LAW 587 – PPSL

BUCKWOLD

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# Introduction to the Law of financing

* North America and most of the rest of the economically developed work operates on a basis of credit

## Types of Credit

1. Unsecured debt
	* Debtor buys goods/services/money and promises to pay the Creditor, who is promising to provide what the debtor is paying for
2. Secured Debt – what this course is about
	* The promise to pay is ***secured*** by some form of property
		+ Creditor acquires a security interest in the collateral
* A secured creditor seizes and sells directly
	+ The seizure is conducted in Alberta by civil enforcement agency
		- No judgment required
* The difference between secured and unsecured debt lies in the ability of creditor grantors to directly reach their debtor’s property, or some other source of funds, in the event of the debtor’s failure to pay in accordance with the agreed terms of credit
* The distinguishing feature of secured debt is that the creditor holds both the chose in action comprised of the debtor’s personal obligation to pay *and* an interest in property to which the creditor can look to satisfy the personal obligation

##### What if the debtor is bankrupt?

* When someone becomes bankruptcy, federal law takes over (*Bankruptcy & Insolvency Act*)
	+ The law is invoked by someone making an assignment into bankruptcy or by someone applying into bankruptcy
* Debt financing doesn’t equal equity financing
* Debt Financing is when the creditor lends money or provides property on credit terms
	+ This creates a debt relationship that may be secured or unsecured
* Equity Financing is when a shareholder purchases shares in a corporation or otherwise injects funds as an investment into other forms of enterprise, such as joint ventures and partnerships
* In that case, this is not a debt relationship - the rights of the shareholder are based on ownership and not on debt

##### Law of Secured Financing

* The law of secured financing has two branches
	+ 1st – governs the respective rights of the creditor and the debtor who are party to a security agreement underlying a secured credit transaction in relation to recovery of the secured debt, particularly through realization of the security interest by seizure and disposition of the collateral
	+ 2nd – regulates the competing rights of secured creditors and other persons who may be claiming an entitlement to the property of a debtor; that is, it determines the priority of competing claims to the same property
* *Inter partes* issues are generally more easily understood and resolved than are the more complex issues associated with questions of priority
	+ *Inter partes* rights are affected by debtor protection legislation that varies province to province
* The law governing priority is, to a significant degree, homogeneous in all of the common law jurisdictions of the country

##### The Structure of Secured Credit Relationships: *Inter Parte Rights*

* Secured transactions fall into one of two categories:
	+ Vendor credit – a person who sells goods or services on credit takes a security interest in property of the buyer to secure payment of the balance of the purchase price
		- If the buyer fails to pay in the manner stipulated by the parties’ agreement he or she is in “default”, and the seller is entitled to seize the property subject to the security interest, sell it and apply the proceeds of sale to payment of the outstanding purchase price
		- There is no limit in principle on the amount or value of property in which a secured creditor may take a security interest
			* However, the creditor is only entitled to enforce the security interest with respect to property having a value commensurate with the quantum of debt outstanding at any given time
	+ Lender credit – the lender/creditor lends money to the borrower/debtor and takes a security interest in property of the debtor to secure repayment of the sum loaned
		- The lender is ordinarily (though not always) a bank, credit union or trust company
		- In some instances, the money is used to purchase an asset, which the lender would then take a security interest in
* *Inter partes* rights do not have anything to do with priority

#  What is a security interest? the ppsa substance test: concept and Function

## ppsa fundamentals

##### The Concept of the *PPSA*

The fundamental conceptual innovation of the PPSA is its adoption of the “security interest” as the basis for determination of both *inter partes* rights and priority disputes. **Regardless of the formal structure contemplated by the contract defining a secured financing transaction, it is viewed as giving a “security interest” in the property offered as collateral to the secured party.** That interest in turn supports the secured party’s entitlement to enforce payment of the secured debt as against the debtor through seizure of the collateral in the event of the debtor’s default, and provides the basis for assertion of the secured party’s claim to the collateral as against competing claimants.

* **The PPSA is:**
	+ the primary source of law (and primary subject of this course)
	+ comprehensive scope
	+ available to and used by creditors of all kinds
	+ overlaid on and in some instances supplemented by basic principles of property law
* The PPSA definition of personal property contemplate seven categories each of which is separately defined:
	+ Goods
	+ Documents of title
	+ Chattel paper
	+ Instruments
	+ Money
	+ Investment property
	+ Intangibles
		- These categories cover every conceivable kind of personal property
* The PPSA sub-classifies goods into consumer goods, equipment and inventory
	+ **Consumer goods** 🡪 goods that are used or acquired for use primarily for personal, household or family persons
	+ **Inventory** 🡪 includes stock held by a person for sale or lease, goods furnished under a contract of service, raw materials or WIP, and material used or consumed in business
		- Goods used or consumed in a business does not include goods that are simply utilized in a business
		- Used means used or depleted (fuel)
	+ **Equipment** 🡪 residual category, encompassing all goods held by a debtor other than as inventory or consumer goods
* A secured transaction will initially involve a security agreement between the debtor and:
1. lender who advances funds to be repaid as agreed,
2. a vendor who sells goods to the debtor on secured credit terms, under which some or all of the purchase price of the goods is to be paid in the future, or
3. a lessor or consignor of goods who is treated as a secured party under the PPSA
* In some cases the security agreement is assigned by the original secured creditor to a third party financer, who assumes the secured party’s right to enforce the security agreement against the debtor
	+ This is most likely to occur in the context of secured sales or leasing but it may also occur with lender credit
* There are differences between credit in a consumer and business situation
	+ Consumer Level Transaction:
		- Single contract between the secured party and the debtor
		- Security interest in one or more specified items of collateral
		- Specified amount of debt with interest and related charges
		- Enforcement in the event of default through seizure and sale of items of collateral
			* NOTE: while in principle a debtor may grant a security interest in a broader pool of assets, or in an AllPAAP, the Act precludes attachment of the security interest to after-acquired consumer goods except in specific circumstances
	+ Business Level Transaction:
		- A master agreement that provides for a number of sub-agreements
		- Security interest in a changing pool of collateral
		- Variable amount of debt that can increase or decrease as payments are made
		- Enforcement in the event of default through seizure and sale of individual items of collateral or collection of accounts, or through receivership
* The *PPSA* allows parties to define their contracts as they want – there is no limit on what a debtor can give and what a lender can take
	+ It is up to the parties to decide
	+ The *PPSA* then applies to the contract as it is written
		- Therefore, those who are comfortable with the *PPSA* and advising big lenders will be favor by the *PPSA*
		- The creditor does have the advantage of being able to borrow more

##### Key Language

* **Security interest (s 1(1)(tt))** – created by a “security agreement” (s 1(1)(ss)) between the creditor and debtor parties
* A security interest comes into existence when it “attaches” in accordance with the statutory rules
* A security interest can be “perfected” or “unperfected”
	+ Perfection is not relevant to enforcement of an interest, but it plays a critical role in priority
* The *PPSA* is built on general law of property and contract
	+ At common law, *nemo dat* is the basic mechanism used to determine competing claims to the same property
		- Priority is determined on the basis of which of the competing *in rem* interests in or to the property arose first
* A security interest is an *in rem* interest in property but it will not necessarily prevail on the basis that it arose before a competing interest
	+ Priority under the *PPSA* regime will depend upon whether the security interest is perfected and on the priority rules that applies to the competition in question
* The proprietary character of a security interest typically confers 3 basic rights on the secured party:
	+ The right to seize and sell or otherwise realize the value of the collateral given as security on the debtor’s default
	+ The right to apply the proceeds realized from the collateral in satisfaction of the obligation secured by it in preference to the claims of the debtor’s unsecured creditors
	+ The right to enforce the security interest against third parties who acquire proprietary rights in the collateral from the debtor

### ppsa snapshot



## the core concept of the *PPSA*: “Security interest”

* Characterization: transactions that “in substance” create a security interest (**s 3(1)**)
	+ Transactions that create a “deemed” security interest -but only for the purpose of governing priorities (**s 3(2)**)
* The concept of “security interest” is at the core of the *PPSA*
	+ The act applies only to transactions that create or provide for security interests or that are deemed to create security interests
* Not all security interests falling within the scope of the Act are conceptually the same
	+ **S 3(1)(b)** provides a non-exclusive list of transactions that are to be treated as creating or providing for security interests under the substance test
		- The rules laid down in this section are typically referred to as the “substance test”
	+ **S 3(2)** provides a list of transactions that do not in substance function as a security agreement, but that are “deemed” to be security agreement *for some purpose*
		- Subject to sections 4 and 55
* A security interest does not involve any dealing with the title or ownership of the collateral
	+ This is where it differs from legal or equitable mortgages, which involves the transfer of legal or equitable title to the creditor
* The role of the security interest is to provide an alternative source of compensation should the debtor fail to perform his/her obligations to the secured party
* Conditional sales contracts, security leases, security consignments and security trusts were included within the scope of the *PPSA* in order to merge separate streams of personal property security law into a single system
	+ These transactions all have essentially the same function: to provide or recognize by contract that a person to whom an obligation is owed has an interest in personal property that would permit that person to look to the property as a source of compensation should the obligation not be performed.
	+ These are included in the *PPSA* because *functionally* they are security agreements

##### Substance Test

**3(1)** Subject to section 4, this Act applies:

1. To every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral; and **[THE TEST]**
2. without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation. **[PARTICULAR FORMS OF TRANSACTION THAT MAY OR DO MEET THE TEST]**

**1(1)(tt)** "security interest" means: **[THE DEFINITION]**

**(i)** an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible **[i.e. PERSONAL PROPERTY]** that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods; and

**1(1)(ss)** "security agreement" means an agreement that creates or provides for a security interest **[MAY BE ORAL]** and, if the context permits, includes

**(i)** an agreement that creates or provides for a prior security interest, and

**(ii)** a writing that evidences a security agreement;

## application of the substance test

* Many of the cases litigated under the *PPSA* arise from the question: “does the lease/consignment/trust ‘in substance’ create or provide for an interest that functions as a security interest?”

### legal consequences of characterization

* Under s 3(2), all features of the *PPSA* except its post-default enforcement provisions (part V), apply to true leases having a term of more than one year as defined by s 1(1)(z) and commercial consignments falling within s 1(1)(h).
	+ If the transaction is a security lease or consignment – lessor/consignor is a secured party who is required to comply with the regulatory scheme applicable to enforcement of security interests
	+ If the transaction is a true lease or consignment – the lessor/consignor is in law the owner of the property leased or consigned
		- Lessee/consignee has no rights under the *PPSA*, rights are defined by the contract between the parties
* Characterisation is also important for the purpose of other statutes that deal with interests defined as “security interests”
* **Transactions “in substance” security agreements: s. 3(1):**
	+ Lease of goods (any duration)
	+ Consignment of goods
	+ Assignment of accounts as security
	+ Trusts and other
		- Priority competitions: *PPSA* applies
		- Enforcement *inter partes*: *PPSA* applies (part 5)
* **Transactions “deemed” security agreements: s 3(2):**
	+ "Lease for a term of more than one year"
	+ "Commercial consignment"
	+ Transfer (assignment) of accounts outright
		- Priority competitions: PPSA applies
		- Enforcement *inter partes*: Contract and general law of property applies
* **Transactions that are *neither* security agreement in substance nor deemed security agreement:***inter partes* and priority rights determined by contract and general law of property.

### true lease or security agreements (security lease)

##### The Relevance of Characterization of Leases

* The issue of characterization of leases arises under all Acts, but is relevant principally in the context of *inter partes* rights of lessors and lessees
	+ The reason for this is that all features of the Acts, other than post-default enforcement, apply to true leases having a term of more than one year
		- For all practical purposes, it is only when a lessee or third-party claims rights under Part 5 that the issue arises
* If the transaction is a security lease, the lessor is a secured party who is required to comply with the regulatory scheme applicable to enforcement of security interest
* If it is a true lease, the lessor is in law the owner of the leased property and the lessee has only the common law rights of a defaulting lessee
* Lease – enter into an agreement in which one party *owns* the goods. The borrower leases the goods to use for certain payments
* Hard to determine
* The task is to determine what was the **imputed goal or intention** (but not necessarily the expressed intention) of the parties to the transaction as determined by the circumstances surrounding its creation and the effect its terms could reasonably be expected to produce
* One approach – determine whether the transaction has characteristics more consistent with a sale than a bailment
	+ If it looks more like a sale, it is likely to be a security agreement in substance
* If the lease is found to be a security lease, it will be treated as a security agreement for purposes falling within the PPSA
	+ The lessor no longer has rights of title, just has a security interest
	+ Lessor must observe *PPSA* provisions relating to repossession and the right to enforce payment obligations in lease
	+ Lessor’s rights may be also be limited by other legislation
* Priority in a true lease situation follows title and *nemo dat*
* Priority in a security lease situation will be determined under s 3(1) of the *PPSA*
* Why would you structure it as a lease v a security lease? There are tax benefits to the lessor
* The lessor is a security lease does not expect the property back – they are essentially financing the sale of it through the term of the lease

*843504 Alberta Ltd. (Re),* quoting M.E. Burke 🡪 The author identifies (at pp 292-294) the following as "primary factors" of a security lease:

1. **Relevance of the purchase option price** - whether the purchase option price is nominal or reflective of fair market value.
	* If the purchase price is nominal, it is more reflective of a security lease
2. **Mandatory purchase options** - whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term.
	* If they are obligated to purchase at the end of the lease, it will be deemed a security lease
3. **Open-end leases/guaranteed residual clauses** - whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term.
4. **Sale-leaseback transactions** - whether the transaction is structured as a sale and leaseback.
	* This will ALWAYS be a security lease

###### Consequences of finding that lessor’s interest is or is not a security interest?

* Scenario 1 – Lease with dealership contains a clause under which the lessee guarantees that the car will have a specified Residual Value at the end of the lease. Lessee has option to purchase at end of lease for RV. If Lessee elects not to purchase it, lessor is entitled to recover from Lessee the RV minus any mount recovered by resale of the car. At end of lease, Lessee returns the car to Lessor who sells it and claims damages against Lessee representing the difference between amount recovered on sale and the guaranteed RV. Lessor retains title to car until such time as Lessee elects to exercise the option to purchase.
	+ Dealership was functionally assured recovery of the full purchase price of the vehicle because they got all the payments due at the end of the lease and they were assured of recovering the residual value.
		- *Campbell Ford Sales Ltd v Langlois*
	+ In substance a security agreement.
* Scenario 2 - Didn’t have to pay the dealership any difference between the resale price and the residual value. If the lessee terminates the lease early or defaults, then the lessor recovers the car and the lessee is required to pay all the remaining monthly installments plus RV minus amount recovered by resale. This is a true lease because lessee has no such obligation if there is no default.
	+ WHY DO THESE TWO CASES MATTER? Lessor is suing the lessee under the lease. Are there any constraints on this? If this is in substance a security agreement, under BC legislation, once they seize the car, they would have no further right to sue for any damages or balance due under the lease (inter partes enforcement issue). Does the whole PPSA apply?
	+ We do not have that provision in AB, but we do have a similar provision in the Law of Property Act
		- *Daimler Chrysler Services Canada Inc v Cameron*
* Scenario 3 - Bank/lessor is assured of recovering full value of combine plus interest over 5-year term. Farmer/lessee is in effect purchasing the combine under the lease. At the end of 5 years, $300,000 combine is worth much more than $500. Same as if the farmer was buying the equipment from the bank and making payments over a 5-year period.
	+ This is in substance a security interest
		- *Canadian Western Bank v Baker*

