

farm financial difficulties

information about farm land foreclosure and farm asset seizures



farm financial difficulties

Revised 2005 (Version 6.1)

This booklet has been prepared, published and distributed by the Public Legal Education Association of Saskatchewan (PLEA). The purpose of PLEA and this booklet is to provide the public with an introduction to a particular area of law. The content of this publication is intended as general legal information only and should not form the basis of legal advice of any kind. Individuals seeking specific legal advice should consult a lawyer.

PLEA is a non-profit, non-government corporation funded by the Law Foundation of Saskatchewan and the Department of Justice Canada. PLEA is supported by the Law Society of Saskatchewan, Canadian Bar Association (Saskatchewan Branch), College of Law, Saskatchewan Legal Aid Commission, Saskatoon Public Library and the public libraries and regional colleges throughout the province.

Contents may not be commercially reproduced, but any other reproduction is encouraged.

PLEA would like to acknowledge Wendy Collinge, of Farm Debt Mediation Services (Government of Canada) for her assistance in the review of this version of the booklet.

public legal education association of saskatchewan

The Public Legal Education Association of Saskatchewan (PLEA) is a non-profit, non-government organization that provides free services to the people of Saskatchewan. PLEA's goal is to assist the public in becoming more informed about the law and the legal system.

attend **free legal information sessions** at
Saskatchewan libraries and regional colleges

organize a **speakers' bureau** for your
group or organization

request **free publications** on various areas of the law

search our web site at **www.plea.org**

For more information on these and other PLEA services, contact:



Public Legal Education Association of Saskatchewan
Saskatoon, Saskatchewan

Tel: (306) 653-1868 Fax: (306) 653-1869 E-mail: plea@plea.org

All cover photos credit PhotoDelux.

© 2005 Public Legal Education Association of Saskatchewan, Inc.
ISBN 1-896168-54-X

Table of Contents

INTRODUCTION	1
FARM LAND FORECLOSURE	2
Steps in Foreclosure	3
Home Quarter Protection.....	7
The Foreclosure Action	11
SEIZING FARM ASSETS.....	18
Farm Machinery Seizures.....	18
Livestock and Grain Seizures	22
Exemptions	22
The Bank Act, Section 427	23
HELP FOR FARMERS IN FINANCIAL DIFFICULTY	24
Co-operation of the Creditor	24
Mediation	25
Order for Schedule of Payments.....	28
Bankruptcy and Bankruptcy Proposals	29
GETTING HELP	31

Introduction

Farmers, like others in business, often borrow money to finance their operations. When farmers decide to borrow money they may go to a bank, credit union, trust company, or other financial institution. A person or an institution that has loaned money to a farmer is called a lender. A person or institution that a farmer owes money to is called a creditor.

When farmers cannot meet their loan payments, the results are often serious. Saskatchewan law is set up to give farmers some protection from losing their land and machinery, but the law can be complicated. This publication may help farmers understand the law and how it affects them. The law applies to both individual and corporate farmers.

Farmers who face losing their land or machinery require professional advice from someone such as an accountant or a lawyer. This publication does not replace that professional advice, but explains the steps and time limits that the law provides. Those farmers who wait to get advice may find that their choices are limited. All references to the farmer in this publication also refer to the farmer's lawyer. For example, where the publication says the farmer must file certain documents with the court, it is generally understood that the farmer's lawyer will file the court documents. A farmer may ask a lawyer to represent him or her at any stage in the process.

This publication gives general legal information on farm land foreclosure and on seizing agricultural machinery, livestock, or grain. It also discusses some options the farmer may have either *before* or *during* foreclosure or seizing of assets.

Farm Land Foreclosure

A mortgage is created when land is used to secure a loan. If a farmer fails to make payments under a mortgage or agreement for sale, they may lose their farm land through foreclosure or judicial sale. Foreclosure ends the farmer's ownership of the property covered by the mortgage or the loan. When a foreclosure action is successful, the creditor becomes the registered owner of the property. A judicial sale happens when the court orders the property to be sold. Unlike in foreclosure proceedings, the creditor does not become the registered owner. Instead, the proceeds of the sale go towards paying the debt.

The Saskatchewan Farm Security Act helps to protect farmers against loss of their farm land. Under this law, the lender must follow certain steps before it can foreclose. The lender must give notice of its intention to foreclose. The farmer and lender enter mediation in an effort to work out an acceptable solution to their financial difficulties. If mediation fails, the Farm Land Security Board prepares a report, and the lender may then ask a court for consent to begin the foreclosure. The foreclosure action itself involves filing forms, going to court, and getting a court order for foreclosure or judicial sale.

The process, from the notice of intention to foreclose to the final order for foreclosure or judicial sale, involves many time limits and delays. At *any* time during the term of the mortgage and before the final order, the farmer may be able to pay the arrears, that is



the amount that is overdue and the interest, and stop the process. However, if the loan is in a demand position - where the lender has a legal right to demand immediate payment of the entire amount - then the entire loan would be

considered in arrears. As well, municipal taxes on the mortgaged property would need to be brought up to date.

Steps Before Foreclosure

Notice of Intention to Foreclose

The lender must give the farmer and the Farm Land Security Board 150 days notice of its intention to ask the court's permission to foreclose on a mortgage. The Farm Land Security Board receives the notice and sends a copy to the Dispute Resolution Office at Saskatchewan Justice.

