

Debtor – Creditor Basics:

Enforcing on Personal and Real Property In
Saskatchewan

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Statutory Notices and Demands

A secured party may serve the following documents on a debtor *prior to* seizing or repossessing property in Saskatchewan:

1. A demand letter
2. A notice of intention to enforce security (the “**BIA Notice**”) pursuant to section 244(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”)
3. A notice of intent to realize on security pursuant to section 21 (the “**FDMA Notice**”) of the *Farm Debt Mediation Act* (the “**FDMA**”)
4. A notice of intention to take possession (the “**SFSA Section 48 Notice**”) pursuant to *The Saskatchewan Farm Security Act* (the “**SFSA**”)
5. The notice pursuant to section 12 of the SFSA (the “**SFSA Land Notice**”)

The Demand Letter

Prior to sending a demand letter, a creditor may consider the following:

1. What defaults has the debtor committed pursuant to the loan, lease or security agreements?
2. Is the debtor a farmer or a business person?
3. Is the property subject to a mortgage, security agreement or lease?
4. Is the obligation a true demand obligation, or is the creditor relying on an acceleration clause?
5. Has the loan matured?

A creditor must provide a reasonable amount of time for the debtor to repay the indebtedness (see: *Ronald Elwyn Lister Ltd. v Dunlop Canada Ltd.*, [1982] SCJ No. 38, [1982] 1 SCR 726 (SCC)).

The BIA Notice

A secured creditor or lessor may need to serve the BIA Notice if (among other things) the creditor intends to enforce against all or substantially all of the debtor's assets.

A secured creditor or lessor may serve the BIA Notice at the same time they serve the Demand Letter.

A secured creditor or lessor must typically wait 10 days after the BIA Notice has been served prior to seizing or repossessing the debtor's assets.

Service is typically effected via either personal service or registered mail.

The FDMA Notice

A “***secured creditor***” who intends to pursue a debt claim or enforce its security against a farmer should serve a FDMA Notice.

A secured creditor cannot take any further enforcement steps for a period of 15 **business** days following service of the FDMA Notice.

Service is typically effected via either registered mail or personal service. If it is sent by registered mail, service is deemed effective **seven days** after it is sent.

Two Farm Mediations

After the FDMA Notice and SFSA Land Notice have been served, the farmer and secured creditor *may* attend two mediations:

1. A mediation involving all of the farmer's creditors pursuant to the FDMA (the “**FDMA Mediation**”); and
1. A mediation pursuant to the SFSA (the “**SFSA Mediation**”).

The FDMA Mediation

A farmer may apply for either:

1. A stay of proceedings by all of the farmer's creditors, a review of the farmer's financial affairs, and mediation between the farmer and its creditors (section 5(1)(a)); or
1. A review of the farmer's financial affairs and mediation between the farmer and its secured creditors.

The SFSA Mediation will be discussed later on in the presentation.

Farm Personal Property

*The Saskatchewan Farm Security Act (The
“SFSA”)*

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Seizing Farm Equipment - Parts IV and V of the SFSA

Special rules apply to seizing farm implements.

- The first question to be asked is “is this person a farmer under the SFSA”
- If you have a farmer, the next question is what type of security interest do you have?
- Finally, are you attempting to seize a farm “implement”?

The SFSA Section 48 Notice

- These notices must be served after the FDMA Notice has been served, assuming the farmer has not invoked the mediation process.
- The section 48 notice gives the debtor Notice of the Intent to Take Possession of the collateral.
- Must be served BEFORE seizure.
- Farmer has 30 days to
 - 1) remedy arrears
 - 2) apply to Court for relief
 - 3) Strike a deal with the Creditor

Section 48 Court Applications

- Obligation on Farmer to apply to the Court.
- Operates as a relief from forfeiture application. Farmer should satisfy the Court as to:
 - Why they are in arrears;
 - How they will remedy the arrears; and
 - Why the equipment is important.
- In most cases, Court will provide farmer with some time to remedy default if they apply to the Court.

Section 48 of the SFSA

- If the farmer remedies the default, the notice is vitiated.
- In addition, if a payment, even a partial payment, is made, it vitiates the Section 48 Notice.

Section 57 Notice - Notice of Possession

- If 40 days have passed since the first notice and, if applicable, the farmer did not remedy the default pursuant to an agreement or Court Order, the creditor may seize the equipment.
- The farmer needs to then serve notice pursuant to section 57 of the SFSA, the Notice of Possession

Section 57 - Notice of Possession

- This notice comes after seizure but before sale.
- Again, any payment accepted may vitiate the notice.
- While there are no reported decisions on section 57, it is likely again a relief from forfeiture application.
- A farmer cannot apply to the Court again if they did so after receiving the section 48 notice.

If 40 days pass from the date the Section 57 notice is served, the creditor may proceed with sale.

Section 55 of the SFSA

If a creditor takes possession of an implement or disposes of an implement contrary to Part IV of the SFSA, the creditor is subject to significant consequences pursuant to section 55 of the SFSA.

