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| **Introduction** | All parties must act in a commercially reasonable manner (**68(2)**) and in good faith (**68 CL/Equity preserved**). PPSA objectives: provide **compl code on PPS law** to aid business financing, **legal predictability**, give **rights and remedies** to parties to enforce SI.*PPSA* prevails over other Acts unless expressly provided (**73**), and can be supplemented by the common law where there is no conflict (**68(1)**). In general, perfected valid and enforceable security interests prevail over unsecured creditors (***Marine******Buildings***)Even if a SP is SP1, doesn’t mean they will be 1st priority ranking – it puts SP in the best position re priority over collateral (subject to a valid PMSI) |  |
| **Defined Terms under s.1(1)**  | **Debtor** 🡪 a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral… (c) a **lessee** **under a lease for a term of more than one year**, [**deemed SIs**] (e) … a transferee of or successor to the interest of a person referred to in paragraph (a) [**encourages transferee to reg new interest**], or **SP** 🡪 (a) a person who has a SI. Includes receiver (**55**)**Collateral** 🡪 PP subject to a SI**SA** 🡪 agreement that creates a SI**SI** 🡪“(a) an **interest in goods** …[and other forms of PP] **that secures payment or performance of an obligation** …, and (b) the interest of (iii) 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**” |  |
| **1. Valid and Enforceable SI**s.2(1) Substance TestS.10 Writing | Tacking – disallowed (***Roadhouse***), subj to all obl clause, justified under **68(2)**. Accel Cl – Permitted if SP has commercially reasonable grounds that performance is/maybe impaired (objective) (**16a**) OR C is in jeopardy (**16b**). **FORM** – SI unenforce against 3P unless either 1) SP has real/apparent possession of C (**10(1)(a)**) OR 2) signed SA adeq desc (**10(1)(d)**) – by item/kind, PP categories (goods etc). Writing req strictly enf (***Stingray***), adequate described (***New Solutions***). Descrip inadequate if C described as consumer goods or equip with no further ref to kind (**10(3)**)**SUBSTANCE TEST** – PPSA covers all trx that in substance create SI without regard to form or title/possess holder (**2(1)**)**DEEMED SI** – don’t sec perf of obl but creates in substance SI (ex. lease 1+ yr **s.3(c)**). Security Lease – passes s.2 + 1+ year is indefinite term (***Stoke Resources***) + not true lease (rent, temp possession, right of reverter) + option to purchase for less than FMV (***Daimler*** factors – **opt to purch**, intention of parties, lang of lease, lessor biz, effect of trx). ***Newcourt*** was true lease as true option to purchase truck for FMV at end of lease. Security Trust – passes **s.2** + creditor/debtor rel (***Skybridge***) + not source of rel. Court doesn’t permit SP choosing trust law to defeat PPSA claim for policy reasons (***Berman***). Instead, the law of equity applies.**EXCLUDED TRX** (**4**) – Liens (non-consensual), real property (except fixtures), *Bank Act* (has own regime).**COLLATERAL** – incl proceeds, described as PP under **1(2)** and Regs or uncertain. PP types: money, intangibles, doc of title, goods. Can be consumer goods (used primarily for personal/household purpose), inventory (held by D for sale/lease or has been leased, raw mats/work in progress, mats consumed in bus), or equipment (not inventory or consumer goods – need SN under Regs). Characterization of good depends on *debtor use* of C and occurs at time SI attaches (**1(4)**). If inventory 🡪 must be held as inventory (**10(4), *Furmanek***). **PROCEEDS** – identifiable/traceable PP derived (in)directly from dealing of C or proceeds of C where D acquires an interest (**1(1)**). SI continues in C and extends to proceeds (**28(1)**, ***Marathon Realty***). Continuously perfected if OG C perf by reg of FS (**28(2)**). Date of reg of OG C is date of priority (**35**). If AAP clause 🡪 implied auth of dealing under **28(1)(a)** so SP only has SI in the proceeds. Must be IDENTIFIABLE (factual inquiry) or TRACEABLE, where C comingled with other PP losing distinct ID, must be closely and substantially connected to OG C (***Pettyjohn*** – cows), now law in BC (***Re River***). | ***Saulnier*** 🡪 License is PP if proprietary int***Stingray*** 🡪 oral agreement doesn’t comply w/ s.10***Skybridge*** 🡪 travel funds held in T/B rel***Pettyjohn*** 🡪 sale of one type of cows for another type = ID |