The notice must clearly state the details of the mortgage, including what is overdue, the total amount owing and what farm land secures the mortgage. During the 150 day notice period, financial review and mediation aimed at the settling of the matter take place.

Field Review

After it receives the lender's 150-day notice, the Farm Land Security Board has up to 60 days to complete a review of the farmer's financial affairs.

The Board appoints a field consultant, who meets with the farm family. Together, they complete an accurate financial statement and prepare for mediation. The field person will discuss a number of issues with the farm family. They will talk about things like the family's legal rights and obligations, goals and options, and the mediation and settlement processes.

When the financial review is complete, it will be used to determine, in more detail, what options are available to the family. The field consultant will help the farm family prepare proposals designed to achieve a reasonable settlement of the financial situation. The field consultant will also make sure that the farm family obtains legal advice concerning protection against foreclosure that exists in the law.

The Board completes its financial review and sends a copy to the farmer, the lender, and the Dispute Resolution Office.

Mediation

Mediation is a method of resolving a dispute without going to court. In farmer/lender disputes the mediator is an impartial third person appointed by the Dispute Resolution Office of Saskatchewan Justice, or the Farm Debt Mediation Service. The Farm Debt Mediation Service is a federal government program offering farmer/creditor mediation, financial assessment, and debt counselling. The program is governed by the *Farm Debt Mediation Act*. The mediator works with both the farmer and lender to assist them in reaching an acceptable solution.

Under the provincial system, after the Farm Land Security Board completes its financial report, the law provides for a minimum of 45 days for mediation. The total mediation period is up to 105 days after service of the notice. However, this can be extended, if all parties agree.

The field consultant from the Farm Land Security Board attends the first mediation session with the farmer. This field consultant supports the farmer and assists in examining the available options.

During the mediation, both the farmer and the lender are expected to participate in good faith. The mediator will consider the following behaviour as evidence that one side is *not* mediating in good faith...

- if either side does not attend meetings regularly without reason
- if either side fails to provide accurate information regarding its financial affairs
- if the lender does not send a person who has the authority to make a deal with the farmer
- if either side fails to provide suggestions for repaying the debt, or fails to give reasons why a proposal by the other side is unacceptable
- if either side behaves in a way that implies lack of good faith

If mediation is successful, the farmer and the lender will have reached a suitable resolution, and generally proceedings to foreclose stop. A mediated settlement may involve a consent foreclosure or voluntary transfer of mortgaged lands to the lender.

All discussions are confidential. If mediation is unsuccessful, the only information the mediator provides to the Farm Land Security Board is notice that the farmer and lender did not reach an agreement. The Farm Land Security Board reports this to the courts. The one exception is where, in the mediator's opinion, one of the sides did not mediate in good faith. In this situation, the mediator will file a certificate with the Farm Land Security Board stating that either the farmer or lender did not participate in good faith. The Board includes this certificate in the report to the court.

The Report to Court

If the mediation is unsuccessful, the Farm Land Security Board has the final 45 days of the 150-day notice period to prepare a report for the court. The purpose of the report is to advise the court if it would be equitable and just to allow foreclosure. The Board may meet with the farmer and the lender in order to prepare this report.

The Board's report *must* include...

- the mediator's certificate if one was issued and, if necessary, the Board's comments regarding the certificate
- whether the farmer has a reasonable possibility of meeting his or her financial obligations under the mortgage
- whether the farmer is making a sincere and reasonable effort to meet these obligations
- whether the mortgaged farm land includes a house and building occupied by the farmer as his/her residence. (This is called a homestead and includes up to 160 acres of land that the buildings are situated on.)
- where the farmer allocated his or her financial resources during the period that the mortgage became in arrears, and the farmer's reasons for so doing

The report *may* also include...

- the value and productive capacity of the land
- the state of accounts between the farmer and the lender
- the income of the farmer and the farmer's spouse
- the portion of farm income that would be needed for the farmer to make payments on the debt
- the local or general agricultural conditions that might affect the farmer's ability to pay
- the reasonable possibility of the farmer being able to pay the mortgage debt if the mortgage were based on the current fair market value

After it completes the report, the Board gives copies to the farmer and the lender.

Court Consent

If the lender decides to continue with the foreclosure application after unsuccessful mediation, the lender must advise the Farm Land Security Board. The Board then files its report with the court. The lender applies to the court for an order for consent to start foreclosure.

If the Board's report includes a mediator's certificate stating that the *farmer* did not participate in good faith, the court will likely give the lender consent to begin the foreclosure action. If, on the other hand, the mediator's certificate states that the *lender* did not participate in good faith, the farmer may ask the judge to order further mediation for a period of not longer than 60 days.

During this additional mediation period, the lender cannot take any action on the mortgage debt. For example, the lender cannot at this time sue on any personal promise to pay contained in the mortgage. If the lender still does not participate in good faith, the court will delay the lender's application for an order to start foreclosure a further 180 days beyond the 60-day period.

Before the court gives consent to the lender to begin foreclosure, the lender must show one of the following...

- that the farmer has no reasonable possibility of making his or her mortgage payments
- that the farmer is not making a sincere and reasonable effort to make payments on the mortgage
- that the farmer did not participate in mediation in good faith

If the lender can convince the court of any one of the above, and that foreclosing is fair, the court will grant consent. The lender can begin the foreclosure action. If the lender fails to persuade the court of at least one of the above, and the court refuses consent, the lender cannot apply again for consent to foreclose for a period of 12 months.

