# Law 438 – Secured Transactions – Rosalyn Chan

* **S73:** The *PPSA* prevails over everything unless the other Act explicitly says that it doesn’t: ***Marine Bldg Holdings v Proton***
* **S74:** If there is a conflict between the *PPSA* and the *Business Practices and Consumer Protection Act*, the *Land Title Act,* or the *International Interests in Mobile Equipment (Aircraft Equipment) Act*, those Acts prevail.

# Transactions Creating a Security Interest

* **S1(1) “security interest”:** “**true**” (a) – an interest in goods, chattel paper, investment property, document of title, instrument, money, or intangible that secures payment or performance of an obligation
  + “**deemed**” (b) – an interest in (i) the transfer of an account or chattel paper, (ii) commercial consignment, or (iii) a lease for a term of more than one year
* **S2:** The *PPSA* applies to every transaction that in substance creates a SI – form and title to the collateral don’t matter – and specifically to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper AS LONG AS they secure payment or performance of an obligation.
  + Substance over form – can’t escape the *PPSA* by dressing it up as something else
* **S4:** The *PPSA* doesn’t apply to a lot of shit… interests in land, wages, liens, blah blah blah

## Parties to a Secured Transaction

* **S1(1) “creditor”:** includes an assignee for the benefit of a creditor, an executor, administrator or committee of a creditor
* **S1(1) “debtor”:** means a lot of things apparently:
  + **(a)** a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral,
  + **(b)** a person who receives goods from another person under a commercial consignment,
  + **(c)** a lessee under a lease for a term of more than one year,
  + **(d)** a transferor of an account or chattel paper,
  + **(e)** in S17, 24, 26, 58, 59(14), 61(8), and 69, a transferee of or successor to the interest of a person referred to in (a), or
  + (f) if the person referred to in (a) and the owner of the collateral are not the same person, (i) if the term debtor is used in a provision dealing with the collateral, an owner of the collateral, (ii) if the term debtor is used in a provision dealing with the obligation, the obligor, and (iii) if the context permits, both the owner and the obligor
* **S1(1) “receiver”:** includes a receiver-manager
* **S1(1) “secured party”: (a)** a person who has a security interest, **(b)** a person who holds a security interest for the benefit of another person, and **(c)** the trustee, if a security interest is embodied in a trust indenture
* To come within the *PPSA*, the transaction has to be consensual
* D includes not only the obvious situation where someone owes C money and gives C an interest in personal property to secure the indebtedness, but can also include a party who comes to own that collateral, but doesn’t actually owe anything
  + A third party guarantor also falls within the definition of a D

## Standard of Behaviour

* **S68: (1)** Principles of common law, equity, and the law merchant apply as long as they aren’t inconsistent with the Act
  + **(2)** All rights, duties or obligations arising under a SA, this Act and any other applicable law must be exercised in **good** **faith** and a **commercially** **reasonable** **manner**
  + **(3)** A person doesn’t act in bad faith merely because the person acts with knowledge of the interest of some other person.
* Notice includes actual knowledge, constructive knowledge, and imputed knowledge – just because a third person knows D owes money relating to collateral to a given C doesn’t necessarily constitute knowledge that C has a SI in the collateral: ***Maritime Telegraph and Telephone Co***
  + Natural person: information acquired in circumstances where a reasonable person would take notice – constructive knowledge – **S1(2)(a)**
  + Corporation: reasonable attention of managing D/O, or senior employee for matters to which information relates – **S1(2)(c)**

## The “Obligation Secured”

* **S1(1) “security interest”:** “**true**” (a) – an interest in goods, chattel paper, investment property, document of title, instrument, money, or intangible that secures payment or performance of an obligation
  + “**deemed**” (b) – an interest in (i) the transfer of an account or chattel paper, (ii) commercial consignment, or (iii) a lease for a term of more than one year

### Amount of the Obligation

* The SI is only used to satisfy the extent of the obligation owed and no more. It can only be used to satisfy indebtedness in default on an obligation currently due

### Has there been a Future Advance? Can you use Tacking?

* **S1(1) “advance”:** The payment of money, the provision of credit or the giving of value and includes any liability of D to pay any interest, credit costs or other charges or costs payable by D in connection with an advance or the enforcement of a SI securing an advance
* **S1(1) “future advance”:** An advance whether or not the advance is made in accordance with an obligation and includes reasonable costs incurred and expenditures made for the protection, maintenance, preservation or repair of collateral
* **S14: (1)** SA can provide for future advances and
  + **(2)** Unless parties otherwise agree, an obligation owing to D to make future advances is not binding on a SP if the collateral has been seized, attached, charged or made subject to an equitable execution under the circumstances described in S20(a)(i) or (ii) and the SP has knowledge of this fact before making the advances
* **S35(5):** Subject to (6), the priority that a SI has under (1) applies to all advances, including future advances
  + **(6):** A perfected SI has priority over the interest of persons referred to in S20 (a) only to the extent of
    - **(a)** advances made before the interests of the person arise, or before the sheriff seizes the collateral or obtains a right to it under the *Creditor Assistance Act*,
    - **(b)** advances made before SP acquires knowledge of (i) the interests of the persons, (ii) seizure of the collateral by the sheriff, or (iii) an order giving the sheriff a right to the collateral
    - **(c)** advances made in accordance with (i) statutory requirement, or (ii) a legally binding obligation owing to a person other than D entered into by the SP before the SP acquired the knowledge referred to in (b)
    - **(d)** reasonable costs and expenses incurred by SP for the protection, preservation or repair of the collateral, and
    - **(e)** the amount of taxes paid by SP under s27(1) of the *Manufactured Home Act*
* SI often created to secure an indebtedness that will increase/decrease over time – ie: in cases of revolving credit (ex: line of credit) – *PPSA* lets parties agree that a SI taken today can cover further advances made by C to D at a future date
* SP can be in competition with other claimants – if D agrees, SP will be permitted to “tack” on later advances he makes to a priority position that was created for him earlier
* An assignee has priority over a more junior secured C, but only in respect to the assignor’s original secured loan, not in respect of any other indebtedness owed by D to the assignee: ***Canamsucco Road House v Lngas*** (the third C bought the first C’s indebtedness, and then tried to take on their original third indebtedness to the first C’s priority claim)

### Is There an Acceleration Clause?

* **S16:** If a SA provides that a SP may accelerate payment or performance by the D when the SP is or believes himself insecure or decides that the collateral is in jeopardy, the provision must be construed to mean that the SP has the right to accelerate payment or performance **ONLY IF** the SP, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy

### What is the collateral?

* **S1(4)**: Characterization of the goods occurs at the time the SI attaches
  + Consumer goods: primarily used or acquired for personal, family, or household purposes
  + Inventory: goods held for sale or lease; furnished under a contract of service; raw materials; materials used/consumed in business
  + Equipment: residual category – goods that are not inventory or consumer goods

## What form does the SA have to take?

* **S1(1) “security agreement”:** An agreement that creates or provides for a SI and, if that context permits, includes **(a)** an agreement that provides for a prior SI and **(b)** writing that evidences a SA
* **S9:** Subject to this and any other enactment, a SA is effective according to its terms.
* **S10:** An SI is only enforceable against a third party if
  + **(a)** the collateral is not a certificated security and is in the possession of the SP
  + **(b)** the collateral is a certificated security in registered form and the certificate has been delivered to the SP under S68 of the *Securities Transfer Act* in accordance with the D’s SA
  + **(d)** D has signed a SA that contains
    - (i) a description of the collateral by item or kind, or by reference to one or more of the following: goods, investment property, instruments, documents of title, chattel paper, intangibles, money, crops, or licenses
    - (ii) a description of collateral that is a security entitlement, securities account or futures account if it describes collateral by those terms or as investment property or if it describes the underlying financial asset or futures contract
    - (iii) a statement that an SI is taken in all of D’s present and after acquired personal property or
    - (iv) a statement that an SI is taken in all of D’s present and after acquired personal property except
      * (A) specified items or kinds of personal property, or
      * (B) one or more of the following: goods, investment property, instruments, documents of title, chattel paper, intangibles, money, crops, or licenses
  + (2) For the purposes of (1)(a), SP is deemed not to have taken possession of collateral that is in the apparent possession or control of D or D’s agent
  + (3) Subject to (6), a description is inadequate for the purposes of (1)(d) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral
  + **(4)** A description of collateral as inventory is adequate for the purposes of (1)(d) only while it is held by D as inventory
  + **(5)** A SI in proceeds is enforceable against a 3rd party whether or not the SA contains a description of the proceeds
  + (6) If personal property is excluded from a description of collateral the excluded property may be described as consumer goods without further reference to the item or kind of property excluded
* **S11:** If a SA is in writing, SP must deliver a copy of the SA to D within 10 days after it is executed, and if SP fails to do so after a request by D, a court may, on application by D, order the delivery of the copy to D
* Knowledge of a SI is irrelevant – you must follow the form prescribed in S10 and verbal SAs are unenforceable against third parties: ***Riepe v Stingray Holdings***
* “Assets” is not precise enough wording as the writing requirement is to describe the collateral by item or kind – this SI would be valid against D, but not a third party: ***674921 BC v New Solutions Financial***

## Transactions Creating “True” Security Interests

* **S1(1) “security interest”:** “**true**” (a) – an interest in goods, chattel paper, investment property, document of title, instrument, money, or intangible that secures payment or performance of an obligation
  + “**deemed**” (b) – an interest in (i) the transfer of an account or chattel paper, (ii) commercial consignment, or (iii) a lease for a term of more than one year
* **S2(1):** The *PPSA* applies to every transaction that in substance creates a security interest – form and title to the collateral don’t matter – and specifically to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper AS LONG AS they secure payment or performance of an obligation.
  + Substance over form – can’t escape the *PPSA* by dressing it up as something else
* **S75: (1)** A reference in an Act, regulation, agreement or document to the *Book Accounts Assignment Act*, the *Chattel Mortgage Act,* the *Company Act*, the *Manufactured Home Act* or the *Sale of Goods on Condition Act*, that relates to a security interest is deemed to be a reference to this Act or to the corresponding provisions of this Act.
  + **(2)** A reference in an Act, regulation, agreement or document to a chattel mortgage, conditional sales contract, floating charge, pledge, assignment of book accounts or other similar agreement is deemed to be a reference to the corresponding kind of SA under this Act.
* Blahblahblah example of a lease. I think. ***Yeung v Au***

### Typical Forms of Security Agreements

* **S2(1):** Substance over form!
* **S68(1):** Principles of common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply
* GSA: an agreement where collateral is all PAAP
* SA: agreement that creates/provides for a SI and includes agreements for prior SIs and writing evidencing a SI
* Conditional sales contract (buying or selling on credit), chattel mortgage (mortgaging against a specific item that is not land and that D already has an interest in), the charge (upon a default, a chargee obtains the right to sell the property. Fixed charge: the subject matter is identified immediately, floating charge: the SP has a charge over a category of things that crystallizes and settles upon the property at the time of default) and the pledge are STs

### Is This Shit a Consignment That Falls Under the *PPSA*?

* **S2(1)(b):** This Act applies to a consignment if it secures payment or performance of an obligation
* Factors signalling a consignment to secure an obligation include 1) the obligation of the consignee to pay for unsold items, 2) insurance, 3) language of the agreement, and 4) furnishing of FSs: ***Re Toyerama*** (RT arranged with T for them to sell number of surplus toys – no obligation to pay for toys left in the warehouse, only those that left, and no express right in T to return the toys to RT. Not a SA since RT can become the owner again for toys not sold)