| **2. Attachment** (**s.12**) | Atch occurs when the last of the 3 requirements occur, in whatever order. **(1) Value?** Must have consideration, includes past (**1(1)**, ***TD Bank*** – prior loan). **(2) D have rights in C?** Somewhere between possess (***Hailbeck***) & title, interpreted broadly (***Kinetics***, where rights were pursuant to SA), needs proprietary interest to be consistent with nemo dat. **(3) Writing req?** C must be either in possess of SP (**10(1)(a)**), or described in SA (**10(1)**). Atch for AAP occurs when D acquires AAP (to facilitate financing inventory) (**13**) but doesn’t atch for crops that don’t grow, & consumer goods, unless PMSI. | ***Hailbeck*** 🡪 mere possession***Kinetics*** 🡪 rec’d rights purs to SA |
| **3. Perfection (s.19)****Registration (25)**Seriously misleading**Possession (24)****Proceeds (28(2))** | Perf occurs when valid SI + attachment + 1 perfection step (**19**) – can reg FS before perfected (**43(5)**). Unperfected SIs subordinate (**35(1)(b)**). If many unperfected SIs, first to atch has priority (**35(1)(c)**). Change of perfection method continues priority if no intermediate period (**23(1)**) and doesn’t alter priority (**35(2)**). **REGISTRATION** of FS + **19** = perfected SI (**25**). Must register FS with registry w/adequate descrip of debtor/SP/collateral/SN goods (**43(1)**). C can be general C (content in **10 & ss.9/11 REG**) or SN goods of generally high value (C held as consumer goods or equip – **10 & ss.9/10 REG**). Can be renewed (**44(2)**), amended (**44(3)**) but changes necessitate a new filing. Copy of FS given to debtor (**43(15)**), can be filed in advance of SA (cuz date of perf = date of reg, **45(4)**, ***New Solutions***) and cover many SAs (**42(5)**). JR SPs can search Reg & find exact/inexact matches. FS not invalidated by errors in reg so long as error not seriously misleading (SM) (**43(6)**), objectively assessed. No party need actually be misled (**43(8)**, ***Alda***). If error, SP can file FS change statement to correct within 15 days of knowledge to preserve priority (**51(2)**) so long as no SP has come in between. 4 main errors: 1) ***D name*** 🡪 auto-SM if common name, reg invalid. If similar match, seriously misleading if reasonable searcher that is within class of persons for whose benefit registration and other methods of perfection are required (***Alda***), but minor discrepancies disregarded. Total accuracy not necessary (***Coates***); 2) ***Error in SN*** 🡪 on own not necessarily SM as suppl search method and given small # similar matches. But if equip & need SN but SN absent 🡪 can’t be saved, unperfected SI; 3) ***Error in D name but SN correct*** 🡪 error in D name fatal, but weak authority saying correct SN cures D name; 4) ***Error in C descript*** 🡪 minor error reg otherwise valid, but absence of AAP fatal (not in SA/FS). **POSSESSION** of C + 19 = perfected SI unless seizure or repossession (**24(1)**). Unequivocal possession held *as collateral*, not bare or constructive possession, is required (***Royal Trust***). Possession must be obtained prior to D default or seen as seizure (***Bank of NS v RBC***). If SP lose possession, can re-perfect by reg within 15 days to hold original priority and remain perfected (**26(1)+ 23(1)**), or SI becomes unperfected (**26(2)**).**PROCEEDS** – continuously perfected so long as original C perfected by registration of a FS (**28(2)**). If SP enforces SI against both C and proceeds, amt secured is FMV when C dealt. | ***Alda*** 🡪 **was SM**, gram error in the C descript, that C descript didn’t include AAP cl.***Coates*** 🡪 **not SM**, right name wrong SN as reas pers would have looked further***Munroe*** 🡪 **not SM**, error of SN right name  |
