**28(1)(a) preserves si & 28(1)(b) extends it to proceeds!**

* si doesn’t continue if SP authorizes dealing in a particular collateral, but continue to have a si in the proceeds!

s.18 provides the means to acquire info from SP

**Situating the PPSA**

* PPSA prevails (s.73) – ex. in **Marine Building Holding**PPSA prevailed
* Principles of common law and equity continue to apply as long as not inconsistent w/ PPSA (s.68)

**Standard of behavior**

* Act in good faith & a commercially reasonable manner (s.68(2))
* Acting w/ knowledge of another’s si doesn’t alone constitute bad faith (s.68(3))

**Is it property?** Can’t have a si in something that is not property– ex. statutory lien

* The law is mixed on whether a license constitutes property or not (**Saulnier**)

**Is the transaction covered by the PPSA?**

**Must fit in s.2(1) to be covered (subject to the exclusions in s.4)!**

* General criteria: PPSA applies to every transaction that creates a **si** w/out regard to form & ownership (i.e. doesn’t matter who has title) (s.2(1)(a))
* Illustrations: C/M; conditional sale; an assignment; a consignment; a lease; transfer of C/P – if they secure payment or performance of an obligation (s.2(1)(b)).

**si defined in s.1(1)**

* **True (a)** interest in goods, C/P, inv prop, doc of title, instrument, money, or intangible that secures payment or performance of an obligation
* **Deemed (b)** interest in *(less of the statute applies to deemed STs)* 🡪 w/in the scope of PPSA, even if they don’t secure payment/performance of obligation (**s.3**)
  + (i) transfer of an account or C/P *(whether absolute or conditional; transferred by assignment)*🡪 transferor = D; transferee = SP
    - s.4 excludes: (h) as part of sale of biz, (i) made to facilitate collection, (k) made for benefit of creditors
  + (ii) commercial consignment
  + (iii) lease for more than 1-yr

**ST for sure!**

* **Chattel mortgage:** owner of property (mortgagor; D) --- gives mortgage to --- creditor (mortgagee; SP)
* **Conditional sale K:** buy/sell on credit // seller (retains title) = SP // buyer = D // leads to the creation of a **PMSI** in the goods bought on credit
* **Assignment:** SP gets si in D’s accounts either directly as original collateral OR by virtue of accounts arising as proceeds dealing w/ other collateral in which they have an interest
  + Conditional assignment is a true ST!
  + Absolute assignment is not a true ST, it would be a deemed ST! Assignor = D (per def of debtore)
* **C/P:** won’t be on the EXAM!

**Ambiguous**

* **Consignment:** PPSA applies to a consignment if it secures payment or performance of an obligation (s.2(1)(b)) – **Consignment can be subject to PPSA if** 
  + **True consignment:** consignor leaves property w/ agent to find buyer 🡪 presumption = PPSA doesn’t apply – if true consignment, it might still be a commercial consignment
    - **Toyerama:** *absence of any obligation to pay for unsold warehouse goods was the determining factor that it was a consignment arrangement rather than a conditional sale.*
  + **Security consignment:** the agent looks an awful like a buyer under a conditional sale K b/c (1) agent must find a buyer or become the buyer itself, or (2) agent has obligations under the K that are similar to obligations of an owner (ex. insure goods; pay taxes). This consignment is in essence a disguised conditional sale K and as such falls w/in the PPSA 🡪 agent/consignee = D // owner/consignor = SP 🡪 subject to the PPSA in its entirety
  + **Commercial consignment** is deemed to be a ST (s.1(1)(ii)) // agent/consignee = D // owner/consignor = SP
    - def s.1(1): goods are delivered for sale, lease or other disposition + consignor must retain interest after delivery + consignee & consignor deal in goods of that description in the **ordinary course of their biz** **but not if** it is generally known to the creditors of the **consignee** that the consignee is in the biz of selling or leasing goods of others, or goods are delivered to an auctioneer for sale
      * **The test** is not what the actual parties before the court know or don’t know, but what other potential creditors (who may or may not exist) might be expected to know (**Furmanek:** *actual owner of goods lost to SPs b/c no registration*).
    - Part 5 remedies do not apply (s.3(b) & s.55(2)(a))
* **Lease:** PPSA applies to a lease if it secures payment or performance of an obligation (s.2(1)(b))
  + **True lease:** lessor/creditor retains ownership b/c they want to remain the owner, not b/c lessee/debtor owes $ 🡪 PPSA doesn’t apply
    - **Newcourt Financial v Frizzell:** *true lease; instead of PPSA remedies, use rights and remedies as outlined in the lease agreements*
  + **Security lease:** the transaction is functionally equivalent to a conditional sale K and therefore involves the creation of a si // lessor = SP // lessee = D // **Newcourt Financial; DaimlerChrystler** provide lists for whether security lease or not (p.12)
    - Mandatory lease period + automatic ownership OR token option @ the end OR lease covers the entire useful life of goods
  + **Over 1-yr lease:** is deemed to be a ST (s.1(1)(iii)) // lessee = D // lessor = SP; also interest of lessor under a lease for a term of more than 1-yr is a **PMSI** 
    - (a) Lease for an indefinite period that is determinable
      * Lease for over 1-yr from the beginning, even if lasts 3 wks
    - (b) Lease for less than 1-yr, but remain in position for over 1-yr
      * Doesn’t become a “lease for a term of more than one yr” until the lessee’s possession extends for more than 1-yr (s.1(3))
    - (c) Lease for less than 1-yr w/ an option to renew, which would make it more than 1-yr
      * Lease for over 1-yr from the beginning even if option not exercised
    - But does not include a lease if lessor is not “regularly engaged” in the biz of leasing, or lease of furniture as part of a household
  + **Side note:** lessee can give a si – if this is done for a lease for 8 months, then competition b/w lessor & SP is governed by common law. If, however, it’s for over 1-year, then lessor becomes a SP (also holder of a PMSI), and competition w/ other SP would be governed by PPSA, and lessor can use superpriority in s.34(1), if perfects interest w/in 15-ds.
* **Trust:** PPSA applies to a trust if it secures payment or performance of an obligation (s.2(1)(b))
  + proceeds are traceable whether or not there is a fiduciary relation (s.1(5))
  + **True trust: *Skybridge Holidays*** (travel agency holding $ in trust was not a ST)
  + **Security trust:** if si is taken to ensure trust obligation is performed // trustee = D // beneficiary = SP
  + Taking an interest in proceeds & stipulating that they be held in trust for SP doesn’t affect priority at all!