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| **True Consignment – No SI** | **Security Consignment – SI** |
| Consignor gives goods to consignee to sell. Consignee has the legal power to return any and all of the goods without obligation. There is never the intention that the consignee gets title to the goods and no obligation to buy the goods (***Access Cash v Elliot Lake*** factors) | Essentially a conditional sale. The consignee insures the goods and is required to buy the goods themselves if another buyer can’t be found. The consignor gets rid of the goods to either a third party or to the consignee. |

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| **Commercial Consignment – A Deemed SI** |
| **S1(1) “commercial consignment”:** a consignment under which  1) goods are delivered for sale, lease or other disposition  2) to a consignee who, in the ordinary course of the consignee’s business, deals in goods of that description,  3) by a consignor who **(a)** in the ordinary course of their business, deals in goods of that description, and **(b)** reserves an interest in the goods after they have been delivered.   * Doesn’t include an agreement where goods are delivered to an auctioneer or to another consignee if it’s generally known to Cs of the consignee that they are in the business of selling or leasing goods of others   PART 5 REMEDIES DO NOT APPLY: **S3(b)** & **S55(2)(a)** |

### Or is it a Lease?

* Where there is an option to purchase attached to the lease, the transaction is like a disguised conditional sale, and therefore involves the creation of a SI.
* **S2(1)(b):** This Act applies to a lease if it secures payment or performance of an obligation.
* Where the price at the end of the lease is comparable to market value, then it is a true lease. Where it is substantially less, the lease is basically a conditional sale. The basis for calculating the price at the beginning of the lease must be a genuine pre-estimate at that time: ***DaimierChrysler***

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| **True Lease – No SI** | **Security Lease – SI** |
| Lessor retains title and gives possession to lessee. Intention of the contract is that goods be returned, not because of breach, but because the lessor wants goods back once lease period is over. It doesn’t secure any obligations – Part 5 remedies do not apply. Instead, use common law and the rights/remedies outlined in the lease agreement (***Newcourt Financial***). Leases that can be terminated at any time by the lessee and/or that have no option to purchase will be a true lease. | There is no true intention that the goods be returned unless something goes wrong with the contract and the lessor gets the goods back as a remedy. It is an issue of law and fact whether a lease is a security lease, not for the parties alone to determine. **Factors:** intent, whether deposit is payable and refundable, ownership at the end of the lease, indicia of ownership like costs of repair/insurance, responsibility for taxes, goods acquired by the lessor specifically for the lease, whether payment can be accelerated in the event of a default, presence of liquidated damages, whether default provisions are inordinately favourable to the lessor (***Newcourt Financial***)  1. The lease is for a mandatory period close to the natural life of the thing.  2. The lessee is given the option to purchase – it is almost certain at the outset the lessee will exercise the option.  3. The nature of the lessor’s business is financing, the lessee assumes ownership responsibilities, and there is an acceleration clause: ***DaimierChrysler*** |

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| **Lease > 1 Year – Deemed SI** |
| **S1(1):** Includes **(a)** a lease for an indefinite term including a lease that is determinable by one or both parties within one year from its execution, **(b)** a lease that is for one year or less initially, but the goods, with the consent of the lessor, are kept for longer than a year, and **(c)** a lease for a term of a year or less if **(i)** the lease provides that it’s renewable for one or more terms automatically, at the option of one or both the parties, and **(ii)** the total terms, including the original term, exceed one year.  It doesn’t include **(d)** a lease involving a lessor who is not regularly engaged in the business of leasing goods, **(e)** a lease of household furnishings or appliances as part of a lease of land if the goods are incidental to the use and enjoyment of the land, or **(f)** a lease of a prescribed kind of goods regardless of the length of the term of the lease.  **S3:** Applies to leases for more than one year that do not secure payment or performance of an obligation  PART 5 REMEDIES DO NOT APPLY: **S3(c)** & **S55(2)(a)** |

### Or is it a Trust?

* **S1(5):** Proceeds are traceable whether or not there is a fiduciary relationship between SP and the person who has rights in or has dealt with the proceeds
* **S2(1)(b):** This Act applies to trusts that secure payment or performance of an obligation.
* Some STs use trusts to allow the SP to use tracing to follow money into and through a mixed-source account

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| **True Trust – no SI** | **Security Trust – SI** |
| B doesn’t have an interest in the property held by T as a method to ensure that T performs another obligation. | The trust is set up as a security device as a way for B to ensure certain moneys received by T will be held for the benefit of B to satisfy or pay off another obligation. The C/D relationship overlaps the B/T relationship. |

**Test to determine whether it is a C/D relationship: *Skybridge Holidays***

1. The purpose of the transaction (here it was to receive vacation deposits as the agent of the consumers, which cannot analogize the C/D relationship.

2. The role and relationship of the parties

3. Practicality and commercial reality (here it wasn’t practical for each consumer to register and perfect their interest – they didn’t even know they were C’s)

4. Intention of the parties (here, the customers became Cs/Bs unintentionally through bankruptcy)

## Security Transactions Excluded from the *PPSA*

* **S4:** *PPSA* doesn’t apply to lots of shit
  + **(a)**: lien/charge/interest given by rule of law as it applies to consensual transactions only
  + **(b):** SAs covered by federal law for constitutional reasons (ie: *PPSA* doesn’t apply to reserve property: ***Kingsclear*** – bus on reserve, can’t seize off property either – federally regulated property)
  + **(c)**: interests/claims under insurance policies
  + **(d):** present or future wages – excluded from any all-PAAPs applying to individuals
  + **(e):** transfer of an interest in an unearned right in an uncompleted contract
  + **(f):** creation or transfer of land interest
  + **(g):** payments arising in connection with land interests

## Transactions Deemed to Create Security Interests

* **S1(1) “account”:** a monetary obligation not evidenced by chattel paper or an instrument, whether or not the obligation has been earned by performance, but doesn’t include investment property
  + **“chattel paper”:** one or more writings that evidence both a monetary obligation and a security interest in, or a lease of, specific goods or specific goods and accessions
  + **“obligation secured”:** when determining the amount payable under a lease that secures payment or performance of an obligation, **(a)** the amount originally contracted to be paid under the lease, **(b)** any other amount payable in accordance with the terms of the lease and **(c)** any other amount required to be paid by the lessee to obtain ownership of the collateral, less any amount paid before determination
  + **“purchase money security interest: (a)** a SI taken in collateral to the extent that it secures payment of all or part of its purchase price, **(b)** a SI taken in collateral by a person who gives value for the purpose of enabling D to acquire rights in the collateral, to the extent that the value is applied to acquire the rights, **(c)** the interest of a lessor of goods under a lease for a term of more than one year, and **(d)** the interest of a person who delivers goods to another person under a commercial consignment, but doesn’t include a transaction of sale by and lease back to the seller and, for the purposes of this definition, “purchase price” and “value” include credit charges or interest payable for the purchase or loan credit
  + **“security agreement”**: an agreement that creates or provides for a SI and, if the context permits, includes (a) an agreement that provides for a prior SI, and (b) writing that evidences a SA
  + **“security interest”:** an interest in tons of things including the deemed interests – transfer of account or chattel paper, commercial consignment, and a lease for more than one year, whether or not the interest secures payment or performance of an obligation
* **S1(3):** a lease under paragraph (b) of the definition of “lease for a term of more than one year” does not become a lease for a term of more than one year until the lessee’s possession extends for more than one year
* **S2:** This Act applies to tons of stuff
* **S3:** Deemed interests transfer of account or chattel paper, commercial consignment, and a lease for more than one year, whether or not the interest secures payment or performance of an obligation – subject to S4 & 55
* **S55(2)(a):** Part 5 remedies don’t apply to SIs in S3.
* It has to be shown that creditors generally know their D is dealing with consigned goods and it has to be generally known to Cs, not just the specific Cs – refers to what a potential, objective C would know: ***Furmanek v Community Futures*** (consignor of jewellery failed to register and was found to be an unperfected SP because the business was not objectively known to deal in consignment goods)

# The Property Encumbered: COllateral and Proceeds

* *PPSA* doesn’t define personal property – if you can make an argument that something isn’t personal property, this Act won’t apply

## Collateral – Personal Property Subject to a SI

* **S1(4):** Determination of whether goods are consumer goods, inventory, or equipment must be made when the SI attaches
* **Inventory:** **(a)** goods held for sale or lease, **(b)** furnished under contract of service, **(c)** raw materials, **(d)** materials used/consumed in business (judicially interpreted to mean materials that are “used up”)
  + **S10(4):** A description of collateral as “inventory” is adequate for writing requirement purposes only while it is held by D as inventory
* **Consumer Goods:** used/acquired primarily for personal, family, or household purposes – the SA must include further reference to the kind, it’s not enough to say “consumer goods”: **S10(3)**
  + **S10(6):** If personal property is excluded from the collateral, it is enough to call it “consumer goods”
  + SI won’t attach to after-acquired property, unless it’s an accession or a SI from a PMSI or SI in collateral obtained by D as a replacement for the collateral described in the SA
* **Equipment**: errthang else – residual category - the SA must include further reference to the kind, it’s not enough to say “equipment”: **S10(3)**
* A thing is personal property so long as it confers rights (proprietary), even if the rights are contingent or for a limited time: ***Saulnier v RBC*** (fishing license was found to be property)
* You can’t force something to no longer be inventory just by seizing it – S10(4) can’t be used to defeat priorities established by the Act – the thing must no longer be inventory through a voluntary measure or something other than default: ***Furmanek v Community Futures*** (consignor of jewellery – all of it was inventory and subject to proceeds)

## Proceeds and Tracing

* **S1(1) “proceeds”: (a)** identifiable or traceable personal property, fixtures, and crops **(i)** derived directly or indirectly from dealing with collateral or the proceeds of the collateral, and **(ii)** in which D gets an interest
  + **(b)** a right to an insurance/indemnity payment or compensation for loss of/damage to the collateral or proceeds (***Cooper v Bar XH***)
  + **(c)** a payment made in discharge or redemption of an intangible, an instrument, an investment property, or chattel paper
* **S10(5):** A SI in proceeds is enforceable against a third party whether or not the SA contains of a description of the proceeds
* **S28: (1)** If collateral is dealt with or otherwise gives rise to proceeds, the SI **(a)** continues in the collateral unless the SP expressly or impliedly authorizes the dealing, and **(b)** extends to the proceeds, but if the SP enforces a SI against both the collateral and the proceeds, the amount secured is limited to the market value of the collateral at the date of the dealing.
  + **(1.1)** The limitation in (1) of the amount secured doesn’t apply if the collateral is investment property.
  + **(2)** A SI in proceeds is a continuously perfected SI if the interest in the original collateral is perfected by **registration** of a FS that **(a)** contains a description of the proceeds that would be sufficient to perfect a SI in original collateral of the same kind, **(b)** covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or **(c)** covers the original collateral, if the proceeds consist of money, cheques, or deposit accounts in deposit taking institutions.
  + **(3)** Why does this section continue on… If the SI in the original collateral was perfected other than as described in (2), the SI in the proceeds is a continuously perfected SI for 15 days after the SI in the original collateral attaches to the proceeds, unless the SI in the proceeds is otherwise perfected by any other methods and under the circumstances prescribed for original collateral of the same kind.
* **S35(3):** Subject to S28, the time of registration, possession or perfection of a SI in the original collateral is also the time of registration, possession, or perfection of its proceeds.
* Proceeds of proceeds are still considered to be proceeds – SI continues in proceeds of inventory sold: ***Re CIBC & Marathon Realty*** (retailer entered into a lease where the GSA said they get the goods and the proceeds, M seized their inventory for rental arrears and the retailer also owed the bank under the GSA. The bank’s SI in the original inventory extends to proceeds from its sale and includes the replacement inventory as proceeds of proceeds)
* Funds deposited into a bank account where a negative balance still results is not proceeds because D has no rights in that property
* Lowest Intermediate Balance Rule: any additions to a mixed fund with withdrawals and deposits are not presumed to be subject to Sis of previous SPs unless it is specifically designated to top up the SI: ***Universal CIT Credit v Farmers Bank*** (D deposited proceeds of a sale of cars that had a SI attached)
  + The SP can only claim against the lowest intermediate balance of the account and withdrawals from the account are presumed to belong to D’s (it won’t affect the interest of third parties)
* Things that are bought with money withdrawn are proceeds if the SI attaches to some of the withdrawn funds and the SP can only claim a proportional claim
* There must be a close and substantial connection between the old property and the new in order to use PPSA tracing: ***Agricultural Credit Corp Sask v Pettyjohn*** (one type of cows sold to buy another)
  + BC FOLLOWS THIS: ***Re River Industries***

**EXAMPLE**: $500 is secured by $25 put into an account. D deposits $17, and then withdraws $23. Another random $14 is deposited. D then uses the $23 to buy a debt worth $46.