### true consignment or security interest

* These are not as often used for security agreements anymore
* The *PPSA* does not provide a test for distinguishing consignments that are security agreements that fall within the act from non-security or true consignments that are not with its scope
	+ The principles of common law are to be applied in the determination, to the extent that they focus on the substance of the transaction in question
* Consignment:
	+ In technical legal terms – involves a relationship of principle and agent between the transferor and the transferee of goods
		- The owner of the property delivers possession of goods to another person whose role is to sell the goods as agent for the owner
		- The obligations of the consignee-agent are not secured by the consignor-principals’ ownership of the consigned property or by the beneficial interest he/she holds under the trust
* Security agreement:
	+ The debtor is not an agent; her/she buys and sells on his/her own account
		- His/her implicit obligations are not those of a fiduciary of the transferor, they are those of a buyer of goods
		- The secured party remains the owner under a security agreement since in this way he/she is seeking to secure himself against non-performance of the transferee-debtor’s obligations
* The role of the court is to determine whether a transaction labelled a consignment has features that indicate a principal-agent relationship or a secured sales transaction
	+ To determine the substance of the agreement, courts will look both to the terms of the contract itself and the conduct of the parties in relation to that contract
* ***Access Cash International Inc v Elliot Lake and North Shore Corporation for Business Development*** 🡪 the court listed the features of a true consignment, but many of those listed are ambiguous, since the terms of the agreement do not necessarily reflect the true purpose of the transaction
	+ In each case, it is necessary to look at the transaction as a whole to determine its intended function
* Features of a True Consignment (bold denotes the strongest features, all others are somewhat vague):
	+ The merchant is the agent of the supplier
	+ Title in the goods remains in the supplier
	+ Title passes directly from the supplier to the ultimate retail purchaser and does not pass through the merchant
	+ The merchant has no obligation to pay for the goods until they are sold to a third party
	+ **The supplier has the right to demand the return of the goods at any time**
	+ **The merchant has the right to return unsold goods to the supplier (strong suggestion)**
	+ The merchant is required to maintain separate books and records in respect of the supplier’s goods
	+ The merchant is required to hold sale proceeds in trust for the supplier
	+ **The supplier has the right to stipulate a fixed price or a price floor for the goods**
	+ The merchant has the right to inspect the goods and the premises in which they are stored
	+ The goods are shown as an asset in the books and records of the supplier and are not shown as an asset in the books and records of the merchant
	+ The shipping documents refer to the goods as consigned
	+ The supplier maintains insurance on the goods after they are delivered to the merchant
	+ **It is apparent from the merchant’s dealings with others that the goods belong to the supplier rather than the merchant (strong suggestion)**
* A consignment that is a ‘commercial consignment’ as defined by s 1(1)(h) falls within the scope of the *PPSA* under s 3(2) even if it is not a true consignment
* The *PPSA* *inter partes* enforcement provisions only apply if the consignment is in substance a security agreement
	+ If a consignment is a commercial consignment, it is therefore necessary to determine whether it is ALSO in substance a security agreement if the *PPSA* is involved
* If a lease is not a commercial consignment under s 1(1)(h), the lease can only fall within the scope of the *PPSA* for both *inter partes* and priorities purposes under the substance test of s 3(1)

### security agreement and/or trust

* **When is a trust agreement in substance a security agreement?**
	+ The concept of trust: trustee holds legal titled to property in trust for beneficiary, who is the owner in equity (beneficial owner)
	+ Typical forms of trust
		- A (settlor/owner) transfers property to B (trustee) in trust for the benefit of C (beneficiary)
		- A (settlor/owner) transfers property to B (trustee) for the benefit of A (beneficiary)
			* A is both the settlor and beneficiary
		- A (settlor/owner) declares him/herself trustee for the benefit of B (beneficiary)
			* A is both the settlor and trustee
* The beneficiary is the **true** owner of the property
* Trusts are used in many areas of law, including commercial law
* Essential features of the legal concept of trust:
	+ Simple trust is created when a person (settlor/donor) executes a written declaration of trust which establishes the trust, names the trustee and establishes the terms and conditions upon which the trust will be conducted
	+ The assets of the trust (trust *res*) are usually given to the trustee to be administered in accordance with the trust terms and conditions
		- These terms provide that the trust *res* is to be held or used for the benefit of a third person, generally referred to as the beneficiary
	+ The trustee holds legal title to the property subject to the trust, but the beneficiary is the equitable owner
* In equity, a trustee has a fiduciary obligation to carry out the terms of the trust
	+ Can be implied in law
* A trust that involves an obligation on the part of the trustee to pay money held by the trustee to the beneficiary is not necessarily a security agreement
	+ The obligation to pay is imposed on the trustee by equity and enforceable under the law of trusts
* BUT 🡪 an agreement giving rise to a trust can be both a trust and in substance a security agreement within the scope of s 3(1) where its function is to secure an obligation, not just embody the obligation as part of the trust relationship
	+ Security trust
* Under a security trust, the property designated as trust property is security for the performance of an obligation that is independent of the trust obligation
	+ **TEST:** Is the trust being used as a device to secure an obligation that exists independently of the trust (security trust) or is itself the source of the obligation (simple trust)?
* Somewhat hard to determine as the nature of the relationship between parties must be known?
	+ What did they intend to create?

#### *Re Skybridge Holidays Inc*, (1999) 173 DLR 4th 333 (BCCA)

* Court had to determine whether a security interest was created when customers of a travel agency paid money to the agency to purchase travel services
* The money was being held in a trust account when the agency became bankrupt
* If the relationship between the agency and customers was that of customer and supplier, the money in the account was in equity property of the customer that did not vest in the trustee in bankruptcy
* If the relationship was that of debtor and creditor, the customer had, at best, an unperfected security interest in the trust account
	+ This interest could be defeated by Skybridge’s trustee in bankruptcy
* The court determined it was not a security trust
	+ “**The *PPSA* is explicit that a trust interest is a security interest if the purpose is to secure the payment or performance of an obligation.** The substantive nature of the trust is critical. The travellers in this case are consumers, not lenders, and they became creditors unintentionally as a result of an unforeseen bankruptcy.”

**Applying the test**: the trust was the source of the obligation; it is because the travel agent held their money in trust that they had to pay them back if no trip occurred. There was no independent debt. Therefore, simple trust

#### *Contech Enterprises Ltd v Vegherb LLC*, 2015 BCCA 99

* Court considered an agreement for sale of the assets of a business under terms that provided for deferred payment of part of the purchase price
	+ The transaction included a separate licence agreement under which the vendor of the business granted the purchaser a licence to use the vendor’s intellectual property
	+ The agreement provided that the vendor would assign the IP right to the purchaser if and when the purchaser’s obligations under the APA were satisfied
* The Court concluded that the interest retained by the vendor as owner of the IP was intended to secure payment for the purchase price of the business assets, including the IP itself
* The license agreement was therefore in substance a security agreement under the PPSA

#### *Alignvest Private Debt Ltd v Surefire Industries Ltd*, 2015 ABCA 355

* The Court considered a provision in a real property lease under which the tenant made a prepayment of money to the landlord
* The prepayment was described in the lease as security for performance of the tenant’s obligations under the lease
	+ The landlord was entitled to apply the prepayment to rent owing at specified future times, but the tenant was entitled to have the amount of the pre-payment returned if the lease was terminated for reasons other than default by the tenant before the money was so applied
* The CA held that the prepayment was not prepaid rent that became the property of the landlord
* The landlords’ interest in the funds was in a substance a security interest which had to be perfected in order to have priority as against third parties
* **Takeaway:** be careful to not draft provisions dealing with prepayment of rent so as to avoid the conclusion that the landlord must register in the PPSR to preserve the right to retain such prepayments as against the creditors of the tenant
	+ If in doubt, register against your tenant

### The Substance Test in Federal Legislation

* Section 227(4.1) of federal *Income Tax Act* – property of a tax debtor and property held by any secured creditor (224(1.3)) of that person that but for a security interest (224(1.3)) would be property of the person is subject to a deemed trust in favour of Crown and is property beneficially owned by Her Majesty notwithstanding any security interest in such property.
	+ Section 224(1.3)
		- “security interest” means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatsoever, however, or whenever arising, created, deemed to arise or otherwise provided for.
* What does this mean?
	+ Tax debtor has property subject to a security interest, but if they owe money to CRA, the CRA gets the money notwithstanding the security interest

#### *Caisse Populaire Desjardins de L’Est de Drummond v Canada* (2009 SCC)

*Held:* If the substance of the agreement demonstrates that the parties intended an interest in property to secure an indebtedness, then a security interest exists within the meaning of s 224(1.3)

* The whole point of the agreement was to secure payment of the debt. Provincial law not used to determine the meaning of the term “security interest”.
* Features of the agreement(s):
	+ (1) Debtor borrowed money from Caisse under a line of credit
	+ (2) Debtor deposited funds in locked-in term deposit account with Caisse
	+ (3) Negative pledge clause – deposit cannot be transferred or given as security
	+ (4) Caisse entitled to withhold funds on deposit pending repayment of loan and on default was entitled to “compensation” – ie. set-off deposit against debt.
	+ (5) Debtor hypothecated and pledged the sum on deposit to the Caisse to further secure repayment under the credit contract equal to the amount the Caisse was entitled to withhold (but dissenting judgment suggests hypothec was not effective under Quebec law).
* **NOTE:** HOWEVER, given the similarity between the Income Tax Act definition and that of the PPSA the decision may be of persuasive authority in relation to the question of whether a credit arrangement under which the creditor has a right of set-off gives rise to a security interest for purposes of PPSA.
* One important distinction: Courts have consistently held that a transaction that involves retention of title by the creditor party does not fall within the ITA definition, though it is clearly a security agreement for purposes of PPSA.
	+ Conditional sale agreement under PPSA will be in substance a security agreement. It is not a security interest under the ITA because of case law. So, a secured seller will win as against the CRA.

# the deemed security interests & exclusions from the *PPSA*

## deemed security interests

* Two general sets of rights associated with a security interest:
	+ *Inter partes* rights - rights relating to the enforcement of the obligation secured through seizure and disposition of the collateral
	+ Priority rights – rights relating to the priority of the security interest *vis-à-vis* the competing interest of third parties
		- Priority is primarily affected by perfection, which usually occurs by registering the interest at the PPSR
* The PPSA adopts registration as the primary determinate of the priority statues of a security interest because registration gives public notice of the existence of the secure party’s claim to identifiable property of the debtor
* The need to provide public notice of a creditor’s claim arises in any case in which the creditor has acquired what is “in substance” a security interest in the debtor’s property
	+ Deception can still occur
* The creation, perfection, priority, registration and conflict of law’s provisions of the PPSA apply to four types of transactions that give rise to those concerns, though they are not functionally or conceptually security agreements:
	1. **S 1(1)(b) – an assignment (sale) of accounts**
		+ “transfer of an account” is a literal description – not a defined term
		+ Owner of account transfers (assigns) the account to transferee (assignee)
		+ Account becomes property of the transferee
		+ But the interest of the transferee is by definition a “security interest” for purposes of priorities [s 1(1)(tt)(ii)(A)] - the transferee is a “secured party”
		+ The transferor is by definition a “debtor” [s 1(1)(m)(iii)]
	2. **S 1(1)(g) – an assignment of chattel paper**
		+ “transfer of chattel paper” is a literal description – not a defined term
		+ Owner of chattel paper transfers (assigns) the chattel paper to transferee (assignee)
		+ Chattel paper becomes property of the transferee
		+ But the interest of the transferee is by definition a “security interest” for purposes of priorities [s 1(1)(tt)(ii)(A)]
		+ The transferor is by definition a “debtor” [s 1(1)(m)(iii)]
	3. S 1(1)(z) – a lease for a term of more than one year
	4. S 1(1)(h) – a commercial consignment
		+ “commercial consignment” is a defined term [s 1(1)(h)]
		+ Consignor is owner of the goods under the terms of the consignment
		+ But consignor’s interest under a “commercial consignment” is defined as a security interest for purposes of priorities [s 1(1)(tt)(ii)(B)]
		+ Consignee is by definition a “debtor” [s 1(1)(m)(i)]
* S 3(2) of the *PPSA* deems these above transactions to be security agreements
* The deeming effect does not extend to *inter partes* enforcement, since these transactions do not involve the types of relationships that are characteristics of secured financing arrangements (s 55)
	+ They are invoked if they involve security interests for purposes of determining the priority of competing claims to the subject property
* THEREFORE: the priority provisions of the PPS apply to these “deemed” security interests, but the provisions governing *inter partes* enforcement do not
* In all of these deemed interests, the person who holds legal tile is the owner of the property involved for purpose of issues that do not fall within the PPSA
* With respect to issues that do fall within the PPSA, the interest of the title holder is characterized as merely a security interest and the counterparty-debtor is correspondingly *treated as* the owner

## commercial consignment

* The definition for consignment under the PPSA (s 1(1)(h)) captures only consignments under which both the consignor and consignee are in the business of dealing in goods of the description consigned
	+ A consignment under which a consumer delivers property to a commercial consignee is not caught by the Act
	+ Consignments to auctioneers and to consignees who are generally known to their creditors to be selling or leasing goods for others are specifically excluded from the scope of the Act
		- These aren’t included because the potential for deception is so minimal
* **Definition:** means a consignment under which goods are delivered for sale, lease, or other dispositions to a consignee who, in the ordinary course of the consignee’s business, deals in goods of that description by a consignor who:
	+ - In the ordinary course of the consignor’s business, deals in goods of that description, and
		- Reserves an interest in the goods after they have been delivered
	+ But does not include an agreement under which goods are delivered to an auctioneer for the sale or to a consignee for sale, lease or other disposition *if it is generally known to the creditors of the consignee that the consignee is in the business of selling or leasing goods of other*
* The definition excludes an agreement under which goods are delivered to a consignee for sale, lease, or other disposition 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
* Elements of the definition test:
	+ Goods are delivered (by owner/consignor) to a consignee for sale, lease or other disposition
	+ Consignee deals with goods that description in the ordinary course of business
	+ Consignor reserves an interest in the goods
* But **NOT** including:
	+ An agreement for delivery of goods to an auctioneer for sale.
	+ An agreement for delivery of goods to a consignee if it is generally known to creditors of the consignee that the consignee is in the business of selling or leasing goods belonging to others
* If it is not a commercial consignment, you still need to do a substance test
* Does it fall within the PPSA priority rules?

#### *Canadian Imperial Bank of Commerce v Williams*, 2007 ABCA 340

*Issue:* Is it generally known to creditors of the consignee (Bonnett Farms) that the consignee is in the business of selling or leasing goods of others?

*Held:* Court concluded that affidavit evidence given by consignors as to the knowledge of Bonnett Farms’ creditors was acceptable notwithstanding that the consignors were interested parties. It further held that information contained in consignors’ affidavits was admissible even though it was hearsay. However, affidavits of both parties was inconclusive as to general knowledge of Bonnett Farms’ creditors – directed trial of issue.

*Why does characterization matter?*

* If it is a commercial consignment, those ranchers are going to lose their cattle to CIBC.
* If is not a commercial consignment, the ranchers would get their cattle back because they are the owners of the cattle (PPSA does not apply).