**Excluded: s. 4** (p.14)

* SAs covered by federal law
  + Property situated on a reserve is not governed by the PPSA (**Kingsclear:** *band defaulted on payments for bus*)

**Checklist**

* **Is the property original collateral, proceeds, or both?**
* **Debtor:** person who owes money // party who comes to own the collateral // deemed Ds
* **Obligation secured:** what is the amount actually owing?
* **Tacking:** SA can provide for future advances (s.14)
  + A junior creditor that takes an assignment of the interest of a senior creditor cannot use the senior position w/ respect to the obligations owed to the assignee before the assignment (**Canamsucco**). But can buy the assignment and then take on more new debt to the senior position.
* **Acceleration clause:** Acceleration clause may be included to allow SP to seize for full outstanding debt, not just amount in default.
  + **Available if** SP has commercially reasonable grounds to believe payment/performance is/is about to be impaired OR collateral is/is about to be in jeopardy (s.16)
* **Characterization of goods:** determination of whether goods are consumer goods, inventory, or equipment must be made at the time si attaches, unless stated otherwise in the act **(s.1(4))**
  + **Accessions:** means goods that are installed in or affixed to other goods (ex. enginge of a plane)
  + **Consumer goods:** primarily used or acquired for personal, family, or household purposes
  + **Crops:**
  + **Equipment:** goods that are not inventory or consumer goods
  + **Fixtures:** fixtures are personal property for PPSA purposes. If fixture, then s. 36 applies. Determine whether fixtures, consumer goods, inventory?
  + **Inventory:** goods held for sale or lease; furnished under K of service; raw materials; materials used up or consumed in business (ex. painting on the wall won’t be inventory p. 24)
  + **Processed & commingled goods:** if goods are manufactured or dealt w/ so that they lose their identity and become part of a larger mass (ex. flour used to make cake), an interest in them may be permitted to continue in the larger mass (s.39(1))
* **Delivery requirements:** SP must deliver a copy of the SA to D w/in 10 days after execution (s.11)

**Enforceability?**

**Is there a SA? Is the collateral properly described?**

* **Against D:** no particular form required; SA is effective according to its terms (s.9)
* **Against 3rd parties:** SP must
  + **have possession of the collateral** (s.10(1)(a)) OR
    - deemed not to have possession of collateral that is in apparent possession or control of D or D’s agent (s.10(2))
  + **meet the writing requirements** in s.10(1)(d), which require signature of debtor plus (*pick one*): **description of collateral** by **item,** OR **kind,** OR by **reference** to one or more of the following: goods, instruments, documents of title, C/P, intangibles, money, crops, licences (s.10(1)(d)(i)) // **All-PAAP** (i.e. general security agreement) (s.10(1)(d)(iii)) // **All-PAAP w/ exceptions** (s.10(1)(d)(iv))
    - **No writing at all:** as illustrated in **Riepe**, as a result of a failure to meet the writing requirements,a 3rd party who knows about the si is entitled to ignore it.
    - **Use of an unrecognized term:** “all assets” insufficient description (**674921**)
    - **Consumer goods/equipment:** description is inadequate if it says “consumer goods” or “equipment” without further reference to the kind of collateral (s.10(3))
      * But use of **consumer goods** is sufficient to exclude personal property from description of collateral per s.10(6)
      * But if you simply say si in goods, then consumer goods would be covered!
    - **Inventory** only adequate as description for s. 10(1)(d) while property is held by D as inventory (s.10(4)) // once sold to someone, not inventory anymore and writing requirement not satisfied
      * can’t use s. 10(4) as a self-help section (**Furmanek:** *SP can’t undermine interest of other SPs against it by taking property from D, so that it’s not held by D as inventory anymore*)
    - **Proceeds:** SA need not reference proceeds to be enforceable against 3rd parties (s.10(5))
    - **ALL PAAP: Double characterization** as proceeds & original collateral 🡪 So assert interest in Y is an interest in proceeds of … (look @ example on p.6) // important for PMSI

🡪 a description of the collateral as … w/out further reference to … is inadequate to meet the writing requirements. As a result, the agreement does not create security interests enforceable against 3d parties in accordance w/ s.10.

**Proceeds**

* **Def 1(1) (a) Identifiable** (describable) **or traceable** (locatable)personal property, fixtures, and crops **derived directly or indirectly** from any dealing with collateral or the proceeds of the collateral, **and** in which debtor acquires an interest (*but doesn’t have to retain interest*) // **(c) payments** (*has to be in money*) **made in total/partial discharge or redemption of intangible** (*unlike sub(a), D doesn’t have to acquire an interest in it // ex. will always get an interest in payments from an intangible (ex. an account) as proceeds under sub(c), even if D never acquires an interest in the payment*)
  + **CIBC & Marathon** confirms that proceeds of proceeds constitute proceeds
* If SP has an interest in **after-acquired property**, then D deals w/ given property, what the D gets in exchange can fall w/in the definition of after-acquired property (in which case it is original collateral) as well as w/in the definition of proceeds.
* **s.28(b)** extends si to proceeds automatically // parties can K out of this
* **limitation:** proceed against both original + proceeds 🡪 amount secured limited to value of collateral at date of dealing s.28(1)
* To perfect an interest in proceeds, will usually have to describe them in a F/S

**Tracing mixed accounts** – discuss the principles in abstract // being able to locate proceeds

* Proceeds are traceable whether or not there is a fiduciary relationship (s.1(5))
* Account has to be in a positive balance, otherwise it is owned by the bank not D
* **(1) Common law:** first in first out (this approach is rarely used)
* **(2) Equity:** Lowest intermediate balance rule: when money is taken out of a mixed account that is subject to si, it is presumed to come first out of money that is not a si. If money that is subject to si is used to buy X, then get a si in part of X (which is fixed @ the percentage w/ respect of total money that came out) (**Universal CIT**) (more common approach)
  + if reach a dead end using this method, then use Pettyjohn
* **(3) PPSA rules:** can trace from one item (cows) to later item (despite the fact that through the usual rules of tracing can’t get to them) if there is a **close & substantial connection** b/w the original property and later property (*that you are seeking a si in*) // How much of the value can be used to secure the indebtedness? When using the close and substantial approach, look at the value of original collateral at the time that it was dealt w/ and what percentage is swallowed by obligation owing (**Pettyjohn**).
* **(4) The common sense rule:** when you have competing SPs trying to use the lowest intermediate balance rule & you can’t satisfy both of them, then you don’t use the LIB rule and give each of them a percentage.