Home Quarter Protection

The Saskatchewan Farm Security Act provides special protection against foreclosure of the home quarter. This protection is available at two stages of the foreclosure proceedings. The first time the home quarter mortgage may be protected from foreclosure is when the lender applies for consent to begin the foreclosure (*The 3-Year Rule for Homesteads*). The second time is at the end of the foreclosure proceedings when the lender applies to complete the foreclosure (*Protection from the Final Order for Foreclosure*).

The 3-Year Rule for Homesteads

The court *must* dismiss the lender's application for consent to foreclose on the homestead if all the following conditions are met...

- the mortgage or agreement for sale covers the home quarter occupied by the farmer as his bona fide farm residence
- the mortgage was made before June 24, 1988

- the court is satisfied that the farmer is making a sincere and reasonable effort to make payments, even though there may not be a reasonable possibility of paying the mortgage debt

If the court dismisses the application for consent to foreclose on the homestead, the lender cannot make another application for three years, unless any one of the following happens...

- the farmer (or the spouse and children, if the farmer dies) ceases to live on the homestead
- the land has deteriorated through the farmer's neglect or wilful act
- the farmer is no longer making reasonable efforts to pay the debt



Protection from the Final Order for Foreclosure

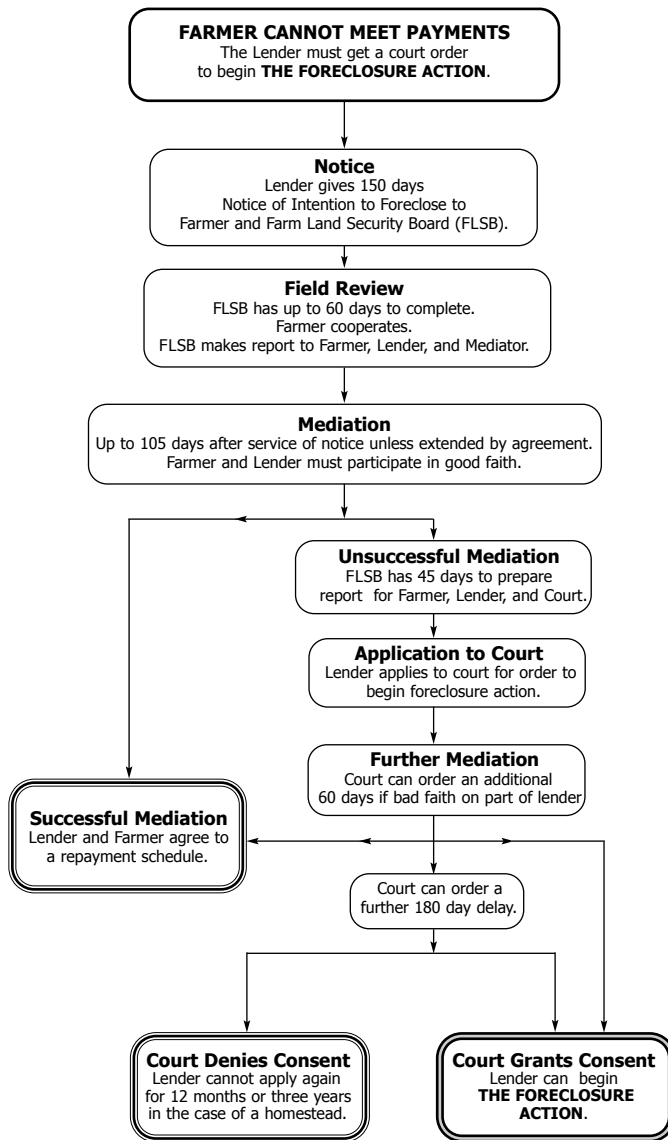
The farmer will not always lose the homestead even if the lender gets the court's consent to begin foreclosure on a home quarter mortgage. *The Saskatchewan Farm Security Act* provides that a final order for foreclosure will have no effect on a homestead for as long as the homestead continues to be a homestead. In other words, the final order for foreclosure will not make the lender the registered owner of the land and the mortgage debt exists as long as the land is still a homestead.

Home quarter mortgages that are not covered by this protection include...

- mortgages financed by a vendor who is an individual or a corporation with less than 10 shareholders
- Farm Credit Corporation mortgages given before June 24, 1988

- a mortgage entered into where the loan was solely to purchase the homestead or solely for the purpose of new construction or improvements on the homestead
- mortgages entered into after September 20, 1992, where the farm land was not a homestead when the farmer signed the mortgage
- mortgages on farm land that was not a homestead as of September 20, 1992, even if the mortgage was entered into before that date
- a mortgage subject to a waiver granted by the Board (The lender and the farmer may have applied to the Farm Land Security Board for an order waiving or giving up the homestead protection at the time they negotiated the mortgage. The Board can only grant this application if it is in the best interest of the farmer. If the Board grants the application, the farmer will have given up all the homestead protection outlined above.)
- mortgages subject to class exemptions issued by the Board
- mortgages in cases where an exclusion order was made by the Provincial Mediation Board under *The Farm Security Act* before June 24, 1988





- Note:
1. At any time, the farmer can pay the arrears and stop the proceedings.
 2. At any time, the farmer can apply to the Farm Debt Mediation Service for a stay of proceedings that will halt any further action until the farmer and creditor have entered into mediation to explore alternatives to the foreclosure process.