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| **Common Law – FIFO** | **Equity – LIB** |
| When money comes out of a mixed account, it is assumed that it came out from the money that first went in.  **EXAMPLE**: Each of the bundles, the $23 and the $19 in the account, secures $500, but not to the full amount. With FIFO, the $23 is entirely used to secure the $500, and $2 out of the account is what SP has an interest in. SP has an interest in the proceeds of the $23 to its entirety, so has an interest in the $46. | When money goes into a mixed account and this money is subject to someone else’s interest, equity assumes that when money comes out, it first comes out from money that is not subject to someone else’s interest.  **EXAMPLE**: The $23 that is withdrawn first comes from the $17 deposit that no one has an interest in, which means that SP has an interest in $6 of it to secure the $500 and the $19 in the account is entirely subject to the SI that SP has. When the $14 is deposited, SP only has an interest in the original $19/$33, unless D specifically says it is meant to top up. SP only has an SI in the proceeds of the $23 to the extent that he had an interest in the original $23 – 6/23, so he has an SI of 6/23 of $46 - $12 worth. |

# Creating the SI: Attachment

## General Attachment

* **S1(1) “value”:** any consideration sufficient to support a simple contract, and includes an antecedent debt or liability
* **S12: (1)** A SI attaches when **(a)** value is given, **(b)** the D has rights in the collateral or power to transfer rights in the collateral to a SP, and **(c)** except for the purpose of enforcing rights between the parties to the SA, the SI becomes enforceable under S10, unless the parties have specifically agreed to postpone the time for attachment, then it will attach at that time.
  + **(2)** For the purposes of (1)(b) and without limiting other rights, if any, which D has in the collateral, a D has rights in goods leased to D or consigned to D when D obtains possession of them in accordance with the lease or consignment.
  + **(3)** For the purposes of (1), a D has no rights in any of the following:
    - **(a)** crops until they become growing crops
    - **(b)** the young of animal until they are conceived
    - **(c)** minerals or hydrocarbons until they are extracted
    - **(d)** trees, other than crops, until they are severed.
  + **(4)** The attachment of a SI in a securities account is also attachment of a SI in the security entitlements carried in the securities account.
  + **(5)** The attachment of a SI in a futures account is also attachment of a SI in the futures contracts carried in the futures account.
* **S28: (1)** If collateral is dealt with or otherwise gives rise to proceeds, the SI **(a)** continues in the collateral unless the SP expressly or impliedly authorizes the dealing,
* These requirements are only necessary for the SI to attach in the first place and don’t need to continue for the SI to continue to be attached
* Value can be past consideration and is sufficient value: ***TD Bank v Nova Entertainment*** (2 SPs fighting over the same collateral – there was a problem with attachment as SP1 didn’t give any more money, there was no new value)
* There is no minimum level of sufficient rights required for S12 attachment: ***Kinetics Technology v Fourth National Bank*** (KTI delivered goods it owed to OHT for repair – OHT had a SI with the bank and defaulted – the bank took possession of KTI’s property. The court said the bank’s SI had attached)
  + D must only have some degree of control/authority over the collateral
* Legal or equitable title is not required – rights may merely be possessory in origin – just needs to have some rights to the collateral, not ownership: ***Haibeck v No 40 Taurus Ventures***
  + Nemo dat – can’t give more than he has to give though

## Attachment for a PMSI

* **S1(1) “purchase money security interest: (a) SELLER PMSI** a SI taken in collateral to the extent that it secures payment of all or part of its purchase price, **(b)** **LENDER PMSI** a SI taken in collateral by a person who gives value for the purpose of enabling D to acquire rights in the collateral, to the extent that the value is applied to acquire the rights, **(c)** **DEEMED PMSI** the interest of a lessor of goods under a lease for a term of more than one year, and **(d)** **DEEMED PMSI** the interest of a person who delivers goods to another person under a commercial consignment, but doesn’t include a transaction of sale by and lease back to the seller and, for the purposes of this definition, “purchase price” and “value” include credit charges or interest payable for the purchase or loan credit

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| ***PPSA*** | **SI Type** | **Requirement** | **Result** |
| **S22(1)(a)** | PMSI in collateral, other than intangible | Perfected within 15 days of possession by D or agent | Priority over SIs in S20(a) and (b) (unperfected Sis) |
| **S22(1)(b)** | PMSI in an intangible | Perfected within 15 days of SI attachment | Priority over SIs in S20(a) and (b) (unperfected Sis) |
| **S34(1)(a)** | PMSI in collateral+proceeds, other than intangibles or inventory | **1.** Subject to S28 **2.** Perfected within 15 days of possession by D or agent | Priority over all SIs in same collateral given by same D |
| **S34(1)(b)** | PMSI in an intangible+proceeds | **1.** Subject to S28 **2.** Perfected within 15 days of SI attachment | Priority over all SIs in same collateral given by same D |
| **S34(2)** | PMSI in inventory+proceeds | Subject to (5)&S28, **(a)** perfected at time D or agent has possession, **(b)** SP gives notice to any other SP with registered FS of same collateral, **(c)** SP gives notice any other SP with registered SA of same collateral, **(d)&(e)** notice must state SP expects to get a PMSI in the described inventory and notice must be given before possession of D or agent | Priority over any other SI in same collateral given by same D |
| **S34(4)(a)** | PMSI in inventory+proceeds | **1.** Subject to S28 **2.** Perfected when D or agent obtains possession | Priority over any other PMSI in same collateral given by same D |
| **S34(4)(b)** | PMSI in collateral other than inventory+proceeds | **1.** Subject to S28 **2.** Perfected within 15 days of possession by D or agent | Priority over any other PMSI in same collateral given by same D |
| **S34(5)** | Non-proceeds SI in accounts | **1.** Given for new value **2.** FS registered before **(a)** PMSI perfected or **(b)** a FS relating to the PMSI is registered | Priority over PMSI in the accounts as proceeds of inventory |
| **S34(6)(a)** | Non-proceeds PMSI for inventory | Perfected when D or agent gets possession | Priority over PMSI in the same collateral as proceeds |
| **S34(6)(b)** | Non-proceeds PMSI for collateral other than inventory | Perfected within 15 days of D or agent getting possession | Priority over PMSI in the same collateral as proceeds |
| **S34(8)** | SI in crops+proceeds | **1.** Perfected **2.** given for value to enable D to produce/harvest crops, given **(a)** while they’re growing crops, or **(b)** during 6 months before crops became growing crops | Priority over any other SI in same collateral given by same D |
| **S34(9)** | SI in fowl, cattle, horses, sheep, swine or fish+proceeds | **1.** Perfected **2.** given to enable D to acquire food or drugs for the animals | Priority over any other SI in same collateral given by same D, but not over a perfected PMSI |

* **S22: (2)** For the purposes of this section, if goods are shipped by common carrier to D or to a person designated by D, D does not have possession of the goods until D or the third person at the request of D has obtained actual possession of the goods or a document of title to the goods, whichever is earlier
* **S28(1)(b):** PMSI status extends to its proceeds
* **S34: (3)** a notice referred to in (2) may be given in accordance with S72 or by registered mail addressed to the address of the person to be notified as it appears in the FS referred to in (2)(b) or the SA in (2)(c)
  + **(7)** For the purposes of this section, if goods are shipped by common carrier to D or to a person designated by D, D is not deemed to have obtained possession of the goods until D, or another person designated, has obtained actual possession of the goods or a document of title to the goods, whichever is earlier
* TEST for whether a C got a PMSI: 1) Lender has an SI in the property, 2) has given value for the purpose of enabling D to acquire rights in the property, and 3) the value has been used to acquire those rights: ***Agricultural Credit Corp Sask v Pettyjohn***
* A change in the nature of rights can constitute “acquiring further rights” – if the rights are enlarged: ***Unisource Canada Inc v Laurentian Bank*** (D has leased property – already had some rights – and a new lender allowed D to exercise the option to purchase, claiming a PMSI – this was considered getting rights)
* Collective/Global PMSIs – still allowed in BC, but not ON: If C’s funds are used to purchase a group of collateral (not purchased in a single lot), this PMSI is all treated as one big unit for the full amount extended: ***Chrysler Credit Canada v RBC*** (CC financed purchase of new car inventory and claimed a PMSI on cars taken in trade for new car, where loan for that particular car wasn’t repaid and on cars taken in trade where the load was repaid – Court attached the PMSI to the whole inventory)
  + **If you’re advising C:** argue this if the good that D is arguing they have paid down is worth more/easier to seize/easier to resell
  + **If you’re advising D:** argue this doesn’t apply because you want the good free of its debt and don’t want the PMSI hanging over all of your shit

# Perfection of the SI

* **S19:** A SI is perfected when **(a)** it has attached, and **(b)** all steps required for perfection under this Act have been completed.
* **S23: (1)** If a SI is perfected under this Act and is again perfected in some other way without having been unperfected, the SI is continuously perfected .
  + **(2)** A transferee of a SI has the same priority with respect to perfection of the SI as the transferor had at the time of the transfer.
* **S26: (1)** A SI perfected under S24 in **(a)** an instrument or certificated security that a SP delivers to the D for the purpose of **(i)** ultimate sale or exchange, **(ii)** presentation, collection or renewal, or **(iii)** registration of transfer, or **(b)** a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the SP makes available to D for the purpose of **(i)** ultimate sale or exchange, **(ii)** loading, unloading, storing, shipping or transshipping, or **(iii)** manufacturing, processing, packaging, or otherwise dealing with the goods in a manner preliminary to their sale or exchange, remains perfected for the first 15 days after the collateral comes under the control of D.
  + **(2)** After the 15 days, a SI referred to in this section is subject to the provisions of this Act relating to the perfection of a SI.

