

# AGRI-FACTS

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## Alberta *Personal Property Security Act*: What It Means to Farmers

The *Personal Property Security Act* (PPSA) was put in place by the Alberta government in 1990. The Act governs the majority of dealings between secured creditors and their debtors relating to the personal property of debtors (all property that is not “land”).

The PPSA also governs most matters of priority of claims to personal property between different secured creditors of the same debtor or with competing secured claims to the same property.

This Act modernized and rationalized secured credit law in Alberta by amending or repealing several former acts, some of which were very outdated, and by providing a uniform system of security registrations and priorities.

The PPSA applies to most transactions in which creditors obtain an interest in a debtor's personal property to secure payment or performance of an obligation. The PPSA simplified and modernized the registration of and searches for security interests by the creation of the Personal Property Registry (PPR), which is now (with some narrow exceptions) a purely electronic registry system.

The PPSA does not apply to some types of liens and interests that are governed entirely by their own provincial act or common law, or to security interests under federal statutes, such as security given by farmers to banks pursuant to the *Bank Act*. Where a conflict arises, those laws may prevail. These exceptions are no longer very common in relation to farming, and this publication deals only with the PPSA.

### Farmers and the PPSA

Most lenders of money and some suppliers of purchase credit require security before they provide financing or credit. A “security agreement” is any written document, no matter how it is entitled or labelled, signed by the debtor that contains a provision granting the creditor a charge upon or interest in personal property.

In the agricultural context, the personal property may include such assets as livestock, crops (in the field or in the bin), general machinery and equipment, vehicles or accounts receivable.

The PPSA applies to any form of interest that either in form or substance can be regarded as a security interest. While such transactions as leases, lease-options or conditional sale contracts only give possession, and not current title, to the “debtor” (really a lessee or purchaser),

they are regarded by the PPSA as security interests. The lessor or seller can lose or compromise their title and ownership by failing to know this fact.

#### Security agreements

Here are the three most common categories of security agreements granted by farmers:

- General Security Agreement (GSA)
- specific Security Agreement (SA)
- Purchase Money Security Interest (PMSI)

A GSA provides a creditor with the broadest security. Most GSA's pledge “all present and after acquired personal property,” such that not only all current assets,

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but all those acquired after the date of signing are affected. A debtor may negotiate for some present or future assets to be expressly excluded.

An SA provides a creditor with security over a specific asset or list of specific assets that the farmer currently owns, or as a category of both present and future assets (for example, all “book debts,” all “livestock”).

A PMSI is an SA that secures a creditor who has financed the purchase of an item or items as a seller (for example, equipment dealer), or as a lender (for example, loan to purchase specific property) or by way of a lease or lease-option arrangement.

As between a debtor and a creditor, registration is not necessary or relevant. The parties have the rights and obligations set out in the written agreement, but enforcement of the creditor’s rights is governed by the PPSA and common law.

A creditor registers its interests in PPR to preserve and protect the priority of its claims against third parties – persons who obtain a security agreement in the same personal property or, in some cases, purchasers of that property in situations where the sale proceeds have not gone to the creditor. The registration basically shows the name and address of the debtor(s) and creditor(s) and a description of the collateral in the required form.

## Enforcement

When, due to debtor default, security agreements are enforced, the rights of the creditor and the farmer are determined firstly by the provisions of the security agreements themselves. However, certain provisions of the PPSA and other legislation regarding rights and remedies on enforcement are mandatory.

Any rights or remedies contained in security agreements that conflict with or vary from these mandatory provisions are not enforceable, and these mandatory provisions cannot be waived by a debtor.

Most commonly, a creditor with a valid security interest in a farmer’s personal property, in a default situation, can enforce the security agreement by seizing any or all of the security through a civil enforcement agent or by appointing (with or without a court order) a receiver or a receiver and manager.

Because the receiver option is comparatively expensive, creditors generally only use it in the following situations:

- where amounts are large and/or
- there is a need to carry on or wind-up active operations for maximum recovery and/or
- there are environmental issues and/or

- there are a significant number of assets, other creditors and possible priorities issues

In these instances, the creditor can have the assets sold and the sale proceeds applied to the debt owing and the expenses of collecting the debt, or the creditor may be able to take ownership of the assets as full satisfaction of the debt.

