**What Fits into the PPSA as a Secured Transaction**

* S.2(1)(a): every transaction that in substance creates a security interest regardless of form or legal ownership of the property.
* S.2(1)(b): list of deemed secured transactions – leases of over a year, commercial consignments.

**Definition of Debtor**

* S.1: a person who owes payment or performance of an obligation secured; where it’s a deemed security interest; or a transferee/successor of an interest of the debtor (anybody who gets a transfer from a debtor of that collateral is also the SP’s debtor). Doesn’t matter if the debtor was prohibited from transferring.

**Acceleration Clauses**

* A clause parties can put in the security agreements that in the event of one default, all amounts which would otherwise have been paid in the future become suddenly due and payable immediately.
* So that if you fail one month’s payment, that’s not the only amount the SP can go after from the collateral.

**Future Obligations (All PAAP)**

* May not be able to predict at time you enter into security agreement what the obligations secured are going to be (bank doesn’t know how much you’re going to borrow from your line of credit) and similarly secured party may not know the future state of your property, so will get an all PAAP.
* S.10(d)(iii): advantage is that if your debtor gets proceeds, you get an interest in that not only as proceeds but also as original collateral (proceeds = after acquired property). Also no concerns about whether your description is adequate.
* New Solutions: must use the words “all present and after acquired property” in the security agreement, those exact words.
* All PAAP also applies to the debtor’s intangibles: debts and contractual obligations he’s owed.

**Tacking**

* S.35(5): future advances from a secured party tack onto earlier advances, have the same priority as the secured party’s earlier advances.
* Canamsucco Road House: if a secured party buys out the interest of a subordinate secured party, that interest does not tack on.

**Form Requirements for Enforceability against Third Parties**

* Old forms are still in effect.
* S.10(1)(a): it is enforceable if the secured party is in possession against the collateral. This obviously does not work for intangibles.
* S.10(1)(d): get the debtor to sign a written security agreement that contains a description of the collateral. This description can be by item or kind, can just say “all PAAP,” or can just say “all PAAP” with various exclusions.
* S.10(3): describing collateral as “equipment” or “consumer goods” is not sufficient.
* S.10(4): if you describe the collateral as “inventory,” your security interest in that collateral is only enforceable against third parties when it is possessed by the debtor and is actually held as inventory. As soon as it isn’t, you lose your interest.
* If the inventory is sold, you’ll have interest in the proceeds but not in the collateral.
* S.10(5): your security interest in proceeds is always enforceable against third parties regardless of whether or not the security agreement mentions or describes the proceeds.
* If you fail the writing requirements, you cannot rank against other parties.
* Riepe: writing requirements also apply for enforcing your interest as a secured party (like a lessor) in a deemed secured transaction.
* Riepe: does not matter whether the third party knows about your interest or not – if it doesn’t meet s.10 requirements, they can ignore it.

**Conditional Sale Agreements**

* Re s.2, CSA’s are ALWAYS security interests (not deemed, but true security interests). This is because it is an owner retaining an interest subject to conditions: repayment or performance of an obligation.

**Assignments**

* Transfer of ownership of intangible property.
* Absolute assignment is not a secured transaction.
* Conditional assignment is a secured transaction: I transfer you a debt and you can’t assert your rights as a creditor until you meet pre-conditions.

**Consignment (is it a CSA, and hence a secured transaction?) – Toyarama**

* Could the consignee become owner under the consignment contract? Was it a consignment where he was forced to buy the goods if he couldn’t find a buyer (CSA)?
* Did the consignee’s responsibilities look like those of an owner: responsible for risk and liability, paid taxes on the property, maintained it like an owner would.
* If so, consignor is the secured party, consignee the creditor.

**Commercial Consignment – Deemed ST**

* Even if it really is a consignment, under s.3, it’s a deemed ST
* Where the goods are delivered to a consignee who is in the ordinary course of business to deal with goods of that description for a consignor.
* Both the consignor and consignee deal in goods of that description and there has been a consignment.
* Does not cover auctions nor does it cover where it is generally known to creditors of the consignee that he is generally in the business of dealing with the goods of others.
* Furmanek: it isn’t whether the creditors of the consignee, the people in the court, knew that the debtor dealt in consigned goods but rather whether creditors GENERALLY would know.
* Commercial consignments, as deemed secured transactions, do not get any remedies from the PPSA. Remedies are whatever the parties agreed to in their security agreement.

