Enforcement in Saskatchewan, An Overview

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A. Introduction

This paper is intended to provide a high-level overview of the notices and procedures to be utilized when enforcing on security in Saskatchewan. This paper will touch on the three of the most common types of enforcement

1. Personal Property;
2. Farm Equipment and Crop; and
3. Residential and Farm Real Property.

Enforcement of security can be quite nuanced and, while this will provide an overview of the process, enforcement is not a one size fits all approach. Careful consideration should be given to the process and notices required each time before enforcing.

B. The Common Notices

Demand Letter

If a debtor defaults under the terms of a mortgage, lease or loan agreement, the lender/lessor must formally demand payment of the indebtedness owed. This common law demand will typically be in the form of a demand letter.

The demand letter may include the following information:

1. Advise as to the nature of the default (missed payment, cross-default clause, etc.);
2. Advise how the debtor can rectify the default;
3. How long the debtor has to rectify the default - this must be a reasonable amount of time (see *Ronald Elwyn Lister Ltd. v Dunlop Canada Ltd.,* [1982] 1 SCR 726 (SCC)*)*; and
4. The consequences of the failure to rectify the default.

The demand letter may also specify if the underlying loan if payable in full (i.e. a matured or demand obligation) or if the loan is simply in arrears. Similarly, counsel for the creditor will also want to consider if there is an acceleration clause in the loan or security agreement. If, for example, the creditor is enforcing a debt secured by a mortgage, section 61 of *The Queen's Bench Act* typically allows a mortgagor to reinstate the mortgage if the underlying default has been cured.

BIA Notice

When enforcing against all, or substantially all, of a debtor's business related property, including inventory, accounts receivable or other property, the creditor is required to serve a notice of intention (the "**BIA Notice**") pursuant to section 244 of the *Bankruptcy and Insolvency Act* (the "**BIA**"). Following service of the BIA Notice, the creditor must wait ten days before taking further action. This provides the debtor an opportunity to seek a stay of proceedings and formal insolvency protection. A creditor must wait 10 days after the BIA Notice has been served on the debtor before realizing on the security, unless the debtor consent to early enforcement, in writing.

FDMA Notice

When a "secured creditor" is taking action against a farmer, regardless of the type of security, the creditor must serve the statutory notice (the "**FDMA Notice**") in accordance with section 21 of *The Farm Debt Mediation Act* (the "**FDMA**"). The definition of "secured creditor" under the FDMA is broad and counsel would be well advised to review the definition prior to taking any legal action against a farmer. The FDMA Notice must be served at least 15 business days prior to secured creditor taking further action. If this notice is served by registered mail, service is deemed effective 7 business days after it is placed in the mail.

C. Personal Property

Non-Farm Enforcement

<u>The Notices and Processes</u>

Assuming that no stay of proceedings is in place as a result of the BIA Notice or otherwise, the creditor can then seek a voluntary surrender or hire a bailiff to effect seizure of the personal property. Depending on the cooperation of the debtor, this process may move quickly so the creditor must ensure it has a location ready to securely hold the property seized while the notice periods are in play.

Once the creditor has secured the collateral, they are not permitted to immediately sell the equipment. Rather, subject to certain exceptions, section 59 of *The Personal Property Security Act, 1993* (the "**PPSA**") requires the creditor to serve notice on the debtor, and any other party that has requested the information or has a security interest in the collateral, advising of the following:

1. What was seized;
2. How the sale can be prevented (i.e. what amount is owing to redeem the debt);
3. The total balance owing;

4. The cost of seizure that must be paid by the debtor/other creditor;
5. The proposed method of sale;
6. Advising of the right to redeem; and
7. Advising the debtor may be liable for the shortfall, subject to other applicable laws (such as section 18 of *The Limitation of Civil Rights Act*).

This notice must be served at least 20 days prior to sale of the collateral. There are certain exceptions to section 59, when the collateral is of a nature that it will quickly deteriorate in value (it may be perishable) or the cost of holding the security for 20 days is inordinate in comparison to the actual value of the equipment itself.

If the collateral is not redeemed in 20 days, it can be sold. Section 60 of the PPSA sets out how to deal with the proceeds, including payment of seizure and sale costs.

The next question becomes, what happens if there is a shortfall?

<u>Suing on a Deficit</u>

With respect to conditional sales contracts, Saskatchewan is a typically a sue only jurisdiction by operation of section 18 of *The Limitation of Civil Rights Act* (the "**LCRA**"). While a conditional sales contract is not defined in the legislation, a good rule of thumb is that if you provide the purchase money financing for personal property, the lender likely has a conditional sales contract.

