small operators, the distance between a load of logs in the bush and the mill is a key determinant of profitability.

Loggers may experience not only commercial dependency but a degree of social dependency as well. For the most part, the logging industry is situated in small close-knit communities. Many logging operations are family-run. In contrast, most mills are operated by multi-national

forest product companies. All these factors might decrease the bargaining power that a logger has in contracting with a mill.

As independent contractors, loggers are relatively isolated in a political sense. They are not unionized.[86] In some jurisdictions, loggers associations have been created as a means of protecting loggers' interests through collective action.[87] However, there are no such associations currently operating in Ontario. There were efforts to establish a loggers association in the early 2000s but this did not survive.

These features of the contemporary logging industry may result in unequal power relationships between logging contractors and forest product companies. A similar power imbalance has been observed in the Oregon logging industry:

> ...[C]ontracts are fundamentally not a meeting of equals in exchange. Rather, they are an instrument of power used to achieve flexibility via shorter term commitments to gyppo loggers [independent contractors], and at the same time to pursue integration and control via specific contract terms, various asymmetries in regional market competition, and differential control of assets....[88]

A 2001 British Columbia government report described a similar situation in that jurisdiction:

> The consolidation of the forest sector during the last decade has resulted in fewer larger companies. This consolidation has effectively reduced the number of companies with which a contractor may enter into agreements. This reduction in contracting opportunities in turn provides the licencee with an ability to make *take it or leave it* offers as they know the contractor has very limited opportunity to find alternative sources of work.[89]

In an older BC study, the author found that small logging contractors were "entirely dependent on big companies for contracts" and that they could be "broken and put out of business by their employers". These contractors took for granted their "inferior bargaining position".[90]

The possibility of a mill closing as a result of insolvency is another risk for Ontario loggers. Logging contractors suffered during the recent recession and many went out of business, in part because of their business structure. With only a few customers, their fortunes are closely tied to those of the mills that they supply. And their small size and large capital costs mean that they are less resilient in difficult economic times.

Even after an insolvency event, loggers may continue to be disadvantaged. In consultations, the LCO heard about public subsidies being paid to forest product companies to bring a mill back into operation while amounts owing to loggers remain unpaid:

> After they reorganized the company, the head guys got a big bonus for doing a good job reorganizing for less... easy when you don't pay your contractors for 2 weeks. We had a scale of which truck was hauling our wood... but we still never got paid. I know it's the same for all payables but it is frustrating to see that they got bonuses while we have to keep our loss....[91]

Some logging contractors have more equitable business relationships with the mills that hire them. This is particularly so in the southern part of the province where contractors are more likely to be dealing with a small local mill or private woodlot owner than a multi-national

forest products company.[92] However, the predominant state of affairs in the industry is that loggers are economically reliant on the mills they supply.

It is fair to say, then, that Ontario's logging contractors are most often not in a position to negotiate individualized contract terms.[93] In practice, mills set a price per cubic metre of wood harvested and loggers "take it or leave it". In these circumstances, it is not realistic to expect loggers to protect themselves through consensual security agreements. As Professor Ronald C.C. Cuming has explained in the context of repairer, storer and carrier liens:

> There are transactional costs associated with the use of security agreements, particularly those under which the debtor remains in possession of the collateral, and a degree of legal sophistication not generally found among service providers, is required. Since the amount of credit involved in a single transaction involving the supply of services is likely to be small, the transactional costs, including the costs of acquiring the necessary knowledge of secured financing law, are likely to be disproportionate to the benefits derived from acquiring a security interest. The practical result would be that many service providers would be unsecured creditors.
>
> Inherent in this reasoning is the conclusion that liens should be provided by law only to suppliers who generally grant small amounts of credit and who do not have cost-effective alternative methods of securing payment.[94]

...[T]he ongoing economic dependence of forestry workers may not, on its own, indicate a continued need for a statutory lien regime.

Recalling that some of the foresty worker lien claims filed in the Buchanan insolvency approached $1 million, this reasoning suggests that the ongoing economic dependence of forestry workers may not, on its own, indicate a continued need for a statutory lien regime. However, in a law reform project in 1992, the Law Reform Commission of British Columbia (LRCBC) pointed to the lack of consensual security agreements in the forest industry as a reason to retain statutory security for forestry workers in that jurisdiction:

> Those who participate in the forest industry other than as wage earners might view the repeal of the Act as a loss, but as the Act is currently framed their right to assert lien claims rests on a very dubious and fragile basis. To the extent that these participants are able to use the legislation as a lever to induce payment, it might be asked why they should be entitled to a coercive collective device which is denied other players in the economy. This line of argument also suggests that repeal may be appropriate.
>
> While we would welcome submissions directed at this issue, our provisional view is that some form of statutory security should continue to be available for those who work in the forest industry. They work in an environment where consensual security is not widely used and it is only fair that both workers and contractors have protection of a kind that the *Woodworker Lien Act* provides.[95]

3. The Impact of Ontario's Forest Licencing Regime on the Logging Industry

Approximately 80 per cent of Ontario forests are owned by the provincial Crown and licenced for the purpose of commercial harvesting.[96] The licencing regime under which the Ministry of Natural Resources (MNR) regulates these forests also impacts loggers' contractual relationships and, therefore, the viability of a lien regime.

At the time that the Act was introduced, Ontario had a rudimentary licencing system. Lumbermen would obtain a licence to harvest a parcel of Crown land and would hire loggers to carry out operations on their behalf. Lumbermen paid fees to the Crown based on the volume of trees cut as well as, in some cases, a land rental fee.[97] As licencee, the lumber company had a property interest in the harvested logs.[98] The lumber company was also responsible for the loggers' wages whether through its employee (the camp foreman) or its local agent (a jobber). A lien regime was straightforward in these circumstances. The logger had a direct service contract (whether as employee or independent contractor) with a licencee whose property interest in the harvested logs constituted the security for the amount owing under that contract.

Today, Ontario's forest licencing regime is more complex and new models are emerging which affect how and with whom loggers contract. Under the *Crown Forest Sustainability Act, 1994* (CFSA), the MNR grants sustainable forest licences (SFLs) which are issued for 20 years and may be renewed.[99] Of the 36 SFLs in Ontario (as of 2011), 18 are single-entity SFLs held by forest product companies with wood-using mills.[100] In these single-entity SFLs, contracting takes place much as it did at the turn of the century. The licenced forest product companies undertake forest management responsibilities as an adjunct to their commercial logging operations. They have a property interest in the forest resources (subject to the obligation to pay Crown stumpage fees) and they hire logging contractors to harvest on their licenced property. It is the licencee's property interest in the harvested wood that makes it possible for contractors and subcontractors to assert a lien claim against the wood in the event of non-payment.

...[I]n other cases, the shareholders of coop [sustainable forest licenses] are logging contractors and they are issued [Forest Resource Licences] directly. These contractors carry out harvesting on their own account and sell their wood to third party forest product companies.

More recently, Ontario policy is to limit the involvement of forest product companies in the management of Crown forests in order to separate the commercial side of the industry from the forest management side.[101] The other 18 SFLs are held by cooperatives involved in forest management only. These coop SFLs may have a variety of shareholders, including commercial operators such as forest product companies, local sawmills and logging contractors. The relationships between these shareholders vary. In some cases, the controlling shareholder is a forest products company. It will be granted a Forest Resource Licence (FRL) authorizing it to harvest on the licenced property and then will hire logging contractors to carry out the harvesting. However, in other cases, the shareholders of coop SFLs are logging contractors and they are issued FRLs directly. These contractors carry out harvesting on their own account and sell their wood to third party forest product companies.[102] In this latter model, logging contractors are no longer in a service contract with a forest product company and the forest product company does not have any property interest in the wood until it is purchased at the mill gate. In this scenario, a lien claim makes little sense. Subcontractors, on the other hand, continue to have a service contract with the contractor and, therefore (assuming that subcontractors are covered by the Act), a lien remedy against the contractor continues to protect their interests. In any event, the myriad of licencing and contracting arrangements possible in Ontario's modern forest licencing regime complicates the application of the Act and, in some circumstances, renders it inappropriate.[103]

Another consequence of Ontario's modern forest licencing policy is that it may go some way to alleviating the commercial power imbalance existing between contractors and forest product companies. Contractors who participate in collective ownership of a licence may have more bargaining power over the placement of the wood that they harvest. For example, logger shareholders in a coop SFL may sell their wood in bulk, allowing them to negotiate with different mills. An industry newspaper story quoted one shareholder logger as stating, "[b]ecause of the volume, we have had access to all kinds of markets that we might not

have had as independent loggers".[104] In consultations, more than one industry stakeholder suggested that one of the purposes of the cooperative licencing structure was to prevent any one segment of the industry from controlling the agenda.[105]

On the other hand, any such benefits resulting from forest licencing reform will take time. Meanwhile, many loggers remain at a disadvantage, perhaps more in practice than is apparent on paper. The licencing relationship between the Crown, mills and contractors can complicate this. For example, the LCO heard in consultations that, in some cases, contractors are jointly responsible for the payment of Crown stumpage fees. Also, mills control "scaling" (weighing the wood at the mill gate to determine the payment due). Scaling practices can be controversial with disputes over the measures used to scale wood for different purposes (such as calculating payment to contractors versus calculating Crown stumpage fees).

The development of Ontario's forest licencing regime also calls into question whether the commercial lien regime in the current Act remains the best governance model for protecting today's loggers. Unlike in 1891, almost every aspect of today's logging industry is already affected by Ontario's forest licencing regime. Although the contractual relationship between licencees, contractors and subcontractors is not currently regulated, this would certainly be possible. For example, British Columbia has enacted a *Timber Harvesting Contract and Subcontract Regulation* which imposes certain conditions on the contractual relationship between licencees and contractors/subcontractors.[106] One of the core objectives of the regulation is to provide financial and job security for contractors and subcontractors. This purpose has been expressed as follows:

> The underlying policy of the Regulation is to protect and promote the interests of the independent contract logging community. This community is generally comprised of small and medium sized businesses – anything from a single operator with a piece of equipment up to a relatively large outfit employing dozens of people and carrying on several integrated timber harvesting operations simultaneously. A common thread amongst these businesses is that they invest large amounts of money in supplies and equipment, and are extremely dependent upon license holders (i.e., forest companies with replaceable tenures under the Forest Act) for their work. In this context, the evolving policy behind the Regulation has been directed at:
>
> (1) protecting the contract logging community generally by preserving its source of work;
> (2) redressing the imbalance of bargaining power experienced by individual contractors as a result of their dependent relationship upon license holders.[107]

The BC Regulation requires that, in certain circumstances, licencees offer replacement contracts to their contractors and contractors offer replacement subcontracts to their subcontractors. Replacement contracts guarantee a fixed amount of work for the logger subject to several exceptions set out in the Regulation. The Regulation also mandates some of the other terms of these contracts, including provision for arbitration in the event of a dispute. The practical effectiveness of the Regulation may have been limited to some extent by a 2004 amendment which provides that most of its provisions, including the provision for replaceable contracts, may be waived by the parties.[108]

The BC Regulation does not regulate security interests nor does it provide a mechanism for contractors to recover amounts owing to them. However, there might be some benefit in Ontario to introducing any new financial protections for loggers in the form of a regulation

under the CFSA. Direct regulation under the CFSA would signal that this is an industry-specific initiative that is intended to be an exception to Ontario's overall commercial law regime. Also, given the dramatic changes to the relationship between loggers and licencees since 1891, MNR may wish to explore alternative means of combating unequal bargaining power in the industry. A regulation under the CFSA would allow for this issue to be addressed in the context of the broader regulatory environment affecting both loggers and licencees.

F. The *Forestry Workers Lien for Wages Act* is Incompatible with the Modern Logging Industry

FWLWA was designed to respond to an industry model operating over a century ago. However, as explained above, almost everything about the industry has changed. It is apparent that the Act is no longer functional as is. It is equally obvious that superficial amendments to the existing structure of the Act would be inadequate to bring it in line with modern harvesting methods and labour practices.[109] In fact, the preceding examination reveals a number of factors suggesting that the Act has outlived its usefulness altogether:

It seems clear that most of Ontario's logging contractors remain economically dependent on the mills they supply. The pertinent issue is whether this sets logging contractors apart from other small contractors operating in Ontario's economy....

- The original legislative intent behind the Act contemplated a very different industry from that in operation today. There is no longer concern that American lumbermen are using the border to shield themselves from their payment obligations. No longer are loggers doing an entire season's work in the bush without payment. The risk of non-payment has diminished substantially in the modern context.
- The value of a lien remedy tied to the specific logs or timber worked on is considerably reduced now that logs are processed more quickly.
- As independent contractors, loggers have a fundamentally different relationship with the mills than they did in 1891. They charge a contract price that covers their business costs over and above their labour and, with the aid of modern equipment, they can harvest enough wood to generate receivables in the hundreds of thousands of dollars. Although it is apparent that elements of economic vulnerability remain, these small business owners are far from the casual seasonal employees of 1891.
- The Act is premised on a service contract existing between a mill and a logging contractor. Today, as a result of forest licencing reform, some loggers harvest on their own account and sell logs on the open market. A lien regime makes less sense where a sale of goods takes place rather than a sale of services.
- Ontario's licencing regime has, to some extent, supplanted the role of the Act in protecting loggers in their contractual relationships with mills. Some loggers are now participating in the collective ownership of forest management companies that control decisions about the logging and regeneration of Ontario forests. The future direction of licencing reform is to expand on this trend.

These factors demonstrate that a forestry worker lien regime is no longer a logical legislative tool for protecting Ontario loggers in 2013 and, in some circumstances, is clearly incompatible with the way that the contemporary logging industry functions. They also call into question whether there is a continuing commercial need for FWLWA. It may be that not only the language of the Act is outdated but also the very concept of an industry-specific statutory lien regime in favour of logging contractors.[110]

There are two policy rationales that might be said to support the continued existence of a forestry worker lien regime. First is that the degree of financial risk assumed by logging contractors justifies their statutory protection. It seems clear that most of Ontario's logging contractors remain economically dependent on the mills they supply. The pertinent issue is whether this sets logging contractors apart from other small contractors operating in Ontario's economy (whether because of the absence of consensual security agreements, the political importance of forest resources or some other policy reason) such that they should continue to be statutorily protected at the expense of other industry players. This became a recurring theme during the LCO consultations. Several stakeholders asked why logging contractors should have a lien remedy when other small independent contractors do not. Why should the owner/operator of a feller buncher be able to claim a lien but the business supplying fuel to the feller buncher not have the same protection? Or, if loggers are to have a lien, why shouldn't sawmills also have a lien against the logs that they deliver to pulp mills for further processing? A number of stakeholders acknowledged an element of arbitrariness here.

Courts have traditionally had difficulty distinguishing between contractors engaged in "labour" on "logs or timber" for the purpose of the Act, and contractors who are only tangentially connected to the industry.[111] This gives rise to a concern for commercial faimess, particularly in the case of insolvency which is generally a zero-sum game. Super-priority for logging contractors means that other contractors only tangentially connected to the industry may lose out. In 1891, Ontario's policy to support resource harvesting may have justified drawing this boundary between loggers and others in the supply chain leading to finished wood products. Today, the boundary line is no longer so apparent.

