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Commercial Loans: Practising Perfection To Ensure Enforceable Security

Default Has Occurred: Getting The Process Started On Enforcement

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INTRODUCTION

Although the current global focus on the financial downturn has led many to believe that insolvencies are on the rise, the fact is that financial defaults and insolvencies are regular occurrences in Canada. However, the constancy of defaults does not mean that debt enforcement is a straightforward process, particularly where secured creditors are concerned. Counsel acting for secured creditors must not only be mindful of the remedies available, but some of the pitfalls that may suddenly appear along the way.

This article is designed to be a quick "how-to" guide that highlights the various enforcement options available to a secured creditor when facing a default situation. As the topic of security reviews and fixing defects in the security package has been previously discussed in this program, the launching point for this article will be the demand letter. It will then review the various preliminary considerations that every secured creditor must examine prior to enforcement. Should the creditor's analysis favour proceeding with enforcement, the various remedies available to creditors will be explored.

STEP 1: ISSUING THE DEMAND LETTER

In some cases, the demand letter is the most important step in the enforcement process. The demand letter is a signal to the debtor that the creditor is serious and ready to press ahead with its enforcement rights. This alone may galvanize the debtor to take serious steps to address the creditor's concerns and work out alternate arrangements for payment or restructuring the indebtedness. Not only is the letter designed to intimidate the debtor, but it can protect the creditor from later complaints by the debtor. Provided it is accompanied by the applicable statutory notice (discussed below), it may also assist in preserving the creditor's ability to enforce its security should the debtor file a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act* ("BIA").[1]

To be effective, the letter itself should give clear notice to the debtor that the debt is due and the consequences that will result should the letter go ignored. The demand should clearly set out the amount of the indebtedness, identify the nature of the indebtedness, the name of the creditor and the *per diem* interest rate accruing on the overdue accounts. Where possible, a "drop dead" or cure date should be clearly indicated to the recipient along with the consequences of ignoring the letter (e.g. the commencement of litigation and/or the creditor exercising its enforcement rights). An example of a typical demand letter is attached as Appendix A.

Not only does prior notice make practical sense, but it is a requirement at common law and under BIA. The common law notice requirement should be the creditor's first consideration. The suitable amount of common law "reasonable notice" is fact specific and will need to be weighed

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[1] BIA, s. 69.1(2)(b).

in light of various factors which include: (1) the amount of the loan; (2) the length of the relationship between debtor and creditor; (3) the risk to the secured creditor of losing its money or the collateral; and (4) the character and reputation of the debtor.[2]

The difficulty is that there is no "one size fits all" notice period that can be applied to every default situation. In practice, most counsel adopt a standard ten day notice period as it tracks the ten day notice period required under the BIA. However, it will be up to counsel to assess the appropriate notice period under common law.

Section 244 of the BIA

Under s. 244(1) of the BIA, secured creditors are required to give ten days' notice prior to enforcing their security against "all or substantially all" of the debtor's inventory, accounts receivable or other property. The notice itself is a prescribed form known as a "Notice of Intention to Enforce Security".[3] It is also commonly referred to as a "Section 244 Notice". A sample Section 244 Notice is attached at Appendix B.

The Section 244 Notice must be sent to the debtor in the manner required in the notice provisions in the security agreement. If the security agreement is silent, then the Section 244 Notice must be sent by registered mail or courier.[4] It is also a good practice to send copies of the notice to any guarantors. Although not required under the BIA, the notification of guarantors could facilitate a possible resolution of the indebtedness.

As it is usually difficult for a creditor to know whether the debtor is (a) insolvent or (b) the secured assets constitute a "substantially all" of the debtor's property, the safest and most prudent course of action is to make it a practice to include a Section 244 Notice with every demand letter. Otherwise, creditors who fail to deliver a Section 244 Notice could expose themselves to a large damages award arising from business losses caused as a result of the creditor's hasty actions.

During the mandatory ten day notice period, the secured creditor cannot take any steps to enforce its security unless the debtor consents to earlier enforcement. The consent can only be obtained after the notice has been issued, not prior to sending the notice.[5]

Where a secured creditor suspects that its security will be at risk during that 10 day notice period, it can apply to the court, without notice to the debtor, under s. 47 of the BIA, either before or after the notice is delivered for the appointment of an interim receiver to take control of the debtor's assets and preserve them. In order to obtain an order appointing an interim receiver, the secured creditor must establish that it is necessary for the protection of the debtor's estate or the interests of the creditor. In addition, the creditor must show that there is significant danger that

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2 *Lister v. Dunlop* (1982), 41 C.B.R. (N.S.) 272 (S.C.C.); *Kavcar Investments Ltd. et al v Aetna Financial Services Ltd. et al* (1989), 70 O.R. (2d) 225 (C.A.).