**Leases (CSA in Disguise)**

* Where there’s an option to purchase that can be exercised at the end of the lease and it can be predicted from the beginning of the lease/transaction that the way things are set up, the lessee would be a fool not to exercise it or would be penalized for not doing so.
* Also, where the lease is a mandatory lease for the entire usable life of whatever’s being leased and by the time the lessor got title back, given nature of the property, there would be no value left in it.
* Also, where the lessee has onerous obligations to insure things or keep it in good repair, treating it like an owner.
* In any of these three situations: lessor is secured party, lessee is debtor.
* Newcourt Financial Factors for Finding a Lease that’s really a secured transaction: intent of the parties, whether a deposit or down-payment was required at the outset of the lease and whether it was refundable, ownership at the end of the agreement and purchase options (does it automatically pass to the lessee at the end of their term or could it be bought for far lower than market value?), and indicia of ownership: lessee has responsibilities of an owner.

**Leases of Over a Year (Deemed Secured Transaction)**

* Even if it’s a true lease and not a CSA disguised with options and such, it’s deemed if the lease is set out to be a year or more, but no remedies for default from the PPSA.
* If the lease is for an indefinite term, even if the lease is ended before the year is up, if it’s for an indefinite period from the outset, it’s covered. It’s in the PPSA from the start.
* If the lease is for a year or less, but at the outset it is renewable for one or more terms at the option of one of the parties and the terms total up to a year or more. Doesn’t matter if the renewal options are never exercised. It’s in the PPSA from the start.
* If, with the consent of the lessor, they just end up having uninterrupted possession for over a year. In this situation, it doesn’t fall under the PPSA until he has it for over a year.
* The lessor must be regularly engaged in the business of leasing goods for it to be deemed ST.
* Does not include leasing of household goods/appliances as part of leasing land.

**Trusts (Secured Transactions in Disguise)**

* Where trust was entered into to secure payment or performance of an obligation. Beneficiary is the secured party and trustee is the debtor. The whole trust was entered into to force trustee to do various things as the trustee under fiduciary duty.

**Transactions Taken out of the PPSA (s.4)**

* S.4(a): non-consensual transactions, like interests that are given by operation of law or statute.
* 4(b): a security agreement under federal legislation, like the Bank Act or Indian Act.
* 4(c ): claims relating to insurance.
* 4(d): claims for wages and salaries.
* 4(f): interests in land.
* 4(g): interests in rental payments, mortgages.

**Licenses: Are they Property Capable of Attracting Security Interests?**

* Common law approach: no, they’re not property. Must be property, tangible or intangible, to attract security interests.
* Regulations approach: depends on the extent to which they are subject to government whims. If government can give and take it away at its will, it’s not property. If it’s more entrenched, it can be.
* Commercial realities approach: do these things have meaning and value to the parties? If they do, it’s property.
* Saulnier approach: those three approaches aren’t determinative – must be assessed on a case by case basis to determine if license is of enough substance of commercial value.

**When is Collateral Categorized?**

* S.1(4): determination of whether goods are consumer goods, inventory, or equipment must be made at the time the security interest in the goods attaches.
* S.10(4): inventory is the exception thanks to this section. For the purposes of writing requirement, inventory can cease to be inventory when the debtor ceases to hold it as such. Furmanek shows that s.1(4) only applies when it doesn’t conflict with other provisions.
* Otherwise, what collateral/goods are categorized as is fixed at the time of attachment.

**Proceeds**

* S.28(1)(b): if you have a security interest in collateral and it is dealt with and gives rise to proceeds, your security interest automatically extends to the proceeds.
* S.28(1)(a): your security interest also continues in the original collateral, wherever it goes.
* Doesn’t have to be the debtor who dealt with the property, can be someone else whether rightfully or wrongfully.
* S.28(1): if you enforce your interest against both the collateral and the proceeds, the amount secured is limited to the market value of the collateral at the date it was dealt with. No such limit if you only go after the property.
* Proceeds: must be identifiable and must be property that arises either directly from the original collateral or as proceeds from proceeds. Doesn’t matter how many generations (CIBC).
* The proceeds must be something in which the debtor acquires an interest. Probably sufficient if the debtor used it.
* This requirement doesn’t extend to the proceeds from a negotiable interest or an intangible, like an account. Any payment made under that intangible is proceeds, even if the payment isn’t made to your debtor and, hence, he has no interest in it.
* So if the debtor transfers the account to someone else, any payments made under the account are proceeds and your security interest attaches even though debtor has no interest in it.
* However, if, after the transfer, payments are made via personal property, you don’t get an interest in that as proceeds.

