Non-Title Tax Enforcement by Saskatchewan Municipalities

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The following is intended for general information only, regarding some of the issues relating to municipal administration in Saskatchewan. We advise you to seek specific legal advice prior to making any of the arrangements outlined in this article, as the particular facts of each person's situation will vary, as will the advisability and effectiveness of any particular strategy.

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1. Introduction

Tax enforcement is an unpleasant but necessary task.

The method of choice, for most Municipalities, is title proceedings under *The Tax Enforcement Act*.

It is important to remember, however, that other methods of tax enforcement are available. In certain cases, they may be preferable.

2. Reasons to Use Non-title Remedies

There are a number of reasons why taking non-title proceedings is preferenable.

Over the years, municipalities have been encouraged to avoid taking title where taking title to the land is undesirable, or the re-sale market is depressed. The classic example is where there environmental difficulties with the land.

However, there are other reasons to avoid title proceedings. These include:

- The taxes are owing on oil and gas wells. Were taxes are owing on oil and gas wells, there is likely no surface title in the name of the production company. While the municipality has a lien on the production equipment, it will evaporate where the well ceases production, and the equipment is left to rust, or is removed without notification to the municipality. Where taxes fall into arrears on an oil or gas well, this is usually a sign that all is not well, and that immediate action should be taken before the equipment is removed and before receivership or bankruptcy intervenes; and
- Utility payments are owing by a tenant and have been added to taxes, and the arrears are substantial when compared to the value of the land. In these circumstances, the arrears can be recovered from the goods of the tenant, or by legal proceedings.

Most importantly, however, using non-title proceedings saves time, and in most cases cost. By bringing legal action or distress proceedings, the outstanding arrears are brought to a head quickly, and dealt with before further interest and penalty accrues. This benefits the cashflow of the municipality and saves interest expense to the ratepayer.

Prerequisites to Enforcement

- **The Common Misconception**

  The most common misconception encountered when talking to municipal government about tax enforcement is that no enforcement proceedings can be taken until a tax lien has been registered against title to the land.

This is ***simply incorrect.***

Tax enforcement *against title* requires a tax lien to be registered six months before a resolution to acquire title may be passed by Council, and after that, six month and one month notices (and the consent of the Provincial Mediation Board) are required to take title to land.

No tax lien is required to take non-title proceedings. This has important implications – it means that you can move quickly to collect taxes where circumstances require it. And, as is noted below, in certain circumstances, *you can collect not only arrears, but current taxes*.

- **Collecting Current Taxes in Addition to Arrears**

Some of the remedies available to you permit you to collect only tax arrears, while other remedies permit collection of current taxes.

Be sure you are not trying to collect prematurely for current taxes. On the other hand, if you are using an expensive remedy, and collection of current taxes is permitted, it may make sense to proceed for all taxes owing, rather than letting the current levy slip into arrears.

- **Amounts must be Due and Owing**

Taxes

In particular, when you are seeking to enforce payment of obligations arising in the current year, you must be sure that the tax is due and owing.

Unfortunately, there is no express provision in Saskatchewan's municipal legislation which provides for the day upon which taxes are due. Nevertheless, it is clear from the municipal property taxation scheme that those taxes are due on the date the notices are mailed, and accordingly, legal action may be commenced thereafter. Section 269(2) of the *The Municipalities Act* ("TMA"), section 239 of *The Cities Act* ("TCA"), and section 265.9 of *The Northern Municipalities Act* ("TNMA") provide that the certification of the date that the tax notices are sent is admissible in evidence as proof that the tax notices have been sent and that the taxes have been imposed.

Effect of Assessment Appeals

Generally, where an assessment appeal is pending before the Board of Revision, your assessment roll will not be confirmed. Thus, while waiting for confirmation, you may only sue for arrears. However, once the assessment roll is confirmed, the current taxes are due and owing.

Accordingly, when proceeding for current taxes, you should ensure that your roll has been confirmed, and be prepared to prove that when matters proceed to trial. Even if there is an

appeal outstanding to the Saskatchewan Municipal Board, or to the Court of Appeal, if the roll has been confirmed, the taxes are due and owing (though an adverse finding may require a refund of taxes to be made by the municipality, such that you may consider holding enforcement in abeyance in some circumstances).

Collecting Items Added to Taxes

The Act provides for certain charges and costs to be added to taxes. These include custom work fees, fire-fighting charges, and so on.