3 *Bankruptcy and Insolvency General Rules*, C.R.C., 1978, c. 368, as amended, rule 124; Form 86.

4 *Ibid*.

5 BIA, s. 244(2.1).

the debtor's assets will be dissipated.[6] The BIA now requires that the application to appoint an interim receiver must be made in the "locality of the debtor" – meaning where the debtor carried on business or resided.

Under the recent amendments to the BIA, the appointment of the interim receiver terminates upon the earliest of:

(a) the taking of possession by a receiver (as defined under s. 243(2) of the BIA) of the debtor's property over which the interim receiver was appointed;

(b) a trustee in bankruptcy taking possession of the debtor's property over which the interim receiver was appointed; and

(c) the expiry of 30 days after the appointment of the interim receiver.[7]

Should the creditor wish to continue the appointment beyond the interim period, it may apply under s. 243 of the BIA for a full receivership appointment. This is discussed in more detail below.

Farm Debt Mediation Act

Where the security agreement contains a charge against the property of a farmer, the secured creditor must also serve the farmer with a Notice of Intent to Realize on Security under the *Farm Debt Mediation Act* (the "Farm Debt Notice") prior to exercising its remedies under its security.[8] The Farm Debt Notice can be served at the same time as the demand letter and Section 244 Notice. A sample Farm Debt Notice is attached at Appendix C.
The notice period under the *Farm Debt Mediation Act* is 15 business days.[9] During the notice period, or at any time afterwards, the farmer can request a stay of proceedings under s. 5(1)(a) of the Act, preventing the creditor from beginning or continuing its enforcement efforts against the farmer's assets or commencing or continuing any action for the recovery of debt.[10] The counterbalance is that during this time, the farmer cannot incur any additional debt, make payments, or sell or transfer assets without prior written permission.

The initial term of the stay of proceedings is 30 days, but the stay can be extended in 30 day increments up to a maximum period of 120 days.[11]

STEP 2: INITIAL CONSIDERATIONS

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6 *Royal Bank v. Canadian Print Music Distributors Inc.* (2006), 23 C.B.R. (5th) 42 (Ont. S.C.J.).

7 BIA, s. 47(1).

8 *Farm Debt Mediation Act*, S.C. 1997, c. 21, s. 21.

9 *Ibid*, s. 21(2).

10 *Ibid*, s. 12.

11 *Ibid*, s. 13(1).

Where the debtor fails to heed the creditor's warning, creditors often want to take immediate steps to recover the debt. However, prudent counsel should encourage the creditor to play "debt detective" before plunging into the enforcement process. In other words, although the lawyer may have determined that the creditor's security is enforceable and has priority, the primary question before taking further steps must be: will there be a likely recovery to the creditor?

To make this determination, the creditor should carefully consider the following:

1. What is the value of the secured collateral? What are the costs associated with realizing on the secured asset?

2. Are there any competing claims that may rank above the secured creditor's position?

Assessing the Value of the Collateral

Depending on the resources available to your client, it may already have a good sense of the current value of the secured asset. This is particularly so if your client holds security over a specific asset such as machinery or a vehicle. This may not be the case where your client has security over a basket of assets by way of a general security agreement.

In either case, your client will get a better sense of its possible recovery from a pre-enforcement inspection to assess the condition of the collateral. Most security agreements permit the secured party reasonable access to inspect the collateral. Where the creditor's security relates to inventory or accounts, the creditor may consider performing a spot audit to review the books and records of the debtor to ensure that the creditor's list of secured assets matches the assets in the debtor's control. Alternatively, the creditor might also consider appointing a "monitor" under its security to put together a snapshot of the debtor's financial position. To ensure that there are no issues regarding the deemed trusts or WEPPA charges noted above, the creditor should ensure that the monitor is an observer only and does not insert itself into any aspect of the debtor's business.

Hand in hand with inspecting the debtor's personal property is determining the net recovery that may be available to your client. Where possible, your client should engage an appraiser to determine the value of the assets. The creditor will also need to assess the costs of realization including appraisal fees, consultant fees, recovery fees and reconditioning costs, storage fees, sale costs and commissions. Armed with this information, the creditor will be better able to make an informed decision.

Competing Claims

The second phase of the pre-enforcement analysis is to determine whether that are any competing claims that could present issues for your client in maximizing recovery. For instance, statutory liens or deemed trusts created under federal and provincial legislation can have priority over perfected security interests. Other considerations include the impact of the *Wage Earner Protection Plan Act* and a landlord's right of distress.