## lease for the term of more than one year

* Uncertainty as to what constitutes a lease for a term of more than one year has been removed by the elaborate definition in of the term in s 1(1)(z)
* The Act will apply in any case in which the lessee may or in fact does remain in possession of the leased property for a period of time in excess of one year
	+ A lease for an indefinite term falls within the Act
* A lease for a term of less than a year that is automatically renewable for one or more terms the total of which exceeds one year is deemed to be a lease for a term of more than one year
* Where the lease has an initial term of one year or less and the lessee remains in possession or substantially uninterrupted possession of the leased property after the expiry of the term with the consent of the lessor, the lease is deemed to be a lease for a term of more than one year as soon as, but not before, the duration of the lessee’s possession exceeds one year
	+ During the initial one year term of the lease, non-PPSA laws governs all priority issues associated with conflicting claims relating to the lease property
		- It becomes a security interest after one year
* Not all leases for a term of more than one year are deemed to create a security interest
	+ A lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land and leases of prescribed goods are outside the act
* The deeming provision does not apply to a lease where the lessor is not regularly engaged in the business of leasing goods
* Does not involve *private* lessors

##### Buckwold’s Notes

* If transaction is a “lease for a term of more than one year”, it falls within the Act for purposes of determining the priority of competing claims to the consigned goods. *Inter partes* rights are determined by the agreement and general law, UNLESS the lease is also “in substance” a security agreement.
* If transaction is “in substance” a security agreement in the form of a lease (regardless of its length), it falls within the Act for all purposes – i.e., priorities & *inter partes* enforcement.
* If transaction is neither, parties rights determined by general law (*nemo dat* re priorities)

#### *Fast Labour Solutions (Edmonton) Limited v Kramer’s Technical Services Inc*, 2016 ABCA 266

* The case involved the lease of a crane worth an estimated $500,000 by an Iowa parent company, Kramer Iowa to its’ AB subsidiary, Kramer’s Edmonton
* The lease was to facilitate a contract for demolition work in Alberta
* The crane was seized by a judgment creditor for Kramer’s Edmonton who had registered a write of enforcement against the Edmonton company in the Alberta PPSR
* Iowa claimed the enforcer had no right to the crane as it was not Edmonton’s property
* The **core** issue became whether Iowa regularly engaged in the business of leasing goods
	+ Does not have to be the business’ sole function
* A company can be in the business of leasing goods even if it never makes any profit off of it
* One of the indicia is that the lease is for a commercial purpose and is part of an overall business strategy
	+ I.e. holding companies
* It does not matter if the property is leased to a non-arm’s length person, if only because the statute draws no such distinction
* Iowa was in the business of regularly leasing goods and therefore, the section of the *PPSA* is engaged
	+ They need to register to perfect
* Judgment creditor wins
* Note: the *Civil Enforcement Act* uses the *PPSA* definition of “security interest”

#### *Stokes Resources & Consulting Inc v Auto Body Services Red Deer Ltd*, 2011 ABCA 370

* **Issue**: is an arrangement under which one person has possession of and is permitted to use goods belonging to another person in return for payment of a price always a lease?
* Principal of Stoke invested in oilfield well testing company Rockies and agreed to deliver possession of an industrial tank to Rockies for use in the joint venture
* Had a falling out. Stoke then sent tank to another company, but when that company did not pay the rentals due, the tank was (inadvertently) returned to Rockies
* Remained there on the understanding that they could use it for rent of $200 per day
* Rockies never used the tank. It was eventually seized by Rockies' creditors as security on a debt.
* Stoke could only assert its rights against the writ holder depended on whether the transaction could be classified as a lease greater than 1 year
* ABCA held that it was not a lease, but merely a **license** to use
	+ Based on the premise that Stoke retained the right to lease the property to third parties at all times
	+ No evidence of a grant of exclusive possession - for a lease, the lessee has exclusive use of the property until the expiry of the lease (that was not present in this case)

**Note:** the Courts seem to be sympathetic to lessors

## summary up to this point

* “Deemed” security agreements fall within the scope of the PPSA for purposes of determining priority of claims to the property subject to the agreement – s.3(2)
* Concept: the identified party holds a “security interest” – s.1(1)(tt)(ii) definition
	+ True transfer/assignment of account – interest of assignee = security interest in the account assigned
	+ “Commercial consignment” (of goods) – interest of consignor = security interest in the goods
	+ “Lease (of goods) for a term of more than 1 year” – interest of lessor = security interest in the goods
* The transferor/assignor of an account, consignee under a commercial consignment and lessee under a lease for a term of more than one year is a “debtor” – s 1(1)(m) definitions
	+ (Implicitly, the assignor, consignee or lessee is treated as owner.)
* Application of the statute: Does the transaction fall within s. 3(2)? Where the transaction is a lease or consignment of goods, **apply the definitions** of:
	+ Lease for a term of more than 1 year
	+ Commercial consignment
* **But note:**
	+ A transaction in the form of an assignment of accounts, a lease or consignment of goods may fall within the Act under the substance test in s. 3(1).
	+ Where the transaction is “in substance” a security agreement, the Act applies to determine priorities *and* inter partes rights.

## exclusions from the scope of the act

* Section 4 sets out a list of transactions, most of which would be within the scope of the *PPSA* if they were not specifically excluded from the section

### interests in land

* Section **4(f)** – expressly excludes the creation or transfer of an interest in land
* Section **4(g)** – excludes the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments.
	+ This applies to assignments or charges of mortgage payments or payments under an agreement for sale
	+ *PPSA* defers to land law

#### *Alignvest Private Debt Ltd v Surefire Industries Ltd*, 2015 ABQB 148

* The court held that money paid by a tenant to a landlord under the terms of a lease of land was property of the tenant subject to a security interest held by the landlord to secure performance of the tenant’s obligation under the lease
* The security interest was not excluded from the PPSA by s 4(g) because the security interest was an interest in the deposit, not an interest in the lease
* The court suggested that the implied purpose of s 4(g) is to exclude the interests that can be protected by registration of a caveat in the land titles registry
	+ The deposit, as an intangible personal property interest held to Surefire’s obligation, cannot be registered like that
* In Alberta, an assignment of rental payments under a lease of land is deemed to be an equitable interest in land

### Security agreements governed by federal law

* A transaction that gives rise to a section 427 *Bank Act* security creates a security interest
* **BUT** this security interest arises under and is governed by a conceptually different regime established through federal legislation
* Section **4(b)** was clearly designed to remove the potential for confusion resulting from overlap of the systems of the *PPSA* and the *Bank Act*
	+ A *Bank Act* security interest does NOT create a *PPSA* security interest
* To be excluded from the *PPSA*, the security act must be ‘governed’ by federal legislation
	+ Not clear what constitutes governed
* First approach – so long as federal legislation either addresses the rights of the parities to the agreement or the rights of third parties, the *PPSA* does not apply
* Second approach – view the term governed as referring to a federal regime that replicates or substantially replicates the *PPSA* regime

### insurance interests

* The rights of payment from a contract of insurance are intangible property and would ordinarily be subject to the PPSA were they not excluded by s **4(c)**
	+ An outright assignment of an insurance policy would be a ‘deemed’ security agreement falling within s **3(2)(a)**
	+ An assignment by way of security would be in substance a security agreement under s **3(1)**
* The exclusion does not apply to the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss or damage to collateral

##### Example 1

A holds an insurance policy on her car with Insurer. A’s car is wrecked with the result that Insurer owes A $10,000 under the insurance policy. A assigns the right to payment under the policy to B (outright or as security) and then becomes bankrupt. Does the PPSA apply to a priority competition between B and A’s trustee in bankruptcy, both of whom claim the money?

**Answer:** B does not have an interest in the car so he does not get the money

##### Example 2

A holds an insurance policy on her car with Insurer. A has granted a security interest in the car to SP to secure a loan. A’s car is wrecked with the result that Insurer owes A $10,000 under the insurance policy.

SP’s security interest in the car extends to the money payable under the policy as “proceeds” – discussed later in the course.

A assigns the right to payment under the policy to B (outright or as security). Does the PPSA apply to a priority competition between SP and B, both of whom claim the money?

**Answer:** This scenarios falls within the PPSA – Both parties have a right to the proceeds

The difference from example 1 is that the secured party has an interest in the secured *property*

### other exclusions

* **4(a)** – a lien, charge or other interest given by an Act or rule of law in force in Alberta
* **4(d) –** compensation for labour or personal services
* **4(e) –** the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor’s obligations under the contract
* **4(h)** – a sale of accounts or chattel paper as part of a sale of the business out of which they arose, unless the vendor remains in apparent control of the business after the sale;
* **4(i)** – a transfer of accounts made solely to facilitate the collection of accounts for the transferor;
* **4(j)** – the creation or transfer of an interest in a right to damages in tort;
* **4(k)** – an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency.

# attachment

## an interest in “personal property”

* **Attachment** – the concept of attachment determines when a security interest is recognized as having come into existence
	+ Assumes the interest in question is an interest in personal property
* In general, the *PPSA* only applies to consensual security interests – security interests voluntarily created by a debtor in favor of a particular creditor pursuant to a contract
* The effectiveness of a security interest is a matter of contract law
	+ Depends on aspects such as the legal capacity of the debtor, authority to act, and the absence of vitiating factors, etc.
* Assuming that the parties agreement as a matter of contract law is effective, the issue of whether that agreement creates a security interest is determined by the attachment rules of the *PPSA*
* The *PPSA* uses the term “attachment” to describe the creation of the security interest as distinct from the entry into the security agreement
* Until attachment occurs, no security interest exists and the secured parties rights against the debtor are purely persona and contractual
* Once a security interest attaches, the secured party acquires proprietary rights in the collateral
* **Attachment requires the satisfaction of 3 conditions**: the secured party must give value, the debtor must have rights in the collateral, and the security agreement must satisfy one of the three evidentiary requirements recognized by the Act (discussed more below)
* A creditor who claims rights in relation to something that is not recognized as personal property cannot have a security interest under the *PPSA*
* There is an issue in connection with agreements that purport to give creditors a security interest in a license or agricultural quota held by a debtor
	+ Case law is mixed:
		- *National Trust Co v Bouckhuyt* 🡪 ONCA held that a tobacco quota was not intangible personal property under the *PPSA*. This decision was based on the fact that reissuance or renewal of a license is subject to the discretionary control of the granting authority and is therefore too transitory in nature to be considered property
		- *Sugarman v Duca Community Credit Union Ltd* 🡪 decided opposite that of *National Trust* in relation to a debtor’s nursing home license
		- *Saskatoon Auction Mart Ltd v Finesse* 🡪 the court held that a milk quota was property that could be subject to a security interest, notwithstanding that the milk board had control over the transfer of a quota
* *Saulnier v Royal Bank of Canada* 🡪 SCC decision that partially answered the question
	+ The court considered whether a debtor’s license to fish was property that could vest in the debtor’s trustee in bankruptcy or be subject to a security interest under the *PPSA*
	+ Conclusion: the license was property, on the limited basis that the right to participate in the fishery conferred by the license was coupled with a proprietary interest in the fish caught under the license
		- License was akin to a *profit a prendre* which is property at common law
			* *Profit* 🡪 the right to enter land and take something that is itself capable of being owned (minerals, etc)
	+ This decision does not provide much guidance in relation to licenses that do not cover the ability to acquire property (e.g. business license)

#### *National Trust Co v Bouckhuyt (1987),* 43 DLR (4th) 543

* ONCA held that the tobacco quota was not intangible personal property under the Ontario *PPSA*
* The right of the hold is so transitory and ephemeral in its nature that it cannot be considered property

#### *Sugarman v Duca Community Credit Untion Limited,* (1999) 44 OR (3d) 357 (CA)

* Came to opposite conclusion in relation to debtor’s nursing home licence

#### *Saskatoon Auction Mart Ltd v Finesse*, [1993] 1 WWR 265 (Sask QB)

* Court concluded that a milk quota was property that could be subject of a security interest, notwithstanding that the milk board had control over the transfer of the quota

#### *Saulnier v Royal Bank of Canada*, 2008 SCC 58

*Facts:* Saulnier holds four commercial fishing licenses in Nova Scotia

* In order to finance his fishing business, he signed a General Security Agreement ("GSA") with a bank, as well as a guarantee for the debts of his company
	+ The GSAs gave the bank a security interest in "all ... present and after acquired personal property including ... Intangibles ... and in all proceeds and renewals thereof"
* In 2004, the fishing business faltered and Saulnier made an assignment in bankruptcy
* The following year, the receiver and the trustee in bankruptcy signed an agreement to sell the four licenses and other assets to a third party for $630,000, but Saulnier refused to sign the necessary documents
* The trustee in bankruptcy and the bank brought an application for declaratory relief
* Saulnier claimed that the commercial fishing licenses did not constitute "property" available to a trustee under the federal *Bankruptcy and Insolvency Act*, or to a creditor who has registered a GSA under the Nova Scotia *Personal Property Security Act*.

*Issues:* Do commercial fishing licences constitute “property” under the *Bankruptcy and Insolvency Act* and *Personal Property Security* *Act*?

*Held:* The trustee was entitled to require Saulnier to transfer his fishing licences to a third party purchaser

*Reasons:* A fishing license gives the holder exclusive right to fishery and a proprietary right in both the fish harvested and the resulting earnings which is directly analogous to *profit à prendre*, which is undeniably a property right - they are current commercial realities

* The license serves as precondition for unlocking the appellant's other marine assets; since the value of the appellant's other business equipment is conditional upon acquisition of a fishing license, it follows that the trustee was entitled to require Saulnier to transfer his fishing licenses to a third party purchaser
* Having control over how something can be used is an important factor in deciding whether or not the thing at issue is indeed private property

#### *Stout & CO LLP v Chez Outdoors Ltd*, 2009 ABQB 444

* What amounted to a licence to provide guiding and outfitting services to hunters in Alberta was “property” that could be seized to enforce a writ of enforcement under the Civil Enforcement Act.

#### *Kasten Energy Inc v Shamrock Oil & Gas Ltd*, 2013 ABQB 63

* A creditor applied for the appointment of a receiver to enforce its security interest in ALLPAP of the debtor
* The debtor held an oil and gas lease that entitled it to extract oil and gas from a specific well
	+ It was undisputed that the oil and gas was part of the land before extraction but becomes personal property once removed
	+ The parties further agreed that the rights of extraction in the lease were a *profit*
* The creditor contented that the rights were personal property while the debtor argued they were a *profit* meaning it was an interest in land
* The Court determined the rights were personal, relying on *Saulnier*
* CASE BOOK COMMENTS: this was an incorrect reading of *Saulnier*
	+ The SCC acknowledge that a *profit* is property and analogized the right to fish embodied in a fishing license to a *profit*
	+ **BUT** the court did not say that a fishing license is a *profit* or that a *profit* is personal property
	+ The characterization of the license as personal property was linked to the fact that the subject of the license itself was personal property (the fish)
	+ In *Kasten*, the subject of lease and the right to removal related to something that is itself land (oil)

## the requirement of attachment

* A security interest comes into existence when it attaches to personal property
	+ Without attachment, there is no security interest
* There are two levels of attachment as per **section 12(1)**; as between debtor and creditor, the security interest attaches when:
	+ Value is given
	+ The debtor has rights in the collateral
* Where the question of attachment involves the rights of third parties (transferees, creditors of the debtor, debtor’s trustee in bankruptcy), there is an additional requirement:
	+ The security interest must be enforceable within the meaning of **s** **10**
* S 12 and 10 speak to the attachment and enforceability of a security interest
* These provisions proceed on the assumption that an agreement exists under which the debtor has conferred an interest in property, as opposed to one that creates only an *in personam* debt or obligation
* S **10** – a security interest is not enforceable against third parties unless:
	+ The secured party is in possession of the collateral
	+ The debtor has signed a *written* security agreement that describes the collateral in the manner prescribed; OR
	+ Where the collateral is a security or other type of investment property
* So, where a secured party is involved in a priority competition with a third party claiming an interest in the collateral, the security interest has “attached” only if all 3 requirements in **s 12** have been met
* If the secured party simply wants to enforce his/her right to recover the debt by taking the collateral from the debtor, the security interest has “attached” if the first two requirements of **s 12**  have been met
* The order in which the elements occur does not matter

##### Value

* Value given by who? **The secured party** in return for the interest
* One of the prerequisites for attachment is that value be given by or on behalf of the person claiming the security interest
	+ Value is defined in **s 1(1)(ww)**; any consideration sufficient to support a simple contract
* Encompasses any consideration sufficient to support a simple contract and includes an antecedent debt or liability
* Money does not have to change hands
	+ A binding commitment to give credit at some later date satisfies the definition of ‘value’
		- Value is satisfied even if the commitment is subject to conditions
* Past consideration can be considered value under the *PPSA*
	+ A owes $1,000 to B on an unsecured basis.
	+ A agrees to give B a security interest in A’s widget to secure repayment of the pre-existing debt (likely but not necessarily as a device to forestall litigation or collection action by B, or perhaps to induce B to lend additional funds).
	+ B has given “value” to A supporting attachment of the security interest. The antecedent debt is value regardless of whether it is “past consideration” under the law of contract
* The person granting the interest does not have to receive the value
	+ A person may grant a security interest in his/her property to a secured party to secure a loan payable to a third party
		- If the primary debtor defaults, the secured party may proceed against the collateral in which the security interest has been taken