If a secured creditor is seeking to enforce security against all or substantially all the assets or inventory of the debtor, it must first serve a prescribed form of notice under the *Bankruptcy and Insolvency Act* and then wait 10 days before proceeding.

Any secured creditor of a farmer, as defined by the *Farm Debt Mediation Act*, must serve the farmer with a notice of intention to enforce security. This notice gives the farmer 15 business days after being served in which to settle the claim or file application with the Farm Debt Mediation Service for mediation between the farmer and their secured creditors to try to reach settlement of all issues. This action can result in a legal stay of all enforcement matters for some period of time.

Some other key aspects of enforcement include the following:

- If there are no other creditors who object, a creditor and farmer can agree to voluntary liquidation of security without the involvement of civil enforcement agents or receivers.
- Only a civil enforcement agent or appointed receiver can legally seize or repossess security.
- If the security is not being removed by the bailiff when it is seized, the farmer will usually be required to sign a “bailee’s undertaking,” which is a promise to retain possession of and care for the seized property until it is removed and sold. A breach of this undertaking carries civil liability for damages and may be a criminal offence.
- After seizure and before sale, the civil enforcement agent or the creditor must, in most cases, serve a “notice of disposition” on the debtors and all other persons who are known to have or may have any interest in the seized property. This notice gives the debtor 20 days to pay out the claim or reinstate the account and thus avoid loss of the property. It also gives other claimants time to assert or enforce their own claims.
- The seized property can be sold by private or public sale, including by consignment, tender or auction. If sale results in proceeds in excess of those needed to pay the seizing creditor in full, the surplus will be paid to any creditor with a secondary charge on the same property or, if none, then to the debtor.
- Unless otherwise agreed upon by the creditor, or an exception applies in law, the debtor will be liable to pay any deficiency after the conclusion of seizure and sale.

- If a creditor gives notice of election to retain seized property rather than sell it, a farmer can give a formal notice of objection, which will force the creditor either to sell the property or to apply to the court on notice to the farmer, to determine the issue.

## Key features of the PPSA

### Who can use it?

There are no restrictions on who can use the PPSA. All financial institutions, whether private, public or government, individuals and corporations and even foreign corporations and non-residents of Alberta can use security agreements and registration through PPSA.

Some lenders may have other options (such as banks under the *Bank Act*), but that does not prevent their access to PPSA.

The PPSA also permits registration and gives certain rights and priorities to several other types of claims or notices that are not “security interests.” Here are some examples:

- governmental liens or claims arising under other legislation, such as Workers’ Compensation Board claims for unpaid assessments
- appointment of a receiver or of a trustee in bankruptcy
- court orders relating to entitlement to personal property
- seizures pursuant to security interest claims, landlord’s distress and writs
- writs of enforcement filed by creditors who have obtained a money judgment in court
- maintenance enforcement orders
- garagekeepers’ liens
- postponements

The PPR is available to the public as a way of determining, by searches, what registered claims exist against a particular debtor or particular property for the purposes of lending or credit risk assessment or for determining whether a purchaser can obtain clear title.

### Registration process

While the PPSA still refers to the registration of a “financing statement”; in fact, no paper form is involved – the financing statement is the electronic data input into the system, which then produces a “verification statement” that can be printed in paper form.

This statement provides key information:

- the type of registration (such as “security interest”)
- the term of registration (1 to 25 years or infinity –

the fee paid depends on the term, and it is renewable)

- names and addresses of debtors and secured parties
- description of collateral under “serial number goods,” “general collateral” and other less common categories

The information so registered will then appear as a distinct item on any PPR search of the debtor name or a serial number matching any of those listed in the serial number goods category.

A creditor can register before a debtor has even signed a security agreement, but the interest is not “perfected” until that signing stage occurs. The creditor must, however, provide the debtor with a copy of the verification statement, unless the debtor has waived this condition in writing.

There are processes to challenge and remove a registration that a debtor or other secured creditor asserts to be invalid or incorrect. When a debtor has completed payment of the debt, the creditor is obligated to discharge the registration, and a debtor should ensure that this discharge is verified.

Proper collateral descriptions are very important. A GSA registration that does not exactly state “all present and after-acquired personal property” under general collateral is not valid as against competing secured creditors in the same property, receivers or bankruptcy trustees.