Before commencing a suit for such costs, however, be sure that you are legally entitled to collect them. In this regard, you should check to ensure that:

- You have clear statutory authority to add the charges to taxes;
- All the necessary enabling bylaws and/or resolutions have been passed;
- The costs are properly documented by way of invoice or otherwise; and
- That the necessary time frame has passed. Note that certain costs may only be added to taxes at the conclusion of the year.

- **Demand For Payment**

  Though not legally required, it may be useful to send a formal demand for payment. In many cases, municipal taxes are paid immediately after a demand letter.

  In some cases, you may feel that the taxpayer is more likely to respond if a lawyer sends a letter on your behalf. The judgment call is yours.

- **Is the Taxpayer a Farmer?**

  If the taxpayer is, or may be a farmer, notice of intention to take proceedings (including a lawsuit) should be given pursuant to the provisions of the *Farm Debt Mediation Act* (Canada) at least 15 business days before action is taken.

3. Suing the Taxpayer

If the taxes go unpaid, the first alternative is to simply sue the taxpayer. This makes sense where the taxpayer has the means to pay, but simply refuses to do so.

A suit for taxes may also make sense where the Municipality has a dwindling tax roll, and does not want to eliminate a source of revenue by taking title.

- **Enabling Provisions**

A lawsuit is authorized by Section 320 of TMA, section 285 of TCA and section 261.8 of TNMA, which provide that the taxes due on any property are collectable by action in priority to every claim except that of the Crown. Further, section 275 of TMA, section 245 of TCA and section 257.5 of TNMA state that taxes due to a municipality are recoverable as a debt due to the Municipality, and take priority to every claim except that of the Crown. Accordingly, there is clear authority for suing the taxpayer. If this were not enough, section 368 of TMA and 332 of TCA further provides that except as provided in that Act or any other Act, an amount owing to a City may be collected by civil action for debt in a court of competent jurisdiction. There is no comparable provision in TNMA.

- **The Initial Paperwork**

In the event that the taxpayer owes less than $20,000.00 to the Municipality, proceedings may be brought in Provincial Court, pursuant to *The Small Claims Act, 1997*. This is of particular benefit to smaller municipalities, which may have a circuit court location nearby, meaning that travel costs can be kept to a minimum.

If the taxes owing are greater than $20,000.00, proceedings must be brought in the Court of Queen's Bench ("Queen's Bench").

Where proceedings are brought in the Queen's Bench, the assistance of a lawyer must be secured. Your lawyer will draft your Statement of Claim and make the necessary arrangements for service, and to have the matter heard, if necessary.

If the matter is to be heard in Small Claims Court, it is possible to dispense with the assistance of a lawyer. In those circumstances, you may either:

  - Write a summary of your tax claim and send it to the nearest permanent office of the Provincial Court, along with copies of all supporting documents for your claim (see below) and a request that a summons be issued and the matter be set for trial on a particular date at the circuit court location nearest you; or
  - Take the particulars of your tax claim to the office of the Provincial Court. A clerk will then assist you in writing the claim and having the summons issued.

A case management conference is typically ordered before a trial date will be set. While you may request that your claim proceeds directly to trial, that is in the discretion of the judge issuing the claim. Once the summons has been issued, you must serve the claim and summons at least ten days before the case management conference or trial date (a much longer time frame is recommended). Service must be made on the taxpayer, as identified on your tax roll.

You may attempt service by registered mail. If you do so, the taxpayer must sign for the registered mail, and you must have an Acknowledgment of Receipt Card returned. If this does not work, you must serve the taxpayer personally.

Once you have served the taxpayer, be it personally or by registered mail, an Affidavit of Service must be prepared and filed in the court.

- **Proving Your Claim**

If you proceed in the Queen's Bench, your taxpayer must file a defence within 20 days (or such longer time as your lawyer may permit). If no defence is filed, judgment may simply be entered, without the necessity of proving your claim. This is called a "default judgment."

If a defence is filed in the Queen's Bench, however, you must prove your claim.

You may be able to swear an Affidavit and simply move for summary judgment. Otherwise, you will have to participate in a trial and be prepared to prove your claim for taxes.

In Provincial Court, you must have a trial unless you are able to get the taxpayer's consent for a judgment on written material only. You are required to show up on the trial date and prove your claim.

In order to prove your claim, you must prepare the necessary documentary evidence.

Section 277 of the TMA, section 247 of TCA and section 257.7 of TNMA provide that production of a copy of the portion of the tax roll, which relates to the taxes payable by the taxpayer, and which is certified by a designated officer, is admissible in evidence as proof, in the absence of evidence to the contrary, that the taxes are owing. Thus, before trial, you should prepare a certified copy of the relevant portion of the tax roll.

