Secured Transactions

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INTRODUCTION

**Secured Transactions**

* Part of commercial law (relates to financing [debtor/creditor relations])
* Deals with competitions among/between lenders who want to access the limited resources of the debtor in which they all have common interests
* Part of the interests arise because they have lent money/given credit to the debtor who has in return given them an interest in property that they can use and enforce if the debtor does not pay as promised (interest given as collateral)
* Creditor is OWED money by the debtor
  + To secure their position, the creditor wants to take an interest in a property in which the debtor has some rights
  + Secured creditors claims have preference over others
  + Process of achieving this secured status🡪secured transactions
* Arises most commonly in large commercial transactions but also arises in consumer contexts
  + Deeming provisions in statute affect parties that may not believe themselves to be lenders or have a collateral interest
* Secured transactions concerns property law and contract law
  + Consensually created property interests – CONTRACT based
  + Contract = security agreement

**Personal Property Security Act (PPSA)**

* Exclusively about secured transactions in *personal* property (as opposed to *real*)
* In BC, the PPSA replaced a complex set of legislation. Now a single, comprehensive piece!
  + Single regime; single registry to cover most secured transactions; registration can be for infinity
* All CL jurisdictions have a PPSA (based on the English CL and US Uniform Commercial Code [UCC])
  + US has set up a model statutory regime 🡪 Uniform Commercial Code (UCC) – has a number of articles that set out a comprehensive code for dealing with commercial law
    - This set of rules has its origins in UK CL of contracts, etc. but is much more complex, comprehensive and useful than the English CL models
    - Canadian CL movement in the 1970s to just adopt the UCC which didn’t go anywhere
    - Most of what is covered in the US by the UCC is covered by English CL models
  + Canadian CL jurisdictions have adopted certain parts of the UCC – most notably, article 9 has been adopted as the model for the PPSA
  + Most Canadian CL jurisdictions (including BC) have also adopted article 8 of the UCC which deals with securities transfers
    - Adopted it by putting part of it in the PPSA and part of it in the Securities Transfer Act
  + The problem is that since only part of the UCC has been adopted it is a strange fit with the rest of Canadian commercial law
  + Prior to adoption of the UCC we used the English model that didn’t deal with secured transactions as a single comprehensive subject
    - Includes various types of property interest and methods of creating them that work quite differently
      * i.e.: there was a set of rules dealing with mortgages, charges, pledges, intangibles, goods, etc. with each area dealt with separately and possibly codified into statute
      * article 9 unifies all of these areas into one set of rules 🡪 one person is a creditor, the other is a debtor and the creditor gets some comfort/security from taking a secured property interest that can be used as a back up mechanism if they are not paid as promised
    - There are certain types of property that are contained within article 9 and other types of property that are deemed to fall within the PPSA (i.e. absolute sales and assignments, real property, ownership possessory (if tangible) interests.
  + The PPSA (article 9) is the basis for the international convention on security interests
* How the PPSA affects CL
  + PPSA does not deal much with the D-C relationship (leaves that to CL or other statutes)
    - PPSA will, however, “deem” certain relationships to be subject to the same rules as D-C
  + PPSA does modify the CL rules of property relating to priority and relating to how such property interests can be revealed or known by others
  + Importance of nemo dat remains where the PPSA does not have a rule
  + Also in BC, ownership is important sometimes in determining who is the debtor (owner not defined in the PPSA)

**Property**

* + Real (fixtures and crops deemed)
  + Personal
    - Chattels Real (mortgages of land, leases of land, etc)
    - Chattel Personal
      * Choses in Possession “goods”🡪can repossess property (physical possession) – typically dealt with through CL
      * Choses in Action🡪types of property that can be possessed – the only way of defending your property is taking legal action (traditionally not recognized in CL – if something was not tangible and could not be possessed CL didn’t recognize it, started off being recognized in equity)
        + Documents Intangibles – documentary (written) evidence of existence (bonds, debentures, share certificates, bank note, etc.)
        + Pure Intangibles – becoming more important with intellectual property that is often purely intangible and is becoming increasingly rare now that investment property actually has a paper form (ie people don’t usually possess share certificates)
* Property Interests (Consensual)
  + Ownership – possessory (if tangible) [deemed interest]
    - Either possessed property or had an ultimate possession of the property
  + Bailment (not for security) – possessory [deemed interest]
  + Bailment (for security) – possessory – pledge
    - If the reason for possession of property is collateral it is a security interest - pledge
  + Non-Bailment SI – non-possessory (don’t have possession but have the interest so you can take possession/use if you aren’t paid by the debtor as agreed)
    - Mortgage
    - Charge
      * Fixed
      * Floating
    - Equitable lien
* Transfer of Property Interests
  + Absolute
    - Sale [deemed interest]
    - Assignment [deemed interest]
    - Negotiation
    - Gift
  + Conditional – can use interest conditional upon something happening
    - Get the security interest now but cannot use the interest intil the debtor defaults – upon the default the conditional security interest converts into an absolute possessory interest
      * Sale
      * Assignment
  + Temporary
    - Bailment
      * Security
      * Non-security [deemed interest]

Note: not all transactions that would be included [fit within underlined areas] are covered by the statute 🡪although they ought to be covered by the PPSA they have been excluded (statutory regime is both overly and under comprehensive)

PERSONAL PROPERTY SECURITY ACT

NOTES:

* if you are dealing with personal property security you are dealing with the PPSA, but if that property takes the form of investment property, some of the provisions are in the PPSA and some are in the Security Transfer Act (the PPSA and STA work together)
* these are really the only transition provisions still in the PPSA
* we will discuss investment property in class but it will not be examinable
* all scenarios on the exam will take place entirely in BC, we will not have to deal with the conflict of laws issues that often arise/the applicable provisions in the PPSA.

**Parties**

* In a secured transactions there are two parties:
  + Secured Party (creditor)
  + Debtor (gives SI to SP)
* They enter into a consensual agreement that usually takes the form of a contract
  + K: the debtor gives the SP (creditor) an interest in property, which interest the SP can use upon default of the D
  + CL principle: nemo dat – means that a D cannot give an interest to later parties better than it has to give (an interest subject to the interest already created in favour of the creditor [68(1)]
  + A SI is, in essence, a type of property interest usually created by K (voluntarily created)
* Sometimes it will take one of the old-fashioned forms (mortgage, pledge, etc) but under the PPSA you don’t have to use these terms, can just use the term “security agreement” (SA)
* The nature of this contract is that the SP is a creditor and the debtor is a debtor, they owe something to each other (a debt, owing money, is a personal obligation).
  + A SA does something in addition to a debt 🡪 the debtor gives a property interest called a security interest (SI) called a property interest in collateral (collateral is personal property for the purposes of this course)
  + Therefore, the SA creates security for the SP by the creation of a security interest (the SP hopes they will never have to use the SI, would prefer that the debtor just repay the debt according to the terms agreed upon).
* Setting up the relationship between the SP and the debtor is contract law and the PPSA does not deal with this in detail (largely silent, defers to CL Contract Law)
  + To the extent that it does address the contractual relationship between the parties, those provisions are contained in Part 2.
  + When the debtor actually gives the security interest to the SP, the contract between them promises it but the performance of the SI part of the obligation is called “attachment”
  + If there is attachment, then because a SI has been created (which is a property interest), the SP now has to determine how the interest that it has in the property relates to the claims of the rest of the world
    - The rest of the world may also have claims to now (or in the future) the same property 🡪 the SP is not in a contractual relationship with the rest of the world so the different claims to the property held by the SP and the rest of the world are property law
    - The rest of the statute deals with how the claims of the SP, having gotten the SI, relate to the rest of the world
    - The rest of the world can be divided into a number of categories:
      * Other SPs (also have a security interest in the same property)
      * Other “deemed” SPs
      * Other interests (not security interests)
  + The PPSA provides a heavy qualification to the CL property rule of “nemo dat quod non habet” 🡪 sets out a property rule to say whose interest prevails over the other person’s interest that modifies the CL.
* Intersection of property and K law
  + Property law is needed to give the SP entitlement against parties not privy to the K (if only K law, would only have personal remedies)
  + K law allows the interest to be voluntary (created by agreement)
* Part 3 & Part 4 of the PPSA deal with the property law claims that various parties have in the property
* The K between the SP and the debtor creates a SI (property interest) that is a **conditional interest**
  + What then is the procedure for using the SI against the debtor (usually because the debtor has defaulted) 🡪 converting the interest from a SI to some sort of absolute interest which changes the nature of your claims to the property compared to the rest of the world
  + When the SP uses the SI, that involves the K (the debtor) and the rest of the world
  + Part 5 sets out the rules as to what happens if there is a default, how the SI is used by the SP against the debtor and the rest of the world.

**Purpose of Security Interest**

* Very much a back-up device, except in very rare circumstances
* Will be most content when the debtor just fulfills their obligation!

**Organization of Materials**

* How the PPSA relates to other statutes and the CL (quite strong, tends to trump other law)
* The Transaction – the contract that creates the security interest
  + Who are the parties? Who can be the parties?
  + What form does the contract have to take?
* The Subject Matter – what personal property is the subject of the security interest?
  + The interest that a SP has is not just in what the K describes, but also in all of the proceeds (everything that is derived from it)
* Attachment – the performance of the SI that is promised under the contract (ie money is lent)
* The CL said that getting the interest was enough to get the interest against anyone else that made a claim against the property – the PPSA requires the SP to do more to get the best possible interest – this is called “perfection” 🡪 makes the interest in the property as perfect as it can be
  + Various methods (generally through registration) through which the SP can put itself in the best possible position against the claims of the rest of the world
* Competition with the other parties
  + What are the property rules governing how the interest of the SP ranks against those of the rest of the world
* Default

**Note: Not responsible for conflict rules (ch. 8), federal regime (Bank Act)**

**Part 6: Miscellaneous**

* **s.68:**
  + (1) preserves the CL to the extent that it does not conflict with the PPSA (the rules in the PPSA are very specific/precise so if it does not specifically apply, it does not apply 🡪 the PPSA DOES NOT cover all situations)
    - if the rule is x + y = z, not x + not y does not = not z (**rules do not apply negatively**)\*\*
    - There are lots of situations in which the PPSA does not apply and instead resort must be had to the CL.
    - Equity plays a very small role, if at all, in the PPSA
  + **68(2):** all rights, duties, obligations arising under a SA, this Act or any other law applicable to SAs or SIs must be exercised or discharged in good faith and in a commercially reasonable manner
  + **68(3):** a person does not act in bad faith merely because the person acts with knowledge of the interest of some other person
    - **Knowledge:** objective test – constructive notice under circumstances in which a reasonable person would take cognisance of it (question of fact) – pg81
    - PPSA stipulates that registration of a FS does not, by itself, constitute express, constructive or implied notice to any person of express, constructive or implied knowledge on the part of any person of the FS, its contents, or underlying SI or SA [s.47]
* **s.73:** conflicts with other legislation – other statutes give parties interests in property that compete with a security interest. Generally, priority goes to the PPSA which trumps other statutes (with very few exceptions where it expressly says that other Act will prevail
  + **s.74** allows consumer protection legislation and the *Land Title Act* to trump the PPSA, although s.74(2) allows s.36,37,49 of the PPSA to trump the LTA).

*Marine Building Holdings Ltd v. Proton Engineering & Construction Ltd*

* P commenced an action in debt [seeking to collect what is owed to them] against D for arrears of rent pursuant to a commercial lease (judgement creditor – not a SA – unsecured creditor)
* P gets three garnishing orders (against Westcoast Energy, Scotia Bank and Moli Energy)
* D seeks a declaratory judgment stating that the bank has priority to the money paid into court (from Energy garnishees) under the PPSA
  + Bank has an attached (loaned monies and D has interest in SI given [accounts receivable]) and perfected (registration) SI under the PPSA
* 2 parties have an interest in the same property 🡪 one through a builder’s lien, one through the PPSA
* The court finds that the priority set out in the PPSA prevails over the Builder’s Lien Act (at most, the P is an unsecured creditor, and would be subordinate to a secured, perfected creditor)

**Transactions Creating a Security Interest: Parties, Forms, and the Obligation Secured**

* **S.2:** defines which transactions are governed by the PPSA
  + Subject to section 4 [exclusions from Act], this Act applies: (a) to every transaction that **in substance creates a SI**, without regard to its form and without regard to the person who has title to the collateral, and (b) without limiting paragraph (a), 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 if they secure payment or performance of an obligation
  + Traditional forms in italics – constitute a SA almost for sure; whereas the others are more contentious (see below)
  + Any transaction wherein an interest in personal property is taken to secure payment of an obligation🡪ST
    - **Substance over form!!!**
  + Under the PPSA, instead of needing ownership (“property”) in order to give a security interest, a debtor must have rights in the collateral [s.12(1)(b)]; a debtor cannot give a security interest in something in which it has no property interest at all.

**What is a Security Interest?**

* What constitutes a SI?
  + True: the creation of an SI constitutes a purchase within the meaning of that term in the PPSA
  + Deemed: transferee of an account, lease over 1 year, commercial consignment and trusts
    - Remedies do not apply to deemed SIs (Part 5)
* The creation of a SI must be of the essence of the transaction rather than just an incidental result in order for there to be said to be created a SI for the purposes of the PPSA
* While substance is the key to determining whether a SI exists, it has been held that the court should look at the purpose of the transaction, the role and relationship of the parties, the practicality and commercial realities, and the intention of the parties with respect to the transaction

**Parties to a Secured Transaction and Standards of Behaviour: The Contract**

* Between the SP and the Debtor
  + Party *giving* the interest🡪the debtor
  + Party *receiving* the interest🡪SP
* SP will also be the person to whom an underlying obligation is OWED
* S.2(1) – the key to the statute, if you can’t get past s.2 then you aren’t dealing with the PPSA
* Terms defined in s.1:
  + **Security interest:** has 2 parts (2 ways of being able to say you have a security interest). A transaction that creates a SI is a **security agreement** (also defined in s.1 – an agreement that creates or provides for a security interest)
  + Who are the parties to the SA?
    - **Secured Party –** the person who gets the SI by the operation of the SA
      * A person who has a SI; a person who holds an SI for the benefit of another person; the trustee, if a SI embodied in a trust indenture
    - **Debtor –** extremely complicated definition, be aware of the complexity of who the other party can be
      * (a) the person who owes payment or performance of the obligation secured whether or not that person owns or has rights in the collateral (the debtor doesn’t have to have any rights in the collateral – this can include a third party guarantor)
      * there are other people who are also debtors:
        + (b) a person who receives goods from another person under a commercial consignment
        + (c) a lessee under a lease for more than 1 year is a debtor (the lessor is a SP covered by the PPSA)
        + (d) a transferor of an account or chattel paper
        + (e) a transferee or a successor to a person referred to in paragraph (a) in sections 17, 24, 26, 58, 59(14), 61(8) and 69

i.e. A owns property and gives B a SI in the property, then A sells or leases the property to C, C is also B’s debtor

a party who comes to own that collateral (but does not in fact owe anything) could be considered a D

* + - * The breadth of this definition can prove very burdensome for the SP
* **Collateral:** personal property that is subject to a security interest (s.1)
* The relationship between the parties is created because there is some obligation owing between the SP and the debtor
  + This obligation is usually money, but it does not have to be money (can be any debt)
  + **Security interest:** (a) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a SI in the interest of goods
  + The point of a SA and SI is to secure an obligation that is already owing to the SP 🡪 the obligation owing does NOT have to be monetary in nature
    - If A has a K with B to paint B’s house in exchange for B giving A a horse and A doubts that B will actually give the horse, A can take a security interest in B’s boat or field, etc in the event that B defaults on promise to deliver a horse.
    - The obligation owing to SP does not have to be owed by the original debtor (the original debtor is very often a guarantor of a debt owed by somebody else)
      * I.e. Bank lends money to C and refuses to lend any more money to C unless A becomes a guarantor of the debt so that A will be liable to pay in the event that C defaults. The bank will often take a SI in A’s property because C doesn’t have anything of value to give the bank if C defaults (bank would probably also take a security interest against C in the event that C later acquires property 🡪 the bank can over secure itself so there is a huge amount of potentially secured property at the bank’s disposal upon default)
  + If A has a security interest in collateral, then the security interest is a substitute for the payment of the obligation secured (a substitute for the debt that is owing and underlies the security interest)
    - Generally you cannot put yourself in a better position through the collateral than you would be through the initial obligation owing
    - Therefore, have to figure out how much is owing because the SI secures the repayment of the obligation secured – it is a substitute for getting the payment of the debt only (lawyers don’t figure out how much is owed – hire an accountant!)
    - If there is a debt owing and a SI is owing the SP has a property interest but how much that property interest is going to be worth depends on 2 things:
      * 1) what others can do to undermine your interest (we will deal with this later)
      * 2) how much is owed to the SP by the debtor 🡪 in most cases, unless you foreclose on the collateral (rare), you are going to take the collateral, sell it off and pay yourself from that sale the amount that is owing (can only keep the amount you are owed from the underlying debt)
        + this is problematic because the amount owing does not stay the same (money is borrowed, paid back and interest is accruing so the amount owing changes from day to day)
        + when giving legal advise under the PPSA is that you can only give advise as at a particular moment in time as that amount owing can change drastically over time (thus the amount you can get out of the collateral changes over time) 🡪 have to determine, when you go to use the collateral, is how much is owed
        + very difficult to quantify what exactly is the obligation secured
        + Example: if A owes B $100 today and A gives B a security interest in all present and after-acquired property and A has an attached interest in:

If B today has x, y, z

X is worth $10

Y is worth $1

Z is worth $10,000

A has an attached interest in each of x, y, z individually 🡪 it is irrelevant how much the collateral is worth, what matters is how much it secures

If B tomorrow pays back $10, A has a SI of $90 in each of x, y, z at that point in time

The values owing and the values of the collateral change over time (i.e. x could be worth $900 by the time the SI is enforced/collected)

If there is a default, A will likely want to take z, A can foreclose on z and get something worth $10,000 outright for $90 but the debtor and various other parties can object to a foreclosure so that is unlikely.

* Debtor wants to borrow $100 from SP1 and SP wants collateral but doesn’t have any assets except X which is worth $1,000,000.
  + SP0 has already lent $1000 to SP0 and they have a security interest in X
  + Have to explain to SP1 that assuming SP0 perfected their security interest, they are going to have a security interest in X that prevails over SP1’s interest 🡪 will then want to figure out the obligation secured by the other parties that have an interest in the same property as you do
  + In this case, this right now isn’t really problematic because if SP0 is only
  + But, this is complicated by tacking 🡪 once SP0 gets the status of SP, that priority covers SP0 for any amounts lent to the debtor
  + SP0 is owed not only the $1000 and any interest accrued but also any further amounts lent 🡪 i.e. if SP0 later lends $2M to the debtor, that $2M is added to the initial $1000 so then there will not be enough left over from X for SP1 to claim collateral.
    - This is why advice can only be given at a given point in time as it can change drastically over time.

**Amount of Obligation: How much is secured?**

* SI is created to ensure the performance of an underlying obligation and it can generally only be used to satisfy that obligation (it is important to know the extent of that obligation)
* Amount can change day to day – thus the extent to which a SI can be used to satisfy the underlying obligation in the event of default can change from day to day
* SP getting interest in collateral because D owes obligation
  + BUT the SP/creditor will not get more out of the SI/collateral than you will out of the initial obligation
* Priorities
  + If collateral is worth quite a bit and others are owed less, less worry
  + BUT the principle of tacking can alter this – tack on more monies to existing obligation in your priority position
  + S. 35(5): subject to subsection 6, the priority that a SI has under subsection 1 applies to ALL advances, including future advances
    - The priority a SI has applied to **all advances**
    - BUT debtor has to agree to it
    - Advance and future advance are defined terms

**Future Advances and Tacking**

* PPSA allows the parties to agree that a SI given today can cover further advances made by the creditor to the debtor at a future date (this is because the SI will often secure an indebtedness that changes over time – as in a line of credit)
* PPSA says that such an obligation to make future advances is not binding if the SP has knowledge of the collateral being seized, attached, charged or make subject to equitable execution [s.42]
  + The parties can specifically contract out of this protection for SPs
* This allows for **later indebtedness** to be tacked onto a **senior priority**
  + Whether advances are tacked on or not is subject to the agreement between the SP and the D
* The ability to tack on an advance made under another SA will most commonly be permitted when it is the residual priority rule that is used to resolve the competition, the date of filing the first financing statement (or the date of possession) determining the priority for all advances of the two competing secured parties [ss.35(1) & 5]
  + There is no reason why a single financing statement cannot cover more than one security agreement so long as the D and SP are the same and the collateral in the SAs is accurately covered by the financing statement
* However, most creditors will tack on by lending more monies under the existing SA
* If a junior creditor takes assignment of the interest of a senior creditor, the junior can probably not use the senior position with respect to obligations owed to the assignee before the assignment
* Limits on ability to tack on
  + Example: X = $1300
    - SP1 = $1000
    - SP2 = $500
    - SP3 = $600
    - SP1 = lends additional $700
    - SP1 would have priority over entire amount, even if additional money lent after
* Tacking principle has limits
  + If SP1 took assignment of SP3’s interest, this cannot be tacked onto his priority position
    - Cannot by taking an assignment tack on

*Canamsucco Road House Food Co v. Lngas Ltd*

Can a secured party tack on indebtedness obtained through an assignment of a SI?