**Tracing**

* When a debtor gets cash proceeds from collateral and deposits the funds in a mixed account.
* Debtor is presumed to first withdraw money that isn’t subject to someone else’s interest.
* If withdrawals take the account down below the amount subject to an interest: whatever is left in the account is subject to the interest and a percentage of the withdrawal that affected it. $20 in the account is all subject to the interest, and $5 of the $80 withdrawal prior to that.
* If that withdrawal is used to purchase something, whatever is purchased is subject to an interest of the secured party equal to the percentage that that money made up of the withdrawal.
* After having been used to buy something, security interest does not continue in the money. Unless the seller didn’t act in good faith, he takes cash without security interest.
* I have a security interest for $50, you put it into an account and account now has $100. If I withdraw $70, all $30 remaining in the account is subject to the interest, as are $20 of the $70 I withdrew. If I buy something with that $70, you have an interest in that something equal to whatever percent $20 is of $70.
* Future deposits do not “top up” the amount subject to your interest unless the debtor says so.
* Agricultural Credit Corp: you can trace from one piece of property to another if there is a close and substantial connection between them: not defined, but in this case, the property was only one step removed from and was the same type of property to that which originally had a security interest in it.

**Attachment**

* S.12(1): three things must occur for attachment: a) you give value, b)the debtor has rights in the collateral, c) you meet the s.10 enforceability requirement of possession or writing.
* The moment a) and b) are fulfilled, it attaches with respect to the debtor. Once all three occur, it attaches with respect to the rest of the world. Order of fulfillment doesn’t matter.
* S.12(1)(a): Value: whatever would support consideration for a simple contract. Past consideration is not a problem. The consideration may also be given to a third party (TD Bank).
* Value = the promise to do something, not necessarily the actual paying/doing of it.
* Rights: has to be enough there for debtor to have rights in property for SI to attach. Doesn’t matter who has title to the collateral, as long as debtor has some rights to it (Haibeck).
* Timing = when both requirements are satisfied: value is given and debtor gains rights in property (important for after acquired).
* Timing for when value is given is determined by when promise was made, not when actual performance/payment occurs.

**PMSI**

* Whether something is a PMSI is determined after attachment.
* Seller PMSI: a CSA, where secured party sold the collateral on credit to the debtor, he has PMSI in it to the extent of the purchase price or the portion of the price that was on credit.
* Financier PMSI: secured party provided financing that allowed the debtor to acquire rights in the collateral – PMSI extends to the amount of this payment that was used to acquire the collateral.
* Leads to a secured party having two priorities for one piece of collateral: may have secured its loan for $5000 by all PAAP, $200 of which was used to buy a property X. Property X is after acquired property: security interest in it for $5000, but also PMSI in it for $200 of that $5000.
* To get financier PMSI, your money must have been used to acquire rights in the collateral and it must have been INTENDED for that purpose, not simply by accident. Most have been lent specifically to buy THAT piece of collateral, not a general loan/line of credit.
* If original collateral subject to a PMSI is dealt with, the proceeds are also subject to that PMSI.
* Unisource Canada: there is a PMSI in collateral if the secured party’s money led to an enlargement or transformation of the debtor’s rights in the collateral (like if he was leasing the property but the debtor’s funds allowed him to purchase it).
* Agricultural Credit Corp: it’s enough that it was the intention that your money be used to buy the collateral and was somehow involved in the process, if not directly. Unlike to be followed outside of Sask.
* Chrysler Credit Corp: if debtor’s funds are used to purchase collateral, this PMSI is all treated as one big unit – can’t pay back a PMSI interest piece by piece.

**Perfection**

* Perfection occurs the moment the security interest attaches and you’ve taken the steps necessary to perfect. Order this is done doesn’t matter. Perfection can occur before security interest even attaches (s.19).
* S.23: if a security interest is perfected under one method and then, without any interval of unperfection, it is then perfected by some other method, it is perfected as of the earlier date. Eg: if I have possession but file a financing statement in anticipation of losing possession, when I lose possession, my date of perfection is still the date I first had possession, not date of filing.