## Register Yo’ Shit!

* **S1(1) “financing statement”:** if the context requires, **(b)** data authorized under the regulations to be transmitted electronically, directly to the computer data base of the registry by a person defined in the regulations as a registering part, to effect a registration and **(c)** a SA registered under a bunch of acts
* **S1(1) “financing charge statement”:** has the meaning prescribed… what.
* **S1(2):** knowledge provisions! **(a)** natural person knows when info is acquired by the person where a reasonable person would take cognizance of it, **(b)** a partnership knows when it has come to the attention of one general partner or a person having control/management of the partnership where a reasonable person would take cognizance of it, **(c)** a corporation knows when info has come to the attention of a managing director or officer or a senior employee with responsibility for matters to which the info relations where a reasonable person would take cognizance of it or when the information in writing has been delivered to the corporation’s registered office or attorney for service
  + **S47:** Registration of a FS does not, by itself, constitute any kind of notice or knowledge of **(a)** the FS or its contents or **(b)** the SI perfected by the FS or the contents of the SA.
* **S18:** has 19 sections… no. Something about acquisition of information from the SPs

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| **Registry/Registrar Rules** | **S42: (1)** There must be a registry known as the personal property registry for the purposes of registration under this Act and for registrations that are permitted or required under any other enactment to be made in the registry.   * **(2)** The registrar may have a seal of office in the form prescribed. * **(3)** The minister may designate a person as registrar. * **(4)** The registrar may designate one or more persons as deputy registrars. * **(5)** Despite any regulation made under S76, when in the opinion of the registrar the circumstances are such that it is not practicable to provide one or more registry services, the registrar may **(a)** refuse to register the FS, **(b)** refuse to accept requests for search results, and **(c)** otherwise suspend one or more of the functions of the registry, for the period of time during which, in the opinion of the registrar, those circumstances prevailed.   **S46: (1)** The registrar can store any record or information by photographing it, storing it electronically/digitally, or reproduce it and that photograph, stored record, or reproduction is deemed to be the record or information photographed, stored, or reproduce. WTF.   * **(2)** Information in a registration can be removed from the registry records **(a)** when registration is no longer effective, **(b)** on receipt of a FCS discharging or partially discharging the registration or **(d)** on receipt of a court order compelling discharge or partial discharge.   **S48:** **(1)** A person can request the following: **(a)** a search for and the name of D, **(c)** a search for the registration number, **(d)** a copy or certified copy of any registered, printed document.   * **(2)** A printed search result issued by the registry is proof, absence evidence to the contrary, of its contents including **(a)** the date of registration of a FS to which the search result refers, and **(b)** the order of registration of a FS as indicated by the registration number. * **(3)** A copy of a registered, printed FS or other document bearing the certification of the registrar is receivable in evidence as a true copy of the FS or document without proof of the signature or official position of the registrar. |
| **FS Registration Rules S43** | **(1)** If you want to register your FS, you have to submit it an office of the registry  **(2)** Registration is effective from the time assigned to it in the office of registry, and if two or more FSs have the same time, the order of registration is according to the registration numbers assigned  **(3)** Pay your fees if you want to register  **(4)** A FS can be registered before a SA is made and before a SI attaches: ***674921 BC v New Solutions Financial*** (FS for an all-PAAP registered a year before the SA was made – valid)  **(5)** A registration can relate to more than one SA  **(6)** A defect, irregularity, omission or error won’t invalidate registration unless it is seriously mislead   * It is NOT seriously misleading if a search using alternative criteria yields the correct result: ***Re Munro*** (Omission of the middle name and mistake of one number in the serial number is NOT seriously misleading – search with proper number and other criteria disclosed required information) * Seriously misleading if 1)it would prevent a reasonable search from disclosing the existence of the registration and 2) it would make a person who became aware of the registration think that it was not likely the same chattel or D: ***Coates v GM*** (registration had one mistake in the serial number, and a search of the mistaken number gave correct information, but correct number didn’t yield results – not seriously misleading as reasonable person would’ve been alerted)   **(7)** Subject to (9), the registration is invalid if **(a)** one or more Ds are required to be disclosed in the FS and there is a seriously misleading defect, irregularity, omission or error in **(c)** the disclosure of the name of any D other than a D who doesn’t own/have rights in the collateral  **(8)** If it’s alleged that a mistake was seriously misleading, you don’t have to prove that it actually misled someone, just the potential of it  **(9)** Failure to provide a description of any item or kind of collateral won’t invalidate registration for other collateral contained in the FS  **(12)** The registrar has discretion to reject a FS if they think it doesn’t comply with this Act  **(13)** Must give written reasons for rejection |
| **Perfection by Registration Rules**  **S25:** Subject to S19, registration of a FS perfects a SI in collateral. | **S19:** A SI is perfected when **(a)** it has attached, and **(b)** all steps required for perfection under this Act have been completed.  **S23(2):** A transferee of a SI has the same priority with respect to perfection of the SI as the transferor had at the time of the transfer.  **S28(2):** A SI in proceeds is a continuously perfected SI if the interest in the original collateral is perfected by **registration** of a FS that **(a)** contains a description of the proceeds that would be sufficient to perfect a SI in original collateral of the same kind, **(b)** covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or **(c)** covers the original collateral, if the proceeds consist of money, cheques, or deposit accounts in deposit taking institutions.  The FS can be less specific than the SA: ***Regal Feeds v Walder and Niverville Credit Union*** (FS described various kinds of pigs, but no reference to after-acquired or piglets – valid for SP to claim an SI in the piglets) |
| **Renewing or Amending your FS S44** | **(1)** A registration is effective for the period of time indicated on the FS  **(2)** A registration can be renewed by registering a FCS before registration expires and the time extension is the renewal period indicated on it  **(3)** An amendment to a registration, whether the registration is valid or not, can be made by registering a FCS before registration is effective, and the amendment is effective from the date it is registered until the FS being amended is good for |
| **Registering Transfers of SIs S45** | **(1)** If a SP with a registered SI transfers the interest, a FCS disclosing the transfer may be registered  **(2)** If one is registered and only part of the interest of the collateral is transferred, the FCS must contain a description of the collateral  **(3)** When a SP transfer an interest and the SI of the SP isn’t perfected by registration, a FS can be registered where the transferee is disclosed as the SP  **(4)** A FCS disclosing a transfer can be registered before or after the transfer  **(5)** After registration of a FCS disclosing a transfer, the transferee is the SP  **(6)** When a SP has subordinated their interest to another person, a FCS may be registered to disclose that subordination any time while the registration of the subordinated interest is effective. |
| **Amending or Discharging Registrations (obligations completed, agreement to release collateral, description of collateral is fucked, or no SA ever existed)**  **S50** | **(1)** D and SP is anyone included on the registered FS as such  **(2)** If a registration is exclusively for a SI in consumer goods, the SP must discharge the registration within a month of all SA obligations are performed, unless the registration lapses within that month  **(3)** If a FS is registered and **(a)** all SA obligations have been performed, **(b)** the SP has agreed to release all or part of the collateral described in the FS, **(c)** the description of the collateral in the FS contains an item or kind of property that is not collateral under the SA or does not distinguish between original collateral and proceeds, or **(d)** no SA exists between the SP and D, the D or anyone with interest in property that is in the collateral description on the FS may give a written demand to the SP  **(4)** The written demand can require that **(a)** for something under (3)(a) or (d), the registration be discharged, **(b)** for something under (3)(b), the registration be amended or discharged to reflect terms of the agreement, or **(c)** for something falling within (3)(c), the collateral description be amended to exclude those items or kinds of property, and the SP must register a FCS amending or discharging the registration within 40 days after demand is given  **(5)** If the SP fails to register the FCS amending or discharging the registration as required by (4), the person who gave the demand can register a FCS amending or discharging as per the demand, on giving proof to the registrar of the demand, unless the SP registers a court order maintaining registration in the meantime.  **(8)** The SP can apply for a court order for the registration to be **(a)** maintained on any conditions and, subject to S44(1), for any period of time, or **(b)** be discharged or amended.  **(11)** No fee or expense can be charged and no amount accepted by the SP for compliance with a demand made under (3), unless the charge has been agreed to before the demand was made. |
| **Recovery of loss for registry fuck ups S52**  **S54: general rules regarding actions and liabilities of government** | **(1)** Despite S69, the government is not liable (of course not) either directly or vicariously for loss or damage suffered by a person because of **(a)** verbal advice given by an agent or employee of the government about this Act, unless you can prove the agent or employee wasn’t acting in good faith, or **(b)** failure to register or to register correctly data authorized to be transmitted electronically directly to the computer data base of the registry to effect a registration  **(2)** If an action is brought against the government for the recovery of loss or damage that results from a failure of the registrar to register a FS, it is a defence that the failure to register was because **(a)** the applicant didn’t pay the fee under S43(3), **(b)** the registrar refused to register according to S42(5), or **(c)** the registrar refused under S43(12). |

## Perfect it by Possession (or Delivery)

* **S17: (1)** Here, SP also includes a receiver.
  + **(2)** A SP must use reasonable care in the custody and preservation of the collateral they possess, and unless otherwise agreed, reasonable care for an instrument or chattel paper includes taking necessary steps to preserve rights against other persons.
  + **(3)** Unless otherwise agreed, if SP has the collateral **(a)** reasonable expenses (costs of insurance, tax, other charges incurred in obtaining, maintaining possession, preserving collateral) are chargable to D and secured by the collateral, **(b)** the risk of loss or damage to the collateral, unless cause by SP negligence, is on D, **(c)** the SP may use any increase or profits, except money, as additional security (ie: young of animal, dividends paid in additional shares) and must apply any money received, unless remitted to D, immediately on its receipt to reduce the obligation secured by the collateral, and **(d)** the SP must keep the collateral identifiable, but fungible collateral can be commingled
  + **(4)** Subject to (2), a SP may use the collateral **(a)** in a manner and to the extent provided for in the SA, **(b)** for the purposes of preserving the collateral, or **(c)** in accordance with a court order.
* **S24: (1)** Possession of the collateral by SP perfects a SI for chattel paper, goods, an instrument, a negotiable document of title, and money unless possession is a result of seizure or repossession: ***Re Bank of Nova Scotia and RBC*** (default and bank seizes property, claims perfection by possession – court says nah)
  + **(2)** For the purposes of (1), a SP does not have possession of collateral that is in the actual or apparent possession or control of D – no constructive possession, must be taking possession for the purposes of perfecting the SI: ***Royal Trust Corp v Number 7 Honda Sales*** (D defaulted and dumped car on dealership lot – no perfection)
  + **(3)** A SP may perfect a SI in a certificated security by taking delivery of it under S68 of the *Securities Transfer Act*
  + **(4)** A SI in a certificated security in registered form is perfected by delivery when delivery of it occurs under S68 of the *Securities Transfer Act* and remains perfected by delivery until D obtains possession of the security certificate.