Deemed Trusts

A deemed trust arises under a number of taxation statutes. It is a means to ensure that an employer faithfully remits all income tax, employment insurance and Canada Pension Plan amounts collected from its employees[12] or a vendor collects and remits the tax payable by a purchaser in a sales transaction.[13] Should the employer and/or vendor fail to remit these amounts, the legislation provides that the provincial or federal government has a priority over the debtor's assets ahead of secured creditors. Further, the government can demand payment from a single creditor for the entire amount of the deemed trust, despite the existence of other secured creditors. To make matters worse, there is no limitation period relating to deemed trusts.

Another significant hurdle is that these amounts cannot be verified by consulting with an independent source. In most cases, the best resource is the debtor (which is often not reliable) or by conducting an audit. In most cases, the creditor may be left with a "best guesstimate" when attempting to assess the amount of a deemed trust.

As no creditor will want to take steps to realize on its security only to find its claim subordinated to a deemed trust, if the deemed trust amounts equal or exceed the net value of the assets, the creditor may decide that enforcement does not make sense under a cost-benefit analysis.

The good news for secured creditors is that some deemed trusts can be invalidated by way of a bankruptcy. Under s. 67(2) of the BIA, all statutory deemed trusts are rendered invalid in a bankruptcy except for the deemed trust established for employee source deductions (income tax, CPP and EI) or for provincial deemed trusts relating to taxes similar in nature to the *Income Tax Act* or a provincial pension plan which is of the same nature as the Canada Pension Plan.[14] Deemed trusts that become unenforceable in a bankruptcy include those arising under the *Retail Sales Tax Act* (PST)[15], *Excise Tax Act* (GST)[16] and *Pension Benefits Act.*[17] As a result, the secured creditor can gain a significant advantage over certain deemed trusts by commencing an application for a bankruptcy order.

If the debtor's assets are insufficient to pay both the secured creditor's claims and a Crown claim for unremitted GST, then the secured creditor may wish to consider whether a bankruptcy will be cost effective. If either the amount of the deemed trust or the assets of the debtor are less than the anticipated bankruptcy administration fees, then there may be little advantage in a bankruptcy.

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12 See, *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1); *Employment Insurance Act*, S.C. 1996, c. 23, s. 86(2.1); *Canada Pension Plan*, R.S.C. 1985, c. C-8, as amended.

13 For instance, see *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 222(1); *Retail Sales Tax Act*, R.S.O. 1990, c. R. 31, as amended, ss. 22(1) and (2).

14 BIA, s. 67(3).

15 *Supra*, note 13.

16 *Supra*, note 13.

17 R.S.O. 1990, c. P 18, as amended.

On the other hand, if the amount of the deemed trust exceeds the administration fees and the debtor's assets are insufficient to pay all secured claims and the deemed trust, then the secured creditor may decide to pursue a bankruptcy to take advantage of its priority-reversing benefits. Provided that the application for a bankruptcy order is founded on otherwise proper grounds, courts have found that there is nothing improper about a creditor initiating bankruptcy proceedings in order to reverse priorities.[18]

The Wage Earner Protection Program Act

Another issue that should be a primary concern to secured parties is the impact of the *Wage Earner Protection Program Act*[19] ("WEPPA") and related amendments to the BIA, both of which came into force on July 7, 2008.

Essentially, the introduction of WEPPA and the amendments to the BIA afford new protections to employees in the face of a company's insolvency. Under s. 81.3 and 81.4 of the BIA, employees are given a "super-priority" charge of $2,000 per employee (the "Employee Charge") for wages over the current assets (cash, accounts receivable and inventory) of an employer in the event of a bankruptcy or the appointment of a receiver (including both privately and court appointed receivers). In addition, a similar priority was extended to unremitted employer pension contributions (the "Pension Charge"), although no maximum limit was set.[20] Obviously, the Employee and Pension Charges have the potential to significantly impair a secured creditor's ability to achieve full recovery.

The wage earner protection regime can essentially be boiled down to a two step process: (1) employees whose employer is bankrupt or subject to a receivership submit their claims for eligible wages[21] to Service Canada for payment[22] and (2) the federal government assumes the interests of the wage earners and recoups the amount of the Employee Charge from the employer's current assets ahead of all other creditors.

Many creditors think that these super-priority charges are only activated in a bankruptcy or formal receivership proceedings. However, this is not the case. As a "receiver" is broadly defined under s. 243 of the BIA, secured creditors that take possession or control of "all or substantially all" of the inventory, accounts receivable or other property of a debtor pursuant to a security agreement will also be considered to be a receiver.[23] In other words, a secured creditor enforcing its security outside of formal receivership or bankruptcy proceedings can also be subject to the Employee and Pension Charge.

