**Law 438 – Secured Transactions**

**Bruce MacDougall – Spring 2019**

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*Based CANs by Rosalyn Chan and Shawn Kanda*

# I. Situating the *PPSA*

* s. 73**:** Subject tos. 74, this Act prevails over any other Act unless the latter expressly states otherwise (Marine Bldg Holdings)
* S74: **(1)** If there is a conflict between a provision of this Act and **(a)** a provision for the protection of consumers in any other Act, **(b)** the *Land Title Act,* or **(c)** the *International Interests in Mobile Equipment Act*, the provision of those Acts prevails.
* (2) Nothing in subsection **(1)** affects the application of sections 36, 37 and 49 to the [*Land Title Act*](http://www.bclaws.ca/civix/document/id/complete/statreg/96250_00)*.*

# II. Transactions Creating a Security Interest

* 1(1) “security interest”**:** *means* **[**“**true**”**]** [exhaustive]

(a) an interest in goods, chattel paper, investment property, document of title, instrument, money, or an intangible that secures payment or performance of an obligation [i.e., conditional assignment], **and** **[**“**deemed**”**]**

(b) an interest in (i) **the transfer of an account or chattel paper**, (ii) **commercial consignment**, or (iii) **a lease for a term of more than one year**, whether or not the interest secures payment or performance of an obligation.

* + If your transaction fits into **(a)** or **(b)**, or both, then it is covered by **S2(1)** and, thus, governed by the PPSA.
* 2(1)**:** This **Act applies** (a) to every transaction that **in substance creates a SI, without regard to** its **form** and the person who has **title** to the collateral, **and** specifically (b) to a chattel **mortgage**, a **conditional sale**, a trust indenture, a trust receipt, an **assignment**, a **consignment**, a **lease**, and a trust **if they secure** payment or performance of an obligation.
	+ **Substance over form** – you cannot escape the PPSA by dressing your transaction up as something else.
	+ McD says the farther you get from the beginning of the list in **S2(1)(b)** the more open to question it is whether or not that transaction is governed by the PPSA.

## 1. Parties to a Secured Transaction and Standards of Behaviour

1(1) “creditor”**:** *includes* [inclusive] an assignee for the benefit of a creditor, an executor, administrator or committee of a creditor

“debtor”: *means* [exhaustive]

1. a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral,
	* + - i.e., in order for SP to keep its SI once attached, D does not have to keep its rights in the collateral.
2. a person who receives goods from another person under a commercial consignment,
3. a lessee under a lease for a term of more than one year,
4. a transferor of an account or chattel paper,
5. if the person referred to in paragraph **(a)** and the owner of the collateral are not the same person,
6. if the term **debtor** is used in a provision dealing with the collateral, an owner of the collateral,
7. if the term debtor is used in a provision dealing with the obligation, the obligor, and
8. if the context permits, both the owner and the obligor.
	* + - **(f) includes both the original debtor (“obligor”) as well as whoever is the current owner of the collateral –** so whoever eventually gets the secured property will be considered a debtor. This does ***not*** mean guarantor or subsequent owner is liable for the obligation secured.

1(1) “secured party”:

* 1. a person who has a security interest,
	2. a person who holds a security interest for the benefit of another person, and
	3. the trustee, if a security interest is embodied in a trust indenture
	+ To come within the PPSA, the transaction has to be **consensual** Skybridge Holidays
* 68(2) All rights, duties or obligations must be exercised in good faith and a commercially reasonable manner
* Parties who do not come within the parameters of **S2(1)** will be affected by the way PPSA operates. Marine Bldg Holdings

## 2. The “Obligation Secured”

### (1) Amount of the Obligation

* The **SI relates to** the obligation secured, but more particularly, it relates to **how much is in default under that obligation**. The first reason we need to be able to quantify the obligation secured is, save for foreclosure, that the SP may not be able to keep the entirety of the liquidated value of the collateral, in which case **any surplus goes back to the debtor**. If the SP takes beyond what is owing to them, then they have committed the tort of conversion. The second reason we need to quantify the obligation secured is that the collateral might not be worth as much as the obligation secured, in which case the SP needs to know the monetary amount of the obligation secured to ensure that it takes enough collateral to cover the whole of the obligation secured.
* s.18 also requires secured parties to reveal their obligation secured, and to ‘live’ by this revealed information. ie. if they lie about it, they will only be entitled to the amount they specified. This will be point in time information however, and may change (ie. if more debt is added under a tacking agreement)
* Make sure to match the collateral transaction to the obligation it in fact secures.

### (2) Future Advances and Tacking

* 1(1) “advance”**:** *means* the payment of money, the provision of credit or the giving of value and includes any liability of D to pay any interest, credit costs or other charges in connection with an advance
* “future advance”**:** *means* an advance whether or not the advance is made in accordance with an obligation
* 14(1): A SA can provide for future advances.
	+ SIs are often created to secure an indebtedness that will change with time, i.e., revolving credit. The PPSA allows parties to agree that a SI taken today can cover further advances made by SP to D at a future date.
* A secured party is also allowed to **‘tack on’** or add any new debt to the already established security interest as long as they have prior permission of the debtor.
	+ As such, even if SP2 makes a s.18 request and determine SP1’s obligations secured, you must be aware that their obligation secured may increase dramatically due to tacking, and all tacked on amounts will still get priority
* However, SP1 and SP2 can enter into an agreement (a ‘subordination agreement’) whereby any new tacked on amounts to SP1’s obligation secured will be subordinate to SP2’s obligation secured.
* Note: Some of the priority rules do not allow tacking
* Assignee of a SI cannot tack-on other indebtedness owing to the assigned SI: Canamsucco Road House v Lngas (SP3 bought SP1’s interest and then tried to tack on its own indebtedness to SP1’s SI to give it the benefit of greater priority. Court said no- any indebtedness tacked on must arise from the relationship between the original debtor/creditor – it cannot be tacked on by assignment)
	+ Note that with this kind of assignment can sometimes be hard to tell if the new indebtedness is coming from the original relationship or because of something else

### (3) Acceleration Clauses

* Sometimes, the amount in default (the amount currently owed) may not be for the entire obligation secured (ex. payments over several months, amount of obligation is for amount of all payments. Debtor defaults on only one of the payments and not on the agreement as a whole. Secured party can normally only take the amount of that single payment from the collateral).
* To avoid this inconvenience, parties will often put an acceleration clause in the SA, which will state that upon a default of part of the agreement, all of the payments (and the full value of the obligation) will come due.
	+ However, must provide justification of the use of an acceleration clause.
	+ s. 16 says that an acceleration clause should be construed to mean that the secured party has the right to accelerate payment or performance only if he has good reason to believe that the prospect of payment or performance is impaired or that the collateral is in jeopardy.

## 3. The Form of the Agreement

* 1(1) “security agreement”**:** An agreement that **creates or provides for a SI** and, if that context permits, includes (a) an agreement that provides for a prior SI and (b) writing that evidences a SA [e.g., **securitized subordination agreement**]
* s.9**:** Subject to this and any other enactment, a **SA is effective according to its terms**.
	+ So the agreement will be governed by contract law. Form will be important insofar as contract law requires it and insofar it is sensible for business purposes.
	+ However, while you can enforce your interest against the original debtor without any requirements of form, **s.10** states that a security interest is not enforceable against third parties unless one of the following is done:

s.10 **Writing Requirements**

(1) A SI is only enforceable against a third party if

1. the collateral is in the possession of the SP; or
2. the D has signed a SA that contains
3. a description of what the collateral is
4. a statement that the secured party is taken an interest in all present and after acquired property (All P.A.A.P.) (this make agreement a General Security Agreement)
5. a statement that secured party has taken an interest in all P.A.A.P. except certain specified property
* **SAs must therefore be in writing to be enforceable against third parties** (Riepe v Stingray Holdings)
* When putting the security agreement in writing, you should really comply quite closely with s. 10 (especially s. 10(d)). Either use language very specific to a particular item, or using one of the categories in s.10 (d).

10(2) for the purposes of s. 10(1)(a), SP is deemed not to have taken possession of collateral that is in apparent possession/control of debtor or debtor’s agent

(3) Subject to (6), a description is **inadequate** for the purposes of **(1)(d) if** it describes the collateral as **“consumer goods”** or **“equipment”** without further reference to the **kind** of collateral

* + You need to be more specific than this if you want to meet the 10(d) writing requirements

(4) Describing collateral as inventory is adequate for S10(1)(d) only while it is held by the D *as* inventory

* The moment the debtor ceases to hold the property as inventory, you no longer meet the writing requirement with respect to that property
* Therefore, you really **never want to use the word ‘inventory’**- just use the word ‘goods’ instead and 10(4) will not apply.
	+ - This does not mean that some other C can simply remove something from D’s inventory so as to deprive a competing SP of an interest. Furmanek v Community Futures
			* Dougz is unsure about the finding in this case because **S10(4)** does not have any qualification as to *why* collateral is no longer held by the D as inventory.

(5) A SI in proceeds is enforceable against a 3rd party **whether or not** the SA contains **description of the proceeds**

* **“assets”** is **not sufficiently precise** wording to count as a description of the collateral by **item or kind** under **S10(1)(d)(i).** Therefore, this SI would be valid against the D per **S9**, but not a third party: 674921 BC v New Solutions Financial

## 4. Transactions Creating “True” Security Interests

* 2(1):This **Act applies** **(a)** to every transaction **that in substance creates a security interest** – form and title to the collateral do not matter – **and** specifically **(b)** to a chattel **mortgage**, a **conditional sale**, an **assignment**, a **consignment**, a **lease**, a **trust**, and a transfer of chattel paper **if they secure** payment or performance of an obligation.
* **True Security Interest** – a creditor and debtor enter into a security agreement, creating a security interest to secure payment or performance of an obligation. This is straightforwardly covered by the PPSA.
* **Deemed Security Interest**: (s. 2(b)) one of a number of other types of transaction that are covered by the PPSA if they “secure payment or performance of an obligation.” Including:
	+ Conditional Sale
	+ Chattel mortgage
	+ A floating charge,
	+ An assignment (not listed but included)
* There can be overlap between these categories- some deemed security interest are also true security interests
* Yeung v Au illustrates why we care about distinguishing “true” SIs, i.e., because certain other statutory regimes piggy-back onto personal property statutes. An insurance company sued a lessor, claiming he was the “owner” of a vehicle responsible for an accident under the *Motor Vehicle Act*. The lessor argued that they were not the “owner” because the (former) *Sale of Goods on Condition Act* deemed their transaction a conditional sale. The court said that under the (then new) PPSA, we must analyse the transaction to determine if it is functionally the equivalent of a conditional sale. The court found that it was not, despite being dressed up as a “lease-cum-conditional-sale” to avoid the liability provisions under the *MVA*.
	+ because the former statutes governed deemed transactions have been repealed, the ‘primordial’ common law rules now apply to them to the extent they are not displaced by the PPSA.
	+ Takeaway – the **statute does not convert the transaction into something else**. The PPSA **looks to substance** and does not care what the parties to the transaction call their transaction.

### (1) Typical Forms of Security Agreements

* General Security Agreement(**GSA**) is an SA where the collateral is “All PAAP” **S10(1)(d)(iii)**
	+ Generally speaking, this will also include *real property*.