## Temporary Perfection

* **S26: (1)** An SI perfected through possession under S24 in an instrument or negotiable document of title or goods remains perfected for 15 days after SP hands collateral to D – a true grace period as, even if after the 15 days if over, it is not perfected again, the SI is perfected through the 15 days.
  + **(2)** After the 15 days, a SI must be perfected in some other way

## Proceeds

* **S1(1) “proceeds”: (a)** identifiable or traceable personal property, fixtures, and crops **(i)** derived directly or indirectly from dealing with collateral or the proceeds of the collateral, and **(ii)** in which D gets an interest
  + **(b)** a right to an insurance/indemnity payment or compensation for loss of/damage to the collateral or proceeds (***Cooper v Bar XH***)
  + **(c)** a payment made in discharge or redemption of an intangible, an investment property, or chattel paper
* **S10(5):** A SI in proceeds is enforceable against a third party whether or not the SA contains a description of the proceeds.
* **S28: (1)** If collateral is dealt with or otherwise gives rise to proceeds, the SI **(a)** continues in the collateral unless the SP expressly or impliedly authorizes the dealing, and **(b)** extends to the proceeds, but if the SP enforces a SI against both the collateral and the proceeds, the amount secured is limited to the market value of the collateral at the date of the dealing.
  + **(2)** A SI in proceeds is a continuously perfected SI if the interest in the original collateral is perfected by **registration** of a FS that **(a)** contains a description of the proceeds that would be sufficient to perfect a SI in original collateral of the same kind, **(b)** covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or **(c)** covers the original collateral, if the proceeds consist of money, cheques, or deposit accounts in deposit taking institutions.
  + **(3)** Why does this section continue on… If the SI in the original collateral was perfected other than as described in (2), the SI in the proceeds is a continuously perfected SI for 15 days after the SI in the original collateral attaches to the proceeds, unless the SI in the proceeds is otherwise perfected by any other methods and under the circumstances prescribed for original collateral of the same kind.
* **S35(3):** Subject to S28, the time of registration, possession or perfection of a SI in the original collateral is also the time of registration, possession, or perfection of its proceeds.

# Are there multiple SPs with competing interests?: Priority and Detachment Rules

## What is a priority rule?

* **S68(1):** Principles of common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply
* Actual notice is not relevant to priorities and you can take advantage of a rule, even if you are aware of another party’s interest: ***Robert Simpson Co v Shadlock***

## surprise! Priority rules have problems

* **S63: (2)** A court can make one or more of the following orders: **(a)** an order that is necessary to ensure compliance, **(b)** an order giving directions to a person with respect to the exercise of their rights or the discharge of their obligations, **(c)** an order reliving a person from compliance with the requirements of this Part of S17, 36, 37, 38, but only on terms that are just and reasonable to all parties affected, **(d)** an order staying enforcement of rights,**(e)** an order necessary to ensure protection of the interests of any person in the collateral.

### Circularity Problems

These issues arise when the priority rules are irreconcilable and give each competing SP priority over each other. There is no clear solution, but ***GMS Securities v Rich-Wood Kitchens*** outlines several options: 1) give the priority to the least blameworthy party, 2) argue for priority based on public policy that one type of SI should be preferred over another, or 3) impose the burden of finding a resolution on the first SP to take remedial action. The court also looked at reasonable commercial expectations.

### Subordination Agreements

Parties have freedom of contract to provide priorities amongst themselves to override the rules provided for in the *PPSA*.

* **S40: (1)** A SP may subordinate their SI to any other interest and the subordination is effective according to the terms between the parties and may be enforced by a third party if the subordination was meant to benefit them.
  + **(2)** An agreement or undertaking to subordinate or postpone **(a)** the right of a person to the performance of some or all of an obligation to the right of another person to the performance of some or all of another obligation by the same D, or **(b)** some or all of the rights of a SP under a SA to some or all of the rights of another SP under another SA with the same D does not, because of the subordination or postponement alone, create a SI.
* **S45(6)** When a SP has subordinated their interest to another person, a FCS may be registered to disclose that subordination any time while the registration of the subordinated interest is effective.
* A SI that was “subject to the interest of RBC” was found to sufficiently constitute a subordination agreement: ***RBC v Gabriel of Canada***
* Subordination clauses will be interpreted fairly strictly: ***Transamerica Commercial Finance v Imperial TV*** (subordination clause referred to “bankers” and TCF wasn’t allowed to claim the benefit because they were a finance company and not a bank)

### Marshalling – An Equitable “Remedy”

* This is a resolution ordered by the court at the request of a party. It will either amount to a court order to an oversecured party to use particular funds instead of other available funds so as to allow the value of those funds to remain available to undersecured parties who have only those funds to use, or a court order that a junior C be subrogated to the rights of the oversecured party. There has to be two Cs for marshalling to occur. The court will have to ensure that no third party is adversely affected by the order and they must be satisfied that the senior C has access to multiple funds. The order must not be unfair to them to realise on certain funds instead of others (***Surrey Metro Savings v Chestnut Hill Homes***).
* **S68: (1)** Principles of common law, equity, and the law merchant apply as long as they aren’t inconsistent with the Act

## Residual Priority Rules for Random Unspecified Situations

* **S43(4):** A FS can be registered before a SA is made and before a SI attaches: ***674921 BC v New Solutions Financial***
* **S68(2):** All rights, duties or obligations arising under a SA, this Act and any other applicable law must be exercised in **good** **faith** and a **commercially** **reasonable** **manner**
  + **(3)** A person doesn’t act in bad faith merely because the person acts with knowledge of the interest of some other person.

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| **Residual Priority Rules S35** | |
| **General Rules** | **(2)** For the purposes of (1), a continuously perfected SI must be treated as perfected by the method by which it was originally perfected by.  **(3)** Subject to S28, the time of registration/possession/perfection of a SI in original collateral is also the time of registration/possession/perfection of its proceeds |
| **Perfected SI vs Perfected SI** | **(1)(a)** Priority is determined by registration of a FS without regard to date of attachment of SI or possession for the purposes of perfection – whichever is earlier.  A single FS can cover multiple SAs as per **S43(5)** as long as the description of collateral is broad enough: ***RBC v Agricultural Credit Corp Sask***  If the method of perfection changes (ie: from possession to registration of FS), use the date of perfection: **(2)** |
| **Perfected SI vs Unperfected SI** | **(1)(b)** A perfected SI has priority over an unperfected SI |
| **Unperfected SI vs Unperfected SI** | **(1)(c)** Priority is determined by the order of attachment of SIs.  If the time of attachment is the same, SPs share equally in the collateral/proceeds: ***Ontario Dairy Cow*** |
| **Tacking Rules** | **(5)** Subject to (6), the priority that a SI has under (1) applies to all advances, including future advances.  BUT perfected SPs lose priority to persons in **S20(a)** for any advances made AFTER the SP has knowledge of **(i)** the interests of the unsecured creditors (who have judgments), **(ii)** seizure of collateral by the sheriff, **(iii)** an order giving the sheriff right to the collateral: **S35(6)(b)** |
| **Restoration Rule** | **(7)** If registration of a SI lapses due to a failure to renew, SPs have 30 days to reregister so that the lapse doesn’t affect the priority status of the SI over subordinate interests  This doesn’t apply to advances made by the competing SI after the lapse but before reregistration. |

## Specific Priority Rules

### Priority for a PMSI

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| ***PPSA*** | **SI Type** | **Requirement** | **Result** |
| **S22(1)(a)** | PMSI in collateral, other than intangible | Perfected within 15 days of possession by D or agent | Priority over SIs in S20(a) and (b) (unperfected Sis) |
| **S22(1)(b)** | PMSI in an intangible | Perfected within 15 days of SI attachment | Priority over SIs in S20(a) and (b) (unperfected Sis) |
| **S34(1)(a)** | PMSI in collateral+proceeds, other than intangibles or inventory \*super priority continues to proceeds once it’s established, including inventory, just can’t start as inventory to use this rule | **1.** Subject to S28 **2.** Perfected within 15 days of possession by D or agent (when they got it as collateral, they might have had possession before: ***McLeod & Co***) | Priority over all SIs in same collateral given by same D |
| **S34(1)(b)** | PMSI in an intangible+proceeds | **1.** Subject to S28 **2.** Perfected within 15 days of SI attachment | Priority over all SIs in same collateral given by same D |
| **S34(2)** | PMSI in inventory+proceeds | Subject to (5)&S28, **(a)** perfected at time D or agent has possession, **(b)** SP gives notice to any other SP with registered FS of same collateral, **(c)** SP gives notice any other SP with registered SA of same collateral, **(d)&(e)** notice must state SP expects to get a PMSI in the described inventory and notice must be given before possession of D or agent | Priority over any other SI in same collateral given by same D |
| **S34(4)(a)** | Seller PMSI in inventory+proceeds | **1.** Subject to S28 **2.** Perfected when D or agent obtains possession | Priority over any other PMSI in same collateral given by same D |
| **S34(4)(b)** | Seller PMSI in collateral other than inventory+proceeds | **1.** Subject to S28 **2.** Perfected within 15 days of possession by D or agent | Priority over any other PMSI in same collateral given by same D |
| **S34(6)(a)** | Non-proceeds PMSI for inventory | Perfected when D or agent gets possession | Priority over PMSI in the same collateral as proceeds |
| **S34(6)(b)** | Non-proceeds PMSI for collateral other than inventory | Perfected within 15 days of D or agent getting possession | Priority over PMSI in the same collateral as proceeds |

* S34(4) doesn’t apply where there are two lender PMSIs (value given which enabled D to get the collateral)
* S34(6) applies even if the interests were given by different Ds (ex: collateral with a PMSI SI is given in exchange for something else and thus becomes proceeds from another D)

## Is there Competition with a Trustee in Bankruptcy or a Liquidator?

* **S20(b):** An unperfected SI in collateral is not effective against a trustee in bankruptcy or a liquidator
  + The SI must be unperfected at the time of bankruptcy or when the winding-up order is made
  + It’s unclear what “not effective” means – could be that interest disappears or is subordinated
  + Trustees in bankruptcy are able to get a better position than an unperfected SI: ***Re Giffen*** (deemed SP failed to register and D went bankrupt while in possession – the car was seized by the trustee who claimed S20(b) – SP claimed it was still the owner, so nemo dat applies and the trustee doesn’t get a better interest - \*SCC says that title is not determinative)
  + Basically, good luck if you’re an unperfected SP and your D goes bankrupt!
* **S21:** If the interest of a deemed SP (lease for more than one year, commercial consignment) is not effective against a trustee in bankruptcy or a liquidator under S20(b), the SP is deemed, as against the lessee or consignee, to have suffered damages equal to **(a)** the value of the leased or consigned goods at the date of seizure, bankruptcy or the winding-up order, and **(b)** the amount of loss other than that that results from the termination of the lease or consignment.