**Perfection by Registration**

* Just bare bones notice: who’s involved in the transaction and basic idea what the collateral might be.
* S.44: you must indicate in the statement how long you’re registering for. Can be infinity.
* S.45: if you sell or transfer your security interest to someone else, you can, but need not, register this.
* S.47: registration does not constitute notice to anyone.
* S.51: if you get a new debtor, that is if your debtor transfers the collateral to someone else, you are required to register this.
* S.43(2): registration of a financing statement is effective at the time assigned to it by system.
* S.43(4): financing statement may be registered before a security agreement is made and before attachment.
* S.43(5): a registration can relate to one or more security agreements.
* Must have an attached interest for it to be perfected.
* Proceeds must be described in the financing statement. Unlike attachment, proceeds do not automatically perfect.
* Bank of Nova Scotia: you can file a statement at any time, even after default and on the road to getting a remedy.

**Errors in the Financing Statement**

* S.43(6): validity of registration is not affected by a defect, error, or omission in the statement unless that error is seriously misleading, in which case, cases have read this to mean the financing statement is invalid. Re Alda Wholesale: grammatical, punctuation, spelling errors suffice. S.43(7): it’s invalid if one or more debtors aren’t disclosed, if the collateral is consumer goods with a serial number and that’s screwed up.
* S.43(8): not necessary to prove anyone was ACTUALLY misled, just that someone could be.
* S.43(9): failure to provide a description in the statement in relation to any item or kind of collateral affects validity, but not with respect to any other collateral in the statement.
* Regal Fees: unlike security agreement, can sometimes get away with missing details in description of the collateral in the statement. Just needs to be enough to get you to look to the security agreement for more information.

**Perfecting by Possession**

* S.24: possession of collateral by secured party or by someone on his behalf perfects his security interest in that thing, unless possession is the result of seizure or repossession. It must be tangible property.
* Bank of Nova Scotia: Once there’s default, if the reason the SP thereafter has possession of the property is part of a remedial step, this does not constitute perfection. Means it’s very hard to claim perfection by possession if you take possession after default (hard to prove this wasn’t for remedy). Can’t really get possession for perfection once default has occurred and you’re taking steps to exercise a remedy. You can waive the default, but better have that in writing.
* Royal Trust: the reason for possession must be to perfect. If possession is casual, accidental, or for another reason, there is no perfection by possession.

**Temporary Perfection (where you’ve given collateral back to possession of debtor)**

* S.26: you have a perfected security interest for a 15 day period even if you have no possession of the collateral nor any financing statement filed if you give the collateral back to the debtor for some limited purpose.
* This grace period is backdated to when the security party originally got his interest perfected, like when he originally got possession.

**Continuously Perfected Security Interest (Perfecting Proceeds)**

* Remember that to be perfected, proceeds must be described in the financing statement.
* S.28(3): Gives you 15 days to file a financing statement for the proceeds or take possession of them. During those 15 days, they are considered perfected with the date of their perfection being that of the original collateral. If you don’t, they are unperfected.
* For s.28(3) to give you a grace period, your security interest in the original collateral must be perfected. Proceeds of proceeds get their own 15 day period.
* S.28(2): to get this, security interest in the original collateral must be perfected by a financing statement and either….
* (c ): the proceeds are money or cheques
* (b ): your financing statement covers the original collateral and the proceeds are of a kind with the description of the original collateral.
* (a): the most common – the financing statement for the original collateral contains a description of the proceeds using language that would be sufficient to perfect an interest in the original collateral of the same kind. In other words, use of the word “equipment” without further qualification wouldn’t work here either.