In that instance, the creditor is limited to seizing and selling the collateral to recover the debt.

There are several exceptions to this rule, such as:

1. A corporate debtor waived the LCRA at the time of financing (s 40 of the LCRA). This does not apply to individuals
2. The chattel is part of an airplane
3. A true lease and not a conditional sales contract - see the factors set out in *Mercado Capital,* 2007 SKQB 56
4. The debtor willfully damages the security
5. It is unjust or inequitable to limit the right to sue - For example, the debtor has relocated the security and it cannot be located

In addition, the LCRA does not prevent the creditor from having a third party guarantee the debt and then suing on the guarantee itself. However, a creditor cannot take additional security from the debtor in order to secure the debt.

Enforcement on Farm Equipment and Crop

The Notices

As set out above, the process begins with the demand letter, and the BIA Notice and FDMA Notice.

Section 48

After the expiration of the 15 (or 22) business days as required by the FDMA*,* the creditor can proceed with the first notice under *The Saskatchewan Farm Security Act* (the "**SFSA**"). Part IV of the SFSA governs the repossession of a farmer's implements. The section 48 notice is standard form and can be found at Form C of *The Saskatchewan Farm Security Regulations.* The notice must state, among other things:

1. The total balance owing;

2. The arrears;

3. The equipment to be seized; and

4. The farmer's right to apply to Court.

After service of the notice, the farmer has 30 days to elect a Court application to defer or prevent seizure. One can think of this application as a relief from forfeiture application. Provided that the notices are properly served, a Court will not vitiate or set aside the seizure process unless the arrears are paid in full.

Rather, provided a farmer can lead some evidence on the importance of the implement, some form of temporary hardship that led to the arrears, equity in the implement or a plan to rectify the arrears, the Court will typically grant the farmer additional time to make payment, suspending the seizure process. The more information and the better the repayment plan the farmer provides to the Court, the more likely the relief requested will be granted (see *e.g. Bauck vs FCC,* 2020 SKQB 184; *Raes v FCC, 2003* SKCA 58).

If, after 40 days, no Notice of Hearing is received by the lender, it may proceed with seizure of the implement and the next notice in the process.

Section 57

This notice is, again a standard form notice, found at Form E in *The Saskatchewan Farm Security Regulations.* Similar to Form C, it sets out the balance owing, the arrears and the farmers right to apply to Court.

Applications to the Court under sections 57 to 59 of the SFSA are far less common and have yet to be judicially interpreted in a meaningful way in a reported decision. The legal test to be applied under a section 57 notice is likely similar to that applied under a section 48 notice (see *e.g. Petryshyn v National Leasing Group,* 2018 SKQB 5).

Exemptions

Farmers are entitled to a litany of exemptions under the SFSA. Most commonly up for debate is the farmers' equipment, which may be exempt pursuant to section 66(d) of the *SFSA.* Notably, exemptions are only available to a farmer where the secured creditor does not have a purchase money interest. Exemptions are also not available to corporate farms.

If the farmer and creditor cannot agree on exemptions, the onus is on the farmer to prove the exemption. Upon application, the Court will consider what is reasonably necessary for the efficient operation of the farm (section 66(d) of the SFSA*, Herrnbock v Input Capital Corp., 2020 SKCA 120*).

This test, while subjective, follows the commonsense pattern of what does the farmer actually need. While there is no hard and fast rule, the more land farmed, the more operators a farmer has (spouse and children), the more likely the farmer will need multiple combines/tractors. If the farmer can attest to multiple tractors being used for different purposes on the farm, multiple tractors may be exempt.

The exemption of crops is another common application. For crops, this is typically the creditor who provided the cash to purchase inputs for that specific year, or the input supplier themselves if provided on credit and with a security interest. This purchase money security interest is generally year specific as the Court is hesitant to extend the purchase money security interest to additional years based on the argument the fertilizer provides nutrients to the soil for more than one year (see *Helgason v ProSoils,* 2021 SKQB 27).

Without a purchase money security interest, the crop and proceeds thereof may be exempt pursuant to a variety of provisions including:

> 66(c) proceeds necessary to provide for fuel and heating until next harvest
>
> 66(i) proceeds to purchase for seed to sow the land next year – an exemption up to two bushels per acre
>
> 66(j) proceeds needed to pay all remaining unpaid harvest expenses, as well as reasonable home and farming expenses until next harvest.

Given the expansive nature of the exemption, enforcing against crops can be a costly adventure with little upside.

