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Lessons Learned - Lesson Three: When to Send a Notice of Intention to Enforce Security Under Section 244 of the BIA and When to Wait the 10-day Notice Period

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*Cassels developed this **Lessons Learned** series based on our experience with priority disputes between secured creditors and the realization that many secured parties make fundamental errors of law that cause them to lose priority in their collateral. Each lesson in the series will outline a basic mistake and the lesson to be learned…*

Lesson Three: When to Send a Notice of Intention to Enforce Security Under Section 244 of the BIA and When to Wait the 10-day Notice Period

Many of our clients, when faced with a delinquent debtor, are not sure what procedures need to be followed when seeking to enforce their security over the debtors property. In certain cases clients have not sent the necessary statutory notice when required, while in other cases they have sent one when it was not required, delaying the process of enforcement. In Lesson 2 we discussed the need to send a demand letter and in this lesson we will discuss when a Notice of Intention to Enforce Security (NITE) under section 244 of the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3 (the BIA) is required.

Section 244 of the BIA

Section 244 of the BIA requires a secured party to give notice to a debtor of its intention to enforce security when:

1. the secured party intends to enforce its security over *all or substantially all of the inventory, accounts receivable or other property* of the debtor (the Collateral);
2. the Collateral was acquired for or in *relation to a business* carried on by the debtor; and
3. the debtor is an "*insolvent person*", as defined in the BIA.

Once the NITE is delivered, the secured party is required to wait ten days before enforcing its security, absent special relief of the court. This 10-day notice period is intended to provide insolvent debtors with an opportunity to reorganize and negotiate with the secured party. The form and contents of the NITE are

prescribed by the BIA.

Section 244 Does Not Always Apply or May Be Abridged

The following are common instances where secured parties have mistakenly assumed that s.244 of the BIA applies or where a secured party had waited an unnecessary 10 days to enforce its security:

- **The security is not over "*all or substantially all of the inventory, accounts receivable or other property of the debtor*":** This section is "disjunctive"- the security must cover all or substantially all of any one of the three categories of property. Section 244 won't apply when the security covers only a small part of the property of an insolvent person. For example, security over one or a few trucks would not be considered to be all or substantially all of the property of a large debtor company. Accordingly, many leases or specific security agreements will not require a NITE.
- **The Collateral was not acquired in relation to the business of the debtor:** A secured party wishing to enforce security over a director's condominium or family residence would not require a NITE.
- **The debtor is not an "Insolvent Person":** The BIA defines an insolvent person as follows:
    - ***insolvent person*** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
        - (a) who is for any reason unable to meet his obligations as they generally become due,
        - (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
        - (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;Section 2 BIAIncapacity to meet liabilities generally as they become due includes situations where a debtor cannot meet its obligations without liquidating assets that are not normally liquidated in the ordinary course of business. This is generally a factual question and if in doubt, it is safer to assume the debtor company is insolvent.
- **When 10-day period is Abridged:** If the insolvent party executed a waiver of the 10-day notice period *after* the NITE is issued then the secured party may enforce its security. If the debtor company declares bankruptcy or a receiver is appointed then s.244 of the BIA does not apply and no NITE is required. It is not permitted by law for such a waiver to be given prior to the NITE being delivered. Incapacity to meet liabilities generally as they become due includes situations where a debtor cannot meet its obligations without liquidating assets that are not normally liquidated in the ordinary course of business. This is generally a factual question and if in doubt, it is safer to assume the debtor company is insolvent.

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Notice of intention to enforce security under section 244 of the BIA is not always required and you must look at all of the circumstances.

[1] Substantially same definition appears in every *Personal Property Security Act* (or equivalent) in all of the Canadian provinces (excluding Quebec).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.