**PMSI**

**(1) Whether the si that exists can be subcategorized as PMSI? Def in s. 1(1)**

* **True PMSI** 
  + **(a) seller’s PMSI:** allowing someone to buy property on credit – ex. conditional sale agreement
    - SP has a PMSI in X to the extent that it secures payment of all or part of its purchase price, which is …
  + **(b) lender’s PMSI:** giving value **to enable D to acquire rights in the collateral** // get PMSI to the extent that the value is applied to acquire the rights 🡪 could have split priority
    - Lender MUST know what you are using the money for
    - Providing a **line of credit**, absent anything more, is not sufficient to be a “lender PMSI”
    - **Enable D:** as long your money is intended to allow the debtor to acquire property interest that the debtor technically already has, then that might be enough (**Pettyjohn:** *D was supposed to use $ to buy cow, but instead used it to pay off another creditor whose money was used to buy the cow*)
    - **Change in nature of rights:** as long as it can be said that D’s entitlement to the collateral has been enhanced in some way through the value supplied by SP, then D can be said to have obtained rights in the collateral – even if D already had rights in the property (**Unisource:** *$ from lender allowed D, who had a lease, to exercise option to purchase*)
    - **Collective PMSI:** when SP has si in all category of property (ex. ALL inv), and purchase is through $ lent by SP 🡪 **Chrystler Credit** suggests SP can argue that she gets a PMSI in each item in that category for the full purchase price for all of that category (regardless of whether purchase price of each individual item is known or not)
      * Chrystler Credit issue will be irrelevant if SP doesn’t need PMSI status to get priority
* **Deemed PMSI** 
  + **(c) Lease over 1-yr:** lessor gets deemed PMSI
  + **(d) Commercial consignment:** consignor gets deemed PMSI

**(2) ID whether**

* **Proceeds PMSI** PMSI status extends to proceeds - 28(1)(b) says “the si”, so if “the si” is a PMSI, status persists – determine whether
  + SP has si in [?] both as original collateral and proceeds. As proceeds, its interest in [?] is a PMSI b/c it is derived from [??] in which SP had PMSI. If uses nature as proceeds, then will get access to **super priority rules.**
* **Non-proceeds PMSI** = original collateral PMSI

**(3) For how much?** The si of the creditor secures $X, but only part of this represents $ used by D to acquire rights in the collateral. So, the si is a PMSI only to the extent of the value used to acquire the rights in that particular collateral, which is … (p.37)

**Has si attached?**

Attachment is separate from the obligation secured – so, can have a si even though there is nothing actually owed b/c value can be a promise to lend.

**si attached w/ respect to D = satisfy (a) & (b) // si attached w/ respect to 3rd party = satisfy (a), (b) & (c) – look @ each collateral separately!**

**12(1)** si attaches when

**(a)** **value** is given (*value: consideration/ past consideration: a promise to do something (ex. promise to lend), not the performance*) +

* value includes past consideration (ex. **TD Bank v Nova:** *allowed to add existing $ to $ that was going to be lent to make it all secured*) p.217-218
* a binding commitment to do something is sufficient consideration to constitute value – ex. promise to lend or extend credit

**(b)** D has **rights** in collateral or power to transfer rights in collateral to SP (*not required to own & quantum of rights irrelevant*) +

* **rights in goods leased/consigned:** D has rights in goods leased/consigned when he obtains possession (s.12(2))
* D must only have some degree of control/authority over collateral (**Kinetics:** *leaving something w/ someone to do some work on it gives them enough rights that they can give si in the same thing*)
* Rights may be merely possessory (**Haibeck**)
* No min rights required, but D can’t give more than they have (Nemo Dat)
* All PAAP – attachment doesn’t occur until D acquires the property

**(c)** si enforceable under **s.10** unless enforcing b/w parties

**unless specified otherwise by the parties, in which case would have look @ the agreement!** – can’t be implied

**ALL PAAP:** si does not attach to after acquired property that is consumer goods, unless accession // PMSI // or acquired to replace other collateral in the SA – s.13(2)

Example on p. 35

**Perfection**

**Is the si perfected or not?** w/ respect to D, doesn’t matter if i is perfected or not; all you need is attached i

s.19 **A security interest is perfected when** (a) **it has attached**, and (b) all steps required for perfection under this Act have been completed, **regardless of the order of occurrence.**

s.23(1) if there is a change in method of perfection, si is continuously perfected as long as uninterrupted (i.e. priority status won’t change)

s.23(2) provides that the transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.

**Methods**

**(1) By registration F/S (s.25)** – p.41 to 44

* **Procedural rules** 
  + F/S can be registered in advance of SA (s.43(4)) – ex. **674921**
  + Single F/S can cover multiple SAs (s.43(5)) – ex. **674921**
  + Registration doesn’t by itself constitute notice unless statute says otherwise (s. 47)
  + If SP transfers interest may register financing change statement (s.45), BUT if D transfers interest, then SP has to register against name of new D (s. 51)
* **Description of collateral in F/S** 
  + F/S can be less specific than SA (**Regal Feeds:** *SA said si in swain and after acquired swain, but F/S didn’t say after acquired swain, but si in after acquired swain was perfected anyway*)
* **Are there any errors in the registration?** 
  + Validity not affected unless error/omission/defect seriously misleading (s.43(6))
    - If fit w/ 43(6) effect is to make invalid, but there is room as to how much is invalid
  + **Invalid** if seriously misleading error in disclosure of name of any D or serial # of consumer good (s.43(7))
  + BUT don’t have to prove anyone was actually misled (s.43(8))
  + Failure to provide a description in F/S in relation to collateral does not affect validity w/ respect to other collateral contained in the F/S (s.43(9))
  + What is seriously misleading?
  + There could be errors, but not seriously misleading if search using alternate criteria yields correct result (**Re Munro:** *omission of middle name and one-digit mistake in SN was not seriously misleading*)
  + It is probs going too far to say that an incorrect registration not revealed by a correct version of the criteria must always be seriously misleading (**Coates**).
    - A seriously misleading registration is one that (a) would prevent a reasonable search from disclosing registration or (b) would cause a reasonable person to conclude the search was not revealing the same chattel or debtor.