**Priority and Circularity**

* Pair up all the parties for each of the pieces of collateral and find a priority rule for each of those pairings. If there is none, nemo dat. A party may also have two different priorities for a piece of collateral if there is a PMSI.
* GMS: this can result in circularity problems. One resolution is to see if one of the parties could have prevented the circularity problem. Or perhaps one type of interest is preferred over another for policy reasons. Or doctrine of marshalling can resolve.
* In GMS, solution was to make the first party to take remedial action the one to lose out.
* Court said that the expectations of the parties is the primary consideration in resolving

**Subordination Agreements**

* Doesn’t actually alter the priority rules. It is a contract entered into between junior creditor and senior creditor where the senior creditor promises to pay-out the junior creditor’s interest first before satisfying themselves.
* S.40 abolishes the rules of privity: a subordination agreement can be entered into by debtor and senior creditor and the junior creditor that benefits from it can enforce it.
* Need not be registered, though it can be, particular where between debtor and senior creditor.
* Royal Bank and Gabriel: agreements can take any form, either as their own document or as a provision in the security agreement.
* Trans-American: they are interpreted strictly against the party trying to claim the benefit – it’s interpreted narrowly.
* If the subordination covers the collateral but says nothing about proceeds, it will not automatically extend to them.

**Doctrine of Marshalling**

* Where there are alternate pieces of collateral and the senior creditor is oversecured, the junior creditor can get the court to order the senior, oversecured creditor to satisfy their interest in other collateral instead so as to preserve the junior creditor’s interest.
* Surrey Metro: court will consider whether the oversecured party will suffer in any way – won’t order it if there hasn’t yet been a default or the oversecured party isn’t ready to proceed against the collateral (this is because they may end up needing that piece of collateral by virtue of their interest increasing via tacking). Must be shown that the oversecured party won’t be disadvantaged in any way by having to go after other property.
* Disadvantages include if the oversecured senior creditor isn’t ready to go against that other property or going against it would be more complicated.

**Residual Priority Rules**

* If there is no rule, nemo dat.
* Where multiple rules apply to a pair of creditors in competition, the one more specific to the situation prevails.
* S.35(1): if this act does not provide another method for determining priority between competing interests, use these.
* S.35(1)(a): priority between perfected security interests in the same collateral are determined by whoever registered or possessed the collateral first without regard to date of attachment.
* S.35(1)(b): a perfected security interest has priority over unperfected.
* S.35(1)©: priorities among unperfected security interests are determined by the order of attachment of the security interests.

**Priority of Re-Registration After Lapse**

* S.35(7): If registration lapses as a result of failure to renew registration or registration being discharged without authorization or in error and the secured party re-registers not later than 30 days after the lapse, that lapse does not affect their priority with respect to security interests which were subordinate to them directly before the lapse.
* However, this priority rule does NOT apply to the extent that the competing security interest, even if subordinate prior to the lapse, secures advances after the lapse and before re-registration. For that, you’d go back to s.35(1)(a), comparing their date of perfection with the date of your re-registration (you lose out).

**Two Debtor Problem (Your Debtor Sells the Collateral to another Debtor with Other SPs)**

* Doesn’t matter that you’ve forbidden your debtor from transferring the collateral.
* S.35(8): if a debtor transfers an interest in collateral which at the time of the transfer is subject to a perfected security interest then that security interest has priority over an interested granted by the transferee before the transfer (either has an all PAAP on the transferee or the collateral counts as proceeds from whatever the transferor bought with it from the transferee).
* Perfected security interests in that collateral at time of transfer have priority over any security interests granted by the transferee irrespective of date of filing.
* S.35(8) does not affect any secured parties granted interests in the collateral by the transferee AFTER the transfer.
* A hiatus period kicks in 15 days after the original secured party of the collateral learns of its transfer to a new debtor. This never kicks in if he never learns of it, but if he learns of this new debtor, he is expected to go to the register within 15 days to add this new person to its financing statement.
* Any advances made by the transferee’s pre-existing debtor between the end of the 15 day grace period and when you finally get around to amending your financing statement are not covered by s.35(8), their priority instead being determined by the date of perfection. So if the transferee’s secured party filed before the transferor’s secured party, any advances by the transferee’s secured party in this period would take priority.

**PMSI Super-Priority**

* Must have a PMSI to get the s.34 priority rules.
* S.34(1): a PMSI in collateral and/or its proceeds other than intangibles or inventory that is perfected not later than 15 days from the day the debtor gets possession of the collateral has priority over ANY other interest given in that collateral by the same debtor (including pre-existing parties). Make sure it isn’t inventory and that you really do have a PMSI.
* All that matters is that the original collateral isn’t inventory – the proceeds from it can be inventory and it’ll still fall within s.34(1).