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18 *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.).

19 *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1.

20 BIA, s. 81.5.

21 Under s. 2 of the WEPPA, "wages" includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

22 The current maximum payable per employee is approximately $3,250.

23 BIA, s. 243(2); See also *Re Colour Box Limited* (1995), 21 O.R. (3d) 746 (Gen. Div.).

In addition, the secured creditor will be obligated to comply with the corresponding notice and reporting requirements under WEPPA.[24] This includes registering with the Office of the Superintendent of Bankruptcy as a receiver, providing former employees with notice of their WEPPA rights and assisting former employees with their WEPPA claims.

The implementation of WEPPA and the corresponding super-priority claims under the BIA have definitely added a new burden for secured and other creditors. The end result is that secured creditors will need to take their potential WEPPA obligations into account prior to taking any steps to enforce their security. Enforcement counsel would be well advised to recommend that their clients consult with a receiver to assess the creditor's possible exposure under the Employee and/or Pension Charge and the costs of compliance.

Landlords

In addition to actions taken by other secured creditors, the secured creditor will need to be mindful of the actions taken by a landlord. Where there is a default under a security agreement, there is likely a parallel default under the payment obligations with respect to the tenant's lease. The landlord's right of distraint permits a landlord to seize the tenant's assets and sell them for purposes of recovery.[25] While the provisions of the *Commercial Tenancies Act*[26] state that the landlord is unable to seize assets owned by a third party, creditors should be mindful that there is a possibility that the landlord may exercise its right of distraint on the collateral over which the secured party claims a security interest. Should the landlord be able to seize and sell the collateral prior to the secured party taking any steps to enforce its security, in most cases, the landlord will prevail.
In the best case scenario, the creditor has previously obtained a waiver from the landlord in which the landlord agreed not to distrain against the secured party's collateral. Alternatively, there may be an agreement in place in which the landlord is required to notify the creditor of any default in order to allow that creditor to cure the default.

Where the creditor has not obtained a waiver from the landlord, the creditor may consider initiating bankruptcy proceedings to reverse the priorities. As a bankruptcy will activate a stay of proceedings, if the landlord has not yet completed its distraint (including receipt of the sale proceeds), then the assets must be released to the trustee in bankruptcy and the landlord is downgraded to a preferred creditor in the bankruptcy.[27] On the other hand, the secured creditor is not impacted by the stay of proceedings and retains its ability to enforce its security. As with the analysis with respect to deemed trusts, the secured creditor will have to weigh the costs of a bankruptcy against its benefits vis-à-vis a landlord.

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[24] WEPPA, s. 21.

[25] *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, s. 31(2).

[26] R.S.O. 1990, c. L.7, s. 31(2).

[27] BIA, s. 136(1)(f).

STEP 3: ENFORCING THE SECURITY

Assuming the decision has been made to press ahead with enforcement and all applicable notice periods have expired, the creditor will need to develop its enforcement strategy. The strategy selected will be impacted by the considerations explored above such as the financial outlook of the debtor's business, the type of asset, the value of the collateral, enforcement costs and competing claims.

Forbearance Agreement

Recent experience has shown that more and more creditors are prepared to work with their debtors under a forbearance agreement. The reason for this is not solely the result of the downturn in the economy; a forbearance arrangement can often be an efficient and effective means for a creditor to enforce its security.

Under a forbearance agreement (also referred to as a standstill agreement), the secured creditor agrees to hold off on exercising its rights and/or remedies under its security agreement after an event of default for a short period of time in exchange for concessions from the debtor. Not only will the forbearance agreement set out specific payment terms and payment deadlines, but it will typically include:

a) a "forbearance fee" (which may be waived if the debtor adheres to the terms of the forbearance agreement);

b) an expanded security package;

c) higher rates of interest;

d) regular financial reporting or, alternatively, the secured party will be able to appoint a consultant (or a "soft monitor") to monitor the affairs of the business;

e) stipulated events of default or events of termination;

f) written acknowledgment of the amount of the indebtedness that it is due and owing and that the debtor is in default;

g) written acknowledgement of the validity and enforceability of the security and guarantees by both the debtor and guarantors;

h) written acknowledgement of the debtor's receipt of any statutory notices, including the Section 244 Notice, the FDMA Notice and notices of sale under the *Personal Property Security Act* ("PPSA");[28]

i) a waiver of defences and release of claims by the debtor (and guarantors).

By putting a forbearance agreement in place, the creditor may not only be able to improve its enforcement options, but it may enhance its rate of recovery.