* Facts are fucked…
* It would be inequitable to allow a third charge to take precedence over a second charge by obtaining an assignment of the first charge

Note: each item of collateral under a given secured transaction will secure the obligation owed, whatever the value of the collateral (ie. something worth 50 dollars will secure the repayment of an obligation for 100 dollars, even though it would not be adequate on its own to afford full repayment to the SP

**Acceleration Clauses**

* SI in property can only be used to satisfy an indebtedness that is actually in default
* SA commonly provides that upon default, all amounts owing become immediately due and payable
* **S.16**: an acceleration clause should be construed to mean that a SP has the right to accelerate payment or performance only of he has good reason to believe that the prospect of payment or performance is impaired or that the collateral is in jeopardy
* \*have to establish default in order to collect payment
* The moment there is a default on any amount the entire amount becomes due (can provide for this in agreement)
  + Acceleration clause – normally the amount actually defaulted on would be due (ie if default on a 200/mth payment, the 200 would be due immediately but not the entire obligation – if you have reason to believe they will continue to default, can use acceleration clause to collect entire obligation)
  + Equity – cannot use acceleration clauses in certain contexts
    - S.16

**Special Rules: Leases**

* Special rule for determining the amount secured under a lease that secures payment or performance of an obligation
* Here, the term obligation secured is broad enough to cover future payments that will be done under the K, including an option clause (includes amount to obtain ownership)

**The Form of the Agreement**

* **S.9**: a SA is effective according to its terms
  + Freedom of K
  + Different from old legislation
* Left up to the parties and contract law (called the security agreement, but PPSA is concerned with SUBSTANCE not FORM)
  + One modification: past consideration is accepted as valid consideration in the context of attachment (see below)
  + The SA need not be in any particular form if it is to affect only the D and C
* But what about our good friend privity?
* If you want your SA to be recognized by third parties, the PPSA requires that the SP do one of two further steps:
  + SP have possession of the collateral (if the collateral is tangible that is not a certified security)
  + Certain writing requirements be met (s. 10)
* Even if the SP has possession, should still follow the writing requirements – cannot be predicted that you will remain in possession
* If requirements not met, the SI can essentially be ignored
* Example:
  + SP promised to lend $ to D and D promises to give a SI in property
  + All they have is a right under a K
    - Only get interest under K if K is performed (in order for property interest to be given)
      * K gives obligation
  + If obligation performed so that D gives SP promised interest, SP has against the D whatever interest the D promised (conditional on default)
    - Even if D doesn’t have as much promised, he still owes
    - For SP to assert interest against D, all that is needed is K and D has performed K
    - However, **against rest of world with interest** this K doesn’t affect their interest in property
    - Must consider how you can give interest impacts against claims of other parties
* If the SP want the SA (its security interest in property) to have any impact on third parties, it must meet the formal requirements set out in s.10
  + These demand a written SA between the SP and D in most cases if the SP is not to have possession of the property in which the SP is to have an interest and that constitutes security (the “collateral”).
* SA: normally sets out the amount owing by the D to the SP and how that amount will be repaid, a description of the collateral, the obligations of the parties in terms of the treatment of the collateral, the events that constitute a default by the debtor and what the SP is entitled to do in event of such a default
* Great care must be taken to comply with the rules on describing the property
* The SP can get an interest in ALL the property of the debtor – All PAAP [all present and after acquired property]

**Section 10: Writing Requirements**

* **S.10**: writing requirements in certain contexts
  + **If you don’t abide by s.10 requirements🡪third parties won’t recognize your SI**
  + Depends on the type of collateral (nature of property in which you have an interest)
  + Collateral can change nature later on (might not need writing requirement initially, but may after)
    - For all situations, parties will try to satisfy 10(1)(d) 🡪 most onerous
  + Has nothing to do with making SI enforceable between parties
  + BUT is used to make SI enforceable **against other parties**
* S.10(1) subject to subsection (2) and 12.1, a SI is only enforceable against a third party of:
  + (a): enforceable only if collateral is not in form of investment property and is in possession of the SP
    - Rarely relied on – cannot possess intangible property
  + (d): requirements of SA
    - D has to sign agreement (WRITTEN FORM)
      * 4 descriptions of collateral:
        + 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
        + A description of collateral that is a security entitlement, securities account or futures account if it describes the collateral by those terms or as investment property or if it describes the underlying financial asset or futures contract
        + A statement that a SI is taken in all of the debtors present and after acquired personal property or

All PAAP: means security interest in EVERYTHING

* + - * + A statement that a SI is taken in all of the debtors present and after acquired personal property except

Specified items or kinds of personal property

One or more of the following: goods, investment property, instruments, documents of title, chattel paper, intangibles, money, crops or licenses

* + (3) subject to subsection (6), a description is inadequate for the purposes of subsection (1) (b) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral
    - Can be described as: consumer goods or equipment…but must be further particularized
  + (4) a description of collateral as inventory is adequate for the purposes of subsection (1)(b) only while it is held by the D as inventory
  + (5) a SI in proceeds is enforceable against a third 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
* Recommended: describe everything as All PAAP (covers everything)
  + Debtors may not give you an All PAAP because this gives the appearance that all your property is encumbered
  + If you fail to exclude property, this is a bonus (you will get a SI where you didn’t think you would)
* **S. 10(1):** basic requirement
* **S.10(2):** not deemed to have taken possession if in apparent possession of the debtor
  + Deemed: cannot get possession *symbolically* or *constructively* (must actually have for provisions to apply)
* **S.10(4):** collateral described as inventory adequate only while held by the debtor as inventory
  + Example:
    - Take SI in all inventory and truck in lot 🡪OK
    - Take truck and convert into delivery van
    - Lost SI (still in possession BUT no longer inventory
  + May cease to be inventory or be in possession of someone else
    - Now fail to meet the writing requirement
* S. 10(5): All PAAP trucks…
  + If truck is sold, SI goes to new person (interest is not extinguished)
  + If truck is sold for $10,000, the statute automatically transfers interest to proceeds and gets an interest in the truck as well.
  + Do not need to describe proceeds (only original collateral)
  + Security interest continues in collateral and extends to proceeds (these can also be seen as after acquired property)
* Has been held absence of a signature means no attachment occurs and agreements are not retroactively effective

*Riepe v. Stingray Holdings Ltd*

* Facts: lease of vehicle with option attached. Lease was in writing and option was exercised. Lessor retained a SI in the vehicle until paid back. Didn’t reduce this to writing – unsure why
* Knowledge is not relevant – MUST FOLLOW FORM
* Here, since the prior SA was only verbal, it was not enforceable against a third party, and the D was an unsecured creditor of the P.

*674921 BC Ltd v. New Solutions Financial Corp*

* How precise need be the wording in a SA?
* Collateral described as “assets”
  + No SI🡪no writing requirement because “assets” not allowed
  + Failed to describe the collateral by item or kind
* Valid against debtor but not third party

**Transactions Creating “True” Security Interests**

* As long as the transaction is entered into to create an interest that secures payment or performance of an obligation, it is a secured transaction (creates “true” SIs)

*Yeung (Guardian ad litem of) v. Au*

* Q: in the absence of rules in the PPSA, what rules govern the form and nature of transactions?
* Illustrates old from new law
  + Under MVA, owner is liable for accidents involving vehicle
  + Old act (Sale of Goods): if you had a lease with an option to purchase🡪that transaction deemed to be a conditional sale from the outset, even if option not exercised. Meant they were the owner (lessor wasn’t owner and didn’t have liability)
  + TJ found that the repealed act’s definition of “conditional sale” continues to inform the meaning of the provision at issue in the MVA.
  + CA overturns this decision – cannot use repealed definition; exemption in MVA only applies when vehicle has been sold by a true conditional sale agreement
    - In that circumstance the seller is not the owner
    - But in very other circumstance (ie true lease) the driver/lessee is not an owner and the owner is vicariously liable for their acts
* Now: PPSA
  + Does not contain definition of conditional sale
  + Someone sues lessor
  + Extent to which under new act leases deemed to be sales
    - No deeming
    - Lessee is just a lessee, NOT an owner
      * Lessor is responsible!

\*\*preserves common law🡪no deeming!

**Straightforward Security Agreement**

* Secured party and debtor enter into an agreement
  + SP gets an SI from the debtor as collateral
  + Debtor owes an obligation
  + Has to be in writing (for practical purposes)
  + Must describe collateral
* Should be in the K:
  + Description of the obligation secure (OS)
  + Amount secured (includes acceleration clause and tacking)
  + Default – what constitutes a default of the OS
    - Meeting of a pre-condition to result to collateral
      * Ie. failing to pay taxes, change in business, failure to pay all creditors
    - Parties can decide anything is a default in their K
  + Collateral
  + Remedies: what can you do about a default
    - Appointing a receiver
* Basic agreement
  + K the parties call a “security agreement”
  + Parties called SP and D
  + Use terms “collateral” and “obligation secure”
    - Want them to use terms of PPSA
* S.2(1): doesn’t matter who owns the collateral
  + Statute doesn’t care about form – irrelevant!
  + All about substance!
* Traditional forms
  + 2(b): usually constitutes a SA (in statute / / is not always covered by the PPSA)
  + Before PPSA, some of the transactions in 2(b) were covered by statute (have all been repealed to the extent they covered these transactions) or CL (remains in existence)
  + Forms:
    - Chattel mortgage and conditional sale – had statutes (since repealed – tended to change the common law – now have reverted to CL)
  + Statutes: tended to deem transactions to be other transactions (eliminated under PPSA – substance)
  + Now can be BOTH chattel mortgage and security agreement
    - PPSA and CL would both apply

**Typical Forms of SA**

* If the collateral is All PAAP, this is normally called a GSA (general security agreement)
* Chattel mortgage and conditional sale (traditional forms)
* Chattel mortgage:
  + Basic model for SA
  + Someone owns collateral and is also a borrower
  + Mortgager (mortgage whatever they own - debtor)
  + To the mortgagee (who is the lender)
  + Mortgagee gets property interest (conditional)
  + On default, mortgagee forecloses on goods (converting conditional into absolute interest)
  + The owner of property gives an interest in property by way of a mortgage to the mortgagee to ensure repayment
  + Used where the D already has an interest in the collateral in question and uses that existing interest to give a SI to the creditor (mortgagee)
  + PPSA says – that is simply a SA!
    - Meets definition in s.2
* Conditional sale:
  + Title is conditional on payment being met
  + The retention of title is seen as the creation of an interest in property to secure payment or performance of an obligation
  + One person is owner and the other person doesn’t have enough money to pay right now
  + Conditional sale because buyer doesn’t get title until the payments are made
  + This is a SA
    - Buyer has obligation to pay
    - Seller wants to have claim to goods in case obligation is not satisfied (keeps title)
  + \*\*courts often compare transactions to conditional sale to see if SA

Conditional Sale:

Buyer gets title

(sold on credit)

Owner has title

(seller)

|  |  |  |
| --- | --- | --- |
|  | Chattel Mortgage | Conditional Sale |
| Owner | D | SP |
| Lender/Buyer | SP | D |
| Debtor | Has possession of C | Has possession of C |

\*\*either gets or keeps an interest in property

Other types: NOT ON EXAM

* Floating charge & pledge
* Pledge: common law origins
  + Pawn situation
  + Lender of $ who takes goods from borrower
  + Holds onto property until they are paid
  + SP possesses collateral (possessory SI)
* Floating charge: equitable origins
  + Do not use it!!
  + Charge is an equitable term (means security interest)
  + Above are FIXED charges (know subject matter of sale, which house)
  + Here, rather than taking an interest in property that exists now, gets a charge over a category of property
  + What the SP gets is a nominal charge over a category of property but not over any specific contents of that category
  + Floating charges don’t need to be revealed to seller
  + Charge crystallizes on default
    - Sinks onto contents of category at that moment and becomes a FIXED charge
* PPSA is not limited to traditional forms

Floating Charge:

D

lends $ charge category

[inventory or accounts – contents change over time]

SP

**Transactions that create a Security Interest**

* Definition of security interest:
  + S.1 (pg 10):
    - (a) true security interests – interest in which is to secure payment of an obligation
    - (b) list of specific situations which create a SI (deemed SI)
      * Not what you would normally think of as a SI
      * These scenarios can also be true security interests (involving those in (a))
    - Sometimes transactions will fit within (a) and (b)
      * Important distinction\*\*
      * Consignment, lease and trust – when do these meet def’n of SI in (a)??

**Consignment**

* True consignment = NO SECURITY INTEREST!!
  + A basic consignment is a bailment transaction usually involving an agency relationship between the bailor/consignor and bailee/consignee.
  + Consignor preserves title to the goods BUT this is not security to ensure the consignee performs their primary obligation, namely to make a payment
  + There is never the intention the consignee will get title (title will only transfer once a buyer is found)
  + If such a buyer is not found🡪goods returned to the consignor
* If consignment is really a disguised conditional sale – fall within PPSA
  + Security consignments
    - Typically here, the consignee is more like a buyer under a CS
    - Usually would be responsible for insuring goods and buying them if not sold
    - Goods would only be returned to the consignor in breach of K

Consignor owner(seller & principle)

[wants to sell]

Consignee Agent

[possession to agent who locates buyer]

Buyer

* Possession of goods you do not own
* BUT not to secure payment of obligation
* No intention for agent to get interest in goods

Lease

Lessor owner

[retain ownership]

Lessee has possession

* True lease = NOT A SECURITY INTEREST UNDER (a)
  + Lessor retains title and gives possession to a lessee, but this is not analogous to a CS because the reason why the lessor retains title is because they want the goods back at the end of the K
  + Option to purchase: if a true lease, it cannot be said for sure that the lessee will or will not exercise the option until time comes for such exercise
  + FMV can be a significant but not determinative factor
* Security Lease
  + No true intention goods will be returned
* Categorizing a Security Lease
  + Newcourt Factors
  + Other (indicia of SL):
    - Whether the lessee is responsible for taxes and license fees
    - Whether goods involved were acquired by the lessor specifically for this lease
  + Remedies may be indicative of SL (not determinative)
    - Whether payment can be accelerated on default
    - Whether there is a provision for liquidated damages
    - Whether there is a default provision in the lease inordinately favourable to the lessor
  + Lease will be a true lease if:
    - it can be terminated at any time by the lessee or if it has NO option to purchase attached
    - cannot be terminated early but there is value in the leased goods that will be returned to the lessee and there is no option to purchase
    - is an option to purchase but for a sum that is FMV at the time the option is exercised or a genuine pre-estimate of the value
    - lessee required to maintain or operate the goods in a way that preserves the lessors equity interest
  + Options:
    - Almost certainly exercised = SL
    - Less than FMV = SL
    - However, price can be less than market and still be a TL (exercised?)

Trust

Trustee (settlor)

[has interest in property in possession]

Beneficiary

[has interest in property not in possession]

* Trust = NOT A SECURITY INTEREST UNDER (a)
* Not the reason for the transaction – to ensure obligation is performed by trustee
* True Trust
  + The beneficiary does not have an interest in the trust property held by the trustee as a method to ensure that the trustee performs some obligation
  + Normally, the interest of the beneficiary is the main point of the trust not a secondary, back-up device to ensure that something else happens
* Security Trust
  + Usually to ensure that certain monies received by the trustee will be held for the benefit of the beneficiary
  + This will only arise where a C/D relationship overlapping a B/T relationship
  + D is T and SP is B
  + Usually where the D receives money proceeds from collateral the SP has an interest in and the money goes into a mixed account
  + Where the parties do not enter into a trans with the purpose of one party having the other’s money or property as security, there is no security interest created – will be incidental to the true substance of the trans

**Consignment, Lease and Trust**

* Purposes behind these is NOT to ensure payment of obligations
* But these could be seen as secure transactions
  + Statute deems many of these to be secure transactions under (b)
* Even if you know these are deemed, you still need to know whether it falls under (a) or (b), because if it falls under (b) only half the statute applies to the transaction
  + If under (a) 🡪all applies

Consignment

* Court looks to see if consignment functions like a conditional sale
  + If yes, then SA

CONSIGNMENT CONDITIONAL SALE

Consignor owner(seller & principle) SP Seller - title

[wants to sell but **retains title**]

Consignee Agent D Buyer - possession

[**possession** to agent who locates buyer]

Buyer

*Re Toyerama*

* Facts: Regal Toys arranged with Toyerama for them to sell a number of surplus items after Christmas. The agreement included that Toyerama would be invoiced for all toys shipped out of its central warehouse to its locations. Toyerama was broke and couldn’t afford to pay for the toys until they were actually sold. There was no obligation to pay for toys left in the warehouse and no express right in Toyerama to return the toys to Regal
* Issue: consignment intended as security?
* Analysis: the language of the agreement is consistent with a consignment arrangement (except 3(b)). Absence of an agency relationship does not necessarily mean no consignment – agency is not essential where there is fixed return to the supplier, as here
* Determining factor: absence of any obligation on the part of Toyerama to pay for unsold items not delivered to its retail outlets
* No intended as security agreement!
  + No SI created in goods that never left the warehouse and their availability for removal did not provide security for the payment for the toys that had been sold/delivered to retail outlets
  + Goods that left the warehouse were sold to Toyerama and were the property of the bankrupt, even if returned to warehouse
* Regal gets the toys back that were never delivered to retail outlets or not returns from customers

**Consignment Ct’d…**

* Goods put in possession of consignee
* Probably has other SA’s (perfected SI’s)
* What if consignee goes bankrupt?
  + Trustee in bankruptcy can only deal with property that the bankrupt had some right/use of
  + Must be a SI for the trustee in bankruptcy to use (if no SI – person can have their goods back [they cannot be used to settle defaults])
* Old law: consignor could retrieve property (taken out of bankruptcy)
* If not a SP🡪this common law position continues to apply (property cannot be affected)
* If a SP🡪this is a SI
  + In order to preserve position, it better have a perfected SI (if not, then the trustee in bankruptcy can ignore your interest entirely)
* Court decides whether transaction was in essence a sale
* If consignee is in a position tantamount to buyer in CS
* Under a usual consignment the consignee is NOT usually responsible for taxes, etc (buyer in CS is)
* If in the K, the consignee must purchase goods if they are not sold🡪sale
* If the consignee is responsible for selling or buying it itself🡪sale
  + This is normally determinative of CS and thus SI
* Largely analogizing to see if it fits into CS
* In most cases, you still have to register your interest (except ON)

**Lease**

* Also can look like a conditional sale
* While a basic lease is a bailment transaction (lessor/lessee are not SP/D) in other cases, especially when there is an option to purchase attached to the lease, this transaction is like a disguised CS and therefore involves the creation of a SI

Lessor owner lease + option to purchase

[retain ownership/title and want possession back] (if true option🡪at FMV)

Ie. don’t know if it will be

Lessee has possession exercised (but if you can

predict – not really an option🡪CS)

* Indications of CS
  + If lessee is expected to own or be responsible for maintenance during entire useful life or saddled with obligations to 3rd parties
* If option for unreal price (not FMV) 🡪 sham!
  + Whole transaction thought of as CS
* Lease for a mandatory period of time with a true option exercised afterwards
  + If the goods required to be leased for the entire valuable life🡪sham (CS)
  + This arises quite a bit
* If lessee in financial difficulties and there is another SP – in a true lease (not SA), under CL, lessor not affected 🡪take property back
  + But if lease is SA, lessor has SI, it better have perfected it or they lose out entirely (are in second place to other perfected parties)

*Daimler Chrysler Services Canada Inc v. Cameron*

* Issue: whether lease was a true lease or a security lease?
* Reason: if lease is a SA (security lease), then what the lessor is allowed to do if lessee breaks lease is governed by part 5 of the PPSA (if true lease, Part 5 would not apply – not a SI)
  + Very restrictive on what a SP could do
* Characteristics that would be indicative of a SI (most important 🡪least):
  + Whether there was an option to purchase for a nominal [less than FMV] sum
  + Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment
  + Whether the nature of the lessor’s business was to act as a financing agency
  + Whether the lessee paid a sales tax incident to the acquisition of the equipment
  + Whether the lessee paid all other taxes incident ot ownership of the equipment
  + Whether the lessee was responsible for comprehensive insurance on the equipment
  + Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense
  + Whether the agreement place the entire risk of loss upon the lessee
  + Whether the agreement included a clause permitting te lessor to accelerate payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee
  + Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease
  + Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment
  + Where there was a default provision in the lease inordinately favourable to the lessor
  + Whether there was a provision in the lease for liquidated damages
  + Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor
  + Whether the aggregate rentals approximate the value or purchase price of the equipment
* Another relevant factor is term of the lease
  + Short period: true lease (since the leased property will have a significant residual useful life upon expiration of the lease and can be leased again or sold by the lessor
* What parties have put into agreement about procedures on default are an important factor
  + Here, provisions looked like a lot like what provisions a CS includes
  + But this should not be determinative of whether it is a SA
    - Brucey disagrees with this point
* Held: true lease!

*Newcourt Financial Ltd (cob Financialinx) v. Frizzell*

* Consumer content (lease of a vehicle – lessee failed to make payments owing to the lessor, lessor seeks repossession)
* Issue: is this a true lease (common law applies) or a security lease (PPSA Part 5 applies)?
* Breach under lease
  + Lease allowed lessor to repossess, get immediate payment and terminate relationship
    - If true lease, this is ok
    - BUT here lessee argues secured lease
    - If secured lease🡪PPSA
* In BC, if you have any secured transactions whereby debtor is a consumer (collateral = consumer goods), the debtor can reinstate the SA by repaying whatever amount triggered the default (easy reinstatement)
  + Lessee wants to reinstate
* So…does PPSA apply?
  + Illustration of different list of indicia (\*\*probably more useful than prior case)
    - Intent of the parties
    - Was a deposit, down payment or front-end payment required by the lease? If so, was that payment refundable and under what circumstances?
    - Ownership at the end of the agreement and purchase options. For example if the vehicle automatically passes to the lessee at the end of the term or if that option to purchase a the end of the term specifies a price lower than market value, that could support a finding that the lease was in essence a SA
    - Indicia of ownership🡪if the lessee bears the burden of repairing and insuring the vehicle or is to bear any loss or gain from unusual depreciation or appreciation in the value, that could support the characterization of the lease as a SA
* Even though called true lease🡪doesn’t matter what it is called, rather the essence of the transaction
* Because the P wants characterization as a true lease – the onus is on them to show that the price to be paid at the end of the lease (to exercise the option) is equal to or higher than the expected FMV at that time (under FMV = SA)
* Pursuant to the lease, the D is responsible for all costs associated with repair, maintenance and insurance
  + Could be seen to suggest a SL but also as an obligation to preserve the Ps property during the lease term (not determinative)
* Here: true lease!
* \*\*characterization is CRUCIAL

**Trust**

* Not intended as a SA
* Many secured transaction used to be set up as trusts to allow for the equitable rules of tracing – required fiduciary relationship (no longer necessary under the PPSA)

Trustee [D]

goods – sold to third party (money goes to trustee)

Beneficiary [SP] SI in D’s goods (still has an interest [but is difficult to locate and is

practically speaking, not worth pursuing])

* When can a trust be a secured transaction?
* Different from consignment and lease – often trying to avoid PPSA
* Here, people deliberately set their secured transaction up as a trust
  + Why?
    - Money = proceeds (from 3rd party)
    - Interest is extended to proceeds
    - People tend not to leave money laying around – put into an account
    - Money from various sources comes into account
    - Money also comes out to purchase things (wine)
    - SP wants this wine
      * How do you decide whether the $ coming out affects and interest?
        + Mixed monies – where did it come from in the first place?
    - Equitable rules of tracing (to see where money is coming from)
      * Need to have fiduciary relationship owed between person claiming $ and person who has an account
        + Easiest way to do this – set up a trust!!
* In BC, s. 1(5): proceeds are traceable whether or not there is a fiduciary relationship (no longer necessary to set up a trust)

*Skybridge Holidays Inc (Trustee of) v. British Columbia (Registrar of Travel Services)*

*\*\*Brucey believes this to be wrong\*\**

* Travel agency pays money up front for holidays
* Legislation requires $ it receives go into trusts
  + Money held in trust by agency for benefit of consumers
* Travel agency goes bankrupt
  + Trustee in bankruptcy wants to go after money proceedings but travellers want their money
* Issue: so was this trust a SA?
  + Travellers are SP?
    - Then should have registered and lose out because they didn’t
  + Definition of SI is interest in property created to secure payment of an interest
* Trustee argues:
  + Consumers don’t want money, they want travel
    - Money is only there because of back up
* Court says: not a SA!
  + Parties didn’t think of themselves as creditors/debtors
  + Get money back!
* Brucey: this seems off as it is supposed to be irrelevant what the parties thought
* PPSA applied to consensual transactions
  + Travel agency required to set up trusts and was not consensual
* Can have trusts not deliberately set up for SI’s, but can be thought of this way
  + Beneficiary = SP

Exclusions:

* Certain transactions are taken out of the PPSA even if deliberately set up
  + s. 4
    - s.4(a): a security interest not created consensually but put in place by the courts/leg
    - s.4(b): constitutional reasons (federal paramountcy)
      * Bank Act: parallel system of SI’s
    - s.4(f) & (g): land – different set of rules govern

*JE Brooks & Associates Ltd v. Kingsclear Indian Band*

* Security interest given by an Indian Band on a school bus owned by the band
* Indian Act: a non-Indian cannot attach a SI on property situated on a reserve (cannot be collateral)
* Seized bus once it left reserve – is this allowed?
* Federally regulated property outside PPSA – here personal property given to the band by “the Queen” is deemed always to be on the reserve and as such cannot be seized when off the reserve.