**4 types of transactions which will always be SIs under the *PPSA*:**

1. **Chattel Mortgage:** someone owns chattel property (not land), borrows money from a lender, and uses the mortgage form to give the lender an interest in the property. A chattel mortgage will always be a secured transaction- the only reason for the mortgagor’s interest in the property is to secure repayment from the mortgagee.
2. **Conditional Sale:** Buyer buys property on credit and gets possession. Seller no longer wants the property but **retains title** to it as a security in the event the buyer defaults on their promise to pay . Under *PPSA* this will always be considered a secured transaction. Here it is *retained* interest, not a given interest, that is the security interest. Not possible unless the secured party owns the collateral.
3. **Pledge (or pawn):** An owner of property borrows money and gives possession of the property to the lender; who takes the property as security on the loan. Title remains with the debtor. The lender has a bailment interest (security bailment – a conditional bailment interest) and becomes a secured party. Property is “held hostage”- it must be held or the security interest is lost.
4. **Assignment**: while the transactions above will typically be used with types of property you can possess, with pure intangibles they are not usable. In such a case you would instead create a charge on the property by way of assignment (this can be used for tangible property as well but its origins lie in security of intangibles). For example, for a debt that is a promise to pay money, the creditor “owns” the debt –a purely intangible form of property. Promises are always themselves intangible. A debt of money is called an ‘account’ under the *PPSA* and is an intangible – related terminology ‘account creditor’ and ‘account debtor’.
* No such thing as a sale (common law) of an intangible (CL did not recognize intangibles), instead you ‘assign’ it (equity)
* If the creditor themselves needs to borrow money, they could ‘sell’ their entitlement to the debt, or they could use it as collateral
* It is ‘sold’, it is ‘**absolute assignment**’ and the assignee becomes the new account creditor.
* If the original creditor instead wants to use the debt as collateral to borrow money, they can enter into a security agreement and will transfer only conditional ownership in the debt to a third party ‘**conditional assignment**’.
	+ Until the default on the security agreement occurs, the account debtor will continue to pay to the original creditor
	+ The secured party only becomes the creditor for the purposes of the original debt upon default.
	+ Original debtor will be called the **‘account debtor’** for the purposes of *PPSA*- the person who gives the security interest will be called the debtor
* Conditional assignments are true security interests
* **Absolute assignments** is **deemed** security interests under *PPSA*
* Dougz says that in order to figure out whether the PPSA applies to any given transaction, **analogize** the transaction to any one of the four above. If a transaction **functionally** works the same way as one of the four above, then it will be considered a ST and governed by the PPSA*.* If not, then you cannot get the benefit of the statute.
* **“Chattel Paper”** means one or more writings that evidence **both** a monetary obligation **and** a security interest in, or a lease of, specific goods and accessions

**There are 3 other types of transactions which may or may not be SIs under the *PPSA*: (i) leases (ii) consignments and (iii) trusts.**

* In the case of leases and consignments, if they are actually disguised conditional sales, they will be called a **security consignment** or a **security lease**

### (2) Consignment as Security Agreement

* Consignment is an agency situation combined with possession of property. The consignee’s job is to find a buyer, and typically if a buyer is found the sale is between the original owner and the buyer.
* Here, the relationship between the seller and the agent is typically not a secured transaction- it is a ‘**true consignment**’. The owner retains title not as a security interest, but because the agent is never meant to hold title.
* A consignment will be a security agreement if the consignee is required to buy the property if they don’t find a buyer
	+ In the absence of this explicit requirement, the more responsibilities akin to those of a buyer that are loaded on the consignee/agent, the more likely the court will be to find that it is a security interest (ie. taking risk of damage)
* **The *PPSA* also deems consignments in a commercial context to be security agreements – see deemed SIs section below**
* In Re Toyerama some dolls were left on consignment with somebody and while some of them were in possession of the consignee, the consignee went bankrupt. Who got priority, the consignor or the TIB? There was no requirement that the consignee-cum-agent buy the goods but, if it did find a buyer, the consignee-cum-agent momentarily became the owner of the goods. The court decided that this was not a ST, because that is what always happens in a consignment.

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| True Consignment – No SI | Security Consignment – SI |
| In a true consignment, the only property interest that the agent-consignee is going to get and ever will get is simply the possessory interest to possess that property while trying to find a buyer, and, if the agent is successful in finding a buyer, the agent will pass the ownership interest, on behalf of the owner, to the buyer. If the agent does not find a buyer, they will simply hand possession back to the owner. This transaction is a true agency and, hence, not a conditional sale and not governed by the PPSA. | Essentially a conditional sale. The agent-consignee insures the goods wherefore he is required to buy the goods himself if he cannot find a buyer for the principal-owner. Another possibility is that if the agent does find a buyer, then the ownership interest passes through the agent, who, *for a split second*, becomes the owner, on to the buyer. In those situations, the consignee is not just an agent; he has a position that is roughly equivalent to a buyer under a conditional sale. **Cf.** Re Toyerama though. |

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| Commercial Consignment – A Deemed SI |
| 1(1) “commercial consignment”**:** *means* a consignment under which **goods** are **delivered** for sale, lease or other disposition to a **consignee** who, **in the ordinary course of the consignee’s business**, **deals in goods of that description**, by a **consignor** who (a)in the ordinary course of their business, deals in goods of that description, **and** (b) reserves an interest in the goods after they have been delivered,**but does not include** an agreement where goods are delivered to * (d) to a consignee if it is generally known to Cs of the consignee that the consignee is in the business of selling or leasing goods of others
	+ This includes not only the Cs that are actually known, but also notional Cs that are potentially unknown. Furmanek v Community Futures
 |

### (3) Lease

* For a lease to be akin to a security agreement, normally **there has to be a required lease period**
	+ If period is optional, and lessee can end at any time, it will not be a security interest
* Assuming there is a required lease period, it will be **in essence a conditional sale** and will therefore be a **security lease** if:
1. the lease is for the useful life of the rented property– McD says this is fairly common
2. **the lease has an option to buy, but it is not a ‘real option’**- i.e. it is for such a token amount that it will almost certainly be exercised, or sometimes (depending on the authority) if the amount is arbitrary (picked out of the air) it may not be a true lease. If the amount is reasonable or if the amount is to negotiated later, it will probably be a true lease.
* **The *PPSA* also deems leases longer than a year to be security agreements – see deemed SIs section below**
* DaimlerChrysler: (The lessor claimed a right to get the lease property returned and damages for losses sustained by the breach. But under the PPSA in a consumer situation, you cannot have both. If there is a breach by the D-cum-lessee and the SP-cum-lessor’s SI is in “consumer goods”, then the SP cannot take advantage of an acceleration clause, whereas the consumer can reinstate the lease by paying the amount in arrears.)
* If your lease is for more than one year, you still need to characterize the lease as either a “security lease” or “true lease” because you will need to know how much of the PPSA applies to your transaction. Since the PPSA applies in its entirety to a “security lease”, the lessee may give SIs in the leased property while they are leasing it and if the person to whom they give the interest registers as a SP before the owner-lessor, the owner will lose their property to the SP!

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| True Lease – No SI | Security Lease – SI |
| Lessor retains title and gives possession to lessee. Intention of the parties is that goods be returned, not because of a breach, but because the lessor wants goods back once lease period is over. The transaction doesn’t secure any obligation.Dougz says* If the lease period is **not compulsory,** we cannot predict whether lessee might or might not terminate the lease before that period, then it is likely the owner would want to retain ownership of the goods in case of the lessee terminating the lease. This type of transaction would be a “true lease”.
 | There is no true intention that the goods be returned unless something goes wrong with the contract and the lessor gets the goods back as a remedy. It is an issue of law and fact whether a lease is a security lease and not for the parties to determine.Dougz says* If you are **required** to lease the goods for their **entire usable life**, then that is a sale.
* If the lease is for a defined period not the entire usable life of the goods, with an **option to purchase** the property at the end of that period for a **token price,** then that, too, is a sale.
* Analyse the transaction to determine whether the (so-called) lessee, in essence, actually *binds* the goods.
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| Lease for a Term of More than One Year – Deemed SI |
| S1(1) “lease for a term of more than one year”: *includes* * **(a)** a lease for an **indefinite term** **including** a lease that is **determinable** by one or both parties within one year from execution,
* **(b)** subject to **S1(3),** a lease **initially for a term of one year or less** **if** the lessee, with the consent of the lessor, retains **substantially uninterrupted possession** of the leased goods for a period **in excess of one year** after the day the lessee first acquired possession of the goods, and
* **(c)** a lease for a term of **one year or less** **if**
	+ **(i)** the lease provides that it is renewable for one or more terms automatically, at the option of one of the parties or by agreement of all of the parties, **and**
	+ **(ii)** the total terms, including the original term, may exceed one year

**S1(3):** a lease under paragraph **(b)** of the definition of “lease for a term of more than one year” does not become a lease for a term of more than one year **until** the lessee’s possession extends for more than one year* Dougz says it is conceivable that lessee already had possession of the property before lease was executed. In that case, since the statute does not tell us what “possession” means, there is a **danger of not knowing when possession began**.

**S3:** This Act applies to **(c)** a lease for a term of more than one year, that do not secure payment or performance of an obligation. |

### (4) Trust

* 1(5)**:** Proceeds are traceable whether or not there is a fiduciary relationship between SP and the D
	+ Still, some STs are set up as trusts to allow the SP to trace money into and through a mixed-source account.
		- i.e., in case money proceeds cross into or come out of a jurisdiction without equivalent of **S1(5)**.
* 2(1)(b)**:** This Act applies to trusts that secure payment or performance of an obligation.
* In a trust, the contract will be between settlor and trustee- there is no privity of K between trustee and beneficiary. However, equity enforces the obligations of the trustee to the beneficiary.
* Possession and (equitable) ownership are split in a trust- raising the possibility that the beneficiary could be holding the equitable title in security for an obligation of the trustee
* However, the trust property is never securing the trust relationship itself- the trust **is** the obligation
	+ So, true trusts are not secured transactions
* However, if the trust relationship is set up to secured **some other promise** between the T and B, as a device to ensure that other promise is kept, then the trust is a security interest
	+ Usually there will be no third party settler in such a case If the trustee and beneficiary are the parties that set up the trust, likely it is actually like a security agreement
		- i.e. a debtor becomes trustee, creditor becomes beneficiary

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| True Trust – no SI | Security Trust – SI |
| B doesn’t have an interest in the property held by T as a method of ensuring that T performs another obligation. Giving the B the equitable property interest ***is*** the obligation. | The trust is set up as a device to secure payment or performance of another obligation by the T or to ensure that moneys received by T are then held for the benefit of B for the purpose of satisfying an obligation owing. The C/D relationship overlaps with the B/T relationship. |

* Skybridge Holidays(Consumer made part payment on holiday and travel agent promised them vacation. Law was changed to require this money be held in trust. Travel agent went bankrupt and TIB went after money held in trust. TIB argued money was held under security trust but consumer did not register their deemed SI. Court held this was not a ST because parties did not think of themselves as being in a C/D relationship.)
	+ McD thinks this was correctly decided but with the wrong reasoning
		- It shouldn’t matter whether you think of yourselves as a secured party
		- Real reason the consumers are not secured parties should have been because *PPSA* requires security interests to be set up by consent and not by operation of law. Here, the SI came about because of statutory requirements on travel agents (operation of law) and without the knowledge or consent of the consumers
* When setting up a **“security trust”**, the best idea is to state that any money received *as* proceeds and any bank account that money goes into is held in Trust, in order to not encumber the property unnecessarily for the D.