It may be advisable to bring additional documentation against objections the taxpayer may raise.

Likely the first objection raised by a taxpayer will be that he did not receive his tax notice.

Accordingly, abundant caution would dictate that a copy of the tax notice (if not identical to the tax roll) would be prepared and certified by the Administrator. As well, a certified copy of the certification required by section 269 of the *The Municipalities Act* ("TMA") , section 239 of *The Cities Act* ("TCA"), and section 265 of TNMA is admissible in evidence to prove mailing of the notices and that the taxes have been imposed.

Second, the taxpayer may object to the underlying assessment.

Thus, out of abundant caution, a certified copy of the relevant portion of the assessment roll should be prepared.

As well, a certified copy of the certificate required by section 258 of TMA, section 228 of TCA, and section 254 of TNMA should be prepared to prove confirmation. Pursuant to this section, the certificate proves that the roll as completed and certified is valid and binding.

Finally, the Administrator should then review all of these documents, so that any questions by the Court may be answered.

If the Municipality is representing itself at trial, the Administrator should appear in advance of the time set for trial and advise the clerk that the Municipality is ready to proceed.

Thereafter, the lawsuit will commence, under the direction of the judge. Evidence will be given under oath. The Municipality goes first.

The Administrator will be required to present evidence of the debt due and owing to the Municipality. In many cases, presentation only of the certified excerpt from the tax roll will be sufficient to establish the debt, along with the Administrator's verbal testimony, verifying that this amount remains outstanding, and that no sums have been received since the excerpt was prepared.

If the Defendant disputes the assessment or the mailing of the tax notices, the Administrator can then ask to present evidence in rebuttal. The additional evidence relating to the objection may then be presented.

At the conclusion of the trial, judgment should be granted to the Municipality.

Generally, Small Claims Court judges are forgiving with respect to matters of evidence and procedure. However, sometimes there are not.

For this reason, if the Municipality wishes to engage in tax enforcement proceedings in Small Claims Court, it may be advisable to have a lawyer assist the Municipality in the first instance, so that the Administrator can "learn the ropes." Thereafter, the Administrator may, if he or she feels qualified, take over the process.

- **Registration of Judgment**

Once a decision is handed down in Provincial Court, 30 days must pass, being the appeal period. Thereafter, a certified or original copy of the judgment may be taken to the Queen's Bench. The judgment will be registered as if it were a Queen's Bench judgment and may be enforced as such.

If the judgment is obtained in Queen's Bench, no waiting period applies although the taxpayer may bring an appeal, thereby "staying" the judgment.

- **Enforcement by Garnishee Summons**

Once judgment is obtained, you may bring garnishee proceedings against the taxpayer. For example, if you know where the taxpayer banks, you may swear the requisite Affidavit in the Queen's Bench and have a Garnishee Summons issued. The Garnishee Summons may then be served on the bank, and on the taxpayer.

Thereafter, the bank has 20 days in which to pay into court any funds held to the credit of the taxpayer. After a certain time frame expires, these monies can be paid out to the Municipality.

You can garnishee institutions and people other than banks. Credit Unions, employers and other persons who may owe money to the taxpayer may also be garnisheed.

In certain circumstances, you may garnishee before judgment. Note, however, that a Pre-Judgment Garnishee Summons may not normally be used to attach wages or salary.

If you are aware of money owing to the taxpayer and wish to attach it, even though judgment has not been obtained, and if your proceedings are brought in the Queen's Bench, you may obtain a Pre-Judgment Garnishee Summons, in an effort to attach this money.

This is a highly technical remedy and it is strongly recommended that you obtain a lawyer's assistance.

- **Other Enforcement**

In the event that the taxpayer does not pay willingly, and you do not know where funds may be garnisheed, you can issue a Writ of Execution and register it with the Sheriff. You may also register it through the Personal Property Registry, and then with Information Services Corporation for Saskatchewan.

The latter registration is advantageous.

Although your writ does not take priority on lands other than those actually taxed, it will act as a "clog" on title. You should perform a Land Registry Search by name in order to register your writ against those other lands. You will want to ensure that the land owner is actually the taxpayer before registration. If the taxpayer then attempts to transfer lands against which the Writ has been registered, your Writ of Execution will assist in collection of your tax bill, before the land may be dealt with.

Similarly, the Sheriff may be empowered to seize certain property on your behalf, which might not be available through other means.

You may wish to consult your lawyer as to your options.