Review…

* Leases🡪if true, PPSA does not apply; if “security” PPSA does apply
* Consignments🡪if true, PPSA does not apply; if “security” PPSA does apply
* Impossible to have a registry on personal property, but sometimes registration will be required (SI) by deeming them (b) as SI
* Claiming an interest in personal property you do not possess can be misleading to other people
* In certain cases:
  + Not in possession
  + Or in type of property in which we think it’s important to register

**Transactions Deemed to Create Security Interests**

* Three types of situations are deemed to involved SIs (do not actually secure payment or performance of an obligation) and are thus governed by the PPSA
  + The interest of a transferee arising from the transfer of an account or a transfer of chattel paper
  + A person who delivers goods to another person under a commercial consignment
  + A lessor under a lease for a term of more than one year, whether or not the interest secures payment or performance of an obligation
* **Definitions** are important:
  + Lease for a term of more than one year
    - Does not include: a lease involving a lessor who is not regularly engaged in leasing goods
    - Includes: renewal terms, whether or not exercised, if total terms exceed one year and if leased goods are kept after a year, even though lease technically expired
  + Commercial consignment
    - Both consignee and consignor must deal in goods of that description in the ordinary course of business
    - Consignor reserves an interest in goods once delivered
    - Does not include: an agreement under which goods are delivered to a consignee if it is generally known to the creditors of the consignee that the consignee is in the business of selling or leasing goods for others
* Parties will have to register – this gives potential creditors a way to check to see whether the property is in the hands of the person who owns it
* Deemed – part 5 does not apply!

**Interests of a Lessor [b(iii)]**

* What constitutes a lease for more than one year?
  + Defined term in PPSA (s.1)
    - Means = exhaustive
    - Includes = inclusive (may involve transactions not listed here)
  + S.1(3)
  + (b) remains in possession of goods even though lease expires
    - Not a lease in PPSA form from the beginning
    - S.1(3): not a secured transaction from beginning but rather once you reach one year point
  + (c): renewable available and if renewed would be beyond a year
    - Lease could be renewed but doesn’t matter if actually is
    - Lease from beginning!
* The interest of a lessor under a lease for a term of more than one year is a PMSI
* Lessee deemed to be a debtor

Leases:

* Lease for term of more than 1yr could be either true (deemed [s. 3 &55]) or security
  + If security over a year – part 5 applies
  + If true over a year – deemed and part 5 does not apply
* Definition says you have a SI and the statute applies
* S.3 says: refers you to 55
* S.55(2)(a) – this part of the statute doesn’t apply if a transaction is in s.3
* S.3 doesn’t secure payment of an obligation
* In practice: lessor – lessee
  + They need to know: creation of relationship (contractual terms) including remedies
  + Want to know how claim will be protected in relation to ROW
  + S.1(1)[security interest](a)🡪sp – secured lease – d
  + S.1(1)[security interest](b) + s.3🡪true lease
    - S.55 does not apply🡪remedies
    - True lease doesn’t meet🡪no obligations under PPSA

*Newcourt Financial*

See above

**Commercial Consignment**

* True consignment may be deemed under s.1(1)[security interest](b) if a commercial consignment (defined term)
* Ordinary course of business (factual matter)
  + From both ends
* Creditors will want to argue commercial consignment
  + Have to show its not generally known to people dealing with you that you consign things (if known – exclude under (a))
* Dealing in goods of that description:
  + Not clear whether it has to be a regular occurrence, whether a first-time dealing would suffice if more dealings are planned in the future, or how exact it must be
* Creditors knowledge:
  + What other potential creditors might be expected to know (who may or may not exist)! Not just the parties involved

*Furmanek v. Community Futures Development Corp of Howe Sound*

* Jewellery business – consignment of jewellery; SP’s want to act on default and want consigned jewellery included in their All PAAP so they can act against it
* Has SP’s who have been intimately involved in creation of business – know type of business
* Party leaves jewellery there on consignment (true)
* Before jewellery comes back🡪default
* SP seizes collateral (including Seca’s jewellery)
* Seca argues true consignment, meaning CL would apply
* SP argues commercial consignment
* Has to be shown creditors generally know their D is dealing with consigned goods
  + Here, they knew (commercial consignment!)
    - But court said this had not been established because it has to be generally known to category of creditors, not just these specific creditors
    - So, Seca had an unperfected SI which would follow SP
* Inventory Issue:
  + Important date: appointment of receiver – do not want to create a race to seize assets!

**Last Type of Deemed Transaction…(b)(i)**

* A transferee arising from the transfer of an **account** or a transfer of **chattel paper**
* Both defined terms
  + Account: debt owing that is not evidenced by chattel paper or an instrument (not written down basically)
    - Third party owes D (account)
    - 1. SP – D: si in “x”[goods]
    - 2. “x” sold by D to third party on credit
      * D owns debt
  + Debt/account derived from goods🡪meets def’n of proceeds; SI’s are extended to proceeds
  + Debt = account
  + Often have SI in a debt (usually because proceeds from something else or All PAAP)
  + Debts are very commonly traded
    - Very valuable commodities
    - Buying out debts
      * Buy ownership in tangible property transfers
      * Or intangible property – called an assignment (purchases)
      * Assignor (D)🡪assignee(4th party) = now 4th party owns
  + Because of intangible nature of accounts – never know for sure if someone else has had an assignment
  + Have to have a place to register transfer of accounts (or too much confusion)
  + Remedies are not in Part 5 for this because for policy reasons, they should all have the same remedies
  + Chattel Paper (defined in s.1)
    - Security agreement for specified goods
    - Extremely common form of property dealt with
    - SP –D [si in x – goods]
    - X sold to 3rd party on credit – D gets SI in X from 3rd party
    - SP has an interest in X and proceeds (proceeds are type of SA)
    - All expected to register their interest
    - \*\*tend to be manufacturing or care type dealies
* Interest in an account comes into existence as soon as account created
* If transfer is absolute (not a true SI), remedies to not apply

**Review**

* Any obligation is a debt
* If you have a lease >1yr or commercial consignment🡪not a true SI, but DEEMED
  + Part 5 of the statute does not apply (remedies)
* Other deemed transaction🡪transfer of account or chattel paper
  + Part 5 does not apply
  + But many of the rules regarding accounts are not in Part 5 (including rules relating to remedies)
* Account is debt (sold by debtor [person who owes])

ATTACHMENT

**Introduction**

* SP –K—D; D—SI—SP [gives SI in X]
* SP owns an obligation (debt)
* K creates promise to give interest BUT doesn’t create actual interest
* So…when does SI get created in X?
  + K anticipates but doesn’t necessarily create interest
  + When K does create it is said to attach
* Attachment: moment when SP gets interest in collateral
  + SP could give another party an interest in the debt or sell it (assignment)
* Need to know WHEN attachment occurs
  + When interest attaches in X
    - Promise in K [may be all inv/all PAAP]
  + Need to establish date of attachment for each conceivable piece of property (cannot have one date for all pieces [X,Y,Z])

**Attachment – General**

* The very creation of a SI
* Two step process to attain secured position:
  + Attachment – s.12
    - SI of the creditor “attaching” to the property involved
    - Come about pursuant to agreement between creditor and debtor
    - SP has no rights to particular property unless the SP has an interest that has attached – property that is subject to an attached SI is called “collateral”
  + Perfection

**Section 12:**

* Three general requirements for attachment:
  + (a) value is given
    - Defined term in section 1 – roughly equivalent to consideration
    - Consideration: promise to do something (isn’t actually doing of promise, BUT promise itself)
  + (b) debtor has rights in the person property that will become the collateral
  + (c) satisfaction of the writing requirement in s.10 (except for the purpose of enforcing rights only as between the SP and D or if the SP takes possession of the collateral, in which case there are no writing requirements
    - Need to decide who needs to know about interest: SP or ROW?
* Cannot have SI in X unless it is attached
* Who wants to know – people to contract itself [must come in terms of 12(a)&(b) and the rest of the world
* SP has to give value (defined term – ANY consideration; past consideration ok in PPSA) in exchange and debtor must have some rights = attached
* Have to meet (a), (b), **and** (c)
* Destroys how a floating charge operates
* \*\*these requirements must be met for the SI to attach in the first place – they need not continue for the state of attachment to continue in the original collateral (as long as at one point, all three were met)
* (b) is tough and is not defined
  + What is/are sufficient rights? What quantum of rights must the debtor have?
  + Under the Bank Act – ownership
    - But this is not the case in the PPSA (s.2 – doesn’t matter who has title [sufficient but not necessary])
  + Brucey thinks that any property interest is a right (common law)…this should be sufficient
    - Ownership, lease interest, security interest itself
    - License is most problematic “interest”
      * Some are interests and some aren’t

**What and When Attached?**

* Moment (a) & (b) are satisfied
  + Security interest between 2 parties
* As for the rest of the world
  + (c) must be satisfied (writing requirement)
* Requirements can be met in any order – attaches at the moment the final requirement is met
* Must assess attachment for each property
  + Why?
    - Debtor gets rights in various things at different times
    - Item-by-item basis!!
* s.12(1): all this means is that you have a property interest, not what you can do with it against other SP’s (doesn’t determine ranking/priority)
* Basic requirement for attachment: SA between parties contemplates that the SP will get an interest in the claimed collateral
* Parties may agree to postpone attachment
* Rest of 12…deeming
  + Don’t need to know anything after 12(1)
  + 4 & 5 – intangible investment property

**Value**

* Consideration: SP must give value in exchange for the interest
  + Can be antecedent debt or liability, meaning that the fact that the SP has lent money to the D in the past will be value to allow for attachment of a SI under a later deal
  + Consideration normally involved: promise to lend money or extend credit even if it turns out later, the promise is not honoured (consideration can also be forbearance)
  + New value is relevant in some contexts – s.31(6)(a) chattel paper and s.34(5)

**What Constitutes Value?**

*Toronto-Dominion Bank v. Nova Entertainment Inc*

* 2 secured parties fighting over the same collateral
* How to prevail?
  + Show they don’t have SI
* Problem with attachment
  + SP1 didn’t give any more $ (no new value)
* Court: value can be past consideration and is sufficient value (value includes an antecedent debt or liability)

**Rights**

* Q: what rights are sufficient to meet this requirement and when such rights can be said to exist?
* Not defined in the PPSA:
  + So long as the D has some degree of control or authority over collateral placed in possession, it has rights in the collateral
* No requirement for sufficient rights – however, a SP will not get much by the way of rights in collateral if the D has little to give
  + Basic underlying CL principle that regulates what a D can give an SP applies – nemo dat
  + D cannot give the SP (or anyone else) more than they have to give
* Generally the D does not need to own the collateral – title is not necessary in order to acquire rights
  + Legal possession is enough to be able to give rights
* SA can limit attachment to situations which involve sufficient rights

**How Broad is the Notion of Rights?**

*Kinestics Technology International Corporation (KTI) v. The Fourth National Bank of Tulsa*

* When does the D have rights?
* Facts: OHT (manufacturer; gives SI in all PAAP to bank, who then filed a FS) is D; KTI needs machinery (already had many components so transferred possession of these to OHT)
  + Agreement between KTI and OHT:
    - Materials supplied in part by both
    - KTI agreed to make progress payments to OHT at various stages in the process
    - Title to goods delivered to OHT by KTI would remain in KTI
    - Title to goods acquired by OHT from other sources for use in the KTI K would pass to KTI upon the first payment made
* Banks perfected SI – OHT [debtor]< – KTI
* While OHT had goods, bank wants to seize All PAAP to pay itself back. OHT has possession of KTI goods
* KTI argues the bank is not entitled
  + 2 avenues:
    - First: bank does not have SI in goods because OHT has no rights in the property
      * Court says YES, they do have right in the property (bank has attachment)
        + Bailment situation – as long as goods in possession for a specific purpose = rights (pursuant to an agreement or K?)
        + For a SI to attach, a D must have some degree of control or authority over collateral placed in the D’s possession
    - KTI is in competition with the bank
    - Need to claim: my interest prevails over theirs
      * What kind of interest does KTI have?
        + It is ownership, but is it also a security interest?

YES: what KTI is doing is the same as the bank (except using goods instead of money = lender)

Retained interest in goods (title) to ensure they were returned (security)

* + - Both have SI’s – which prevails?
      * KTI did NOT register (unperfected)
      * Bank – perfected – WINS (presumptively)
    - But if you’re in competition with someone with a SI, it disappears (is gone)
      * When a debtor sells goods in the ordinary course of business – deemed to release all SI’s
        + **So Bank loses after all!**

**Is Title Necessary to have Rights?**

*Hailbeck v. No 40 Taurus Ventures Ltd*

* Can a debtor who does not own goods give a SI? YES
* Delivery of the appliances (collateral) is sufficient for rights in the collateral
* Rights may be derived from ownership OR possession
* Previous legislation required ownership – repealed
  + Why? Was very complicated to know when title/ownership passes

**What type of SI has attached?**

Classification of SI’s: Purchase Money Security Interest

* **PMSI:** if a SP’s interest is (at least in part) in collateral that his money or credit has allowed the debtor to get rights in, then the SI in that collateral is a PMSI
  + The holder of the PMSI does not need to be the only person who facilitated the D getting such rights but it must be possible to say that but for the SP the D would not have the rights it does to the property that is the collateral
* Deemed PMSI: interests of lessors in a lease for a term of more than one year and the consignor under a commercial consignment in the leased or consigned goods
* Most difficult issue with PMSI: determining that the SPs actions allow the D “to acquire rights in the collateral” (not always easy to say this requirement is met)
  + When are rights acquired? Substance of trans is important, not the form
  + If entitlement to collateral has been enhanced in some way by value supplied🡪PMSI
  + SK authority that when an earlier creditor (who holds a PMSI) is paid off using funding from a later lender, that later lender can obtain a PMSI if it was intended all along that its financing would be that used to acquire an interest in collateral
* Definition:
  + Actual (2):
    - Financier PMSI
      * SP has provided financing of some sort to allow the D to acquire rights in the collateral subject to the PMSI
      * PMSI to the extent that the value is applied to acquire the rights
    - Seller PMSI
      * SP is the person who sold collateral on credit to the debtor
      * PMSI to the extent that that the SI secured payment of all or part of its purchase price
    - \*conditional sale is usually a PMSI (not invariably) and a chattel mortgage will not (D already has rights)
  + Deemed PMSI
    - Lease over a year and commercial consignment – have facilitated the acquisition by their “D” of rights in the leased/consigned goods
* For how much?
  + Financier: SI is a PMSI only to the extent that it secures repayment of the amount that was used by the debtor to acquire those rights
  + Seller: SI is a PMSI to the extent that it secured payment of all or part of its purchase price
  + “purchase price and value” include credit charges or interest payable for the purchase or loan credit
  + See example on pg 182
* Have an SI that has attached – need to know if it is a **purchase money security interest (PMSI) – SP wants a PMSI**
  + In order to have a PMSI, in addition to basic requirements, there are extra conditions that need to be fulfilled
  + Defined term – only have to meet ONE of the requirements
  + (a) conditional sale
    - Day 1: A - $70 B - $2mil C - $1 D - $15
    - X – computer - $700 owed + $1000
    - Day 2: D acquires E ($100)
    - Day 3: D gifts B
    - Day 4: D repays $200
    - Day 5: D acquires F ($35)
    - Day 6: SP has SI in what? And are they PMSIs?
      * SI in all (all attached)
      * What is value (amount secured)? SI in each for $500
      * PMSI? Analyze each one and see if it fits definition
        + In X ($500)
        + But with added $1000? NO
        + Only PMSI for $500
      * SPO – All PAAP (registered)
      * But SPI would have priority for $500, the SPO and then SPO for rest
      * Seller or vendor PMSI
  + (b) lending money (lender = PMSI)
    - Only applies when acquiring X
    - “To the extent that” and “acquiring rights” are issues in cases
    - Purpose and how it is satisfied – issue (see text)
  + (c) lease and (d) consignment = deemed interests (PMSI)
* This is only labelling!! On exam need to know whether you need it or if it means anything
* Purpose:
  + Sometimes will specifically agree
    - SP must know if they are getting a PMSI
* Acquire rights in collateral
  + Straightforward: debtor uses $ to buy something
    - Not always so straightforward…

**Special Rules for Using PMSI**

* Consumer goods: a SI will not attach to after-acquired goods that are consumer goods, unless the SI is a PMSI or relates to replacement goods [s.13(2)(b)]
* Other special rules relating to priority, grace periods, preserving sales law (pg 184-185)

*Agricultural Credit Corp of Saskatchewan v. Pettyjohn*

* Facts: debtor (farmer) wants to buy cattle. Arranges financing from credit corp (SPI). Money borrowed from SP1 to acquire cattle. However, money doesn’t come through right away so the bank lends (SP0). Bank money buys cattle, SP1’s money pays bank back. Debtor sells cattle and gets money which he uses to pay off the bank. Bank advances more money which debtor uses to buy new cattle. Who has an interest in the new cattle and priority?
* First issue: whether ACCS obtained a PMSI in the 1981 and 1984 cattle?
  + Three requirements for PMSI
    - Lender has taken a SI in property
    - Lender has given value for the purpose of enabling the debtor to acquire rights in the property
      * Value is given where a lender makes a commitment to extend credit – sufficient consideration
      * Here, it was clear that the purpose of the value given was to enable the Pettyjohns to acquire rights in the property in question
    - Value has in fact been used to acquire those rights
      * Here, used to supply credit as the ultimate source of value with which to acquire their rights in the 1981 and 1984 cattle
      * Here, the fact that the use of the value given was, due to the nature of the transaction, after the acquisition of rights does not alter the conclusion that the value given was to acquire those rights (would be commercially unreasonable to divide the trans) – part of a larger transaction to obtain rights
* SPI claims PMSI in new cattle
  + Intended to be used but $ was not used to acquire cattle (Bank’s money was)
  + Court says🡪this doesn’t matter
* Second issue:
  + If money used by D, can you have a PMSI if all the D is doing is changing the nature of rights in collateral?
    - To the extent the D can acquire a greater interest, this is a PMSI

The Extent to which the Value is applied

* SP -- $1000; D buys X&Y (each cost $300 and $700); SP gets an SI in X&Y for $1000 in each
* You would think: PMSI to the extent of the purchase price but cases disagree
* Question is to what extent each is a PMSI when we don’t have a purchase price?
  + PMSI for $1000 in both then
* What if there is a repayment?
  + How would we figure out extent of PMSI?
  + How should the courts deal with this scenario?
* Why are there PMSI’s in first place?
  + Important rules in statute favour them
  + The competing SI
    - Reasoning: SPO must have been happy with the position before X was acquired and SPI is the reason SPO has an interest in this property. Because SP1 facilitates, they should have the chance to get the best priority they can
    - SPO – non-PMSI (after acquired); SPI – PMSI in X; SP2 – SI in X

*Unisource Canada Inc v. Laurentian Bank et al*

* D is arguing it has a PMSI and as such should have priority over P
* A PMSI in collateral or its proceeds has priority over any other SI in the same collateral given by the same debtor
* Laurentian paid out RBC (who was in first place over Unisource) and registered a GSA
* Laurentian claimed a PMSI in the printing press (priority interest)
* Held: PMSI – Laurentian’s refinancing did not merely alter the manner in which the D financed the press, it enabled Printer’s Group to acquire further rights in the press that it previously did not have and as such, meets the definition for PMSI
  + L advanced funds to allow PG to acquire title (under RBC was contingent)

*Chrysler Credit Canada Ltd v. Royal Bank of Canada –* how extensive is a PMSI?

* Probably wrong but still applies in BC (SKCA)
* Facts: car dealership – acquired inventory through financing. Dealer borrows money from time to time to acquire inventory. Repayments made and clear where allocated
* Prior to PPSA coming into force: Dealership had a line of credit with RBC secured by general debenture and an assignment of book debts; both were subordinated by other conventional security held by Chrysler Credit who financed the dealer’s purchase of new cars
* After: Bank gets an all PAAP to secure line of credit; Chrysler Credit to secure its line of credit gets an SI in inventory supplied by the manufacturer as well as the proceeds from the sale of that inventory (registered as a PMSI after the Bank)
* Issue: the extent of Chrysler Credits priority?
  + Had priority over used cars (trade-ins the loans for which the new cars had not been repaid)
    - Proceeds
  + Loans here had been repaid (second category)
    - Even though loans here had been repaid, they were being used to secure ALL of the advances, not just that specific instance – priority for Chrysler (trades were a class of property – inventory)

SP1 D – Dealer

X - $100

Y - $250 (repay $200)

Z - $300

EVERYTHING REPAID

More inventory acquired (A&B)

A - $500 amount owing = $1100

B - $600

(E&F had nothing to do with particular lender)

* Extent to which SPI has a PMSI🡪preferred? And amounts?
* Court: nothing we can do about E&F; however to the extent that these others ( X to B) were ever he subject of a PMSI, they are still PMSI’s
* Furthermore, to the extent that there is property still a PMSI with money owing, PMSI should be global amount (no specific purchase prices)
* Holders of PMSI should be preferred
* If we don’t, people will structure their arrangements so we don’t know allocations
* This case criticized🡪no one would actually do this

**Floating Charge – s.12**

* Taken over a category of property (not specific inventory)
* Don’t want to encumber actually inventory with a fixed charge = so use floating charge
* Default, the charge crystallizes and settles on category at that moment
* S.12 doesn’t accept the floating charge
* Must postpone or use subordination agreement to release interest

**Obtaining Information about Interests**

* Security interests:
  + Perfection: possession or registration
* Why information is needed?
  + Third parties will want to know more than merely whether a SI exists
    - Will want to know extent of interest; whether further advances might be made by the existing third party; what the repayment scheme is and what constitutes a default
* How to get such information?
  + Courts; asking the D; secured party
* Who can request and who must supply this information?
  + Demand must relate to a SA that provides for a SI in the property in which the person making the demand has an interest [s.18(3)]
  + See s.18 (lenders are not entitled – must rely on other parties)

See chart on pg 190 of book for summary!