## 5. Security Transactions Excluded from the *PPSA*

* s.4**:** Except as otherwise provided in this Act, this Act does not apply to the following:

(a): an interest given by a rule of law or an enactment [i.e. by operation of law rather than by consent/agreement of the parties]

* + - ex: Skybridge case above (McD thinks the case should have been decided on this basis)

(b) a SA governed by federal law

* + JE Brooks v Kingsclear Indian Band*: Indian Act* (federal legislation) says you cannot hold a security interest on reserve, so this ousts the *PPSA.* Question in case was when it can be said property is on a reserve. Security interest was in a bus, Indian band defaulted on the loan*.*
		- Creditor waited until bus was off reserve to seize it. Court says you can’t just wait until the property moves off reserve and then claim *Indian Act* does not apply
	+ (f): creation or transfer of **land interest**
		- Note: **fixtures** are deemed to be personal property [not land] for purposes of the *PPSA*
		- *PPSA* takes precedence over *Land Title Act*, but then defers to it in certain situations
	+ (g): …a right to payment that arises in connection with land
		- However- depends how far removed you are from the land interest- for example a mortgage backed security would be governed by PPSA
		- Generally, as long as you are more than one step removed from the land interest, you are in *PPSA*

## 6. Transactions Deemed to Create Security Interests

* For certain types of interests, policy reasons to want people to register so that others are aware of them
* One way to achieve this is to deem the transaction to be governed by the *PPSA*

Security interest: (b) the interest of

1. transferee arising from the **transfer of an account or a transfer of chattel paper**
2. a person who delivers goods to another person under a **commercial consignment**
3. 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

s.3: Subject to S4 and S55, this Act applies to a

(a) **transfer of account or chattel paper**,

(b) **commercial consignment**, and

(c) **lease for more than one year**

that do not secure payment or performance of an obligation

* + **s. 55** tells us that **Part V (Remedies)** of the statute does not apply to the transactions named in s. 3 (transfer of account/chattel paper, commercial consignment, or lease for term of more than one year which do no secure performance of an obligation)
* **However - A commercial consignment can also be a security consignment and a security lease can also be a lease for longer than a year. – so can be both true and deemed SIs. If it fits into the category of true SI,** Part V **applies**
* **Exam: you probably won’t be saying for sure which it is (ie. whether Part 5 applies or not). McD just wants us to identify this as a problem/possibility to address**

**“Commercial consignment”** means a consignment under which goods are delivered to… a **consignee who, in the ordinary course of the consignee’s business, deals in goods of that description**, by a consigner who

1. **in the ordinary course of the consignor’s business, deals in goods of that description**, and
2. reserves an interest in the goods after they have been delivered

**but does not include** an agreement under which goods are delivered

1. to an auctioneer for sale
2. 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 of others**
* to fit within **(d)**, it must be such that **any creditor** (an abstract person) would known that consignee were in the business of selling/leasing goods. Test is very general and objective (Newcourt Financial v. Frizzell)
* logic of **(d)** – if creditors know what the consignee typically does, no need for protection of registration

**“Lease for a term of more than a year”** is an inclusive definition. Obviously, a lease for a term of more than a year fits here even though not explicitly stated.

1. A lease for an indefinite term…
2. Subject to subsection (3) [if you lease for less than a year, but lessor allows lessee to keep the goods for longer than a year (after lease is ended)] [subsection 3 says this particular type does not fit within this definition until **after** the year has elapsed]
3. a lease for a term of one year or less if
	1. the lease provides that it is renewable for one or more terms automatically [at option/agreement of parties], and
	2. the total terms, including the original term, may exceed one year

Note that only **true leases of less than a year** are completely untouched by the *PPSA.*

# III. The Property Encumbered: Collateral and Proceeds

## 1. Collateral

* s.1(1) “collateral”**:** *means* personal property that is subject to a SI.
	+ Collateral must be property (i.e., proprietary). Something that can apply only between two persons and **cannot be transferred** to somebody else is not property and, therefore, not encumbered by the *PPSA*.
		- A thing is **personal property** so long as it **confers rights** (proprietary), even if the rights are contingent or for a limited time: Saulnier v RBC (A fishing license was found to be property.)
			* McDougall doesn’t seem to quite understand the courts reasoning, says it is a ‘thorny issue’, but says that a fishing license is property for purposes of the PPSA. Some licenses clearly are not – i.e. you cannot seize a driver’s license as collateral and use it. However, the value of the fishing license indicates it could be used to secure an obligation
* Whatever it is you decide to create the SI over, that property or the component parts of that category can be susceptible to multiple characterizations. If the collateral is appropriately categorized using a different description than yours, then even though you have not used the same language in your SA, that description of the collateral is going to apply to your SI in it. The provision might benefit other people and override the provision that benefits you from your perspective.
* **Goods** can be further categorized as either “**inventory**”, **“consumer goods**”, or “**equipment**” (a residual category for things that are not inventory or consumer goods)
* s.1(4)**:** Unless otherwise provided in this Act, the **determination** of whether **goods** are c**onsumer goods, inventory or equipment** must be made **as of the time** the SI in the goods **attaches.**
* s.1(1) “inventory”: *means* goods that are **(a)** held for sale or lease, **(b)** furnished under contract of service, **(c)** raw materials
	+ s.10(4): A description of collateral as “inventory” is adequate for s.10 only while it is held by D *as* inventory
* “consumer goods”**:** *means* goods used or acquired for use primarily for personal, family, or household purposes
	+ s.10(3)**:** description in SA is inadequate for the purposes of subsection **(1)(d)** if it describes the collateral as “consumer goods” or “equipment” **without further reference to the kind** of collateral.
		- S10(6)**:** If personal property is excluded from the collateral, it is enough to call it “consumer goods”
* “equipment”**:** *means* goods held by a D other than as inventory or consumer goods [residual category]
* You cannot force property to no longer be inventory just by seizing it – **s.10(4)** cannot be used to defeat priorities established by the Act – the thing must no longer be inventory through **a voluntary measure** or something other than default: Furmanek v Community Futures
	+ However – McD says that the argument made here was a pretty persuasive since it seems like the statute is saying you that when something is removed from inventory it is no longer inventory – if what the court says here is true the statute should be changed – seems to indicate that you could argue either way in this situation – either by the decision in *Furmanek*, or via a plain reading of the statute)

## 2. Proceeds and Tracing

### **(1) Proceeds**

* 1(1) “proceeds”**:**
1. **identifiable or traceable** personal property, fixtures and crops
	1. derived directly or indirectly from any **dealing** with collateral or the proceeds of the collateral, **and**
	2. **in which D acquires an interest**;
		* *identifiable or traceable* personal property just means that the SP must be able to track it down.
		* *dealing* by anybody so that the collateral leads to something else.
2. 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,
3. a **payment** made in total or partial discharge or redemption of an **intangible**
	* + i.e., money used to pay out or redeem an account, to whomever it goes, is subject to the SI.
* s.10(5)**:** A SI in proceeds is **enforceable against a third party** whether or not the SA contains of a description of the proceeds
* **s. 28(1)** …if collateral is dealt with or otherwise gives rise to proceeds, the security interest
1. **continues in the collateral unless the secured party expressly or impliedly authorizes the dealing**, and
2. **extends to the proceeds**
* i.e., whatever the obligation secured for the original collateral was, it will remain the obligation secured for the proceeds.
* Proceeds of proceeds still count as proceeds, and so on– SIs **continue in proceeds of inventory seized**: CIBC v Marathon Realty (Retailer entered into a lease where the GSA said SPs get SI in retailer’s goods and the proceeds. SP1 seized retailer’s inventory in satisfaction of rental arrears, but the bank also had a SI in those. Court said bank’s SI in the original inventory extends to proceeds from liquidation and any replacement inventory *as* proceeds of proceeds).
* **Bank accounts** – the debtor’s bank account must be in a positive balance (i.e. in the black) at the relevant time for it to become collateral or proceeds. If it is in negative balance, there are no proceeds. This includes lines of credit that are being drawn form (considered a negative balance).
* An account **in the red** both before and after money is put into it is not property in which the D has “rights”.

### (2) Tracing

Old common law approach (First In, First Out) money comes out of a mixed account in the same order that it went in.

* + Creditors want to keep as much money in the account as possible, because it is the easiest asset to use in the event of a default without having to resort to tracing. Plus, FIFO starts getting into fractions, which can be complex.

**A modern court will take one of two approaches:**

1. Lowest Intermediate Balance Rule (classic equity rules): money coming out of a mixed account is **presumed not subject to SIs** **unless** D specifies:Universal Credit v Farmers Bank of Portageville (D put money proceeds from a sale of cars subject to a SI, into mixed account. Money was then withdrawn fraudulently. Court accepted bank was not holder in due course and held that the money remaining in the account was the only amount the bank was empowered to debit, since that was the only amount not subject to a SI per LIBR. Therefore, amount required to top-up the account is the amount of money subject to the SI.)
	* Equity assumes that what is withdrawn from account first comes from any part of the account that is not subject to other party’s security interests – in this way it preserves the other party’s interests as long as possible
	* If the money is subsequently withdrawn, you get whatever **proportion** of the withdrawn funds that were subject to the SI.
		+ For example, if $40 in account was for SI, and $30 from other source, and it was all withdrawn, you will be entitled to 4/7ths of the funds
		+ This will be important if the withdrawn money is used to generate proceeds – so you will have a 4/7ths interest in the proceeds
2. Close and Substantial Connection Approach: **Departs from typical equity rules** - you only have to show that there is a close and substantial connection, not a fiduciary duty owed by the D to the C, between two funds in order to use PPSA tracing: Agricultural Credit Corp Sask v Pettyjohn (Agricultural provided financing for D to buy cow, took a PMSI in the cows. However, what D actually did was get a loan from BMO, used BMO money to buy the cow, and then used Agricultural’s money to pay down the debt Court ruled that Agricultural still has a PMSI in the cows because there was a ‘close and substantial connection between their loan and the cows.)
	* Bruce doesn’t like this, but be that as it may, in PPSA context, the usual rules of tracing don’t apply.
	* Re River Industries (1992) Follow ‘close and substantial’ connection approach and adopts it into BC

**Exam: McD says tracing problem will be simple, just explain how the 2 tracing approaches above would work.**

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

|  |  |
| --- | --- |
| Common Law – FIFO | Equity – LIB |
| **EXAMPLE**: Each of the bundles, the $23 and the $19 in the account, secures $500, but not to the full amount. With FIF O, the entirety of the $23 is used to secure the $500, and $2 out of the $10 in the account is subject to SP’s interest. SP has an interest in the entirety of the proceeds from the $23, so has an interest in all of the $46. | **EXAMPLE**: The $23 that is withdrawn first comes from the $17 deposit that no one else has an interest in, which means that SP has an interest in $6 of $23 to secure $500 and the $19 in the account is entirely subject to the SI that SP has. When the $14 is deposited, SP only has an interest in the original $19/$33, unless D specifies it is meant to top up SP’s $25. SP only has an SI in the proceeds of the $23 to the extent that he had an interest in the original $23 – 6/23, so he has an SI of 6/23 of $46 – i.e., $12 worth.  |

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# IV. Creating the Security Interest: Attachment

## 1. Attachment - General

You need to know about whether **each item** has attached; even for All P.A.A.P., in order to use the security interest, you must go through each item and decide whether and when a particular SP’s SI attached.

12(1): A SI **attaches when**

1. **value** is given
2. the **D has** **rights** in the collateral or power to transfer rights in the collateral to a SP, **and**
3. SI meets the writing requirements in s.10[[i.e., this is when SP gets attached security interest in the property 🡪 this can lead to separate dates of attachment (i) as regards the creditor (ii) as regards everyone else (i.e. if it is put in writing later – writing requirements w.r.t. everyone else)]

unless the parties have specifically agreed to postpone the time for attachment, then it will attach at that time.