| **4. Priority****Residual Priority****Circular Priority****Lapse of Reg****Sub Agreement**Complete/partial**PMSI****TIBs****Transferee B****Authorized Deal****B in OCB****Fixtures****Accessions****Lien-holders** | Priority rules govern competing claims to same C. **RESIDUAL** – arise when no specific rules exist. 3 rules: 1) 2 perf SIs = 1st to reg OR perf by poss (**35(1)(a)**); 2) perf & unperf SI = perf (**35(1)(b)**); 3) 2 unperfected SIs = 1st to atch (**35(1)(c)**, ***Ontario Dairy Cow***). If C adequately described, reg of 1 FS can cover separate ST as it is notice a SI may be taken (***Agricultural Credit Sask***). **CIRCULAR PRIORITY** – where no stable outcome of priority occurs, generally arising from 1) lapse of reg or 2) subordination agg. **LAPSE OF REG** – if reg lapse, SP can retain priority if re-register within 30 days of lapse provided no intervening party (**35(7)**). If intervening party in lapse, that party takes priority and new date of perfection arises. To correct, Courts apply either partial or complete subordiation. **SUBORDINATION AGG** – where a sr SP subordinates interest to a jr SP, permitted and effective according to its terms (**40**) whether in SA or other agg, but lang must be clear/unequivocal. Prudent to address all SPs relative to others when drafting to avoid circ priorities (***Re Cif***). Sub Aggs are strictly construed (***Transamerica*** – agg ref ‘bankers’ and SP was finance company). But, if intention to subordinate + language = valid sub agg, and 3P can enforce sub agg even if no privity (***RBC v Gabriel***). To resolve any circular priority, look to agg to see if there was an intention of either partial subordination (SP1 agrees to turn over the benefit to SP3 – ***Cif*** applied this to reach equitable result) or complete subordination (SP1 doesn’t assert ANY claim against C until other SP’s claim satisfied). **PMSI** is interest permitting lenders of new goods to rank in super-priority to all SPs, usually where debtor has AAP clause. Must be reg’d (**34**) and comply strictly to rules.**STEP 1**: PSMI Seller/lender – PMSI seller (SI secures payment of all/part of purchase price (**def 1(a)**), PMSI lender (SI taken by 1 who gives value to enable debtor to acquire rights in C (**def** **1(b)**)), or PMSI lessor (interest of lessor of goods under lease for 1+ years (**def 1(c))**); **STEP 2**: Non-Inventory Collateral (**34(1)**) 🡪 Tangible C must perfect within 15 days of D taking possession *as* collateral (***McLeod Co***), intangible C must perfect within 15 days of atch of PMSI; Inventory Collateral (**34(2)**)🡪 Priority if PMSI perfected at time 1) D gets possession, 2) notice is given to all SI holders that reg’d a FS before possession, and 3) notice includes items/types of inventory taken by PMSI and that the person expects to acquire a PMSI. Where 2 PMSIs in same collateral 🡪 PMSI seller priority over other PSMIs – **34(4)**); **STEP 3**: JC’s/TIBs? Perfected PMSIs have priority over JCs and TIBs (**22**). **TIBs** – unperfected SI is ineffective against TIB if SI unperfected at date of bankruptcy (**20(b)(i)**). Unperfected SI holder cannot exercise rights in C against the TIB (***Re Giffen***). Lessor/transferee w/ unperfected SI can claim damages as unsecured cred of value of lease at time of bankruptcy (**20(a)**). **BUYERS** – where buyer, buyer can take priority if SI unperfected (**20(c)**), SP authorized dealing (**28**), or in OCB (**30(2)**); **TRANSFEREES** have priority where they 1) acquire interest under a transaction that is not SA, 2) give value (incl past consideration), & 3) acquire interest without knowledge of SI (**20(c)**). Priority determined at date transfer takes place.**AUTHORIZED DEALING** – SI continues in C unless express/impliedly authorizes dealing (**28(1)**). SA can determine range of dealings.**BUYERS IN ORDINARY COURSE** – B of goods sold in OCB of seller takes free/clear of perf/unperfected SI in goods whether B knows it unless B knows sale breached SA (**30(2)**), would be commercially unworkable for B to contact SP for every purchase to get a release of goods if in ordinary course. B will also take free if equipment sold + buyer without knowledge of SI + goods undescribed by SN in registration (**30(6)&(7)**) and consumer goods less than $1000 + without knowledge of the SI + buyer gives value (**30(3)&(4)**). *Practical Approach* (SGA not relevant to inform ST, if it looks like a sale then B can rely on it (***Spittlehouse***)) is better than the *Strict Approach* (SGA informs ST, goods vest w/ B on date sale is made (***216200***)). A sale in the ordinary course is a sale to the public at large, a factual inquiry objectively assessed (***Fairline***) to protect B. Factors to determine whether OCB: \*\*\*FMV price (close to FMV = OCB), surrounding circs (public sale = OCB), where agg made (at bus = OCB), quantity sold (large = OCB), business of seller (sells same things = OCB). **FIXTURES** – PP affixed to real P, are goods but excludes building mats (**1(1)**). Fixture interest that atch before or at the time goods become fixture has priority over real property (**36(3) *Furnasman***). Person who has real property interest after the goods become fixture take priority over fixture interest (**36(4)**) so long as SP filed fixture notice in LTO in accord w/ s.49. JC has priority over fixture interest if do **s.49** fixture notice (**36(6)**). PMSI holders and the requisite filing give priority of PMSI holder over JCs (**36(7)**). **ACCESSION** – good affixed to other goods (**def 1(1)**) have same rules as above under **s.38**. To retrieve accession goods, must be removable and separately identifiable from affixed good (***Shuswap***). **LIEN-HOLDERS** – excl from priority because non-consensual (**4(a)**), lien created through furnishing mats/services to goods has priority over any *PPSA* interest, unless lien statute provides otherwise (**32**) to avoid windfall if SP gets priority. Must be 1) non-consensual lien, 2) lien on goods, 3) lienholder supplies mats/services, 4) supplied in OCB. | ***Re Cif*** 🡪 applied partial subord to avoid win-fall of SP***Wheaton Pontiac*** 🡪 **not OCB**, private sale, Keywest had no place of bus, Siben wasn’t in the bus of selling (repairer)***Wheaton Pontiac (above)******Fairline*** 🡪 **not OCB**, sale made at restaurant, only one boat, super low price, could have repaired to increase value.***Furnasman*** 🡪 heating equip attached on install, therefore attached at the time the good became a fixture  |
| **5. Default/ Remedies** | Before exercising remedies, must provide notice to insolvent person of default and try to make arrangement (***BIA***) despite SP always having action for debt. 2-year limitation from first day SP can enforce SA (***Limitation Act***). Part 5 applies except not to deemed SIs (**55(2)(a)**). A default not limited to failure to pay or perform obl sec when due (**def 1(1)**). Default triggers remedies but the SP should always act in good faith and in commercially reasonable manner (**68(2)**). Court can vary a procedure (**63(2)**, ***Andrews***). If demand for payment + reasonable notice + not met within reas time 🡪 SP can take poss of C (**58(2)(a)**) unless D has paid 2/3 of obl sec (**58(3)**). Any SP can seize C. Once in possession, SP must use reasonable care to preserve C (**17(2)**). Reas time is fact based inquiry (***Waldron***), where 1 day is unreasonable (unless perishables), but depends on prospects of D to pay, if C at risk if wait too long, spec circs of the case (***Lister***). **DISPOSITION** – SP may dispose of C after seizing/repossessing (**59(2)**) – must dispose in commercially reasonable manner (**68(2)**) or risk the contract being set aside by Court: creditor make best efforts to find FMV? Right path to generate most revenue? Should have advertised? Appraisal? (***Donnelly***). Notice – of intention to sell must be sent to D and other interested parties (**59(6)**), but can dispense with notice if goods perishable, declining in value, C is money, cost of care is more than C (**59(17)**). Surplus – paid in accordance with priority distribution list (**60**), or if deficiency can bring an action against D for deficiency (**60(5)**).**FORECLOSURE** – SP retains C in satisfaction for entire debt (**61**). Notice – of intention to keep must be sent to D and other interested parties (**61(1), *Trans-Canada***), they have 15 days to object to compel SP to sell C (**61(2)**). Purpose is that C value may be more than debt owing. Court can set aside an objection (**61(7)**). Deemed Foreclosure exists where there is an intention to sell C, but not enough to hold C as inventory while sue for deficiencies (***Inland***).