**The Property Encumbered: Collateral and Proceeds**

**Collateral**

* Property that is the subject of the interest created by a secured transaction is called collateral
  + This term can mean both the original property that is the subject of the SI and also any property derived from the original collateral (proceeds) – term collateral can include proceeds **where the context permits**
* Any personal property can become collateral
  + Personal property is anything that isn’t real property
  + Fixtures (real property) are included in the PPSA
  + Crops are often in fact real property
* Categorization is important in the PPSA – done in the context of a particular transaction
  + Some provisions apply to some types of collateral and not others
  + Some categories are mutually exclusive
    - “inventory”, “consumer goods”, and “equipment” do NOT overlap
    - Anything that constitutes “goods” can be further categorized as one of these labels in the context of a given transaction (goods CAN ALWAYS be subcategorized as one of these, no matter how absurd the result seems – pay attn to def’ns!!)
* Correct classification may vary over time – property can change its nature or its use
  + Particularly true of goods – s.1(4) deals with this by stating that generally the determination as to whether goods are consumer goods, inventory or equipment will be made by looking at the time the SI attaches

**All PAAP**

* A SI in after acquired property attaches without a need for specific appropriation by the debtor [s.13(1)]
* Certain types of collateral or particular items will be excluded

**Types of Collateral**

* Main categories: goods, an instrument, chattel paper, a document of title, money, investment property, and an intangible
* Goods: inventory, consumer goods, equipment (residual category)
  + \*\*watch for 10(4) and 10(3)!!
  + Inventory: expansive definition
    - Held by a person for sale or lease, or that have been leased by that person as lessor; to be furnished by a person or have been furnished by that person under a K of service; raw materials or a work in progress; or materials **used** or consumed in a business
      * “used” is undefined – useful to think of it as “used up”
    - PPSA makes it reasonably difficult to get a senior interest in inventory and makes it easy to lose the interest or have it subordinated
    - Rules: writing requirement (description as inv is no longer sufficient for third parties if not held as this by the D; interest in inv becomes detached upon dealing with it (implied license); PMSI issues (no grace period)
  + Consumer Goods
    - Goods used or acquired for use primarily for personal, family or household purposes
    - Adequate for writing requirements only if further particulars are provided
    - However the use of the term “consumer goods” is sufficient to exclude person property from a description of collateral [s.10(6)]
    - Goods will not be consumer if insured for business use or purposes at time of attachment
    - Treated weird:
      * After-acquired property [13(2)(b)] and remedies [limits]
  + Equipment
    - Default category for goods – it is the category goods fall into if they don’t fit into the other 2 but need to be subcategorized (means the def’n of equipment under the PPSA does not match the popular meaning of equipment)
    - Needs to be further particularized to meet the writing requirement
* See definitions of: instrument; document of title; money
* Intangible: means personal property other than goods, chattel paper, a document of title, an instrument or money
  + Default category of personal property that doesn’t fit within another category
  + Does not include documentary intangibles
  + Basically includes pure intangibles (subcategory of choses in action)
  + Interests in intangibles – assignment (see below) pg 134
* Accounts: means a monetary obligation not evidenced by chattel paper or an instrument, whether or not that obligation has been earned by the performer
  + Intangible
  + Any transfer is deemed to be a secured trans
* Fixtures
  + Deemed to be personal property in the PPSA (personal property that becomes real property because of affixation)
  + See definition of fixtures and building materials and s.36 of the PPSA
  + Factors used to determine chattel vs. fixture:
    - Articles only attached by their weight to the land are usually not part of the land
    - Even slight affixation to the land makes articles part of the land
    - To vary these assumptions there must be clear evidence as to the object and degree of annexation, and
    - An intention of the person affixing the article is material only in so far as t can be presumed from the degree and object of the annexation
      * “object of annexation” that is relevant is whether the annexation is to enhance the value of the premises or the usefulness of it for the purpose for which it is used

**Property Types**

* Attaches to a particular – collateral
* What the nature of property is:
  + 2 issues
    - Property generally (issues)
      * Collateral – personal property
        + But statute is not consistent

Goods is defined to include real property

Fixtures and crops

Many rules apply to only certain categories of property

See chart in book – pg 150

* + - * + Complicating factor

Classifications are not water tight

Processed or comingled goods are goods and inv

Need to be able to identify which categories they fall into

* + - * Goods – most common (for us)
        + Separate def’n from *Sale of Goods Act*
        + Problems in categorizing

Goods are subcategorized

Inventory (CRUCIAL) – supplies provided (furnished) and materials used up or consumed

Consumer goods

Equipment – means goods that don’t fit into inventory or consumer goods

* + - * + Rare that a rule applies to goods generally – need to know WHERE it fits into these 3
        + Example: debtor – car dealership

Lenders: SP1, SP2, SP3

Gives SI to SPI when X in stock

* + - * + SPI – inv (X in lot)
        + SP2 – equipment (X as delivery truck)
        + SP3 – consumer goods (for personal use)
        + Later x = inventory
        + This screws up interest of parties (changing def’n)
        + Writing requirements: held as inv (SPI loses SI when moves out of inv)
        + Registration requirements: s.1(4) – need to know when attaches because that’s when the categorization fixes
        + HOWEVER: unless otherwise provided in this Act (if you are a dealer in property in the ordinary course of business, because this is inventory, rules advantage them)
        + Rule designed to protect third party
        + Sooo many exceptions!!
    - Differentiate this property into original and proceeds

**License**

* To what extent something, such as a license, can be personal property under the PPSA?
  + License is defined term in BC – means a right to harvest timber or to grow and harvest Christmas trees under an agreement by the Forest Act
    - This particular use of a license is included in the term intangible and is clearly covered by the PPSA (some argue only these licenses are covered)
      * But the term intangible also includes personal property and many licenses may be personal property
      * Question is when other licenses come within the bounds of personal property and then are covered by the PPSA?
* Rghts can be created through a license if it is more than a mere gift (constitutes a choses in action)
  + If a license is only a grant of privilege to do what would otherwise be prohibited with nothing else – NOT property

*Saulnier v. Royal Bank of Canada*

* A fishing license was held to be a commercial asset and so personal property
* Look at all circumstances
* License coupled with a proprietary interest (more than a mere license) = personal property
* Who has a proprietary interest!
* Line of credit

Goods🡪$ 🡪 acct

\*debtor has interest in goods and money; debtor has no interest in acct (bank has rights on account) – to reduce indebtedness

Categorization – s. 1(4)

* Other sections may change impact of s.1(4)
* S.10(4): inventory
  + Sometimes you have to monitor if the goods change nature
  + Furmanek case – commercial consignment
    - Secured interest in inventory
      * Other SP’s did not have an attached SI in inventory (10(4))
      * Wasn’t held by debtor (Seca took back)
      * Court qualified s.10(4)
        + Whether something is held by the D as inventory freezes on default (subsequent events don’t matter)
      * Sound policy result
        + Just because collateral was inventory, Seca couldn’t rest assured it would be categorized as inventory later on

**Proceeds and Tracing**

* Property that comes after the initial collateral(proceeds can also derive from dealing with those proceeds)
* Property can be proceeds of collateral even if the D gets her interest in the property only several dealings after the original dealing with the collateral
* It is possible for a given property to be both original collateral and proceeds
  + If SP has All PAAP – proceeds from original collateral are both proceeds and original collateral (because it falls within the def’n of after-acquired property)
* Key: s.28(1) – SI continues in the collateral once it’s dealt with
* Example:
  + Day 1: SP & D – SI in all X’s present and acquired
  + Day 2: D gets X1 [att]
  + Day 3: D gets X2 [att]
  + Day 4: D sells X2 – gets $10 and Y[acct]
    - Debtor no longer has rights in X2 (28(1)) BUT SP does
    - Not original collateral but SI extends to proceeds if they meet def’n of proceeds
  + Day 5: D sells Y to L [acct] – gets X
    - Same as 4
  + Day 6: SP has SI in…?
  + Day 6: D sells omega to K – gets $20
  + Note: acct – promise to pay something (turns into monies)
  + What if Y is an account?
    - Day 7: K sells omega – gets pi
    - Day 8: acct debtor of Y pay $5 to L (SEE NOTES)
    - Day 9: SP’s SI?
      * Definition of proceeds in (a) wouldn’t recognize pi or $5 (debtor has no interest in either of these things, sold rights in original)
* S.10(5): as long as you have an SI in the proceeds, no writing requirement
* Proceeds - definitions:
  + (a): identifiable or traceable personal property derived from collateral in which the debtor acquires an interest
    - Build-up of collateral – no limitation
    - Must determine in the statute what collateral is referring to (original collateral only or ANY)
      * S.28 just says collateral, so any
  + When SI attached is also important – for different proceeds, date of attachment will vary
  + (c): also means payment in total or partial discharge of an intangible
    - Ie so above, SP does have an interest in $5…but not in pi
    - Intangible essentially means an account (sold through assignments)
      * But once $5 is used to acquire, say J, this is no longer proceeds and the SP has no SI in it

Text on Proceeds:

**Definition**

* Statutory definition (first part)
  + Proceeds means (a) identifiable or traceable personal property, fixtures and crops, (i) derived directly or indirectly from any dealing with collateral or the proceeds of collateral, and (ii) in which the D acquires an interest
    - Only property in which D acquires an interest falls within the def.
      * Debtor need not possess or even have received proceeds in order to have an interest in them
      * If the current account balance is in the negative, the D does not have an interest in it and it cannot be proceeds
* Statutory definition (second part)
  + Definition also includes: “a right to an insurance payment or any other payment as indemnity or compensation for loss of, or damage to, the collateral or proceeds of the collateral; and…a payment made in total or partial discharge or redemption of an intangible, and instrument or chattel paper.
    - In these instances, D need not acquire an interest in property for it to be proceeds
    - This latter element is important because it means that payment from an account is proceeds even if the debtor does not acquire an interest in the payment

**Interest Continues in Proceeds after Dealing with Original Collateral**

* S.28(1) “…if collateral is dealt with or otherwise gives rise to proceeds, the SI continues in the collateral unless the SP expressly or impliedly authorises the dealing and extends to proceeds”
  + Interest continues in original collateral and in proceeds
  + **Limit to this**: where a SP enforces a SI against the both the collateral and the proceeds, the amount secured by the SI in the collateral and the proceeds is limited to the market value of the collateral at the time of dealing

**No Writing Required**

* No requirement that proceeds be described at all in the SA
* Interest arises automatically under s. 28(1)(b)

*Re CIBC & Marathon Realty Co Ltd*

* First issue: do proceeds of proceeds constitute proceeds? YES
* Second issue: do not need to police interests

**Tracing**

* Property must be “identifiable” and “traceable”
  + Identifiable if they continue to exist in their original form
  + Traceable if they are converted into a substituted form which can be located and determined to be the substitution for the original collateral or proceeds
* Money tracing: mixed accounts are problematic
  + Equitable rules:
    - Basic common law principle of tracing is first in first out
    - In equity, there is a presumption that the account holder withdraws their own money first
    - Lowest intermediate balance rule – see pg 145 (lazy times)
  + Fiduciary duty:
    - Use to have to have this relationship to trace
    - Easiest way to do this – create a trust
  + Bona Fide purchaser for value without notice
    - Funds taken from a mixed account that are affected by a SP’s interest that go to a bfpvw/on go to that party free of any interests
    - Volunteer takes subject to the right to trace
    - The beneficiary’s (SP) interest can transfer to property acquired in turn from the transferee of the money, but if the money goes to the transferee to pay down an indebtedness to the transferee there is no new property created in which the D has an interest
  + Special PPSA Principles
    - Statutory modification of the fiduciary requirement
      * Proceeds can be traced where there is no FR owed by the D to the SP
    - Judicial modification of tracing rules
      * Pettyjohn
        + Here, old cattle was sold, money proceeds was put into an account (negative balance in line of credit) and money then taken out to buy new cattle. Under equity the interest would have been extinguished since the D has no interest in an account with a negative balance but…
        + Allowed tracing as long as there was a “close and substantial” connection between the original collateral and the new cattle
        + Also limited the amount secured by the interest in proceeds

Since the cattle constituting the security from the original herd was only 50% of the value of the herd🡪 the SP who traced its interest was limited to a SI in respect of at most 50% of the value of the replacement herd

\*\*see charts on 149

Identifiable (factual – evidence of what came from what) and traceable (track it down – where it has gone)

* Traceable – problem arises when property is $
  + Problem: money is hardly ever in an account on its own
    - Extent to which there is a SI in the $ coming out?
    - Accts are subject to special rules in terms of following property
  + Example 1:
    - X🡪$10

ACCT

$8 withdrawn

Y

* Example 2: SI 🡪$15 (amount secured doesn’t change, it’s fixed)
  + [$6] X [coll]]

[10k] Y [proceeds]

[$500] Z [proceeds]

* Example 3:
  + X = airplane with no engine
  + Attached engines
  + Enhanced in value – SI extends to enhanced value

Proceeds

* S.28 extends automatically to proceeds
* If interest is a PMSI – proceed are also a PMSI
* PMSI def’n only applies to original collateral
* Money in a mixed account
  + Rules of tracing – derived from (1) common law; (2) equitable in nature; (3)….
    - (1) CL – not really used
    - (2) EQ – what we are referring too
      * Lowest intermediate balance rule (\*\*most important rule)
        + Universal CIT credit case
  + Example:
    - Issue: whether or not the interest is traced to Y? and the extent to which it can be traced?
    - Do not have access to the entire account🡪SI is limited to what went into the account (equitable rules)

X [goods] $25 owing (bought goods and into account)

Sold

$10

Acct [total of $60 ($30 + $20 = other deposits)]

$15 withdrawal – buys Y

60 total – **only 10 is SI** (not 25)

* When $ comes out of the account, its presumed not to come out of money in SI
* So when 15 dollars comes out of account the proceeds are still in the account
  + What goes in doesn’t necessarily come out
* What if: withdrawal of 42 dollars – then 18 in account (10 of which is subject to SI). Then 15 comes out – only 3 in account
* 15 is composed of 8 not subject to SI and 7 which is subject to the SI
  + 7/15 = SI
    - So 7/15ths of the value of Y is available as proceeds
      * Ie if Y sold for $150, 7/15ths of that value to secure your 25
* If than 3 taken out to purchase Z🡪all subject to SI

Note: outside money coming in would complicate this, but it’s the fractional amount that is important

*Universal CIT Credit Corporation v. Farmers Bank of Portageville*

* SI in inventory (mixed account)
  + Vehicles sold, $ in and out of account, other $ from other sources, other vehicles not in collateral
* $11,500 subject to security interest
* SP had SI in account – 16,000 in account but subject to SI
* THEN debtor (after hours) managed to take $12000 out of account (only 3.8ths in account)
* Argues: some of $ taken out was subject to SI but because the money was given to the bank in a fucked up situation – they don’t get money free and clear and should be subject to SI
* Held: money still subject to SI
  + But how much?
    - How much added to what’s left, will equal the SI
    - 15K – 4 not SI; 11 SI
      * 12 taken – 3.8 thousand left
      * Bank gets to keep 4 K but 8K is subject to SI
* Take free from the interest usually – except here because bank was sneaky (took money to screw)
* Money that goes into account from some other place doesn’t top up the proceeds interest
* According to equity, in order for parties to trace into a mixed account the holder of an account must owe a fiduciary relationship to the person (SP)
  + To hold monies in trust for the SP
  + Problem with equity – rules weren’t designed with PPSA in mind
* Under PPSA
  + S.1(5) – proceeds are traceable, whether or not there is a fiduciary duty
    - No need to set up a trust to create FD

*Agricultural Credit Corp v. Pettyjohn*

* Positive account owned by D; negative account owned by bank

Bank (SP) ACCS (SP inv)

D – cattle

[sold for money – acct – buy new cattle]

Acct is actually a line of credit set up by bank (neg balance)

* Can’t trace into cattle because D needs to have interest in the property
  + Doesn’t meet definition of proceeds
* Court says: equitable rules of tracing have been modified in 1(5) so clearly the legislator wants fair results (not caught on technicalities)
  + All intents and purposes derived…
  + This case is a technicality, so should be allowed to trace through = fair
* But how similar does it need to be?
* RIVER INDUSTRIES is the same – just in BC

With Proceeds:

* Determine – has there been a dealing?
* S.28 – extension of SI to proceeds
  + Funny rule – only in BC
  + Limited to market value of collateral…?
  + Going after original collateral and proceeds
  + Amount you can go after is limited at the date of dealing
* S. 10 – no writing requirement
* Must meet definition for it to be proceeds
* Certain types of property have specific rules
* SP is in competition with people who have an interest in the same property (this is PROPERTY law)
  + What is this property interest?
    - Matter of K
* Particular type of interest – perfected interest
  + To make the SI perfected is a matter for the SP alone
    - Additional steps a SI can take to get this label attached
    - This simply describes the interest (doesn’t do anything on its own – but can sometimes give you access to benefits)
    - S.19: what you need to have for a perfected SI
      * Rules must be complied with
      * Pg 225 (in book) – summary of additional steps, including registration and possession

**Intermediate Stage: Perfection of the Security Interest**

Introduction

* SP wants a perfected SI (attachment creates the SI, perfection then gives it status [potential benefits])
* This is a strengthened position – if only attached, the interest may only be used against the D
* SI cannot be perfected unless the requirements for attachment are met
* To achieve perfection: possession OR registration of a financing statement
  + Don’t need to have more than one method but sometimes you might

**S.19: Basic Provision**

* SI is perfected when (a) it has attached and (b) all steps required for perfection under the Act have been completed, regardless of the order of occurrence
  + (a) & (b) – together get perfected status
  + (a): time of attachment (s.12)
    - Doesn’t matter if you take steps or attach first, but the status of perfection is only achieved only at the moment ALL steps are taken
    - For priority rules, the relevant date is normally date of possession or registration (NOT the date all the steps were complete – but depends on rule)
  + (b): also need to know when the of steps of perfection were taken
    - This date gives us the time we can actually use
    - Could happen at 2 different times – ie perfected by one method and then perfected again - s.23 tells us, **as long as there is no gap between 2** [no intermediate period during which it is unperfected], go to the first set of steps
      * S.23 – deemed to be continuously perfected
      * S.35(2) – for the purposes of the residual priority rule, a continuously perfected SI will be treated as perfected by the original method of perfection
* Continuously perfected
  + Does not necessarily mean it was actually perfected (need attachment as well)
  + BUT once it’s perfected (both a & b satisfied) the important date is when (b) is satisfied
    - Back dating – continuous perfection (method of perfection)
* Grace periods
  + S.28(3): a SI in proceeds is deemed to be a continuously perfected SI for 15 days, so long as the interest in the original collateral was perfected
  + S.26: temporary perfection for 15 days in some limited circumstances where perfection has been by possession (then ended) without there have been a FS filed
  + S.35(7): allows lapsed registration to be re-registered within 30 days and to regain priority status it had before the lapse, except in regard to advances made by competing SIs in the interim (see rule)

Note: perfection is just a status – doesn’t in itself give you anything

**s.24, 25 and 26**

* Investment property NOT on exam
* S.24: possessing the collateral [would never rely solely on possession] – limited to tangible collateral
* S.25: registering the financing stmt – some can only be perfected this way [most common and easiest]
  + Whole of Part 4 is about this method
  + S.42 – sets up registry
  + S.43 – registration of a financing stmt
* S.26: temporary perfection – provides a bridge period in limited circumstances between possession and registration

**Registry System**

* If the SP doesn’t want possession (wants D to have so they can earn monies to pay off obligation), must register a financing statement in the Personal Property Registry
* Only method of perfection for intangible collateral

**Financing Statements**

* Timing issues: if 2 filed at the same time – order is determined by registration numbers assigned [s.43(2)]
* First FS filed will be used for the purpose of the residual priority rules
* Contains: names, types of collateral, period of registration
* S.18 provides the means to acquire further info from the SP
* Length of registration – number of years or infinity
  + Old law – 3 years; now generally infinity
    - Still possible for things to lapse (1-25 years)
* Debtor – if individual, need birthdate
  + Must spell things correctly
* 5 – describe what collateral is (ideally would mirror SA – if not included in FS, not perfected and if in FS but not SA, not actually collateral). Don’t be too ambiguous either
  + Describe by: kind, item, as All PAAP, inventory (description as inv only valid when held as inv by the D)
* This form does not describe agreement, how much is owing, what constitutes a default, etc
  + Who can supply this info? Parties involved
  + Do they have obligation to give info?
    - Depends on s.18 [not on exam] – does not give a potential SP entitlement to info
    - Have most leverage over debtor
    - If info from debtor is wrong, this doesn’t change other SP’s possession (you’re screwed!)