* **Ex:** valuable consideration is given earlier, the agreement is made, (SI is enforceable here by creditor- attachment here for purposes of creditor), and then later it is put into writing (SI is enforceable here by other parties – this is attachment for purposes of other parties)
	+ **Proceeds will have their own date of attachment**
		- But note: **s. 10 says there are no writing requirements for proceeds.** So for proceeds, no need to meet **12(1)(c)** requirement, attachment occurs immediately when **s. 12(1)(a)** [value is given] and **(b)** [debtor has rights in the collateral or power to transfer rights] are met
	+ It is understood that **(a)** is value given by the C to get a SI. The value given is usually the obligation secured.
	+ 2(1)(a) the D does not have to have title to the property to give a SI in it. Just show that at some point after the ST is in place and at the relevant time, the D has some “rights” to give in the property.

28(1): If collateral is dealt with or otherwise gives rise to proceeds, the SI

* 1. continues in the collateral unless the SP expressly or impliedly authorizes the dealing,
* So once an SI is attached, it presumptively stays attached
* s.12 requirements are only necessary for the SI to attach in the first place and D does not need to keep his rights in the collateral in order for SP to keep its SI once attached.
* If something was supposed to have attached under your SA but it did not, that would be a **breach of contract**.

1(1) “value”**:** any consideration sufficient to support a simple contract, and **includes an antecedent** debt or liability

* **12(1)(a)** **value** is usually super easy to make out, if there’s a creditor/debtor relationship, there’s probably value
	+ TD Bank v Nova Entertainment (Court said past consideration is good consideration for purposes of PPSA and can convert SP1’s existing indebtedness into secured debt, i.e., without expanding it or adding any new consideration.)
* **12(1)(b) rights** can be more complicated
	+ “Rights” is a synonym for property interest – for attachment, debtor must have some property rights in the property
	+ Full title obviously counts, but **(b)** just means the debtor must have some kind of property interest in the property
		- You don’t need to own the property to give an SI, you just need an interest of some kind
* No minimum level of sufficient “rights” required for 12(1)(b)**:** Kinetics Technology v Fourth National Bank (KTI delivered goods it owned to D for repair – D had given “All PAAP” to bank and defaulted after possession of goods – bank took possession of KTI’s property. Court found that bank’s SI had indeed attached to KTI’s property in possession of the debtor. Luckily for KTI it detached when D transferred the back property to KTI because that constituted a transfer of “inventory”)
	+ Good law in Canada. According to this US decision, all bailment transactions necessarily entail giving the bailee an ***in rem*** property interest that, in respect of the bailor’s remainder interest, constitutes value given in return for a security interest from the bailee as to the bailor’s [now (also) collateral] property.
* Rights can be merely possessory – D just needs to have some property interest in the collateral Haibeck v No 40 Taurus
	+ *Nemo dat quad non habet* – cannot give more than he has though

## 2. Attachment for a PMSI

Having a PMSI can grant you access to special priority rules (“superpriority”) in certain situations.

* However, these situations may not arise and having a PMSI will turn out to be irrelevant
* **Exam: don’t immediately figure out whether something is a PMSI, wait until you know if it is actually relevant**
* To be a PMSI must fit into one of the categories in the s. 1 definition:

1(1) “purchase money security interest”**:** *means*

1. [Seller PMSI] a SI taken in collateral to the extent that it secures payment of all or part of its purchase price [*i.e., conditional sal*e]
2. [Financier PMSI] a SI taken in collateral by a person who gives value for the purpose of enabling D to acquire rights in the collateral, to the extent that the value is applied to acquire the rights
3. [Deemed PMSI] the interest of a lessor of goods under **a lease for a term of more than one year**, and
4. [Deemed PMSI] the interest of a person who delivers goods to another person under a **commercial consignment,** **but does not include** “security leases”.
* (a) and (b) are ‘true PMSIs’
* (c) and (d) are ‘deemed PMSIs’ – two of the types of deemed SIs (lease more than a year, commercial consignment) give rise to PMSIs
* Important to distinguish between (a) and (b)
	+ It is possible to have both – i.e. get a car in part on credit from seller (a) and in part of credit from someone else (b) – in some cases the seller will get priority here over the financier
* You can have an interest that is partly a PMSI and partly not a PMSI. **You have a PMSI to the extent the collateral relates to the credit originally given** – and a further SI to the extent of the rest of what is owed.
* 28(1)(b)**:** (PM)SI extends to proceeds
	+ Nobody can have a PMSI in collateral as original collateral [e.g., by way of an “All PAAP”].
* As long as SP is somewhere in the vicinity of financing the acquisition of D’s rights in collateral, that might be good enough to give SP a PMSI in the property acquired:Agricultural Credit v Pettyjohn (Creditor said that because debtor was supposed to use the money lent by them to by the collateral, they should have a PMSI. However, what D actual did was use BMO money to buy the collateral, and then used Ag Credit money to pay back BMO. Sask Court said that since the intention was that the money be used for the collateral, it is a PMSI, even though it does not fit within the strict definition)
	+ McD is not fully convinced
* When the money is given to the debtor merely to expand their rights in the collateral (i.e. from bailment to ownership) this still counts as a PMSI in the new interest:Unisource Canada v Laurentian Bank (D leased property – already had some rights –a new lender allowed D to exercise option to purchase and claimed a PMSI – D was considered getting rights)
* **Collective PMSIs** - If SP’s funds are used to purchase a group of collateral separately or as a lot, every item in that block will have a PMSI associated with it for the value of the entire contents of the block:Chrysler Credit Canada v RBC (CC financed purchase of new car inventory and claimed a PMSI on cars taken in trade on sale of new cars where loan wasn’t repaid and also where it was repaid – Court attached CC’s PMSI to the whole inventory)
	+ Here, the collateral was not actually bought as a lot. But the court said that the difference between the two separate transactions was only their form, not their substance [**S2(1)(a)**], partly because the collateral was the same in the separate transactions. Thus, it held that a SP should not be in a different position simply because there was more than one SA with D.
		- **If you’re advising C:** argue this if the goods that D is arguing they have paid down is worth more/easier to seize/easier to resell
		- **If you’re advising D:** argue this doesn’t apply because you want the goods free of debt and don’t want the PMSI hanging over all of your shit
* Remember: an interest is only a PMSI to the extent that the money put forward was used to acquire the goods (or expand rights that the already had – or Pettyjohnsituation)

# V. Perfection of the Security Interest

19**:** A SI is **perfected when**

1. **it has attached**, and
2. all steps required for perfection under PPSA have been completed.
	* Forms of perfection:
		+ **Registration** of a financing statement
		+ **Taking possession** – only possible for tangible capital
		+ **Temporary perfection**: Had possession, but then gave it up (no registration). *PPSA* deems you to have perfection for a short period of time (‘secret lien’)

23 (1) If a SI is perfected under this Act and is again perfected in some other way without having been unperfected, the SI is **continuously perfected** [e.g., good for use with **S26(1)** automatic Grace Period].

(2) A transferee of a SI has the same priority with respect to perfection of the SI as the transferor had at the time of the transfer.

**Per s. 19, an SI must be attached to be perfected!**

## 1. Registration

s. 25: subject to s.**19**, **registration of a financing statement perfects a security interest in collateral**.

* You file a financing statement, not the security agreement itself
* The financing statement is quite barebones, it just lets people know they must investigate further, who the parties are, and how to contact them
* Does not set out the terms of the agreement
* s.18 says that contacted parties must disclose their interest, and will be held to the information they disclosed / estopped from enforcing anything contrary to it
* s.47**:** **Registration not notice:** Registration of a FS does not, by itself, constitute any kind of notice or knowledge of **(a)** the FS or its contents or **(b)** the SI perfected by the FS or the contents of the SA.
* s. 51 says that if there is a new debtor, you must change the registry. If you fail to do so, you may lose priorty – see priority rules section.
* Description of collateral in the financing statement – regulations govern the terminology for this mimic s. 10 of statute, but are often pretty general here
* However, unlike with the way s. 10 applies to security agreements, with a financing statement you **must actually describe proceeds** for the interest in the proceeds to be considered registered/perfected – see cases below
* Regal Feeds indicates that there may be some flexibility in regards to inaccuracies in the financing statement, although this is not provided for in the statute (SA said ‘All present and after-acquired swine’, FS just said ‘All swine’. Court said the SI in after-acquired swine should be considered perfected regardless.)

s. 43

(2) Registration is effective from the time assigned to it in the office of registry, and if two or more FSs have the same time, the order of registration is according to the registration numbers assigned

* Therefore, impossible for there to be two or more FS filed at the same time, one will always be first

(4) **A financing statement may be registered before a SA is made and before a security interest attaches**

* It is good practice to register your interest as soon as possible and before anyone else– “rush to the registry”
	+ 674921 BC v New Solutions Financial (“All PAAP” registered a year before SA was made was valid)

(5) A registration may relate to one or more than one security agreement

* A well organized business will have an overarching financing agreement that governs all later arising SAs

**Registration ‘affected’ if ‘seriously misleading**

(6) The **validity** of the registration of a FS is **not affected by** a defect, irregularity, omission or error in the **FS** **unless** the defect, irregularity, omission or error is seriously misleading.

(7) Subject to (9), **if (a)** one or more Ds are required to be disclosed in the FS **and** there is a seriously misleading defect, irregularity, omission or error in **(c)** the disclosure of the name of any D other than a D who does not own or have rights in the collateral, then the registration is **invalid.**

(8) If it is alleged that a defect, irregularity, omission or error is seriously misleading, it is not necessary to prove that anyone was actually misled by it.

* If your financing statement is inaccurate to the point that it is ‘seriously misleading’, it may be invalid. If not ‘seriously misleading’, you’re fine
	+ What is ‘seriously misleading’? Unclear, but per **(8)** it is an abstract question, do not have to prove that anyone was actually misled**.** A mess of contradictory case law here.
* McD: everyone assumes that if it is ‘seriously misleading’, this means it is automatically invalid, but this may not actually be the case. Can argue via wording of **(6)** that it is just ‘affected’
	+ So if there is a mistake, to defend first argue that the mistake is not ‘seriously misleading’, and in the alternative argue that even if misleading, the registration is affected but not invalid

## 2. Perfection by Possession (or Delivery)

24(1) Subject to s.19, **possession of the collateral by the SP perfects a SI in** (a) **chattel paper** (b) **goods** (c) **an instrument** (d) **a negotiable document of title, or** (e) **money** **unless** possession is a result of **seizure or repossession**

* Possession for the purposes of perfection refers to actual physical custody of the collateral
* Note: it is important to perfect proceeds as well and if they do not fit into the categories in **s.24**, they cannot be perfected by possession
	+ McD: possession is probably a better option for all of these categories except goods, but nonetheless it makes sense to register because of the proceeds issue
* Perfection by possession possible **only if** SP has possession **for the purpose of** **perfection**. If SP gets possession accidentally or involuntarily, or for some other reason not connected with perfection, such possession is not sufficient to perfect its interest: Royal Trust v. Number 7 Honda (buyer forgot the pick up the car from the lot, was left with seller by chance - not possessed for purpose of perfection - not perfected)
	+ However, this intention can often be inferred.
* **S24(1)** says **no perfection** if possession is a result of **seizure or repossession**
	+ Re Bank of Nova Scotia and RBC (Two banks had competing SIs in some trucks. D defaults on both. B RBC seizes the property, then Bank of NS files a FS. Normally RBC would get priority because they took steps to perfect first, but court said cannot perfect by possession after default; RBC is unperfected and subordinate.)
* 17(2) A SP must use reasonable care in the custody and preservation of the collateral they possess…

 (4) Subject to (2), SP in possession of collateral may use collateral to generate proceeds for itself.

## 3. Temporary Perfection

26(1): A SI **perfected by possession** under **S24** **remains perfected**, despite **s. 10**, for the **first 15 days** after the collateral comes under the control of the D.