**(2) Through possession,** (C/P // goods // an instrument // negotiable doc of title // money) unless possession is result of seizure or repossession (i.e. default) **(s.24(1))** // can’t use for intangibles (ex. accounts)

* Perfection by possession is possible only if the reason SP has possession is to perfect its interest.
* SP does not have possession of collateral that is in actual/apparent possession/control of D (s.24(2))
* If SP was in possession from before, must indicate retaining possession for perfection – otherwise in trouble! Possession starts from the time held as collateral.
* If there is default, can’t perfect si by taking possession (*presumption is that the reason SP takes goods is to act on its remedy to seize*); should perfect by registering F/S (**Re Bank of Nova Scotia**) – unless you waive default (p.47)
* Voluntary return of property by D, unrequested by SP, doesn’t constitute possession for the purposes of perfection – SP has to intend to have possession (**Royal Trust Corp v Number 7 Honda**)
* **Temporary perfection:** si perfected by possession remains perfected for 15-ds after SP hands collateral (instruments // securities // negotiable document of title // or goods held by bailee that are not covered by a negotiable doc) over to D (s. 26(1)). After 15-ds, si subject to perfection provisions of the Act (s.26(2)).

**Proceeds** (consider each proceed individually)

* If s.28(2) applies, then don’t need s.28(3)!
* **28(2)** si in proceeds is continuously perfected if **interest in original collateral** is perfected **by registration of a F/S** that:
  + **(a)** **contains description of proceeds** sufficient to perfect si in same kind of original collateral
    - can’t use All PAAP or All Assets or All proceeds
  + **(b)** **covers original collateral** if proceeds are of a kind that fit w/in the description of original collateral
    - if register a si in X & Y (“the bicycles”), then not continuously perfected for si in bicycle W (proceeds from Y)
    - BUT if register si “in bicycles”, then W would be continuously perfected
  + **(c) covers original collateral** if proceeds are money, cheques, **deposit accounts**
    - these are continuously perfected, no need to describe!
    - A promise to pay = account, but is not perfected unless SP does something
  + SP has filed a F/S that covers the original collateral and any proceeds that might arise from the original collateral. This gives access to s.28(2), which allows SP to have a continuously perfected si in the proceeds that dates back w/ reference to the filing of the F/S covering the original collateral.
* **Grace period:** if si in **original collateral** (not necessarily the collateral that gave rise to the proceeds) is perfected, si in proceeds remains perfected for 15-ds (s.28(3))
  + Come here if (a) perfection by possession + no F/S, or (b) F/S doesn’t cover the proceeds
  + So the lender has 15-ds from the sale to register the si in the proceeds since the proceeds are neither described in the original registration nor money.

**Oral agreements**

* **If have possession** **🡪** perfected // if want to give property back – first put agreement in writing, file F/S, and then give property back. If not reduced to writing, then SP ceases to have to have a si at all.
* **If file F/S & not possession 🡪** si only attached w/ respect to D, not others // so perfection w/ respect to those pple occurs once agreement is put into writing.

**Priority Rules**

**Workout all the possible pairings and make sure at least one SP – otherwise PPSA silent!**

**Actual knowledge** of another’s si does not affect the operation of the priority rules in the PPSA unless the rule specifically says so (**Robert Simpson Co v Shadlock:** *Simpson informed Shadlock of its si, but Shadlock registered first. H: doctrine of actual notice does not apply to the PPSA*) // but subject to standard of behavior in s.68(2)

**Supervisory jurisdiction of court** = s.63

* Court intervention under s.63 can be required when circularity problems create irreconcilable priorities

**Residual priority rules**

**Applies when there is no other more particular rule available to apply!**

**ID competition b/w 2 SPs (ID if perfected or not) or 1SP & 1non-SP**

**2 perfected si 🡪 s.35(1)(a)** registration of F/S or possession – whichever is first! // order of attachment is irrelevant

**1 perfected si & 1 unperfected si 🡪 s. 35(1)(b)** perfected si takes priority over unperfected si

**2 or more unperfected si 🡪** **s.35(1)(c)** priority determined by **order of attachment** (*attachment happens when value given + D has rights on collateral + writing requirements in s.10 met)*

* One possible solution to equal priority is to give each party a pro rata share **Ontario Dairy Cow v Milk Marketing** (*si in proceeds from milk license, so attachment simultaneous 🡪 equal priority*)

**General considerations for purposes of sub(1)**

* **Proceeds:** use time of registration, possession, or perfection of original collateral (s.35(3))
  + This is subject to s.28, so pretty useless
* **tacking:** original priority applies to future advances (s.35(5))
  + There is **an exception** **to ability to tack on** when in competition w/ an unsecured creditor who has a judgement debt & is proceeding to execution pursuant to s.20(a): perfected si has priority only to the extent of advances made before the interest of the s.20(a) person arose and perfected party had notice of the person (s.35(6)) – look under miscellaneous
* For serial # goods also look @ s.35(4) – won’t be perfected unless register a F/S containing a description of the goods by a serial #
* **If method of perfection changes** (ex. from possession to registration), then use date of original perfection as long as no break in the perfection status (s.35(2))

**If registration lapses & SP re-registers w/in 30ds,** then priority status w/ respect to **a** **perfected si** that had a subordinate position before the lapse not affected – except w/ respect to the advances made by (the competing si) during the hiatus period (after lapse & before re-registration) **s.35(7)**