##### Rights in the Collateral

* **General rule** – any legal or equitable proprietary interest qualifies as “rights in collateral” but Debtor can only give a security interest in the interest the Debtor has (*nemo dat*)
* Attachment can only occur if the debtor has rights in the collateral (**s 12(1)(b)**)
* The debtor must have something more than a contractual right to possession but may have less than full ownership
	+ Debtor must have an *in rem* interest in the property
* **S 13(1)** is a central feature of the *PPSA* regime
	+ The debtor may wish to grant a security interest in property that he does now own yet, but will be acquired in the future
		- This section facilitates that
* Under **s 13**, the security interest will attach immediately upon the debtor’s acquisition of rights in the property
	+ E.g. if the debtor grants a security interest in cattle, the security interest will attach to presently owned cattle under **s 12** and will automatically attach to subsequently acquired cattle pursuant to **s 13(1)**
* Purchase money security interest 🡪
	+ A security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price (**vendor PMSI**)
	+ A security interest taken in collateral, other than investment property by a person who gives value for the purpose of enabling a debtor to acquire rights in the collateral to the extent that the value is applied to acquire those rights (**lender PMSI**)
	+ The interest of a lessor of goods under a lease for a term of more than one year (**lender PMSI**)
	+ The interest of a person who delivers goods to another person under a commercial consignment (**consignor PMSI**)
* **S 13(2)(b)** precludes automatic attachment where the after-acquired property is **consumer goods**, unless the security interest is a purchase money security interest (**s 1(1)(ii)**) or the good are acquired as a replacement for good in existence when the security interest was granted
	+ **What is the purpose?** Consumer protection. Don’t want to allow a bank to over extend to a consumer borrower who doesn’t understand the law
		- If you allow it to attach forever, you are restricting that consumers ability to seek other financing methods
* **13(2)(a)** A limitation will also occur if the security interest is taken in crop that has not grown yet
	+ Will attach if crop grows **within** one year after the date of the agreement
		- In reality, the bank just continuously resigns a security agreement every year with the same farmer
			* Says they will collect on their loan if the farmer doesn’t resign
* **Exceptions to the general rule:** Debtor can give a security interest in more than Debtor’s interest
	1. Transactions that “in substance” create a security interest and hence fall within the scope of the Act under s. 3(1). Debtor has “rights” in the collateral even if someone other than the debtor is identified by the terms of the contract as owner. Debtor is treated as owner
	2. Non-PPSA rules of law under which Debtor has the power to give more than Debtor has.
		+ Common law: iTrade Finance Inc v. Bank of Montreal
		+ Statute: Factors Act, Sale of Goods Act
	3. The deemed security agreements – s. 3(2): Assignor of an account, consignee under commercial consignment, lessee under lease for a term of more than one year is the “debtor” and treated as owner under the priority rules – i.e. has “rights” in the subject property supporting attachment of a security interest.

##### Security Interest Must be Enforceable Within the Meaning of Section 10 for the Purposes of Priority

* Under **s 10(b)**, the writing requirement is satisfied by a generic description indicating the *kind* of property subject to the security agreement
	+ Although the security agreement itself is not registered or made generally available to the public, creditors and other interested third parties are entitled to obtain a copy of the security agreement from the secured party
* Pawn shop – borrowing money against the security of your collateral. If you don’t redeem it, they are entitled to keep your stuff
* A 3rd party who acquires an interest in the collateral before the evidentiary requirement is satisfied will take free of the security interest
	+ This include the debtor’s trustee in bankruptcy even if the secured party registers a financing statement before bankruptcy commences
* **Note**: even a buyer with actual knowledge of a prior security agreement will acquire the collateral free of the security interest if the secured party has not satisfied the evidentiary requirement prior to the sale

#### *GE Capital Acquisition Inc v Dix Performance (Trustee of)*, [1995] 2 WW 738 (BCSC)

* The description of the collateral as “shelving” was held to meet the requirements of the Act, notwithstanding that it was not sufficiently specific to enable a person to identify the piece of shelving in question
* The purpose of s 10 is to provide evidence of the existence in a security interest in ‘kinds’ of collateral
	+ Just has to fall within one of the clauses under **s 10(1)(d)**
* A person may rely on **s 18** to obtain further particulars if they are required
	+ Debtors, creditors, civil enforcement agencies, or a person with an interest in the personal property of the debtor can demand more information under this section
	+ As someone who is looking to *become* a creditor, you cannot request under this section. The course of action would be to ask the debtor for this information before you become a creditor
* **Charging clause** 🡪 contractual provision indicating that the creditor is granted an interest in property under the agreement with the debtor
	+ E.g. debtor grants to creditor a security interest in [described property] to secure payment of any amount due under this agreement
	+ E.g. seller retains title to [the vehicle] subject to this agreement until such time as the purchase price and any other amount payable hereunder is paid in full by the buyer

##### Interpretation of the Charging Clause

* Does “all present and after-acquired personal property” always mean what it says?
	+ **Usually, but not always**

#### *Okanagan Court Bailiffs Inc v TD Waterhouse Canada Inc* (BCSC)

* Ratio: RRSPS held by the Debtor do not fall within an ALLPAAP clause and must be specifically pledged
	+ Further, RRSPS held by a debtor do not fall within a provision creating a security interest in “accounts” – even though an RRSP is an account
	+ Calling it an ALLPAAP and/or account is not enough
		- Saying the security interest attaches to the debtors accounts will not include the RRSP
* **S 10(3)** and **10(4)** qualify s **10(1)**
	+ Cannot classify goods as “consumer goods” or “equipment” without referencing kinds; also “inventory”
		- Don’t write “consumer goods” – just write “goods” and it will attach
		- Instead of equipment, describe it at least a little – “farm equipment”
	+ These classifications basically cover everything
* **Why is this a special rule?**
	+ Categorization depends on how the person is using the thing that can be classified as consumer goods, equipment or inventor
	+ Describing collateral as consumer goods isn’t enough because if a third party to read it, they do not really know which goods are subject to the agreement
		- They would have to investigate how the debtor is using the goods
	+ Inventory is ok as long as goods are actually held as inventory (**s 10(4)**)
		- As soon as it stops being inventory and becomes something like equipment, it is no longer inventory and the security interest is no longer attached
* Example: Debtor is a rancher. The security agreement states that the Debtor grants SP a security interest in “cattle”
	+ **Buckwold**: she interprets this as being all present and after-acquired cattle
	+ The security interest automatically attaches to cattle because it is adequately described

#### *674921 BC Ltd v Advanced Wing Technologies Corp*, 2006 BCCA 49

* The Court considered the question of whether the language of an agreement indicated an intention to confer an interest in property of the debtor
* The agreement stated that a company that had received fund from two doctors under a JV agreement will provide its assets as collateral for the loan
* When the funds were not repaid, the doctors consulted a lawyer who filed a financing statement in the PPSR and prepared a formal security agreement
	+ That was not signed by the debtor company until almost a year later
* The Chambers judge concluded that the document created an immediate security interest in favor of the doctors
* The CA reversed this finding
* The original agreement only referred to the collateral as “assets” and therefore didn’t conform the s 10 writing requirement
	+ The agreement also did not indicate that an ALLPAAP was taken
* Statement that debtor "will provide security" meant that security would be provided in future, and consequently security interest did **not** arise upon execution of agreement
* Requirements under Act not met until security was executed and delivered, which occurred after competing agreement registered
* **Point being**: make sure there is a charging clause and ensure that collateral is sufficiently described for the purposes of s 10

#### *iTrade Finance Inc v Bank of Montreal*, 2011 SCC 26

*Facts:* - iTrade loaned money to Webworkx on the basis of fraudulent representations regarding Webworkx’s business operations

* Webworx paid out these funds to its president, Ablacksingh, who used the money to buy shares in an investment account
* A later pledged (gave a security interest) these shares as security for a line of credit from BMO
* iTrade discovered the fraud and sued Webworkx and A
* Shares are held in a trust account pending resolution
* The TJ declared that any property purchased using the iTrade money, including the shares, are to be held in a constructive trust for iTrade; this is a remedy for iTrade, much stronger than a judgment for damages
	+ Effectively eliminating BMO’s security
		- BUT the TJ excluded property held by other parties as bona fide purchasers of value without notice
* BMO is trying to claim that, as a bona fide purchaser of value without notice, it should retain its rights in the shares

*Issues:* Who owns the shares – BMO or iTrade?

*Held:* BMO’s interest properly attached and it therefore retains the interest over iTrade (turns on having a proprietary interest (BMO) vs a personal interest (iTrade))

*Reasons:* - If BMO is a bona fide purchaser for value without notice, then it is excluded from the constructive trust imposed by the trial judge

* iTrade's argument that it has a prima facie right to recover monies paid under a mistake of fact is incorrect 🡪 essentially, *nemo dat*
	+ **Buckwold**: this was essentially the principle prior to the decision in this case
* iTrade's rights to recovery was created by the trial judge's imposition of a constructive trust, not through a transaction that in substance creates a security interest
* On the other hand, BMO's transaction with Ablacksingh clearly was intended to create a security agreement
* It can only be enforced from the moment of attachment on
* First two requirements are easily met - there is a signed agreement, and it is clear that BMO gave value to the debtors by extending further credit
* However, there is a question as to whether Ablacksingh had rights in the shares when he pledged them to BMO
	+ Recall that contracts induced by fraudulent misrepresentations are voidable at the instance of the party that has been defrauded
	+ That being said, the agreements allowed Webworx to use the money advanced by iTrade in the manner prescribed, and this was done before iTrade discovered the fraud and initiated the civil proceedings
* Ablacksingh received no greater interest in the funds from Webworx than Webworx had received from iTrade
* This gave Ablacksingh "rights" in the collateral sufficient to enter into the security agreement with BMO
* BMO did not void the contract before the security interest was granted, so therefore the security interest was valid
* Therefore, BMO's security interest property attached pursuant to the PPSA.
* It is necessary, then, to resolve the competing claims of iTrade and BMO
* BMO's interest is covered by the PPSA, while iTrade's is not (there is nothing in the PPSA which governs priority for equitable interests)
* If BMO is a bona fide purchaser for value without notice of a pre-existing equitable interest, then iTrade's interest in the shares is void
* BMO fits the definition of "purchaser" because it acquired a pledge of (an interest in) the shares credited to the investment account, because it acquired a proprietary security interest in those shares when they properly attached
* Therefore, iTrade's equitable interest is extinguished, and BMO retains its security interest in the shares.

**Principle**: PPSA security interest has priority over a prior *equitable* interest if the security interest was acquired without knowledge of the prior interest

### NOTE ON THE QUISTCLOSE TRUST

* The name is derived from *Barclay’s Bank Ltd v Quistclose Investments Ltd* — this trust may arise by operation of law when funds are advanced by one person (A) to another (B) to be used for a specific purpose on condition that if they are not used for that purpose they are be returned to the lender (A). As a matter of law, the borrower (B) may be deemed to hold the funds in trust for the lender (A), who is the beneficiary of the trust.
	+ Trust does not arise from express declaration of trust on part of A, but may be declared by the court when A asserts a claim to the funds, which will often occur when they are claimed by B’s trustee in bankruptcy or another creditor of B.
	+ Since this arises by operation of law and not voluntary agreement, it is not SI and not captured by PPSA.
	+ *Ontario (Minister of Training, Colleges and Universities) v Two Feathers Forest Products LP (2013 ONCA)* — while CAN courts may be willing to find a Quistclose trust in appropriate circumstances, this case suggests they will not do so readily. A trust will not arise in every case in which money is advanced on an undertaking to use it only for a stated purpose. In rare cases in which the court may be prepared to find a Quistclose trust, the equitable interest of the lender/beneficiary may be defeated by a subsequently granted PPSA SI under the “bona fide purchaser for value” rule applied in iTrade.

## the deemed security agreements and “rights in the collateral”

**General rule**: any legal or equitable proprietary interest qualifies as “rights in collateral” but Debtor can only give a security interest in the interest the debtor has

**EXCEPTION**: debtor can give a security interest in more than his/her property

* The creation, perfection, priority, registration and conflict of laws provisions of the *PPSA* apply to four types of transactions that are *not* functionally or conceptually security agreements:
	+ An assignment (sale) of an account (**s 1(1)(b)**)
	+ An assignment of chattel paper (**s 1(1)(f)**)
	+ A lease for a term of more than one year (**s 1(1)(z)**)
	+ A commercial consignment (**s 1(1)(h)**)
* The legislative provision that brings these transaction within the *PPSA* is **s 3(2)** by deeming these to be security interests
* These transactions involve two types of situations:
	+ Where a lessor or consignor gives nothing more than possession of leased or consigned goods to a lease or consignee
	+ Where a creditor sells and transfers ownership in an account or chattel paper to a buyer
* Under the *PPSA*, the lessor or consignor is the secured party and the lessee or consignee is the debtor
	+ The seller of the account or chattel paper is the debtor and the buyer is the secured party
* Under NON-*PPSA* laws, the consignee and lessee have nothing more than a possessory interest in the leased or consigned good
	+ The assignor has no interest whatsoever
* **Question: If a security interest can only attach when a debtor has rights in the collateral, how can a security interest exist if the debtor has no property interest in the asset or assets involved?**
	+ **S 12(2)** deems a lessee or a consignor to have rights in the goods when he/she obtains possession of the goods
	+ Once the debtor obtains possession of the goods under deemed security interest situations, then attachment occurs
	+ For example, in commercial consignments, the consignee can give a security interest in the goods, not just in the consignee's limited interest at common law (that is, they can give security interests in the consigned goods, even though they do not actually have ownership rights over those goods due to the nature of commercial consignments)
	+ Essentially, the debtors in these situations are treated as if they have "rights" in the goods (made explicit in s 12(2))

#### *Re Giffen*, [1998] 1 SCR 91

*Facts:* - Telecom Leasing Co leased a car to a company, who then leased it to G, an employee

* The lease was for more than one year and allowed G to purchase the car at the end
* TLC was not a party to the lease, but it played an active role in the terms and received a deposit
* TLC was also described as the lessor and G as the lessee on insurance documents
* Neither the employer company nor TLC had registered their security interest under the PPSA
* G went bankrupt, the car was sold, and now G’s trustee and TLC are disputing who gets the proceeds of the sale
* TLC claims it owns the car since it never sold it to G, while the trustee relies on the PPSA declaring him to have priority over the lessor of an unperfected lease.

*Issues:* Who has priority over the sale proceeds?