**(2)** After the 15 days, a SI referred to in this section is subject to the provisions of this Act on the perfection of a SI.

* If you perfect by possession, one risk is that if you give up possession (even if accidentally), your interest is no longer perfected
	+ Sometimes SP will have to give collateral back to the debtor so that can do something to it
* One way to avoid this is to just register a financing statement
* **s.26** provides another solution. If you have perfection by possession (and are unregistered), if you then give up possession, for the first 15 days after you give up possession your interest remains perfected
	+ Once 15 days expires, you are unperfected
	+ This is the ‘secret lien’
		- Generally, the idea behind methods of perfection is to let other parties know that you have an interest. This 15 days period of temporary perfection is an exception to this- you have a perfected interest even though there is nothing in those 15 days to indicate to other parties that your interest exists

## 5. Perfection of Proceeds

1(1) “proceeds”**:** *means*

(a) identifiable or traceable personal property, fixtures

(i) derived directly or indirectly from dealing with collateral or its proceeds, and

(ii) in which D gets an interest**;**

1. a payment made of an account
* How to perfect your interest in proceeds?
	+ One option is to take possession – however, another party may have an All. P.A.A.P. financing statement that covers proceeds so they may get perfection before you
* With respect to possession, you need to take possession of proceeds separately

s. 28

(1) If collateral is dealt with or otherwise gives rise to proceeds, the SI

1. continues in the collateral unless the SP expressly or impliedly authorizes the dealing, and
2. extends to the proceeds, but if the SP enforces a SI against both the collateral and the proceeds, the amount secured is limited to the market value of the collateral at the date of the dealing.
	* Note, **S28(1)** automatic extension does **not** **perfect** **proceeds**! See **(2)** and **(3)** for that below.

(2) A **SI in proceeds is continuously perfected** **if the interest in the original collateral is perfected by registration of a FS** that

1. **contains a description of the proceeds** that would be sufficient to perfect a SI in original collateral of the same kind,
	* Stock phrase to meet this requirement: describe the original collateral **“and proceeds, including…”**. Bad practice to not put this in the FS to get the benefit of **28(2)(a)**.
	* This also allows an SP gets a SI in property that derives from collateral ***as*** proceeds, so that a perfected PMSI in collateral leads to perfected PMSI in proceeds – see priority rules, below.
2. covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or
* Ex: All. P.A.A.P. for all bicycles. You deal with bike A and that gives rise to bike B.
	+ - If your SA has an ‘after acquired’ provision, bike B will be considered part of the original collateral, and will be perfected without the help of **s.28(2).**
		- However, if your FS covers after-acquired property but the SA does not, bike B is proceeds and not original collateral.
		- In this situation, s. 28(2)(b) steps in and perfects the proceeds (bike B)
	+ McD does not know of any case that has used **S28(2)(b)**, use it as a backup on an exam
1. covers the original collateral if the proceeds consist of money, cheques or deposit accounts
	* **If the proceeds are money or deposit accounts, they will be continuously perfected as long as FS describes the OC!**
	* **s.28(2)(c)** does not cover all accounts. Money is distinct from a deposit account. Money goes to somebody, but never into an account. It is the promise to pay money back that is the account, not the money itself.
	* Original collateral, by definition, **cannot be proceeds**. Thus, “proceeds” alone cannot describe proceeds. SP cannot use **“All PAAP”** in SA to describe SI in collateral *as* proceeds. That term always describes SI in collateral ***as* OC.**
	* Fitting the proceeds into **s.28(2)** is the ideal situation, but if you fail to do so, you can get a consolation prize in the form of a 15-day grace period in **s.28(3)**:

(3) If the SI in the original collateral was perfected other than as described in **(2)**, the **SI in the proceeds is** a **continuously perfected** SI, **but becomes unperfected 15 days** after the SI in the original collateral attaches to the proceeds, **unless** the SI in the proceeds is **otherwise perfected** by any other methods and under the circumstances prescribed for original collateral of the same kind.

* **s.28(3) deems the proceeds of a perfected SI to also be perfected for a 15 day grace period**, even if there is no possession/registration – they are ‘continuously perfected’, i.e. the perfection of the original collateral attaches to the proceeds
* **This grace period scenario will probably be on the exam**
	+ McD says there is authority to the effect that **every time a new generation of proceeds arises**, even though the interest in the previous generation of proceeds is unperfected, the **SP get 15 days of perfected status.**
* s.10(5)**:** A SI in proceeds is enforceable against a third party whether or not the SA contains a description of the proceeds.
* s.23(1)**:** If a SI is perfected under this Act and is again perfected in some other way without having been unperfected, the SI is **continuously perfected.**
	+ Adjoin with **S28(3),** **S26(1)** and other true [i.e. automatic] Grace Periods to get continuous perfection ***retroactively*.**

# VI. Competing Interests: Priority and Detachment Rules

## 1. What a Priority Rule is

* 68(1): The common law continues to apply, unless it is inconsistent with the statute.
* Priority can only be determined as of a (present or past) particular moment, you can only make (heavily qualified) predictions about future priority
* **Exam: will be asked to described the priorities as they exist on a particular day, don’t speculate about before or after**
* Priority is determined on an item by item basis, even for an All P.A.A.P.
* **Exam: may need to advise client to contact parties to get information about an SI - must specify the information to be accurate as of a particular time**
* Priority rules only operate as between two parties - must break all parties into pairs
* *PPSA* gives rules for when at least one party has an SI; if neither party has an SI, assume common law ‘first in time’ rule
* **Never expand a priority rule beyond what it exactly says – close enough is not good enough, must be exactly match the situation between the pair.** If the rule is not an exact match, move to next rule in sequence:
	1. **‘Specific’ (or ‘special’) priority rules** –usually relate to what collateral is, the type of SI, and/or who the debtor is. If a specific rule applies, it takes precedence. If more than one specific rule applies, you just have to argue that one is more specific than the other – may be up to the court, If no specific rule applies, move to the residual rules:
	2. **‘Residual’ priority rules** – more general (ss. 20 and 35) . If none apply, go to the common-law rule:
	3. **Common law priority rule** - *nemo dat quod non habet /* ‘first in time’
* Once you have determined who has the better priority for each pair, you try to determine what the overall priority ranking is. May sometimes be circular (see below)
* ***Simpson v*. *Shadlock –*** courts will sometimes try to impose their ideas of equity on the rules, but this is not really relevant – if not explicitly stated in the provision, it is not relevant for determining priority

## 2. Priority Rules: General Issues

### (1) Circularity Problems

* Specific *PPSA* rules may not always fit together smoothly, and can cause issues with circularity where no one party has priority over all the others:
* GMS Securities v Rich-Wood Kitchens:
	+ *PPSA* deems fixtures to be personal property so, so they can be subject to SIs
	+ Someone who has a *PPSA* SI in a fixture may have got that SI before the property actually became affixed to the land as a fixture, or they may have got it while it was already a fixture, *or* they may have gotten the SI at the very moment that the property became a fixture
	+ So the competition over the property in question could either be between two secured parties under the *PPSA*, or two mortgagors in a land interest under the *Land Title Act*, *or* a competition between a secured party and a mortgagor.
	+ **Facts:** *PPSA* deems fixtures to be personal property so, so they can be subject to SIs. Mortgagor 1 got an interest in the land. Then a secured party got a SI in some goods. The goods then became affixed to the land, becoming fixtures and putting M1 and SP in competition. Then, Mortgagor 2 got an interest in the land (and the fixtures on it), putting all 3 in competition. SP1 then files Land Title office.
	+ M1 has priority over M2 by registering first, SP1 gets priority over M1 because *PPSA* says their interest in goods that become attached prevails over the person with a land interest, and M2 gets priority over SP because PPSA says that if someone comes along and purchase land interest that you have an SI in, they get priority over you unless you registered beforehand.
	+ No one party has priority = circularity problem. Court must sort this out.
* **Exam: if you find a circularity problem, don’t worry about resolving it – just identify it**

### (2) Subordination Agreements

Parties have freedom of contract to enter into agreements with each other to give a lower-ranked party the benefits of having a higher priority

* s.40(1)**:** A SP **may subordinate** its SI to **any other interest** and the subordination is **effective according to its terms** between the parties **and** **may be enforced by a 3P** if the 3P is the person or one of a class of persons for whose **benefit** the subordination was intended.
	+ **This does away with privity of contract with respect to making parties better off via subordination agreements (still cannot make 3rd parties worse off)**
	+ Will often be made between SP1 and the debtor to subordinate SP1’s interest to new creditors to allow the debtor to actually do business with other parties, who might otherwise not want to
	+ Other creditors will likely contact SP1 to confirm this agreement actually exists - SP1 may put the subordination agreement in the registry to avoid fielding requests, but this is in no way required
* **Exam: will probably be tested on whether a subordination agreement exists and actually applies to the situation**
	+ i.e. you must explicitly include proceeds
	+ Best to word a subordination agreement clearly, but may just be slipped into the security agreement
		- May have to find or construe words that indicate party agrees to subordinate their interest to that of another
* s.45(6) When a SP has subordinated their interest to another person, a **FS may be registered to disclose that subordination** any time while the registration of the subordinated interest is effective.
* Collateral “subject to the interest of RBC” under SA constituted SubA: RBC v Gabriel of Canada
	+ You **can** **securitize** your SubA by also taking SI in another SP’s property thereunder.
		- s.40(2)SubA does not grant a SI, but you can get a SI through it.
* Subordination clauses will be interpreted fairly strictly: Transamerica Commercial Finance v Imperial TV (Agreement said they agreed to subordinate their interest to ‘banks’. TCF wasn’t allowed to claim the benefit. Court construed ‘banks’ narrowly as meaning only federally chartered banks, and they were just a finance company)

### (3) Marshalling – An Equitable “Remedy”

* It is possible that a party with an over-supply of security interests may defeat the interest of a party with a subordinate interest in one or more of those interests
	+ Ex: SP1 has an interest in x, y, and z. SP2 has an interest in only x, and inferior priority. SP1 could choose to satisfy their debts with x, defeating SP2’s interest, even if their debts could otherwise be taken care of with y and z.
* Although not required by the *PPSA*, the court may use its equitable jurisdiction to order **marshalling** to either
	+ 1. order the over-secured party to use particular funds instead of other funds available to it so as to allow the value of those other funds to remain available to under-secured parties who have only those funds to use, or,
		2. order rights of the over-secured party to the interest be subrogated to the under-secured party (more complex)
* Equitable requirements apply- to get marshalling, must have clean hands, no laches, etc.
* There must also be no **hardship**: court must be satisfied that no third party is adversely affected by the order;
	+ that the over-secured party has access to multiple funds, there aren’t further parties that will be prejudiced, and that it is not too hard for the court to determine whether its orders have been complied with
	+ If SP2 is in default but SP1 is not, this might lead to SP1 being under-secured at a later date; therefore Marshalling usually only ordered when all parties are in default
	+ Funds proceeded against need not be PPSA interests (Surrey Metro Savings v Chestnut Hill Homes).
* Marshalling is ‘used fairly frequently’, unless there is a clear reason not to (i.e. clear hardship). Often don’t even have to go to court, might just have to show the other party that the court would clearly order marshalling and they’ll give it to you (since they probably lose nothing).