* A new SP who files during the hiatus is not affected by the restoration rule. Can lead to **circularity problems!**

Single F/S can perfect lots of security interests **(RBC v Agricultural Credit Corp)**

**PMSI: Superpriority?**

**Characterize original collateral**

**PMSI vs. non-PMSI si (in the same collateral granted by same D)**

* **PMSI in collateral/ its proceeds, other than intangibles/inventory,** has priority over another si if perfected w/in 15-ds of D obtaining possession 🡪 s.34(1)(a)
  + grace period starts 15-ds from the time D gets possession as “collateral” (**McLeod**)
    - ex. can get confusing if D previously had possession through lease, then decided to buy using financing
    - can proceeds be inventory? Kiran: yup
* **PMSI in intangible/ its proceeds** has priority if perfected w/in 15-ds after si attaches 🡪 s.34(1)(b)
* **PMSI in inventory/ its proceeds** has priority if (a) PMSI perfected when D gets possession + (b)&(c) **SP gives notice** to other parties + (e) notice given before D gets possession 🡪 s.34(2)
  + If there are no other parties, then SP won’t 34(2) superpriority

**Seller PMSI vs. any other PMSI** **(in the same collateral granted by same D)**

* **For inventory,** PMSI in goods/proceeds taken by seller/lessor/consignor has priority over any other PMSI if perfected at the time D obtains possession 🡪 s.34(4)(a)
* **For collateral other than inventory,** PMSI in goods/proceeds taken by seller/lessor/consignor has priority over any other PMSI if perfected w/in 15-ds of D obtaining possession 🡪 s.34(4)(b)

**Non-proceeds PMSI vs. proceeds PMSI (in same collateral; interest can be given by same D or diff Ds)**

* **For inventory,** non-proceeds PMSI has priority if perfected when D gets possession s.34(6)(a)
* **For collateral other than inventory,** non-proceeds PMSI has priority if perfected w/in 15-ds of D getting possession s.34(6)(b)
* Non-proceeds = good as original collateral

**Accounts:** Non-proceeds si in an account **given for new value** *(i.e. absolute assignment of all PAA accounts)* has priority over a **PMSI** in the account as proceeds of inventory *(SP has PMSI in inventory, and inventory is sold on credit giving rise to an account)* if F/S registered before PMSI perfected or F/S relating to it is registered 🡪 s.34(5)

* This is an exception to PMSI’s taking priority over non-PMSIs // look @ p.390 textbook
* The proceeds of the sale of the collateral in which a PMSI is held is an account. Hence, there is a special priority rule which overrides the usual PMSI rule. // The holder of the PMSI in the original collateral in the form of inventory cannot rely on having the PMSI w/ respect to accounts generated by the sale of the inventory over a financier who holds a si in the accounts as original collateral and who has registered a F/S relating to accounts.

**2 debtor**

**Can’t have a 2D problem if word inventory used as the description b/c of s.10(4) –** even if in the agreement says interest won’t detach

**2 security interests that are in competition were given by diff Ds (collateral transferred; deemed Ds like owners of collateral; D changes name) // Beware of detachment rules (ex. express authorization)!!!**

**ID interests that survive the transfers, then determine whether 35(8) or 51 apply! IF can’t rely on 35(8) or 51, then the general priority rules apply!**

**si given by Tor vs. si given by Tee before the transfer (SP of transferee has an interest in after-acquired property) 🡪 s.35(8)**

* **Perfected si** granted by Tor **has priority** over **si** granted by Tee before the transfer (applies to all advances), except to the extent that si granted by Transferee secures advances made in the hiatus period (for which have to look @ residual priority rules s.35(1)(a) 🡪 might have spilt priorities)
* HP begins 15ds after SP of Tor learns *(Knowledge not consent)* about transfer *(If SP of Tor never learns of the transfer, the hiatus doesn’t begin)* & **(b)** ends when amends registration or takes possession *(if no re-registration, then never ends)*
* SP of Tor has to worry only if SP of Tee makes an advancement in the HP.
* This provision is irrelevant if si detaches on transfer (s.35(9))
  + i.e. interest detached b/c of 28(1)(a) or 30(2) 🡪 won’t apply to inventory
* **Circularity problem** can arise if D1 has to 2 SPs, but only 1 amends registration

**si given by Tor vs. si given by Tee after the transfer + consent / knowledge + no registration w/in 15d 🡪 s.51**(otherwise residual priority rules)

* This section doesn’t apply if SP of Tor amends registration w/in the 15-d period
* **Consent: s.51(1)** IF SP of Tor consents to transfer, then **perfected si** (by registration) **subordinate to**
  + **(a) any non-si** // **(b) perfected si** that arise from the end of 15ds after transfer until SP of Tor amends registration or takes possession
  + **(c) perfected si** that arises during the 15ds **(i)** if SP of Tor doesn’t amend registration or **(ii)** take possession
  + **triggered** as soon as consent given, which is day of transfer
* **Knowledge: s.51(2)(a)** IF SP of Tor learns about the transfer; or **(b)** SP learns of D’s name change, then **perfected si** (by registration) **subordinate to**
  + **(c)** **any non-si** // **(d) perfected si** that arise from the end of 15ds after knowledge until SP of Tor amends registration or takes possession
  + **(e) perfected si** that arises during the 15ds **(i)** if SP of Tor doesn’t amend registration or **(ii)** take possession
  + is there sufficient knowledge to trigger the rule?
  + Section 51(2)(b) can apply to subordinate a SP’s interest to that of a trustee in bankruptcy (**Orion Truck**)

**Competition w/ potential land interests = mortgage**

**Other than the obvious SP, does anybody else have an interest in the fixture or accession?** This would be a competition b/w 2 PPSA SPs and would be governed w/ the priority rules in other sections!

**Fixtures**

**Are we even dealing w/ a fixture?** This turns on the degree of attachment to the land

* if become fixture, then blaw and blaw will have an interest
* if do not become fixture, then blaw will have an interest

**Fixtures:** doesn’t include building materials

**Building materials:** materials incorporated into building & goods attached such that removal would cause some serious damage or weaken structure, but does not include: heating, air conditioning, conveyancing devices (ex. elevators), or machinery installed for use in carrying on an activity insider the building/on the land

**s.30(1) definitions** deem labour Ks & goods supplied under that K enough to trigger the provisions in 30(2).

* Per s.30(1) o.c.b can include K for service & materials. So, if buy fixture in the o.c.b., any prior si held is detached under s.30(2).