The Foreclosure Action

After the lender gets consent from the court to begin, the foreclosure action involves a number of steps. At any time during the term of the mortgage and before the final order, the farmer may redeem the mortgage by paying the arrears and costs. If the mortgage term has expired, the farmer will have to pay out the entire indebtedness to redeem the mortgage.

Statement of Claim

To begin the foreclosure action, the lender files a statement of claim with the Court of Queen's Bench. The statement of claim is a document in which the lender explains why the action has been started and the circumstances surrounding the farmer's failure to make mortgage payments. The lender asks the court for an order that will allow the lender to either foreclose on the land or conduct a judicial sale.

The lender gives copies of the statement of claim to the farmer and to anyone else who has a registered interest in the land, such as a person who is leasing the land.

Statement of Defence

The farmer, or anyone else who has been served in Saskatchewan with the statement of claim, has 20 days to file a statement of defence with the court. If the person is served outside of Saskatchewan, the time to file a statement of defence is longer. The statement of defence is a document that states reasons why the court should not allow the foreclosure. For example, the farmer may deny owing the money under the mortgage in the statement of claim, or may deny that the lender has a valid mortgage. The farmer's lawyer usually prepares and files the statement of defence.

If the farmer files a statement of defence, there may be a trial. At the end of the trial, the court decides whether or not to allow the

foreclosure. If the court allows the foreclosure, it will grant an order nisi for foreclosure or for judicial sale.

If no one files a statement of defence within the required time, there is no trial. The lender may then apply to the court for an order nisi for foreclosure or for judicial sale.

Order Nisi for Foreclosure or for Judicial Sale

The order nisi is a temporary court order that sets a redemption period before the final order for foreclosure takes effect or the judicial sale is held. During this period, the farmer has a further opportunity to pay the arrears on the mortgage. The arrears are any outstanding amounts owing. The mortgage may be in a demand position. For example, the financing term (not the amortization period) may have expired. This allows the lender to demand payment of the entire amount of the loan. In such a case, the entire balance owing must be paid in order to cover the arrears.

The redemption period is a period of time set by the court to give the farmer a chance to pay the arrears, and redeem the property. If the farmer can *redeem* the property, foreclosure or judicial sale proceedings will end. This redemption period is usually three to six months, but it can be shorter or longer depending on the circumstances. The court sets the time for redemption after considering such things as: the number of payments missed; the amount owing compared to the value of the land; the likelihood, if any, that the farmer will continue to make payments on the mortgage debt; and the current local agricultural, economic, and climactic conditions.

When the redemption period is over, the lender may ask the court for a final order for foreclosure. At this time, the court considers information presented by both the farmer and the lender. If the farmer can show a reasonable plan for repaying the debt, the court may further postpone the action to give the farmer more time to catch up on mortgage payments.

Order Nisi for Judicial Sale

If the amount owing on the mortgage is greater than the value of the land, the lender may ask the court for an order nisi for judicial sale instead of an order nisi for foreclosure. In the case of a judicial sale, the lender can sue the farmer and get a personal judgment for any amount still owing after the sale.

If the land is worth more than the debt, the farmer or any other person who has an interest in the land has a right to ask for judicial sale as well. Any proceeds from the sale after the mortgage debt is paid are given to the farmer.

An order nisi for judicial sale also includes a redemption period. If the farmer does not make payments on the mortgage during the redemption period, a court-appointed officer will advertise and conduct the sale at the end of the redemption period. The court sets a minimum price for the sale.



The court must confirm the sale. When the court confirms the sale, the buyer becomes the new registered owner and the farmer must give up possession of the land.

Sometimes a judicial sale is unsuccessful. The lender may then ask the court for a final order for foreclosure.

Adjournments

Any time before the court issues the final order, the farmer may succeed in getting additional adjournments, particularly if he or she has made some payments on the mortgage debt. The number and length of court-ordered adjournments and the length of the redemption period the court allows depend on: the farmer's willingness to keep the judge informed of his or her efforts to pay the debt; the amount of equity in the property; and the likelihood that the farmer can ever catch up in the payments.

Payment of Arrears

Foreclosure proceedings stop any time before the court issues the final order if the farmer pays all arrears. The arrears are the overdue principal and interest that build up during the term of the mortgage. Generally, the farmer must pay the arrears, plus the taxable court costs of the lender to make the mortgage current. Once the term ends, the only way the farmer can stop the proceedings is to pay the entire amount of the mortgage. One possible way to do this is to refinance with the same or a different lender.

Final Order for Foreclosure

The final order for foreclosure is a court order that allows a lender to become the registered owner of the land. A final order is deemed to satisfy the mortgage debt in full. The lender can no longer pursue the farmer personally for the mortgage debt.

However, in many cases a lender cannot enforce a final order for foreclosure against the home quarter (see *Home Quarter Protection*). If a lender cannot foreclose on the home quarter, the lender has the right to apportion the debt. The court will divide the total debt between the homestead and non-homestead land, based on their value. The portion of the debt assigned to the homestead is not extinguished by the foreclosure of the other land.

Actions on the Personal Covenant to Pay

Mortgages always contain a personal covenant. A personal covenant is the farmer's personal promise to pay the amount borrowed. Suing on the personal covenant allows the lender to get a personal judgment against the farmer in addition to getting the land. Getting a personal judgment is important to the lender where the value of the land is less than the amount owing on the mortgage.

Whether or not the lender can sue the farmer on the personal covenant, in addition to foreclosing on the land, depends on why the mortgage was taken out in the first place. A farmer can take

out a mortgage for buying land or for buying other things, such as buildings or equipment.