*Held:* The trustee

*Reasons:*

* The provincial legislatures, in enacting the *PPSA*, have set aside the traditional concepts of title and ownership to a certain extent; redefined property
* This issue cannot be solved by who has title to the car because the issue is priority to the car and not ownership

*Definition of Security Interest*

* The elements of the definition of “security interest” explicitly include a lease for a term of more than one year
* The lessor’s interest in the car is the reservation of title in the car
	+ This interest, created by the lease, falls within the scope of the *PPSA*

*The Nature of the Lessor’s Interest in the Car* **(Characterization)**

* A security interest is valid and enforceable when it attaches to personal property
* **S 12(1)(b)** – the interest attaches when the debtor acquired rights in the collateral
	+ **12(2)** states that the debtor has rights in good leased to the debtor when he obtains possession of them in accordance with the lease
* Therefore, when the bankrupt received the car, the lessor had a valid security interest in the car that could be asserted against the bankrupt
	+ Does remain vulnerable to claims of third parties who obtain an interest in the car through the lessee including trustees in bankruptcy
* To protect this interest, the lessor had to perfect the interest through registration or repossession, neither of which happened before bankruptcy
	+ The lessor had an unperfected security interest

*The Bankrupt’s Interest in the Car Vests in the Trustee*

* S 71(2) of the *BIA* provides that, upon an assignment in bankruptcy, the bankrupt’s property vest in the trustee
* The bankrupt’s right to use and possession of the car constitutes property for the purpose of the *BIA*
	+ The trustee succeeds in this proprietary right
* The trustee assumes the bankrupt’s possessory interest in the car through the operation of s 71(2)
* **S 12(2)** of the *PPSA* also recognizes that a lessee obtains a proprietary interest in the leased goods
	+ Deems the lease a security interest
* From both the perspective of the *PPSA* and the *BIA*, the lessee can be described as having a proprietary interest in the car

### Notes

* Hard to reconcile the decisions of the ABCA in *Sprung Instant Structures Ltd v Caswan Environmental Services Inc*, 1997 ABCA 411 and *Royal Bank v Sprung Instant Structures Ltd*, 2000 ABCA 202 with *Re Giffen*
* Each *Sprung* decision involved a priority dispute over a portable structure leased to Caswan by Sprung under a lease that was clearly a lease for a term of more than a year
* The structure was claimed by RBC upon Caswan’s default under the general security agreement
	+ RBC’s interest was properly registered in December 1994
* Caswan was in possession of the structure when the GSA was executed but the leases were not registered until 1996
* It was after that registration that a Sprung exec became aware that Caswan had defaulted under the GSA and RBC intended to enforce its security
* The CA (in *Sprung No 1*) validated Sprung’s claim to the structures
* The reasoning was based on the view that:
	+ The terms of the RBC GSA did not cover leased goods
	+ The bank’s interest could not attach to the structure even if it did
* In *Sprung No 2*, the CA was asked to overturn its decision in *Sprung 1* after the *Re Giffen* case from the SCC
	+ It refused
* The CA argued that the issues was with the GSA and did not consider the *PPSA* like *Giffen* did
* *Graham v Portacom New Zealand Ltd* 🡪 by the very act of deeming a true lease to be a *PPSA* security interest, ownership in the lease assets is effectively vested in the lessee as against the lessee’s secured creditors and trustee in bankruptcy
	+ The same logic applies to the outright transfer of an account or chattel paper
* By deeming the interest of the transferee to be a security interest, ownership of the transferred account or chattel paper is notionally vested in the transferor, support attachment of a security interest for purposes of priority competition involving the transferee and other 3rd parties dealing with the transferor
* The CA *Sprung* decision is technically good law in Alberta
	+ Appears to be largely ignored in practice
* *1777575 Alberta v Sprung Instant Structures Ltd*, 2014 ABQB 354 🡪 only case in which *Sprung No 1* is directly addressed
	+ Sprung tried to rely on the ABCA decision in the earlier Caswan case, even though it is bad law
	+ Facts were almost identical to the Caswan case
	+ Justice Veit indicated that, firstly, the ABCA might not have been properly directed to PPSA governing principles, and secondly, the wording of the security agreements in both cases were slightly different (not really that different in substance)
	+ **Buckwold**: the security agreements are different, but not totally. Veit was really just looking for a way around the decision
	+ She declines to follow the earlier Caswan (*Sprung 1*) case, and instead properly applies the PPSA principles

**Note:** If you are drafting a security agreement as the lender, to get around the *Sprung 1* decision, you would ensure that your charging clause includes leased goods

## The power of the security interest

* The requirement that the debtor have rights in the collateral in order for a security interest to arise is nothing more than the application of *nemo dat*
* A debtor cannot create a security interest in property in which they do not have an interest
* There are exceptions to *nemo dat*
	+ A person who has only a possessory right in property is empowered by law to convey or charge the full ownership right in the property help by someone else
* *iTrade*🡪 court enabled a debtor to give a security interest in more than the debtor’s interest

### the factors act – disposition by a mercantile agent

* Under the *Factors Act*, s 2, a “mercantile agent” in possession of goods or the documents of title to goods with the consent of the owner has the power to sell or grant a security interest in the goods to the same extent as if expressly authorized by the owner
	+ Provided the mercantile agent is acting in the ordinary course of business and the buyer/secured party take in good faith and without notice that the mercantile agent is acting without authority
	+ The owner’s consent to the agent’s possession is presumed in the absence of evidence to the contrary
* These provisions do not apply to a consignment that falls within the scope of the *PPSA*
	+ **BUT** they may apply to a consignment that is not in substance a security agreement falling within s 3(1)and is not a commercial consignment (s 1(1)(h)) falling within s 3(2)
* The most likely case is one in which a person who does not ordinarily deal in goods delivers an item owned by him or her to a dealer on the understanding that the dealer will sell it as agent for the owner
	+ If the dealer grants a security interest in the goods to a creditor in the ordinary course of the dealer’s business, the creditor may assert the security interest against the owner of the goods
* Perfection is not relevant to the *Factors Act*
* Policy 🡪 protect innocent buyers who may be misled by the title of goods
	+ Also protect the bank who thinks they are dealing with the owner but aren’t
* *Patry v General Motors Acceptance Corp of Canada*

### the sale of goods act – seller in possession

* S 26 of the *Sale of Goods Act* empowers a person who is not the owner of goods to create a security interest that may be asserted against the owner
* This section may apply when a person who has sold goods to a buyer remains in possession of the goods or document of title to the goods, notwithstanding that title has passed to the buyer
* A secured party who acquires an interest from the seller **in the ordinary course of the seller’s business** may defeat the buyer’s title but only if the secured party acquires possession of the goods or the documents of title, and takes in good faith and without notice that the goods have been sold
* The *PPSA* has been amended to exclude the application of the seller in possession provisions if:
	+ The subsequent sale, pledge or disposition of goods or documents by the seller is outside the ordinary course of business AND
	+ Prior to the subsequent transaction, the interest of the original buyer is registered in the PPSR
* If these two conditions are satisfied, the original buyer in effect regains the protection of the *nemo dat* rule
	+ **Note:** even if the subsequent buyer registers before the second sale, if that sale was in the ordinary course of business, their interest is defeated by the new buyer
* S 26 also addresses a situation in which the seller sells the goods to a second buyer, who in turn grants a security interest in the goods

# perfection & Registration

## the concept of perfection

* The principal use of the term perfection is to describe a priority status acquired by a security interest
	+ We only come to this step if we have **priority problem**
* **S 19** 🡪 a security interest is perfected when it has attached and all steps required for perfection have been completed, regardless of the order of their occurrence
	+ An existing interest can acquire perfection when a prescribed step has been taken or the states is conferred by the Act
* Note, s 19 describes only when perfection is achieved
	+ Does not describe the status given to a perfected security interest
* A security interest is an *in rem* interest in personal property
* Interests in property carry a priority status with respect to the subject property
* At common law, the fundamental principle determining the status of two or more interests in the same item of property is *nemo dat*
	+ **But** a prior equitable interest in property may be defeated by a bona fide purchaser of a legal interest who takes without notice of the prior interest (*iTrade*)
* **UNDER PPSA** 🡪 priority is very different
* Perfection is the status that a property right must achieve in order to be protected against competing rights in or claims to the charged property
* The *PPSA* defines perfection, not by stating what it is, but by specifying the interest that can defeat an interest that is not perfected
	+ A debtor’s trustee in bankruptcy (**s 20(a)**)
	+ Other secured creditors (**s 35(1)**)
	+ Buyers of the collateral (**s 20(b)**)
* The term “perfection” simply means that the holder of a security interest has done what is required by the PPSA to qualify for application of the PPSA priority rules based on the fulfilment of those requirements
* Perfection is a requirement for priority (most cases)
* Perfection does **not** confer invulnerability
	+ There can be several perfected interests in the same collateral
* A perfected security interest can be defeated by other interests, in the circumstances defined by the *PPSA* priority rules
* The priority of a perfected interest depends upon the nature and status of the interest or interests with which it is in competition and the operation of any priority rule that applies to competing interests

## perfection steps

* Performance of the acts prescribed in s 19 as a means of perfecting an interest will result in a perfect security interest only if and when both the perfect act *and* attachment of the security interest coincide
* Attachment does not have to occur *before* the perfecting step
	+ E.g. a person may register a financing statement against the name of the prospective debtor before a security agreement is entered into between the registering party and the debtor or a security interest has come into existence (**s 43(4)**)
* Registration is a step in perfection, but it does not complete nor result itself in perfection
* When all three attachment steps (value, rights in collateral, written agreement or possession) *AND* a step required for perfection has occurred, the security interest is perfected
* S 19 is misleading in the fact that it suggests that perfection can be acquired only through a “step” taken by a third party
	+ There are several prescribed circumstances in which the act **automatically** grants perfection

## perfection by registration

* The registry system is a central feature of the *PPSA* regime
	+ The principal mechanism that makes it feasible to permit a creditor to take an *in rem* interest in property left in the possession or control of the debtor without substantial risk to 3rd parties who otherwise may be deceived by that possession or control into believing that the debtor has unencumbered ownership of the property
* In the event that one piece of collateral, held by the debtor, has two secured parties, SP1 and SP2 (in that order), it is imperative that SP1 register it’s interest before SP2 gets involved
	+ In the event that SP1 did not register, SP2 can establish priority over them, since SP2 may not have extended credit to the debtor had they known another party was involved
* Just because SP1’s interest becomes subordinate to SP2’s interest does not mean it ceases to exist
	+ Both interests *exist*, but the creditor who has priority is entitled to have his claim satisfied first
	+ If the collateral is worth more than one creditor’s claim, the remainder will go towards the subordinate creditor
* **S 25** 🡪 the Act permits registration to be used as a basis for perfection of a security interest in any type of collateral
* **BUT**, this is not always the best step:
	+ Perfection by registration results in a weaker priority status than perfection by taking possession of the property where negotiable collateral such as money, a negotiable interest, a security or chattel paper is involved
* Registration provides the mechanism through which subsequent persons who may potentially acquire interests in collateral can apprise themselves of the risk involved in dealing with identified debtors
	+ Registration does not amount to “constructive notice” of the existence of the interest to a which a registration relates
* **S 47** 🡪 registration of a financing statement is not constructive notice to anyone of its contents
* The fact that a security interest has been registered does not mean that anyone thereafter dealing with the subject property is deemed to have notice of that interest
* The priority status of a security interest is determined on the bases of the *fact* of registration
	+ The question of whether the holder of another interest *know* or may be presumed to know that the registration exists is not relevant

## a “notice” registry and pre-agreement registration

* The mechanism for registration of a security interest is registration of a financing statement in the PPSR
* **Financing statement** 🡪 the print or electronic form prescribed by the regulations for the registration of interests
* The most essential registration information required is the name of the debtor and the description of the collateral
	+ See **s 20**
* **S 36** **of the Regulation**🡪 provides the general collateral description rules
* Precise identification of the property in which the security interest is claimed is not required
	+ The objective of this approach is to alert a searching party to the possibility that a prior party *may* be claiming an interest in collateral that would fall within the description given
* The notice registry system of the Act makes only minimal information relating to the relationship between a secured creditor and a debtor available through the registry
	+ Does not include terms of the security agreement
		- Can resort to **s 18** for more information if the party requesting it is enabled to under this provision
* The Act also provides for cases in which a secured party includes an overly broad collateral description in the financing statement
	+ E.g. describing it as an ALLPAAP
	+ **Ss 50(3) and (4)** 🡪 the debtor/any person with an interest in the property that falls within the description in the financing statement may require the secured party to amend the description to exclude any items or kinds of property that are not collateral under the security agreement
* Descriptions tend to be over-inclusive rather than under-inclusive and as such, fewer issues have arose
* **S 34(1) of the Regulation** applies when serial number goods are involved (motor vehicles, trailer, mobile home, etc)
	+ If the serial number goods are consumer goods, the secured party MUST provide the serial number
	+ If the goods are equipment or inventory, the secured party *may* include their serial number
		- **Rationale for this provision**: it is a way for lenders/creditors to deal with goods that have a subsequent owner. The creditor may not know the name of the original party and as such, cannot search the registry by debtor’s name
			* All they would have is the serial number of the item (e.g. used car)
* **s 43(4)** 🡪 a financing statement may be registered before a security agreement is made and before a security interest attaches
	+ This allows a bank to register a financing statement in advance /anticipation of a security agreement
	+ Once the interest perfects, priority is with the bank at the date of registration
* **S 43(5)** 🡪 a registration may relate to one or more than one security agreement
	+ Policy rationale: gives banks and debtor the flexibility to adjust their lending relationship over time

## the operational concepts of a ppsa registry system

* A central aspect of the registry is the method that is used to index or catalogue the information contained in the registry
	+ *Registration-search criterion*
* Two registration-search criteria are generally used: the debtor’s name and the description of the property which the security interest has been taken in
* Registration by collateral description alone would not allow for disclosure of relationships involving a security interest in future accounts, or other types of property to be acquired in the future
	+ A security interest could never be registered until the subject collateral was obtained and identified
		- Hence the need for the debtor’s name
* On the other hand, a system that only uses the name of the debtor as the registration-search criterion has a fundamental weakness
	+ Doesn’t work well where the collateral is a specific item of tangible property or property of a kind that is often sold in second hand markets
	+ This does not protect third parties who cannot search the registry system using the debtor’s name because the existence or identity of the debtor is unknown to them
* This description system is particularly acute where collateral is property for which there is an active resale market
	+ Motor vehicles being a good example as Canada does not have a certificate of title system
* A financing statement that offers a generic description of the goods without reference to their serial numbers therefore suffices to perfect a security interest in serial number equipment within the meaning of **s 25**
	+ **BUT** this registration does not give the security interest full protection against competing claimants
	+ The security interest will **not** be treated as perfected for purposes of a priority competition with another interest (**s 35(4)**) and will not suffice to give the security interest priority over a buyer or lessee of the goods (**ss 30(6)-(7)**)
* **Summary**: registration using the debtor’s name and a generic description of serial number goods held as equipment gives the registering secured creditor priority over other unsecured creditors and the trustee in bankruptcy, but not over buyers of the goods
* **S 43(6)**-**(7)** 🡪 states the extent to which a secured party may deviate from the perfect registration criterion and still have a valid registration
	+ The test is whether or not the deviation results in the registration being “seriously misleading”
* S 43(6) contemplates the registering party using the perfect registration criterion OR an imperfect registration criterion that the hypothetical searching party who uses the perfect search criterion would not be misled by the results of the search

**Debtor name registration and/or search**

* A person can find a registration relating to a security interest in that person’s property by searching that person’s name.
	+ Assumption: A registration will be disclosed by a name search.
	+ Achieved by: Mandatory requirement to include debtor name to perfect in all cases. Debtor name used for registration should be the legal name (name defined by PPR) so a search by legal name will disclose the registration.
	+ NOTE: Debtor name includes the name of an individual or a business or other legal entity

**Serial number registration and/or search**

* In the case of “serial number goods” (as defined), a person can find a registration relating to a security interest in the goods bearing that serial number by searching the serial number.
	+ Assumption: A registration will be disclosed by a serial number search in some cases (ie. in the cases where the PPSA requires the serial number goods), as determined by the PPSA rules.
	+ Achieved by: Mandatory requirement to include serial number to perfect or establish priority in some cases, as determined by the PPSA rules
	+ THE QUALIFIERS: It is unreasonable to require a secured party to register a serial number for serial number goods in all circumstances. A secured party must register a serial number only as follows:
		- for serial number goods held as consumer goods, required to prefect or,
		- for serial number goods held as equipment, required to perfect as against a competing security interest in the goods and to establish priority as against a buyer of the goods – i.e. persons most likely to rely on the registry.
	+ Therefore, a searcher can only assume that a registration will be disclosed by a serial number search when the serial number is required to achieve perfection or priority.

