

BC PERSONAL PROPERTY SECURITY ACT
PRACTICE MANUAL
EXCERPT FROM CHAPTER 18

Enforcement Steps and Practice

II. Overview of Rights and Remedies

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F. Disposing of Seized Goods [§18.10]

II. OVERVIEW OF RIGHTS AND REMEDIES

F. DISPOSING OF SEIZED GOODS [§18.10]

Section 59 sets out rules about disposing of the seized goods and providing protection for interested persons. The secured party is responsible for disposing of the collateral. The secured party must first decide whether it wishes to improve the collateral, either through repairs, processing, or simply preparing the collateral for disposition. Reasonable expenses relating to this process may be added to the debt owed. Also, reasonable expenses relating to the enforcement of the security agreement, including legal fees, may be added to the debt owing (s. 59(2)).

A secured party with a subordinate security interest has the right to add reasonable expenses incurred in their disposal of seized property to the debt owing (s. 59(2)). However, in *Jacobs v. Laumaillet*, 2010 BCSC 1229 (Cha), the court clarified that the rights given to subordinate secured parties under s. 59(2) do not undermine or negate the priority rules found elsewhere in *PPSA* (i.e., s. 35). This means that, in British Columbia, a subordinate secured party is not entitled to recover expenses under s. 59(2) in priority to the interests of prior secured parties. (In contrast, the Alberta Court of Appeal held in *Fast Labour Solutions (Edmonton) Ltd. v. Kramer's Technical Services Inc.*, 2016 ABCA 266, that a subordinate secured party would be granted priority with respect to reasonable expenses if those expenses would have otherwise been incurred by the prior secured party.) The collateral may be disposed of by private sale, public sale, public auction, closed tender with sale to the highest bidder or tenderer, as a whole or in parts, or by lease or deferred payment if the security agreement provides (s. 59(3) and (4)). Delays in the sale may also take place at the secured party's discretion, although a good faith test and the test of commercial reasonability must always be kept in mind.

Section 59(6) protects the debtor by specifying that at least 20 days' notice must be provided to the debtor and other specified persons having an interest in the collateral before disposition may take place. Section 59(7) sets out the notice requirements. In *HSBC Bank Canada v. Kupritz*, 2011 BCSC 788, the court concluded that the same protection must be afforded to guarantors, as they are captured by the definition of "debtor" in the *PPSA*. The court held that a "debtor" is defined as the grantor of the security interest *and* the person responsible for paying the debt, and therefore includes a guarantor.

Be aware that if reinstatement of the obligations is not allowed under the security agreement, it is not necessary to include in the notice information about the sum actually in arrears and the ability to reinstate. In addition, certain information about the sum in arrears, reinstatement, and redemption need not be included in the notice provided to interested people other than the debtor.

Section 59(10) sets out the duties of a receiver at the time of disposition of the collateral. Section 59(14) protects third party purchasers for value of the collateral, presumably to cover the situation where assets are seized and sold and it is later determined that the secured party's rights were defective in some manner. The secured party may purchase the collateral (s. 59(13)); however, it may purchase only in the event of a public sale and only for a price that bears a reasonable relationship to the market value of the collateral.

Finally, s. 59(17) waives the notice requirements in special instances. For example, if the collateral is perishable, if the secured party reasonably believes that the collateral will decline in value rapidly, if the court orders an ex parte application, or if all interested persons waive the notice provisions in writing, the collateral may be disposed of immediately.

Notice requirements will also be waived if collateral is of a type that is to be disposed of by sale on an organized market that handles large volumes of transactions (s. 59(17)(c)). In 1531193 Ontario Inc. v. Northern Credit Union Ltd., 2014 ONSC 938, the court interpreted the equivalent provision to s. 59(17)(c) (s. 63(7)(c) in the Ontario *PPSA*) to include money. The court held that money is customarily traded on organized money markets and, as such, proceeds from a bank account fall within the exception set out in s. 63(7)(c). This decision, while interesting, may have limited application in British Columbia, given that the Ontario *PPSA* does not have an equivalent provision to s. 59(17)(d) of the BC *PPSA*, which provides an exception to the notice requirement *only if* the collateral is foreign money (i.e., money other than a medium of exchange authorized by the Parliament of Canada).

Section 59 does not set out detailed requirements for advertising, appraisals for value of the goods to be sold, or auction procedures; nor does it set out the specific sanctions or penalties that will result if the secured party does not comply with the notice requirements or other terms of the section. It is possible that the secured party would be liable for any lesser amount received for the goods, but it is unlikely that the security interest would be voided. In *VFS Canada Inc. v. Shas Tut Contracting Ltd.*, 2015 BCSC 2015 (Chambers), the secured party sent deficient notices to the wrong address (to the debtor's corporate address instead of the guarantor's personal address as required by s. 72(1)). Due to a combination of these flaws in the notices, the court found the creditor to be non-compliant with s. 59 of the *PPSA* and reduced the deficiency owed to the secured party by \$15,000. This reduction represented the difference between the proceeds received by the creditor from the sale to a third party and the proceeds received by the third party on the re-sale of the collateral.

See the flow chart included as the Appendix to this chapter (§18.35) outlining the notice and disposition steps required.

For information on standards of conduct, see chapter 21 (Standards of Conduct).

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