If the farmer got the mortgage to buy the farm land, the lender cannot sue on the personal covenant to pay. This means that if the farmer is unable to pay the mortgage debt, the lender can *only* foreclose on the land that was given as security for the purchase money.

This also applies to land that the farmer already owned, but used as collateral or additional security for the purchase of other land. The lender cannot ask for a judicial sale. If the value of the land is less than the amount owing on the mortgage, the lender *cannot* sue the farmer for the difference, but the lender can seize or foreclose on any *other* assets that were given as security on the mortgage. Assets that are security are assets that the farmer agreed to put up for the loan. This protection applies only to mortgages that were taken for the purchase price, or part of the purchase price, of the farm land.

If the mortgage money was borrowed for a purpose other than to purchase the land (for example, to buy buildings or equipment), the lender may be able to sue the farmer on the covenant to pay and get a personal judgment.

A farmer who is being sued on the personal covenant needs legal advice as early as possible because this area of law is complicated.

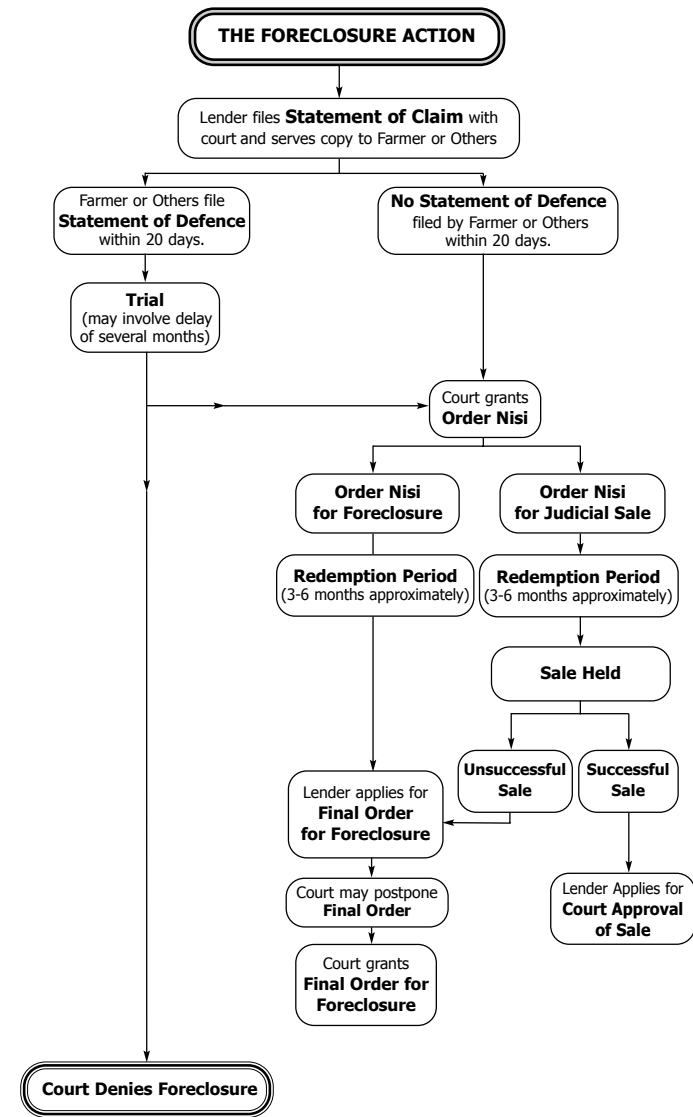
Opportunity to Buy Back

If a farmer voluntarily agrees to transfer the land to the lender, or if the lender forecloses on the land, the lender can then advertise the land for sale. When the lender receives an acceptable offer, he or she must give the farmer the opportunity to buy the land at the same price as that offered by the other buyer. This is called a right of first refusal. The law only says that the farmer can buy the land back at the price in the Offer. It does not say whether the farmer can use any other terms, such as the times allowed for payment,

that may be in the initial agreement with the other buyer.

After the lender gives the farmer written notice of the terms of sale, the farmer has 15 days to notify the lender of his or her intention to buy the land back.

In the next 15 days, the farmer must either pay the purchase price or provide an unconditional commitment to the lender from a recognized financial institution to finance the purchase price within a reasonable time. The lender that is selling the land does not have to finance the farmer's purchase, but may agree to do so.



- Note:
1. At any time, the farmer can apply to the Farm Debt Mediation Service to request a stay of proceedings and additional mediation with the creditors. A stay of proceedings is allowed every two years and can be extended up to 120 days.
 2. A farmer can pay the arrears at any point during the term of the mortgage to stop the entire process.
 3. A farmer may voluntarily transfer the land to a lender at any time.

Seizing Farm Assets

A creditor can always take some kind of action to recover money that is legitimately owing, however the methods that can be used will vary depending on the agreement that was made when money was lent and whether the creditor is a *secured creditor* or an *unsecured creditor*.

A secured creditor is one who has taken security or collateral for the loan. The security or collateral can be any asset of the farmer including farm land, agricultural machinery, or growing crops. The secured creditor can foreclose on land or seize those assets if the farmer does not make payments.

An unsecured creditor is one who has not taken collateral or security for a loan. The unsecured creditor must sue the farmer in court and win a judgment before seizing any goods or forcing the sale of farm land.