**What will a search result disclose?**

* Search of legal name (“perfect” registration search), the search will indicate registrations using exact name (exact matches) and registrations using names that approximate the name search (inexact)
* Search a name approximating debtor’s legal name, the search might or might not produce the debtor’s name
* \* same goes for serial numbers

**NOTE:** In all cases, the search result will provide additional information associated with each registration listed – ie. debtor address, secured party name and address, collateral description. This information can help to confirm that the registration disclosed does or does not relate to the person against whom the search is made.

##### The “Seriously Misleading” Test

This test recognizes that a person may make an error in registration but that it may not be enough to invalidate the registration.

* **43(6)** The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.
* **43(7):**
	+ where one or more debtors are required to be disclosed… and there is a seriously misleading defect, irregularity, or omission or error in
		- the disclosure of any debtor, other than a debtor who does not own or have rights in the collateral…
		- the serial number of the collateral
		- the registration is invalid.
* **43(8)** the test of validity is OBJECTIVE (s 43(8))
	+ Whether or not deviation results in the registration being “seriously misleading”?
	+ The program must not only disclose the registration, but whether the searching party could reasonably be expected to know or be suspicious that the debtor or collateral described in the registration is the same person or collateral described by the perfect search criterion
* Example: Legal name - A search using debtor’s legal name (ie. Samuel William Smithe) that does not disclose the debtor’s name (Samson Smithe) is seriously misleading. However, a search that does include the debtor’s licence name (Sam Smith) along with 15 other similar names would likely be valid because the searcher is required to look at the address.
	+ Note, if an unreasonable amount of matches came up (like 400), it may be considered invalid as it would be a lot go through an compare all the matches
* Example: Serial Number – A search using the serial number (ABC123456789) that does not disclose the registration with a serial number of AB123456789 is seriously misleading and invalid. If the registration does bring up a registration of ACB123456789 with 15 other inexact matches, it would likely be considered a valid registration
	+ **NOTE**: in the event the serial number is *optional*, all of these registrations with the serial number are correct. If it comes down to a priority competition, the outcome would likely be the same as if the serial number were required.
	+ If the collateral is held as inventory, these are all valid.

#### *Case Power & Equipment v 366551 Alberta Inc (Receiver Of)*, (1994) 118 DLR 4th 638 (ABCA)

*Facts:* Two secured creditors with claims against the same collateral in the same debtor

* One secured creditor made an error when filing with the PPSA (and that creditor filed before the second creditor, who did not make a registration mistake)
* Determining priority between the two is dependent on the operation of section 35
* Case Power realized this it made an error and filed an amending statement, albeit after First City’s interest was registered
* Section 35 indicates that, for registrations of equipment, both the debtor's name and serial number must be correctly registered for perfection to be complete
* Section 44(3) of the PPSA indicates that you can cure registration errors by registering a financing change statement (will be effective as of the date of registering the change statement)
* Section 44(4) indicates that you can change the registration and if it is done before anything else happens, the original error is irrelevant
* Section 43(6) indicates that registration will not be affected unless the error is "**seriously misleading."**

*Issues:* Was the error made by the one creditor sufficiently misleading to nullify its security claim, or should it still be recognized?

*Held:* Case has priority over the Volvo Loader, the Case Rammer and the Case Dozer

* First City has priority over the Case Excavator
* The error was not seriously misleading and the interest was therefore perfected

*Ratio*: Errors in the registration documents will not invalidate a registration in a priority contest unless the error is seriously misleading, as determined on an objective basis.

*Reasons:* - Justice Cote indicates that a registration will pass the "seriously misleading" threshold if:

* 1. (1) it would likely prevent a reasonable search under a reasonable filing or registration system from disclosing the existence of the registration, or
	2. (2) it would make a person who did somehow become aware of the registration think that it was likely not the same chattel
* Justice Hetherington changes this test slightly, and makes it a more objective test (**this is the one to use**). A registration error will count as "seriously misleading" if:
1. It would likely prevent a reasonable search from disclosing the existence of the registration (that is, you don't need to think if it was a reasonable filing or a reasonable system), or
2. It would make a person who did somehow become aware of the registration think that it was likely not the same chattel

*Application to the Facts:*

* For the bulldozer, a search with the correct serial number revealed the interest despite the incorrect number and it also showed up when a search of the debtor's name was conducted
* The difference was slight, so a reasonable person would have recognized the registration as applying to that bulldozer
* Therefore, the error was not misleading, and would still allow subsequent creditors to understand that a credit interest had already attached, so the security interest is still enforceable notwithstanding the error
* For the excavator, a reasonable person would have known that the name was a combination of the company name and the name that it carried out its business under
* That being said, if you search individually for either the company name or the trade name, the credit interest will not return any result
* Therefore, this is seriously misleading, since a reasonable third party creditor should be able to conduct a search under either the corporate name or the trade name and reveal the existence of the prior credit interest

######  Case Power Test – Hetherington JA – Test in Alberta

1. It would likely prevent a reasonable search from disclosing the existence of the registration, or
2. It would make a person who did somehow become aware of the registration think that it was likely not the same chattel.

#### *GM Lease Co Ltd v Moncton Motor Home & Sales Inc*, 2003 NBCA 26

*Facts:* - Court considers a priority competition between GMAC, who asserted a security interest in the motorhome in dispute, and the trustee on bankruptcy of the debtor, Moncton

* Moncton purchased a truck from a local dealer under a purchase and financing agreement that was assigned to GMAC
* GMAC (General Motor Acceptance Corp) registers a financing statement that identified both the serial number of the collateral and the debtor’s name
	+ The serial number was correct but the debtor’s name was not
	+ The requirement of a serial number was optional in this case
* A search by debtor’s name would not reveal the security interest
	+ S 43(8)(a) provides that a registration is invalid if there is a “seriously misleading” error in the debtor’s name
	+ The argument hinges on whether s 43 can be interpreted as imposing a dual search requirement
* Moncton goes bankrupt
* GMAC submitted a proof of Claim to the trustee claiming a security interest
* The trustee disallowed the claim as a result of the fact that a name search didn’t bring up the security interest
* The TJ adopted BCCA decision that a reasonable person would conduct a dual search

*Issues:* Whether GMAC’s security interest perfected such that they had priority interest over the trustee in bankruptcy of the debtor

* Whether s 43 requires a dual search

*Held:* - No, unperfected due to seriously misleading error

* No; a dual search requirement is in conflict with s 43(8)(a)

*Ratio*: If a mandatory piece of information is missing or wrong, the registration will be invalid and unperfected

*Reasons:* - A dual search requirement is incompatible with s 437(7) and (8) of the *PPSA*

* The test for determining whether an error is seriously misleading is an objective one
* Rejection of a subjective test means that we need not be concerned with the effect that an error had on the party challenging the validity of the registration
	+ In establishing that an error in the financing statement is seriously misleading, it is not necessary to prove that anyone was actually misled by it
* S 43(9) outlines the objective test 🡪 whether the error would have misled a reasonable user of the system
* Two pieces of information are critical to the ability of searchers to detect relevant financing statements:
	+ Debtor’s name
	+ Serial numbers of the goods (where required)
* S 43(7) states that the validity of a registration is not affected by any error in the financing statement unless the error is seriously misleading
	+ Must contain the debtors name
	+ The duration of the registration
	+ The registrant’s name
	+ Description of the collateral
	+ Serial number of consumer goods
	+ Serial number of inventory and equipment (optional)
* An error in the financing statement does not affect the validity of the registration unless it is seriously misleading (s 43(8))
* S 43(8) is directed at two specific types of errors:
	+ Seriously misleading errors in the debtors name (43(8)(a))
	+ Seriously misleading errors in the serial number (43(8)(b))
* When these provisions are read together, their effect is to deem invalid any registration in which there is a seriously misleading error in either the debtor’s name *or* the serial number in the case of consumer goods
* There are two methods to determine whether an error is seriously misleading:
	+ If a search using the correct information does not disclose the existence of the financing statement as either an exact or close match, then the error will be deemed seriously misleading
	+ 2nd approach – examine the issue in terms of whether the error would seriously mislead a reasonable person: user or searcher
* First approach is more consistent with the *PPSA*
* Other reasons to reject the dual search requirement:
	+ (1) Dual search contradicts the wording in 43(8).
	+ (2) Dual search too easily influenced by doctrine of constructive notice that has been abrogated by s 47.
	+ (3) Dual search is premised on a perceived unfairness or inequity in allowing a third party to prosper at the expense of one guilty of simple inadvertence. Such sentiments are in conflict with ss 20(2)(a) and 43(9).
	+ (4) NBPPSA primarily concerned with promoting certainty and preserving the integrity of the registration system, not subjective notions of fairness.
	+ (5) Need for accuracy is paramount.
	+ (6) Dual search requirement rests on assumptions that are questionable

##### Notes Post-Case

* Gold Key leaves out a particular group of people who may use the search: **judgment creditors**
* It is very difficult for a judgment creditor to obtain the serial numbers of property of a judgment debtor. Consequently, serial number searches are often not possible for them.
* Also, Prof Wood says that the decision in Gold Key proceeds on the false assumption that there are no circumstances in which potential buyers or SP would want to rely on a debtor name search only. However, in the case of inventory, they might do so when a company has lots of different collateral.

##### The Seriously Misleading Test and the “Dual Search” Issue for Serial Number Goods

1. A seriously misleading error in debtor name always invalidates a registration. See s. 43(7).
	* The registration is not saved by a correct serial number. A searching party can rely on a debtor name search and need not also search by serial number with respect to serial number goods. (see Case Power re: excavator, GMAC v. Moncton Motor Homes)
	* Compare Ontario and B.C. Correct serial number will save the registration. Searching parties must conduct a “dual search” to protect themselves.
2. Where serial number is mandatory (i.e. for consumer goods), a seriously misleading error in the serial number will invalidate the registration. The registration is not saved by a correct debtor name. (see s. 43(7) and see GMAC v. Moncton Motor Homes)
3. A registration error may or may not be seriously misleading if the search discloses the registration as a similar match.

“An error in a financing statement, tied to either the debtor's name or the serial number of collateral, is "seriously misleading" if a search using the correct information fails to reveal an exact or close match. It is expected that a search that offers a list of close approximations, may well trigger an obligation on the searcher to conduct further searches. The question is whether the reasonable searcher would ignore the close matches or pursue at least those which are so similar that it would be imprudent for the reasonable person to ignore them.”

#### *Harder (Trustee of) v Alberta Treasury Branch*, 2004 ABQB 285

*Facts:* There was an error in the serial number, however, the name was correct

* The search under the name revealed the existence of the security but not the search done using the correct serial number
* At common law, a bankruptcy trustee who had actual knowledge of the claim of SP could not obtain a superior position to that claim even in the fact of a registration under an incorrect serial number
* However, trustee argues that because of the structure and provisions of the PPSA, this is no longer the case.

*Issues:* Was ATB’s registration under the erroneous serial number “seriously misleading”?

*Held:* A serial number error in the registration of a security interest does NOT defeat the claim of the SP as against a subsequent secured creditor or bankruptcy trustee who obtains actual knowledge of the existence of the security as a result of the name search of the debtor, or otherwise.

*Reasons:*

*Applicable law:* s 20(a)(i), s 25, s 43(6), s 43(7)(b), s 43(8)

*Case Law*:

* GMAC (see above).
* *Kelln (Trustee of)* (Sask CA) – The majority concluded that where a serial number was mandatory, failure to include it would be misleading because a hypothetical searcher could be a person who had only a serial number to search by (ie. this is an objective test, not subjective). Went on to say that if one or both of the mandatory registration-search criteria contain errors which do not prevent the proper identification or retrieval of the financing statement, the error is not seriously misleading and the SI should be perfected.
* *Lambert, Re* (ONCA) – A reasonable person likely would not be mislead by a wrong name but correct serial number, a search of which would produce a record of a prior security interest. However, if the wrong serial number but correct name were set out, a reasonable person could be materially mislead by the error which could result in a failure to locate a prior security granted by a prior owner.
* *Gold Key* (BCCA) – A searcher would not be seriously misled by an error in the debtor’s name if the serial number were correctly recorded, the reverse of the situation at Bar.
* *Case Power* (ABCA) – AN error in a serial number registration is not seriously misleading when coupled with a voluntary name search that reveals the pre-existing security

*Application*:

* In the case at Bar, a search under the correct serial number of the trailer did not produce notice of the existence of the ATB registration under the incorrect serial number as an “inexact match” or otherwise
* One cannot conclude, therefore, that the first of the two tests in Case Power is met, as a presumably reasonable search did not disclose the presence of the ATB security
* ATB argues that second test in Case Power has been met; it can be interpreted to mean that where a subsequent purchaser, financier or bankruptcy trustee has actual knowledge of the existence of earlier security registered under an improper serial number, that error is thus not seriously misleading
* The results of this argument, if accepted, would mean that a cautious purchaser who does more than the minimal required searches in advance of purchasing/taking security on a chattel is disadvantaged because any information thereupon resulting will bind him
* There is nothing inherently illogical in concluding that a party who learns extra information from voluntary searching should be bound by the results of that information.
* Whether or not an error is seriously misleading is to be determined independent of the question of whether it caused prejudice.
* **NOTE:** In Alberta, you would restrict the Harder decision to its facts.
* **What is this case authority for?** Authority for the proposition that if a trustee in bankruptcy has *actual knowledge* of a security interest then an error in the name should not be held to be seriously misleading
	+ Buckwold thinks this is *wrong*

**Exam**: apply *Case Power*, apply *GMAC*, then apply *Harder*

State: if Harder is applied, the result may be that the registration is valid notwithstanding that the name did not appear on the registration. However, this is a controversial case that is probably wrong and should be confined to its facts.

##### Notes Post-Case

* *Fairbanx Corp v Royal Bank of Canada*, 2010 ONCA 385 – A creditor’s subjective knowledge is irrelevant. The test is objective. The Fairbanx registration was therefore invalid since it was not revealed by a search using the correct debtor name.
* The decision in *Harder* is inconsistent with previous decisions rendered in Alberta. *(ie. Primus Automotive Financial Services Canada v Kirby (Trustee of)*.
	+ The reasonable searcher is not expected to search by debtor name if a serial number search fails to disclose a registration.
* Serial number need only be included if it falls within “serial number goods” s 1(1)(y) of the PPSR.
	+ *Royal Bank of Canada v Steinhubl’s Masonry* (Sask QB) – Court concluded that characteristics of a forklift in question fell in the first category “motor vehicle” which includes self-propelled mobile devices capable of traversing unrestricted landscapes …
* *Miller, McClelland Ltd* – court held that the name used need not be the name that appears on debtor’s birth certificate. A registration by using the name by which the debtor was commonly known rather than his legal was found to satisfy the requirement of the PPSR. However, the Regulation has since been amended to impose very precise requirements in determination of debtor’s name for purposes of registration of a financing statement.
* *John Deere Credit Inc*… (2000), 79 Alta LR (3d) 166 (QB) – Court found that the financing statement was seriously misleading and therefore invalid on the basis of the error in identification of SP.
	+ *Severn v Leslie*, 2016 SKQB 309 – Correct serial number, but wrong model number was not a seriously misleading error since a search of the registry could only be conducted by debtor name or serial number.

Summing up: Perfection by registration

**Requires:**

1. Debtor name as specified by Regulations required to perfect in all cases.
2. Collateral description as specified by Regulations required to perfect in all cases. Description may be by item, kind, “all present and after-acquired personal property”, other terms permitted by Reg. ss. 36(2) and (3).
3. But where collateral is serial number goods, serial number must be included in collateral description in some cases:
	* Consumer goods – mandatory in all cases. Reg. s.34(1)(a).
	* Inventory – optional in all cases. Reg. s. 34(1)(b).
	* Equipment - optional per Reg. s. 34(1)(b) but:
		+ Registration without serial number will constitute perfection where priority competition involves a trustee in bankruptcy or a writ holder, BUT
		+ Serial number required for perfection and priority where priority competition involves another security interest. See Act s. 35(4), AND
		+ Serial number required for priority where competition involves a buyer of the goods. See Act ss. 30(6) & (7).