**ID type of competition?**

* 2 PPSA SPs 🡪 no special rules
* 1 PPSA SP vs. person w/ real property interest 🡪 rules in s.36
* 2 real property interests 🡪 no rules in the PPSA

**When did si attach? s.36 of PPSA prevails over LTA (s.74)!!!**

**si that attaches before or @ the time goods become a fixture**

* **has priority** over person who already has an interest in the land (s.36(3)) // priority comes w/ attachment, no perfection required
* **is subordinate to** 
  + person who later acquires an interest in the land if acquired for value + w/out fraud + before s.49 notice filed in LTO (by SP) (s.36(4)(a))
    - in order for SP to have priority, then he has to file s.49 notice in the LTO
  + mortgagee who makes subsequent advances w/out fraud, before s.49 notice filed, but only w/ respect to the advance (s.36(4)(b))
  + prior registered mortgage holders that obtain an order for sale/foreclosure (s.36(4)(b))

**si that attaches after goods become fixtures**

* **is subordinate to** 
  + pre-existing land interests who hasn’t consented to the si/disclaimed an interest in the goods (s.36(5)(a))
  + subsequent land interests if acquired w/out fraud & before s.49 notice filed (s.36(5)(b))

**judgement creditor**

* priority over si in fixture if judgement filed in the land registry after goods affixed & before notice of si filed (s.36(6))
  + **exception:** if si is a **PMSI**, then won’t get priority if notice filed in accordance w/ s.49 w/in 15-ds of the goods becoming affixed (s.36(7))

**a circularity problem** could potentially be resolved through commercial expectations (**GMS Securities v Rich Wood**)

**Accessions**

**Are these accession?**

Accession means goods that are installed in or affixed to other goods // often they are serial numbered goods, so for perfection have to makes sure that number is registered

* **(1)** If not accession, then X will have an interest
* **(2)** If accession, then Y will also have an interest by virtue of them becoming part of the whole 🡪 competition b/w two SPs dealt w/ in s.38
* **(3)** If the shelves are an accession to the racks and the racks are fixtures, then the shelves themselves become fixtures (so person w/ an interest in land will be added to the competition as well, but if the racks are not fixtures, then the person w/ land interest disappears) 🡪 competition of each SP w/ M dealt w/ in s.36

**When did si attach?**

**si that attaches before or @ the time goods become accessions**

* **has priority** over person w/ an interest in the whole (s.38(2)) // priority comes w/ attachment, no perfection required (thus any registration errors irrelevant)
* **is subordinate to** 
  + person who later acquires an interest in the whole if acquired for value, w/out knowledge of si, and before si perfected (s.38(3)(a))
  + SP w/ perfected interest in the whole – w/out knowledge of si & before si perfected (s.38(3)) – covers
    - Advances made under SA after goods become accessions & priority only w/ respect to advances
    - Acquires right to retain whole in satisfaction of obligation secured (foreclosure)

**si that attaches after goods become accessions**

* **is subordinate to** 
  + person w/ pre-existing interest in the “other goods” who hasn’t consented to the si or disclaimed interest in accession (s.38(4)(a))
  + subsequent interests in the whole if acquired, w/out knowledge of si & before si in accession perfected (s.38(4)(b))

**judgement creditor 🡪** a judgment creditor has priority over an accession si if the judgement creditor seizes the whole before the accession si is perfected – s.38(5) // If a PMSI is perfected w/in the 15-d grace period, they do not lose priority to the judgment creditor – s.38(6)

**Miscellaneous**

s.20 provides incentive to SPs to perfect their interest to have priority!

* **Judgement creditor** (i.e. unsecured creditor who has obtained a judgment order for seizure)
  + **Unperfected si** in collateral subordinate to judgment creditors (s.20(a))
    - If SP is a commercial consignor/lessor for more than 1-yr s.21 creates deemed damages
  + **SP w/ perfected si** can’t claim priority w/ respect to advances made after he learns that goods seized (*seizure has to occur for there to be knowledge*) by sheriff to satisfy indebtedness (s.35(6))
    - SP will have priority over the unsecured creditor b/c of nemo dat. However, s.36(6) ousts SP’s ability to tack on to this priority w/ respect to any advances after gaining knowledge of unsecured creditor and seizure.
  + **PMSI** in collateral has priority over judgement creditor if
    - For collateral, other than intangible, perfected w/in 15-ds of D’s possession (s.22(1)(a))
    - For intangible, perfected w/in 15-ds si attaches (s.22(1)(b))
    - If the registration occurs w/in 15-ds, neither unsecured lenders nor the trustee in bankruptcy can defeat interest.
* **If D goes bankrupt 🡪** Interest of an unperfected SP is not effective against a trustee in bankruptcy (s.20(b); ex. **Re Giffen:** *trustee was able to get a better position wrt collateral than D had*)
  + If SP is a commercial consignor/lessor for more than 1-yr s.21 creates deemed damages
  + **PMSI** in collateral has priority over trustee in bankruptcy or liquidator if
    - For collateral, other than intangible, perfected w/in 15-ds of possession (s.22(1)(a))
    - For intangible, perfected w/in 15-ds si attaches (s.22(1)(b))
* **Unsecured BFPFVWN [there has been a transfer of collateral]** 🡪 unperfected si in c/p, doc of title, an instrument, money, an intangible, or goods is subordinate to the interest of a transferee **who is not a SP + gives value + no knowledge of si** (s.20(c)) // def of knowledge s.1(2) // registration of F/S by itself doesn’t constitute notice
  + value passes where there’s a change in position (**RBC v Dawson:** *promise did not constitute value*)???