This same concern about equity can be extended to the Ontario economy more broadly. Outsourcing is a widespread labour market trend and logging contractors have counterparts in other industries such as the automotive industry.[112] This industry is also fragmented with small independent contractors operating several contractual links away from the Big Three manufacturers, thereby making it difficult to assess credit risk. The question is whether preferential statutory protection for logging contractors over small owner-operators in other industries is appropriate in this broader economic context.

A similar point was raised by the LRCBC in a 1972 report on that province's *Mechanics' Lien Act:*

> The aim of the Act is to assist those who provide materials and services on a construction project in obtaining payment. But that is not in itself a sufficient analysis of the *raison d'être* of the Act. There are many classes of persons to whom others incur debts and yet the law does not grant them any special rights of security or priority. And indeed it could not do so. If the law sought to give the same or an equivalent type of protection to all persons to whom others incurred debts, it would succeed in protecting no one. Protection of one class of creditors can be purchased only at the price of rendering another class more vulnerable. Protection for everyone is protection for no one. The fundamental question is, therefore, why a particular class of persons engaged in the construction industry enjoys a protection over and above what is given to creditors generally?[113]

And further on:

> From the point of view of policy, a simple argument against the continued existence of the Act is that it gives a measure of protection to a particular class of people, which not only does not exist in the case of other sectors of

> the community, but which actually operates to the detriment of other sectors of the community. …[T]he persons who suffer directly are the other general creditors of the person whose default precipitated filing of liens.[114]

In spite of this reasoning, the LRCBC decided not to recommend repeal of the *Mechanics' Lien Act* since there was not sufficient evidence before it on the potential commercial consequences of repeal. However, the same question of commercial fairness arises in considering the relative position of Ontario's logging contractors within the broader economy.

Unlike a repair person, a logger does not work on a finished product on behalf of its owner. Rather, a logger provides the first input in a supply chain that will eventually result in a finished wood product. Along this supply chain there are several others who will also contribute value to the finished wood product.

A second policy rationale arguably supporting the continued existence of the Act is that traditionally underlying commercial lien regimes. Commercial lienholders typically add new value to the property (or preserve its value) which benefits all those with an interest in the property including earlier secured parties.[115] Loggers similarly add value to an eventual wood product but in a different context.[116] Unlike a repair person, a logger does not work on a finished product on behalf of its owner. Rather, a logger provides the first input in a supply chain that will eventually result in a finished wood product.[117] Along this supply chain there are several others who will also contribute value to the finished wood product. It is not feasible, nor would it make sense, to provide a lien to everyone along this value chain.[118] For example, silviculturists are involved in tree planting and forest regeneration. It could be argued that these forest professionals are prior even to loggers in the supply chain. However, there is no lien protecting their interests. Again, there is an element of arbitrariness here.

Having examined the operation of FWLWA in its historical and modern industrial context, the next chapter of the Report considers how FWLWA relates to the broader commercial law framework in Ontario.

III. INTERPLAY WITH ONTARIO'S COMMERCIAL LAW FRAMEWORK

A. Statutory Wage Protections

Ontario's original *Woodman's Lien for Wages Act* provided a lien only to logging employees but the Act was amended early on to extend this protection to logging contractors as well.[119] It made sense in the early 20th century to extend protection to both employees and contractors since they were similarly engaged in physical labour and neither had effective means of recovering money owed to them.[120] In contrast, mill employees have never been covered by the Act, even before the introduction of other statutory wage protections.[121] Some commentators have suggested that this is because mill employees are in a better position to assess the financial health of the company before investing their labour.[122]

Today, virtually all loggers are independent contractors rather than employees. However, the Act continues to apply to logging employees and, in this respect, it arguably impacts the balance of interests reflected in modern statutory wage protections.[123] Since 1969, Ontario has had an administrative regime for recovering unpaid wages and this is currently contained in the *Employment Standards Act, 2000* (ESA).[124] In certain circumstances, the ESA also provides for employees to recover wages against directors of an employer corporation.[125]

...[I]n the face of these modern wage protections, this field is well occupied and there is no longer reason to single out logging employees for additional industry-specific protection through a lien regime.

Legislation also protects employees by prioritizing their claims for unpaid wages in relation to other creditors. Under the ESA, an employee's claim for unpaid wages has priority over other unsecured claims up to a maximum of $10,000.[126] In a bankruptcy or receivership, this priority scheme is replaced by that set out in the *Bankruptcy and Insolvency Act* (BIA).[127] Under subsections 81.3 and 81.4 of the BIA, claims for unpaid wages are given a high priority but they are limited to wages earned in the 6 months prior to the bankruptcy and are capped at $2,000.[128]

Most recently, the federal government has introduced the *Wage Earners Protection Program Act* (WEPPA) which allows employees affected by a bankruptcy or receivership to apply directly to government for compensation in relation to unpaid wages up to a maximum of approximately $3,500.[129] The government is then subrogated to the employee's claim for unpaid wages under the BIA.

There is a strong argument to be made that, in the face of these modern wage protections, this field is well occupied and there is no longer reason to single out logging employees for additional industry-specific protection through a lien regime.[130] Nor is it fair to do so. There is no cap on the amount that can be liened under the Act so that logging employees can potentially recover more than the $10,000 maximum recovery allowed by the ESA or the approximately $3,500 recoverable under WEPPA.

And yet if logging employees are no longer to have a lien remedy, it is questionable whether logging contractors should continue to have this remedy. The "labour" contemplated by the 1891 Act was physical labour. In the pre-mechanized industry, it was logical to include contractors within the scope of the Act since early contractors were, in fact, labourers. Today, however, labour represents only 20 to 30 per cent of the typical harvesting contract price, with the remainder reflecting profit and equipment costs, and it is somewhat incongruous for modern contractors to continue to enjoy these statutory rights. At best, the Act is poorly coordinated with Ontario's other statutory wage protections.

B. The *Personal Property Security Act*

The Act came into force long before the advent of a personal property security regime in Ontario. Although a number of security devices such as chattel mortgages and conditional sales contracts existed in 1891, there was no central mechanism for ordering these interests. The result was a fragmented and confusing legal regime which complicated commercial relationships within the business community.[131] The addition of one more security device protecting a special interest group, this time loggers, did not have a significant impact on the commercial scene.

This changed in 1976 with the introduction of the *Personal Property Security Act* (PPSA) and the adoption of a central registry and first-to-register priority scheme.[132] Under the PPSA, creditors extending relatively large amounts of credit may protect themselves by negotiating a security agreement which provides them with a security interest in the debtor's personal property.[133] The creditor may then perfect the security interest by registering a financing statement in the Personal Property Security Registry (PPSR or the Registry). A financing statement provides notice of a potential security interest in collateral but does not constitute proof of that interest. Once perfected through registration, a security interest is easily discoverable by searching the PPSR. The relative priority of security interests is generally determined by the order of registration regardless of actual notice of the security interest. Therefore, a registered security interest (or one perfected through possession) is assured priority over subsequent interests.[134] This centralized scheme provides the predictability necessary for commercial parties to manage their credit risk.

...[T]he [FWLWA] is inconsistent with the spirit of the [Personal Property Security Act] *insofar as it does not provide for third parties to have notice of prior security interests existing in collateral.*

Liens arising by statute or rule of law are excluded from the scope of the PPSA.[135] Therefore, the PPSA has no direct impact on forestry worker liens created under the Act and, in fact, the PPSA confirms the super-priority that the Act accords to forestry worker liens.[136] However, the Act is inconsistent with the spirit of the PPSA insofar as it does not provide for third parties to have notice of prior security interests existing in collateral. According to Professor Cuming,

> Canadian law reflects a long-standing commitment to the principle that some form of public registration should be a precondition to the effectiveness of a non-possessory security interest against third parties.[137]

It was this concern for third party creditors that led to the integration of repair and storage liens into the PPSR in 1989.[138] Although forestry worker liens must be registered in the local Superior Court office, there is no central registry providing third parties with a reliable means of locating prior liens against the wood. This leaves third parties in doubt of the value of their security interest.

The Act also undermines the PPSA's first-to-register rule by providing loggers with a super-priority interest that benefits them at the expense of creditors secured under the PPSA as well as unsecured creditors.[139] And the Act provides that a lien is effective against a subsequent third party purchaser of the logs.[140] This is out of keeping with the PPSA principle that third party buyers in the ordinary course should be able to take collateral free from previously perfected security interests.[141]

Forestry worker liens are not the only statutory lien left out of the PPSR. Liens, and other non-consensual security interests such as deemed statutory trusts, are popular legislative tools for securing payments that are deemed to be of particular public interest.[142] There are numerous Crown liens securing public monies owing including, for example, a lien

over the stumpage fees owing under Ontario's forest licencing regime.[143] For the most part, these liens are also independent of the PPSA system and third party creditors do not have the benefit of the PPSR. However, the philosophy driving modern secured transactions reform has been to harmonize, where appropriate, disparate forms of security with the principles underlying the PPSA regime in order to promote certainty and predictability in the marketplace.[144] As will be seen below, other reform projects to modernize statutory lien law have recognized the value of integrating liens with the PPSA where possible.[145]

C. Bankruptcy and Insolvency

In modern times, FWLWA is most likely to be invoked in cases of insolvency and in this context it is subject to federal bankruptcy and insolvency law.[146] Most provincial statutory liens are effective under the BIA and forestry worker liens should be no different.[147] This is because the BIA defines "secured creditor" to include a statutory lienholder.[148] As such, a lien claimant has a prior claim to the secured property exempting it from the distribution scheme in section 136.[149] Construction liens and repair liens are effective under the BIA on the same reasoning.[150]

Now that the [Bankruptcy and Insolvency Act] *has become a vehicle for providing statutory protection to these classes of trade creditors in addition to unpaid wage earners, there is an issue as to how this regime corresponds to the distinct and more generous lien regime for loggers under the provincial* [Forestry Workers Lien for Wages Act].

In certain circumstances, federal law will override the super-priority of forestry worker liens under the Act. For example, in a case involving a conflict between woodworker lien claims and claims under the *Income Tax Act* and *Excise Tax Act*, the British Columbia Court of Appeal held that woodworker liens were subordinate to the federal claims.[151] Nevertheless, FWLWA continues to fit within the modern federal bankruptcy and insolvency regime for most purposes.

A broader issue is whether the policies underlying these two statutory regimes are compatible. The BIA creates two classes of preferred creditors that are loosely analogous to logging contractors: unpaid suppliers of goods and suppliers of agricultural products or products from the sea.[152] As with logging contractors under the Act, the BIA provides that these creditors rank ahead of the distribution scheme in section 136. However, unlike the Act, the BIA limits the scope of these claims. Unpaid suppliers of goods may repossess goods delivered within 30 days before bankruptcy and only if they remain in identifiable form. Unpaid farmers, fishermen and aquaculturists have security over the assets of the bankrupt in respect of goods supplied within 15 days before bankruptcy.

Agricultural producers, in particular, bear some similarities to loggers and the rationale for protecting agricultural producers under the BIA is similar to the rationale for extending lien protection to loggers. In both cases, suppliers produce a good that is not easily identifiable and is quickly processed and sold. In both cases, a supplier's receivables from a single bankrupt company may represent a large proportion of annual income.[153] Now that the BIA has become a vehicle for providing statutory protection to these classes of trade creditors in addition to unpaid wage earners, there is an issue as to how this regime corresponds to the distinct and more generous lien regime for loggers under the provincial FWLWA.

IV. SPECIFIC ISSUES RAISED BY THE *FORESTRY WORKERS LIEN FOR WAGES ACT*

As a result of the shifting legal and commercial context for the *Forestry Workers Lien for Wages Act*, a lien regime is no longer an appropriate choice for regulating the logging industry. This chapter explores some of the more specific legal issues raised by the Act that would have to be addressed as part of any reform exercise.

A. Determining Who is Entitled to a Lien

It appears that a key reason the current Act is not frequently used is a lack of clarity over its scope. The LCO heard in consultations that workers are sometimes told that the work they do does not fall within the Act. They do not bother filing a lien since most do not have the resources for a court application to determine whether or not they are protected.

There are some inherent difficulties in defining the scope of a forestry worker lien regime. Who should be protected? Loggers are part of a supply chain that results in finished wood products. Each member of the supply chain adds value to the eventual product. It is difficult to set boundaries on the protection to be provided by a lien regime without drawing an arbitrary distinction between loggers and other small businesses contributing to the harvesting process. The scope of a lien regime may also be defined in relation to the functions performed by loggers. In *Buchanan*, the Court took a liberal approach, holding that the Act should protect all functions involved in "the chain of production from cutting trees to delivering them to the mill".[154] However, this does not resolve the problem of setting reasonable boundaries on this concept.

It is difficult to set boundaries on the protection to be provided by a lien regime without drawing an arbitrary distinction between loggers and other small businesses contributing to the harvesting process.

Precision in the scope of the Act must be balanced against the value of employing flexible language so as to encompass future logging functions arising from technological advances. In spite of the progressive interpretation adopted in *Buchanan*, the definitions in the current Act are essentially a close-ended list of specific activities and raw wood products with relatively little room for judicial interpretation.

Another definitional issue raised by the Act is its continued application to logging employees; both the few remaining logging employees directly employed by forest product companies and the employees of logging contractors and subcontractors. Direct employees of forest product companies are clearly covered by the current Act and the issue here, as noted above, is whether a lien remedy should continue to be available given the other statutory wage protections in place. This issue is more complicated in the case of indirect employees, that is, the employees of logging contractors and subcontractors. The language of the Act suggests that these indirect employees are also entitled to assert a lien against the owner of the wood independent of any lien filed by their employer. Should these employee claims be permitted or should these employees be required to look to their direct employer for their wages? Again, the nature of the logging industry makes it difficult to set appropriate boundaries to a forestry worker lien regime.

B. The Subcontractor Problem

A key shortcoming of FWLWA is its failure to accommodate the modern practice of contracting out harvesting operations. Licencees typically hire "stump to dump" contractors who then subcontract out various logging functions such as harvesting, skidding or trucking. These subcontractors may, in turn, hire additional subcontractors to carry out more specialized tasks.

Both contractors and subcontractors contribute value to logs or timber as they move along the supply chain from forest to mill. There is no functional distinction between their economic positions that would justify giving contractors lien protection to the exclusion of subcontractors. Furthermore, unless subcontractors are protected alongside contractors, forest product companies may avoid liability by creating subsidiaries to carry out harvesting operations. This problem has been long recognized by the courts. In 1911, a New Brunswick judge found that a subcontractor was entitled to claim a woodworker lien on the following reasoning:

> The act was intended as a protection to workmen who perform labour or services, and in none of its provisions does it differentiate between the case of a woodman working directly for the owner of the lumber, and that of a woodman one stop farther removed, working for a contractor with the owner. To put upon the act any other construction than the learned judge has, would be to defeat entirely the purpose it was intended to serve, i.e., the protection of the wage-earner. For no owner of logs or timber would be likely to voluntarily assume by a direct hiring, the obligation of responsibility for the woodmen's wages, if by contracting with a third party to get out the logs or timber he could altogether avoid responsibility for those wages, and at the same time have his logs freed from the woodmen's liens thereon.[155]

Although it seems clear that subcontractors should be included in a forestry worker lien regime, this complicates the regime since there may be several degrees of separation between the licencee and a particular subcontractor.

