

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 is 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

The Notices and Processes

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?

Suing on a Deficit

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.