The following is a discussion of the steps that the lender must follow before it can seize and sell any of the farmer's assets. The section on exemptions discusses which assets the lender cannot seize.

Farm Machinery Seizures

A secured creditor may decide to seize or repossess a farm implement if a farmer falls behind in payments on the machinery. The creditor must follow certain procedures before it can seize and sell an implement to pay a debt. These procedures are in *The Saskatchewan Farm Security Act* and the *Farm Debt Mediation Act*. An exception to these safeguards



is security taken under Section 427 of the *Bank Act*, discussed later in a separate section.

The seizure procedures in *The Saskatchewan Farm Security Act* and the *Farm Debt Mediation Act* are important safeguards for farmers. The law imposes severe penalties on secured creditors who disobey court orders or procedures, such as seizing equipment without serving all of the necessary federal and provincial notices to the farmer. For example, if a creditor seizes and sells an implement contrary to the law, the security agreement is cancelled. The security agreement is the document that outlines the terms of the loan, including what assets have been pledged for the loan. If the security agreement is cancelled, the farmer does not have to pay the debt. If an implement is seized without following the proper procedures, the farmer can also sue the secured creditor for one and one-half times the value of the implement at the time it was seized.



Notice of Intention to Seize

Under the federal government's *Farm Debt Mediation Act*, secured creditors must serve the farmer with a notice of intent to realize on security. The notice states the creditor's intention to seize equipment, and advises the farmer of the right to seek assistance from the Farm Debt Mediation Service.

The notice of intent to realize on security must be delivered to the farmer by one of the following means: courier; registered mail; or hand-delivered service. A notice given in any of these manners is deemed effective seven business days after the day on which the notice was sent. After the seven business days have passed, the creditor must wait an additional 15 business days before

commencing any further action on the farmer. Farmers may apply to an administrator for a stay of proceedings, a review of their financial affairs, and mediation with their creditors. If requested, a stay of proceedings will be in place for a period of 30 days during the mediation process, and may be extended for three more 30-day periods, up to a maximum of 120 days.

Under *The Saskatchewan Farm Security Act*, secured creditors must give a 15-day notice of their intention to take possession of equipment. When the farmer receives the notice of intention to seize the machinery, he or she has 30 days to apply to the court for a hearing. Once the farmer applies for the hearing, the creditor cannot take possession of the implement without an order of the Court.

If the creditor accepts a payment according to the loan agreement after it serves the notice, all proceedings to seize the machinery stop. A creditor who later wants to seize must begin again with the notice of intention.

Hearing Following Notice of Intention

Under *The Saskatchewan Farm Security Act*, a court hearing will not occur automatically once the farmer receives the notice of intention to seize assets. The farmer must apply to the court for a hearing within 30 days of service of the notice.

When the farmer applies for a hearing, the registrar of the court immediately notifies the creditor.

At the hearing, the judge reviews a number of things including...

- the amount paid and amount owing
- the size of the loan
- the value of the machinery
- the farmer's prospect for making payments
- the amount of the arrears

After considering these factors, the court may postpone the due date for payment, reschedule the payments, or allow the seizure to take place. If the court allows the seizure, it may impose additional conditions on the creditor to follow when disposing of the implement.

Notice of Possession

If the secured creditor has not been notified of a hearing within 40 days after it has served the notice of intention to seize, the creditor may repossess the implement. After it repossesses the machinery, the creditor must then serve the farmer with a notice of possession. The creditor must hold the machinery for at least 40 days after serving the notice of possession.

Hearing Following Notice of Possession

After receiving the notice of possession, the farmer has a second chance to apply for a hearing if he or she did not have a hearing after the notice of intention. The farmer must apply for this hearing within 30 days of receiving the notice of possession. If the farmer applies for a hearing, the creditor must either keep the implement in its possession or return it to the farmer, unless otherwise stated by the court.

At this hearing, the judge reviews the same things considered at a hearing following the notice of intention. The judge may require the creditor to return the machine to the farmer under certain specified conditions. If the farmer received a hearing after service of the notice of intention to seize, he or she is not entitled to a second hearing after service of the notice of possession.

Livestock and Grain Seizures

There are fewer legal restrictions on the creditor's right to seize livestock and grain (see *Review of Farm Debt*).



If a farmer gave livestock or grain as security for a loan, the creditor is still required to serve the federal government's notice of intent to realize on security. The notice must advise the farmer of the creditor's intent to seize livestock or grain, and his right to mediation with creditors

under the *Farm Debt Mediation Act*. The farmer may also request a stay of proceedings to halt the seizure action. A stay of proceedings can be granted once every two years and can last from 30 to 120 days from the date of application. The exemptions and the requirements of notice still apply.

Exemptions

The Saskatchewan Farm Security Act states that a creditor can only seize certain assets if the loan was to buy the asset, and the farmer pledged that asset as security. For example, if a farmer takes a loan to buy a combine and pledges the combine for security, the creditor can seize the combine if the farmer fails to make payments. But if the loan was to buy another asset, for example, seed grain, and the farmer pledged the combine for security, the creditor cannot seize the combine because it may be exempt for the reason set out in the first point below.

Under *The Saskatchewan Farm Security Act*, the following assets may be exempt from seizure...