Although it seems clear that subcontractors should be included in a forestry worker lien regime, this complicates the regime since there may be several degrees of separation between the licencee and a particular subcontractor. The concern is for the forest product company who pays the general contractor but is, nonetheless, subject to a lien by a subcontractor as a result of the contractor defaulting on its own payments. It is unclear under the existing Act whether subcontractors are entitled to file a lien against an owner with whom they have no contractual relationship. The plain wording of the Act would appear to include subcontractors within its scope. However, an old Supreme Court of Canada decision held otherwise for the very reason that it would be unfair to the owner to expose it to lien claims after having paid the contract price.[156]

The best example of a lien regime operating in a highly fragmented industry is the *Construction Lien Act*.[157] Subcontractors are protected in the construction industry through an elaborate system of holdbacks. Essentially, the owner holds back 10 per cent of the amount payable to the contractor to cover any subcontractor liens. This holdback system extends throughout the contracting pyramid with subcontractors holding back 10 per cent from sub-subcontractors and so forth. A holdback system is effective in allowing for subcontractor lien claims while limiting the owner's exposure. However, it is a complex system which requires industry buy-in. This would be difficult and costly to establish in a smaller industry with informal contracting practices such as the logging industry.

C. Identifying the Property to Which the Lien Attaches

Currently a lien under the Act attaches to "logs or timber" which is defined as a list of products including telegraph poles, railroad ties, tan bark, pulpwood, shingle bolts and staves. This definition is clearly outdated. It includes obsolete products such as tan bark and omits new products such as biomass. As with the definition of "labour", there is little scope for a court to interpret the definition in order to respond to technological change.[158]

Whatever definition is adopted, there is still the problem of ensuring that the property subject to the lien is identifiable to third parties with a potential interest in it. Commercial liens commonly arise in respect of particular articles like vehicles that are unique enough

to be identifiable. This is particularly important in respect of non-possessory liens so that the article may be tracked down even after leaving the possession of the lien claimant. Logs or timber are not easily identifiable. Under the current Act, the lien attaches to the specific wood that the logger has worked on. However, logs are typically mingled with other wood making it difficult to differentiate between them. This problem is exacerbated now that wood is processed very quickly. There may be no clear point at which the wood becomes "not wood". [159]

Closely associated with the problem of identification is the issue of what happens when the wood is processed or sold to a third party. Currently, the Act provides that the lien is enforceable against a third party buyer of wood.[160] As discussed above, this is contrary to modern commercial law norms which prioritize the free transfer of goods.[161]

D. Viability of a Registry System

A registry system providing for third party notice of security interests is a foundational element of the *Personal Property Security Act* (PPSA) and has been adopted in most non-possessory commercial lien regimes as will be discussed below. It would be logical for a reformed forestry worker lien regime to make use of the existing Personal Property Security Registry (PPSR). A particular benefit to the PPSR is that registrations and searches may both be done electronically. This would make it possible for loggers working in northern Ontario to register liens without travelling long distances to the closest Registry office.

...[I]t is questionable whether a registry system would be successful in the context of the logging industry.

There are two ways for a forestry worker lien regime to be integrated into the PPSR system. A parallel but distinct registration process could be set up recognizing the unique nature of forestry worker liens. An example is the *Repair and Storage Lien Act* (RSLA) which was adopted in Ontario in 1989 at the same time that the PPSA was undergoing significant reform.[162] The government took the opportunity to create a dedicated registration process for RSLA claims, but one using the Registry. Alternatively, forestry worker lien claims could be registered by way of a financing statement just as are PPSA security interests. The PPSA specifically provides that the Registry may be used to register other forms of statutory security interests.[163] Other statutory liens in Ontario such as those for recovery of family support enforcement orders are currently registered in this manner.[164] Given the information technology costs of adapting the PPSR to recognize claims filed under a new statute, as well as the relatively small number of forestry worker liens currently filed, this second option would be more appropriate in the logging context.

However, it is questionable whether a registry system would be successful in the context of the logging industry. A key concern would be to ensure the accuracy of financing statements, particularly in identifying the debtor. Under the PPSA, the definition of debtor includes both a person who "owes payment or other performance of the obligation secured" and a person who "owns or has rights in the collateral" depending on the context.[165] For the purpose of registering a forestry worker lien, the debtor would be the licencee even where the logger's direct contractual relationship is with a contractor or subcontractor.[166] This ambiguity in the concept of debtor complicates the use of the PPSR in the logging context where loggers are often dealing with someone other than the owner of the wood and where the licencing regime obscures ownership.

Where a logger was able to correctly identify the "debtor" for the purpose of filing a financing statement, the next challenge would be to record the name accurately. Because the Registry is electronic, even small differences in the spelling of the debtor's name or the

use of abbreviations may lead to different search results. The PPSA Regulation provides detailed requirements on how the debtor name should appear in a financing statement.[167] In practice, small inaccuracies in debtor names are frequent enough to generate a steady stream of litigation and it is questionable whether it would be feasible for loggers to use the Registry successfully without the assistance of a lawyer.[168] This concern brings us full circle back to the access to justice concerns originally motivating this reform project.

It is noteworthy that a recent project by the Manitoba Law Reform Commission on the *Stable Keepers Act* recommended against expanding the scope of that Act beyond possessory liens to include non-possessory liens:

> In the Commission's view, a non-possessory lien, with its attendant requirements of a written acknowledgement of indebtedness and registration of the lien, is not practical in the context of the animal keeping industry in Manitoba.[169]

Although the Commission does not elaborate, it seems possible that, like the logging industry in Ontario, the Manitoba animal keeping industry operates on an informal basis that is inconsistent with the formalities of a secured transactions registry system. The LCO is concerned that a registry system in the Ontario logging industry would not be practically effective.

E. Variation in the Value of Lien Claims

Another aspect of logging business practices that complicates a lien regime is the large variation in the value of receivables owing to particular contractors or subcontractors. In *Buchanan*, the forestry worker lien claims ranged from less than $20,000 to almost $1 million. This variability results from the industry practice of forest product companies paying contracts only after wood is received at the mill. Although the general contractor might be paid promptly, it may take appreciably longer for this payment to trickle down to sub-subcontractors and during this time they may continue to generate additional receivables.

This wide variation in the value of forestry worker lien claims has at least two consequences. First, it raises questions about the enforcement mechanism that is appropriate in the circumstances. A summary enforcement procedure might be appropriate for smaller claims but more procedural protections preferable for larger claims. Second, the variation creates uncertainty. Third party lenders are unable to assess their credit risk unless they have a reasonably accurate idea of their potential exposure.

F. Evidentiary Basis for Lien Claims

The PPSR operates as notice of a potential security interest in property but is not intended to provide proof of that interest. Instead, a potential creditor searching the system and finding a registered security interest must confirm its validity with the debtor or registered creditor.[170] This system is suitable for the PPSA regime because a consensual security agreement serves as evidence of the security interest.

In a statutory lien regime, however, evidence of the validity of a lien claim may be more difficult to come by. Since statutory liens are created by operation of law, there may be no documentary evidence of the underlying transaction giving rise to a lien claim and it may be more difficult for a third party to determine the legitimacy of the claim. This evidentiary problem has been addressed in some statutory lien regimes by requiring that, in order to

enforce a non-possessory lien, the lien claimant must obtain a signed acknowledgement of indebtedness from the debtor.[171] Lien claimants such as repairers or storers under the RSLA are typically in a position to demand this signed acknowledgement where they start out having possession of the liened article since they may require the acknowledgement as a condition of returning the article to its owner.[172]

In contrast, a signed acknowledgement of indebtedness may not be a feasible evidentiary requirement for a forestry worker lien regime.[173] The logging industry operates relatively informally on the basis of long-term relationships and, often, without written contracts. Furthermore, loggers typically do not have possession of the wood that they harvest and may not be in a position to require an acknowledgement of indebtedness from the licencee or contractor.

G. Fairness in the Priority Scheme

The appropriate level of priority to be accorded to forestry worker liens is closely linked to the policy rationale underpinning FWLWA. In cases of insolvency, the priority accorded to a security interest by statute very often means the difference between recovery and non-recovery for the secured party. A reformed forestry workers lien regime would have little practical effect unless the lien is given sufficient priority to ensure that loggers recover at the end of the day.

A reformed forestry workers lien regime would have little practical effect unless the lien is given sufficient priority to ensure that loggers recover at the end of the day.

Currently, liens under FWLWA have priority over all other claims except those asserted by the Crown and claims for tolls asserted by a "timber slide company" or "any owner of a slide or boom".[174] There are reasons to question whether this super-priority should continue to exist. First, it is arguably excessive relative to the priority status of most other secured creditors who are subject to the first-in-time rule under the PPSA. Non-possessory repair and storage liens registered in the PPSR do generally have super-priority over PPSA security interests. However, even these liens have been compromised to some extent in order to facilitate integration into the PPSR system.[175]

A second reason for reconsidering the traditional super-priority position of forestry worker liens is to ensure the continued availability of credit in the industry. The LCO heard in consultations that financial institutions may be unwilling to lend to forest product companies if their security interests do not have priority over forestry worker liens. This is in contrast to repair and storage liens where the financial industry has apparently accepted the super-priority status of repairers and storers.

An alternative to super-priority for forestry worker liens would be to move towards substantial integration with the PPSA. Under the PPSA, consensual security interests are generally ranked according to the date they are perfected (either by possession or by registration in the PPSR).[176] However, where security agreements secure future advances, the future advances receive the same priority as the original security interest, thereby permitting them to leapfrog over security interests registered during the intervening time period.[177] Since bank financing is typically secured prior to forestry worker liens arising, loggers would be unlikely to recover in this scenario.

This review of the Act in the broader context of Ontario's commercial law framework reveals a number of idiosyncrasies in the nature of a forestry worker lien regime that would complicate effective reform. In the next chapter we explore how other statutory commercial lien regimes have addressed similar issues and consider to what extent these regimes might serve as models for reforming the Act.

V. REFORM OF OTHER COMMERCIAL LIEN REGIMES

A. Woodworker Lien Acts in Other Jurisdictions

In some jurisdictions, woodworker lien legislation similar to FWLWA has been repealed, presumably because it was deemed commercially obsolete. For example, Michigan's legislation was quietly repealed in 2000.[178] In Quebec, provisions for the protection of forestry workers had existed under the *Civil Code of Lower Canada*[179] but were abolished when the Civil Code of Quebec was enacted in the early 1990s.[180] However, several other provinces in Canada, as well as US states such as Washington and Oregon, continue to have woodworker lien legislation on the books.[181] These statutes are generally similar to FWLWA. In most of these jurisdictions, there has been no recent policy discussion of the law and recent case law is sparse. However, Alberta and British Columbia are exceptions here. Law reform projects reviewing woodworker lien legislation were conducted in both provinces and, in British Columbia, this was followed by legislative reform.

In some jurisdictions, woodworker lien legislation similar to FWLWA has been repealed, presumably because it was deemed commercially obsolete.

The Alberta Law Reform Institute (ALRI) reviewed its woodworker lien legislation in the early 1990s as part of a larger reform project on lien law.[182] It found that lien acts were outdated and there had been no significant developments in lien law for the past 60 years. The Report cited several reasons for reforming these acts, including growing obsolescence, lack of uniformity, lack of compatibility with the Alberta PPSA, need for a registry and need for improved enforcement methods.[183] It recommended that a new general lien act be developed which would apply to loggers as well as others such as garagemen and warehousemen. ALRI discussed the option of abolishing liens but rejected this on the basis that it would create uncertainty, particularly in respect of priority rules.[184] This, however, is not all that instructive in reconsidering Ontario's Act. ALRI's project encompassed all liens, including possessory liens. Abolition would have been a much more extreme proposition in that context. ALRI's Report did not lead to reform and Alberta's woodworker lien legislation remains on the books.[185]

B. Woodworker Lien Reform in British Columbia

1. *The Law Reform Commission of British Columbia's Proposed* Forest Work Security Act

British Columbia's *Woodworker Lien Act* (WLA) is similar to FWLWA in Ontario with an important exception.[186] The WLA provides protection to logging employees but *not* to contractors.[187] In 1992, the LRCBC undertook a reform project in part in order to expand coverage of the WLA to logging contractors. It found that the rationale for the WLA remained because logging contractors were not able to negotiate consensual security agreements.[188]

The LRCBC's 1994 Report recommended replacing the WLA with a new *Forest Work Security Act* (the proposed Act) which would be closely integrated with BC's version of the PPSA.[189] The Report explained:

> Incorporating the PPSA by reference into the new Act, as we have done, provides a central conceptual pillar which can then be altered or modified as may be needed to meet the exigencies of forest work. This also permits legislation which is relatively short and uncluttered.[190]

The proposed Act would create a forest work security interest securing money owed to a forest worker. A "forest worker" was defined to include employees and contractors (as well as subcontractors) and "forest work" was given an open-ended definition as "all work incidental to a timber harvesting operation" with a non-exclusive list of activities serving as examples.

The forest work security interest would attach to all forest products at a harvesting or handling site owned by the licencee or contractor. This would obviate the need for a claimant to differentiate between individual logs. "Forest products" would be defined as logs or timber that may be cut or trimmed but not further processed. In an exception to the PPSA, the security interest would not attach to the proceeds from the sale of forest products. The security interest would be terminated once forest products left the harvesting or handling site (except when being hauled) or were processed.

The LRCBC chose to extend the proposed Act to subcontractors. It addressed the subcontractor problem by recommending that subcontractor claims be limited to the amount owed by the owner to the general contractor at the time the owner received notice of the lien.[191] Provision would be made for subcontractors to give notice of a lien claim to the owner, thereby preserving any amount not yet paid out by the owner for satisfaction of the subcontractor's lien claim.

The security interest would be registrable under the BC PPSA and subject to the first-to-register rule in the PPSA, with the exception that $20,000 of the claim would have priority over all PPSA security interests.[192] This statutory cap on priority claims would allow third party lenders to anticipate potential exposure and order their affairs accordingly. Most other aspects of the forest work security interest, including enforcement rules, would be addressed by reference to the BC PPSA.

Subcontractors are dealt with separately in the [*BC* Forestry Service Providers Protection Act]. *Only contractors have a lien against the owner's forest products. Subcontractors are protected with a statutory charge against the contractor's accounts receivable.*

The LRCBC Report was not adopted by the British Columbia legislature and the WLA remains in force to this day.

2. *British Columbia's* Forestry Service Providers Protection Act

In 2010, the British Columbia government introduced new legislation protecting loggers. However, it adopted a different approach to that recommended by the LRCBC. It left in place the existing WLA applying to logging employees and enacted a two-part statute, the *Forestry Service Providers Protection Act* (FSPPA), specifically to protect logging contractors and subcontractors.[193] The FSPPA was fully brought into force in April 2013.