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| ***PPSA*** | **SI Type** | **Requirement** | **Result** |
| **S22(1)(a)** | PMSI in collateral, other than intangible | Perfected within 15 days of possession by D or agent | Priority over SIs in S20(a) and (b) (unperfected Sis) |
| **S22(1)(b)** | PMSI in an intangible | Perfected within 15 days of SI attachment | Priority over SIs in S20(a) and (b) (unperfected Sis) |

## Is there Competition with Transferees of Collateral and Buyers and Lessees of Goods?

### Transferees Where SIs are Unperfected

* **S1(1) “consumer goods”:** goods that are used or acquired for use primarily for personal, family, or household purposes
* **S1(2):** knowledge provisions! **(a)** natural person knows when info is acquired by the person where a reasonable person would take cognizance of it, **(b)** a partnership knows when it has come to the attention of one general partner or a person having control/management of the partnership where a reasonable person would take cognizance of it, **(c)** a corporation knows when info has come to the attention of a managing director or officer or a senior employee with responsibility for matters to which the info relations where a reasonable person would take cognizance of it or when the information in writing has been delivered to the corporation’s registered office or attorney for service
* **S20(c):** A SI in chattel paper, a document of title, an instrument, money, an intangible or goods is subordinate to the interests of a transferee who **(i)** acquires an interest under a transaction that isn’t a SA, **(ii)** gives value, and **(iii)** acquires the interest without knowledge of the SI and before the SI is perfected. \*BFPVWN!
  + **“value”:** any consideration sufficient to support a simple contract, including an antecedent debt or liability
* Value only passes where there’s a change in position – an exculpatory promise is insufficient: ***RBC v Dawson Motors*** – this is probably inconsistent with the *PPSA*

### Authorised Dealing Free from SI

* **S28: (1)** If collateral is dealt with or otherwise gives rise to proceeds, the SI **(a)** continues in the collateral unless the SP expressly or impliedly authorizes the dealing**.**
* Commonly seen when dealing with inventory and generally limited to sales

### Buyer or Lessee in the Ordinary Course of Business

* **S30(1)**: “buyer of goods” – includes a person who obtains vested rights in goods under a contract to which they are a party as a consequence of goods becoming a fixture or accession to property in which they have an interest. “Seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is a party to a contract with the buyer. “The ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials
  + **(3)** A buyer/lessee of goods acquired as consumer goods takes free from a perfected or unperfected SI in goods if the buyer/lessee **(a)** gave value for the interest and **(b)** didn’t know about the SI.
    - **(4)** Doesn’t apply to a SI in **(a)** a fixture or **(b)** goods whose purchase price is over $1000, or for a lease, the market value of which is over $1000.
  + **(5)** A buyer/lessee of goods takes free from a SI that is temporarily perfected under S26(1), 28(3) or 29(4) or a SI that is continually perfected under S51 during any of the 15 day grace periods, if the buyer/lessee **(a)** gave value for the interest and **(b)** didn’t know about the SI.
  + **(6)** If goods are sold/leased, the buyer/lessee takes free from any SI in the goods perfected under S25 if **(a)** the buyer/lessee bought/leased the goods without knowledge of the SI.
    - **(7)** Only applies to equipment
  + **(8)** A sale/lease referred to in (2), (3), (5), or (6) may be for cash, by exchange for other property or on credit and includes delivering goods or a document of title to goods under a pre-existing contract for sale, but doesn’t include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

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| **Defining “the Ordinary Course of Business”** | | |
| **30(1)** “The ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials.  **(2)** A buyer or lessee of goods sold/leased in the ordinary course of business of the seller/lessor takes free of any perfected or unperfected SI in goods given by the seller/lessor or arising under S28/29, whether or not the buyer/lessee knows about it UNLESS they knew that the sale/lease constitutes a breach of the SA  In a series of transactions, even if the final transaction was in the ordinary course of business, if the earlier ones aren’t, those SI will prevail: ***Royal Bank v Wheaton Pontiac*** (There was a liquidation sale, the vendor had no place of business and was not licensed to sell cars – the SI in the car was perfected by registration and so the end purchaser is subject to earlier SIs)  Factors to determine “the ordinary course of business of the seller”: ***Fairline Boats v Leger*** (boat sold at boat show, rather than the ordinary place of business and for an unusually low price due to financial difficulty of the seller)   * Who are the parties? * Where was the agreement made? * Quantity of goods * Is the price within the usual market range?   Parties to an agreement cannot define the meaning of “the ordinary course of business”, it is a question of fact, to be assessed objectively: ***Ford Motor Credit v Centre Motors*** (a buyer under a sale that is *apparently* in the ordinary course of business, but was actually fraudulent, can still access the protection of this section) | | |
| **“Buyer”** | | **“Sale”** |
| To get the protection of **S30(2),** the buyer must be the “owner”, so the goods must be identifiable/delivered, though full payment of purchase price is not required: ***Royal Bank v 216200 Alberta*** (a furniture deal had some contracts with customers, but some of the goods were not delivered yet) | | “Sale” should be given its ordinary meaning – *SOGA* is not relevant to the *PPSA* context: ***Spittlehouse v Northshore Marine*** (contract for the sale of a boat where title hadn’t passed because payment was outstanding) |
| **S30(2)**  **vs**  **S28(1)(a)** | If the SP didn’t authorize D deal with the collateral free from the SI, but the buyer didn’t know about the breach of the SA, even if they knew about the SI, **S30(2)** is not subject to the Act, and so will trump **S28(1)(a)** allowing the buyer to take it free from interest. | |

## Are there two Ds? (haha)

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|  | **Requirements** | **Priority** |
| **Transferee grants SI BEFORE the transfer S35(8)** | **1.** D1 transfers collateral subject to SP1’s perfected SI  **2.** D2 has granted other SIs to SP2 before this transfer | SP1 has priority over any of D2’s SPs, EXCEPT for SIs granted by D2 to secure advances made **(a)** after 15 or more days have passed since SP1 gets knowledge that they have to register a new FS with D2 as a new D and **(b)** before they’ve actually amended registration or taken possession of the collateral  **(9)** Doesn’t apply if transferee take property free from SI granted by transferor |
| **Transferee grants SI AFTER transfer S51(1)\*Consent** | **1.** D1 transfers collateral subject to SP1’s perfected registered SI  **2.** SP1 consents to the transfer, but not detachment of interest  **3.** D2 grants other SIs after the transfer | SP1’s SI is subordinate to **(a)** interests or **(b)** perfected SIs arising in the period between 15 days after the transfer and the time SP reregisters with D2 as the new D, and  **(c)** perfected SI’s arising after the transfer but before the 15 day grace period is over if **(i)** the registration hasn’t been amended to disclose D2 as the new D, or **(ii)** SP1 doesn’t take possession of the collateral |
| **Transferee grants SI AFTER transfer S51(2)\*Knowledge** | **1.** D1 transfers collateral subject to SP1’s perfected registered SI  **2.** SP1 doesn’t consent to the transfer, but finds out  **3.** D2 grants other SIs after the transfer | If SP1 finds out **(a)** that they have to register a FCS showing D2 as the new D or **(b)** that D1 has changed their name, their SI is subordinate to  **(c)** interests or **(d)** perfect SIs arising in the period between 15 days after the transfer and the time SP reregisters with D2 as the new D, or with D’s new name or  **(e)** a perfected SI registered/perfected after SP found out, but before the 15 day grace period lapsed, if before the 15 is over **(i)** registration is not amended or **(ii)** SP1 doesn’t take possession of the collateral. |

## Is there competition between holders of interest given after a transfer of collateral?

* **S28: (1)** If collateral is dealt with or otherwise gives rise to proceeds, the SI **(a)** continues in the collateral unless the SP expressly or impliedly authorizes the dealing**.**
* **S30(1)**: “buyer of goods” – includes a person who obtains vested rights in goods under a contract to which they are a party as a consequence of goods becoming a fixture or accession to property in which they have an interest. “Seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is a party to a contract with the buyer. “The ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials
  + **(3)** A buyer/lessee of goods acquired as consumer goods takes free from a perfected or unperfected SI in goods if the buyer/lessee **(a)** gave value for the interest and **(b)** didn’t know about the SI.
    - **(4)** Doesn’t apply to a SI in **(a)** a fixture or **(b)** goods whose purchase price is over $1000, or for a lease, the market value of which is over $1000.
  + **(5)** A buyer/lessee of goods takes free from a SI that is temporarily perfected under S26(1), 28(3) or 29(4) or a SI that is continually perfected under S51 during any of the 15 day grace periods, if the buyer/lessee **(a)** gave value for the interest and **(b)** didn’t know about the SI.
  + **(6)** If goods are sold/leased, the buyer/lessee takes free from any SI in the goods perfected under S25 if **(a)** the buyer/lessee bought/leased the goods without knowledge of the SI.
    - **(7)** Only applies to equipment
  + **(8)** A sale/lease referred to in (2), (3), (5), or (6) may be for cash, by exchange for other property or on credit and includes delivering goods or a document of title to goods under a pre-existing contract for sale, but doesn’t include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.
* **S33: (1)** “transfer” includes a sale, the creation of a SI or a transfer under judgment enforcement proceedings
  + **(2)** Despite a provision in a SA prohibiting a transfer or declaring a transfer to be a default, the rights of a D in collateral may be transferred consensually or by operation of law, but a transfer by the D does not prejudice the rights of the SP under the agreement, including the right to *treat* the transfer as an act of default
* **S35(8):** See above for SIs given before transfer
* **S51:** See above for SIs given after transfer
* SP failed to reregister after D changed their name and D went bankrupt – the trustee in bankruptcy seized the collateral and claimed that SP lost priority under S51(2)(b): ***Re Orion Truck Centre***

## Is there Competition between Transferees of Accounts?

* **S1(2):** knowledge provisions! **(a)** natural person knows when info is acquired by the person where a reasonable person would take cognizance of it, **(b)** a partnership knows when it has come to the attention of one general partner or a person having control/management of the partnership where a reasonable person would take cognizance of it, **(c)** a corporation knows when info has come to the attention of a managing director or officer or a senior employee with responsibility for matters to which the info relations where a reasonable person would take cognizance of it or when the information in writing has been delivered to the corporation’s registered office or attorney for service
* **S1(1) “account”:** a monetary obligation not evidenced by chattel paper or an instrument, whether or not the obligation has been earned by performance, but doesn’t include investment property
  + **“new value”:** value other than an antecedent debt or liability
  + **“purchase”:** taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property
  + **“specific good”:** goods identified and agreed on at the time the agreement for the goods is made
* **S34(5):** A non-proceeds SI in accounts given for new value has priority over a PMSI in the accounts as proceeds of inventory if the FS for the SI is registered before **(a)** the PMSI is perfected or **(b)** a FS for it is registered.
* **S1(1)(b)(i):** any transfer of accounts is a deemed ST - PART 5 REMEDIES DO NOT APPLY: **S3(c)** & **S55(2)(a)**
* **S41:** **(1)** “account D” is a person who is obligated under an intangible or chattel paper
  + **(2)** The rights of an assignee of intangible collateral are subject to **(a)** the terms of the contract between the ACC D, and **(b)** any defence/claim of the ACC D against the assignor that accrues before the ACC D has knowledge of the assignment unless the ACC D has made an enforceable agreement not to assert defences or claims arising out of the contract.
  + **(3)** A change or substitution of a contract referred to in (2)(a) that is made in good faith and in accordance with reasonable commercial standards is effective against the assignee, unless the ACC agreed otherwise
  + **(4)** (3) applies **(a)** where an assigned right to payment arising from the contract hasn’t been earned by performance, and **(b)** even if there has been notice of the assignment to the ACC D.
  + **(5)** If a contract has been changed or substituted as per (3), the assignee has the same rights as the assignor under the changed contract.
  + **(6)** Despite (3)-(5), a term in the assignment agreement stating that a change or substitution is a breach of contract is still valid.
  + **(7)** If the intangible collateral is assigned, the ACC D keep paying the assignor **(a)** BEFORE the ACC D receives a notice that **(i)** states the amount payable to the assignee under the assigned contract and **(ii)** identifies the contract that states the amount payable is to become payable OR **(b)** AFTER **(i)** the ACC D requests the assignee to give proof of the assignment, and **(ii)** they fail to give that proof within 15 days of the request.
  + **(8)** Payment by an ACC D to an assignee according to the (7)(a) notice discharges the obligation of the ACC D to the extent of that payment (no shit?)
  + **(9)** If there is a term in the contract between the ACC D and the assignor that prohibits assigning the whole account, it is binding on the assignor, but only to make them liable for damages for breach of contract – unenforceable against third parties (assignees)
* **S57: (1)** “SP” includes a receiver
  + - **(2)** If there is a default under a SA, a SP is entitled, **(a)** to notify D on an intangible to make payment to the SP whether or not the assignor was making collections on the collateral before the notification, **(b)** Subject to 59, to take control of any proceeds that the SP is entitled to under S28, and **(c)** to apply any money taken as collateral or paid under (a) to the satisfy the obligation secured by the SI
    - **(3)** A SP may deduct the SP’s reasonable collection expenses **(a)** from an amount collected **(i)** from a D on an intangible or **(b)** from money held as collateral.
    - **(4)** A SP who enforces a SI by giving (2)(a) notice must, within 15 days, notify the SA’s D.