## 3. Residual Priority Rules: Competition With Another Security Interest

For s.35(1)(a):

* S43(4)**:** A FS can be registered before a SA is made and before a SI attaches: 674921 BC v New Solutions Financial
* A single FS can cover various SAs as per **s.43(5)** as long as the description of collateral is broad enough: RBC v Agricultural Credit Corp Sask

**s.35**:(*remember: go here if no specific rule applies*)

**Key Rules**

**(1)(a) priority between perfected SIs**… is determined by the order of occurrence of the following:

* + **registration of a financing statement** without regard to date of attachment [*rush to the registry*]
	+ **possession of collateral** in accordance with s. 24 without regard to the date of attachment s. 24 [**note:** must take possession **for the purpose of perfection** and you cannot do this if the interest is not attached/does not exist]
	+ [temporary perfection]

**(1)(b)** a **perfected SI has priority over an unperfected SI** [*note that this can change day by day*]

**(1)(c)** **priority among unperfected SIs** is determined by the order of attachment of the security interests

[***Ontario Dairy Cow*** *- several parties will often have their interests attach in proceeds all at the same time – i.e. when the proceeds arise – and therefore none will have priority over the others*]

**General Rules**

(2) For the purposes of (1), a continuously perfected SI must be treated as perfected by the method by which it was originally perfected.

(3) Subject to s. **28** for the purposes of **(1)**, the time of registration, possession or perfection of a SI in the original collateral is **also the time of** registration, possession, or perfection of **its proceeds**

**Tacking Rules**

(5) Subject to **(6)**, the priority that a SI has under **(1)** applies to all advances, including future advances

(6)(b)a **perfected SI** **loses priority** to the interest of persons in **s.20(a)** for any **advances made** **after** the SP has **knowledge** of **(i)** the interests of judgment creditors, **(ii)** seizure of collateral by a sheriff, or **(iii)** an order giving the sheriff a right to the collateral.

**Continuity of perfection? rule**

(7) **If registration** of a SI **lapses**… and the **SP re-registers** the SI not later than **30 days** after the lapse, the **lapse does not affect the priority** status of the SI **in relation to a competing perfected SI** that, immediately before the lapse **had a subordinate priority** position, **except** to the extent that the competing SI secures advances made or contracted for after the lapse and before registration

* So if you re-register within the grace period, the priority you had before the lapse is restored – except for the any advances that where made by the competing parties during the lapse/before registration (note: the party’s own advances are not part of this exception)
* With respect to any advances made by the competing parties during the lapse/before registration, **s.35(7)** does not apply at all – so you just go to the regular priority rules, i.e. go back so **s.35(1)** to determine the priority with respect to those advances
	+ In some cases this may create a circularity problem
* Note that **s.35(7)** only relates to competition between SPs. In reality, issues may arises with respect to trustees in bankruptcy and **35(7)** provides no help with that to SPs.

## 4. Specific Priority Rules: Competition With Another Security Interest

### (1) Priority for a Purchase Money Security Interest

* Having a PMSI can grant you access (in some situations) to ‘superpriority’ - need a PMSI + some other requirement
	+ In many cases, you will have a PMSI but nothing in **s.34** will apply to you , so you will be stuck using non-PMSI rules
* Some rules apply only when one party has a PMSI, others only when both parties have a PMSI
* Some apply when the interests are from the same debtor; other rules do not have this requirement
* Certain rules only apply when you have a ‘non-proceeds PMSI’ – you can only take advantage of the rule/superpriority with respect to original collateral, not proceeds
* So determining all these variables will be necessary to figure out if you can use any of the rules
* At times, a super-priority rule will reach the same result as the residual priority rule
* What matters is what the original collateral is, even though they may be now be dealing with PMSI proceeds, which could then be inventory, but not originally)
* Recall that only a portion of the debt to a party may be subject to a PMSI (the rest could be normal) – only that portion can be used with the super-priority rules
* If the original collateral is inventory, could be difficult to get super-priority; if it is not, it is much easier

s. 34

**PMSI vs. Non-PMSI from the same Debtor**

(1)Subject to **s.28**, a PMSI in

1. **neither inventory nor and intangible** that is **perfected not later than 15 days after debtor obtains possession** of the collateral, or
2. **an intangible** that is **perfected not later than 15 days after SI attaches**

**has priority over another SI given by the same debtor**

* with a PMSI in collateral/proceeds, other than intangibles/inventory, as long as it is perfected within 15 days of the debtor taking possession of the collateral, you have super-priority over other SIs from the same debot
	+ For intangibles, must be perfect within 15 days of attachment
* Super-priority continues to proceeds once it’s established, including inventory, just can’t start as inventory to use 34(1)
* For 34(1), if debtor already has possession when they purchase something, 15 days will start running from the date of attachment: McLeod & Co(PMSI in snow blower, debtor was leasing before purchase so had been in possession for a long time. Court said 15 day grace period from ‘possession’ started when the interest attached)
* Subject to section 28 (must be continuously perfected with proceeds)

(2) Subject to s.28, **a PMSI in inventory or its proceeds** has priority over another SI given by the same debtor if (ALL of the following)

1. The PMSI must be perfected at time the debtor gets possession of the collateral
2. Must have given a notice to any other SP who, before the PMSI FS was filed, filed a FS that included the same item or kind of collateral
3. Must give notice to any other party that registered a SA with interest in the same item or kind of collateral
4. Notice in (b) must state that the person giving notice expects to acquire a PMSI in the inventory, and describe the inventory
5. The notice must be given before debtor obtains possession of collateral
* **Key for s.34(2):** **To get PMSI in inventory, SP must file FS and send notice to all other parties with an interest before debtor gets possession of collateral**
* Limited by s.34(5)
* Cannot use 34(1) or (2) if both parties have a PMSI:

**Perfected Seller/Lessor/Consignor PMSI vs. Other PMSI given by same debtor**

(4) a **PMSI** in goods and its proceeds taken by a **seller, lessor, or consignor** that is

1. In the case of **inventory, is** perfected at the date the debtor obtains possession
2. In the case of collateral **other than inventory**, is perfected within **15 days** of the time the debtor gets possession

**has priority over another PMSI given by the same debtor**

* Interestingly, **s.24(4)** gives preference to seller, consignor, or lessor PMSIs over financier/lender PMSIs, which cannot use it
* Lessor and consignor are deemed PMSIs

**Exception to Superpriority for Accounts**

(5) A non-proceeds security interest in accounts [*i.e. as original collateral*] which was acquired for new value [*you specifically bought this account*] has priority over a PMSI in the account as proceeds of inventory as long as the non-proceeds SI is registered before the PMSI is perfected or registered.

* Generally speaking, the PMSI in this case would have superpriority. s.34(5) creates an exception to this.
* The non-proceeds SI in accounts will typically be an absolute assignee of the account, a deemed SP.

**Non-Proceeds PMSI vs. Proceeds PMSI**

(6) A **non-proceeds PMSI** [*i.e. in original collateral*] **has priority over** a **PMSI in the same collateral as proceeds** if

1. In the case of **inventory**, is perfected **at the date** the debtor obtains possession of the collateral, or
2. In the case of collateral **other than inventory**, is perfected within **15 days** of the time the debtor gets possession
* **S34(6) applies even if the interests were given by different debtors!**
	+ This would arise in a situation where the original collateral was purchased with PMSI proceeds by another debtor
* **s.28(2)** continuous perfection in proceeds if collateral perfected by **FS**. The SP should take advantage of this for their PMSI.

## 5. Competition with a Trustee in Bankruptcy or a Liquidator

These rules look at a competition between a **NON-SI vs unperfected SI.**

S20(a) provides that an **unperfected SI** in collateral is **subordinate to the interest of an unsecured judgment creditor** or sheriff with rights to it under *Creditor Assistance Act*.

* SI must be unperfected at the time that the judgment creditor’s interest arises
* If your SI is perfected, you get out of s. 20(a), but **only with respect to the original collateral and any advances that fit within s. 35(6)**. Other advances will be subordinate even though you are perfected.
* Key requirements in 35(6) relate to moment the SP has knowledge of the competing interest.

35(6)**:** A **perfected SI** has priority over the interest of persons referred to in **S20(a)** **only to the extent of**

* + - **(b)** advances made **before** the SP acquired **knowledge** of
			* **(i)** the interests judgment creditors,
			* **(ii)** seizure of collateral by the sheriff, or
			* **(iii)** an order giving the sheriff right to the collateral
* **McD says 35(6) as a whole is very badly worded, but just note that SP will not have priority for advances made after it learns of the judgment creditor/sheriff’s interest.**

**S20(b):** An **unperfected** SI in collateral is **not effective** against a trustee in bankruptcy or a liquidator

* The SI must be unperfected **at the time of** bankruptcy
* “not effective” means that interest **disappears** from the collateral and all of its proceeds.
* Trustees in bankruptcy are able to get a better position than an unperfected SI: Re Giffen (Lessor with deemed SI failed to register and D went bankrupt while in possession of collateral. Trustee seized it and claimed **S20(b**). SP claimed it was still the owner, so *nemo dat* should mean that the trustee does not get a better interest. **SCC** said TIB can ignore ownership interest of lessor in “lease for a term of more than one year” because lessor’s deemed SI in the leased property unperfect.)
* **Exam: will just be told there is a TIB or Liquidator, do not need to know how/why this happened or get into the complexity of bankruptcy law**

## 6. Competition with Transferees of Collateral and Buyers and Lessees of Goods

When unsure which provision to use here, the assumption is that whichever one which is most protective of the non-secured party should prevail.

### (1) Transferees where Security Interest Unperfected

These rules look at a competition between a **NON-SI vs unperfected SI** and **can be argued by anyone.**

20(c)**:** An **unperfected SI** in goods or intangibles is **subordinate** to the **interests of a transferee** who

1. acquires an interest under a transaction that is **not a SA**
2. gives value, **and**
3. acquires the interest **without knowledge** of the SI ***and*** **before** the SI is perfected.
* **s.20(c)** essentially codifies the principle of a **bona fide purchaser for value without notice**, but removes secured parties from being able to take advantage of it
* However, BFPFVWN does not take the interest completely freely. This does not detach the SP’s interest, it just makes it subordinate
* **s.20(c)** also says the party must acquire their interest before the SI is perfected
* Transferee’ is not defined, can be anyone who comes along and gets the interest.
	+ Note however that **s.20(c)(i)** means secured parties cannot take advantage of this provision
* RBC v. Dawson Motors – court seems to suggest that **value** for the purposes of **20(c)(i)** is only given by a change in a party’s position. You must actually have paid to have given value, rather than just having promised value.
	+ **McDougall says this is wrong** because consideration is a promise to do something and has value in and of itself – but this case is an authority that says this if needed

s.1(2**):** a natural person **knows** when a reasonable person would take cognizance of it…

### (2) Authorized Dealing Free from Security Interest

28(1) If collateral is dealt with or otherwise gives rise to proceeds, the SI

1. continues in the collateral **unless** the **SP** **expressly or impliedly authorizes** the dealing**,** and
2. extends to the proceeds
* The PPSA preserves the common law ‘licence to deal’: if you have a SI in inventory, it is assumed that you give implied authorization to the debtor to deal in that inventory, unless you explicitly say they cannot
	+ You can rebut the presumption by expressly saying to the debtor that they cannot deal with the inventory, or that they can ‘deal’ with it but not free from your interest
	+ Otherwise, if the SI is in inventory it will be presumed they are authorized to deal and s. 28(1)(a) will apply
* Express authorization can apply to any type of property. Implicit authorization is **usually limited to inventory**
	+ However, it is possible that even if there was no explicit authorization to deal in a specific instance, it could be implied if there was authorization in previous dealings between the parties. (this seems remote and unlikely to come up on exam)
* Using **s.28(1)(a)** is probably preferable to using **s.20(c)** because 28(1)(a) actually makes the SI nonexistent while 20(c) just makes it subordinate
	+ Even though it may have no practical difference for the party themselves, the *Sale of Goods Act* means they will have to reveal any remaining SI under s.20(c) when they sell the goods

### (3) Buyer or Lessee in the Ordinary Course of Business

These rules look at a competition between **an SI and a NON-SI** and **can be argued by anyone**.