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[28] PPSA, s. 62(1).

Taking Possession

A secured creditor can seize goods under its security and under s. 62 of the PPSA. Seizure can be accomplished in one of three ways: (1) by the secured creditor directly, (2) by a bailiff or agent appointed by the creditor or, (3) through a receiver appointed pursuant to the provisions of the security agreement.

In many cases, a secured creditor will effect seizure through a bailiff or by appointing a private receiver. In the case of a bailiff, the secured creditor should issue a warrant for the recovery of the secured assets. The warrant should include a detailed list of the collateral that is subject to the debtor's security agreement. Where moving the asset is not cost effective, the creditor may take constructive seizure of the asset by rendering it unusable and affixing labels to the asset.[29]

Should the creditor decide to appoint a private receiver under its security agreement, the receiver will generally require that the creditor issue a letter of appointment to the receiver. Appointment letters generally state that the security is enforceable, that the receiver is considered to be the agent of the debtor and that all of the receiver's fees and expenses shall be paid from the amounts realized by the receiver. The receiver will also require that the secured party provide an indemnity for all liabilities and costs incurred as part of the engagement.

The purpose of the receiver is not to operate the debtor's business but to take possession and control of the secured assets. However, where necessary, the secured creditor can appoint a receiver and manager.[30] This is an expansion of the receiver's mandate in which the receiver and manager is able to operate the debtor's business.

In cases where the debtor is uncooperative and refuses to allow the receiver or agent on its property, the secured creditor may consider obtaining an order for recovery under s. 104 of the *Courts of Justice Act*[31] and Rule 44 of the *Rules of Civil Procedure*.[32] The creditor could bring the motion with or without notice to the debtor, although in most cases, short service of the materials should at least be considered. To obtain an interim recovery order, the creditor would need to establish its right to take possession and that the assets are being unlawfully detained. In some cases, the creditor may be required to post security twice the value of the property to be seized with the court.[33] Another option is making an application under s. 67 of the PPSA. Under this section, the court can make "any order necessary to determine questions of priority or entitlement in or to the collateral".[34] Unlike Rule 44, there is no requirement to post security under s. 67 unless required to do so by the court.

Selling the Collateral

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29 PPSA, s. 62(1)(b).

30 PPSA, s. 60(1)(a).

31 1990, c. C.43.

32 R.R.O. 1990, Reg. 194.

33 *Ibid*, R. 44.03.

34 PPSA, s. 67(1)(c).

Upon successfully seizing the collateral, the secured creditor can then take steps to sell the collateral. Prior to selling the secured assets, the creditor (or its private receiver) must issue a notice of sale pursuant to s. 63 of the PPSA. Under s. 63 of the PPSA, the secured creditor is required to provide at least 15 days' notice to the debtor, guarantors of the debtor, parties with a registered security interest and anyone else who has an interest in the collateral. In cases where the collateral is perishable or the secured creditor believes on reasonable grounds that the collateral will quickly decline in value, notice is not required. Enforcement counsel are well advised to carefully document the evidence supporting the secured creditor's reliance upon this exception.

Once the secured notice has expired, the secured creditor can begin with the process of selling the secured property. Under s. 63(2) of the PPSA, the collateral may be disposed of by way of a public sale, private sale, lease or through another method at any time or place, provided the disposition is on a "commercially reasonable basis". Although the secured party is able to purchase the collateral, it may only do so at a public sale unless a court orders otherwise.[35]

As noted previously, the creditor should obtain an independent written evaluation of the collateral prior to sale. This will protect the creditor should the debtor ever complain that the creditor did not obtain the maximum value of the assets.

As previously noted, creditors should note that even though it may take possession or control of all or substantially the entire inventory, accounts receivable or other assets of the debtor outside of any bankruptcy proceedings, the creditor may be deemed to be a receiver under s. 243 of the BIA. As a result, the creditor will be required to abide by the reporting and other obligations imposed upon a receiver under the BIA. It may also be forced to contend with the obligations imposed under WEPPA and payment of deemed trusts.

Foreclosure

One enforcement option that may not often be considered by creditors is the prospect of retaining the collateral (or foreclosing) on the secured assets in full satisfaction of the indebtedness.

The process of foreclosure is similar to that of selling the collateral. The creditor issues a notice under s. 65 of the PPSA to those who would be entitled to a Notice of Sale under the PPSA.[36] If no objections are made within 15 days after the notice is served, (or the secured party has received written consent from all of the parties entitled to notice), then the creditor is deemed to have accepted the secured asset in full satisfaction of the debt.[37]

If one of the persons entitled to notice objects, the creditor must sell or dispose of the collateral in accordance with s. 63 of the PPSA. Alternatively, the creditor can apply to the court to obtain an order that the objection is ineffective because the objection was made for a purpose other than

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35 PPSA, s. 63(8).