## Is there competition between holders of interests in fixtures?

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| **Is this a fixture or a building material?** | **S1(1) “building materials”:** materials incorporated into a building, including goods attached to a building so that their removal **(a)** necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building apart from the loss of value of the building resulting from the removal, or **(b)** would result in the weakening of the structure of the building or the exposure of the building to weather damage or deterioration   * DOES NOT INCLUDE: **(c)** heating, AC or conveyance devices or **(d)** machinery installed in a building or on land for use in carrying on an activity inside the building or on the land   **“fixture”:** doesn’t include building materials  **“goods”:** tangible personal property, fixtures, crops and the unborn young of animals, but doesn’t include chattel paper, a document of title, an instrument, investment property, money, trees other than crops until the trees are severed, or minerals, or hydrocarbons until they are extracted. | |
| **General** | | |
| **S30(1)**: “buyer of goods” – includes a person who obtains vested rights in goods under a contract to which they are a party as a consequence of goods becoming a fixture or accession to property in which they have an interest. “Seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is a party to a contract with the buyer. “The ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials   * **(2)** A buyer or lessee of goods sold/leased in the ordinary course of business of the seller/lessor takes free of any perfected or unperfected SI in goods given by the seller/lessor or arising under S28/29, whether or not the buyer/lessee knows about it UNLESS they knew that the sale/lease constitutes a breach of the SA   **S36: (1)** SP includes a receiver   * **(2)** This section applies to land for which a certificate of title has been issued under the *LTA* and to prescribed land or classes of land   **S49:** If you have a fixture, register it accordingly.  **S73:** Subject to S74, if there is a conflict between this Act and any other Act, this one wins unless the other act specifically says it doesn’t  **S74:** If there is a conflict between the *PPSA* and the *Business Practices and Consumer Protection Act*, the *Land Title Act,* or the *International Interests in Mobile Equipment (Aircraft Equipment) Act*, those Acts prevail. | | |
| **Priority S36** | | |
| **SI ATTACHES BEFORE OR AT THE TIME** | | **SI ATTACHES AFTER** |
| **(3)** Except as provided here and in S30, a SI in goods that attaches BEFORE OR AT THE TIME the goods become fixtures has priority over claims to the goods made by a person with an interest in the land (no registration needed, a secret lien!)  **(4)** A SI from (3) is subordinate to the interest of **(a)** a person who acquires, for value, an interest in land AFTER, including an assignee for value of the interest of a person with an interest in the land AT THE TIME the goods become fixtures and **(b)** any person with a registered mortgage on land who **(a)** makes an advance under the mortgage AFTER the goods become fixtures, but only with respect to that advance, or **(ii)** obtains an order for sale or foreclosure AFTER the goods become fixtures without fraud and before the notice of the SI is filed according to S49 in the LTO. | | **(5)** A SI in goods that attaches AFTER the goods become fixtures is subordinate to someone’s interests who **(a)** has an interest in the land AT THE TIME and who **(i)** hasn’t consented to the SI, **(ii)** hasn’t disclaimed an interest in the goods/fixtures, **(iii)** hasn’t entered into an agreement where a person can remove the goods, **(iv)** is not otherwise precluded from stopping D from removing the goods, or **(b)** acquires an interest in the land AFTER if they got it without fraud and before the notice of the SI is filed according to S49 in the LTO. |
| **(6)** A SI referred to in (3) or (5) is subordinate to the interest of a C of the D who caused a judgment to be registered under the *Court Order Enforcement Act* in the appropriate LTO affecting land, AFTER the goods become fixtures, and before the S49 notice is filed.  **(7)** The interest of a C referred to in (6) is subordinate to a PMSI in goods that have a S49 notice filed not later than 15 days after the goods are affixed to the land. | | |
| **Removing the Goods From the Land S36** | | |
| **(8)** A SP who, under this Act, has the right to remove goods from land must exercise this right in a way that causes no further damage to the land and to other property located on it or that puts the occupier of the land to no greater inconvenience than is necessarily incidental to the removal of goods  **(9)** A person other than D who has an interest in the land AT THE TIME the goods subject to the SI become fixtures is entitled to reimbursement for any damages to their interest caused by the removal of goods, but is not entitled to reimbursement for the decrease in value of land caused by the absence of the goods or need for replacement  **(10)** The person entitled to reimbursement under (9) can refuse permission to remove the goods until the SP has given adequate security for reimbursement.  **(11)** The SP may apply to court for the following orders: **(a)** determining the person entitled to reimbursement under this section, **(b)** determining the amount and kind of security to be provided by the SP, **(c)** designating the depository for the security, **(d)** authorizing the removal of goods without the provision of security for reimbursement under (10)  **(12)** A person having an interest in the land that is subordinate to a SI under this section can, before the goods are removed by the SP, retain the goods on payment to the SP of the lessor of: **(a)** the amount secured by the SI having priority over the interest or **(b)** the market value of the goods removed from the land  **(13)** The SP who has a right to remove goods from land must give each person who appears to have an interest in the land according to the LTO a notice of their intention to remove the shit and the notice must contain **(a)** their name and address, **(b)** description of the goods to be removed, **(c)** the amount required to satisfy the obligation secured by the SI, **(d)** the market value of the shit, **(e)** a description of the land to which the goods are affixed, and **(f)** a statement of intention to remove the goods unless the amount referred to in (12) is paid by a specified date that is at least 15 days after the notice is given according to (14)  **(14)** A notice referred to above must be given at least 15 days before removal of the goods and may be given according to S72 or by registered mail to the person it’s supposed to go to according to the LTO  **(15)** A person entitled to receive a notice under (14) may apply to a court for an order postponing removal of the goods | | |

* Owner argued that the supply of the furnace was in the ordinary course of business as under **30**, but the court said that the supply was incidental and building the house was in the ordinary course of business: ***Manning v Furnasman Heating (QB)***
  + But S30 says that the ordinary course of business can include the supply of goods under a contract for service and materials
* The owner purchased a newly built house that included a furnace as a fixture – the builder had purchased the furnace under an apparent conditional sale, and still owed money – builder defaulted and F went after the owner – *PPSA* doesn’t apply because the contract didn’t make it clear the furnace was sold under a conditional sale (so subject to a SI) – owner wins: ***Manning v Furnasman Heating (CA)***
* There were two mortgagees with interests registered in the LTO, but RW had interests in the cabinets BEFORE they become fixtures – created a circularity problem with no way to resolve without violating either the *LTA* or the *PPSA –* the court gave RW priority: ***GMS Securities & Apparaisals v Rich-Wood Kitchens***

## Is there competition with holders of interests in an accession?

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| **General** | |
| **S30(1)**: “buyer of goods” – includes a person who obtains vested rights in goods under a contract to which they are a party as a consequence of goods becoming a fixture or accession to property in which they have an interest. “Seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is a party to a contract with the buyer. “The ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials   * **(2)** A buyer or lessee of goods sold/leased in the ordinary course of business of the seller/lessor takes free of any perfected or unperfected SI in goods given by the seller/lessor or arising under S28/29, whether or not the buyer/lessee knows about it UNLESS they knew that the sale/lease constitutes a breach of the SA   **S1(1) “accession”:** goods installed in or affixed to other goods  **S38: (1)** “other goods”: goods to which an accession is installed or affixed, SP includes a receiver, “the whole” means the accession and what it’s attached to | |
| **Priority S38** | |
| **SI ATTACHES BEFORE OR AT THE TIME** | **SI ATTACHES AFTER** |
| **(2)** Except as provided here and in S30, a SI in goods that attaches BEFORE OR AT THE TIME the goods become an accession has priority over claims to the goods as an accession made by a person with an interest in the whole (no registration needed, a secret lien!)  **(3)** A SI from (2) is subordinate to the interest of **(a)** a person who acquires, for value, an interest in the whole AFTER, including an assignee for value of the interest of a person with an interest in the whole AT THE TIME the goods become accessions and **(b)** any person with a perfected SI in the whole who **(a)** makes an advance under the SA AFTER, but only with respect to that advance, or **(ii)** acquires the right to retain the whole in satisfaction of the obligation secured without knowledge of the SI in the accession and before its perfected. | **(4)** A SI in goods that attaches AFTER the goods become an accession is subordinate to someone’s interests who **(a)** has an interest in the other goods AT THE TIME and who **(i)** hasn’t consented to the SI, **(ii)** hasn’t disclaimed an interest in the goods/accession, **(iii)** hasn’t entered into an agreement where a person can remove the accession, **(iv)** is not otherwise precluded from stopping D from removing the accession, or **(b)** acquires an interest in the whole AFTER if they got it without knowledge and before the SI in the accession is perfected. |
| **(5)** A SI referred to in (2) or (4) is subordinate to the interest of a C or a sheriff who has seized or caused the whole to be seized to enforce a judgment if **(a)** the seizure occurs under circumstances referred to in S20, and **(b)** the SI is not perfected at the time of seizure  **(6)** The interest of a C or a sheriff referred to in (5) is subordinate to a PMSI in goods that is perfected within 15 days of the goods becoming an accession. | |
| **Removing the Accession From the Whole S38** | |
| **(7)** A SP who, under this Act, has the right to remove the accession from the whole must exercise this right in a way that causes no further damage to the other goods or that puts the person in possession to no greater inconvenience than is necessarily incidental to the removal of the accession  **(8)** A person other than D who has an interest in the land AT THE TIME the goods subject to the SI become an accession is entitled to reimbursement for any damages to their interest in the other goods caused by the removal of of the accession, but is not entitled to reimbursement for the decrease in value of the other goods caused by the absence of the accession or need for replacement  **(9)** The person entitled to reimbursement under (8) can refuse permission to remove the accession until the SP has given adequate security for reimbursement.  **(10)** The SP may apply to court for the following orders: **(a)** determining the person entitled to reimbursement under this section, **(b)** determining the amount and kind of security to be provided by the SP, **(c)** prescribing the depository for the security, **(d)** authorizing the removal of goods without the provision of security for reimbursement under (9)  **(11)** A person having an interest in the whole that is subordinate to a SI under this section can, before the accession is removed by the SP, retain the accession on payment to the SP of the lessor of: **(a)** the amount secured by the SI having priority over the interest or **(b)** the market value of the accession removed from the other goods  **(12)** The SP who has a right to remove accession from the whole must give each person **(a)** who is known by the SP to have an interest in the other goods or the whole, and **(b)** who has registered a FS **(i)** using the name of the D and referring to the other goods, a notice of their intention to remove the shit and the notice must contain **(c)** their name and address, **(d)** description of the goods to be removed, **(e)** the amount required to satisfy the obligation secured by the SI, **(f)** the market value of the shit, **(g)** a description of the other goods, and **(h)** a statement of intention to remove the accession unless the amount referred to in (11) is paid by a specified date that is at least 15 days after the notice is given according to (13)  **(13)** A notice referred to above must be given at least 15 days before removal of the accession and may be given according to S72 or by registered mail to the person it’s supposed to go to according to the FS  **(14)** A person entitled to receive a notice under (12) may apply to a court for an order postponing removal of the accession | |

# Default and Remedies

## Deafult

* **S1(1) “default”: (a)** not paying what you’re supposed to when you’re supposed to or **(b)** the occurrence of an event or set of circumstances that causes the SI to become enforceable under the SA
* **S56(2):** If D is in default under a SA **(a)** except as under (3), the SP has against D only **(i)** the rights and remedies provided in the SA, **(ii)** the rights and remedies provided in this Part and S36-38, and **(iii)** when the SP is in possession or control of the collateral, the rights/remedies/obligations under S17 and **(b)** D has against the SP the rights and remedies provided in the SA, those provided by any other statute or rule of law consistent with this Act, and those provided in this Part and in S17.
* SP must figure out whether there was a default, for how much, and what collateral they can proceed against (go for the one that is most valuable and where you have the highest priority)
  + Are they going to proceed as a SP or unsecured C (sue)?
  + If SP, go through remedies.