4. Direct Collection from Tenant

Pursuant to section 321 of TMA, section 285 of TCA and section 261.9 of TNMA, where a tenant occupies property on which taxes are owing, the Municipality may send a notice directly to the tenant, requiring him or her to pay rental directly to the Municipality until taxes are satisfied, together with costs.

At least 14 days before such a notice is sent, the Municipality must send a notice to the owner advising the owner of its intention to proceed as above. Once notice has been given to the tenant, he or she may then deduct such payments from their rent, pursuant to subsection 14.

The Act expressly provides that the Municipality may, out of the rents collected, pay for heat, insurance and other such items. Certain deductions are also authorized pursuant to subsection 9.

If rent is not paid, the Municipality has the same power of distress against the tenant as has the landlord. Note, however, that the right of distress is restricted in the event of certain residential tenancies.

5. Recovery from Insurance Proceeds

Under section 322 of TMA, section 286 of TCA and section 262 of TNMA, if improvements are damaged or destroyed, and taxes are unpaid, the Municipality may serve a demand on the insurer that the unpaid taxes be paid directly to the Municipality.

If that payment is not made, a lawsuit may be maintained against the insurer.

Note, however, that the requirement to pay applies only to the extent that the amount payable under the insurance policy is not used in rebuilding or repairing the improvements damaged or destroyed.

The claim appears to be limited to the building portion of the policy, and it does not appear that the claim may be advanced with respect to contents insurance. Given the wording of the statue, the demand will likely only be applicable with respect to the improvements tax, and not any tax on the underlying land.

6. Distress

- **Enabling Provisions**

  Pursuant to sections 323 and 325 of TMA, sections 287 and 289 of TCA, and sections 262.1 and 262.3 of TNMA, if taxes are unpaid for 30 days after mailing of the tax notice, the Municipality may issue a warrant to a bailiff to collect the taxes or any portion of them, together with costs, by distress. If the Municipality has reason to believe that goods that are

to be seized will be removed from the municipality before the 30 days expire, the Municipality may apply to a justice of the peace for an order authorizing the issuance of the distress warrant before the expiry of 30 days.

Section 324 of TMA , section 288 of TCA and 262.2 of TNMA provide that the following may be distressed and sold:

- Goods belonging to the taxpayer, wherever those goods may be found within the municipality;
- Goods in the possession of the taxpayer, wherever those goods may be found within the municipality; and
- Goods found on the property with respect to which the tax has been levied and that are owned by or in the possession of any occupant of the premises, other than a tenant.

Certain property is exempted from distress. Each Act provides that the following goods may not be distrained:

- Goods that are the subject of a valid and subsisting lien in favor of a vendor (although the interest of the taxpayer, or other occupant of the property other than the owner, may still be seized subject to the vendor's interest);
- The vendor's or lessor's share of a crop may not be distrained or sold for taxes due with respect to other land owned or occupied by the taxpayer;
- An animal not belonging to the taxpayer or to any occupant of the premises (unless the person who holds that interest is the spouse, daughter, son, daughter-in-law or son-in-law of the taxpayer or occupant, or any other person living with the taxpayer or occupant as part of the family) may not be seized; and
- Where goods are in the possession of the taxpayer only for storing and warehousing or for selling on commission, or as agent, the goods may not be distrained.

Goods which are exempt from seizure under execution may not be seized, unless they are the property of the taxpayer. The person claiming an exemption shall indicate which goods are exempt.

The Act also has an odd provision which provides that if there is a security interest that is a mortgage on goods that would be liable to distress if they had not been mortgaged, the ownership of the goods is deemed to have remained in the mortgagor. This would, apparently, give the Municipality priority over a bank holding security in the goods (unless the bank held an assignment of a Conditional Sales Contract).

From a practical perspective, it is best to conduct the search of the Personal Property Registry, and the Bank Act registry. At that point, the Municipality can determine which goods are claimed by other creditors. By seizing goods which are not claimed by others, the Municipality avoids the expense of a legal fight to determine priority. Only if goods are not available should the Municipality consider seizing disputed goods.

Section 334 of TMA, section , section 298 of TCA and section 263.2 of TNMA provide that the Municipality's right of distress has priority over that of a landlord. This is so, even if the landlord has distrained prior to the Municipality arriving.

In selecting the goods for seizure, and adjudicating priority issues, you will want to consult your lawyer.

- **Distress for Licence Fees**

Pursuant to Section 333 of TMA, section 297 of TCA and section 263.1 of TNMA,, a licence fee unpaid for 14 days after it becomes payable may be enforced by way of distress. If the Municipality has reason to believe that goods that are to be seized will be removed from the municipality before the 14 days expire, the Municipality may apply to a justice of the peace for an order authorizing the Municipality to seize the goods before the expiry of 14 days.