This will likely be on the exam.

s.30

1. In this section,

**“buyer of goods”** *includes* a person who obtains vested rights in goods under a contract to which they are a party as a consequence of goods becoming a fixture or accession to property in which they have an interest;

**“seller”** *includes* a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is a party to a contract with the buyer;

**“the ordinary course of business of the seller”** *includes* the supply of goods in the ordinary course of business as part of a contract for services and materials

1. **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 goods given by the seller or lessor or arising under ss. 28 or 29, whether or not the buyer or lessee knows of it, unless they also know that the sale or lease constitutes a breach of the SA under which SI was created.**
* 30(2)is another iteration of the bona fide purchaser for value without notice.
	+ Unlike with s.20 (which you can defeat by perfecting) or s. 28 (which you can defeat by explicitly saying they cannot deal), there is not much a SP can do to prevent 30(2) from operating, short of actually taking possession of the property
	+ As such, it is the most often used. It is also very frequently litigated.
1. A **buyer** or lessee of goods acquired as **“consumer goods” takes** **free from a perfected or unperfected SI** in goods **if** the buyer or lessee

**(a)** gave value for the interest **and**

**(b)** did not know about the SI.

1. Subsection **(3)** **does not apply to** a SI in

**(a)** a fixture or

**(b)** goods whose purchase price is over $1000, or for a lease, the market value of which is over $1000.

Case law deals with the meaning of different parts of **s.30(2)**. The case are often inconsistent – McD says use whatever supports your position.

* **In a series of transactions, even if the final transaction was in the ordinary course of business, if earlier ones were not, the previous SIs will remain**. Royal Bank v. Wheaton Pontiac: (Court said that Final buyer does not take free from an SI that was given much earlier in a chain of transactions. s. 30(2) only applies to SIs given by the immediate seller.)
* What does the buyer need to ‘know’ to not be able to use s.30(2)?
	+ - * They must know it is a breach of the security agreement - that the person they are buying it from is not supposed to be selling it)
* What is the **‘ordinary course of business’?** Look at the quantity and type of goods being sold, when/where they are being sold. Repetition is also an important element (Fairlane Boats v. Leger)
* McD: lots of room for debate, can always litigate whether something is in the ordinary course of business, but this is not generally defined in the statute.

**Who is a buyer? When does someone become a buyer?**

* Royal Bank v. 216200 Albertasays defer to the meaning under the *Sale of Goods Act* – must be a ‘sale’ (by owner) not an ‘agreement to sell’ (by someone not yet the owner)
* Spittlehouse v. Northshore Marinesays no, do not use the *Sale of Goods Act* because it’s a mess on who is a buyer. Just use a common-sense approach.
* **Do not need to know the *SoGA* stuff for exam**

## 7. Two-Debtor Situations

For all below, we are assuming the SP’s SI, whether or not they have consented, survives the transfer by way of **s.28(1)(a)**.

**Transferee grants SI before transfer**

35(8) If a debtor transfers an interest in collateral which, at the time of the transfer, is subject to a perfected SI, that SI has priority over any other SI granted by the transferee before the transfer, except to the extent that the SI granted by the transferee secures advances made, or contracted for,

1. After the expiry of 15 days from the day the secured party who holds the SI in the transferred collateral has knowledge of the information required to register a financing statement disclosing the transferee as the new debtor, and
2. Before the SP referred to in paragraph (a) amends the registration to disclose the name of the transferee as the new debtor or takes possession of the collateral

35(9) Subsection (8) does not apply if the transferee acquires the debtor’s interest free from the SI granted by the debtor

* When new debtor enters the picture via a transfer of property, 35(8) indicates an SP is expected to add them to the registration of their SI – but only once they know they exist
* The period between 35(8)(a) - the expiry of 15 days from SP in transferred property’s knowledge and 35(8)(b) - that SP’s registration to disclose the name of the new debtor - is the hiatus
	+ You can have knowledge before the transfer, but in that case the 15 days only starts counting down once the transfer is actually made
* During the hiatus, s. 35(8) will not govern advances made by the transferee. Instead, the regular priority rules will apply.
	+ s.35(8) will continue to apply to advances made by the transferor during the hiatus period
* So: given the requirements are met, s.35(8) can give an SP1, who has an SI in collateral was just transferred to a new debtor, priority for that collateral over SP2, who had an early SA with that same debtor (for example, an All. P.A.A.P.)
* But note that s.35(8) only deals with a conflict with interests that arose before the transfer; s. 51 deals with interests that arise after the transfer.

**Transferee grants SI after transfer and SP consented to the transfer**

51(1) If a SI has been **perfected by registration** and the debtor transfers all or part of the interest in the collateral with the **prior consent** of the SP, the SI in the transferred collateral is subordinate to

1. A non-SI interest arising in the period between **15 days after the transfer** and the time SP re-registers with D2 as the new D
2. A perfected security interest registered or perfected in the period referred to in **(a)**
3. A perfected security interest registered after the transfer but before the 15 day period is over if, before the expiry of 15 days,
	* 1. the registration has not been amended to disclose D2 as the new D, **or**
		2. SP1 does not take possession of the collateral.
* If SP acts within 15 days to register against D2, **S51(1)** and **(2)** will have no application
* The *PPSA* assumes that if you **consent** to transfer, you will be monitoring the situation- actual knowledge of the transfer occurring is not required for **s.51(1)**
* **s.51** also creates a hiatus period, starting 15 days after the transfer and ending when SP1 reregisters their interest
	+ If SP1 has consented to transfer, any new perfected SI or any non-security interest arises during this hiatus period, it has priority over SP1’s interest
* **51(1)(c)** says that if SP1 does not reregister or take possession at any time during the 15 day period before the hiatus, SP1’s interest will be subordinate to any new perfected security interest that arises (but not a non-security interest).
	+ The 15 days are therefore not a true grace period
	+ However, if SP1 reregisters at any point during the 15 days, they maintain priority
* The SP’s consent to D1’s transfer does not amount to subsequent consent for the transferee-D2 to transfer to a 3P.

Transferee grants SI after transfer and SP1 knows about the transfer

51(2) If a SI has been **perfected by registration** and the SP has **knowledge** of information required to register a financing change statement showing the transferee as the new debtor

1. A non-SI interest arising in the period between **15 days after the time SP has knowledge** of info required to register FS showing D2 as the new D and the time SP re-registers with D2 as the new D
2. A perfected security interest registered or perfected in the period referred to in **(a)**
3. A perfected security interest registered **after the SP has knowledge** of the required information but before the 15 day period is over if, before the expiry of 15 days,
4. the registration has not been amended to disclose D2 as the new D, **or**
5. SP1 does not take possession of the collateral.
* Same structure as 51(1), but the start time of the 15 day ‘grace period’ for 51(2) is the time that SP1 **acquires knowledge of the transfer**
* s.51(2) will also apply when the debtor is the same but has simply changed its name
* The statute is **silent** as to other interests within the **15-day period** in **S51(1)** and **(2)**, so ***nemo dat***applies during that time.

## 9. Competition with Transferees of Negotiable or Quasi-Negotiable Collateral

## or of Intangibles

* An account (PPSA term for a debt) is a pure intangible. In an account, A owes (money) to B. A is the account debtor and B is the account creditor. B ‘owns’ the account.
	+ B could sell the account to C by means of ‘absolute assignment’. C would then be the account creditor of C.
		- McD: this is technically just a sale, not a SI - C just steps into B’s shoes. However, the *PPSA* deems all assignments to be security interests so C is technically an SP.
	+ Alternatively, B could use the account as collateral by means of a ‘conditional assignment’ to E. E would then only step into B’s shoes in the event of a default by B.
* In theory, accounts are mainly subject to the residual priority rules so competitions between SPs over them are fairly straightforward
* However, problems can arise after the account is paid out to one of the SPs. For purpose of this course, just need to know that whoever has the money usually will have the advantage
* See s.34(5) anti-superpriority rule for accounts in PMSI section, above.
* 57(2)**:** In the event of a default under a SA, a SP is entitled to notify a D on an intangible to make payment to the SP.

## 11. Competition with Holders of Interests in a Fixture or in Crops

* The *PPSA* treats fixtures as personal property, and therefore you can have a security interest in them. You can take an interest in somethings as personal property before it becomes a fixture, or even after it has already become a fixture (different rules will apply)
	+ *PPSA* definition of fixture excludes ‘building materials’ – ‘materials that are incorporated into a building… but does not include heating, air condition, or conveyancing devices (i.e. these could be fixtures)
* s.36 deals with competition between holders of a *PPSA* SI in fixtures and a holder of a land interest in the same fixtures.
* Remembers: s. 75(1) says if there is a conflict between the *PPSA* and (b) the *Land Title Act*, the *LTA* prevails, except that 75(2) says this does not apply to ss. 36, 37, and 49 of the *PPSA*:

s.49**:** If you have an interest in a fixture, you must register it with the **Land Title Office**

* Otherwise, a *later* land interest will defeat your personal property interest

s.36:

(2) This section applies to land for which a certificate of title has been issued under the *Land Title Act*

**SI attached before or at the time the goods became fixtures:**

(3): a SI in goods that attaches before or at the time the goods become fixtures has priority over claims to the goods made by a person with an interest in the land (“secret lien”)

(4) [Except that] the SI referred to in (3) is subordinate to the interest of

1. A person who acquires for value an interest in the land after the goods become fixtures

without fraud and before the notice of the SI is filed in accordance with **s.49**

**SI attached after the goods became fixtures**

(5) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who

1. Has an interest in the land at the time the goods become fixtures
2. Acquires an interest in the land after the goods become fixtures if the interest is acquired without fraud and before the notice of the SI interest is filed in accordance with **s.49**
* **s.49** notice has no effect on other SPs, so it can lead to circularity problems.
* Circularity problems in general are likely to arise from the interaction of the *LTA* and *PPSA* – especially on an exam cooked up by our good buddy **Bruce**
* GMS v Rich-Wood Kitchens: M1 (*mortgagor – land interest*) was in place first. Then came a SP whose SI attached before the goods became a fixture. Then M2 came in. Under the *LTA*, M1 had priority over M2. Under **S36(3)**, SP had priority over M1 because SP’s interest attached prior to the goods becoming a fixture. But, M2 had priority over SP because of **S36(4)** and SP had not filed a **s.49** notice in the Land Title Office.
	+ McD says SP is also subordinate to existing holders of the interest in the land to the extent that they make further advances under their mortgage after the goods become a fixture.

## 12. Competition with Holders of Interests in an Accession

**s.1(1) “accession”**: means goods installed in or affixed to other goods

s.38(1) In this section

“other goods” *means* goods to which an accession is installed or affixed

“the whole” *means* an accession and the goods to which the accession is installed or affixed.

* The statute does not provide any rules to figure out which is the accession and which is the “other goods”. Generally the larger or more expensive portion will be the “other goods”.
* If you have an SI in something that was goods prior to the time your interest attached, then, simply by virtue of having an attached interest, you have priority over somebody with a pre-existing interest in the “other goods”. If, however, someone later on (after the attachment) gets an interest in **the whole** before you perfect your SI, you lose out. This situation will cause another circularity problem.

**SI attached before or at the time goods become an accession**

**38(2)** a SI in goods **that attaches before or at the time** the goods become an accession **has priority** with respect to the goods over claims to the goods **as an accession** made by a person with an interest in the whole

**(3)** a SI referred to in (2) is subordinate to a person who acquires for value an interest in the whole after the goods become an accession without knowledge of the SI in the accession and before it is perfected.