Failure to register anything defined as “serial number goods” by year, make, model and correct serial number will be fatal in the same priority terms and as against purchasers of such property. In a farming context, what is or is not “serial number goods” can be complex, but generally, all motor vehicles, tractors, combines and trailers are in this category.

Since the actual security documents are not registered, the PPSA provides for the right of any debtor, other creditor or civil enforcement agent to obtain copies of relevant documents and information on amounts owed and terms of payment by a written demand served on the registered secured party.

### Priority of creditor claims

It is common for several creditors to have security interests in either different groupings of or the same personal property. For example, if there is a GSA and a SA by different creditors, both creditors will have a security interest in the property affected by the SA (unless it is expressly excluded from the GSA security). The single most important purpose of the PPSA is to determine the priority of creditor claims in default or sale situations.

Very generally, priority among secured creditors is determined by the order in time in which they “perfected” their interests. The PPSA has an extensive set of rules to determine when perfection has occurred in a variety of different situations.

Most commonly, an interest is perfected when a security agreement has been signed, the debtor has possession of the affected property and the security interest has been registered. So, in most cases, the first creditor to have registered will have priority.

There are, of course, a number of specific exceptions to the basic rules. In the context of farming, the two most common examples of what is referenced as “super priority” are Purchase Money Security Interests (PMSI’s) and “input interests.”

The PPSA approach to PMSI’s is that since the asset in question is only acquired at all by way of the financing by a seller or lender for its purchase, that seller or lender should have first claim to the asset. Thus, if the seller or lender registers a PMSI within 15 days of the debtor obtaining possession of the relevant property, the secured party will have priority over prior registered GSA’s or SA’s as to the specific property.

To ensure farmers have access to financing and credit for vital inputs, the PPSA gives the same sort of super priority to the seller or lender who finances the inputs for livestock or crop production.

As to feed, drugs and hormones supplied for livestock, fowl or fish, the seller or lender has priority of interest in the livestock, fowl or fish for sums owing for inputs supplied from the time of registration. The rules as to crops are somewhat complex, but at the simplest level, the secured creditor financing the production or harvest of crops with inputs such as seed, fertilizer and pesticides, and who registers prior to planting or any time before harvest will have priority of claim to those crops.

These super priority situations can be utilized by farmers who extend credit for such inputs to other farmers if they obtain an appropriate security agreement and register it properly.

Farmers should be aware that the fact of one creditor having legal priority of interest does not mean that other creditors with interests in the same “after-acquired” property (such as a GSA) lose any interest. They become secondary charges, in order of priority, against any net value beyond what is owing to the creditor having the prior claim to the property.

## Farmer’s rights

The PPSA establishes certain rights of debtors and obligations of creditors that can be asserted by farmers. These rights and obligations include the following:

- A creditor must deliver a copy of any written security agreement to a debtor no later than 10 days after the agreement was signed. A debtor can also compel a creditor to deliver certain statements upon demand and can force compliance through the court.
- Creditors are obliged to exercise all rights, duties and obligations in good faith and in a “commercially reasonable manner.” If a creditor exercises ill motives or is proceeding to enforce claims in a negligent fashion that will not result in fair value recovery, the farmer can seek court assistance to prevent this result or claim damages from the creditor.
- A debtor has the right to redeem seized property by paying the total amount owed to the creditor, including reasonable costs and expenses of the seizure process to date before the property has been sold.
- A debtor has the right, up to twice in each year during the term of the security agreement, to reinstate the agreement in good standing by paying all arrears and costs before the seized property is sold.
- If a creditor agrees with the debtor to retain seized property in satisfaction of the debt or has duly elected to do so without objection by the debtor, the creditor cannot pursue the debtor for any shortfall in recovery.
- A debtor can seek damages from a creditor who causes unnecessary damage in making a seizure or who fails, without reasonable excuse, to fulfil any duties or obligations imposed by the PPSA.

### Get legal advice

This publication is a very generalized and selective guide to the topic of the PPSA as it affects farmers. The PPSA and its regulations are voluminous and, in some aspects, very complex law.

If farmers have issues, concerns or questions about a particular situation in relation to matters involving rights or obligations of themselves or their creditors, this publication is not a substitute for seeking competent advice from a lawyer with experience in such matters.

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