Under Part 1 of the FSPPA, a logging contractor has a lien for the amounts due under a harvesting contract.[194] A contractor is defined broadly as someone carrying out "services" for the forest products owner. "Services" are defined in relation to a list of specific activities such as felling, bucking and yarding including "any other prescribed activity". On its face, this definition is perhaps narrower than the scope of the LRCBC's proposed Act but it does make provision for regulations expanding the definition of "services" as new logging functions develop in the industry.

The FSPPA goes further than the LRCBC's proposed Act in expanding the property subject to the lien. The lien attaches to all of the owner's forest products no matter where they are located and includes products acquired after the services are rendered. Forest products are broadly defined to include prescribed products in addition to raw timber. Then, in addition to the lien, a contractor is given a charge over the accounts receivable of the owner. Of course, this does not increase the overall value of the lien claim. The lien and charge secure only the fair value of the services provided. However, it removes the concern that the property will disappear before a lien can be enforced.

Subcontractors are dealt with separately in the FSPPA. Only contractors have a lien against the owner's forest products. Subcontractors are protected with a statutory charge against the contractor's accounts receivable.[195] Payment for the forest products that is received by

the contractor is bookmarked for the subcontractor and so on down the supply chain. This is an elegant solution to the subcontractor problem in that it maintains the privity of each contractual relationship and does not require complex administration. However, it denies subcontractors the security of having a direct claim over specific property.

Forestry service provider liens and charges under the BC FSPPA are registered as financing statements in BC's PPSR. It is not necessary that a lien or charge be registered in order to enforce it against the debtor. However, registration is necessary for the lien or charge to have priority over subsequently registered or enforced PPSA security interests.

Significantly, liens and charges under the FSPPA do not have the super-priority status provided for in Ontario's FWLWA and other historical statutory lien regimes. The FSPPA provides that a lien or charge is subordinate to previously registered PPSA security interests (including future advances). Practically speaking, this minimizes the likelihood of loggers recovering in insolvency. The FSPPA counterbalances this by establishing a Compensation Fund on which loggers may draw in cases of insolvency.[196] The government has made an initial payment into the Fund of $5 million but it is not yet clear who will contribute to the Fund in the future. In legislative debates, the idea was that all stakeholders would contribute.[197] The government has set up a private entity to administer the Fund.[198]

British Columbia's new legislation suggests that there is still a commercial need for logging lien legislation in some situations. However, there are some important differences between the British Columbia and Ontario logging industries which limit the analogy.

The rationale for the FSPPA's two-pronged approach to protecting logging contractors and subcontractors was articulated by a government member in the BC Legislature:

> As the member opposite likely knows, unsecured creditors typically receive a very small portion of the money that's owed to them in insolvency. But the compensation fund protects the contractor at that stage.
>
> If there was only a compensation fund in place but no lien in place, and then if the licencee chose to make life difficult for the contractor out of an insolvency situation, there'd be no protection, there'd be no lien ability for that contractor to lever and ensure that they are paid for those services, other than the normal court processes that exist today, which are deemed to be bulky and unworkable.[199]

The reason that the government chose to depart from the super-priority traditionally accorded to lienholders is explained earlier in the debates:

> The challenge comes in ensuring that we're not negatively impacting licencees' availability of credit by displacing the order that various credit providers are involved in, in an insolvency situation, secured versus unsecured creditors.[200]

British Columbia's new legislation suggests that there is still a commercial need for logging lien legislation in some situations. However, there are some important differences between the British Columbia and Ontario logging industries which limit the analogy. British Columbia is Canada's largest logging industry by far and forest products companies and loggers are both active politically.[201] Furthermore, unlike in Ontario, the British Columbia WLA applies only to logging employees. The impetus for reform was to expand the scope of the WLA to include contractors. The possibility of repealing the lien legislation was never really on the table. The relative quantity of case law originating from British Columbia also suggests that that jurisdiction may have more of a commercial need for the Act than does Ontario.[202]

C. Analogous Commercial Lien Regimes

The LCO also examined other instances of statutory lien reform as possible comparators for reforming FWLWA. Although these models are analogous to the Act to varying degrees, there are distinctions in the nature and purpose of forestry worker liens which limit the lessons to be learned.

1. Ontario's Repair and Storage Lien Act

At common law, repairers had a possessory lien over items they worked on, entitling them to retain the items until paid for the work. The repairer lien did not protect storers of goods (historically known as "warehousemen") since warehousemen merely preserved, rather than enhanced, the value of goods. Eventually, a statutory lien was created extending a possessory lien to warehousemen.[203] However, before 1989, both repair liens and warehousemen liens were exclusively possessory, disappearing once possession was lost.

Ontario's *Repair and Storage Lien Act* was enacted in 1989 to update this historical regime. The impetus for reform was to address circumstances where repairers and storers gave up possession of the goods before being paid. This was a commercial necessity in cases where debtors required possession of the goods in order to generate funds to pay for their repair or storage. In other cases, it was the repairer or storer who wished to give up possession of the goods in order to avoid the cost of storing them while awaiting payment.[204]

The RSLA creates both a possessory and a non-possessory lien in favour of repairers and storers.[205] It appears that a repair lien attaches to an article even where the debtor does not own the article and has not been authorized by the owner to have it repaired. However, this is not made clear in the legislation. At common law a repair lien was recognized only if authorized by the owner.[206] In contrast, it is clear under the RSLA that a lien for unauthorized storage services does attach. The RSLA specifies that, where a storer has reason to believe that the owner of an article has not authorized the storage, the value of the lien is capped at 60 days storage fees unless the storer provides the owner with notice of the lien.[207] Apparently, this provision was primarily intended to address the case of cars being impounded by police or parking authorities and then sent to an impound lot.[208]

The subcontracting problem that arises under FWLWA is addressed in the RSLA in a somewhat different context, that is, where repairers or storers take possession of an article but then forward it on to another person to actually do the work. The RSLA provides that the repairer or storer taking possession of the article is deemed to have performed the services and may exercise the right to a lien *unless* that person merely acted as an agent in transferring the article to the eventual repairer or storer.[209] This provision makes it clear that only one or the other, but not both, may claim a lien. Therefore, there is no concern, as there is with FWLWA, that the owner may be subject to a lien claim even after he or she has paid for the repair or storage.

Where a repairer or storer does not have possession of an article subject to a lien, it is more difficult to establish the validity of the lien claim. In order to prevent spurious claims, the RSLA provides that non-possessory liens are not enforceable unless the lien claimant has obtained a signed acknowledgement of indebtedness supporting the claim.[210]

The RSLA provides for non-possessory liens to be registered in the PPSR. Once registered, they rank behind possessory liens but are generally prior to security interests under the PPSA.[211] A non-possessory lienholder may enforce the lien by directing the sheriff to seize

the goods and deliver them to the lienholder.[212]

Forestry worker liens bear some similarity to repair liens. Both protect workers who provide services enhancing the value of goods. A rationale arguably underlying both lien regimes is that the owner of goods should not profit from their enhanced value without paying for the improvements.[213] However, there are also a number of important distinctions between forestry worker liens and repair and storage liens:

- Repair and storage liens are typically justified on the basis of implied contract theory in that the owner of the goods does not expect to regain the goods without paying for the services rendered.[214] However, subcontracting is more prevalent in the logging industry than it is in the repair and storage industry. Implied contract theory does not easily extend to the logging context where many lien claimants have no contractual relationship with the licencee and, therefore, no commercial expectation that the licencee should pay the amount owing.

- Repair and storage liens were originally exclusively possessory. The purpose of the RSLA was to extend this pre-existing remedy to address non-possessory circumstances. In contrast, forestry worker liens do not have a possessory origin. They lie further afield from the traditional concept of a lien.[215]

Forestry worker liens bear some similarity to repair liens. Both protect workers who provide services enhancing the value of goods ... However, there are also a number of important distinctions...

- As a result of the non-possessory nature of forestry worker liens, it may be more difficult for loggers to establish evidence of a lien claim. Subcontractors may not be in a position to require that they receive an acknowledgement of indebtedness as a condition of passing the logs on.

- The goods subject to repair and storage liens (automobiles, for example) are typically easily identifiable. In contrast, identifying the logs or timber subject to a forestry workers lien can be a significant problem detracting from the effectiveness of a public registry.

- Repair and storage liens typically represent a much smaller proportion of the lienholder's receivables than do forestry worker liens.

- Unlike many repairers and storers, loggers tend to form long-term contractual relationships with certain licencees and may be unwilling to file a lien claim for fear of jeopardizing a future relationship.

These distinctions limit the usefulness of the RSLA as a model for reforming forestry worker liens in Ontario.

2. *The Alberta Law Reform Institute's Proposed* Liens Act

As noted above, in 1992 ALRI undertook a reform project to consolidate several non-consensual liens, including repair and storage liens, carrier liens, innkeeper liens, stable keeper liens, thresher liens and woodworker liens, into a single statute. This proved to be difficult in respect of woodworker liens which were distinguishable from the others in some important respects.

For example, ALRI recommended that liens not attach to goods owned by third parties, even in the case of innkeepers and carriers where traditionally this had been allowed. Instead, liens should operate only in the context of a direct contractual relationship. ALRI noted that "there is little justification for permitting a lien to be claimed against goods of a third party who has not authorized the transaction".[216] However, ALRI exempted woodworker liens from

this rule due to the fragmented nature of the industry. Subcontractors were so common in the logging industry that it would be unfair to exclude them from protection. Therefore, ALRI recommended that logging subcontractors be permitted to file woodworker liens. In order to partially protect owners, it recommended that a subcontractor lien be restricted to the amount still owing by the owner to the contractor after having received notice of the lien.[217]

ALRI also recommended that lien claimants who give up possession of goods must obtain from the debtor a written acknowledgement of indebtedness as evidence in order to enforce their lien. Once again, however, woodworker liens (and thresher liens) were exempted from this rule. Woodworkers could not give up possession of goods since they typically did not have possession in the first place. Therefore, unlike the other liens covered by the Report, woodworkers could not demand written proof of the debt as a condition of delivering the goods to the debtor. Although ALRI did not discuss this point, the effect of this exemption would have been to allow woodworker lien claims to proceed with less of an evidentiary basis than other lien claims. Commercial parties might have less confidence in such a system, particularly in cases where woodworker liens were asserted against third parties.

The ULCC decided not to include woodworker liens within the legislation on the basis that these liens, along with thresher and beet liens, were local in nature and not suitable for inclusion in a uniform act.

ALRI did find that woodworker liens, in common with the other liens being discussed, should be made subject to a central registry system. Registration would be by way of a financing statement under the Alberta PPSA.[218] The proposed Act would preserve the priority of the liens over PPSA secured interests so long as the liens were perfected either by registration or through possession.[219] However, liens would be subordinate to third party buyers acquiring the collateral in the ordinary course of business. Liens would be enforced using similar procedures to those set out in the PPSA whereby the sheriff would be responsible for seizing goods subject to the lien but the lienholder would be responsible for their sale.[220]

ALRI's proposed legislation was not adopted in Alberta. However, the Report is valuable for having examined woodworker liens in the context of statutory liens generally. Woodworker liens share with repair and storage liens, innkeeper liens and stable keeper liens a concern for protecting those who enhance or maintain the value of goods. According to the Report, all non-possessory statutory liens should be subject to a registration requirement in concert with the PPSA regime. However, the Report also illustrates the functional differences between woodworker liens and other statutory liens. These differences complicate the development of a woodworker lien regime that accords with PPSA principles.

3. The Uniform Law Conference of Canada's Uniform Liens Act

The ALRI Report inspired the Uniform Law Conference of Canada (ULCC) to undertake a similar reform project to harmonize commercial lien law. The resulting Uniform Lien Act (ULA) addresses repairers, storers and common carriers.[221] The ULCC decided not to include woodworker liens within the legislation on the basis that these liens, along with thresher and beet liens, were local in nature and not suitable for inclusion in a uniform act.[222]

The ULA bears some similarity to Ontario's RSLA although there remain significant distinctions.[223] In designing the ULA, the ULCC maintained a conceptual distinction between statutory liens and PPSA security interests, reasoning that: "[p]ersons who improve or add value are generally not in the same position as persons who lend money or sell property".[224] However, the ULCC recommended that PPSA provisions should be applied to the lien context where possible.

Unlike the RSLA, the ULA fuses storage, repair and carrier liens into a single lien for "services". Where the issue of authorization for services remains somewhat murky in the RSLA, the ULA makes a clear policy choice to permit a lien to attach even where the work is authorized by someone other than the owner of the goods. The commentary explains, "[this] is intended to permit the widest possible lien creation without considerations of apparent authority or ownership."[225] However, the ULA makes no provision for notice to the owner of the goods in such circumstances.

As with the RSLA, the ULA provides an evidentiary basis for non-possessory liens by requiring that such a lien is enforceable only where the lien claimant has obtained either a signed authorization for the services giving rise to the lien or a signed acknowledgement of indebtedness.[226] The ULA also subjects a non-possessory lien to a registration requirement under the PPSA. The priority rules are complex but registered liens maintain priority over other interests in the property in most circumstances.

For registration of a non-possessory lien to be valid, the financing statement must name both the owner of the goods and the person requesting the services (where they are not the same). This provision addresses the scenario where a lien claimant does not know the owner of the goods and so registers a financing statement naming only the debtor but a third party subsequently searching the Registry does not know the debtor and searches only under the name of the owner. The drafters of the ULA made a policy choice to protect the interests of third parties over lien claimants in these circumstances, reasoning that "it is the lien claimant who is in the best position to prevent the problem from arising" since "[h]e or she can demand proof of ownership of goods with respect to which services are being requested".[227]

Today, it is widely accepted that the modern [Construction Lien Act] *remains essential to the health of the construction industry. However, the extent to which the same policy rationale continues to exist in the logging industry is a matter of debate.*

The only province that has implemented the ULA in its entirety is Saskatchewan with its *Commercial Liens Act*.[228] Nova Scotia has passed legislation to implement the Act but this has not been brought into force.[229] In 2003, the British Columbia Law Institute recommended that BC adopt the ULA but this has not happened to date.[230]

Although broader in scope than Ontario's RSLA, the ULA is still designed to protect a limited group of workers: those providing labour and materials for the purpose of repairing, storing or transporting goods at the request of a person possessing the goods. Again, the unique features of forestry worker liens limit the usefulness of the ULA as a reform model.