**Part 4: Main Provisions**

* Financing stmt doesn’t indicate there even is a SA in place
  + S.43(4): allows for this (registration before SA is made and SI attachment)
    - This is actually usual practice – protects against grace periods
* S.43(2): registration effect when you file
* S.43(5): registration can relate to more than one SA
  + No reason why a single FS cannot cover more than one SA as long as the D and SP are the same and the collateral in the SA is accurately covered by the FS
* S.43(6)(7)(8): mistakes!!
* S.44: how long registration lasts
* S.45: selling your SI (transfer)
  + S.45(1): may be registered (the change) – don’t have to
    - SP may not be correct – need to do further investigation
    - Does not imply notice to anyone or anything (unlike the Land Title Office) – to have notice under the PPSA, you must actually be told of the registration or have checked the registry and found what was registered
    - This is because it normally doesn’t matter whether people know
    - S.23(2) provides that the transferee of a SI has the same priority with respect to perfection of the SI as the transferor had at the time of transfer
* S.47: registration of FS does not constitute express, constructive or implied notice of the contents to any person
* S.50: change/alter registration (if a person has a filing against their name and want it removed)
* S.51: if debtors interest has been transferred (if D transfers an interest in collateral and the SI continues)
  + SP whose interest continues is expected to amend registration to include the new debtor (or when debtor changes name)
  + This is not compulsory but there is a risk to losing priority position if it is not done
* Example:
  + Attached interest (day 2,3,4🡪s.12 satisfied)
  + 1--------🡪WXY
  + 2🡪X
  + 3🡪Y
  + 4🡪Z
  + 5
  + 6
  + Financing stmt – SI in WXY on day 1 (W never attached, no SI); doesn’t cover Z (unperfected); perfected interest in X, Y on day 6
  + Contains error🡪financing stmt ineffective

**Errors/Omissions**

* S.43(6): the validity of the registration of a FS is not affected by a defect, irregularity, omission or error in the FS or in the registration of it unless the defect, irregularity, omission or error is seriously misleading
  + This is not limited to searchable fields
* Registration against the wrong debtor is ineffective
* Error in serial number for consumer goods where required – invalid [s.43(7)]
* Name does not need to be consistent with the birth certificate
* Language problems: syntactical, grammatical or ambiguity
* Serious misleading:
  + P must show that a reasonable person might be misled as well as seriously misled (objective test)
  + Whether errors/omissions are seriously misleading is very fact specific
  + S.43(8) do not need to prove anyone was actually misled
  + Leaving collateral off a FS altogether is probably seriously misleading
  + Curative effects: if say there is an error in the Ds name but the serial number is correct – may prevent the error from being seriously misleading as it can still be searched
  + Error in serial # may be seriously misleading – however, if a search using the correct serial number turns up the wrong one – probably ok
* Effect:
  + The effect of an error/omission is not clearly spelled out in the PPSA
  + Only says the validity of registration is affected [s.43(6)] – cases assume invalidity
  + Partial error: PPSA says that if there is a seriously or materially misleading error or omission in part of the registration, the error/omission will affect only part of that registration

**Duration, Lapse and Re-registration**

* Lapse – no longer perfected
* Re-registration after lapse – may partially save position if reregistered within 30 days of lapse

Notice – SP must give copy of FS to D within 20 days of registration

*674921 BC Ltd v. New Solutions Financial Corp*

* Can a FS relate to a SI that comes into existence after the filing of the FS?
* Confirms position that FS can relate to more than one SA (formed before and/or after registration)

*Regal Feeds Ltd v. Walder and Niverille Credit Union Ltd*

* How much information about collateral ought a registration to reveal?
* SA between parties that covered All PAA swine but the FS only made reference to all swine (did not specify after acquired)
* Priority competition on after acquired swine – who gets it?
* Argument: may have a SA/SI over swine, but it’s not perfected
* Court: registration is a device to put people on notice that they have to go elsewhere to get details
* Would have to go to SA to see what ALL meant; the FS put them on sufficient notice of an agreement and exact details must be gotten from the SA upon notice
  + Here🡪all meant All PAA swine (FS only has to describe collateral to the extent it identifies it, the notice given then send the others to the SA for exact details)
  + Regal Feeds gets priority

**Errors**

* Every word is important
* In BC, s.43(6), validity of a FS is not affected unless the defeat, error, etc is seriously misleading
  + Doesn’t provide def’n of seriously misleading
  + Also doesn’t say how validity is affected
    - Cases presume invalidity but it doesn’t say this
* Sub 7🡪if you don’t get the D or serial number right, and this is a serious misleading error – this makes registration invalid
* Sub 8 🡪 alleged seriously misleading, not necessary to prove someone was actually mislead
* Sub 9🡪 how the mistakes affects financing statement

*Re Munro*

* What can be left out of the registration of a name and not be seriously misleading?
* What types of errors are possible?
  + Middle initial left out
    - Not seriously misleading (registration will be disclosed without this initial and use of middle name is not required in all registrations in BC)
  + Serial number error
    - More problematic as mandatory requirement
    - Test: whether the error is seriously misleading? Not necessary to prove anyone was actually mislead
    - Ordinary meaning of “seriously misleading”: led astray and weighty, important, or grave
      * Here, it is doubted anyone could be seriously mislead by this error as the registration still came up when searched (even though an error)
      * Factor in decision: no one has actually been misled here (can be a consideration)
* In BC, registry itself is designed to compensate for errors (can search many fields on form)
  + Gives you more info than you ask for (will generate alternate spellings, etc)

*Coates v. General Motors Acceptance Corp of Canada*

* Should the registry computer programme determine what is seriously misleading?
* Is the registration of the incorrect serial number seriously misleading?
* If someone has made an error, but someone searches correct and the search generates the error 🡪 not seriously misleading (here, the searcher should have looked into the other results as they came up to see if there were other similarities, which there were, to reveal GMACs interest)
* If we are to employ an electronic registry, the crucial fact is whether the incorrect filing prevented a searcher from finding the registration when searching under one of the alternate search criteria – if a search using the correct version of the criteria does not reveal the registration, the registration has failed
* Following principles apply in respect of registration of serial numbered goods:
  + Test of whether registration is seriously misleading is objective and doesn’t require that someone was actually misled
  + Total accuracy in registration by name or serial number is not necessary
  + A seriously misleading description of either the name or the serial number in the reg will defeat it
  + A seriously misleading reg is one that
    - Would prevent a reasonable search from disclosing the registration or
    - Would cause a reasonable person to conclude that the search was not revealing the same chattel (serial number) or the same debtor (name search). The obligation is on the searcher to review the similar registrations to make this determination
    - Program will not be assessed – only question is whether a registry search will reveal the incorrect registration
* However, BC authorities have gone against this🡪no legislative authority

*Alda Wholesale Ltd (Re)*

* Be aware of regulations but **not responsible for facts of this case**
* Error can relate to punctuation or grammar
* Leased (used to describe the collateral) but
  + Issue: qualify noun before it or modify all items that come before it?
* Court held: seriously misleading (ambiguity)
* INVALID

Note: descriptions should coincide precisely with SA (not always feasible – FS might be more general – All PAAP)

Note: assume Alda approach – court more generous in Regal Feeds

**Possession**

* Powerful device – obviates need for writing requirement and financing statement
* Where possession by SP used as perfection, there is no writing requirement under s.10(1)(a) for attachment to occur
* Why is possession good enough?
  + All these others (FS, etc) are devices designed to protect third parties
  + There is an assumption that a person in possession of collateral has an interest in it – other potential SPs will inquire why the D does not have possession and will reveal the prior interest
* In practice – people get SI in things they never see
  + But, with negotiable or quasi-negotiable collateral, it is usual to have possession as perfection as D could transfer this collateral to a third party free of the interest
* Perfection by possession
  + Ought to have filed FS as well
* S.24
  + Cannot use for all types of collateral
  + (d): repealed – investment property
* S.24(2): actual or apparent position of the debtor (no perfection)
* Must really perfect by possession
  + Money or negotiable property
    - Filing a FS is essentially useless because of ease of transfer

**When this cannot be used…**

* Post-default: if an SP seized upon breach, this possession does not lead to perfection
* No intention to perfect: perfection by possession is only possible if the reason the SP has possession is in order to perfect its interest
  + This can be difficult to establish
* Possession by D: s.24(2) – cannot claim to possess collateral for the purposes of perfection if the collateral “is in the actual or apparent possession or control of the debtor or the debtor’s agent”
* Receiver: depends on if agent for the SP (possession for perfection) or the D (not ok)
* Intangibles

**Obligations while in Possession**

* SP must use reasonable care in the custody and preservation of collateral
* S.17

*Re Bank of Nova Scotia and Royal Bank of Canada et al*

* When is it too late to perfect by possession and/or filing?
  + Basically, does the appointment of a receiver crystallize the security interests of the parties for the purpose of determining priority?
  + Did the receiver perfect by possession before the appellant perfected by reg?
* Bank A and Bank B both took steps to perfect SI but didn’t (SI in car)
* Default
  + Bank A appoints a receiver (acting for Bank A)
  + Then Bank B amends FS to correct it (has perfected)
  + Then Bank A files a correct as well
* Who has priority??
  + Whoever took first steps to perfect
* Possession can’t be related to default = not perfected (not possessed for the right reason – for securing payment of an obligation [realizing on obligation] and not really held as collateral)
* Whether the receiver is in possession of collateral on behalf of Bank A
  + Status before B
* If perfecting by possession🡪perfected unless possession by seizure or repossession
* No limitation on filing FS
  + Can file even after default has occurred
* B has priority even though A in possession

Second issue – what happens if a SP is in possession but accidentally ends up in possession of collateral?

* Particularly at issue in BC
  + Prior regime: seize or sue! Designed so you couldn’t do both
    - Still in effect for consumer goods
    - D would encourage seize or sue by dumping collateral with SP – SP didn’t want to use because they wouldn’t get much and couldn’t sue for deficiencies
    - Cases: whether SP seized or D forced in them
      * Intention of perfecting interest? YES – intent involved – must be in possession because SP wants

*Royal Trust Corp of Canada v. Number 7 Honda Sales Ltd*

* What constitutes possession?
* Dumps vehicle back with SP
* Court says: just because it’s in your possession doesn’t mean it’s in your possession for perfection (this possession was also not collateral)
* Depends on nature of property involved – usually GOODS
* Possession – normal way of perfecting in s.24 except for goods

**Temporary Perfection**

* Very unusual (not litigated)
* Situation where parties have perfected by possession but SP has surrendered collateral to D must file FS or will lose perfected status for a period of time
  + SP does not have possession and there is no FS filed
* S.26:
  + Can have perfected status when you don’t possess or have not filed a FS
    - Usually when the D possesses to do something with the collateral
  + S.26(1): remains for first 15 days
    - Must fit in criteria – only applies to certain types of collateral (instruments and certificated securities, or negotiable documents or title or goods held by a bailee that are not covered by a negotiable document of title
* Secret lien or grace period
  + Someone actually has a perfected SI but you can’t find it anywhere. May well do your due diligence, but too fucking bad
  + 15 day grace period
    - Practice is, in lending, that you enter into transactions, file FS, but you don’t actually lend until expiry of all possible periods then recheck🡪then make loan
* Perfection not always necessary – not responsible for these methods

**Proceeds**

* When SI in proceeds attaches is governed by the same rules as original attachment to collateral
* S.28(1) – extends SI automatically to proceeds
  + Eliminates the writing and possession requirements that are normally prerequisites for attachment
  + Eliminates third requirement
* S.10 confirms this indirectly
* Issue: has the SI been perfected or not? And perfected at a time that is useful?
* S.28(2): shortcut way to getting a better perfected status in proceeds
  + Backdates the perfected status of giving SI in the proceeds
    - Continuously perfected
* S.28(3): if you can’t use 28(2), then SI in the proceeds is a continuously perfected SI
* Example:
  + Day 1: FS “SI in X + in Y as proceeds”
  + Day 2: SA – SI in X
  + Day 3: money advanced by SP ($100)
  + Day 4: debtor gets X (rights in collateral)
  + Day 5: SP lends more monies ($50)
  + Day 6: Debtor sells X, gets Z in exchange
  + Day 7: SP lends more monies ($200)
  + Day 8: status of SP is?
  + SP has interest in X on Day 8 (secures $350)
    - Perfected
    - S.28(1)(a): SP still has SI in X
  + Day 4: date of attachment (s.12 satisfied)
    - Value, writing requirement, rights in collateral
  + When perfected?
    - S.19: attached [day 4] and steps taken [day1]
    - On day 4 as well (arise at same time)
  + But once we have perfected status – date extra steps were taken is important – DAY 1!!
  + Value given when promise given not actual money lent
  + What about Y?
    - Hasn’t come along – no SI
  + Z – proceeds
    - 28(1)(b): extends SI in Z
    - Arises when s.12 (except writing requirement) are met (DAY 6)
      * Value given(promise to lend) and D has rights
* Can’t use perfection rules in s.28 if original SI is not perfected
* True s.10 does not require proceeds to be described in SA BUT must be described in FS – might as well do both
  + Unless you can take advantage of provision in s.28
* S.28(3): is continuously perfected
  + Deeming provision – 2 things: (1) perfected and (2) continuously perfected
  + Continuously perfected means: deemed to have same date as SI in original collateral (in our example would be Day 1)
  + Becomes unperfected on the expiration of 15 days after attachment
    - So, day 21 – becomes unperfected unless in 15 day period, SP has taken steps to perfect SI in Z, which would be an adequate method if it was original collateral
* Question: doesn’t say whether if you take steps in 15 days whether you get continuously perfected status
  + So (in example) is it day 17 or 1?
  + Courts have inferred it remains at day 1 because you usually only change the original FS (but statute doesn’t actually say that)
* 15 days is nothing in the real world – normally want to come within 28(2)

Note: for exam, priority will be asked on a specific day – it is irrelevant what may happen in the future (it is dangerous to advise what may happen later)

Side note: what happens if no extra steps taken in above scenario on day 21?

* Day 25: Z sold for omega
* Day 30: status of SP?
  + Still has SI in X (perfected)
  + Y still hasn’t arisen
  + Z? period has expired – became unperfected
  + Z has given rise to proceeds – omega
  + Does s.28(3) apply? – 15 day perfected?
    - Statute doesn’t answer this question but answer seems to be YES
    - Section speaks of original collateral NOT intervening proceeds

s.28(2)

* 3 ways to deem continuously perfected
  + Depends on the overarching pre-requisite
    - SI interest in original perfected by FS
    - Provisions here relate to FS
      * (a) contains a description of the proceeds
        + Must use the terminology which is acceptable to describe original collateral (in regulations)

Cannot just say “in all proceeds”

* + - * (b) original FS covers the original collateral if the proceeds are of a kind that are covered by the original collateral
        + Bikes exchanged for new bikes
        + Not entirely clear how close in kind it has to be
      * (c) if the proceeds are money, cheques, deposits, accts in a deposit taking institution – perfected continuously
        + Don’t need to be described
* Issue: what if coll –x; proceeds – b, proceeds from B are cash?
  + Original FS said X
  + B doesn’t fit within 28(2) – unperfected
  + But does cash fit within s.28(2)(c) [can you have a hiatus?]
    - YES – assumption – look at FS and original collateral

Text notes on proceeds:

**Proceeds**

* Perfection by usual means:
  + Proceeds are collateral and so any of the methods of perfection for original collateral is available for proceeds as well
    - But these dates would probably be quite late – too bad for you!
* Continuous perfection: to allow collateral to have the same priority status as original collateral the statute provides for continuous perfection under 28(2) if certain criteria are met
  + Deemed perfection for initial period: there is a deemed period for perfection of a SI in proceeds. There is deemed to be a continuously perfected SI in any proceeds for 15 days after the interest in proceeds arises, provided that the SI in the original collateral was perfected [s.28(3)]
    - Unclear whether this period would give perfected status to proceeds when the original was not perfected
    - If the buyer gave value and has no knowledge of SI – this deemed perfection does not operate to protect the SI
* Perfection for longer period: in order to use these proceeds provisions to get a continuously perfected SI, the SI in the original collateral must have been perfected by the filing of a FS [s.28(2)]
  + One has to categorize the proceeds (as long as requirements are met – CP)
    - Proceeds described: have the proceeds specifically described in the original FS [s.28(2)(a)]
    - Proceeds similar to original collateral: if the proceeds are a type similar to the original collateral, as described in the FS, then the interest in them in CP [s.28(2)(b)]
      * Only necessary where interest in original collateral did not cover after-acquired property
    - Money, cheques, deposit accounts: if the proceeds are these, in a deposit taking institution, this is a CP as long as the SI in the original collateral was perfected by the filing of a FS [s.28(2)(c)]
  + Each instance of proceeds will need to be considered separately to see if it falls into an above category
  + Always look to the status of the original collateral (proceeds may not be CP, but proceeds of proceeds could be) – see pg 224

\*\*chart on 225!

**Priority**

Example:

|  |  |
| --- | --- |
| 1 | SP1 – SA with D1 [adv $300 + SI in “X&Y”] [Y attached, X not]  D1 has Y |
| 2 | SP2 – FS – DI [All PAAP]  No indication of agreement/interest on this day |
| 3 | SP3 – SA/FS – D2 [adv $200 + SI in Z] [ SI attached and perfected]  D2 has Z |
| 4 | D1 gets X using $ from SP1 [X attaches [probably PMSI] but not perfected] |
| 5 | SP2 – SA with D1 – “all Xs and Ys” [attached perfected interest in X&Y] |
| 6 | SP1 – FS(D1) – “all Xs” [X becomes perfected but not Y] |
| 7 | SP3 – adv $300 |
| 8 | SP2 – adv $500 |
| 9 | SP1 – adv $150 |
| 10 | SP2 – SA w/ D1 “all PAAP”  This is a red herring – irrelevant [already had this] |
| 11 | D2 sells Z to D1 + gets Y in exchange [D1 – Z; D2 – Y] |
| 12 | D2 sells Y to D3 + gets omega in exchange |
| 13 | SP4 – SA/FS (D2) – SI in “all PAAP” [adv $1000) |
| 14 | What is SP1’s position? |

Day 11:

* Proceeds 🡪SP3: SI in Z continues and extends to Y
  + Attached in Y
  + But perfected? Depends on 28(2)
    - Continuously perfected (relating to financing statement filed on day 3)
* SP1 &2 has interest in Y
  + S.28 applies to them as well (opposite)🡪proceeds Z
  + SP1 has unperfected interest in Y (cannot use 28(2))
    - Interest in Z is then also unperfected
  + SP2 has a perfected interest in Y (Day 2 FS)
  + SP1 and SP2 probably lose interest in Y (also in competition with buyer)

Day 12:

* Y🡪do interests continue? YES
* Omega🡪who can claim omega as proceeds?
  + SP of D2 only (D must get an interest)
    - SP3

**Introduction**

* What is a priority rule?
  + Establishes which of 2 interests in the same collateral takes precedence over the other
  + PPSA provides rules only where at least one of the parties in the competition is a SP
  + Preserves CL – nemo dat (first in time)

*Robert Simpson Co Ltd v. Shadlock et al*

* Can actual notice of a SI affect the priorities as established by the PPSA?
* NO

**Paired Competition**

* Priority rules are designed to be binary – only dealing with pairs
  + Exceptions: ss. 35(1)(c), 35.1(8), 39(2)
* Can lead to circular priority

**Generally…**

* Priority – 2 practical ramifications (to do with remedies)
  + Because of you proceed to use collateral in a remedial way you need to know whom to give a notice (need to know priority)
    - If you don’t give notice – you may be denied remedies
  + What you can do or how valuable the collateral is (can’t do anything injurious to people above you)
    - Encumbrances must be disclosed on sale
      * If above you but not below you (going to try to buy of above you)
* Need to know for priority rules:
  + When someone has an SI (attached)
  + When perfected and by what means (and if FS, when filed)
  + Who the debtor is/was
  + What category of property?
  + How much advanced by a given date
    - Various parties can only claim what they are owed
  + Who gave them an SI (which debtor)
  + PMSI or not?
  + Proceeds or not?
  + Has the interest disappeared by the date in question
  + Nature of the collateral (goods etc)
  + Who else has an interest? Liens etc? Nature of the transaction?
* Example:
  + X with SPI, SP2, Gov’t lien, family law claim
    - Must provide what priority rule you will apply to arrange these parties in a linear fashion
  + So say you have X with SP1(A); SP2(B); Gov lien (C)
    - All done through pairs
      * A- B Rule J priority: B PPSA
      * B-C Rule K priority: C CL
      * C-A Rule J priority: C PPSA
    - For each competition decide what rule applies to determine priority
    - Rules in the PPSA or other statutes or common law
      * Specific rules dominate general rules
      * HERE: C🡪B🡪A
      * So if B is trying to use X, it will have to give notice to A and will probably eliminate interest of A. C doesn’t get notice, but interest remains

**Knowledge and Good Faith**

* Knowledge: actual knowledge of another’s SI should not affect the priority rules unless specifically stated
* Good faith: s.68(2) and 68(3) – distinguishes knowledge from bad faith (bad faith requires some form of positive action on the part of the party with a prior perfected SI)

**Priority Rules: General Issues**

* Priority rules set out in the PPSA can be modified to a limited extent by the parties and/or court
  + Subordination agreement
  + Marshalling
* Circular priority: results when the priority rules end up giving irreconcilable priorities
  + Resolution: subordinate the party at fault (but someone isn’t always at fault) or make a decision based on policy considerations, marshalling

*GMS Securities & Appraisals Ltd v. Rich-Wood Kitchens Ltd and National Trust Co*

* How is a circularity problem to be resolved? Here, the approach was to essentially impose the burden of the resolution of the circularity problem on the first party taking remedial action against the collateral

R-W

PPSA PPSA

GMS M-I

Reg Act

* This solution will never apply to any other set of facts
* Decided on a purely policy basis on a case-by-case basis
* Based on “expectations” as the primary consideration

**Subordination Agreements**

* Factor: statute [s.40] allows SP ‘s to K out of the benefits of their priority situation
  + Doesn’t really change the priorities, which are established by CL and the PPSA, but can change the practical realities of priority
  + Effective according to its terms and can be enforced by a third party if the third party is the person or one of the class of persons for whose benefit the subordination was intended.
* Example:
  + C🡪subordination agreement
  + B
  + A
  + C can have a subordination agreement with A, contractually agreeing to subordinate its position with A’s position
  + Not in C”s best interest to encumber all the property (so no one else will deal with the D)
  + So agree to subordinate their position to new parties (subject to contract principles)
    - Business decision NOT legal decision
      * Usually paid for this
* If there is a subordination agreement
  + Ignore agreement and work out priority
  + Then apply agreement to affect allocation
* Example 2
  + X worth $500
    - C – 400
    - B – 200
    - A – 150
  + Practically speaking A gets nothing
  + Doesn’t impact B (B probably doesn’t even know)
  + S.45(6): allows for the registration of subordination agreement (not required)
  + S.40: talks about the use of the subordination agreement

**Subordination Agreement**

* Held to its contractual terms
* Statute allows agreements to exist
* S.40(1): privity is abolished

-Affects subordination agreement

* Senior party and debtor entered into K (to below other people – who can enforce K against senior because of s.40)
* Statute does not care about form of subordination agreement (easy to find)
* Subordination agreement interpreted very strictly against the person who wants to rely on it