**SI attached after goods become an accession**

**38(4)** A SI in goods **that attaches after** the goods become an accession is **subordinate** to an interest of somebody else with a **perfected SI** in the goods unless it is perfected before their interest arises.

# VII. Default and Remedies

**1.** **Default**

1(1) “default”:

1. The failure to pay or otherwise perform the obligation secured when due **or**
2. the occurrence of an event or set of circumstances that, under the terms of the SA causes the SI to become enforceable
	* Per **(b)**, default can be anything specified in the SA.
		+ i.e. changing business strategy, firing certain people, moving location, etc.
* Default triggers SP’s ability to use the SI
	+ Always remember to determine the correct amount of the obligation owing
* SP is not required to call in the SI if there is a default. It is fairly common for an SP to waive some defaults
	+ Debtor will want SP to put this in writing
	+ SP will want to specify this does not preclude them from claiming for future defaults
* An oversecured SP may not need to proceed against all the collateral, but generally the *PPSA* allows to you choose which collateral to proceed against, or even all of it
* Often, an SP will have multiple SAs with same debtor – it is important to know which of the agreements is in default
	+ It is also possible that parties have tied together their various agreements, so that default under one will count as default under all

**2. Remedies**

* Definitions make it looks like you have recourse to any remedy in the *PPSA*, and anything you put in the contract
	+ However, PPSA remedies are fairly comprehensive, so it is unusual to put other remedies in an SA
* Note that you cannot just put a remedy in the contract that is similar to a *PPSA* remedy but removes all the related protective procedures;
	+ Court says that if your remedy looks to much like a PPSA remedy, you cannot get out of the procedural protections for other parties
* **Your ability to proceed against collateral is not directly related to your priority – you don’t have to be most senior creditor. However, any interests with better priority will continue in the collateral, and will prevail over yours**
* When you proceed against the collateral, lower-ranked SPs’ interests will be wiped out
	+ However, theoretically the higher-ranked SPs will not be prejudiced because their interest will be preserved - the money paid out to the lower ranked SP will be considered proceeds, and the senior SPs can still proceed against them according to the ranking
	+ However, if the lower ranked SP spends the money on goods, this may not be proceeds
	+ With accounts, it is therefore a good idea to be the first to notify the account debtor
		- Also not a bad idea to just take an absolute assignment from the beginning

**(1) Statutory versus Other Remedies**

* SP always has the option to pursue ordinary contract remedies and sue the debtor as a unsecured party, rather than *PPSA* remedies.

**(2) Preliminary Notice**

* The **common law** says that when a debtor is in breach of a SA, and the creditor intends to proceed against the collateral, **the SP must send a notice to the debtor that they are in default before they can proceed against the collateral**
	+ This notice must specify the amount owing, and give the debtor a chance to make good on their obligations

**(3) Receivers and Managers**

* After the notice period, technically you can seize the property or you can tell account creditors to pay you directly
* However, practically speaking, there is a usually a brief period before which you are actually able to dispose of the collateral
* For this reason, you may want to appoint a receiver to manage a corporate debtor’s business to preserve the value of your collateral. Two ways to appoint a receiver:
	+ By a clause in the contract. Generally speaking, SAs will have this
	+ By going to court, which has jurisdiction to appoint a receiver. Often, parties will be wary of taking on the receiver role unless a court orders it (thereby making it clear it is legitimate)

**(4)** **Collection of Payments under Intangibles or Chattel Paper after Default**

* If collateral is an intangible, s.57 says that on default you may notify the (account) debtor to make payment directly to the secured party (i.e. SP becomes ‘absolute assignee’)

**(5)** **Seizure of Collateral**

* If collateral is tangible (i.e. goods, or paper other than chattel paper), s.58 says that you must seize/repossess the collateral
	+ Seizing the collateral is not a true remedy, it is a preliminary step. However, in some case it may operate as a remedy if the shock value of seizure cause the debtor (or even another party) to pay the amount of the obligation
* If you already have possession, you will have to note somehow that your possession is no for the purpose of covering the default
	+ At this point (and after default generally) it can no longer be ‘for the purpose of perfection’ – so you will have to show you perfected earlier
* Once you have possession of the property, you have certain duties and obligations – however, need to be careful because if you treat the property too much as though it is your own, someone could try to get the court to say that you have **foreclosed** on the property (see below)
* After seizing the collateral, SP will have to decide whether to dispose of it or foreclose:

**(6) Disposition**

**Disposition of Collateral**

59(2) After seizing the collateral, the SP may dispose of it… and the proceeds of it must be applied in the following order to

1. The cost of seizure
2. The satisfaction of the obligation secured
* **s.59** makes it look like you have an unfettered election, but you don’t, you must justify disposition
* You must conduct the disposition in a **‘commercially reasonable manner’** (Copp v. MediDent)
	+ If you don’t, the court ay issue an injunction, reverse the disposition or you may be precluded from pursuing any further remedy. You need to make the best deal in the circumstances. If it’s a private sale, get an independent valuation.
	+ Donnelly v. International Harvester (goods that were being disposed of were not properly repaired, so when disposed of they did not fetch the optimal market price. Court found that they were not disposed of in a **‘commercially reasonable manner’**, and reversed the disposition).
* However you choose to dispose of the collateral, s.59(6) says you must give notice (in addition to the original, common-law mandated notice given to the debtor) of the disposition to parties with interests subordinate to yours.
* Remember you can only keep an amount that corresponds to the amount you are owed:

60(2) if a SP has dealt with/disposed of the collateral, then any surplus after paying back that SP must be accounted for and paid out in the following order

* 1. To a person with a subordinate SI
	2. To a person with any other interest
	3. To the debtor
* Note that **s.60(2)** does not mention the higher priority security interests. This is because their SIs continue in the collateral that is disposed and its proceeds

**(7) Foreclosure**

61(1) After default, a secured party may propose to take the collateral in satisfaction of the obligation secured by it and must give a notice of the proposal to

1. **the debtor** or any other person who is known by the secured party to be an owner of the collateral,
2. a creditor or **person with a subordinate SI**
	* 1. **who has registered an FS** before the date that notice is given to the debtor, **or**
		2. **whose SI is perfected by possession** at the time the secured party seized the collateral, and

(2) If anyone entitled to a notice under **(1)** whose interest would be **adversely affected** by the SP’s proposal, gives to the SP a **notice of objection within 15 days** after notice given, the **SP must dispose of the collateral** under **s.59**.

* “Foreclosure” is taking the collateral as your own (called this because it forecloses all other remedies)
* When you foreclose (‘take the collateral in satisfaction of the obligation secured’) you, lose any further claims
	+ Generally speaking, parties will not want to foreclose on goods
		- If you dispose of (sell) goods, you can actually buy them yourself – so no real reason to foreclose on goods rather than just sell them
	+ You can choose whether to sell or foreclose with respect to each individual item
	+ However, foreclosure on any item means you cannot proceed against later items
* You must first “propose” to foreclose on the collateral
	+ You have to send notice to the debtor and all subordinate SPs (but not SPs with senior priority)
* After this, the other parties may within 15 days object to the disposition
	+ They must be prepared to show why they object, but this is usually not difficult to do.
	+ If a party objects, the collateral cannot be foreclosed on, you can only either choose to do nothing or dispose of it
* If no one objects, you can foreclose and you take the collateral free of the debtor’s interest and the interests of any subordinate SPs.
* Technically, if you foreclose on property worth more than your obligation secured, if you get it you get to keep the full value of the collateral
	+ However, in practice, the other parties will almost certainly object and force you to just dispose of the collateral
* Parties will very rarely want to foreclose; more commonly, foreclosure will come up when other parties try to argue that an SP has actually foreclosed on some collateral.
	+ If they argue successfully, this will remove that SP from competition for other collateral.
	+ They will often argue that the SP that has seized property is doing too much (i.e. repairs, dealing) with the collateral and is treating the property as though it is their own
	+ Still an open question whether this kind of ‘constructive foreclosure’ is possible
	+ ***Angelkovski v.* *Trans-Canada Foods Ltd.*** says no, but it seems more likely that the approach in Inland Kenworth Ltd. v. Laboucane prevails: that is, if you treat the property too much as if it was your own, you run the risk of being seen to have foreclosed.

**(8) Rights of Redemption and Reinstatement**

s.62: before you disposition of/foreclosure on the collateral, any party can “**redeem”** the collateral by pay off the amount of obligation currently owed – in this case SP that seized must return the collateral to the debtor

* If there are remaining obligations that were not defaulted on, SP’s SI in the collateral may be **reinstated**
* 62(1)(b) provides that for **consumer goods** you can redeem collateral simply by paying whatever is **currently owed** and **ignore the operation of an acceleration clause**
	+ So if an acceleration clause says that on default of any obligation all the payments become due, you can simply pay off the payment that would have been due, ignore all the accelerated ones, and the consumer goods will be reinstated.
	+ However, s.62(2) says that a consumer cannot do this more than twice.

**(10) Consumer Goods**

* After seizure of the collateral SP ordinarily still has the option to just sue the debtor if the obligation is not fully covered, as long as they don’t foreclose
* s.67 creates an exception to this for consumer goods
* A remnant of older **“seize or sue”** secured transactions regime, which said that you could either seize the property, or sue under contract law, **but not both.** s.67 **preserves this only in the context of consumer goods** - must do one or the other.
	+ ***Whitewater of Motors v. Amatto***: (a consumer, having failed to make payments on a vehicle, simply returned the vehicle to the creditor’s lot. Argument was that the creditor accepted the surrender of the goods and therefore that the obligation was extinguished via **s. 67**. Creditor said no, I didn’t accept the surrender of the goods, and the court agreed – you have to do more to be considered to have accepted the goods.)

**Exam Checklist**

**Attachment –** Original collateral must have **s.10** writing requirements to be enforceable against 3rd parties

**Characterization of collateral –** when SI attaches, but different for each SP

Goods – inventory, consumer goods, or equipment?

**Are there Proceeds?**

**Access to PMSI rules?**

**Subordination agreement?** Enforceable?

**Perfection?**

**19**: Requirements for perfection

**23**: Continuous Perfection

**25**: registration of a financing Statement

**43(4)**: FS can be registered before SI attaches

**43(6)**: FS “affected”, possibly invalid if seriously misleading

**26**: temporary perfection (15 day grace period)

**28(3)**: perfection in proceeds (15 day grace period)

**Residual Priority rules**

**35(1)(a)**: perfected SIs by order of registration or possession

**35(1)(b)**: perfected SIs over unperfected Sis

**35(1)(c)**: unperfected SIs by order of attachment

**35(2)**: continuously perfected SI governed by date of original perfection

**35(5)**: future advances tack onto priority

**Specific Priority rules**

**35(7)**: lapse in registration (30 day“false” grace period)

**34(1)/(2)**: PMSI vs non-PMSI

**34(4)**: seller PMSI vs lender PMSI

**34(6)**: original collateral PMSI vs proceeds PMSI

**SP vs Transferees**

**20(c)**: BFPV that is not a secured party if unperfected

**28(1)(a)**: authorized dealing, license to deal

**30(2)**: debtor sells in the ordinary course of business

**30(3)**: consumer goods

**20(a)**: SP vs unsecured creditor

**35(8)**: SI given by transferor vs. SI arising before the transfer (15 day grace period after knowledge)

**51**: SI given by transferor vs. SI arising after transfer (15 day grace period after **(1)** knowledge or **(2)** consent + transfer)

**36**: SIs in fixtures vs land interests

**38**: SI in accession vs SI in whole