- The loan/lease agreement is cancelled;
- The farmer is released from all liability with respect to the implement under the loan/lease agreement; **and**
- Debtor is entitled to damages of 1.5x the value of the collateral seized.

Enforcing GSA's and Judgment

When enforcing against a farmer on a GSA or Judgment, a farmer may have certain exemptions from seizure under the SFSA, in addition to those under the BIA or *The Enforcement of Money Judgments Act* (“**EMJA**”).

The exemptions are set out under Part V of the SFSA.

Part V of the SFSA

Part V of the SFSA provides expansive exemptions to farmers.

Exceptions:

- Corporations do not get exemptions
- PMSI interests are not subject to exemptions
- Farmer must apply to Court and prove exemptions, not automatic.

Most common exemption issues before the Court:

- Equipment
- Crop and crop proceeds

Part IV notices still required. Then, if an exemption is claimed, an application comes before the Court by way of Originating Application

Part V of the SFSA - Enforcing on Crop - Section 66(c), (i) and (j)

Perhaps the most expansive exemption, crop and the proceeds of crop are exempt as follows:

1. proceeds necessary to provide for fuel and heating until next harvest
2. proceeds to purchase seed to sow the land next year – an exemption up to two bushels per acre
3. proceeds needed to pay all remaining unpaid harvest expenses, as well as reasonable home and farming expenses until next harvest.

Note: The Farmer will be required to lead detailed evidence of their farming plan and expenses for the next year.

Part V of the SFSA - Enforcing on Equipment

Section 66(d) of the SFSA provides an exemption for:

all livestock, farm machinery and equipment, including one automobile or one farm truck, that are reasonably necessary for the proper and efficient conduct of the farmer's agricultural operations for the next 12 months;

A contextual analysis, a creditor will be unable to enforce on equipment that the farmer requires to run his farm for the next year.

Among other things, the Farmer must prove:

1. The size of their farm;
2. That they are a farmer;
3. The equipment they have; and
4. How they use it/why it is truly necessary.

Recent case law makes it clear that the farmer must provide specifics. It is more than simply stating "I am a farmer and I need a combine" (see *Herrnbock vs Input Capital*, 2020 SKCA 120 for an example).

Section 66(d) - Enforcing on Equipment

Note that if an exemption is proven, the security interest remains.

The creditor may be permitted to enforce when the farmer's equipment is no longer exempt. The most common example is the equity in equipment on a voluntary sale, if the proceeds are not reinvested in new, exempt equipment.

Exempt equipment that is sold, where the proceeds used to purchase similar equipment, maintains its exemption and the equity is not seizable.

Non-Farm Personal Property



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To Seize or Sue - Section 18 of *The Limitation of Civil Rights Act* (the “LCRA”)

- Section 18 governs the enforcement of conditional sales contracts.
- Sask is a generally a seize only jurisdiction for conditional sales contracts.
- If you have a security interest pursuant to a conditional sales contract (Think most purchase money financings), subject to limited exceptions, you are limited to seizure.

Some exceptions to section 18 of the LCRA

1. You obtained a corporate waiver at the time financing was obtained - section 40 of the LCRA - This does not apply to individuals.
2. The chattel you are enforcing on is part of an airplane
3. It was 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, affecting the value of the recovery.
5. It would be unjust or inequitable to limit the right to sue - For example, the debtor has relocated the security and it cannot be located.

Getting Around Section 18 of the LCRA

While one cannot sue the debtor, they have other options:

1. If the debtor is a corporation and no corporate waiver was obtained, the creditor can seek a guarantee from the directors and/or shareholders; or
2. If the debtor is an individual, the creditor can seek a guarantee from third parties.

The creditor likely can NOT get additional security from the original debtor to secure any shortfall on a conditional sales contract.

The Notices to Seize and Sell

The Personal Property Security Act, 1993 (the “**PPSA**”) requires notice to be given when property is seized and before it is sold.

Section 59 of the PPSA requires certain notices to be given after seizure, but at least 20 days prior to sale of the equipment. Notice must be given to:

1. The debtor
2. Any party who may have a registered interest (serial numbered or general secured) in the personal property registry against the equipment
3. Any other person who has provided the creditor with a demand for written notice

Note: There are exceptions to requiring notice where, among other things, the collateral seized may be perishable or subject to a very quick diminution in value.

Section 59 of the PPSA - The Notice of Disposition

The notice under section 59 of the PPSA must state:

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 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 *LCRA*)

Section 60 of the PPSA - After the Sale

Section 60 of the PPSA sets out the manner in which excess proceeds, or a deficiency, must be dealt with.

In addition, any other secured creditor, or the debtor, may request an accounting from the sale. The creditor should ensure accurate records are kept of how the property was disposed of and where the collateral went.

Suing on the Deficiency

After sale, and assuming there are no roadblocks preventing suit on a deficiency such as section 18 of the LCRA or section 46 of SFSA, the debtor can sue on a deficit.

Section 46 of the SFSA is the farming equivalent to section 18 of the LCRA, but **cannot** be waived by corporations.

The creditor can then, assuming judgment is obtained, enforce pursuant to EMJA.



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Questions?