**Parties to a Subordination Agreement**

* Two SPs
  + Senior agrees to subordinate to a junior
  + Can be limited in any way the parties decide – might limit the subordination to particular types of collateral, to particular amounts of money, to particular time periods, etc
* SP and D
  + Senior SP agrees to subordinate – facilitates Ds business (not in SPs best interests to over encumber Ds property)
  + Privity rules are eliminated in this context – allowing a K between SP and D to benefit a 3rd party
* Impact on third parties: cannot be adverse!
* Implied license is not a subordination agreement
* Content: will be interpreted against the party seeking to benefit from it; language must be clear and unequivocal before rights will be taken away

*Royal Bank of Canada v. Gabriel of Canada Ltd*

* What constitutes a subordination agreement and who can enforce it?
* Subordination agreement to benefit RBC found in collateral note attached to main agreement
* Is this sufficient? YES

*Transamerica Commercial Finance Corp Canada v. Imperial TV*

* How strictly will subordination agreements be interpreted?
* Had subordination agreement
* Given in favour of bankers (pg 172)
* Court held: Transamerica is outside scope of agreement because it is not a bank
* **Wording in agreement must be specific**
  + Court is reluctant to extend agreement

\*\*here, PMSI would have had priority over the floating charge but they didn’t give notice (follow the procedural requirement) and so they couldn’t rely on this rule and instead had to use the subordination agreement

Note: would have to include proceeds in subordination agreement for them to be included

**Marshalling**

* Equivalent to subordination agreement but it’s not the parties altering, it’s the courts
  + Either forces the oversecured party to act on certain collateral or gives the undersecured party an interest in some of the oversecureds interests that it didn’t have previously
* Operates outside the statute
* First must determine priority position under statute
* Must ensure third parties are not adversely affected and that is it “fair” to the senior party
* Example:
  + SPI [All PAAP] owed $500 – A[10] B[50] C[100] D[1000] E[6]
    - ALL SECURE THE $500
  + SP2 owed $70 – C
  + SPI can seize any property to sell to satisfy the obligation
    - So if SPI seizes ABC = $160
    - Clears any SI subordinate to you
    - SP2s interest in C disappears (interest in proceeds remains)
    - SP2 kind of gets screwed (interest in proceeds is still subordinate)
    - So equity will step in with the doctrine of marshalling
      * SP1 must give SP2 notice and SP2 can go to the court and ask the court to marshall
    - Undersecured party can ask the court to order and oversecured party to deal with it’s interests in a specific way
      * Seize C last
    - SP1 can argue that marshalling adversely affects their interest
      * Any party can seize but if you’re not in first place whoever buys it takes subject to the SI (hard to find buyer)
* Marshalling will only be ordered when all the parties have an interest in using the property at this moment (usually in cases of bankruptcy)
* Must figure out if person you’re competing with is a secured party or not (different sets of rules apply)
* Look for a rule that covers the specific competition at issue (want as precise of rule as possible)
  + However there are residual/general rules if there is no specific rule
  + So try to find specific rule first and if none 🡪residual

*Surrey Metro Savings v. Chestnut Hill Homes*

* How does marshalling work?
* Doctrine of marshalling rests on the principle that a creditor who has means of satisfying his debt out of 2 or more funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of the funds
* In this case, Coast was the author of its own misfortune (not open to equity) by failing to register in a timely fashion
* Junior creditors must make this claim in a timely fashion

**Residual Priority Rules: Competition with another SI**

Introduction

* These should only apply if no other specific rule covers the situation
* Where are the residual rules found?
  + S.35🡪competition between 2 secured parties
    - Perfected SI has priority over unperfected SI
    - Priority goes then to party who perfected first (registered or took possession)
      * Time of attachment is irrelevant, but it must have occurred
    - Between unperfected SI – time of attachment is determinative
  + S.20🡪competition between a secured party and a non-secured party
* Shouldn’t force the residual rules apply to all situations
  + Sometimes must go to common law – nemo dat – first in time
  + Not all situations are covered
* 35(7) allows for continuity of perfection where there has been a discharge or lapse in registration, provided there is re-registration within 30 days
  + This re-establishment of priority will not be effective against SI that were registered or perfected during the hiatus or against advances (secured by pre-existing interests) made during the hiatus.

**Section 35**

* S.35(1)
  + (a) priority between perfected Sis
    - If between those both perfected by filing a FS - whoever filed first!! [35(1)(a)(i)]
    - Example: priority on day 6?
      * SPI – att day 2; fin st day 3; perfected day 3
      * SP2 – fin st day 1; att day 4; perfected day 4
      * SP2 has priority!!! Because of FS filing date
    - What about if 2 financing statements filed for one transaction? Generally first filed will prevail for the residual priority rules
    - (a)(ii) perfected by different methods: relevant date is the filing for the one party and the date of the other SP having taken possession
      * Relevant dates are not the dates of perfection, but the timing of filing versus timing of the possession (I believe this is referring to attachment and pre-emptive filing…)
      * If the SI is originally perfected one way and then the other, the relevant date is the first date of the first method provided there is no break in the perfected status of the relevant SI [s.35(2)]
  + (b) perfected has priority over unperfected
  + (c) unperfected priority is determined by attachment
    - Very common to have the same date of attachment
      * More than one party has an all PAAP – interests will attach at the same time for all; this would also apply to proceeds
    - One of the very few rules that doesn’t depend on a 2-sided competition

*Ontario Dairy Cow Leasing Ltd v. Ontario Milk Marketing Board*

* Question: how is priority established as between unperfected SIs?
* Here, there is 2 unperfected SI that attached on the same day – no priority!
* Possible solution: share pro rata (divide up the shares in proportion)

*Royal Bank of Canada v. Agricultural Credit Corp of Saskatchewan*

* Question: can a single FS perfect multiple SI even when the subsequent loans constitute separate and distinct transactions?

Note:30% of problems on the exam use the residual rules. Section 35(1) requires 2 SI in competition BUT does not require the same debtor (doesn’t distinguish between deemed and real Sis)

**Section 35**

* S.35(2) continuously perfected must be treated as perfected by original method
* S.35(3) extends rules in 35(1) to proceeds
  + Subject to specific rules in s.28 about CP proceeds – time of perfection, possession or registration of original collateral is the time for perfection, possession or registration of its proceeds as well
* Consider the example above with the following additions and assuming SPI used possession:
  + Proceeds X🡪Y (5)
    - SI in Y deemed to be continuously perfected for 15 days
    - Beyond 15 days – must be within s.28(2)
      * Perfected by financing statement
    - Here if SPI used possession to perfect X and no longer has Y in possession, SP2 would win (SPI would be unperfected)
    - If SPI does have possession of Y🡪perfected BUT not deemed perfected (not backdated)
      * Perfected on day 5
      * SP2 wins again (deemed date of perfection)
* S.35(5) if registration lapses as a result of failure to renew or discharge and is re-registered within 30 days – maintains priority
  + Example:
    - SPI – FS [3] ATT[3] ADV 1; ADV 3 [14]; ADV 4 [20]
    - SP2 – FS [1] ATT [1] ADV 2; ADV 5 [10]; ADV 6 [17]
    - Priority on day 30? SP2
    - But what if on day 18 – SP2’s FS gets removed from the registry?
      * Could happen because of expiry OR accidentally/purposefully removed (without authorization or in error, it doesn’t matter)
      * Day 30: SPI – perfected and wins SP2 – unperfected
* S.35(7) provides a grace period to restore registration and to a limited extent restore priority position (allows continuity of perfection where there has been a discharge or lapse in registration, provided there is registration within 30 days of the discharge/lapse. **This re-establishment of priority will not be effective against SIs that were registered or perfected during the hiatus or against advances [secured by pre-existing security interests] made during the hiatus**)
* But what if:
  + Day 25 – restores registration
    - Lapse does not affect priority status in relation to a competing perfected SI that immediately before the lapse had a subordinate position
    - BUT🡪except this rule does not apply to the extent that this secures advances made after the lapse and before re-registration
      * Day 20 advance would not be considered (use 35(1)(a))
      * This grace period is retrospective
      * What if SP3 FS ATT and PERF day 21?
        + Must determine:

SPI – SP2(winner) 🡪2 rules 35(7)

SP2 – SP3(winner)🡪35(1)(a)

SP3 – SPI(winner)🡪35(1)(a)

Circular priority problem here!

**Tacking**

* SPs are generally allowed to “tack” on later advances to earlier advances or agreements for many priority rules, in particular the residual priority rules (subject of course to agreement with the D allowing such tacking)
* Watch for rules on tacking – can mean some advances have priority while others are subordinate

**Registration after Lapse**

* No general grace period allowing a SI to be considered perfected even when its perfected status has lapsed
* However, 35(7) retrospectively allows for perfected status to be deemed continued for up to 30 days after it has in fact lapsed
* Cause of lapse: does not matter why the lapse occurred
* Retrospective effect: benefit will only arise if there is a re-registration within 30 days – if that is the case the section works retrospectively (not a true grace period)
* Later advances:
  + The restoration of priority will not affect any advances made by the subordinate secured party during that hiatus
  + Any advances made by either party after the re-registration are tacked onto the restored priorities as settled by the restoration rule
* New secured parties: no secured party who had not registered a FS before the lapse of A’s registration will be affected by the restoration rule (can lead to circularity)

Example:

|  |  |  |
| --- | --- | --- |
| Day | D1 | D2 |
| 1 |  | SPI ALL PAAP – ADV 1 |
| 2 | SP2 – X – ADV 2 |  |
| 3 | SP3 – X – ADV 3 |  |
| 4 | D1 🡪 X 🡪 D2 (SP2 knowledge of transaction) |  |
| 5 | SP2 – ADV 5 |  |
| 6 |  | SP1 – ADV 6 |
| 7 | SP3 – ADV 7 |  |
| 20 | 15 days from SP2s knowledge |  |
| 23 | SP2 ADV 23 |  |
| 24 |  | SP2 – ADV 24 |
| 25 | SP3 – ADV 25 |  |
| 27 |  | SP1 – ADV 27 |
| 28 | SP2 amends registration to show D2 as debtor |  |
| 30 | SP2 – ADV 30 |  |
| 32 | SP3 – ADV 32 |  |
| 35 |  | SP1 – ADV 35 |
| 40 | Priorities to X? |  |

\*mere knowledge is enough

**SP1 – SP2 SP1 – SP3 SP2 – SP3**

SP1 – adv 27 SP3 - all adv SP2 – all adv

s.35(1)(a) s.35(8) s.35(1)(a)

SP2 - all adv SP1 – all adv SP3 – all adv

s. 35(8)

SP1 (except 27)

**Competition with a non-SI**

**Competition with a Trustee in Bankruptcy or a Liquidator**

* Generally speaking, a bankruptcy or insolvency will not affect the SPs ability to deal with the collateral, as long as it has a **perfected** interest
* 1. Unperfected SIs
  + Security interest has to be perfected in order for the T/L to have to recognize the SPs interest
    - USI is not effective against a T/L [s.20(b)]
    - Anyone who takes title through the T/L can take it clear if that is the effect of the USI being not effective
  + Timing issues
    - The act of perfection must occur before the date of bankruptcy or the date of the winding up order to be considered perfected and avoid the consequences of these provisions
  + PMSI
    - Grace period for PMSIs
    - Tangible: a PMSI perfected not later than 15 days after the D or a third person at the request of the D obtains possession of the collateral has priority over the T/L [s.22(1)(a)]
    - Intangible: 15 day grace period starts the day the SI attaches [s.22(1)(b)]
* 2. Secured Parties claiming as Unsecured Creditor
  + If the SP loses its priority position because of the operation of the above section, it can still claim as an unsecured creditor, but it will have no special position
* 3. Damages – Leases and Consignments
  + Consignors and lessors may not realize their status (deemed SI) and perfect – so the statute allows them generous damage proceedings

**Unless a SI is perfected, it could be deemed not effective against the interest of a trustee as under 20(b)**

*Re Giffen*

* Question: can the trustee in bankruptcy have a better position in relation to the collateral than had the bankrupt debtor? YES
* Facts: lessor failed to perfect its SI in a car leased to an employee (lease of more than one year with an option to purchase). The employee went bankrupt and the trustee in bankruptcy is claiming priority to the proceeds from the sale of the car over the lessor. The lessor argues that the bankrupt employee never owned the car and that the trustee cannot have a better claim to the car than the bankrupt had
* Issue: can s. 20(b)(i) of the PPSA extinguish the lessors right to the car in favour of the trustee’s interest, or is the operation of s. 20(b)(i) limited by certain provisions of the BIA?
* Note: property includes a leasehold interest under the PPSA
* Trustee can sell the car and confer good title!

**Competition with Unsecured Creditors**

* Unsecured creditors have a limited interest in property when it is seized to satisfy a judgment
* Limited interest will not exist until there is some sort of charging order affecting the property
* 1. Subordination of Unperfected Interests
  + Where an unsecured creditor has such a claim, the unsecured creditor can ignore the unperfected security interest
  + The USI becomes subordinate to the seizing unsecured creditor and any person taking through it
  + S. 20(a) says an unperfected SI is subordinate to the following interests:
    - A person, or that person’s legal rep who causes the collateral to be seized under the legal process to enforce a judgment or who has obtained a charging order or equitable execution affecting or relating to collateral
    - A sheriff who has seized or has the right to collateral
    - A judgment creditor or other person entitled by law to participate in the distribution of property or its proceeds seized under legal process
  + In order to avoid this dismal fate – the SI must be perfected at the time the interests arise or when writ of execution delivered
  + PMSI – grace period
    - S.22(1)(a) – see this (pg 251)
* 3. Limited Tacking
  + S.35 limits the ability of a **perfected** SP to tack on further advances in one particular context of a priority competition between an SP and a non-secured party [s.35(6)]
  + The peoples who can benefit from this are the same as those named in 20(a)
  + Here, when the perfected SP has **knowledge** of the interests of the parties named in 20(a), they can no longer tack on advances [s.35(6)(b)]

**Competition with Transferees of Collateral and Buyers and Lessees of Goods**

* Transferee = buyer; transferor = seller
* 3 main situations where a buyer or other transferee will be able to affect the value or existence of the SI (ie eliminate/subordinate the SI entirely)
* Where the collateral involved is goods, these protections are variations on the CL rule that a person, who is bona fide and without notice, purchases goods from a dealer/trader in the ordinary course of business of that dealer/trader, takes free from encumbrances placed by the dealer/trader
* A dealer has implied authority to conduct its business
* 1. Transferees where the SI Unperfected
  + S. 20(c): a security interest in chattel paper, a document of title, an instrument, money, an intangible or goods is **subordinate** to the interest of a transferee who
    - Acquires an interest under a transaction that is not a **security agreement**
    - Gives value and
    - Acquires the interest without the knowledge of the SI and **before the SI is perfected**
  + Another SP cannot use this provision to take priority over an USI
  + Requirements:
    - Must be a transfer
    - Must be for value
      * Value means consideration sufficient to support a simple contract and including some forms of past consideration
    - Knowledge
      * Transferee must not have knowledge of the SI
      * Registration is not knowledge

*RBC v. Dawson Motors (Guelph) Ltd*

* Question: what constitutes “value” for the purpose of s. 20(c)?
* Here, the promise was not value (must give value before the interest of a USI becomes perfected)
* Class notes on this case:
  + Dawson Motors – court got the law wrong
    - SI – unperfected
    - K to buy – buyer (transferee) promising to pay
    - SI becomes perfected
    - Buyer pays
    - Does buyer take subject to SI?
    - Buyer wants to use 20(c) [not SP; gave value)
    - SP says: didn’t give value before perfection
      * Court accepted this (must have actually given value – not just a promise)
* 2. Authorised Dealing Free from SI
  + S.28(1): allows a SI to continue in collateral even after the collateral has been dealt with
    - This “dealing” could be by the SPs own D or by any other party
    - Preserves the CL, as cannot give better interest than you hold
  + However s. 28(1)(a) provides that the SI will continue unless the SP expressly or impliedly authorizes the dealing
    - Express authorisation
    - Implied authorisation – license to deal (inventory – assumed that SP has authorised)
      * Implied permission for a dealing to result in the release of the SI, where the collateral is **inventory** and the SP is an inventory financier
      * SP can prevent this by explicitly stating that its interest in inventory is to continue even after the dealing with the collateral
      * Once the collateral/inventory is dealt with in the ordinary course of business the interest transfers to the proceeds (and doesn’t continue in the inventory) and the interest in the proceeds will end if the proceeds are applied to pay down a debt owed to a third party or to satisfy the “legal incidents” to the sale
      * Giving a SI to a subsequent party is not a “dealing” getting rid of the first interest
      * Note: if described as “inventory” in the SA, this description is only valid as long as the collateral is held by the D as inventory – so if the inventory is dealt with in such circumstances, the SI would no longer be attached, as against the claims of 3rd parties, once the D ceases to hold the property

*The Queen v. Royal Bank of Canada [Sparrow Electric Corp]*

* Question: what is the basis for an implied permission to sell?
* The SI only disappears if the D actually sells the inventory and applies the proceeds to a debt to a third party (is this necessary?? And I don’t know what it means??)
* Must be an actual sale – if not this section would only function to subordinate this interest to every person and everything that could be considered a “sale” in the “OCB”
* 3. Buyer (or lessee) in the Ordinary Course of Business
  + S.30: allows buyers or lessees to take free from SIs in certain situations (where a buyer takes free, so do any parties who take through that buyer)
  + S.30(2): a buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected SI in the goods given by the seller or lessor or arising under s. 28/29 whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the SA under which the SI was created
  + The buyer or lessee will not, under this provision, take free from SI not given by the seller/lessor
  + Important differences from 28
  + Several limits on the availability of this provision
    - Limited to buyers/lessees of goods (different from 20(c) and 28(1)(a) in this regard)
      * What constitutes a buyer? See case
    - Types of permitted payment
      * Sale or lease may be for cash, by exchange or on credit [30(8)]
    - Goods: only covers GOODS
      * Could be by way of proceeds; could also be by way of reattachment [29(1)]; transferred from an interest in an account or chattel paper that was created on an earlier dealing with the goods [29(3)]
    - Ordinary course of business
      * Various factors will help determine this – where agreement is made, the quantity of goods and price
        + A sale between private individuals is not OCB
        + Transaction can be in the OCB if a first time dealing
    - Knowledge
      * Did not know breach – not enough that they know the SA exists – need more particular knowledge
    - Only SI from the seller/lessor
      * Can only take free from SI given by the seller/lessor (only their SPs)
      * If subject to interests given by other parties – too fucking bad

*RBC v. Wheaton Pontiac Buick Cadillac GMC Ltd*

* Question: does s.30(2) allow a buyer to take free only of SIs given by her seller? YES
* D [car dealer][inv][bank claims fiero]🡪1🡪2🡪3[ordinary course of business]🡪Morin[didn’t know]🡪fiero🡪SI?
* Does not take free
  + S.30(2) only operates to allow buyers to take free from S1 **of their seller** (bank was not seller)
  + Cannot take free of any SI
* Then wants to apply 30(2) from D🡪1
  + SI is gone so is no longer there when she gets
  + Court says NO
  + Car dealer had gone out of business when car was sold🡪not ordinary course of business

*Fairline Boats Ltd v. Leger et al.*

* Question: what constitutes the “ordinary course of business”?
* In order to determine if it is in the OCB, the courts must consider all the circumstances
* The usual or regular type of transaction that people in that sellers business engage in must be evaluated
* One factor is where the agreement is made – if it is at the business premise of the seller it is more likely to be OCB; another factors might be important (if ordinary customer)
* Other factors: quantity of goods; price charged
* Here, not in OCB

*RBC v. 216200 Alberta Ltd*

* Question: who is a **buyer** in the OCB?
* Debenture (debt obligation – acknowledging your debt) [D can give SP this and grant the SP an SI]
* This court would use the Sale of Goods definition of “sale” as opposed to ON which would take more of a common sense view
  + Goods are sold when title passes to the buyer (no title passes to the buyer in unascertained goods until the goods are ascertained and appropriated to the sale)
  + Title may pass at the time of making a contract where there was a sale of a specific item in the possession which was in a deliverable state and identified in some fashion
* Various buyer entered into K with dealer (D)
* Bank had a SI in inv (all PAAI)
  + Part payment or in entirety but no one had actually received any furniture
    - Some was specifically allocated to K, some not allocated and others not in hands of D
  + Arguing protected by 30(2)
  + Problem: in order to determine if consumers are buyers, must determine if, under sale of goods act, title had passed (definition of sale)
  + Only specifically allocated would be considered sales

*Spittlehouse v. Northshore Marine Inc (Receiver of)*

* Question: should the *Sale of Goods Act* determine when there is a sale?
* Common parlance indicated it was clearly a sale

*Ford Motor Credit Co of Canada Ltd v. Centre Motors of Brampton Ltd*

* Question: what is the relationship between sections 30(2) and 28(1)? Can the parties themselves designate a transaction to be in the OCB?
* Comparison with other sections
  + 20(c)
    - Designed to protect third parties (will be evoked by them)
    - In the hands of the third party – SP needs to perfect to prevent the operation of this section
    - Only certain types of transactions and limited to unperfected SI
    - Subordination
  + 28(1)
    - Applies to third parties, but is not specifically designed for them (ie SP needs to release, etc)
    - No limits on types of collateral of third party beneficiaries
    - Both perfected and non-perfected may be eliminated
  + 30(2)
    - Designed to protect third parties (will be evoked by them)
    - Limited to buyer, lessees and goods
    - Both perfected and non-perfected may be eliminated
* 4. Fixtures
  + Fixtures come within this provision
* 5. Other protection
  + Consumer goods
    - S.30(3): buyer or lessee of goods that are acquired as consumer goods takes free from a perfected or unperfected SI in the goods if the buyer gave value for the interest acquired and bought/leased goods without knowledge of the SI
    - This section does not apply to a fixture or if the value exceeds $1000 [s.30(4)]
    - If CG are within these parameters, the buyer can take free from ANY SI (not just those given by the seller) if value
    - But cannot rely on this if they have knowledge of the SI
    - Allows a buyer/lessee to take free of any SI in goods, but is limited to consumer goods worth $1000 or less
  + Serial numbered goods
    - S. 30(6)(7): if goods are sold/leased, the buyer/lessee takes free from the SI in the goods perfected by registration, if the buyer/lessee bought or leased the goods without knowledge of the SI and the good were not described by serial number
  + Buyers/lessees who take in a grace period
    - Take free from SIs that might otherwise benefit from the 15 day grace period [s.30(5)]

**Competition with Holders of Interests Given after the Transfer of Collateral**

* The transferee of collateral becomes the new debtor of the SP (although the new D is not obliged to the SP – ie repayment)
* The original SP must register its interest against the name of the transferee if the original SP has consented to or has knowledge of the transfer
* If it fails to, its interest will be subordinate to some third parties who get their interest through the transferee
* Name changes: required to amend
* S. 51: third parties who are non-secured parties (rules operate to protect third parties even if they were not actually misled by the failure of the SP to amend registration)
* \*\*but, the rule does not provide for where there is neither consent nor knowledge – in this case the SI remains effective and has priority against the transferee and any third parties
* 2 situations:
  + Where the SP has consented to the transfer
    - SP is expected to go to the registry and change FS to reflect new debtor/transferee
    - If not done within the 15 day grace period, than any interest granted by the transferee after the 15 days period and before the amendment of the SP will have priority over the SI of the original SP (transferor = original debtor) [51(1)(a)]
  + Knowledge of transfer
    - The 15 day period does not start until the SP has knowledge of the transfer [51(2)(c)]
    - If there has been more than one transfer – only need to amend to reflect current possession
* Debtor name change – 15 day period runs when SP learns of name change [51(2)(b)(c)]
* Circular priority problems can arise – sad times

A bit of randomness…

* S.20: prefers non-SI over unperfected SI
  + Depends on who non-SP is
  + Judgment creditor preferred (by subordination)
* S.20(c): “transferee for value”
  + Only applies to certain types of collateral
  + Sale of goods act interferes with this section
  + Gives value (no gifts)
* Dawson Motors – court got the law wrong
  + SI – unperfected
  + K to buy – buyer (transferee) promising to pay
  + SI becomes perfected
  + Buyer pays
  + Does buyer take subject to SI?
  + Buyer wants to use 20(c) [not SP; gave value)
  + SP says: didn’t give value before perfection
    - Court accepted this (must have actually given value – not just a promise)
* Using s.20 – doesn’t become detached!!
* S.30: when another person (non-SP) enters picture, SP’s often simply drop out of picture (detached)
* Sometimes have 2 or 3 rules that achieve the same result
  + All you need is one as long as it does the job
* S.28: unless the SP expressly or impliedly authorizes the dealing
  + Ie the SP consents – releases the SI (express)
  + But implied🡪would be determined on the facts
    - Important common law principle preserved in implied
    - Sparrow Electric Case
* CL license to sell that is implicit in secured trans
* CL exception to nemo dat
* License the common law implies into the holder of a non-possessory property interest when the person who is in actual possession

License to deal property interest non-owner in possession

Owner bailment

Not in possession SI

Could have other property interests owner - goods

SI third party ownership (without notice)

(unaware of ownership)

* Gives non-owner a license to deal with property free of SI as long as party takes as ownership as a bona fide purchaser without notice (unaware of non-owner)
* Clears SI when 3rd party doesn’t know)
* If you are an SP and you are a holder of SI in goods where the person holding them who ordinarily sells goods to people who would take ownership – you have given a license, SI would not continue
* Expressly tell them NOT allowed to deal with free of SI – does not detach even if third party doesn’t know
  + License is important aspect, not 3rd party knowledge
* Only applies to goods
* 3rd party has to be buyer
* Restriction of inventory
* So, SI on inventory – have to be aware you’ve implicitly given D freedom to deal with SI

*Sparrow Electrics - zoned*

* SP1 – SI in inventory (license to deal free from SI)
* SP2 – subordination agreement favouring SP2?