36 PPSA, s. 65(2).

37 *Ibid*, s. 65(6).

the protection of the party's interest in the collateral or the fair market value of the collateral is less than the total amount owing to the secured creditor.[38]

The benefit of foreclosure is that it can be an extremely simple and inexpensive means to gain control of the collateral. However, the creditor will clearly need to do a cost benefit analysis in determining whether to proceed on this path. If the creditor is of the view that the asset will increase in value, foreclosure may be warranted. However, where the market for the asset is declining, the creditor may not opt to pursue this route as the foreclosure process will require the creditor to forego any deficiency arising under the loan arrangements.

Appointment of Receiver

Where the creditor determines that it is not appropriate to appoint a private receiver (for instance, due to acrimony with the debtor), it may opt to appoint an interim receiver under s. 47 or a full receiver under s. 243 of the BIA and s. 101 of the *Courts of Justice Act* ("CJA"). Due to the time limits now imposed under s. 47 of the BIA (as discussed above), the creditor will likely opt for the appointment of a full receiver. Where the creditor has felt it necessary to apply for an interim reeceiver during the ten day notice period, it is able to continue the appointment under s. 243 of the BIA.

Under s. 243 of the BIA and s. 101 of the CJA, the court may appoint a reeciver to take possession of the debtor's property and exercise control over the debtor's business where it is "just and convenient" to do so. The receiver to be appointed must be a trustee licensed under the BIA.[39]

The over-arching benefit of a court-appointed receiver is the stay of proceedings contained in the receivership order. This will allow the receiver to assess the debtor's financial status, identify assets and prepare a marketing plan for the sale of the assets. Court appointed receivers are generally granted the authority to borrow funds and obtain documents from third parties.

Although the creditor has more control over a private receiver (with less cost associated with the recevership), the protections afforded by a court-appointment can be invaluable. For instance, as each step in the receivership process must be approved by the court (such as the sale of assets), this will significantly reduce any complaints by the debtor. Another benefit is that under the recent amendments to the BIA, the court now has the jurisdiction to appoint a "national" receiver with the authority to act in respect of assets located across the country. Previously, a receiver's authority or power was restricted to assets within the jurisdiction in which which the receiver was appointed.

The creditor's desire to appoint a receiver may be tempered by the existence of environmental issues. Although the BIA contains some protections for receivers for environmental conditions that pre-existed the appointment[40], should the receiver take control of or occupy contaminated

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38 *Ibid*, s. 65(5).

39 BIA, s. 243(4).

40 BIA, s. 14.06(2).

property, the receiver will have to deal with liabilities arising under provincial law, thereby adding to the cost and duration of the appointment.

Counsel acting for creditors seeking to appoint a court-appointed receiver should consult with the model receivership order approved by the Commercial List Users Committee along with the explanatory notes which provide background for the use of these orders. They can be viewed on the OBA website (www.oba.org) under the Insolvency Law section.

Initiating a Law Suit

If there is a remaining deficiency after the security creditor has exhausted its realization efforts, it is open to that secured creditor to commence a claim against the debtor pursuant to the amounts owing under the agreement. The question of whether pursuit to the claim is warranted will be dependant on a number of factors.

Unlike asset realization, litigation can be an extremely lengthy process. In addition, the costs of litigation are often difficult to estimate due to the unpredictable behaviour of a debtor. In egregious cases, the secured creditor may be forced to call upon the court to compel a debtor to comply with the various steps in a litigation proceeding. All of which will add an additional layer of cost to the creditor's deficiency. The decision whether to proceed on this path will need to be carefully weighed by the creditor.

Conclusion

On paper, secured creditors appear to have a great deal of power where there has been a default. However, in practice, these expansive powers are hampered by a host of factors beyond the creditor's control or awareness. A careful analysis of the considerations outlined in this paper and the various enforcement options will be essential to the creditor's success in maximizing its realization.

Enforcement remedies must be tailored to suit the situation. Through careful forethought and analysis, a secured creditor can assess the risks and costs associated with the various remedies available and develop the best, and most practical, recovery strategy.