- all livestock, farm machinery and equipment, including an automobile or truck that the farmer needs to run the agricultural operation for the next 12 months

- a quantity of seed grain sufficient to sow the farmer's cultivated land (to a maximum of two bushels per acre)
- the farmer's crop to the extent that, when converted to cash, it will pay the costs of harvesting, the farmer's living allowance until the next harvest, and the necessary farming operation expenses until the next harvest
- the farmer's homestead, household furniture and appliances, clothing, bedding, and other basic necessities of life



A farmer can waive the protection of the exemption in the following circumstances...

- the loan is made after September 20, 1992
- the loan is for a specific amount
- the security agreement mentions the specific items that would otherwise be exempt
- the loan does not refinance any existing debt in favour of that lender
- the farmer has received independent legal advice about his or her rights

The Bank Act: Section 427

When giving a new loan, a chartered bank (not a *credit union*) may take a special security on crops, livestock, and equipment under section 427 of the *Bank Act*. Because a bank has broad powers of seizure under the *Bank Act*, a farmer in difficulty needs to know whether or not he or she has given section 427 security for the loan.

If a farmer defaults in making payments on such a loan, the bank is not affected by the exemptions under *The Saskatchewan Farm Security Act* that are discussed above. That is, the bank may take possession of its security, including exercising its right to harvest any standing crops.

In 1990, the Supreme Court of Canada ruled that banks are not required to observe the notice provisions of *The Saskatchewan Farm Security Act* when seizing section 427 security. However, banks are required to observe provisions of the *Farm Debt Mediation Act* when seizing section 427 security.

Help for Farmers in Financial Difficulty

A farmer in serious financial difficulty has several options. A farmer can...

- seek the co-operation of the creditors
- attempt to reach an agreement with creditors through mediation
- apply to the court for an order setting a schedule of payments if the creditor has a judgment
- declare bankruptcy

These options each involve risks and are discussed in more detail below.

Co-operation of the Creditor

The earlier the farmer advises a creditor of difficulties in making payments, the better the chance to delay and possibly avoid seizure or foreclosure. If the farmer and the creditor keep each other informed of the situation, they may be able to work out an arrangement for repaying the debt.

Mediation

Mediation is a compulsory step in a foreclosure proceeding. The court can order mediation in disputes when a lender tries to seize farm machinery or other farm assets.

A farmer and creditor can try mediation on a voluntary basis at any other time. A mediator tries to help a farmer and a creditor reach a conclusion to a debt problem that is satisfactory to both of them. Mediators provide voluntary mediation on a fee-for-service basis. Farmers and lenders can find mediators in private practice, or call the Dispute Resolution Office.

Farm Debt Mediation Act

A farmer may also enter into mediation with his or her creditors through application to the Farm Debt Mediation Service. Under the *Farm Debt Mediation Act*, a secured creditor must give 15 business days notice to the farmer of its intention to begin foreclosure proceedings or to seize any security. The creditor must also advise the farmer that he or she has the right to apply to the Farm Debt Mediation Service for assistance.

The farmer does not have to apply for mediation assistance from the Farm Debt Mediation Service during the 15 day notice period. The program is voluntary for farmers, and creditors cannot force farmers to apply. Farmers may apply for the service without having received any notices of intent from creditors. The service provides farmers with an opportunity to discuss options and offer solutions to creditors in a neutral and non-threatening environment. Discussions are not admissible in court; they are not legally binding, and are "without prejudice". However, should the farmer and creditors sign an agreement, it is considered legally binding by the parties.

If the farmer and creditor/s are unable to reach a satisfactory arrangement, the creditor can proceed with foreclosure or seizure. If the creditor decides to foreclose or seize, he or she must still

follow all of the requirements of both *The Saskatchewan Farm Security Act* and the *Farm Debt Mediation Act*.

A farmer who cannot meet his financial obligations may ask the federal Farm Debt Mediation Service for a review of his or her financial affairs and assistance in working out a plan with the creditor/s for repaying the debt/s. The farmer may apply for mediation and a stay of proceedings or for mediation without a stay of proceedings.

Application for Mediation with a Stay of Proceedings

If a farmer applies for and receives mediation with a stay, the creditor cannot take any steps to seize or foreclose on security as long as the stay is in place. Upon approval of the application, a stay of proceedings lasting 30 days will be granted. Under the Act, an additional three, 30-day extensions can be granted, for a total of 120 days. The farmer may apply for a stay of proceedings only once every two years, but can apply at any time either before or during foreclosure, seizure of assets, or court proceedings.

The farmer must abide by the rules regarding the sale or transfer of assets, payment of debts and expenses, and the incurrance of any new debt while the stay is in place. An application under this section of the Act requires that all creditors, secured and unsecured, be notified of the application and the date and time of the mediation meeting.

Once an application has been approved, the Farm Debt Mediation Service will appoint a farm financial consultant to visit the farm, complete a financial review, discuss options to resolve the debt issues of all creditors, and develop a recovery plan for presentation at the mediation meeting. Between the 45th and 50th day from application, a mediation meeting with all creditors will be held, using the services of a professional mediator. The farm financial consultant makes the arrangements for this meeting, and assists the farm family to prepare for the meeting

and attends the meeting with them. The mediator is a neutral third party who manages the mediation process, including recording the issues and agreements reached and distributing a report to all parties after the meeting. There is no cost to farmers for these services under the *Farm Debt Mediation Act*.

Application for Mediation without a Stay of Proceedings

A farmer can apply for mediation without requesting a stay of proceedings. In this case the farmer is requesting a financial review of their farm, counselling with a farm financial consultant,



and a mediation meeting with their creditors. An application under this section of the Act requires that only secured creditors be notified of the application and the date and time of the mediation meeting. Unsecured creditors

may be added at the discretion of the farmer, or the Administrator of the Act.