License…

* Other rules can supplement this – Sale of Goods Act
* S.30 of PPSA
  + S.30(2) a buyer of goods sold in the ordinary course of business of the seller
  + To take advantage of the rule:
    - Have to be a buyer of goods
    - Only applies to goods but is not limited to inventory
    - Take free from any perfected or unperfected
    - Doesn’t matter if you know or not

*Wheaton Pontiac*

* D [car dealer][inv][bank claims fiero]🡪1🡪2🡪3[ordinary course of business]🡪Morin[didn’t know]🡪fiero🡪SI?
* Does not take free
  + S.30(2) only operates to allow buyers to take free from S1 of their seller (bank was not seller)
  + Cannot take free of any SI
* Then wants to apply 30(2) from D🡪1
  + SI is gone so is no longer there when she gets
  + Court says NO
  + Car dealer had gone out of business when car was sold🡪not ordinary course of business

Section 30 some more…

* Limits on 30(2)
  + Have to be trying to clear a SI given by your seller; has to be in ordinary course of business
* Ordinary course of business is not defined (only through case law)
  + 30(1) doesn’t really relate to 30(2) but to fixtures
* OCB: pre-req – there must be a SALE
  + Sales law – hard to know how relevant sales law is in the context of the PPSA (contrasting authorities) – has not come up in BC yet
  + ON: would ignore it – use common sense view
    - Sale of goods is irrelevant to the PPSA
    - As long as to an ordinary purchaser it looks like a sale
  + SK: here, SI in inventory of furniture dealer
    - Various buyer entered into K with dealer (D)
    - Bank had a SI in inv (all PAAI)
      * Part payment or in entirety but no one had actually received any furniture
        + Some was specifically allocated to K, some not allocated and others not in hands of D
      * Arguing protected by 30(2)
      * Problem: in order to determine if consumers are buyers, must determine if, under sale of goods act, title had passed (definition of sale)
      * Only specifically allocated would be considered sales
* S.30(2) cannot take advantage if you know would be a breach of SA
* S.30(2) and 28(1)(a) will often be used at the same time

*Ford Motor Credit*

* Discusses how 30(2) and 28(1)(a) are different and similar
* 20(c) operates clearly to protect any transferee
* 28(1)(a) can protect any transferee but could be argued to only protect buyers (if using common law license)
* 30(2) only protects buyers and sometimes leases and only applies to goods (inventory)
* 20(c) applies to any tangible collateral
* 28(1)(a) ANY collateral at all (if using CL license🡪only applies to goods)
* 20(c) only applies to unperfected SIs
* Knowledge of third party:
  + 30(2) doesn’t matter if third party knows of SI
  + 20(c) cannot have knowledge
  + 28(1)(a) depends on how you are trying to use rule
    - Express: can know
    - Unless using CL license🡪cannot know about SI
* 20(c) subordinates SI – other 2 rules eliminate it

Section 30

* S. 30(3): can clear all SI’s
  + Special rules for consumer situations
  + Slightly different parameters; only useful when cannot take clear of all SI’s under 30(2)
* S.30(4)
  + Protection for buyer in 30(3) is only for very low value goods (under $1000)
  + Can’t take advantage of 30(3) if you have knowledge
* S. 30(6): would have fit in with how you perfect your SI
  + Only applies to equipment and can be registered by serial number
  + Can perfect goods with serial number but someone can buy the goods free of SI

**Section 20 – competition with a non-security interest**

* **One party has an SI and the other is not a SP**
* Residual rules relating to where at least one security interest is not perfected
* S.20(c) – situation where unperfected SI against someone who later buys collateral (unsecured interest loses out)
  + SI is still there, just subordinate to other interests (ie if the lease disappears then the unsecured interest is back in prior position)
* S.1(2) definition – when people have knowledge
* S.20(b) [crucial provision]: SI in collateral is not effective against a trustee in bankruptcy
* If you lease goods (business of) and lease a tractor for 3 years, your lessee after 1 year goes bankrupt and your SI is unperfected, once the trustee is appointed your ownership of the tractor is gone. You lose!
  + Must be perfected at the date of bankruptcy
* S.20(a) not clear what property interest is if judgment creditor (without statute)
* 20(a) says that is there is a JC who has property seized, if that property is collateral with unsecured interest this interest (the unsecured) is now subordinate
* If you have perfected SI in property that is seized, s. 20 doesn’t apply
* S.35🡪competition between third parties normally
  + Exception: s.35(6) competition between SI and person described in 20(a)
* Example:
  + D1 – X
  + SP1 – SP2 (not perfected) – SP3
  + Unsecured creditor (judgement) seizes X
  + S.20 changes CL (no more nemo dat)
  + SP1 (between SP1 and SP2 – 35(1)(b))
    - 35(1)(a)
  + SP3
  + UC
    - 20(a)
  + SP2
* 35(6) provides a qualification to this
  + A perfected SI has priority over interests of person described in 20(a) only to the extent of:
    - Notify SP’s property has been seized which prevents further tacking on
      * Can confine interest
* But what is only one SP gets notice and the other continues to make advances?
  + Priority above UC
    - No limitation between SP1 &3 advances🡪different rules apply
* Example 2:

|  |  |  |
| --- | --- | --- |
|  | D1 (x) | D2 |
| 1 | SP1 |  |
| 2 |  | SP2 all PAAP [no competition between the parties at this point] |
| 3 | D1 – x – D2 | SP2 gets SI in X |

|  |  |  |
| --- | --- | --- |
|  | D1 (x) | D2 |
| 1 |  | SP2 all PAAP |
| 2 | SP1 |  |
| 3 | D1 – x – D2 |  |

\*\*FS is date

**Two Debtor Situations: Priority Rules**

* Although the first to file priority rules may seem to be unfair in the case of 2 D situations, there is nothing in the PPSA preventing their operation in this situation
* 2 sets of rules that explicitly deal with this: 35(8) and 51
  + The general “first to file” only applies where the two more specific sections do not apply
* Problems:
  + Arise normally where an interest in collateral is transferred from one debtor to another
  + Transferor will have given the interest to its SP before the transfer and this SP must remain attached after the transfer for this problem to arise
  + The transferee might have agreed to give the SI to its SP either before or after or upon the transfer
* Priority Rule:
  + Competition with SI granted ***before*** the transfer
    - Where the SI granted by the transferor (selling) is in competition with an interest granted by the transferee (buying) before the transfer, the general rule is that the interest granted by the transferor will have priority [35(8)]. This will usually cover all advances made by either party
    - PPSA expects the SP of the transferor, when the transfer comes to their knowledge and the transferee is a debtor, to amend their registration to reflect this
    - The SP of the transferor 15 days to do this
    - Fails to amend within 15 days – any advance made by the SP of the transferee after the expiration of the 15 day period and before the amendment, will have to use another rule (not this one with respect to priority) which will usually be first to file
  + Competition with SI granted ***after*** transfer
    - Competition between a SI granted by the transferor and one granted by the transferee after transfer [s.51]
    - 15 days to amend to prevent its interest being subordinated to the interests of the new SPs of the transferee
    - Consented:
      * If not filed within the 15 days and between the 15 to re-reg – the SI granted by the transferee has priority
    - Knowledge:
      * See 305
    - No consent or knowledge – this rule does not apply (go to first to file)

Section 35 ctd

* S.35(8) – 2 debtor priority rules
  + More specific than general rule
  + Once they know transfer has taken place, they have 15 days to amend registry
  + At time of transfer, subject to PSI then this has priority over any SI of transferee at the time of transfer
  + Does not apply in some situations
    - Except to the extent that, the SI granted by transferee secures advances made or contracted for period described in (a) & (b)
* Don’t amend?
  + Person they are in competition with could advance and 35(8) won’t apply to that advance
  + S.35(8) – doesn’t apply in the negative (silent on priority)

**Specific Priority Rules**

* Priority rules that are more specific in nature (pre-empt residual rules)
* Arise when you have a specific type of interest [both SI] or a specific type of collateral/property [apply when one or both are SP]
* Applies where there is competition between **2 SIs**
* S. 34: applies where **at least one is a PMSI**
  + S.35 and s.20 apply whether or not interest is PMSI
  + Give preferential treatment to the holder of a PMSI (gives better treatment to PMSI even if other interest has been in existence earlier)
  + Why? PMSI holder is responsible for financing and allowing debtors other parties to get interest
  + PMSI is just a status but it allows you to take advantage of certain rule
    - **SUPER PRIORITY!!!**
    - Three things must be remembered:
      * PMSI is just a SI and so generally speaking, all other priority rules are perfectly capable of applying to a competition involving a PMSI – only where a more specific rule applies so they have super priority
      * Second, no guarantee of super priority
      * Third, tend to operate only in contexts where there is a competition between SIs given by the same D
      * 2 PMSIs – this rule is redundant and residual priority would likely apply
        + Exceptions to this: seller>financier (if certain conditions are met) see pg 292
* PMSI: financier PMSI and seller PMSI
  + FPMSI: provided financing of some sort to allow the debtor to acquire rights in the collateral that is the subject of the PMSI
  + SPMSI: the SP is the person who has sold the collateral on credit to the D
  + Also, interests of the lessor/consignor are PMSI
* **S.34(1) & (2)**
  + Rules require that competition be between one PMSI and a SI that is not a PMSI
  + Both SIs have to be given by the same debtor
    - 34(2) applies to PMSI in inventory or its proceeds (at the time it attached)
      * Only when original collateral is inventory
    - 34(1) all other property
* **S.34(1): Collateral other than Inventory**
  + PMSI not in inventory
  + SI must be categorized as being an intangible or not an intangible (tangible)
  + (a) isn’t an intangible/account
    - Perfect within 15 days after D obtains possession 🡪priority over any other SI given by the same debtor in the same collateral
      * If both PMSI – rule is nonsense
      * If different D – rule doesn’t apply
  + This applies not just to the original collateral but to any of the proceeds
  + Possible proceeds may be inventory
  + **Super priority is determined by original collateral**
    - Proceeds might be of a different nature
    - Still must satisfy s.28
    - Example:
      * X🡪equipment (perfected in X within 15 days (34(1))
      * Y(proceeds)🡪inventory
        + Still use 34(1) – although subject to a.28

Because of original collateral!!

*McLeod & Co v. Price Waterhouse Ltd*

* When does the grace period to perfect for super priority begin?
* Issue: proceeds from a tractor; the applicants are disputing Ford’s claimed PMSI because they claim Ford did not perfect its PMSI by registration of a FS within 15 days after the D obtained possession of the collateral
* D has had collateral all along (many months before Ford registered its FS)
* Have to be in possession as the “debtor” of the creditor, and until this time, the time on the 15 days does not start running.
* Didn’t become collateral until SA came into place – then 15 days from when agreement in place

**Section 34(2): Inventory**

* No grace period for filing
* **Requirements and Order – must take several steps in the right order**
* Before or at the time the D gets possession of the collateral that is the subject of the PMSI, the holder of the PMSI must have:
  + Perfected the SI [s.34(2)(a)] and
  + Given notice to any other party, including any other SP, who has registered a FS containing a description that includes the same item or kind of collateral, stating that the person giving notice expects to acquire a PMSI in inventory of the D and describing the inventory by item or kind
  + \*\*must occur before or at the time the D gets possession [s.34(2)(e)]
* PMSI in inventory or its proceeds (can be anything) then you will have priority over all of the SPs from same debtor if:
  + (a) PMSI has to be perfected at the time D takes possession
  + (b) & (c) SP has to give a notice to any other SP that has filed a FS that includes a description of inventory
  + (d) notice has to state you expect to acquire a PMSI. Must describe inventory in item or kind
* Before D gets possession – to use 34(2) (depend on the date the debtor gets possession)
  + Send a notice to anyone registered saying you’re getting a PMSI and describing inventory (perfected SI)
* What if the debtor had possession before the PMSI? Pg 291 - wtf
  + Leasing property, then decides to buy it – would not fulfil 34(1) and (2)
  + For 34(1), not the debtor until attachment and for 34(2), cannot attach before notices sent out
* Example:
  + SP1 SP2
  + All PAAP – 1 FS – X – on day 2 – inv – FS – pmsi (??)
  + X 🡪 y (debentures)
  + SP2 – complied with section 28?
    - Continuously perfected SI in proceeds
    - Now wants super priority over SP1
    - Status with respect to original collateral?
      * S.28(1)(a) PMSI in Y and original collateral
      * S.28(2) continuously perfected
      * S.34 must show sent a notice to SP1 containing the word inventory

**Proceeds**

* If either of the basic PMSI rules are met, super priority applies not just to the original collateral but also to the proceeds from that collateral
* 34(6)(b): in the case of collateral other than inventory, a non-proceeds PMSI has priority over a PMSI in the same collateral as proceeds if the non-proceeds PMSI is perfected no later than 15 days after possession by debtor
* 34(6)(a): for inventory, the same rule applies but without the grace period; the non-proceeds PMSI must be perfected at the date of possession by the D
* \*\*\*this rule will apply when there are 2 different D giving SIs

**Super Priority**

* Only with respect to SI to the extent it is a PMSI
  + SP1 owed $15000
  + Secured by All PAAP
  + $2000 used by D to acquire X (secures 15K)
  + PMSI in X to the extent of $2000
  + May have to split priority positions
* S.34(4) PMSI in goods and its proceeds taken by a seller has priority over other PMSIs given by the same D (PMSI vs. PMSI)
  + Preference to seller PMSI (sold property on credit) provided that, in the case of collateral other than inventory, perfected within 15 days of Ds possession OR if inventory, perfected on day of possession
  + SEE EXAMPLE IN BOOK – TOO MUCH TO TYPE
* S.34(6) non-proceeds has priority over proceeds if NP (non-proceeds?) is perfected, within 15 days
* More specific rule will always prevail
  + 34(6) over 35(8) usually
  + Not responsible for s. 29

**How do Security Interests become Detached?**

* SI versus…
* Another P’s interests
  + Another SI – s.35 (except for sub 6) and 34 rules
  + Non-SI – s.20
  + Another SI/non-SI – may have an SI or may not
* Non SI: leasor’s; interest that arises after SI in place
  + Arises before – common law handles this(first in time)
    - SP1: s.28(1)(a)
* D – SI – in X
  + Sells X to D2; D2 leases X to D3

**Two Debtor Situations**

* See green sheet!
* Parties might be in competition – not both SP necessarily
* Now – section 51 can apply in either situation (2 SP; 1 SP, on not)
* See helpful box chart – pink tab in notes
* Notes on green sheet:
  + Who has a SI in X (in existence on Day 80)?
    - If X is inventory – transfer might have different results (than if X is not inventory)
    - On day 80, SP4 disappears
    - If collateral is inventory, the CL license kicks in – anyone who has a SI is assumed to give permission (SP2 and SP3 disappear) to sell
    - SP5 restricted to license in agreement
    - SP1 doesn’t have an interest until the transfer (All PAAP)
    - SP7, SP12, SP30, SP75🡪still have interest in day 80
    - S.35(8) applies to competition to SP (**with SI before transfer**) and an SP who gets interest on transfer (but already had an interest)
      * Interest given by transferor prevails over interest of transferee
        + OR SP2,3,5> SP1 [EE]

Also priority over SP7, 12, 30, 75 etc because of 35(1) – filing

* + - * SP2 never gets knowledge – can always take advantage of 35(8) and take priority over SP1
    - But 35(8) doesn’t always apply
      * If SP’s (OR) get knowledge of transfer then they have 15 days to amend registration to show DA as their D
        + So SP3 and 5 have until Day 25

SP3: registration on day 32 (cannot use 35(8) from day 25 to day 32 – cannot apply to advances in this period)

Residual priority rules apply to the date of registration

SP1>SP5 for advances l&k (made between 25 – re-reg) over 15 days

* + - S.51: if a SI has been perfected by registration and D transfers all or part with consent of SO, interest is subordinate…
    - (1) in certain situations SP5 will be subordinate (consent)
    - (2)SP has knowledge of new D🡪that SI s subordinate to certain ones that come after
      * SP3 knows!
    - SP2 has no knowledge or consent (s.51 doesn’t apply)
    - For SP5, s.51(1): subordinate to (a) &(b) [work together] and (c)
      * (a) &(b)🡪a perfected SI in transferred collateral that transpires from 15 days after the transfer…
        + SP5 has 15 days from the transfer (not knowledge) to re-register (if not, then its interest is subordinate to those that arise from 15 days to amendment)
        + Subordinate to any interest between transfer to 15 days
        + BUT if you register in 15 days, none of this applies!!!

If SP5 reregisters on Day 11, s.51 disappears

SP5 also risks losing out – people not secured can take advantage after 15 days???

* + - S.51 – does not apply to SP1
      * Applies to all advances parties make
      * Advances tacked onto priority
    - S.51(2): SP3 had knowledge but not CONSENT
      * Works the same as 51(1) but start period is different
      * Starts when knowledge happens
        + Similar to 35(8) – but different of when it starts to effect interest
      * So SP7 could take priority over SP5 but not SP3
    - Looks at 35(8) – priority of SI after re-registration, after 15 days

Grace Periods

* S.35(8) – 15 days (negative grace period does not adversely affect you)
* S.51 – 15 days, but if you don’t register within 15 days you will be adversely affected

Section 51(2) – applies to situations where you have 2 parties and they derive from 2 D’s. Would also apply where original debtor has changed their name (same rules but know change of name)

*Re: O’Rion*

* Trustee in bankruptcy of transferee
* Name change
* Whether the trustee can take advantage of these rules and take priority to the interest of the third party?