APPENDIX A

September 29, 2008

Debt B Gone
Direct Line: 416.111.2222
Direct Fax: 416.222.3333
dgone@demandinglawyers.com

Personal & Strictly Confidential

Delivered via Courier

Always Debtors Inc.
123 Borrowers Way
Toronto ON G1T 2C2

Attention: Mr. Debtor

Dear Mr. Debtor

Re: Always Debtors Inc. ("Debtors")
- Indebtedness Pursuant to Commitment Letter dated March 7, 2008 issued by Generous Lenders Inc. in favour of Debtors (the "Commitment Letter")

We are counsel for Generous Lenders Inc. **("Lenders")**.

We understand that on or about March 7, 2008, Lenders agreed to advance to Debtors the sum of $700,000 pursuant to the Commitment Letter (the "**Loan**"). As security for the Loan, Debtors granted a security interest to Lenders by way of a Business Loan General Security Agreement dated March 8, 2008 (the "**GSA**") and pursuant to a mortgage registered as SN123456 on April 19, 2008 in the principal amount of $700,000 over the property described as PT LT 11 CON 22 Pelham PT 2 22R2222 and municipally known as 123 Borrowers Way, Toronto, ON (the "**Mortgage**").

We are advised by our client that Debtors has failed to make the required payments under the terms of the Loan. Failure to make payments of interest and principal when due under the Loan is an event of default under the Loan.

Accordingly, Lenders hereby demands payment in the amount of $719,747.26 (the "**Indebtedness**"), being the total of Debtors' current indebtedness under the Loan. The particulars of the Indebtedness are as follows:

	Principal Amount Owing in Canadian Dollars
Principal Amount	$700,000.00
Interest (June 30, 2008 to August 31, 2008)	$15,396.17
Interest (September 1, 2008 to September 26, 2008)	$ 4,351.09
Total	**$ 719,747.26**

At this time, we hereby demand full payment of the Indebtedness of Debtors to our client. This amount must be paid by the close of business on the **31st day of October, 2008**. Payment should be made to our office by certified cheque made payable to Demanding Lawyers, LLP in trust.

In the event that Debtors does not remit the required funds by October 31, 2008, Lenders will take steps to enforce its security under the GSA and the Mortgage. In that regard, we enclose a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* and a Notice of Intention to Realize on Security pursuant to the *Farm Debt Mediation Act.*

In addition, we may be instructed to commence proceedings against Debtors without further notice. If we are required to commence legal proceedings against you, we will claim additional amounts for prejudgment interest, penalties and legal costs.

We trust that you will respond accordingly.

Yours truly,

Debt B. Gone
DBG/me

APPENDIX B

Notice of Intention to Enforce Security

(Subsection 244(1) of the Bankruptcy and Insolvency Act)

TO: **Always Debtors Inc., an insolvent person**

Take notice that:

1. **Generous Lenders Inc. ("Lenders"**), a secured creditor, intends to enforce its security on the property of the insolvent person described below:

> (a) All present and future undertaking, assets and property of Always Debtors Inc. as more particularly described in the general security agreement dated the 8th day of March, 2008, granted by Always Debtors Inc. in favour of Lenders; and (b) the property described as PT LT 11 CON 22 Pelham PT 2 22R2222 and municipally known as 123 Borrowers Way, Toronto, ON (the "**Real Property**") pursuant to a mortgage registered as BW12345 on April 19, 2008 in the principal amount of $700,000 over the Real Property.

2. The security that is to be enforced is in the form of the general security agreement and the mortgage referred to in section 1 herein.

3. The total amount of indebtedness secured by the security is described in a letter from Demanding Lawyers LLP to Always Debtors Inc. dated the 29th day of September, 2008.

4. The secured creditor will not have the right to enforce the security until after the expiry of the 10-day period following the sending of this notice, unless the insolvent person consents to an earlier enforcement.

Dated at Toronto, Ontario this 29th day of September, 2008.

Generous Lenders Inc.

by its solicitors,

Demanding Lawyers LLP

Per: _____

Debt B. Gone

Telephone: (416) 111-2222

dgone@demandinglawyers.com

The term "an insolvent person" is inserted in this form merely to comply with Form 115 and subsection 244(1) of the *Bankruptcy and Insolvency Act*.