28(1)(a) & 30 detach si rather than subordinate, so only need to use 1 **[there has been a transfer of collateral]**

* **Authorized dealing 🡪** SP can expressly/impliedly authorize that collateral be dealt w/ free of SP’s interest (s.28(1)(a)). **Detachment!!!** // can still claim against the proceeds though!
  + Implied authorization: past practices (have provided express authorization in similar situations in the past), CL implied authorization to deal w/ inventory (this applies!) 
    - If agreement expressly says can’t sell free of interest w/out permission, then can’t rely on s.28(1)(a) b/c presumption of license to deal is rebutted.
  + How to prevent? SP can expressly say no dealings allowed free of its si
  + If D sells inventory, then new buyer takes free from any interests (s.28(1)(a)). Unless parties expressly state that it doesn’t detach.
* **Buyer/lessee of GOODS in the o.c.b of seller/lessor 🡪** take free from perfected/unperfected si in the goods whether or not they know si exists, unless they know that it constitutes a breach of SA (i.e. knowledge of specific provision in SA that prohibits the transfer) **(s.30(2))** **Detachment!!!**
  + SP’s instructions that can’t sell w/out my interest irrelevant; only option SP has is to take possession (p.70)
  + **Series of sales:** s.30(2) only detaches si given by the person who conducts the sale/lease, not other parties (**Royal Bank v Wheaton:** *if sale is done when seller in receivership, then not o.c.b*)
  + **o.c.b?** might have to examine the buyer b/c if you don’t normally sell to pple like that, then it might not be in o.c.b // factors to consider (**Fairline Boats**): who are the parties? Where was agreement made? Quantity of goods? Is the price w/in the usual market value?
    - Whether transaction is in o.c.b is a question of fact, not based on intention of the parties (**Ford Motor**)
  + **There has to be a sale** which has been subject to much litigation. One line of authority uses the SGA to define sale through transfer of title – buyer must be the “owner”, so the goods must be identifiable/delivered (**216200 Alberta**). A separate line of authority from **Spittlehouse** takes a more pragmatic approach – “sale” should be given its ordinary meaning – i.e. someone can be a buyer if title has not yet passed to them.
  + **Buyer includes someone who gains interest b/c goods became a fixture on property in which they already had an interest (s.30(1))**
* **Buyer/lessee of GOODS acquired as CONSUMER GOODS 🡪** take free from perfected/unperfected si if buyer/lessee **gave value + no knowledge of si** (s.30(3)) // won’t apply if si in fixtures or value exceeds $1,000 (s.30(4))
  + if buying consumer goods, can take **free from any si** – not just si given by your seller
  + consumer can’t rely on this provision if goes to the registry and finds the registration, but there is no requirement on consumer to check the registry

**PPSA silent**

There are times when the PPSA simply does not contain a priority rule governing the competition b/w two given interests. Here, the retention by the PPSA of the CL to the extent that it does not conflict w/ the statute (s. 68(1)) will cause a CL rule or principle to be applied so as to give resolution to the priority competition. If it is used in this way, the CL principle of nemo dat quod non habet will mean in practice that the interest that is first in time will have priority.

**Circularity**

* It seems to result to a circularity problem – don’t have to give possible solutions unless specifically asked in the remedy sections
* **GMS Securities v Rich-Wood Kitchens** (*si of cabinet-maker prevailed over mortgagee; court based its decision on policy + reasonable commercial expectation*)
* The PPSA has no built-in solution to circular priority issues – possible solutions
  + Party “at fault”
  + Prefer interests based on policy reasons (GMS)
  + Impose burden of resolution on first party taking remedial action (GMS) (p.304)

**After statutory priority is established, ID ways that priority can be changed:**

* Subordination agreement
* Marshalling: court can through an order of marshalling order that the claims to property be reorganized.

**Subordination agreements**

* s.40 authorizes SP to subordinate their interests to a junior creditor // can be b/w 2SP2 OR b/w SP & D
  + Can be used to reverse effect of priority rules but not the priority itself
* Can be enforced by a **3rd party** if K intended to benefit them (s.40(1))
  + Per s.40(1), junior creditor can enforce an agreement b/w D and SP if junior creditor is the person or one of a class of persons for whose benefit the SA was intended.
* Can’t have an adverse effect on someone who is not a party to the K
* SA does not create a si – s.40(2)
* A financing change statement may be registered in the Personal Property Registry to disclose the subordination, but not required to do so (s.45(6))
* If there is more than one party, then may want to specify how the money is to be split
* No particular words/**form** is required in order to have a subordination agreement (**RBC v Gabriel of Canada:** *K said SI was subject to the interest of the Royal Bank*). BUT courts will **interpret** the wording strictly (**Transamerica Commercial Finance v Imperial TV:** *agreement to subordinate si to banks did not cover financial institutions that were not banks*)
  + Bruce: if sub-A w/ respect to X, then sub-A doesn’t cover proceeds

**Marshaling**

**Come here if one SP oversecured and other undersecured! OR circularity!**

A court can alter the practical effect of the priorities through the doctrine of marshalling. Sometimes court intervention in the operation of the priority rules is needed because the priority rules do not present a clear hierarchy of interests - but instead end up creating circular priority. Marshalling is an equitable doctrine designed to promote fairness. The court will not use it if the interests of third parties would be adversely affected by the marshalling order.

Ex. **Surrey Metro**

**Remedies**

**Is D in breach of SA? Is this a default? What is in default at that moment? Is there an acceleration clause?**

* TIP: proceed against the most value collateral that you have the highest priority in
* Must decide if going to proceed as SP (if yes, go through remedies) or unsecured creditor (i.e. sue; if position w/ respect to collateral is weak, then might be better off suing)
* SP can proceed against collateral until it is exhausted, then sue in court for deficiencies.
* **Upon default,** SP can proceed to take a remedy against the debtor. An SP who proceeds against collateral when there has been no default is liable for damages to D.