**Accounts**

* Up until now, most of the rules dealt with apply to general property
* Defined term
  + Account: monetary obligation not evidenced by chattel paper…
  + Main type of intangible property (intangible is also defined)
  + Account arises when you have:
    - Acct cred “owner” and an acct debtor
      * Debt is property owned by creditor
        + If debt is monetary obligation not in writing – account
* Accounts are of value to acct creditor and can be valuable collateral if acct creditor wants to borrow money from someone else
* Type of debt has particular importance
  + Obligation to pay money
    - Defined separately – intangible (because it’s so important in terms of its use as collateral)
* Conditional transfer of ownership of acct – SP!
* Can also have an absolute transfer (assignment)
* If acct creditor is selling their position outright or giving an SI in it, this is called an assignment (whereby you sell ownership of an intangible)
* Absolute assignment – selling
* Conditional assignment – giving an SI
  + Works like a mortgage (need default to exercise interest)
    - On default, becomes absolute owner/assign (default is pre-condition)
* Absolute transfer of an account is effectively immediately
  + Assignee must give notice to D of assignment and then D must make payment to assignee
* Conditional transfer🡪SP
  + D probably doesn’t know of assignment; will only become aware on default (then absolute ownership happens)
* Value: account has notional value (but really only as valuable as underlying debt which depends on the debtor)
  + Goods have inherent value
* Deemed SI: transferee (SP) arising from assignment or account or chattel paper should takes steps to perfect
  + So any transfer of an account creates a SI
    - Selling outright OR giving SI
  + Distinction between deemed SI and account
    - Why?
      * There are some provisions (Part 5, s.57) that only apply to true SI in an intangible but this provision is not really that important
        + S.41🡪this is what is actually important and is deliberately not in Part 5 (so it applies to any transfer, not just true SI)
    - Could give SI in account then absolute assignment (deemed)🡪competing interests
    - Accounts arise from:
      * All PAAP – includes all accounts
      * Account is often proceeds (inventory sold on credit)
* If the SI in original property is a PMSI, SI in account is PMSI as well
* Account is monetary obligation so expectation account will be paid out (proceeds will arise from account)
  + Special definition in proceeds which relates to accounts
  + In order to be proceeds, D must have interest in $
  + Para (c): total or partial payment of intangible (no mention of D having interest)
* S.41: reiteration of CL and equitable rules in relation to accounts
  + How you use the property (if assignee🡪must give notice to D to make payment to you; can continue to pay acct creditor until given notice)
  + Where you get an assignment of account, you take it subject to the defences of the assignor
    - Ie. K rescinded by D🡪account disappears even if account assigned
  + S.41(9) changes common law/equity
    - K between account creditor and debtor may have a non-assignment clause (binding)
    - Term in K which prohibits/restricts assignment is BINDING on assignor but only to the extent in making the assignor liable for damages🡪doesn’t apply to third party but is a breach of K

**Priority Rules for Accounts**

* Just the rules we have looked at so far – the residual rules
* Perfection – filing a statement
* Priority goes to whoever has applied first
* BUT special rules relating to accounts
  + S.34(5)
    - Financial institutions deal exclusively with accounts and doesn’t see itself as an SP but it is deemed by PPSA
    - File FS – problem arises when PMSI (super priority)
    - Priority over PMSI as long as registered before
    - Eliminates super priority rules
      * Rule introduced by banks so they don’t get screwed

**Fixtures**

* Statute does not define
* But, we know that fixtures DO NOT include “building materials”
  + “Building materials” = bricks, etc...things that by taking out, you would fuck up other parts of the building; BUT, does not include A/C, heating, installed machinery... (see exact wording in statute, s.1)
* Since fixtures = part of land, strange that PPSA deals with
* STATUTORY OVERLAP:
  + Interest in fixtures is still an interest in real property too, so must register in LTO and PP Registry
* Brucey says:
  + Fixtures = things attached to land that add value
  + A whole fucking building can be registered in the PP registry
  + Can rip out an elevator and be like “haha, fuck you you cracker ass cracker!”, and the building owner will be like “wtf, this interest is not registered in the land title office?” <---too bad sucka!
* WHY are fixtures included in the PPSA?
  + Because objects can become affixed!
  + Although, you can obtain an interest in a fixture initially too...hmm
  + Fixtures introduce new types or priority competition:
    - SP <> SP: dealt with by the PPSA, but not s. 36
      * No special rules with respect to competitions between the interests of 2 personal property secured parties in the same fixture – general priority rules will apply
    - SP<> Mort’gee: dealt with by s.36!!!
    - M <> M: dealt with by Land Title Act (no rules in the PPSA)
    - Section 36 pisses of a lot of people.

**Section 36**

* Deals only with SP < > M priority competitions
* Need to know whether the PP SI attached before or at the time the goods became a fixture or whether it attached once the goods were already a fixture (Note: attached, not perfected)
* TWO (2) types of SP:
  + #1: those who obtain an SI before or at the same time the collateral (goods) become fixtures (note, for purposes of this section, need attachment only required, NOT perfection!)
  + #2: those who obtain SI AFTER the goods become fixtures
  + For #1, section **36(3)**and **36(4)** apply
  + For #2, section **36(5)** applies

**36(3)**:

* If the SI attached before or at the time the goods became a fixture and the competition is with the holder of an existing interest in the real property, then the PP SI will have priority
* SP had priority over M
* Problem of SP having a “secret lien”, since ONLY attachment is required
* However, a person in 36(3) is subordinate to a person in section 36(4), so still incentive to perfect

**36(4)**:

* (a): A person described in section 36(3) is subordinate to a person who acquires an interest, for value, in the land, AFTER the goods have become fixtures, including assignees who have acquired interest after goods became fixtures, even if the assignor obtained that interest prior to goods becoming fixtures
  + If the PP SI is in competition with a holder of a real property interest in the fixture arises after the thing is a fixture and who acquires the interest for value and without fraud, then the SI will be subordinate unless the holder of the interest has filed a notice of its interest in the LTO before the competing interest arises (perfection)
* (b): A person described in section 36(3) is also subordinate to any M, to the extent of the advances made by that M AFTER the goods become fixtures
* CIRCULARITY PROBLEM:
  + SP1 had priority over M1 due to operation of 36(3)
  + M1 has priority over M2 due to operation of LTA
  + M2 has priority over SP1 due to 36(4)
* Note though, section 74 of the PPSA suggests favouring PP interest over the land interest

**s. 36(5)**

* When the SI in a fixture attaches after it has become a fixture, there are fewer complications
* To have priority at all against a competing real property interest, the SP must have filed a notice in the LTO
* Subordinate to earlier filings in the LTO

**s.49:** (referred to in s. 36; not all that important)

* Filing in LTO:
* For FIXTURES, this constitutes perfection under PPSA too, according to Ontario courts
* Questionable whether this would only constitute perfection in SP/M competitions, or also in SP/SP competitions too (since these are not governed by s.36); Brucey still thinks this should constitute perfection in either case)

**Manning et al. v. Furnasman Case (Manitoba):**

1. Owner + Contractor
2. Contractor purchases furnace from 3rd party seller to install in owner’s home
3. Contractor purchased on conditional sales agreement, not full on sale
4. Contractor defaults on payment
5. Can seller go into owner’s home and rip out furnace?
6. Court thought this would be a ridiculous result; tries to find way to legitimize not allowing this to happen; owners had no reason to know of seller’s SI at all
7. Court tried to make s.30 argument:
   1. Can the owner take free from the seller’s SI since they are a BFPFVWN?
   2. Problem with this: home owners are not really BFPFVWN; they did not purchase furnace in the “Ordinary Course of Business” since they contracted with the contractor for services, not for the sale of the furnace itself (at the time; though s. 30 NOW COVERS supplies used as part of a contract for services)
8. Trial Court makes other argument: (that I don’t comprehend)
   1. Balancing of interests require that the unperfected interest be subordinated. To avoid secret s.36 liens, must register SI; SP loses.
9. Court of Appeal:
   1. Found that there was not actually a (conditional sales) contract between the seller and the contract (Brucey does not agree with either the trial court or the CA; things court took too much of a policy role, then twisted the law, to achieve desired outcome)
   2. In any case, statute is now changed, as mentioned above!

**Accessions**

* Defined in the PPSA
* “Goods affixed to, or installed in, other goods”
  + tire on a car, nail in a bookcase
  + has to be removable
* smaller object affixed to a larger (called “the whole”)
* interest can arise in the accession itself or because it is part of an interest in the whole
* once an accession is part of a whole, it will be in competition with those security interests in the whole
* a SI in goods does not disappear on the goods becoming an accession
  + however, upon affixation, whoever has an interest in the whole will have an interest in the accession (can result in priority competitions)
* s.38 generally favours the holder of a SI in goods that have become an accession provided that the SI attached before affixation of the goods

1. **Kulchyski Case, p. 278:**
   1. ISSUE:
      1. What if the good is not removable from the other good?
   2. ANSWER:
      1. Then it is NOT an accession, but rather a commingled good (we will not deal with these)

**s.38**:

* SPs who have an interest in the OTHER GOOD automatically acquire an SI in the accession (where exactly does it say this...?)
* “other good” and “the whole” are defined in s.38(1); very straightforward/obvious definitions
* THREE(3) Types of Priority Competitions:
  + 1) Accession < > Accession (dealt w/ by PPSA, not s. 38)
  + 2) Accession < > Other Good/Whole (dealt w/ by s.38)
  + 3) Other Good/Whole < > Other Good/Whole (dealt w/ by PPSA, not s. 38)
* SAME rules as in s.36, except that this does not fuck with another statutory regime!
* Some difficulty can arise in defining WHICH item is the “accession” and which is the “other good” (for example, while an engine might be installed into some sort of plane, it may be the engine that is the most valuable part...should it be considered the accession, or the other good?)
* Section 36(3) is equivalent to section 38(2)
* Section 36(4) is equivalent to section 38(3)
* Interest in accession: in order to determine priority it is necessary to determine whether A got its security interest before or at the time the goods became an accession, or whether it got its security interest after the item was part of the whole
* Interest in the whole: necessary to determine whether the interest in the whole was had before the accession was part of the whole (had an interest in the other goods, or afterwards)

Interest in Accession Pre-existing

* When A gets an interest before or at the time the collateral is an accession and is in competition with B whose interest in the other goods predates the collateral’s becoming an accession, then A will have priority because it has an attached interest (no need to perfect)
* Need to perfect: A will lose in a priority competition with C (if A fails to perfect) if C acquires an interest in the whole after the accession, if C does so without knowledge of the SI in the accession and before it is perfected.
* Also subordinate to Bs advances after the fact (if B doesn’t have knowledge and A is not yet perfected)
* Review this 271

Subsequent Security Interest in Accession

* If As SI in the accession alone is taken after the collateral is already an accession then there are different rules
* If a person who has an existing SI in the other goods when the goods become an accession, A`s SI will be subordinate unless the other person consents to the SI, disclaims an interest in the SI or has agreed to the removal of the accession
* Person who acquires a SI in the whole after accession – A will be subordinate if unperfected

**Kulchyski Case again**, re: perfection of SIs in accessions:

Must perfect by registering serial no. of the accession, if it has its own serial no., once it becomes part of the whole, in order for perfected status of the good to extend to the accession!

Defaults and Remedies

* Contract gives the property interest while priority rules are based in property law
* SP going to use the property interest in some way on default (which is under K)
  + Impact on D and rest of the world
* Priority rules:
  + Do you have to decide who is in competition with SP? Could be non-SP; SP [perfected or non-perfected]
  + PPSA is not a complete set of priority rules (remember CL🡪nemo dat)

Remedies

* Subject to property rules

Default

* What constitutes a default? Up to parties to decide
* When you haven’t paid what you are supposed to pay🡪default
  + Failure to pay on time, taxes, amount, etc.
* S.56(2): proceed to remedies
* Being in default doesn’t mean the SP has to do something – will have to elect to do something
  + Stuck with consequences of affirming K or proceeding to remedies
  + Can waive the default
* 2 stages of default:
  + 1. There is a default
  + 2. Default for how much
* Up to parties to agree on remedies but there are a few presumptive ones in statute
* Remedy in K is unusual
  + Why? Because there is authority (Andrews – pg 315) which say that is you have a remedy in the K that looks like a statutory remedy, the statutory remedy applies (can’t contract out of procedural protections provided by statute)
* Remedies upon default under a true secured transaction (pg 339 in text)
  + Personal: sue (no special status as SP)
  + Real: statutory
    - Receivership
      * Available only for business debtors
      * Often involves court appointment and supervision
    - Collection
      * Only on collateral that affords payments: intangible and chattel paper
      * Might already have been paid out to another
    - Seizure
      * Notices usually necessary
      * Duties while in possession
    - Disposition
      * Notices usually necessary
      * Subject to tests of good faith and commercial reasonableness
    - Foreclosure
      * Notices usually necessary
      * Extinguishes obligation (ie no deficiency claim remains)
      * Subject to objection of affected parties

**Personal and Real Remedies** (generally speaking, these are cumulative)

* S.55(3): cumulative – can use both personal and real remedies
* S.55(9): SI does not merge because reduced to judgment
  + Not precluded from real remedy if you’ve taken personal remedy
* Personal – breach of K
  + Remedies depend on breach
  + Purely personal to the parties of the K🡪privity
  + Available for any breach
* Access to a ‘thing’ as a remedial device
  + Can use if pre-condition is satisfied
* **Real remedy: against the ‘thing’ (will impact anyone else that has an interest in the ‘thing’)**
* Remedies: part 5 (s.55)
  + Context in which it applies (s.55)
  + Have access to rights and remedies (s.56)
  + S.56(3) precludes the contracting out of certain procedural protections
* Procedural preliminary steps to remedies:
  + Appointment of a receiver
  + Seizure of collateral if tangible
  + Notification (under intangible) to D
* What actually gets you something as an SP
  + Sell or foreclose (after seizure)
  + Collect payment
* \*but taking certain preliminary steps may be enough to collect payment (prompted by incentive to pay)
* Mandatory to go through preliminary steps to get to others
* **FIRST thing you must do: give notice to D**
  + This is a CL rule based on fairness
  + Before a SP can proceed against collateral, it must give notice of the default and the demand for payment to the D and a chance to make payment to remedy the default
  + The notice period may be a few days and in some circumstances it may be reasonable that no notice is given
  + In assessing what length of time would be reasonable, the following factors will be relevant
    - The amount of the loan, the risk to the creditor of losing its money or the security, the length of the relationship between the D and the C, the character and reputation of the D, the potential ability to raise money in a short period of time, and the circumstances surrounding the demand for payment
* *Waldron v RBC*
  + If there is a D in default, SP must give D a final chance to remedy default
    - How much default
    - Will happen if not dealt with
    - Time period to remedy
  + Highly ambiguous: how much notification must be given (depends on circumstances)

**Receivership**

* Assuming notice [usually a few days] has been given, one more preliminary matter (*optional*) for SP:
  + Whether or not you want to appoint a receiver (takes over affairs of D)
  + To manage or restore company
  + Possible for a receiver to be appointed by any creditor (but usually by SP – usually have K right to appoint)
  + Right to apply to court to do this also
  + Want someone appointed ASAP
  + Typical for SP, in receivership, to ask court to appoint receiver (some won’t take job unless appointed by the court)
* PPSA: contains rules about receiver (appointment is preliminary to winding up of the D)
  + What they can do; who they are
  + These rules do not fit logically in the PPSA (more like the law of agency)
  + S.66: ability of the court to supervise what the receiver is doing
  + If receiver is appointed pursuant to SA🡪will contain what they can/cannot do
  + Just because a SP is entitled to appoint a receiver (because of K) this doesn’t mean the court will appoint one if asked
    - RBC case: several defaults; agreement allowed for receiver; goes to courts🡪they refused
* **So whether you appoint or not, the next step is deciding what collateral you will proceed against**
  + Tangible: seize
  + Intangible: notify
  + Documentary intangible: both seize and notify
    - These (all 3 above) you do on your own (no court involved)
    - However, there are a couple of weird jurisdictions🡪need government official to proceed (Alberta and NWT)

**More on Remedies**

* Statutory
* Use of collateral in a remedial way
  + Depends on type
    - Intangible: not a whole lot in statute on how you proceed
      * Example: $1000
        + X goods
        + Y acct
        + Z negotiable instruments
      * How you proceed against these is up to you
      * Q: what collateral do you want to use? The most useful, which is the intangible🡪$!!
* S.57 (intangible) \*\* SPs debtor is owed payment as a creditor!!!!
  + Relates particularly to accounts (s.41)
  + S.57 WHEN you can do the things in s.41 and because it is in Part 5, only deals with true SIs
  + Using an account in a remedial way🡪ZONED
  + On default the SP can change its conditional assignment in this property into an absolute assignment and become the account creditor – SP must notify the account debtor involved to make payments to it as the new account creditor
* Tangible:
  + S.58: right of seizure or repossession
    - Seizure: certain rules for certain types of property
      * Already in possession: possession for remedial purposes from now on
        + Tricky to know when status changes – CL notice
      * S.58: what happens when property is in possession
      * But s.17🡪sets out rules that constrain SP in possession (same rules for perfecting and seizing)
      * Gives you bailment interest only
    - Seizing is a preliminary step
  + Once you have in your possession, SP must decide to (1) keep property in satisfaction of obligation secured (foreclosure) or (2) sell it
    - More useful to sell that foreclose
    - If you foreclose there may well be objections by various parties
    - Foreclose: extinguishes other interests…(zoned)
    - Sell: could buy yourself at FMV if you want it

Sale of Collateral

* S.59
  + S.59(2): in existing condition or fix up; charge for reasonable costs of repair
  + Dispose of it🡪s.59(3), by private or public sale
  + It is usual to sell at public sale because it is easy to challenge a private sale (by other SPs; debtor🡪don’t sell for FMV, other parties can probably deprive you of your ability to sue for deficiencies)
  + S.59(13): SP can purchase collateral at FMV at public sale
  + \*\*\*59(14) when a SP disposes to a purchaser in good faith, purchaser gets free from SI and all subordinate interests whether or not this section complied with
  + When you sell🡪only disposing it free from your SI and **subordinate** interests. When it sells, buyer takes it subject to prior interests (who could potentially seize it).
    - In practice, all of SPs will do this together OR you will want to clear high interests first (no one will buy and could be commercially unreasonable to sell this way)
    - Why you need to know prior interests🡪who you will need to buy out!!
    - Other law relates to this – s.16 of the Sale of Goods Act (must reveal charges and encumbrances)
* S.59🡪before proceeding
* S.59(6): fairly elaborate notice requirement before proceeding with sale
  + Separate notice from CL notice (2 notices given)
  + At least 20 days notice before disposition
    - When, where, what, etc
  + To whom?
    - 59(6): debtor (includes who has possession [they also get notice]) and parties with subordinate interests
    - Prior interests are NOT entitled to notice
* Hope to get money from sale
  + S.60: who gets paid
  + Giving accounting of payment
  + Get monies to the extent you are owed and then extra to subordinates
  + Still extra🡪goes to D
    - Example: SPI [400] and SP2 [500] have interest in X [sold for 600]
      * SPI gets 400; SP2 gets remaining 200 and loses SI in X
      * Very much in interest of subordinates that as much as possible be raised
* SP may owe you damages if not conducted in commercially reasonable manner
* S.69: if procedures haven’t been followed🡪entitled to damages (sue for actual damage or amount prescribed by statute) and further, s.69(7) says if procedures in statute not complied with court can order SP1 in breach is not entitled to anything (cuts SP1 off)
  + Powerful disincentive

Note: s.68 – good faith and in a commercially reasonable manner🡪applies to disposition of collateral

Not done basic improvements/repairs to machinery🡪probably not commercially reasonable manner

Cases:

* Cop
  + - * Illustrates the danger of these transactions
      * Dentists (D) have falling out (medical equipment seized by SP)
      * SP sells it privately to one of the D (other D challenged of being commercially unreasonable)
        + Found not CU
      * Donnelly
        + Illustrates deficiency possibilities
        + Consequences of acting like an ass (commercially unreasonable)

**Foreclose on the Collateral**

* Statute doesn’t use this word (other than in s.61) – keeping collateral in satisfaction of obligation secured
* If you chose this, the obligation secured by the collateral is deemed to be satisfied (ie there could be no suit for any deficiency)
* Seized and propose to various parties who may be affected that you just keep it to satisfy obligation
* Not unusual for other parties to argue you have done this
* Cases – illustrate the above point
* S.61:
  + How to proceed: propose this to affected parties
  + To whom to give notice: same as under s.59 (debtor, party in possession, subordinates)
  + Notice: 15 days to object to notice
    - If not deemed by passage of time to have elected this remedy
    - Any party who gets notice can object
      * If object: **must move to disposition route** and start process over again (new notice, 20 days, etc)
* S.61(3): if no notice of objection, SP is deemed to have irrevocably elected…entitled to hold property free from interests of D and subordinates
  + Not free from prior (subject to that)
* S.61(8): if foreclosed🡪you can sell it but not free from prior interests
* Do it first🡪extinguish obligation (nothing else owing to you)
* S.62: any of the parties entitled to remedy the collateral by paying out the obligation secured
  + If they pay it out🡪obligation has been repaid and collateral returned to D
  + This is very unlikely to happen but may be on an exam
  + Before the SP eho has seized collateral has disposed of it or foreclosed on it, the D or holder of a subordinate interest in the collateral may redeem the collateral
  + This is done by tendering fulfillment of the obligation secured by the collateral together with the expenses incurred seizing the collateral and readying it for disposition
* Pay attention to acceleration clause
  + Would have to pay out as well but collateral restored

**Consumer Goods**

* S. 58(3): prohibits the seizure of consumer goods by a SP with a SI in them when the D has paid at least 2/3 of the total amount secured
* If an SP has seized consumer goods the D will be able to redeem collateral by paying out the amount actually in default regardless of acceleration clause (put back in position if no default)
* S.62: but can only do this twice a year
  + If not, you are just allowing D to delay payment
  + When assessed as consumer goods?
    - Attached? Default? Not sure of definitive answer
* Ability to redeem – elaborated in s.62 (haven’t been told this, notice is defective)
* Also, s.67 denies a SP with a SI in consumer goods the ability to both seize and sue – the SP must choose
* Exercise of a real remedy against consumer goods extinguishes the real remedy

Foreclosure cases

* Argued another SP involved who had interest in X&Y
  + SP1 had seized X
  + SP2 says, although didn’t admit 61, the way SP1 proceeded made it seem like own property
    - Constructive foreclosure
      * All obligations to SP1 satisfied
        + No more SI in Y for SP1
* BC case: agrees this is possible (constructive foreclosure) if you treat collateral as your own
  + Putting it in your inventory, keeping it for too long (no maximum period in statute)
  + Puts SP in bind as they are required to fix up/repair or be found commercially unreasonable
  + Can get around this by seizing all at the same time

Real Remedies:

Tangible – seizure🡪selling/foreclosure vs. Intangible – selling/sending out notice

* Assuming you’ve done all of these things, you may still be owed $ (junior SP) – may be no point going against collateral
  + But you’re still a creditor and can go after personal remedies
* SP get what they can from collateral and sue for the rest

**Consumer Goods** (again Brucey)

* Have retained some old law in the PPSA
* Seize or sue (prior default remedial approach)
  + Opted for one, couldn’t get the other
  + Rationale: without alternative approach, there would be no reason/benefit to get the most from the sale
  + In BC, this survives in the consumer goods provision
* S.67: preserves remedial approach
  + D in default under SI with consumer goods then (a) (b) (c) or (d) [faced with possession – provision applies]
  + Doesn’t say when characterization is done
  + Shouldn’t probably exclude consumer goods
    - Seize, foreclose, or bring action to recover judgment
* S.67(2): D unperformed obligations under SI are extinguished
* S.67(10): sue!!! SI extinguished
* Whitewater Motors:
  + When you say a SP is proceeding under 67(1)(c) – may accept surrender of goods by the D
  + Intention in having possession of collateral

Miscellaneous Rules

* S.69: consequences of non-compliance with the statute (procedure and remedially important)
  + Damages
  + Allows court to make various orders
* Limits to what court can do pursuant to s.69
  + Andrews
    - Both the D and SP were asking the court to do something
    - D said: court should deprive SP of SI in particular collateral
    - SP: allowed to K
    - Both denied!
    - Cannot in K have a remedy similar to a statutory remedy and get rid of the procedural safeguards!
* Read with courts ability to marshall
  + Shouldn’t be depriving parties of remedies or collateral UNLESS they haven’t complied with statute
* S.69 is essentially damages
* Osmond v. Murray
  + Registration of SI (FS)
  + Successful application claiming standing
  + In ON – must remove registration in respect to CG of title – no reason registration should be there