4. Ontario's Construction Lien Act

Ontario's *Construction Lien Act* (CLA) is, conceptually speaking, a step removed from FWLWA and the other statutory lien regimes discussed above. This is because it provides for a lien attaching to real property rather than to personal property. However, the two lien regimes share a similar background. The 1891 predecessor to FWLWA was enacted in response to industrial conditions that were similar to those existing in the construction industry at the time. Ontario's first construction lien regime preceded the 1891 Act by roughly 20 years and provided a model for legislators drafting that Act.[231] At that time, the construction and logging industries were both strong candidates for legislative protection given their importance to the development of the young province.[232] And both industries tended to be undercapitalized resulting in frequent insolvencies.[233]

Today, it is widely accepted that the modern CLA remains essential to the health of the construction industry.[234] However, the extent to which the same policy rationale continues to exist in the logging industry is a matter of debate. Certainly both industries remain highly

fragmented with the potential for several degrees of separation between the worker and the owner of the property. According to Stephen Fram,

> ...[T]he eventual chance of a particular constructor obtaining payment for the work he has done is often contingent upon the ultimate state of accounts between persons with whom he has no contractual dealings and the solvency of those persons. That solvency may be difficult for the supplier to determine and may also fluctuate widely during the course of construction as unexpected costs are encountered.[235]

However, there are also distinctions. Logging work is now predominantly carried out by incorporated contractors and subcontractors. Although a significant proportion of construction workers are also self-employed, they are less likely to be incorporated and more likely to be independent operators.[236] Unionization is also more prevalent in the construction industry.[237]

Construction workers are at financial risk since, although they contribute to the improvement of real property, they may not produce anything tangible that can be repossessed if they are not paid.[238] As the Northwest Territories Committee on Law Reform explained, construction workers are "essentially producing an immovable object, on someone else's property, on credit. Mechanics' lien legislation stands as an attempt to deal more fairly with these parties."[239] In contrast, loggers produce a tangible item – logs. Although logs are then transformed into other wood products, their value is consolidated at each stage of the process.[240]

On the other hand, loggers experience challenges not experienced by construction workers. Since improvements to real property are fixed, they are more easily identifiable for the purpose of proving a lien claim. Logs, however, are fungible and difficult to identify once mingled with other logs. Furthermore, logs disappear once processed, thereby restricting the life span of a forestry worker lien.

Another distinction is the relative use being made of the CLA as compared to FWLWA. The CLA remains entrenched within the construction industry and is regularly relied on in the courts. Even if desirable on policy grounds, repeal would not be a practical option. As Kevin McGuinness states:

> It is clear that the mechanics' lien and its sister remedies have become the central feature of credit granting practice within the construction industry. Certainly, their abolition would have a highly disruptive effect upon that industry.[241]

In contrast, there is relatively little use being made of the Act by forestry workers.[242] The distinctions between the modern construction and logging industries, as well as the different nature of these two lien regimes, limit the usefulness of the CLA as a model for reforming the Act.

D. Forestry Worker Liens are Distinct from Other Commercial Lien Regimes

This review of some reformed statutory lien regimes illustrates that there are varying approaches to coordinating statutory liens with the principles underlying the PPSA. Leaving aside the CLA (which, as discussed above, operates in a very different industrial context), these approaches may be roughly divided into two conceptual models. First are models designed to emulate the PPSA's protection of consensual security interests. Second are models more

concerned to preserve traditional lien concepts, particularly in respect of workers who add value to goods.

Although elements of both conceptual models can be found in all of the examples above, the LRCBC's proposed Act and, to some extent, the BC FSPPA are closer to a PPSA model. In both cases, the statutory security interest extends beyond the logs or timber worked on and attaches to other forest products owned by the licencee and, in the case of the FSPPA, to accounts receivable. Also, both statutes constrain, to different extents, the traditional super-priority given to lien holders in favour of the PPSA priority system.

In contrast is the model represented by the RSLA, ALRI's proposed Act and the ULA. These statutes preserve more attributes of the traditional concept of a lien. They provide for liens attaching primarily to the property being improved. Although they adopt the registration system in the PPSA, their priority schemes are based more on the traditional super-priority accorded to liens (with some legislative refinements) rather than the first-to-register priority scheme of the PPSA.

Forestry worker liens do not fit easily into either of these conceptual models. Unlike the consensual security agreements subject to the PPSA, forestry workers tend not to negotiate formal agreements.[243] This limits the extent to which they can be subsumed into the PPSA. For example, a possible challenge in enforcing forestry worker liens may be determining the point at which they arise. This is not an issue with consensual security agreements. Also, PPSA enforcement mechanisms may not be appropriate where a debtor has not had the opportunity to negotiate the terms of the security agreement giving rise to the lien.

There remains the conceptual problem that, unlike most forms of property subject to statutory lien regimes, logs are, by their very nature, intended to disappear as they are processed into wood products. This is a signal that a lien regime is not necessarily suitable in this commercial environment.

On the other hand, forestry worker liens are also distinct from more traditional statutory lien regimes as acknowledged by the drafters of each of the RSLA, ALRI's proposed Act and ULA. Unlike repairers and storers, loggers typically do not have possession of the logs they work on. Furthermore, logging is frequently subcontracted out and logs are not easily identifiable.

Of the various statutory lien regimes discussed above, BC's FSPPA is most useful as a model of what a reformed forestry worker lien regime in Ontario might look like. However, there remain significant challenges to designing a reformed Act in Ontario and a "made in BC" solution is not necessarily appropriate given the different commercial conditions existing in Ontario's logging industry. Some of the more problematic design challenges are as follows.

First is the nature of the property that serves as security for a forestry worker lien regime. Fungible property such as logs are difficult to describe for the purposes of a registry system and difficult to identify for the purpose of enforcing a lien. BC's FSPPA has circumvented this problem by defining the property subject to a lien broadly so that, even if particular wood cannot be identified, the lienholder may look to other assets to satisfy the claim. This is an effective approach to the problem. However, as pointed out in the LCO's Consultation Paper, there is the possibility that this may result in disputes among creditors over the property available to satisfy lien claims.[244] Furthermore, there remains the conceptual problem that, unlike most forms of property subject to statutory lien regimes, logs are, by their very nature, intended to disappear as they are processed into wood products. This is a signal that a lien regime is not necessarily suitable in this commercial environment.

Second, there is no clear solution to the problem of protecting subcontractors within a forestry worker lien regime without prejudicing licencees. Lien regimes primarily directed at repairers and storers have varying approaches to the issue of whether liens should attach without owner authorization. But these do not typically involve subcontracting and, therefore, are not apposite to the logging context. For example, statutes like the ULA that

provide for a lien in respect of unauthorized services to goods are justified on the basis that the owner of the goods generally gains some value from those unauthorized services. This rationale does not apply where services have been subcontracted. A licencee does not gain additional value from subcontracted harvesting services since it must pay the general contractor for the services.

Reformed woodworker lien regimes all acknowledge that protecting subcontractors is a practical necessity given the structure of the logging industry. The challenge then would be to design a mechanism to protect the licencee from paying twice for the same services. Each of the approaches discussed above has some drawbacks. The approach in BC's FSPPA of limiting subcontractor claims to a charge on the accounts receivable of the contractor is perhaps the most workable in the modern context and given the size and informal business practices of Ontario's logging industry. However, subcontractors would have to be content with a relatively less secure claim than typical of a lien regime.

Third, since the advent of the PPSA, it is no longer generally acceptable for a non-possessory commercial lien regime to operate in the absence of some form of notice to third parties. However, a registry system would be administratively unwieldy in the logging industry which is small, fragmented and operates informally on the basis of long-term relationships. One challenge would be to determine who should be named in registering a lien claim. The ULA imposes a duty on the lienholder to identify and name both the owner and the debtor (where these are not the same). The BC FSPPA avoids this problem by providing that subcontractors may register a charge only against the party with whom they have contracted. This latter option seems more workable in a licenced industry where ownership may not always be clear. However, another challenge would be to support logging contractors and subcontractors in accessing a registry system and in inputting the exact information necessary to file a valid claim. Finally, it remains questionable whether a registry system would be cost-effective given the small number of forestry worker lien claims that are typically filed in Ontario.

A compensation fund would be a controversial proposition in Ontario. During the LCO's consultations, a number of stakeholders from both the forest products industry and the logging community expressed distaste for the idea of more government regulation in the industry.

Fourth, there is the challenge of integrating forestry worker lien claims into the priority scheme under the PPSA while being cognizant of the impact on other creditor claims. The BC FSPPA adopts the first-to-register priority scheme of the PPSA. However, the BC government addressed the concern that logging contractors would not recover in insolvency by establishing a Compensation Fund. A compensation fund would be a controversial proposition in Ontario. During the LCO's consultations, a number of stakeholders from both the forest products industry and the logging community expressed distaste for the idea of more government regulation in the industry. Ontario licencees already pay a portion of their stumpage fees into two funds. The Forestry Renewal Trust Fund is used to fund forest regeneration and the Forest Futures Trust Fund insures against natural disasters such as insects, diseases or forest fires. In 2011/2012, in addition to stumpage charges averaging around $3.06 per cubic metre, licencees also paid $3.71 per cubic metre into these Funds.[245] Depending on who would be required to contribute, a compensation fund would likely raise the cost of business even further.

Certainly, it would be possible to draft a new act for Ontario that addressed each of the above design challenges. BC's FSPPA is an example of a complete overhaul of a traditional forestry worker lien regime that achieves its purpose using contemporary commercial law norms and concepts. However, the challenges discussed here illustrate that, at best, a lien regime has become an awkward legal tool for protecting logger's interests in the 21st century and, at worst, signals that such a regime is simply no longer commercially or legally appropriate.

VI. TRANSFORMATION OF THE LOGGING INDUSTRY AND LEGAL FRAMEWORK WARRANT REPEAL

In this Report, we have discussed a myriad of factors that distinguish the commercial and legal environment existing at the time FWLWA was introduced in Ontario from that existing today. The accumulation of these factors, including the changes to the logging industry and commercial law environment as well as the shifting policy context, has led the LCO to conclude that FWLWA is commercially and legally obsolete.

From a historical perspective, the Act was intended to respond to commercial challenges quite different from those facing the modern logging industry. Today, the characteristics of the industry, including the nature of the relationship existing between loggers and mills, the technology employed in logging and the regulatory structure of the industry do not easily lend themselves to a lien regime.

From a historical perspective, the Act was intended to respond to commercial challenges quite different from those facing the modern logging industry. Today, the characteristics of the industry, including the nature of the relationship existing between loggers and mills, the technology employed in logging and the regulatory structure of the industry do not easily lend themselves to a lien regime.

Altough many Ontario loggers remain economically dependent on the mills they supply, this, on its own, is no longer sufficient rationale for the continued existence of a lien regime. It does not explain loggers who run relatively large operations and may extend hundreds of thousands of dollars in credit to mills. It fails to acknowledge that modern loggers are just as likely to be aware of a mill's financial problems – or not – as any other creditor. And it does not take into account other similarly situated owner operators in the logging industry and elsewhere who have no statutory protection. A more modern approach to statutory protection for disadvantaged Ontario loggers would be to ensure that they are in the same position as creditors who are not so disadvantaged.[246] At most, this rationale would support a PPSA-style security regime for loggers which would place them in line behind the major bank lenders. It does not support continued super-priority for loggers over other commercial parties.

From a legal point of view, the Act is able to co-exist wth modern statutory wage protections and commercial regulatory statutes such as the PPSA but it is incompatible with some of the policy objectives underlying those regimes. Furthermore, there are a number of features of logging that distinguish it from repair work and other work more typically subject to commercial lien regimes. This also complicates reform and, more importantly, serves as another indicator that a lien regime is no longer the most appropriate tool for protecting Ontario forestry workers.

The LCO has also considered the potential consequences of repeal versus reform. FWLWA, as with other statutory commercial lien regimes, has a predominantly economic function. As Kevin McGuinness has written in relation to the CLA:

> Stated in its most basic terms, the purpose of this statute is to accord preferential treatment to one group of creditors (namely, construction industry suppliers) over all other creditors. There is no apparent moral or social benefit to be derived from giving construction industry creditors such a preference. The justification, if there is one, must be an economic one, namely that by giving special protection to the construction industry, construction lien law enhances the efficient operation of the provincial economy.[247]

Whether the Act is repealed or reformed, there are likely to be economic consequences. One consideration is the interdependence of forest product companies and logging contractors. Contractors rely on forest product companies to purchase their harvested wood just as forest product companies rely on logging contractors to supply it. Each has a vested

interest in the economic health of the other. Statutory protection for loggers must take into account these intertwined interests. A reformed forestry worker lien regime would provide better protection for contractors in a cyclical industry. On the other hand, forest products companies are concerned that a reformed regime would adversely impact their borrowing capacity and the cost of credit.[248]

An underlying economic consideration is the need to balance the protection offered by the Act to forestry workers with the corresponding cost to other secured and unsecured creditors.

An underlying economic consideration is the need to balance the protection offered by the Act to forestry workers with the corresponding cost to other secured and unsecured creditors. This balancing exercise must take into account that fact that loggers falling within the scope of the Act have had a statutory right to claim a lien for 122 years. Repeal of FWLWA would remove this statutory right but would put loggers in a similar position to many other small Ontario businesses and, from that perspective, would rationalize the rights and remedies typically available to creditors within Ontario's commercial law framework.

In sum, FWLWA was enacted in response to a specific set of economic conditions existing in Ontario's logging industry at the end of the 19th century. The LCO's consultations and research revealed a contemporary logging industry that has changed so dramatically through mechanization, regulation and business practices that it no longer bears a clear resemblance to that industry long ago. And this modern logging industry operates within a very different commercial and legal context than that in force when the Act was introduced. Although many Ontario loggers continue to bear financial risk due to industrial conditions, a lien remedy providing loggers with super-priority over most other claims in the wood is no longer proportional to the rights and remedies of other creditors in Ontario's economy. The LCO has concluded in all the circumstances that, while it may be possible to reform the Act roughly along the lines of the BC FSPPA, it would not be appropriate to perpetuate this outdated lien regime. On balance, the LCO recommends that the FWLWA be repealed rather than reformed.

VII. RECOMMENDATION

As a result of its consultations and research, the LCO has concluded that FWLWA is no longer compatible with Ontario's modern logging industry and commercial and legal environment. The logging contractors and subcontractors currently entitled to claim a lien under the language of FWLWA are not akin to the casual logging employees whom the Act was intended to protect. The financial risk that today's loggers bear in the modern economy is not comparable to the economic circumstances experienced by 19th century loggers. In light of these findings, the LCO is of the opinion that it would not be appropriate to reform the Act and that repeal is the preferable option.

The LCO therefore recommends that:

The Government of Ontario repeal the *Forestry Workers Lien for Wages Act*.