D. Real Property

Farmland Foreclosure

If the mortgagor is a business or a farmer, additional statutory notices may be served along with the demand letter, including: (i) the BIA Notice; (ii) the FDMA Notice; and (iii) the notice of intention pursuant to section 12 of the SFSA (the "**SFSA Land Notice**").

The SFSA Land Notice requires a mortgagee to identify, among other things:

1. The amount of arrears owed pursuant to the mortgage.
2. The total amount outstanding pursuant to the mortgage.
3. The amounts and dates of all installments paid during the three years immediately preceding the date of the notice.
4. The mortgage renewal date.

The Farm Land Security Board Process

Service of the SFSA Land Notice of both the farmer and the Saskatchewan Farm Land Security Board (the "**Board**") triggers a mandatory mediation pursuant to the SFSA and the start of the Board's financial review process (the "**Board's Process**").

With respect to the SFSA mandatory mediation, both parties must participate in the mediation in good faith (see: section 12(9) of the SFSA). This good faith requirement does ***not*** require the mortgagee to "reduce, restructure, refinance, forgive or otherwise resolve debt" owed to the mortgagee (see: section 12(10) of the SFSA). The mediation process itself must take place within 105 days following the date of service of the SFSA Land Notice, unless all parties agree otherwise (see: section 12(6)(a) of the SFSA).

The Board's Process includes a financial review of the farmer's affairs and the preparation of a court report (the "**Court Report**"). The Board's financial review must be completed within 60 days of the Board being served with the SFSA Land Notice (see section 12(3) of the SFSA). Unless the SFSA meditation process is extended by the parties, the Board is required to complete the Court Report within 150 days after it is served with the SFSA Land Notice. The Court Report must include information outlined in section 12(12(a) of the SFSA and may include information outlined in section 12(12)(b) of the SFSA.

After the 150 days have expired, the mortgagee may apply to the Court of King's Bench pursuant to section 11(1)(a) of the SFSA for an order that section 9(d) of the SFSA does not apply to the mortgage (which allows the mortgagor to commence a foreclosure action).

The Section 11(1)(a) Application

The mortgagor must satisfy the following test to obtain an order pursuant to section 11(1)(a) of the SFSA:

1. The farmer does not have a reasonable possibility of meeting their obligations pursuant to the mortgage (the "**Viability Test**") (see: section 13(a)(i) of the SFSA); **or**
2. The farmer is not making a sincere and reasonable effort to meet their obligations under the mortgage (the "**Sincerity Test**")(see: section 13(a)(ii) of the SFSA); **and**
3. It would not be unjust or inequitable for the Court to grant the order (the "**Just and Equitable Test**")(see: section 19 of the SFSA).

In assessing the Viability Test and Sincerity Test the Court "shall presume" that the farmer has satisfied both obligations (see: section 13(a) of the SFSA). The Court must also "give primary consideration to" to the Court Report (see: section 13(b) of the SFSA). The Court will, however, give little weight to the Court Report in circumstances where the Board fails to properly carry out its mandate in accordance with section 12(12) of the SFSA (see, for example: *Farm Credit Canada v Palmer,* 2021 SKQB 50).

The Court may make an order:

1. That section 9(d) of the SFSA does not apply to the mortgage;
2. Adjourn the application for any period that it considers appropriate (see: section 13(e)(i) of the SFSA);
3. Adjourn the application for any period that it considers appropriate and order that further mediation occur (see: section 13(e)(ii) of the SFSA); or
4. Dismiss the application

If the application is dismissed outright, the mortgagee cannot apply for another order pursuant to section 11 or serve another SFSA Land Notice with respect to the subject mortgage for a period of 1 year from the date that the application was dismissed (see: *Farm Credit Canada v Sobkow,* 2007 SKQB 49).

Residential & Commercial Foreclosures

The Land Contracts (Actions) Act, 2018, (the "**LCAA**") governs the pre-action proceedings of non-farm foreclosure with two exceptions:

1) Corporate mortgagors who waive the application of the LCAA pursuant to the terms of the mortgage (s. 14(3)); and

2) Property used solely for commercial purposes is excluded from the application of the LCAA (s. 3).

Unless one of the above exceptions apply, the lender must obtain leave to commence pursuant to the LCAA.

Applying for Leave to Commence

The lender must serve the mortgagors and the Provincial Mediation Board with a Notice of Application for Leave to Commence and Affidavit Regarding State of Respondent's Account Under Mortgage (King's Bench Forms 10-39), minimally 60 days prior to the hearing date. Along with these prescribed forms, the lender must also file a copy of the mortgage, along with any amending agreements, and reasonable evidence of the value of the land, often in the form of a drive-by appraisal or comparative market analysis.