**RESULT:** Registration of a security interest can be discovered by searching debtor name or, where serial number of goods is included in the financing statement, by serial number

## admendment and discharge of registration

* A secured party may amend a registration in order to correct an error or omission or indicate information relating to a change in the agreement between the parties or other pertinent circumstances
	+ Register a financing change statement
* Where the change in registration data relates to information that affects the perfected status of the security interest, the date of registration for purposes of determining perfection and priority is the date the financing change statement is registered
* Security interests in the new collateral is perfected as at the date the amendment is registered and the priority of that interest will be determined by that date
* **Prior interests**: to the extent that the amended description includes collateral of a kind that fell within the original collateral description, perfection and priority or the security interest in that collateral will still be determined by the original registration
* Where circumstances have changed in relation to information that does not affect the perfected status or priority of a security interest, the secured party may but is not obliged to amend a registration to reflect the change
* **S 45** 🡪 do not have to register a financing change statement if the secured party changes
	+ Searches are conducted by debtor’s name and serial numbers
* A registration may be discharged by the registering party and in any event, will expire at the end of the registration term selected in the financing statement, unless it is renewed
* The *PPSA* also provides a means whereby a registration may be discharged or amended at the instance of the party named as debtor where the secured party has no right to maintain it in its existing format or at all
	+ E.g. when a registration is made in anticipation of a security agreement that doesn’t ultimately occur
	+ When the debt has been repaid in full; or
	+ When the collateral description in the registration covers property that is not in fact subject to a security agreement
* **S 50** 🡪 the circumstances in which mandatory discharge or amendment of a registration is available and the procedure in which it is achieved
* The debtor may serve a demand that the secured party discharge or amend the registration within 40 days, following which the change demanded may be made by the debtor unless the secured party obtains a court order maintaining it
* Trust indenture 🡪 procedure is different
	+ Compulsory discharge or amendment of a registration requires a court order obtained at the request of the debtor
* **Trust indenture** – a financing transaction, generally involving a very large sum of money, under which the borrower issues secured debentures (debt obligations) through an arrangement with a trust company
* **S 50(2)** 🡪 special provisions for the discharge of a registration relating to a security interest in consumer goods
* **S 50(5)** 🡪 if a secured party does not comply with a demand to change, the party demanding the change can register a financing change statement with the Registrar
* **S 67(1) and (2)** 🡪 A secured party who fails to take the required steps to discharge a registration is liable for statutory damages, as well as for any loss or damage suffered by the debtor

#### *Matco Capital Ltd v Ramparts Energy Ltd*, 2008 ABQB 403

***Decision:*** Court concluded that the agreement between Matco and Ramparts was not a “security agreement” because the SI contemplated was contingent on the satisfaction of an uncertain future event, namely, that Matco would exercise the redemption rights described above and Ramparts would be unable to redeem the shares.

***Reasons:*** The intention of the legislature seems to be to allow for the registration of a SI which, nonetheless is in some process of being “finalized” (section 43(4))

* If such transaction fails to proceed, the borrower can force a discharge of the financing statement pursuant to section 50.

**NOTE** This analysis contradicts the clear wording of 43(4) and violates the policy of the Act, which is designed to enable a potential creditor to establish a priority position before a debt arises, whether or not the debt is subject to a contingency

* There is nothing in the legislation to suggest that the right to effect a registration requires proof that an agreement “is in the process of being finalized” – therefore, Matco was entitled to register regardless of whether security agreement existed at that time
* The decision should have focused on 50(3)(d) which permits debtor to demand discharge if “no security agreement exists between SP and the debtor”.

###### Example Problem – Discharge

* D is attempting to procure a business start-up loan from the Bank of Montreal but is unsure that she will succeed. On March 1, SP enters into an agreement with D under which SP agrees to loan $100,000 to D if D is unable to get financing from BMO by September 1. D agrees to give SP a security interest in all her present and after-acquired personal property to secure the loan.
* SP registers a financing statement.
* On June 1, D demands discharge of the financing statement under s. 50 and SP applies for an order that the registration be maintained. The application is denied on the grounds that the security interest contemplated in the agreement between SP and D is subject to a contingency; it will arise only if D is unable to obtain funds from BMO before September 1.
* On August 1, D borrows money from SP2 (not BMO), who takes a security interest in D’s present and after-acquired personal property and registers a financing statement.
* D is unable to obtain a loan from BMO before September 1. SP is obligated under the March 1 agreement to advance $100,000 to D (because it is a contract). If SP registers a new financing statement to secure the loan, SP’s security interest will be subordinate to SP2’s.
	+ The whole point of section 43(4) is to accommodate anticipated security interests to establish priority position so that you can conduct your affairs.
	+ HOWEVER, Matco says that if it is contingent, then you can demand discharge under s 50.

## Perfection by Possession

* Transfer of possession of the collateral to the secured party or agent of the secured party is method through which an attached security interest can gain perfected status (**s 24**)
* **S 27(1)** 🡪 where the collateral is goods held by a bailee, a form of perfection by possession occurs when the bailee issues a document of title in the name of the secured party or agrees to hold the goods on behalf of the secured party
	+ In the latter, the bailee is treated as the agent of the secured party
* S 24 provides that a security interest in all categories of collateral other than intangibles and investment property may be perfect by the secured party taking possession of the collateral
	+ Intangibles are excluded from the list because it is not physically possible to take possession of them
* Requires **actual, physical possession** by the secured party or the agent
* **S 24(2)** 🡪 a secured party does not have possession of a collateral that is in the actual or apparent possession or control of the debtor or debtor’s agent
	+ Reasonable person test in terms of whether something is in control of the collateral

##### Does Seizure Constitute Perfection by Possession?

* Under the AB *PPSA*, a security interest is not perfect by possession when that possession resulted from seizure or repossession of a collateral as a result of the debtor’s default
* Only when there is objective evidence that the receiver-manager intends to dispose of the collateral to enforce the security interest does the receiver-manager’s possession qualify as perfection by possession

## Perfection by Delivery or Control

* Special rules apply to perfection of a security interest in a category of collateral called an investment property (**s 1(1)(y.1)**)
	+ This definition includes “security” – **1(1)(rr)** and “security entitlement” – **1(1)(ss.2)**
* **S 24(3) and (4)** provide for perfection by delivery of a security interest in “security”
* If the security is represented by a physical document (“certificated security: **1(1)(e.1)**), a SP perfects by delivery through taking actual possession of the document
* If not represented by physical document (“uncertificated security” – **1(1)(vv.1)**), the SP accomplishes the delivery by becoming registered as owner of security
	+ This means SP is registered on the issuing corporation’s share registry as owner of the shares
* **S 24.1** provides that a SI in investment property of any kind may be perfected by “control” (**s 1(1.1)** of the collateral

## Automatic Perection

* There are several circumstances in which the *PPSA* grants the status of perfection to a security interest without requiring the secured party to effect a registration relating to it or to take possession of the collateral
	+ The automatic perfection granted is **temporary**
	+ In most cases, it does not offered the secured creditor the same degree of protection as perfection by registration or by taking possession of the collateral
* **S 5(2)** – automatic perfection is temporary and conditional
	+ It is recognized for a specified period of time only if a perfection step is taken before the expiry of the stipulated time period
* **S 26(1)** – temporary and unconditional
	+ It is recognized for specified period of time whether or not an additional perfection step is taken before or after the expiry of that period
* The Act confers temporary, conditional perfection on a SI in proceeds (**s28(3**))

# priority fundamentals

## the meaning of “priority” and “suboridnation”

* Practical consequences of the priority rule depend upon the language in which the rule is cast
* A priority rule stating that a security interest has “priority” over or is “subordinate” to another interest usually has the effect of ranking the competing interests without affecting their continued existence
	+ The fact that a security interest is “subordinate” to another security interest does not directly affect the right of the subordinate secured party to take action to enforce the security interest upon the debtor’s default through the seizure of the collateral
	+ It **does** affect the secured party’s entitlement to the proceeds of disposition of the collateral
* The language of subordination and priority is also used to describe the outcome of priority rules governing competitions between a security interest and other kinds of claimants, which may be case in different terms creating different consequences
	+ E.g. **s 20(a)** 🡪 the priority rule governing a competition between a holder of a security interest and the debtor’s trustee in bankruptcy stipulates that an unperfected security interest is “not effective” against the trustee
		- But, it is commonly said that the unperfected security interest is “subordinate” to trustee, or that the trustee has “priority” over the security interest
		- In practical terms, the effect of this language is that the unperfected security interest is terminated due to the trustee’s ability to liquidate and distribute the property regardless of the interest
* A competing party that takes “free of” a security interest is essentially saying that party has priority over the security interest (**s 30(2)**)
	+ In circumstances of this kind, the priority rule does more than simply rank the interest of one party as against the other
	+ It effectively terminates the security interest entirely, such that its holder has no further claim to satisfaction through the collateral
* The priority rule that governs the ranking of unperfected security interests in certain types of property as against a transferee of the property states that the security interest is subordinate to the interest of the transferee (**s 20(b)**)
	+ The security interest is effectively eliminated by the transfer, even though the rule does not say that it is cut-off
	+ Subordination of the security interest to the interest of the transferee means that the security interest cannot be enforced against the property in the hands of the transferee so for all intents and purposes it no longer exists as a source of recovery for the secured party

## subordination of unperfected security interest to the trustee in bankruptcy

* S 71 of the *BIA* provides that, when a debtor becomes bankrupt, the property of the bankrupt vests in the trustee in bankruptcy, subject to the rights of secured creditors

72.(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

* **S 20** pf the *PPSA* provides that an unperfected security interest is “not effective” against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy
	+ This is likely the most important priority rule in the Act
	+ **Inverse**: a perfected security interest has priority over the trustee in bankruptcy

#### *Re Giffen*, [1998] 1 SCR 91

*Facts:* - Telecom Leasing Co leased a car to a company, who then leased it to G, an employee

* The lease was for more than one year and allowed G to purchase the car at the end
* TLC was not a party to the lease, but it played an active role in the terms and received a deposit
* TLC was also described as the lessor and G as the lessee on insurance documents
* Neither the employer company nor TLC had registered their security interest under the PPSA
* G went bankrupt, the car was sold, and now G’s trustee and TLC are disputing who gets the proceeds of the sale
* TLC claims it owns the car since it never sold it to G, while the trustee relies on the PPSA declaring him to have priority over the lessor of an unperfected lease.

*Issues:* Who has priority over the sale proceeds?

*Held:* The trustee

*Reasons:*

* The provincial legislatures, in enacting the *PPSA*, have set aside the traditional concepts of title and ownership to a certain extent; redefined property
* This issue cannot be solved by who has title to the car because the issue is priority to the car and not ownership

*Definition of Security Interest*

* The elements of the definition of “security interest” explicitly include a lease for a term of more than one year
* The lessor’s interest in the car is the reservation of title in the car
	+ This interest, created by the lease, falls within the scope of the *PPSA*

*The Nature of the Lessor’s Interest in the Car* **(Characterization)**

* A security interest is valid and enforceable when it attaches to personal property
* **S 12(1)(b)** – the interest attaches when the debtor acquired rights in the collateral
	+ **12(2)** states that the debtor has rights in good leased to the debtor when he obtains possession of them in accordance with the lease
* Therefore, when the bankrupt received the car, the lessor had a valid security interest in the car that could be asserted against the bankrupt
	+ Does remain vulnerable to claims of third parties who obtain an interest in the car through the lessee including trustees in bankruptcy
* To protect this interest, the lessor had to perfect the interest through registration or repossession, neither of which happened before bankruptcy
	+ The lessor had an unperfected security interest

*The Bankrupt’s Interest in the Car Vests in the Trustee*

* S 71(2) of the *BIA* provides that, upon an assignment in bankruptcy, the bankrupt’s property vest in the trustee
* The bankrupt’s right to use and possession of the car constitutes property for the purpose of the *BIA*
	+ The trustee succeeds in this proprietary right
* The trustee assumes the bankrupt’s possessory interest in the car through the operation of s 71(2)
* **S 12(2)** of the *PPSA* also recognizes that a lessee obtains a proprietary interest in the leased goods
	+ Deems the lease a security interest
* From both the perspective of the *PPSA* and the *BIA*, the lessee can be described as having a proprietary interest in the car

*The Priority Context and Operation of s 20(b)(i)*

* Purpose of the section: a person with an interest rooted in title to property in the possession of another, once perfected, can, in the event of default by the debtor, look to the property ahead of all others to satisfy his claim
	+ If that interest is not perfected, it is vulnerable, even though it is rooted in title to the goods
* Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral
* **However**, public disclosure does not seem to be required to protected the trustee who is not in the position of an innocent third part; rather the trustee succeeds to the interests of the bankrupt
* Trustees are given the capacity to defeat unperfected security interests because of the “representative capacity of the trustee and the effect of bankruptcy on the enforcement rights on unsecured creditors”
* *Prior* to bankruptcy, unsecured creditors can make claims against the debtor through provincial judgment enforcement measures
	+ Successful claims will rank prior to unperfected security interests subject to **s 20**
* **Once bankruptcy occurs**, all claims are frozen and the unsecured creditors must look to the trustee to assert their claims
	+ Trustees become the representative of creditors who can no longer bring their claims to a perfected status
	+ The trustee has status, under s 20(b)(i) to attack the unperfected security interest
* The trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts the claim of the unsecured creditors to the goods and possession of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests. It is simply a contest between unsecured creditors and unperfected security interests
* The purpose of s **20(b)(i)** is, at least in part, to permit the unsecured creditor to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security interests they enjoyed prior to the bankruptcy of the debtor

*The Present Appeal and Section 20(b)(i)*

* The trustee’s possessory interest in the car, acquired through the bankrupt under the *BIA*, comes into competition with the unperfected security interest of the lessor
* S 20(b)(i) explicitly states that a security interest in collateral “is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy”
	+ On a plain reading of s 20(b)(i), the lessor’s interest in the car is ineffective against the trustee
* S 20(b)(i) does not grant title or any other proprietary interest to the trustee, but it prevents the lessor from exercising rights against the trustee
* The effect of this section on the present facts 🡪 the trustee ends up with full rights to the car when the bankrupt only had a right to use and possession
* S 20(b)(i) **modifies** the principle which provides that the trustee cannot obtain a greater interest in the goods than the bankrupt
	+ This section can give the trustee a greater interest in the disputed property than that enjoyed by the bankrupt

*The Trustee Can Confer Clear Title*

* Title could not defeat the trustee’s claim, but does the lessor’s retention of title and *nemo dat* prevent the trustee from dealing with the car?
* S 81 of the *BIA* provides a procedure through which third parties can file claims with the trustee against property in the possession of the bankrupt at the time of bankruptcy
	+ s 81(2) holds that where a trustee disputes a claim and the claimant does not appeal in the relevant time frame, all rights are considered relinquished to the trustee
	+ s 81 does not specifically deal with the circumstances where a claimant’s claim is defeated, but presumably, the trustee would be able to deal with the property free of a claim
* In this case, the lessor could have made a claim under s 81, but it would have been defeated by s 20(b)(i)
* Given both of these sections, and the lessor’s failure to make the claim, the car was effectively relinquished to the trustee who can then confer good title

*The Federal Priority Scheme, Which is Subject to the Rights of Secured Creditors, Is Not Disturbed*

* S 136 of the *BIA* sets out a priority scheme for the division of property of the bankrupt; the interest of the various creditor rights are all subject to the rights of secured creditors
* S 67 describes that which constitutes the property of the bankrupt
* Provincial legislation cannot interfere with the priority distribution set out in the BIA
* **But** the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the BIA and the rights of parties involved in a bankruptcy (see s 72(1) of the BIA)
* **S 20(b)(i)** does not reorder federal priorities
	+ Compliance with the perfection requirements of the *PPSA* is a precondition to maintaining secured creditor status under the *BIA*
	+ In the event of bankruptcy, the consequences of a failure to perfect are spelled out in s 20(b)(i)
		- In effect, the secured party with an unperfected security interest becomes an unsecured creditor of the bankrupt