APPENDIX A: ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

- Guy Bourguoin, United Steelworkers Local 1-2995
- British Columbia Ministry of Forests, Lands and Natural Resource Operations
- British Columbia Truck Loggers Association
- Chantal Brochu & Derek Zulianello, Buset & Partners LLP
- Ontario Ministry of Consumer Services
- Professor Ron C.C. Cuming, University of Saskatchewan
- Professor Anthony Duggan, University of Toronto Faculty of Law
- Etienne Esquega, Esquega Law Office
- Dean Don Floyd, Faculty of Forestry & Environmental Management, University of New Brunswick
- Eric Gertner, McCarthy Tétrault LLP
- Ontario Ministry of Government Services
- James Harrison, Greenmantle Forest Inc.
- Richard B. Jones, Business Counsel at Law
- Professor Shashi Kant, Faculty of Forestry, University of Toronto
- National Aboriginal Forestry Association
- Peter Nitschke, Bancroft Minden Forest Company
- Nova Scotia Ministry of Natural Resources
- Ontario Forest Industries Association
- Resolute Forest Products, Thunder Bay
- Madam Justice Helen M. Pierce, Superior Court of Justice
- Paul Poschmann, Lake Nipigon Forest Management Inc.
- Professor Ian Radforth, Department of History, University of Toronto
- Allan Willcocks, Regional Director Northwest Region, Ministry of Natural Resources
- Associate Dean John R. Williamson, Faculty of Law, University of New Brunswick
- Professor Roderick J. Wood, Faculty of Law, University of Alberta
- Professor Emeritus Jacob Ziegel, University of Toronto, Faculty of Law
- Several individual loggers

APPENDIX B: LIST OF ACRONYMS

ALRI - Alberta Law Reform Institute

BIA - *Bankruptcy and Insolvency Act*

CFSA - *Crown Forest Sustainability Act, 1994*

CLA - *Construction Lien Act*

ESA - *Employment Standards Act, 2000*

FRL - Forest Resource Licence

FRSAEA - *Family Responsibility and Support Arrears Enforcement Act, 1996*

FSPPA – British Columbia *Forestry Service Providers Protection Act*

FWLWA - *Forestry Workers Lien for Wages Act*

LCO - Law Commission of Ontario

LFMC - Local Forest Management Corporation

LRCBC - Law Reform Commission of British Columbia

MNR - Ministry of Natural Resources

MLRC – Manitoba Law Reform Commission

PPSA - *Personal Property Security Act*

PPSR - Personal Property Security Registry

RSLA - *Repair and Storage Lien Act*

SFL - Sustainable Forest Licence

ULA - *Uniform Lien Act*

ULCC - Uniform Law Conference of Canada

WEPPA - *Wage Earners Protection Program Act*

WLA – British Columbia *Woodworker Lien Act*

ENDNOTES

1 *Forestry Workers Lien for Wages Act*, R.S.O. 1990, c.F.28 [FWLWA or the Act].

2 Under the Act, the phrase "forestry workers" refers to loggers who harvest timber and deliver it to the mill for processing. In this Report, we also use the more common term "loggers" or "logging contractors" to describe these individuals. Unlike some other jurisdictions, the Act does not apply to mill workers.

3 The original Act was the *Woodman's Lien for Wages Act*, S.O. 1891, 54 Vict., c.22 [original Act].

4 Ontario's logging industry is one sector of the forest industry which encompasses logging, forestry services such as silviculture and forest management, lumber processing and pulp production. Logging involves harvesting trees and transporting them to a mill for processing. It is the first step in a chain of value that leads to manufactured wood products.

5 *Buchanan Forest Products Ltd. (Re)* (2009), 58 C.B.R. (5th) 184 (Ont.S.C.J.) [*Buchanan*]; additional reasons (2010), 68 C.B.R. (5th) 220 (Ont. S.C.J.).

6 *Buchanan*, note 5. The lien claims in *Buchanan* arose out of somewhat unique circumstances. Some have argued that the Buchanan insolvency was caused by questionable business practices and is not representative of the industry generally. Whether or not that is the case, it is noteworthy that no other lien claims seem to have been litigated during what was a lengthy industry-wide recession.

7 A more detailed survey of woodworker lien claims was carried out by the Law Reform Commission of British Columbia (LRCBC) in their review of BC's *Woodworker Lien Act*, now R.S.B.C. 1996, c.491 [WLA]. That survey also revealed relatively few claims being filed, although apparently more than in Ontario: LRCBC, *Working Paper on Liens for Logging Work* (Victoria: Ministry of the Attorney General, 1992) [1992 Working Paper], online: http://bcli.org/sites/default/files/LRC-CP68-Liens_for_Logging_Work.pdf.

8 In 1896, Ontario's original Act was expanded to protect logging contractors as well as employees. However, the new provision applied only to contractors working "for any licencee of the Crown": 1896, 59 Vict. c.36, s.4 [1896 Admendment]. By 1914, the words "for any licencee of the Crown" had been omitted from the provision, giving rise to the possibility that the Act also protected subcontractors. This broader interpretation was rejected in *Keenan Bros.* v. *Langdon*, [1928] S.C.R. 203, 206.

9 FWLWA, note 1, s.3.

10 Confusion about the scope of the Act is not solely a modern problem: Edward P. Raymond, "Woodmen's Lien Law in New Brunswick" (1906) 26 Can. L. Times 249.

11 FWLWA, note 1, s.1. Although blacksmiths are no longer used in logging operations, there are a few logging camps still in existence and these may employ cooks.

12 FWLWA, note 1, s.1.

13 In *Buchanan*, note 5, the Court held that the definition of "logs or timber" includes woodchips. Biomass is the residual wood fibre remaining on the forest floor after harvesting has taken place. Biomass is increasingly being marketed as a renewable source of bioenergy that may be used in generating electricity.

14 Although this is not explicit in the Act, it can be inferred from the closed definition of "logs or timber" as well as ss.13(d) which contemplates a lien claimant filing an application for attachment where "logs or timber are about to be cut into lumber or other timber so that the logs or timber cannot be identified".

15 FWLWA, note 1, ss. 5(4).

16 FWLWA, note 1, ss. 5(3).

17 FWLWA, note 1, ss. 8(1).

18 FWLWA, note 1, ss. 9(3).

19 The Rules of the Ontario Small Claims Court require parties to exchange the documents on which they rely for their claims: Rules 7.01 and 9.01, O. Reg. 258/98, *Courts of Justice Act*, R.S.O. 1990, c.C43. However, this rule may not always be strictly enforced: Michael Rappaport, "Major Changes Coming to Ontario's Small Claims Courts", *The Lawyer's Weekly* (December 11, 2009), online: http://www.lawyersweekly.ca/index.php?section=article&articleid=1058. In contrast, the Superior Court of Justice Rules provide for a variety of forms of discovery including oral discovery: Rules 29.1-33, Rules of Civil

Procedure, R.R.O. 1990, Reg. 194, *Courts of Justice Act*, R.S.O. 1990, c.C43.

20 Several of the forestry worker claims in the *Buchanan* proceeding amounted to hundreds of thousands of dollars and one claim was just under one million dollars: *In re Terrace Bay Pulp Inc.*, Approval and Vesting Order, September 13, 2010 (Ont. Sup. Ct., Commercial List), Schedule "A", Summary of Lien Claimants [Summary of Lien Claimants], online: http://documentcentre.eycan.com/eycm_library/Project%20Pick%5CEnglish%5C-CCAA%202009%5CCourt%20Orders%5CApproval%20&%20Vesting%20Order%20of%20Justice%20Morawetz,%20dated%20September%2013,%202010.pdf.

21 FWLWA, note 1, ss. 13, 14.

22 FWLWA, note 1, s. 18.

23 FWLWA, note 1, ss. 3(1).

24 FWLWA, note 1, s. 7.

25 In the costs proceeding following the *Buchanan* decision, Senior Regional Justice Pierce held that these cost caps do not apply to a common issues hearing: (2010), 68 C.B.R. (5th) 220 (Ont.S.J.) at para.7.

26 FWLWA, note 1, s. 25. In Small Claims Court proceedings, costs are capped at $5 for contested claims and $2 for uncontested claims.

27 *Lakes and Rivers Improvement Act*, R.S.O. 1990, L.3. Section 24 provides for the removal of log jams to further the purposes of the Act. However, there is no mention of the separation of logs or timber.

28 FWLWA, note 1, s. 2.

29 "Logging in the Ottawa Valley – The Ottawa River and the Lumber Industry" in *A Background Study for Nomination of the Ottawa River Under the Canadian Heritage Rivers System*, Ottawa River Heritage Designation Committee (2005) 89, 98, online: http://www.ottawariver.org/pdf/0-ORHDC.pdf

30 Ian Radforth, *Bushworkers and Bosses: Logging in Northern Ontario 1900-1980* (Toronto: University of Toronto Press, 1987) 13 [Radforth, *Bushworkers*].

31 Radforth, *Bushworkers*, note 30, 97.

32 Ian Radforth, "The Shantymen", in Paul Craven, ed., *Labouring Lives: Work and Workers in Nineteenth Century-Ontario* (Toronto: University of Toronto Press, 1995), 221 [Radforth, "Shantymen"].

33 Radforth, *Bushworkers*, note 30, 66.

34 *Workmen's Compensation Act*, S.O. 1914, c.25. The previous statute required injured employees to sue their employer in court: *Workmen's Compensation for Injuries Act*, S.O. 1886, 49 Vict., c. 28.

35 Radforth, *Bushworkers*, note 30, 42.

36 In some cases, woodworkers would be required to pay a bribe in order to be hired on: Radforth, *Bushworkers*, note 30, 35.

37 Radforth, *Bushworkers*, note 30, 4.

38 Radforth, *Bushworkers*, note 30, 107-108.

39 Radforth, "Shantymen", note 32, 237-239. Lumber companies owning mills would set up logging operations in the bush and hire foremen to run these operations. The foreman was typically responsible for recruiting a complement of loggers each season.

40 Radforth, "Shantymen", note 32, 249.

41 Jeremy Webber, "Labour and the Law" in Paul Craven, ed., *Labouring Lives: Work and Workers in Nineteenth Century-Ontario* (Toronto: University of Toronto Press, 1995) 126; Radforth, *Bushworkers*, note 30, 41.

42 Radforth, "Shantymen", note 32, 250-251.

43 Radforth, "Shantymen", note 32, 251.

44 See, for example, David Lee, *Lumber Kings and Shantymen: Logging, Lumber and Timber in the Ottawa Valley* (Toronto: James Lorimer & Company Ltd., 2006) 200-202.

45 George B. Engberg, "Lumber and Labor in the Lake States" (March 1959) 36 Minnesota History 153, 165, online: http://collections.mnhs.org/MNHistoryMagazine/articles/36/v36i05p153-166.pdf.

46 James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836 – 1915*

(Cambridge: The Belknap Press of Harvard University Press, 1964) 391.

47 See *McDonnell* v. *Cook* (1845), 1 U.C.Q.B. 542 for an example of workers holding a third party owner to account for their unpaid wages. Also see R.C.B. Risk, "The Golden Age: The Law About the Market in Nineteenth Century Ontario" (1976) 3 U.T.L.J. 307, 309. Other cases regarding early liens are collected at footnote 163 in Webber, note 41.

48 *Buchanan*, note 5.

49 Ontario Legislative Assembly, *Newspaper Hansard* (4 April 1891), referring to the *Mechanics' Lien Act*, R.S.O. 1887, c. 126.

50 *Brooks-Sanford Co.* v. *Theodore Telier Construction Co.* (1910), 22 O.L.R. 176 (C.A.) at para. 5.

51 Ontario Legislative Assembly, *Newspaper Hansard* (14 April 1891). "Jobbers" were contractors retained by lumber companies (often located in Michigan) to run Ontario logging operations on their behalf: personal communication with Ian Radforth (February 7, 2013).

52 Ontario Legislative Assumbly, *Newspaper Hansard* (25 April 1891).

53 FWLWA, note 1, s.32.

54 Radforth, "Shantymen", note 32, 211.

55 This provision was first passed in 1898: H.V. Nelles, "The Manufacturing Condition" in *The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1849-1941*, 2d. ed., (McGill-Queen's University Press, 2005) 48, 65-87. It remains in force today: *Crown Forest Sustainability Act*, 1994, S.O. 1994, c. 25, s.30 [CFSA].

56 See Hurst, note 46. The Wisconsin legislation was first introduced in 1849, predating the Ontario legislation by over 40 years. Industry conditions in the two jurisdictions were similar and it seems reasonable to assume that similar policy considerations underlay both acts. Certainly, the Ontario legislature was aware of lien legislation elsewhere as indicated by its reference to Michigan's version of the statute during debates.

57 *Carpenter* v. *Bayfield Western R. Co.*, 83 N.W. 764 (Wis. 1900), quoted in Hurst, note 46, 408.

58 Hurst, note 46, 409, citing *Winslow* v. *Urquhart*, 44 Wis. 197 (Wis. 1878).

59 Ontario practice is that local timber is processed in Ontario mills unless there is no local market for it. Less than 4% of timber is shipped to mills outside Ontario: Ontario Ministry of Natural Resources (MNR), *Strengthening Forestry's Future: Forest Tenure Modernization in Ontario*, 12, online: http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@forests/documents/document/stdprod_092158.pdf.

60 Logging plays a significant role in the economies of other Canadian provinces to varying degrees. British Columbia and Quebec are the two top producers of forest products with Ontario a close third. British Columbia's industry is the largest by a significant margin. It is divided into two distinct regions – coastal logging and interior logging. It has also established a complex regulatory regime including, for example, more than eight different types of forest licences.

61 Canadian Forest Service, *The State of Canada's Forests, 2012 Annual Report* (Natural Resources Canada) 14, online: http://cfs.nrcan.gc.ca/pubwarehouse/pdfs/34055.pdf.

62 Canadian Forest Service, note 61; Ontario Ministry of Natural Resources, *State of Ontario's Forests, 2011, Indicator Report, 5.2.2, Trends in Forest-related Employment*, 3, online: http://www.web2.mnr.gov.on.ca/mnr/forests/public/publications/SOF_2011/indicators/522.pdf. The forest industry includes logging, pulp and paper manufacturing, wood product manufacturing and furniture manufacturing, as well as support activities such as silviculture and forest management.

63 Ontario Ministry of Natural Resources, *State of Ontario's Forests, 2011, Indicator Report, 6.2.1, Resilience of Forest-based Communities*, 7, online: http://www.web2.mnr.gov.on.ca/mnr/forests/public/publications/SOF_2011/indicators/621.pdf.

64 Jake Wilson and John Graham, *Relationships Between First Nations and the Forest Industry: The Legal and Policy Context, Report for the National Aboriginal Forestry Association* (Institute on Governance, 2005) 53, online: http://iog.ca/wp-content/uploads/2012/12/2005_March_prov_forestry.pdf.

65 Radforth, *Bushworkers*, note 30, 203-204.

66 Radforth, *Bushworkers*, note 30, 207.

67 Radforth, *Bushworkers*, note 30, 214-215. Also see Patricia Marchak, "Labour in a Staples Economy" (1979) 2 Studies in Political Economy 7, 15.

68 For some important differences remaining between mechanized logging work and factory work, see Richard A. Rajala, "The Forest as Factory: Technological Change and Worker Control in the West Coast Logging Industry, 1880-1930" (1993) 32 Labour/Le Travail 73, 80-81.

69 Radforth, *Bushworkers*, note 30, 220. According to Statistics Canada, there were 7,321 loggers in Ontario in 2006. This number steadily decreased to 3,674 loggers in 2010 but rose slightly to 4,228 loggers in 2011: Statistics Canada, Table 301-0007, "Logging industries, principal statistics by North American Industry Classification System (NAICS) annual", CANSIM (database). Also see Gregg Delcourt and Bill Wilson, "Forest Industry Employment: A Jurisdictional Comparison" (1998) 24 Canadian Public Policy S11, S19 and S23.

70 For a case study of the changing circumstances of an individual logger over 30 years in Newfoundland's logging industry, see Peter R. Sinclar, Martha MacDonald and Barbara Neis, "The Changing World of Andy Gibson: Restructuring Forestry on Newfoundland's Great Northern Peninsula" (2006) 78 Studies in Political Economy 177. At 187, the article identifies the following key events affecting loggers: "logging camps run by mills were replaced by locally based, mobile crews hired by logging contractors; unionization of the labour force decreased; piecework became predominant; mechanical harvesters replaced many loggers, changed the labour process, and reduced demand for labour; servicing personnel became more important; loggers increasingly bore the costs of their equipment; and wood supply became a vital issue."