Twenty-five to 5 days prior to the hearing date, the lender must serve updated information on the mortgagor respecting the current state of the mortgage account. The lender must also now serve an Appearance Day Memo on the mortgagor prior to the hearing date.

If the lender intends to seek pre-leave costs, the request must be made at the leave application (see: *Bridgewater v. Haines*, 2012 SKQB 257; *Westfield Twins Condominium Corporation v. Wilchuk*, 2021 SKQB 23). Pre-leave costs are only awarded under rare and exceptional circumstances, for example when the mortgagor is a "chronic offender," who has the ability to pay but refuses or neglects to do so.

At the Hearing, the Court will consider all relevant information and may decide to:

- Adjourn the hearing from time to time for a period of not more than 8 months

- Grant the application for leave to commence the action

- Dismiss the application for leave to commence an action, or

- Make any other decision the judge considers appropriate

Purchase Money or Non-Purchase Money Mortgage?

If the purpose of the mortgage was to purchase the mortgaged property, the lender is restricted to its action against the property and is prevented from suing on the personal covenant (see: s. 2 of the LCRA). This restriction of suing on the promise to pay does not apply to a corporate mortgagor that has waived the LCRA. Section 25 of the SFSA contains a parallel provision applicable to farmland.

If the purpose of the mortgage was other than to purchase the mortgaged property, the lender can maintain an action to enforce the promise to pay if it believes that the value of the mortgaged property is less than the outstanding debt obligations. The lender can only sue on the promise to pay if it pursues a judicial sale of the property. A final order for foreclosure extinguishes the promise to pay.

Statement of Claim (Farm, Commercial and Residential)

Once the Court has granted leave to commence under the LCAA, or granted an Order under section 11 of the SFSA, (or if a corporate mortgagor has waived the LCAA or the property is used solely for commercial purposes), the lender will commence its foreclosure action by statement of claim.

The statement of claim in a mortgage action is the form 10-40 of *The King's Bench Rules*. The prescribed form sets out the information to be contained in the claim. The lender will request all of the available remedies in the claim, including judgment, foreclosure, sale of the mortgaged premises, the appointment of a receiver of the rents, issues, profits of the mortgaged premises and costs.

The mortgage claim is restricted to the mortgage debt only and should not include any ancillary indebtedness of the mortgagor to the lender (*Conexus Credit Union v. Benko*, 2021 SKQB 321).

All parties with an interest in the mortgaged property are named as defendants in the action and served with the claim.

Foreclosure or Judicial Sale?

Following service of the claim and assuming the defendants are noted in default of defence, the lender must determine whether to proceed by an order nisi for foreclosure or order nisi for judicial sale of the property.

Foreclosure transfers title to the property into the lender's name in full satisfaction of the mortgage debt (s. 6 LCRA and s. 25 SFSA). The lender either keeps the surplus or suffers the loss.

Judicial Sale is the process of selling the property pursuant to a court order which sets the terms of sale. If the lender proceeds by judicial sale, it can sue the mortgagor for any shortfall, as long

as the purpose of the mortgage was other than to purchase the property.

Order Nisi for Foreclosure and Final Order for Foreclosure

If the lender decides to proceed by Order Nisi for Foreclosure, it must prepare, issue and serve an Order Nisi for Foreclosure (KB Form 10-43) on the defendants. The order will typically be sought by notice of application but can be pursued without notice. The Order Nisi for Foreclosure sets a redemption period, which allows the mortgagor to redeem the property or reinstate the mortgage if the mortgage has not yet matured or been demanded.

If the mortgagor fails to redeem the property or reinstate the mortgage during the redemption period, the land will be transferred to the lender upon further application for a Final Order for Foreclosure.

Once the Court grants the Final Order for Foreclosure, the Order is submitted to the Land Titles Office and acts as a transfer to transfer title to the mortgaged property to the lender or its nominee. As the foreclosure extinguishes the mortgage debt, the final order concludes the foreclosure process.

Order Nisi for Judicial Sale

Judicial sale is an equitable remedy used when the lender does not want to take title to the property into its name and/or it wants to sue the mortgagor for the shortfall. The Court exercises a supervisory role in the judicial sale process and will only grant equitable orders (see: *Co-operative Trust Company of Canada v. O'Grady*, 1986 WWR 731, (SaskCA) and *Royal Bank of Canada v. Pearl Boutique Ltd*., 2020 SKQB 106).