Once an application is approved, the process is much the same as an application for mediation with a stay, with the exception of the stay of proceedings. It is business as usual for the farmer and creditor. An application under the section of the Act does not stop creditors from continuing their seizure or foreclosure action in the event one had begun. The farmer is not restricted in the sale, transfer, or purchase of assets. He or she is not restricted by the payment of, or incurring of, new debt either.

Once an application has been approved, the Farm Debt Mediation Service will appoint a farm financial consultant to visit the farm, complete a financial review, discuss options to resolve the debt issues, and develop a recovery plan for presentation at the mediation meeting.

Between the 45th and 60th day from application, a mediation meeting will be held, using the services of a professional mediator. The farm financial consultant makes the arrangements for this meeting, assists the farm family to prepare for the meeting, and attends the meeting with them. The mediator is a neutral third party who manages the mediation process, including recording the issues and agreements reached, and distributing a report to all parties after the meeting. There is no cost to farmers for these services under the *Farm Debt Mediation Act*.

Order for Schedule of Payments

Sometimes a creditor will sue and get a judgment for the payment of money. The judgment allows the creditor to garnishee the farmer's bank account and his or her produce receipts, such as grain cheques. Garnishment allows creditors to take money or receipts and use the funds to pay off the debt the farmer owes to the creditor. With a judgment, the creditor may also instruct the sheriff to seize and sell some of the farmer's unsecured assets to pay the amount of the judgment. The exemptions described before will apply. If the creditor gets a judgment, the farmer can ask the court for an order setting out a schedule of payments. This order will delay garnishment or seizure proceedings.

To determine a schedule, the judge considers whether or not the farmer is capable of making payments over a period of time, and whether the farmer needs this additional time to pay. If the judge feels that the farmer has the ability to pay the judgment immediately, he or she will refuse to set a schedule of payments.

For more information on court judgments, garnishment, and seizures by a sheriff, see the PLEA publication *Debts and Credit*.

Bankruptcy and Bankruptcy Proposals

Sometimes a farmer makes satisfactory arrangements with the secured creditors but continues to be pressured by unsecured creditors. The law considers a farmer insolvent when the amount of money the farmer owes is greater than the value of his or her assets and when the farmer is unable to pay his or her debts. An insolvent farmer can make an assignment in bankruptcy or make a proposal to the creditors. However, a farmer cannot be petitioned into bankruptcy by his creditors.

Bankruptcy Proposals

A bankruptcy proposal is a step that allows the bankrupt farmer a chance to make alternate payment arrangements with his or her creditors. In a bankruptcy proposal, the farmer asks the court to grant more time for payment, to approve a lesser



sum as full payment of the debts, or both. The farmer may or may not include secured creditors in the proposal. Secured creditors are not affected by a proposal if they are not included in the proposal, or if they seized their security before the farmer made the proposal.

The farmer must find a bankruptcy trustee to prepare the proposal. The trustee arranges a meeting of all the creditors. The creditors can accept or reject the proposal. If two-thirds of the creditors approve the proposal, the trustee applies for the court's approval. The court will want a report from the trustee before it approves the proposal. The court may also hear from the farmer and any creditor who opposes the proposal. If two-thirds of the creditors and the court approve the proposal, the proposal binds all the creditors. If the creditors or the court refuses to approve the proposal, the court will declare the farmer to be in bankruptcy.

Bankruptcy

The farmer does not have to make a proposal. A farmer can voluntarily declare bankruptcy. Bankruptcy is a process that wipes out most debts and stops any legal proceedings started by the creditors. The bankrupt farmer makes an assignment in bankruptcy. This means that the farmer turns over his or her assets to a bankruptcy trustee. The trustee sells those assets and divides the proceeds among the creditors. Some assets are exempt. The farmer does not have to turn over exempt assets to the trustee. Exempt assets include the home quarter, some seed grain, tools, and some pieces of farm machinery.

Secured assets do not go to the trustee. A secured creditor is entitled to seize any assets that are covered by the security. Secured creditors are affected by a bankruptcy only if they are included under a proposal. Otherwise, secured creditors can repossess or foreclose on property covered by their security, so long as they follow the procedures set out in *The Saskatchewan Farm Security Act*.

The farmer will usually receive a discharge within one year of declaring bankruptcy. A discharge means the farmer is no longer liable for his or her debts. Some debts are not discharged by the bankruptcy. Arrears of child or spousal maintenance, and debts that are incurred by fraud are examples of debts that are not discharged.

Getting Help

Dispute Resolution Office

3rd Floor, 3085 Albert Street
Regina, SK S4S 0B1
phone: (306) 787-5747
fax: (306) 787-0088

or

122 - 3rd Avenue North
Saskatoon, SK S7K 2H6
phone: (306) 933-7864
fax: (306) 933-7766

Farm Land Security Board

207 - 3988 Albert Street
Regina, SK S4S 3R1
phone: (306) 787-5047
fax: (306) 787-8599
website: www.farmland.gov.sk.ca

Farm Stress Line

toll Free: 1-800-667-4442

Farm Debt Mediation Service

Manitoba/Saskatchewan Region
401 - 1800 Hamilton Street
Regina, SK S4P 4K7
phone: (306) 780-5544 or 1-866-452-5556
fax: (306) 780-7353