71 Radforth, *Bushworkers*, note 30, 230-231.

72 Radforth, *Bushworkers*, note 30, 234.

73 Radforth, *Bushworkers*, note 30, 235.

74 A US study found that 74 per cent of logging contractors operating in the Northwest states operated with five employees or fewer: Travis T. Allen, Han-Sup Han, Steven R. Shook, "A Structural Assessment of the Contract Logging Sector in the Inland Northwest" (2008) 58 Forest Products Journal 27.

75 Statistic quoted by an industry stakeholder during consultations. This distinguishes modern logging contractors from the early contractors covered by the Act who may have owned a saw or a team of horses but contracted primarily for their labour.

76 All trees harvested in Ontario must be manufactured within Canada: CFSA, note 55, s.30.

77 Ontario Ministry of Natural Resources (MNR), *State of Ontario's Forests, 2011*, 18, online: http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@forests/documents/document/stdprod_101907.pdf.

78 MNR, note 77, 57-60; also see the accompanying Indicator Reports, notes 62 and 63.

79 Canadian Forest Service, note 61, 42.

80 The LCO heard in consultations that modern quality standards require that mills process wood rapidly. Logs begin to deteriorate after approximately one month.

81 In *Buchanan*, lien claimants were able to assert liens over specific logs only because the mill went bankrupt. As a result, processing suddenly ceased and harvested logs remained sitting in the bush or in the mill yard: *Buchanan*, note 5.

82 *Buchanan*, note 5, para. 43.

83 *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, 2001 SCC 59.

84 Summary of Lien Claimants, note 20.

85 Etienne St-Jean and Luc LeBel, "The Influence of Decisional Autonomy on Performance and Strategic Choices – The Case of Subcontracting SMEs in Logging Operations" in Okia Clement Akais, ed., *Global Perspectives on Sustainable Forest Management* (InTech, 2012) 59, 60, online: http://www.intechopen.com/books/global-perspectives-on-sustainable-forest-management/the-influence-of-decisional-autonomy-on-performance-and-strategic-choices-the-case-of-sub-contra.

86 When mills that have historically employed loggers decide to contract out logging operations, it is typical for some of their logging employees to be transferred to the new contractor. In cases where these employees are unionized, some have been able to retain their collective bargaining rights as part of the transfer. But this practice is gradually dying out.

87 Andrew F. Egan, "Uniting an Independent and Isolated Workforce: The Logger Association Phenomenon in the United States" (2002) 15 Society & Natural Resources: An International Journal 541.

88 W. Scott Prudham, "Downsizing Nature: Managing Risk and Knowledge Economies Through Production Subcontracting in the Oregon Logging Sector" (2002) 34 Environment and Planning 145, 148.

89 Regulation Review Team, *Review of the Timber Harvesting Contract and Subcontract Regulation: Stakeholder Input (B.C.* Ministry of Forests, November 2001) 6, online: http://www.for.gov.bc.ca/hth/timber-tenures/contract-sub-contract.htm (Emphasis in original).

90 Marchak, note 67, 16.

91 Email from a logger (January 17, 2013).

92 A similar mix of business relationships seems to exist in Québec where a 2010 study found that 20 per cent of small forestry enterprises were genuine entrepreneurs and less likely to be dependent on the large firms hiring them: Etienne St-Jean, Luc LeBel and Josée Audet, "Entrepreneurial Orientation in the Forest Industry: A Population Ecology Perspective" (2010) 17 Journal of Small Business and Enterprise Development 204.

93 It has been suggested that small logging contractors in BC do not have sufficient bargaining power to refuse to do unsafe work and that this has contributed to record high injury rates: John Heaney, "If You Go Down To The Woods Today, Are You In For A Big Surprise?" (2007) 12 Appeal 39, 44.

94 Ronald C.C. Cuming, "The Spreading Influences of PPSA Concepts: The Uniform Liens Act" (1999-2000) 15 B.F.L.R. 1.

95 LRCBC, note 7, 15. It appears to have been significant to the Commission's reasoning that (unlike in Ontario) the existing BC Act applied only to wage earners rather than contractors. The repeal option was not addressed in the Commission's 1994 Final Report.

96 Another 9 per cent of Ontario forests, primarily in southern Ontario, are privately owned. Many of these are also commercially harvested: MNR, note 59.

97 Radforth, "Shantymen", note 32, 209-210.

98 The Crown retains ownership of the logs until the stumpage fees are paid: CFSA, note 55, s.33. Even though a licence is not a property interest in common law, the licencee has a property interest in the harvested logs: *Saulnier* v. *Royal Bank of Canada*, 2008 SCC 58.

99 CFSA, note 55, s.26. SFLs grant the holder the right to harvest and the corresponding responsibility to protect the resource by carrying out renewal and maintenance activities. The holder must pay licence (stumpage) fees in addition to managing the sustainability of the forest. Section 27 of the CFSA also provides for Forest Resource Licenses (FRLs) that only last up to five years and are more limited in scope. FRLs are granted within the context of an existing SFL.

100 MNR, note 59, 12.

101 The *Forest Tenure Modernization Act, 2011*, S.O. 2011, c. 10, was enacted to make the wood allocation system more competitive by inserting more distance between mill owners and forest management responsibilities. The intent of the Act is to create Local Forest Management Corporations (LFMCs) with responsibility to manage the forest and market and sell the timber. These are to be Crown agencies run by a local manager. The Crown will appoint local board members. The goal is to have 2 LFMCs established by 2016: MNR, note 59, 7. The first LFMC, Nawiinginokiima Forest Management Corporation, was created by O. Reg. 111/12.

102 An example is Lakehead Forest which is managed under an SFL held by Greenmantle Forest Inc. Greenmantle is wholly owned by Superior North Loggers Inc., a cooperative made up exclusively of 31 small logging contractors. All of the 31 loggers except for the haulers are family-owned and operated.

103 To complicate matters further, it is not always clear who actually owns logs or timber at different stages of the harvesting process. A typical SFL provides that, subject to conditions, the company "shall be entitled to harvest and utilize through its shareholders, the full available harvest described in the Forest Management Plan". However, as noted above, the licencee does not receive ownership of the wood until Crown charges (stumpage fees) are paid to the Ministry: CFSA, note 55, s.33.

104 "Multi-shareholder SFLs: Pros & Cons", *The Working Forest*, June 26, 2007, online: http://www.workingforest.com/legacy/multi-shareholder-sfls-pros-cons/.

105 Most recently, the Crown seems to have backed off its original policy of removing forest product companies from forest management altogether. It now acknowledges that forest product companies may participate as shareholders in cooperative-held licences.

106 *Timber Harvesting Contract and Subcontract Regulation*, BC Reg. 22/96, as amended by BC Reg. 278/2004, promulgated under ss. 152 to 161 of the *Forest Act*, R.S.B.C. 1996, c.157 [BC Timber Reg].

107 *Hayes Forest Services Ltd.* v. *Pacific Forest Products Ltd.*, 2000 BCCA 66, quoting from John Forstrom, "Forestry Law – 1997 Update: Drafting Contracts to Comply with Bill 13", Continuing Legal Education Conference (May 1997), 2.1.01-2.1.02.

108 BC Timber Reg, note 106.

109 The LRCBC found that BC's woodworker lien legislation was similarly beyond repair: LRCBC, Report on the Woodworker Lien Act (Victoria: Ministry of the Attorney General, 1994) 9-10, online: http://bcli.org/sites/default/files/LRC137-Woodworker_Lien_Act.pdf [1994 Final Report].

110 It is not uncommon for historic legislation to fall out of step with modern social conditions, particularly in the labour context. One example brought before the courts was section 44 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, s.44, which prohibited individuals who financed labour disruptions from claiming benefits under the Act. In *Hill* v. *Canada (Attorney General)*, [1988] 1 S.C.R. 513, the Supreme Court of Canada found that "the original rationale on which the legislation … was predicated ha[d] lost most of its relevance through the intervening years due to the evolution in Canadian labour relations, the labour movement, and the social and economic conditions of Canadian society" (para. 55). The majority of the Court interpreted the word "financing" in light of its ordinary meaning when the Act was introduced and held that the payment of union dues in modern times did not amount to financing for the purpose of the provision. Also see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada, 2008), 158-161.

111 In *Canadian Imperial Bank of Commerce* v. *Levesque Lumber (Hearst) Ltd.* (1994), 22 C.L.R. (2d) 225 (Ont. Gen. Div.) [*Levesque*], the Court held that an individual who maintained logging roads was excluded from the Act. In *Buchanan*, the Court took a broader approach and held that contractors engaged in opening and maintaining logging roads were covered by the Act: see note 5. In *Keown* v. *Clear Lake Lumber Co.*, [1947] 1 D.L.R. 654 (Ont.C.A.), the Court held that a trucker who picked up a load of logs along the highway and transported it to the mill was not entitled to a lien under the Act. Again, in *Buchanan*, this decision was distinguished on its facts and the scope of the Act interpreted more broadly. In spite of the liberal approach taken in *Buchanan*, it seems clear that the Act's wording does not extend to contractors more tangentially connected to the harvesting process such as equipment suppliers for example.

112 Small to medium enterprises supplying moulds to Ontario's automotive parts industry have been required to accept lower prices due to the greater financial power of the Big Three automakers and their first-tier suppliers. As a result of this unequal bargaining power, mouldmakers have also been required to wait for payment until after the mould has been successfully used in production. This has resulted in cash-flow problems for the mould-maker and significant credit risk: John Holmes, Tod Rutherford and Susan Fitzgibbon, "Innovation in the Automotive Parts Industry: A Case Study of the Windsor-Essex Region", paper presented at 6th Annual National Conference of the Innovation Systems Research Network (May 13-15, 2004) 22ff., online: http://www.utoronto.ca/isrn/publications/WorkingPapers/Working04/Holmes04_Automotive.pdf; "Troubling Terms: Moldmakers are Seeking Solutions to Payment Delays from Many of their Automotive Clients" (2000) 58 *Canadian Plastics* 1, online: http://www.canplastics.com/news/troubling-terms/1000164532/; "Tool, mould makers nervous as auto worries mount", *Windsor Star* (November 18, 2008), online: http://www.canada.com/story_print.html?id=6c729a94-7ee4-4095-942b-8f43ae588934&sponsor=.

113 LRCBC, *Report on Debtor Creditor Relationships, Part II – Mechanics' Lien Act: Improvements on Land* (1972) 12-13.

114 LRCBC, note 113, 22-23.

115 See Ontario Ministry of Attorney General, *Discussion Paper on Repairer and Storer Liens* (1985) 24. A discussion of the similarities and distinctions between FWLWA and other Ontario commercial lien regimes is found below.

116 See, for example, Hurst, note 46, 409.

117 Now that loggers are incorporated, own their own equipment and, in some circumstances, work on their

own account, they begin to resemble modern trade creditors more than the bushmen of 1891.

118 Under the Ontario Act, only independent contractors who have "cut, removed, taken out or driven logs or timber" are entitled to assert a lien: FWLWA, note 1, ss. 3(2). In *Levesque*, note 111, the Court held that a contractor who maintained logging roads was not entitled to claim a lien under this provision.

119 1896 Amendment, note 8.

120 Logging employees would have had recourse to the *Master and Servant Act*, R.S.O. 1877, c. 133, s.12, which provided for wage recovery orders by Justices of the Peace. However, these orders were not easily enforceable: Law Commission of Ontario, *Vulnerable Workers & Precarious Work: Background Paper* (Toronto: December 2010) 22-23, online: http://www.lco-cdo.org/VulnerableWorkersBackgroundPaper-December2010.pdf.

121 See, for example, *White* v. *Sandy Lake Lumber Co*. (1912), 48 C.L.J. 25 (Ont. Dist. Ct.).

122 This rationale for granting lien protection to loggers rather than mill employees was expressed in a historical context in *Carpenter* vs. *Bayfield Western R. Co*., note 57, quoted by Hurst, note 46, 408. It continues to be articulated by some industry observers as a reason for retaining lien legislation.

123 These are extensively reviewed in Geoffrey England, *Employment Law in Canada*, 4th ed. (Lexis Nexis Canada, 2005), ch. 19. For limitations in the existing process for recovering unpaid wages, see the Law Commission of Ontario, *Vulnerable Workers and Precarious Work, Final Report* (Toronto: December 2012) 53-66, online: http://www.lco-cdo.org/vulnerable-workers-final-report.pdf. Also see a background paper commissioned for that Project, Leah F. Vosko, Eric Tucker, Mark P. Thomas, Mary Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada* (November 2011), online: http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf.

124 *Employment Standards Act, 2000*, S.O. 2000, c.41, s.103 [ESA]. Employment standards legislation was first introduced in Ontario in 1969: *Employment Standards Act*, S.O. 1968, c. 35.

125 ESA, 2000, note 124, s.81.

126 ESA, 2000, note 124, s.14.

127 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 [BIA].

128 BIA, note 127, ss. 81.3, 81.4, 136(1)(d).

129 *Wage Earners Protection Program Act*, S.C. 2005, c.47 [WEPPA]; Service Canada, "Wage Earner Protection Program", online: http://www.servicecanada.gc.ca/eng/sc/wepp/.

130 LRCBC, 1992 Working Paper, note 7, 14-15.

131 Richard H. McLaren, *Secured Transactions in Personal Property in Canada*, 3d ed. (online) (Carswell, 2013) para. 1.01; also see Risk, note 47, 326 on a general characteristic of commercial legislation enacted during the mid-1800s: "The legislation was often a specific response to a particular and immediate problem, and was shaped or limited by the current perception of the problem. It was often made – or copied – hurriedly, without adequate consideration of need and context. The result was gaps, inconsistencies, and awkward limits, which were often met by hurried amendments."

132 *Personal Property Security Act*, S.O. 1967, c. 73 [PPSA]. The Act did not come into force until April 1, 1976.

133 Smaller amounts may be secured by use of a credit card.

134 This is a simplified description of a more complex priority ranking which also orders unperfected security interests. See Ronald C.C. Cuming, Catherine Walsh and Roderick J. Wood, *Personal Property Security Law* (Irwin Law, 2005) 8.

135 PPSA, note 132, ss. 4(1)(a).

136 PPSA, note 132, ss. 20(1)(a)(i) and 31.

137 Cuming, Walsh & Wood, note 134, 225.

138 *Repair and Storage Liens Act*, S.O. 1989, c.17 [RSLA]; Ontario Ministry of the Attorney General, note 115, 26; See the discussion below.

139 The PPSA acknowledges this priority in s.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.": PPSA, note 132.

140 FWLWA, note 1, s. 7.

141 See, for example, PPSA, note 132, ss. 28(1). Also see LRCBC, 1992 Working Paper, note 7, 25.

142 See, for example, the lien created for the recovery of child support payments in arrears (although note that this lien is required to be registered in the Personal Property Security Registry [PPSR]): *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31, s. 43 [FRSAEA].

143 CFSA, note 55, s.63. Under s.3 of FWLWA, the Crown's lien ranks ahead of forestry worker liens against the same wood: FWLWA, note 1.