The lender must determine whether to proceed by real estate listing or by tender or auction as the forms differ according to the method of sale (KB Forms 10-47).

The lender will seek an order nisi for judicial sale pursuant to an application before the court. In rare circumstances, an order nisi for sale can be sought without notice. Upon issuance of the order nisi for sale, the mortgagor will have the ability to redeem the land or reinstate the mortgage, where applicable. If the mortgagor fails to reinstate the mortgage or redeem the land, it will be sold according to the terms of the order.

The order nisi for sale directs the sale of the land following the redemption period and details the method of sale, the upset price, appointment of selling officer, commissions, deposits, length of time for advertising or listing.

Upset Price

The upset price is the minimum price that the property may be sold for without further court order. The upset price informs the maximum deficiency judgment against the mortgagors if the lender intends to sue on the shortfall. Section 5 of the LCRA requires the upset price to be set in the order

nisi. Setting the upset price is seen as a balancing of interests between the mortgagee and the mortgagor (see: *Saskatoon Credit Union v. Goertz* (198 73 Sask R 81 (CA)).

Appointment of Selling Officer

The selling officer, now appointed in the order nisi for sale, is an independent lawyer who oversees the sale of the property to ensure it accords with the terms of the order. Many lenders habitually used their solicitor as the selling officer. In 2020, the Court stated in unequivocal terms, that the lender's solicitor should not be appointed as the selling officer due to the obvious conflict of interest (see: *Affinity Credit Union v. Algner*, 2020 SKQB 174). However, the Court of Appeal later suggested the lender's solicitor may apply to act as selling officer under certain circumstances (see: *The Toronto Dominion Bank v. Sader*, 2021 SKCA 154).

Amending the Order Nisi

Many lenders will be left in the unfortunate position of being unable to sell the mortgaged property according to the terms of its initial order nisi for sale. The lender may wish to apply to court to amend the terms of the order nisi, typically seeking additional time to sell the property and/or to reduce the upset price. The Court has shown increasing unwillingness to amend an order nisi upon further application by the lender, particularly in the event of insufficient evidence from the lender, delay on behalf of the lender or failure to comply with the initial order nisi.

Order Confirming Sale

Once an offer to purchase is received and conditionally accepted by the selling officer, the lender applies to Court to have the sale confirmed by an order confirming sale (KB Form 10-47E). The sale must conform to the terms of the order nisi for sale and, if not, consent of the court to amend is requested at the time of the application for an order confirming sale. The lender typically applies to court by notice upon the defendants. The lender only applies to court after the buyers' conditions have been removed from the offer.

The order confirming sale names the purchasers and the purchase price. The order may direct persons in possession of the property when to give up possession and it may also direct the disbursement of sale proceeds and may request a specific amount of legal fees or direct an application for legal fees to be assessed.

The order further directs the Registrar of Land Titles will accept an application to set up a new title based on the terms of the Order. Once granted, the Order is submitted into Land Titles and acts as the transfer.

Cap on Legal Fees (Non-Farm Foreclosure)

A lender will request a specific amount of legal fees in the order confirming sale or direct a subsequent application to have costs assessed. The lender must prove it is entitled to legal fees.

The mortgage typically provides for a full indemnity for solicitor-client costs but the common law has capped the solicitor-client costs payable in a non-farm foreclosure.

The Court has taken a "standard costs approach" when awarding solicitor client costs in foreclosure proceedings. The standard award of legal fees is set at $5,000, though this award of costs can be increased or decreased depending on the particular circumstances.

Additional SFSA specific foreclosure considerations

If a mortgagee forecloses on Saskatchewan farm land, cancels an agreement for sale, or accepts a voluntary quit claim of Saskatchewan farm land, the mortgagee must give the farmer a right of first refusal prior to selling the subject land to a third-party (see: section 27 of the SFSA).

A farmer's homestead is afforded additional protection under section 44 of the SFSA. Unless a mortgage is exempted from section 44 protection, a mortgagee cannot take out a final order of foreclosure as long as the farmer continues to occupy the homestead (see: section 44(1) and section 44(4) of the SFSA).

Finally, a mortgagee's ability to collect "fees and costs" in the foreclosure process is restricted to party-party costs (see: section 33 of the SFSA).

Conclusions and Closing Remarks

The above is intended to provide a high-level overview of the roadmap to realizing on security in Saskatchewan. Given the nuances with respect to enforcement, especially with respect to farm assets, the above should not be seen as a one-size fits all approach. The applicable legislation, and lending and security documents, should be carefully reviewed at each instance to ensure enforcement can occur in an efficient and cost-effective manner.