APPENDIX C

Agriculture and Agri-Food Canada | Agriculture et Agroalimentaire Canada

Farm Debt Mediation Service | Service de médiation en matiére D'endettement agricole

NOTICE OF INTENT TO REALIZE ON SECURITY | PRÉAVIS DE RÉALISATION DE SÛRETÉ

As required under Section 21 of the Farm Debt Mediation Act, you are hereby notified that it is the intent of:
Conformément à l'article 21 de la Loi sur la médiation en matière d'endettement agricole, vous ête, par la présente, avisé qu'il est dans l'intention de:

Honest Lenders Inc.
(name of creditor / nom du creancier)

To realize on security given against the assets of:
De réaliser sur la sûreté contre les biens de:

Mr. Debtor
(name of farmer / nom de l'agriculteur(tnce))

of
domicilié au:

123 Borrowers Way, Toronto, ON G1T 2C2
(address / addresse)

The security being:
La sûreté qui est:

SEE SCHEDULE "A" on / sur SCHEDULE "B"

(type(s) of security / genre(s) de sûreté) | (asset(s) / bien(s))

and you are hereby notified of your right to make application under Section 5 of the Farm Debt Mediation Act for a review of your financial affairs, mediation with your creditors, and to obtain a stay of proceedings against this action provided you are eligible and:

a) unable to meet your obligations as they generally become due;

b) have ceased paying your current obligations in the ordinary course of business as they generally become due; or

c) the aggregate of your property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all your obligations, due and accruing due.

Any application must be received by an administrator within 15 business days of receipt of this notice, failing which a secured creditor may take action to realize on the security

You may apply for a stay of proceedings by making an application to the Farm Debt Mediation Act administrator at:

et vous êtes, par la présente, avisé de votre droit de déposer une demand d'examen en vertu de l'article 5 dela Loi sur la médiation en matièr d'endettement agricole pour un examen de votre situation financière médiation entre vous et vos créanciers, et d'obtenir une suspension de toute procédures, à condition que vous soyez admissible à faire la demande et:

a) Qu'il vous soit impossible d'acquitter vos obligations au fur et à mesur de leur échéance; ou

b) que vous ayez cessé d'acquitter vos obligations courantes dans le cour ordinaire de vos affaires au fur et à mesure de leur échéance; ou

c) que la totalité de vos biens ne soit pas suffisante, d'après une just estimation, ou ne suffirait pas, s'il en était disposé lors d'une vent régulièrement effectuée par autorité de justice pour permettr l'acquittement de toutes vos obligations échues et à échoir.

Toute demande doit être déposée devant l'adminstrateur(trice) dans les 1 jours ouvrables suivant la réception de cet avis, faute de quoi un créancie garanti peut prendre des mesures afin de réliser une sûreté.

Il vous est possible de demander une suspension de cette action en déposan under demande à l'administrateur de la Loi sur la médiation en matièr d'endettement agricole à:

Farm Debt Mediation Service
123 Compromise Road West
Guelph, Ontario
N1G 4T1
1-800 –111-2222 or (519) 111-2222

Dated this 29th day of September 2008 At Toronto, Ontario
Date ce jour de à

Honest Lenders Inc., by its solicitors Demanding Lawyers LLP

Per: _____ (416) 111.2222

Signature of secured Creditor or authorized representative
Signature du créancier garanti ou du représentant autonsé

Creditor Phone Number
Numéro de téléphone du créancier

The information you provide on this document is collected by Agriculture and Agri-Food Canada under the authority of the Farm Debt Mediation Act for the purpose of facilitating financial arrangements between farmers and their creditors. Personal information will be protected under the provisions of the Privacy Act and will be stored in Personal Information Bank AAFC-PPU-227. Information may be accessible or protected as required under the provisions of the Access to Information Act

Les renseignements que vous fournissez dans le présent document sont recueillis pa Agriculture et Agroalimentaire Canada en vertu de la Loi sur la médiation en matièr d'endettement agricole afin de faciliter la conclusion d'arrangements financiers entre le agriculteurs(trices) et leurs créanciers. Les renseignements personnels seront protégés e vertu de la Loi sur la protection des renseignements personnels et seront versés au Fichier d renseignement personnels AAC-PPU-227. Les rensiegnements peuvent être accessibles o protégés selon ce que prescrit la Loi sur l'accès à l'information

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SCHEDULE "A"

Business Loan General Security Agreement dated March 8th 2008.

Mortgage registered as SN123456 on April 19th 2008 in the principal amount of $700,000 over the property described as PT LT 11 CON 22 Pelham PT 2 22R2222 and municipally known as 123 Borrorer's Way, Toronto, ON.

Guarantee and Postponement of Claim dated March 8th 2008 issued jointly and severally by Mr. Debtor and Mrs. Debtor.

SCHEDULE "B"

All present and future undertaking, assets and property of Always Debtors Inc. as more particularly described in the general security agreement dated the 8th day of March, 2008, granted by Always Debtors Inc. in favour of Lenders; and (b) the property described as PT LT 11 CON 22 Pelham PT 2 22R2222 and municipally known as 123 Borrowers Way, Toronto, ON (the "Real Property") pursuant to a mortgage registered as BW12345 on April 19, 2008 in the principal amount of $700,000 over the Real Property.