**Per s. 55(2),** SP has rights and remedies provided in the PPSA, and security agreement.

**Statutory Remedies**

**Deemed STs** are covered by the PPSA (s.3); but not Part 5 which is the remedies section (s.55(2)(a)) – look @ p.7

* If true lease more than 1-yr, then not covered by Part 5 // but security lease covered
  + **True lease:** having regard to the relevant considerations, the impugned transaction is a true lease that comes w/in the definition of s.3 and, therefore, is excluded from Part 5 of the PPSA.
* Transfer of account or C/P, doesn’t matter b/c remedies outside of Part 5 // go to ss.36-38

**Preliminary notice**

* At common law, before SP can proceed against collateral, it must give notice of default / and the demand for payment to D / and a chance to make the payment to remedy the default. Per s. 68(1), principles of the common law continue to apply.
* There is no set time frame in which notice must be give – it depends on what is reasonable given surrounding circumstances at the time of default (**Waldron**)

**Options**

* **Receiver/managers** **(For corporate Ds only)**: will take over affairs of D
  + s.64(1) allows provisions to be included in the SA for appointment of a receiver
  + s.66 allows SP to apply to court to have a receiver appointed. It’s an application w/ court discretion, not entitlement (**White Cross**)
  + qualifications of receiver (ss.64, 65)
* **Collection of payments under intangibles (ex. accounts)** 
  + The first step in realizing on a si is to get control of the property, so SP has to notify the account debtor that they are now to pay the SP rather than the original account creditor (i.e. defaulting D) (s.57(2)). SP must also notify the original D w/in 15 days that they have given the account debtor this notice (s.57(4)).
* **FOR tangible collateral** 
  + **Seizure of collateral:** upon default, any SP may seize, regardless or prioritys.58(2)(a) // if collateral is hard to move or store, SP can seize w/out actual removal s.58(2)(b)
    - Certain types of collateral are subject to special rules for seizure:
      * Accessions (s.38(7)) / fixtures (s.36(8)) must be removed causing the least amount of damage
      * If interest is in **consumer goods** and D has paid at least 2/3 of the obligation secure, SP may not seize the consumer goods w/out a court order (s.58(3))
    - Obligations while in possession
      * SP must use reasonable care to preserve collateral s.17(2)
      * Any retained increase or profits must be used by SP to reduce the obligation secured s.17(3)(c)
      * Collateral must be kept identifiable, except fungible collateral may be commingled s. 17(3)(d)
      * D is typically responsible for reasonable expenses (ex. insurance)
    - Proceeding against proceeds: if SP proceeds against both the collateral and the proceeds, the amount secured is limited to the market value of collateral at the time of dealing.
  + **Disposition:** after seizing or repossession, SP can dispose of it in its existing condition or after repairing it (*commercial reasonable to fix?*) (s.59(2)) – SP my dispose collateral (a) by private sale, (b) by public sale, (c) as a whole or in commercial units or parts, (d) by lease if SA permits s.59(3)
    - Standard: commercially reasonable manner (s.68(2)) // if commercially unreasonable may result in denial of further action & liability in damages (s.69(3))
      * Creditor must take reasonable care to ensure that proper value is obtained for the collateral – factors like appraisal of value & advertisement (**Copp v Medi-Dent**)
      * SP has no claim for deficiency and may be liable in damages for commercially unreasonable sales (**Donnelly:** *no notice of disposition, no repairs, non-arm’s length transaction*)
    - Notice: at least 20-ds prior to disposition, notice must be sent to D, owner, holders of subordinate perfected si, and holders of any other interest who have made it known to the SP s.59(6) // for content of notice, look at s.59(7)
      * **If consumer goods:** notice must indicate D can reinstate SA on payment s.59(7)(f)
      * Notice not required if perishable goods, security position in danger of being diminished, money … (s.59(17)).
    - Distribution of the money: the PPSA sets out the order in which money proceeds from the disposition will be distributed:
      * First, satisfy own indebtedness under s.59.
        + 59(2)(a): reasonable costs of seizing, repossessing, holding, repairing, and disposing of collateral
        + 59(2)(b): satisfaction of the obligation secured by the security interest of the party making the disposition.
      * Then, any surplus should be distributed according to s.60.
        + 60(2)(a): to persons w/ a subordinate perfected si in the collateral (*only paid if there is a default against them, otherwise surplus goes to D*)

per s.59(14), purchasers will take free of subordinate security interests, so these SPs will get nothing if there is no surplus.

* + - * + 60(2)(b): to any other person w/ interests in the collateral if that person has given notice of the interest to the SP before distribution
        + 60(2)(c): to the D – money going to D would count as proceeds for senior parties & any junior party who didn’t get paid.
        + Senior SP doesn’t get any of the distribution, but their interest continues in the collateral.
      * Per s.60(3) SP must give a written accounting of the distribution to the final four categories of pple.
    - Disposition might be preferred over foreclosure b/c it doesn’t eliminate underlying obligation, so allowing SP to continue action for deficiency, including suing for amount due or seizing further collateral, if there is any.
  + **Foreclosure:** after default, SP may propose to take the collateral in satisfaction of the obligation secured by it s.61(1)
    - Notice: notice of proposal must go to debtor + knowns owners (61(1)(a)) and subordinate perfected Sis (61(1)(b))
    - If any party who is entitled to a notice objects, then SP has to dispose of collateral under s.59 (61(2)) // can apply to court to render objection invalid s.61(7)
    - If no objection, then takes free from interest of D and any subordinate SPs, but not senior SPs (*which makes it kinda pointless*) s.61(3)
    - SP might opt for this if they actually want the collateral
    - If SP uses the collateral after seizure in particular ways as if it were their own, it may be deemed to act as if it had foreclosed on it and estopped from pursuing further action.
      * This is still a live issue
      * **Angelkovski:** there can be no foreclosure w/out proper notice sent
  + **Rights of redemption & reinstatement:** before SP who has seized collateral has either disposed or foreclosed on it, any party entitled to a notice of disposition or foreclosure proposal can redeem the collateral by tendering fulfillment of the obligation secured related to that collateral s. 62(1)(a)
    - **Consumer goods:** if collateral is consumer goods, D may have the SA **reinstated** by paying the amount in arrears (exclusive of an A/C) plus any expenses incurred, currying any default s.62(1)(b) // can only do twice a yr 62(2)
    - for other types of collateral, D may apply to court for this relief s.62(3)
* **Power of the Court**

**Contractual Remedies**

s. 56(3) limits the ability of parties to waive or contract out of much of the PPSA (ex. **Andrews:** contractual remedies may not be allowed if they are too close to a statutory remedy)