## Remedies

* **S55: (2)(a)** This doesn’t apply to deemed STs!
  + **(6)** If the same obligation is secured by an interest in land and a SI, the SP may **(a)** proceed under this part or **(b)** proceed as both land and under this part if the personal property were land in which case **(i)** the SP’s rights, remedies and duties in respect of the land apply to the personal property with necessary modification as if the personal property were land, and **(ii)** this Part doesn’t apply
  + **(7)** (6)(b) doesn’t limit the rights of a SP who has a SI in personal property taken before or after the SI mentioned in (6) and the SP **(a)** has standings in proceedings taken in accordance with (6)(b) and **(b)** can apply to the court for a judicially supervised sale
  + **(8)** For the purposes of distributing the amount received from the sale of land and personal property if the price paid is not allocated separately, the amounts will be allocated proportional to the total price according to the ratio between the market value of the personal property and the market value of the land at the time of the sale
* **S56:** SP and D only have the rights, remedies, duties/obligations under this Part and the SA.

### Statutory vs Other Remedies

* Contractual remedies may not be allowed if they are too close to a statutory remedy: ***Andrews and Trotchie v Mack Financial***

### Preliminary Notice – SP has to give notice to D before using any remedy

* SP has to give D a final chance to meet their obligations. The notice must tell D they are in default, for how much, the consequences of a final failure to pay, and the timeline in which D has to pay. There is no particular form that is required though.
* **S68: (1)** Principles of common law, equity, and the law merchant apply as long as they aren’t inconsistent with the Act
* There is no set time frame in which notice must be given – it depends on what is reasonable given surrounding circumstances at the time of default: ***Waldron v RBC***

### Receivers and Managers

* **S1(1) “receivers”:** includes a receiver manager (someone who takes over the business until it is profitable again, then returns it back to D)
* **S64:** Appointment and qualification of receivers – can be by the Court or because of a SA
  + Even if the SA provides for a receiver, you can still go to court to get one appoint, you just need to prove why an appointment is necessary: ***RBC v White Cross Properties***
* **S65:** Obligations of the receiver
* **S66:** Court supervision of receiverships and exemption from compliance

### Collection of Payments under Intangibles or Chattel Paper Default

* **S41:** **(1)** “account D” is a person who is obligated under an intangible or chattel paper
  + **(2)** The rights of an assignee of intangible collateral are subject to **(a)** the terms of the contract between the ACC D, and **(b)** any defence/claim of the ACC D against the assignor that accrues before the ACC D has knowledge of the assignment unless the ACC D has made an enforceable agreement not to assert defences or claims arising out of the contract.
  + **(3)** A change or substitution of a contract referred to in (2)(a) that is made in good faith and in accordance with reasonable commercial standards is effective against the assignee, unless the ACC agreed otherwise
  + **(4)** (3) applies **(a)** where an assigned right to payment arising from the contract hasn’t been earned by performance, and **(b)** even if there has been notice of the assignment to the ACC D.
  + **(5)** If a contract has been changed or substituted as per (3), the assignee has the same rights as the assignor under the changed contract.
  + **(6)** Despite (3)-(5), a term in the assignment agreement stating that a change or substitution is a breach of contract is still valid.
  + **(7)** If the intangible collateral is assigned, the ACC D keep paying the assignor **(a)** BEFORE the ACC D receives a notice that **(i)** states the amount payable to the assignee under the assigned contract and **(ii)** identifies the contract that states the amount payable is to become payable OR **(b)** AFTER **(i)** the ACC D requests the assignee to give proof of the assignment, and **(ii)** they fail to give that proof within 15 days of the request.
  + **(8)** Payment by an ACC D to an assignee according to the (7)(a) notice discharges the obligation of the ACC D to the extent of that payment (no shit?)
  + **(9)** If there is a term in the contract between the ACC D and the assignor that prohibits assigning the whole account, it is binding on the assignor, but only to make them liable for damages for breach of contract – unenforceable against third parties (assignees)
* **S57: (1)** “SP” includes a receiver
  + **(2)** If there is a default under a SA, a SP is entitled, **(a)** to notify D on an intangible to make payment to the SP whether or not the assignor was making collections on the collateral before the notification, **(b)** Subject to 59, to take control of any proceeds that the SP is entitled to under S28, and **(c)** to apply any money taken as collateral or paid under (a) to the satisfy the obligation secured by the SI
  + **(3)** A SP may deduct the SP’s reasonable collection expenses **(a)** from an amount collected **(i)** from a D on an intangible or **(b)** from money held as collateral.
  + **(4)** A SP who enforces a SI by giving (2)(a) notice must, within 15 days, notify the SA’s D.

### Seizure of Collateral

* **S58: (1)** SP includes a receiver
  + **(2)** Subject to (3) and to S36-38, on default under a SA, **(a)** the SP can take possession of the collateral, unless otherwise agreed to, **(b)** if the collateral can’t be moved or stored easily, can take possession without taking it from D’s premises as long as SP’s SI is perfected by registration, **(c)** if (b) applies, SP can dispose of the collateral on D’s premises, **(d)** if collateral is a document of title, SP can proceed either as a document of title or as to the goods covered by it, **(e)** if the collateral is a license, SP can seize it by giving notice to D, and doing either: **(i)** if license granted under an Act, sending a copy of the notice of seizure to the applicable minister, or **(ii)** giving a copy of the notice to the grantor of the license
  + **(3)** Subject to (4), if a defaulted D for a SI in consumer goods has paid at least 2/3 of the total amount owed, SP can’t seize
  + **(4)** SP can apply for a court order saying that (3) doesn’t apply
  + **(5)** In an application under (4), the court can take into account all relevant circumstances, including value of collateral, amount of obligation discharged, reasons for default and present/future financial circumstances of the parties
* **S17: (1)** Here, SP also includes a receiver.
  + **(2)** A SP must use reasonable care in the custody and preservation of the collateral they possess, and unless otherwise agreed, reasonable care for an instrument or chattel paper includes taking necessary steps to preserve rights against other persons.
  + **(3)** Unless otherwise agreed, if SP has the collateral **(a)** reasonable expenses (costs of insurance, tax, other charges incurred in obtaining, maintaining possession, preserving collateral) are chargable to D and secured by the collateral, **(b)** the risk of loss or damage to the collateral, unless cause by SP negligence, is on D, **(c)** the SP may use any increase or profits, except money, as additional security (ie: young of animal, dividends paid in additional shares) and must apply any money received, unless remitted to D, immediately on its receipt to reduce the obligation secured by the collateral, and **(d)** the SP must keep the collateral identifiable, but fungible collateral can be commingled
  + **(4)** Subject to (2), a SP may use the collateral **(a)** in a manner and to the extent provided for in the SA, **(b)** for the purposes of preserving the collateral, or **(c)** in accordance with a court order.
* **S24: (1)** Possession of the collateral by SP perfects a SI for chattel paper, goods, an instrument, a negotiable document of title, and money unless possession is a result of seizure or repossession: ***Re Bank of Nova Scotia and RBC*** (default and bank seizes property, claims perfection by possession – court says nah)

### Disposition (Sale)

* **S59: (2)** After seizing the collateral, SP can dispose of it as is, or make repairs, and the proceeds of the disposition must be applied **(a)** first to reasonable expenses for seizing and repairing and any other expense for enforcing the SA against the SI, then **(b)** to satisfy the obligation secured by the SI of the person seizing, and any surplus is dealt with according to S60.
  + **(3)** Four methods: Private sale, Public sale, As whole or in commercial units/parts, By lease if the SA allows it
  + **(5)** SP can delay disposal
  + **(6)** SP has to give notice of disposition to **(a)** D and anyone else they know to be an owner, **(b)** any C or person with a SI that is subordinate to their interest who has registered or perfected by possession at the time SP seize the collateral, and **(c)** anyone else with an interest who gave a notice to SP of their interest before SP gives a notice to D of disposition at least 20 days before the disposition
    - **(10)** Same with a receiver
  + **(7)** Notice must contain a description of the collateral, the amount required to satisfy the obligation secured, the amount actually in arrears, etc
    - **(11)** Describes what has to be in the notice given by a receiver
  + **(13)** SP can purchase the collateral as part of a public sale, but only for a price similar to market value
  + **(14)** A BFPV who gets the collateral from the SP and has possession takes it free from the interest of D, those subordinate to D, and those subordinate to the SP
  + **(17)** A notice is not required if…
  + **(18)** If the collateral is a license…
* The standard of disposition is in a commercially reasonable manner
  + ***Copp v Medi-Dent Service:*** not commercially reasonable because the goods were sold back to D with no effort to ascertain the value and no bids were taken
  + ***Donnelly v International Harvester Credit***: not commercially reasonable because there were no repairs made before the sale, it was a non-arms length transaction, and there was no notice of the disposition
* **S60:** **(2)** Any surplus from a disposition must be paid in the following order:
  1. A person with a subordinate SI who registered or whose interest was perfected by possession when the collateral was seized
  2. Any other person with an interest in the collateral if they gave notice to the SP before distribution of notices
  3. D or any other person who is known by SP to be an owner
  + **(4)** The surplus can also be paid into the court if there is a question as to who is entitled to payment under (2)
  + **(5)** Unless otherwise agreed, D is liable for any deficiency to SP

### Voluntary Foreclosure – you’re keeping that shit

* **S61: (1)** After seizure, SP can propose to take the collateral in satisfaction of the obligation secured and a notice of the proposal must go to **(a)** D and any other known owners and **(b)** subordinate perfected SIs
  + **(2)** One of them can object within 15 days of the notice and then SP must dispose of the collateral
  + **(7)** SP can apply to the court to invalidate the objection
* The notice requirement means there is no such thing as constructive foreclosure: ***Angelkovski v Trans-Canada Foods***
* Well, maybe. If a party who didn’t receive a notice is fine with constructive foreclosure, then why should someone care?: ***Inland Kenworth Ltd v Laboucane***

### Rights of Redemption and Reinstatement

* **S62:** **(1)** Prior to disposition or foreclosure, a person who is entitled to receive notice under S58(6) and (10), can redeem the collateral by fulfilling the obligation secured or if the collateral is consumer goods, D (or a guarantor) can reinstate the SA by paying what is owed, disregarding an acceleration clause
  + **(2)** No reinstatement for consumer goods more than twice if SA requires payment in full by D within 12 months after value was given by SP, or more than twice a year, if the SA requires payment in excess of one year.
* D must give notice to redeem, which prevents constructive foreclosure: ***Angelkovski v Trans-Canada Foods***

### Monetary Remedies

* **S60(5):** Unless otherwise agreed, D is liable for any deficiency to SP
* **S69:** Consequences of non-compliance with the Act

### Other Remedies for Shit I stopped Caring About