- **Notice and Sale**

Once the goods are seized, there is a statutory requirement to provide notice of the seizure to the taxpayer, and thereafter, sale may proceed. Sale is governed by section 330 of TMA, section .294 of TCA and section 262.8 of TNMA.

Costs are recoverable on the same basis as under *The Distress Act*. Note that this imposes a severe limitation on your right to recover cost for seizure and sale.

Section 329 of the Act provides that the Municipality may release goods held under seizure, whether or not any portion of the claim has been satisfied, without prejudice to the Municipality's right to recover, by distress or otherwise, the balance of the tax claim.

- **Following Hidden Goods**

Where goods have been fraudulently or clandestinely conveyed away to another location, section 326 of TMA , section 290 of TCA and section 262.4 of TNMA provide that the Municipality has the same right to break open and enter a building, yard or place, and to seize, as has a landlord.

This is a highly technical remedy and subject to onerous consequences if done improperly. A lawyer's advice should be employed before this remedy is used.

7. Goods in the Hands of Others

Pursuant to section 335 of the TMA, section 299 of TCA and section 263.3 of TNMA, , if the Sheriff or bailiff has seized personal property of the taxpayer, or if a liquidator, receiver, Trustee in Bankruptcy, or any assignee for the benefit of creditors, has possession of property of the taxpayer, or if the property has been converted into cash by any of these, the Municipality may simply give a distress warrant to the person who holds the goods or proceeds.

When a distress warrant is given, the recipient is to pay the amount of taxes to the Municipality in priority to all other fees, charges, liens or claims, subject to, where there has been a seizure, the payment of the fees of the Sheriff or bailiff making the seizure.

The Municipality's priority takes priority to all claims, except those of the Crown.

There are certain limitations where goods are in the hands of an executor, Administrator, receiver, trustee or a liquidator pursuant to a winding-up order, or in the hands of an executor of the estate of the deceased taxpayer.

8. Collection from Oil or Gas Wells

Under Section 317 of TMA and section 261.4 of TNMA where tax is unpaid after year-end on resource production equipment of an oil or gas well, the Administrator may give notice to anyone who purchases oil or gas originating from the well that the owner has failed to pay the taxes levied.

There is no similar provision in TCA.

The notice is to be served by registered mail and must contain certain information.

Thereafter, the purchaser shall remit payments to the Municipality to be applied to taxes.

9. Removed or Demolished Improvements

Under section 336 of TMA section 300 of TCA and section 263.4 of TNMA where there are taxes owing on improvements or on the land on which the improvements are located, the improvements are not to be removed from the municipality or demolished.

If improvements are removed or demolished, the Municipality may locate the improvement, enter the land, sever it from the soil, if necessary, and remove it, restoring it to its former position. Alternatively, the Municipality may distrain and sell the improvement for unpaid taxes and costs. The distraint or seizure must occur within 12 months of the removal or demolition of the improvement. Expenses incurred in seizing and restoring may be added to the tax roll and collected in the same manner as taxes.

10. Expenses of Enforcement

In most circumstances, the Municipality is entitled to recover the entirety of its costs of enforcement. In other circumstances, for example where costs are limited by court rules, it is not.

Of course, even if the Municipality is entitled to recover those costs, the taxpayer must have sufficient assets to satisfy them.

Accordingly, section 309 of TMA, section 273 of TCA and 260.6 of TNMA provide that where a Municipality has incurred reasonable cost to enforce the payment of taxes, which are not recoverable from the person who owed the taxes, the Municipality may apportion such cost between it and the other taxing authorities on whose behalf the Municipality took action.

The apportionment shall take place and shares corresponding to the respective amount of taxes collected on behalf of the Municipality and the taxing authority. Note, however, that remuneration paid to an employee of the Municipality may not be included in this apportionment.

11. Conclusion

As can be seen from the foregoing, there are a number of alternatives to bringing title proceedings under *The Tax Enforcement Act*.

The key to taking these proceedings is to ensure that the sum sought is accurate, that the necessary pre-conditions to collection have been taken and that the necessary documentation has been prepared.

Especially when undertaking a remedy for the first time, but in any other case, th*e Municipality should consult its lawyer as to its rights and obligations.*

12. Contacting a Lawyer on this Subject

For more information on this subject or specific legal advice, contact M. Kim Anderson at (306) 933-1344, or at mk.anderson@thinkrsplaw.com.

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