**REDEMPTION/REINSTATEMENT** – post-default, D can reinstate SA by paying sums in arrears + reasonable expenses incurred, but only when consumer goods, not precluded by SA, and instance of reinstatement not more than 2 times per year (**62(2)**).**RECEIVER** –instrument/court-appointed receiver avail (**65**), and remedies available for the SP in the event of D non-compliance, including damages (**69(3)**). Qualifications/obligations of receivers (**66&67**).**CONSUMER GOODS** – SP may seize or sue for debt of obl sec for consumer goods in satisfaction of obl sec (**67(1)**) and SI in obl sec extinguished (**67(2)**). When SP receives amount equal to gross amount from the sale 🡪 obligations and liability of D discharged (**67(7)**).**COURT VARIANCE** – Court can vary a disposition (**63(2)**, ***Andrews***). | ***Medi-dent*** 🡪 sale of equip to D **NCR** as private sale, low $, could have gotten FMV***Donnelly*** 🡪 sale of truck to parent comp of D NCR as transfer under FMV, no effort to repair, non-arms-length trans, sat on lot for 8 months |
| **6. Conflicts**If mobile goods 🡪 | **LOCATION OF COLLATERAL** – Governing law is OG law where C located when SI attaches (**5(1)**). If move, remain perfected if FS reg within either **(a)** 60 days of coming to the new jurisdiction, **(b)** 15 days of SP has knowledge the goods have moved to a new jurisdiction (actual knowledge – ***Re Searcy***), OR **(c)** original perfection expires (**5(3)**). If fails to re=perfect, unperfected SI in new juris continuity conditional on expiry of grace period. If re-perfect after end of grace period or come in unperfect, SP perfect at date of new reg (**5(5)**). **EXCEPTION** – new juris law governs if SP and D know goods are going to new juris + goods move to new juris within 30 days of attach (**6(1)**).**LOCATION OF DEBTOR** – if goods are inherently mobile, equip or leased inventory 🡪 location of D (***Advance Diamond***). Mobile goods used for transport of people/property (cars, airports, trailers, etc.) and governed by the law where the debtor is located when the SI attaches (**7(2)**). D location = place of business, if not principal residence of the debtor (**7(1)**). If competing SPs in new juris, priority is determined in looking to the location of the debtor. If D relocates, perfected SI in location of D remains perfected if perfected within **(a)** 60 days after D relocates, **(b)** 15 days after SP has knowledge of D relocation (Actual knowledge is required – ***Re Searcy***), OR original perfection expires (**7(3)**). Enforcement procedure against C governed by law of juris where goods seized (**8(1)**).***Advance Diamond*** 🡪 priority reversed when goods moved juris, but goods mobile and s.7 applies***Daewoo*** 🡪 excavator that moved breached SA, sold and leased, but since mobile b/c held for lease by D, s.7 applies | ***Jukes*** 🡪 leased car moved to new juris unperfected, didn’t re-perfect so TIB defeated claim |
| **7. *Bank Act*** | SPs can choose to secure under either the PPSA and Bank Act, but their co-existence is based on fundamentally different principles.*Bank Act* security can only be taken by eligible Canadian Banks (ie not credit unions), only in operable with a certain class of Ds (**427(1)**) with particular types of goods (**425**). Some Ds are wholesalers, dealers, manufacturers of agricultural, forestry, and mining products, farmers & fishers. *Bank Act* security CANNOT be used to secure consumer loans, equipment outside industries listed in s.427(1), and intangible PP.**Attach**: SI attaches on delivery of SA to the Bank, and vests title with Bank when the security given (**s.427(2)**). Permissible to take security in AAP, and it attaches at time SI is taken (***Elgin Co-Op*** – SI in grain fields growing, Co-Op buys crop but disputed by SP; SP wins as it’s ok to take SI in AAP crops).**Registration**: SPs must register their filing & notice of intention to take security – failing to do so will render void any rights/powers of bank against creditors of borrowers (**427(4-6)**). **Default/Disposition**: Default trigger the SP’s ability to enforce its SI, permitting Bank to sell the collateral so long as it is commercially reasonable (**427&428**) |  |