144 See Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, "Secured Transactions Law in Canada – Significant Achievements, Unfinished Business and Ongoing Challenges" (2011) 50 C.B.L.J. 156, section II. A central registry system will not always be appropriate depending on the particular security device in issue. A registry is called for where there are many potential lenders and it is too costly for a searching party to make inquiries to determine if a security interest has been granted: Roderick J. Wood and Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992) 30 Alta. L. Rev. 1055.

145 LRCBC, 1992 Working Paper, note 7, 15-16; Alberta Law Reform Institute [ALRI], *Report on Liens* (Edmonton, 1992) 61-62, online: http://www.law.ualberta.ca/alri/docs/rfd013.pdf.

146 BIA, note 127; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 [CCAA]. Under the CCAA, companies may shelter from creditors under court supervision and the court may impose compromises in order to avoid a bankruptcy. This kind of creative compromise occurred in *Buchanan*, note 5. Court-supervised negotiations resulted in lien claimants recovering 75 per cent of their claim. Later, the government gave another company in the Buchanan family a $25 million forgivable loan to start the mill up again. In spite of this capital injection, the lienholders never did receive the remaining amounts owing to them.

147 There does not appear to be any case law definitively addressing this issue.

148 BIA, note 127, s.2.

149 Roderick J. Wood, *Bankruptcy and Insolvency Law* (Irwin Law, 2009) 119-120.

150 Bristow, Glaholt, Reynolds & Wise, *Construction Builders' Mechanics' Liens in Canada*, 7th ed. (Toronto: Thomson Carswell, 2005+) 8-60; Houlden and Morawetz, *Bankruptcy and Insolvency Analysis* (Insolvency Source, Westlaw Canada) para. 59.

151 The Court relied on *Husky Oil* for the principle that "a province cannot create a priority scheme that overrides a federally-created scheme": *W. Mullner Trucking Ltd. v. Baer Enterprises Ltd.* (2010), 1 B.C.L.R. (5th) 33 (C.A.) at par. 21 quoting from *Husky Oil Operations* v. *Canada (Minister of National Revenue)*, [1995] 3 S.C.R. 452.

152 BIA, note 127, ss. 81.1 and 81.2.

153 Canada, *House of Commons Debates* (1 November 1991), 4400; Robert A. Klotz, "Protection of Unpaid Suppliers Under the New Bankruptcy and Insolvency Act" (1993) 21 C.B.L.J. 161, 163 and 165.

154 *Buchanan*, note 5, para. 42.

155 *Good* v. *The Nepisiguit Lumber Company Limited* (1911), 41 N.B.R. 57, quoted in *Acadia Forest Products Ltd. v. Flemming Gibson Industries Ltd*. (1977), 31 N.B.R. (2d) 482 (Co. Ct.) at paras. 18, 41.

156 *Keenan Bros Ltd.* v. *Langdon*, note 8.

157 *Construction Lien Act*, R.S.O. 1990, c.C.30 [CLA].

158 In *Buchanan*, the Court got around this by characterizing wood chips as pulpwood "cut very small": *Buchanan*, note 5, para. 44.

159 Once the wood is processed, the lien disappears: *Buchanan*, note 5.

160 FWLWA, note 1, s.7

161 For example, the PPSA provides that a third party buyer in the ordinary course takes property free of existing security interests. However, the PPSA protects the creditor by providing that the security interest extends to the proceeds of any sale of secured property: PPSA, note 132, ss. 25(1), 28(1).

162 RSLA, note 138.

163 PPSA, note 132, ss. 41(1): "A registration system, including a central office, shall be maintained for the

purposes of this Act and any other Act that provides for registration in the registration system".

164 FRSAEA, note 142, s.43.

165 PPSA, note 132, ss.1(1).

166 Cuming, Walsh & Wood, note 134, 14.

167 PPSA Reg. 912, s.16.

168 The most common source of PPSA litigation is challenges to the validity of a registration due to registrant error: Cuming, Walsh & Wood, note 134, 269.

169 Manitoba Law Reform Commission [MLRC], *Report #124: The Stable Keepers Act*, (August 2011) 22.

170 PPSA, note 132, ss.18(1).

171 RSLA, note 138, ss.7(5); Uniform Law Conference of Canada, *Uniform Liens Act, 2000*, ss. 5(1) [ULA], online: http://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/699-liens/1625-liens-act-2000

172 However, it is not necessary for a repairer or storer to start out having possession of the article in order for a non-possessory lien to attach: RSLA, note 138.

173 See the similar conclusion of the MLRC in the *Stable Keepers Act Report*. An acknowledgement of indebtedness requirement would, in fact, have worked better in that context since stable keepers would have possession of the animals before the non-possessory lien came into effect so that an acknowledgement could be required as a condition of giving up possession: MLRC, note 169.

174 FWLWA, note 1, s.3.

175 The RSLA provides that non-possessory liens do not have priority over security interests arising after the lien arose but before the lien is registered: RSLA, note 138, s. 10.

176 PPSA, note 132, ss. 30(1). This does not take into account the special priority provided to PMSIs and other special priority rules under the PPSA.

177 PPSA, note 132, ss. 13, 30(3).

178 Michigan, Journal of the House (90th Legislature, 2000, No 67) 2438-2439, online: http://www.legislature.mi.gov/%28S%28tlhraoa1nx2z2u55ukhq5155%29%29/documents/1999-2000/Journal/House/pdf/2000-HJ-11-30-067.pdf. The legislative debates do not provide much discussion of the reason for repeal: 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

179 *Code civil du Bas-Canada*, accessed in Badouin, J.L. & Renaud, Y., *Code Civil Annoté* (Montréal: Wilson & Lafleur Ltée, 1988).

180 L.R.Q., c. C-1991.

181 British Columbia: *Woodworker Lien Act*, R.S.B.C. 1996, c.491 (governing logging employees), *Forestry Service Providers Protection Act*, S.B.C. 2010, c.16 [FSPPA] (governing logging contractors); Alberta: *Woodmen's Lien Act*, R.S.A. 2000, c. W-14; Saskatchewan: *Woodmen's Lien Act*, R.S.S. 1978, c. W-16; Manitoba: *Woodmen's Liens Act*, R.S.M. 1987, c. W190; New Brunswick: *Woods Workers' Lien Act*, R.S.N.B. c. W-12.5; Nova Scotia: *Woodmen's Lien Act*, R.S.N.S. 1989, c. 507; Oregon: ORS - 2011 Edition, Chapter 87 "Statutory Liens", online: http://www.leg.state.or.us/ors/087.html; Washington: Washington State Legislature, Title 60 RCW "Liens", online: http://apps.leg.wa.gov/rcw/default.aspx?Cite=60.

182 ALRI, note 145.

183 ALRI, note 145, 56-62.

184 ALRI, note 145.

185 *Woodmen's Lien Act*, R.S.A. 2000, c. W-14.

186 *Woodworker Lien Act*, R.S.B.C. 1996, c. 491 [WLA].

187 Another distinction is that, unlike the Ontario Act, the BC Act protects mill workers in addition to logging employees.

188 LRCBC, 1992 Working Paper, note 7.

189 LRCBC, 1994 Final Report, note 109.

190 LRCBC, 1994 Final Report, note 109, 12.

191 LRCBC, 1994 Final Report, note 109, 15. A similar recommendation was made by ALRI, note 145, 76-77.

192 However, the proposed Act would have made the $20,000 super-priority subordinate to perfected PMSIs.

193 FSPPA, note 181.

194 FSPPA, note 181, s.2.

195 FSPPA, note 181, s.11.

196 Established by BC Reg. 64/2012.

197 Legislative Debates of British Columbia, Committee of the Whole House, Bill 21 – Forestry Service Providers Protection Act, Tuesday May 25, 2010, 5716, Hon. P. Bell: "The member for Cowichan Valley earlier in his remarks suggested that stakeholders should all participate in the fund. I think that's probably a safe bet…."

198 The Ministry entered into an agreement with the Administrative Authority dated February 1, 2013, online: http://www.for.gov.bc.ca/ftp/hth/external/!publish/web/timber-tenures/Forestry-service-provider-protection-admin-agreement.pdf.

199 Legislative Debates of British Columbia, Committee of the Whole House, Bill 21 – Forestry Service Providers Protection Act, Tuesday May 25, 2010, 5685-5686.

200 Legislative Debates of British Columbia, Second Reading of Bills, Bill 21 – Forestry Service Providers Protection Act, Tuesday May 18, 2010, 5479.

201 In 2010, British Columbia's logging industry generated $3.3 billion in revenues as compared to just under $1 billion in Ontario. Wages and salaries for logging contractors (and other forestry workers) amounted to $543 million in BC as compared to $158 million in Ontario: Canadian Forest Service, note 61, 12 and 14.

202 A Canlii search of the BC courts database between 1980 and 2013 revealed 18 decisions containing the phrase "woodworker lien". The Ontario courts database for the same time period lists only the two *Buchanan* decisions containing the phrase "forestry worker lien". Of course, the number of reported court decisions is not necessarily an accurate measure of the commercial use of the legislation. The LRCBC survey of registry offices found that relatively few liens were being filed in BC: 1992 Working Paper, note 7.

203 *Warehousemen's Lien Act*, R.S.O. 1980, c. 529 (first enacted in the 1920s).

204 See Ontario Ministry of Attorney General, note 115.

205 A lien may arise even where a repairer does not have actual possession of the article: RSLA, note 138, ss. 3(4).

206 ALRI, note 145, 48.

207 RSLA, note 138, ss.4(4).

208 Arthur L. Close, "Commentary: Ontario Ministry of the Attorney General Discussion Paper on Repair and Storage Liens" (1985) 10 C.B.L.J. 359, 362.

209 RSLA, note 138, ss.1(2).

210 RSLA, note 138, ss. 7(5).

211 RSLA, note 138, s.6.

212 RSLA, note 138, s.14.

213 Woodworker liens were not traditionally thought of in this fashion. Instead, they were intended as a means of statutory wage protection. However, the rationale fits insofar as harvesting timber results in an unharvested tree being transformed into logs ready for further processing.

214 ALRI, note 145, 70.

215 For example, an early recommendation for the RSLA was that it would only apply to repairer and storers who had once had possession of the articles but had given up possession. This is rarely the case for forestry workers.

216 ALRI, note 145, 75.

217 ALRI, note 145, 76-77.

218 ALRI, note 145, 92.

219 ALRI, note 145, 89.

220 ALRI, note 145, 99.

221 ULA, note 171. The Act was originally adopted by the ULCC in 1996 and amended in 2000.

222 Uniform Law Conference of Canada [ULCC], 1994 Charlottetown PE Annual Meeting, Civil Section Documents - *Report on Commercial Liens, 1994*, online: http://www.ulcc.ca/en/1994-charlottetoen-pe/448-civil-section-documents/330-report-on-commercial-liens-1994?tmpl=component&print=1&page=.

223 For a discussion of the ULA in comparison with Ontario`s RSLA, see Cuming, note 94.

224 ULCC, note 222.

225 ULA, note 171, ss.2(1) and Commentary.

226 ULA, note 171, ss.5(1).

227 ULA, note 171, ss. 8(3) and Commentary.

228 *Commercial Liens Act*, S.S. 2001, c.15-1.

229 *Liens Act*, S.N.S. 2001, c. 33, not yet proclaimed.

230 British Columbia Law Institute, *Report on the Uniform Liens Act,* Report No. 23 (January, 2003), online: http://bcli.org/sites/default/files/Uniform_Liens_Act.pdf.

231 *Mechanics' Lien Act*, 1873, 36 Vict. ch. 27.

232 On the social and economic importance of the construction industry as a factor motivating lien legislation, see Samuel L. Phillips, *A Treatise on the Law of Mechanics' Liens on Real and Personal Property*, 3d. ed. (Boston: Little, Brown & Company, 1893) 11.

233 Kevin McGuinness, *Construction Lien Remedies in Ontario*, 2d ed. (Toronto: Carswell, 1997).

234 Stephen V. Fram, "The Proposed Ontario Construction Lien Act" (1981-1982) 3 Advoc. Q. 460, 463; also see the Law Reform Commission of Nova Scotia, *Builders' Liens in Nova Scotia: Reform of the Mechanics' Lien Act* (Final Report, June 2003) 18-19, online: http://www.lawreform.ns.ca/Downloads/Builders_Liens_%20FIN.pdf.

235 Fram, note 234, 462.

236 In 2006, approximately 33 per cent of Ontario construction workers were self-employed and, of these, 62 per cent were independent operators with no paid help. Of these independent operators, 75 per cent were unincorporated: Ontario Construction Secretariat, *Independent Operators: Self Employment and the Underground Economy* (May 2007), online: http://www.iciconstruction.com/about/news/article_1C.cfm?CFID=7543469&CFTOKEN=30552437.

237 In 2010, the construction industry Canada-wide had a unionization rate of approximately 30 per cent: Sharanjit Uppal, *Unionization 2011*, Statistics Canada: Perspectives on Labour and Income, 4, online: http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11579-eng.pdf. Although exact numbers for the logging industry are not known, the LCO heard in consultations that there is very little unionization remaining (as contrasted with the wood processing industry).

238 See LRCBC, *Debtor Creditor Relationships, Part II: Mechanics' Lien Acts – Improvements on Land* (1972) 14; Kevin McGuinness, *A Theory of Mechanic Liens,* S.J.D. Thesis, University of Toronto Faculty of Law (1982) 503.

239 Northwest Territories Commission on Law Reform, *Report on Mechanics' Lien Law in the Northwest Territories*, Yellowknife, 1988, quoted in McGuinness, note 233, 12.

240 On the other hand, the fact that logs are a mobile form of property also complicates a woodworker lien regime since it is relatively difficult for third parties to ensure that others do not have competing interests in the logs.

241 McGuinness, note 238, 802.

242 An informal Canlii search of the Ontario courts database between 1980 and 2013 revealed 926 court decisions including the phrase "construction lien". A comparable search of the phrase "forestry workers lien" revealed only the two *Buchanan* decisions.

243 For the distinction between liens and PPSA security interests, see ULCC, note 222, section VI.

244 LCO, *Modernization of the Forestry Workers Lien for Wages Act: Consultation Paper* (August 2012), 20, online: http://www.lco-cdo.org/en/forestry-workers-consultation-paper.

245 National Forestry Database, *Ontario Tenure Holders' Rights, 2011-2012*, online: http://nfdp.ccfm.org/data/tables/tab82_f_e.php.

246 Apart from consensual security agreements, small businesses may use credit cards to manage their credit risk. Credit card companies assess consumers' creditworthiness on behalf of the business owner. Banks provide a similar service in issuing lines of credit. However, these mechanisms are not available in respect of logging contracts given the relatively large amounts in issue.

247 McGuinness, note 233, 15.

248 This same concern led the British Columbia government to deny logging contractors a super-priority lien. The concern was that the financial industry would refuse to lend to small forest products companies in these circumstances: Legislative Debates of British Columbia, Second Reading of Bills - Bill 21, Forestry Service Providers Protection Act, Tuesday May 18, 2010, 5479, Hon. P.Bell. Instead, the government enacted the FSPPA which gives logging contractors only modest lien protection but also provides a compensation fund against which contractors can claim in cases of insolvency: FSPPA, note 181.

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