##### Notes Post Case

1. Court confirmed 12(2) that a lessee acquires a proprietary interest in the leased goods through the specific provision that “a debtor has rights in goods leased to the debtor”
2. The priority of the trustee in bankruptcy under section 20(a) is determined as at the date of bankruptcy
3. Section 2 of BIA defines “date of bankruptcy” as:
	1. The granting of a bankruptcy order against the person
	2. The filing of an assignment in respect of the person, or
	3. The event that causes an assignment by the person to be deemed
4. **TESTABLE:** *Glencoe Express Inc,* Re (1992), 14 CBR (3d) 68 (BCSC) – Court held that, at the date of bankruptcy, the lessee had no interest that could vest in the trustee under the Bankruptcy and Insolvency Act because the lease had terminated.
	1. **The implications of termination of a true lease for a term of more than one year [s 3(2) lease] in a priority competition with the lessee’s trustee in bankruptcy. Assume the lessor has not registered.**
		1. Lessor leases goods to lessee under a true lease for more than one year
		2. Lessee defaults in lease payments and lessor repossesses goods
		3. Lessee becomes bankrupt.
		4. Trustee has priority regardless if lease was ever perfected. WHY???
	2. **The implications of termination of a true lease for a term of more than one year in a priority competition between the lessor and a security interest in the leased goods granted by the lessee**
		1. Debtor borrows money from Bank and gives Bank a security interest in “all present and after-acquired personal property” of Debtor.
		2. Bank registers a financing statement against Debtor describing the collateral as “all present and after-acquired personal property”.
		3. Lessor leases a valuable piece of equipment to Debtor under a lease for a term of more than one year, ending on December 31. Lessor does not register its interest.
		4. Debtor defaults in paying Bank. On October 1, Bank notifies Debtor that it intends to seize its collateral, including the leased equipment.
		5. Debtor notifies Lessor of Bank’s intention. Lessor declares the lease in default under a clause in the lease that defines default as any action threatened or taken against the lessee by a creditor. Lessor terminates the lease and takes possession of the equipment on October 10.
		6. Is Bank entitled to enforce its security interest in the equipment? What effect, if any, does Lessor’s termination of the lease have on Bank’s position? Would the result be different if Bank claimed the equipment after December 31?
			1. In this case, the termination of the lease does not change the outcome. The lessor’s interest is still an unperfected security interest.
			2. If the lease expires? The PPSA does not have a clear answer.
				1. At what point in time is the lessor allowed to treat the goods as their own?
5. Problem is that certain basic assets of a judgment debtor are exempt from judgment enforcement measures. Section 67(1) of BIA provides that the property of a bankrupt divisible among his creditors shall not comprise any property that as against the bankrupt is exempt from execution or seizure under provincial law.
6. *Perimeter Transportation Ltd (Re),* 2010 BCCA 508 – Although section 20(a)(i) had the effect of subordinating Century’s unperfected interest in the buses to Perimeter’s trustee, it did not operate to defeat GE’s perfected security interest
	1. Not important for test purposes.

## priority as between security interests

### introduction and overview of priority rules

* The priority structure of a secured financing system can embody one or other of two approaches:
	1. Provide flexible priority rules that give courts wide discretion to do justice between secured parties with competing claims to the collateral
	2. Provide clear, certain priority rules that facilitate a high level risk assessment but that, because of their inflexibility and focus on easily established factors, produce “injustice” in some particular situations
* The *PPSA* mostly embodies the second approach
* Predictable priority rules generally result in fairness to person who, without knowledge of the rules, make informed decisions as to whether or not to take an interest in property that is or may be collateral
* In situations where it is difficult or impossible to obtain information they require to make informed decisions, the Act imposes priority rules that, for the most part, provide an acceptable level of protection for those when they acquire an interest in property subject to prior security interest (**s 30(2)-(8)**)
* Predictability and the fairness flowing from predictability are not the only policies embodied in the priority structure of the Act
* **S 35** provides a set of basic/default priority rules determining competitions between security interests in the same collateral
* These rules apply unless they are supplanted by a more specific rule
	+ The default rules apply to the following:
		- **S 35(a)** perfected v perfected interests
		- **S 35(b)** perfected v unperfected interests 🡪 perfected *always* has priority
		- **S 35(c)** unperfected v unperfected interest

**Strategy for Determining Priority**

* 1. Is each of the competing security interests perfect?
		1. Registration, possession, temporary
	2. Apply priority rule (s 35(1)) based on conclusion
* Remember, s 43(4) allows a financing statement to be registered *before* a security agreement has been created. Once created, this registration date governs priority

###### S 35(1): Perfected Security Interests v Perfected Security Interests

* Sets priorities by the order of occurrence of registration, possession by the secured party for the purposes of perfects (where tangibles are involved) or temporary perfection
* Perfection is a *sine qua non* of acquiring priority under the default rule, but not the determinant of who *has* priority
	+ The latter is determined by the date of the registration possession or operation of a temporary perfection provision of the act
* Priority is determined at the **DATE OF REGISTRATION**
	+ *Not* by who perfected their interest first
		- S 43(4) allows for registration prior to perfection
* **Rationale**: as the subsequent secured party, you can search the registry and find SP1’s registration. SP2 now has the knowledge that it may not be wise to enter into a security agreement with the debtor. SP1 could enter into a second agreement and further subordinate SP2’s interest
	+ SP2 could get a subordinate agreement with SP1 and SP1 may agree to a certain extent (such as $10000)
		- This injects more capital into the debtor which is a benefit to SP1
* The rules for priority are written, but parties can work out their own options through inter partes contracts

**Perfection by Registration with Respect to Serial Number Goods**

* If the collateral is a serial number good, it is necessary to determine whether the serial number of the goods must be included in order for a financing statement to be regarded as registered within the meaning of s 35(1)
* Consumer goods *must* contain the serial number to be perfected under **s 25** and registered under **s 35**
* Equipment may include serial number – registration of a financing statement covering such goods perfects the security interest for purposes of **s 25** whether or not serial number is included
	+ However, **s 35(4)** provides that a SI in serial numbered goods that are equipment “is not registered or perfected by registration” for the purposes of s 35 unless a financing statement including the serial number of the goods is registered
	+ Therefore, without a serial number, equipment is not considered registered or perfected for the purpose of the priority rules in **s 35**, due to the operation of **s 35(4)**
* **S 35(4)** does not affect inventory

**The Section 35(9) Exception to First-In-Time Priority – The “Double Debtor” Rule**

* **S 35(9)** creates an exception to the first-in-time rule of s 35(1) in the very unusual circumstances to which it is addressed
	+ Where a debtor transfers an interest in collateral that, at the time of the *transfer*, is subject to a perfect security interest, that security interest has property over any other security interest granted by the transferee before the transfer
		- Note: this rule only comes into play where the competing security interests are given by***different*** debtors in the sequence described
* Effect of the rule **–** reverse the outcome that would otherwise follow from the regular rule under s 35(1)
* **Trick to the rule** 🡪 if there are two debtors and a transfer of collateral, refer to the rule to determine whether it should apply
	+ If the specific facts don’t fit the rule, normal priority rules govern

Example:

* May 1 - SP1 takes a security interest in all of Alpha Ltd.’s (Debtor 1) present and after-acquired property and registers a financing statement.
* June 1 - SP2 takes a security interest in construction equipment owned by Beta Ltd. (Debtor 2) and registers a financing statement.
* July 2 – Beta Ltd. (Debtor 2) sells an item of construction equipment to Alpha Ltd. (transferee/Debtor1)
	+ The circumstances are such that SP2’s security interest is not cut off by the sale
	+ Alpha Ltd. therefore acquires the equipment subject to SP2’s perfected security interest
	+ SP1’s security interest attaches and is perfected when Alpha acquires the equipment.
* SP1 was first to register, but SP2 has priority under s. 35(9), subject to the exception for further advances by SP1 if SP2 learns of the transfer and does not amend its registration
* SP1 (security interest granted by Alpha, the transferee) was first to register, but SP2 (security interest granted by Beta, the original owner) has priority under s. 35(9), subject to the exception for further advances by SP1.
* If SP2 acquires knowledge that the equipment has been transferred to Alpha, SP2 has 15 days within which to register a financing statement against the name of the transferee (Alpha) as the new debtor. If SP2 fails to do so, SP1 will have priority with respect to further advances made after the expiry of that period.
* If SP2 does not discover that the equipment was transferred to Alpha, SP2 has priority with respect to all advances including future advances made by SP1.
* The exception for a future advance:
	+ May 1 - SP1 takes a security interest in all of Alpha Ltd’s present and after-acquired property and registers a financing statement.
	+ June 1 - SP2 takes a security interest in construction equipment owned by Beta Ltd and registers a financing statement.
	+ July 2 – Beta Ltd sells an item of construction equipment to Alpha Ltd (transferee) (SP2’s security interest is not cut off by the sale. SP1’s security interest attaches when Alpha acquires the equipment)
	+ The equipment is worth $100,000. SP1’s security interest secures $80,000 owed by Alpha to SP1. SP2’s security interest secures $100,000 owed by Beta to SP2.
	+ SP1 and SP2 both have perfected security interests in the equipment. SP2 has priority over SP1 to the extent of the $100,000 owed by Beta to SP2, even though SP1 registered before SP2 (SP2 gets $100,000, SP1 gets 0 in a realization sale).
	+ August 1 – SP2 learns that Alpha now owns the equipment.
	+ August 20 – SP1 searches the registry against Alpha’s name and does not discover SP2’s interest (because it is registered against Beta). SP1 advances an additional $20,000 to Alpha.
	+ SP1 will have priority over SP2 to the extent of $20,000. If the equipment were sold to enforce either interest, first $20,000 to SP1, balance of $80,000 to SP2.
	+ If SP1 made the additional advance to Alpha on August 10, SP1 would NOT have priority with respect to that advance – was made before the 15-day period expired.
* **SUMMARY:** If SP2 learns of the sale of equipment, SP2 will not have priority in relation to funds subsequently advanced by SP1 unless SP2 amends its registration to disclose D1 as the new debtor.

### the role of *nemo dat* in the resolution of priority competitions

* Most priority disputes involving security interest can be resolved through the direct application of a priority rule such as those in s 35
	+ In some instances, priority is determined by *nemo dat* operating in combination with one of the priority rules that determines the position of a person to whom property subject to a security interest is transferred by the debtor

##### Scenario 1 – Cut Off

* SP1 takes a security interest in D’s property and perfects by registration
* D sells the collateral to B in the ordinary course of D’s business with the result that, under s 30(2), B “takes free from” SP1’s security interest
* B gives a security interest in the collateral to SP2 who perfects by registration
* Both SP1 and SP2 claim priority with respect to their security interest in the collateral
* **Result: s 30(2)** has the consequence of cutting SP1’s SI in the collateral once it is sold to B. The solution to the priority dispute involves application of *nemo dat* principle. Since B’s title itself is not subject to SP1’s interest, then the interest B gives to SP2 is similarly not subject to SP1’s interest. The outcome is that SP2 in effect has priority over SP1, in that SP2 is entitled to enforce its SI while SP1 is not.

##### Scenario 2 – Subordinate

* Same facts, but SP1’s security interest is not perfect at the time D sells the collateral to B
* However, the sale is out of the ordinary course of D’s business, so s 30(2) does not apply
* **Results**: Since SP1’s SI was not perfected when D sold the collateral, **s 20(b)** applies.
	+ Flowing from the *nemo dat* principle and not the *PPSA*, if B acquired the collateral without knowledge of SP1’s SI, SP1’s SI is “subordinate to” B’s ownership interest. Therefore, B can give first priority to SP2.
	+ NOTE: It does not matter if SP2 is perfected or not.

##### Scenario 3

* Same facts, but B bought the collateral from D out of the ordinary course of business and with knowledge of SP1’s interest
* At the time SP2 acquired her interest, SP1’s was not perfected
* **Result**: Neither ss 30(2) nor 20(b) applies to give B a clear title.
	+ Since there is no "cut-off" priority rule that affects SP1's SI in the collateral, the collateral remains subject to SP1's interest in B's hands.
	+ Therefore, **s 35(1)** applies to determine that competition, with the result that SP2, having perfected her SI by registration, gets first priority.
	+ NOTE: S35(9) "double debtor rule" does not apply to these facts
		- Section 35(9) applies only where
			* (a) the property transferred is subject to a perfected security interest held by SP1 before it was transferred to the buyer or transferee and
			* (b) that security interest is in competition with another security interest granted by the transferee before the transfer
	+ In this instance, the property transferred was subject to an unperfected SI which was in competition with another SI granted by the transferee after the transfer

Summing up: Where property subject to a security interest has been transferred by a debtor to a buyer or other transferee, consider the potential impact of

1. The “double debtor” rule s. 35(9). Is relevant where:
	* the property was subject to a **perfected** security interest held by Secured Party A before it was transferred to the buyer/transferee
	* A’s security interest **was not** cut off or subordinated by a priority rule that applies as between A and the transferee
	* a security interest held by Secured Party B attaches when the collateral is acquired by the transferee under a security agreement between the transferee and B entered into **before** the transfer (i.e. the security interest was “granted by the transferee before the transfer”). B’s security interest is perfected by a previously registered financing statement.

RESULT: A has priority over B even if B’s security interest is perfected by registration of a financing statement that was registered BEFORE the financing statement registered by A, subject to the exception for future advances made by B.

1. The operation of *nemo dat*. Is relevant where:
	* the property was subject to a security interest held by Secured Party A before it was transferred to a buyer/transferee
	* a security interest is granted by the buyer/transferee to Secured Party B, AND
	1. A’s security interest **was cut off or subordinated** under a priority rule that applies as between A and the transferee and the transferee gives a security interest in the property to Secured Party B.

RESULT: The priority rules applicable to competing security interests do not apply. The property is not subject to A’s interest after the transfer, or A’s interest is subordinated to the transferee’s interest and therefore subordinated to any interest given by the transferee.

1. A’s security interest **was not cut off or subordinated** under a priority rule that applies as between A and the transferee **but A’s security interest is unperfected**.

RESULT: Section 35(1) applies. A will be subordinate to B if B’s security interest is perfected. A will have priority over B if B’s security interest is unperfected (first to attach).

###### S 35(1)(c): Unperfected Security Interests v Unperfected Security Interests

* Priority between unperfected security interests is determined on the basis of the date of attachment
* There is no statutory priority rule to deal with situations in which two competing unperfected security interests attach at the same time
* It has been suggested that priority will be determined by the date of the respective security agreements; the creditor who holds the first agreement will have priority

#### *Royal Bank of Canada v Radius Credit Union Ltd*, 2010 SCC 48

* Involved a priority dispute between SP1 who held a PPSA interest and SP2 who held a Bank Act security interest in the same property
* The property was acquired by the debtor after the security agreements were signed
* Priority could not be determined by application of the PPSA because the Bank Act is not governed by the PPSA
* **Novel principle was advanced:** each creditor acquired an “inchoate” interest in the after-acquired property as at the date that its security agreement was signed
	+ Each interest subsequently attached when the property was acquired
	+ The ordinary properly law principle of *nemo dat* was then applied
* Because SP1’s inchoate interest arose first, SP2 acquired its interest subject to SP1 interest
	+ SP1 had priority

###### Is Knowledge of a Competing Interest Relevant to Priority?

* Under s 35(1), a perfected security interest is given priority over a prior unperfected interest even if the secured party holding the perfected security interest is aware at the time he/she acquires the interest of the existence of the unperfected interest
* **BUT** this result prevails *only* when the party holding the perfected interest was acting in “good faith” when she obtained that interest, or took steps necessary to establish its priority over the unperfected security interest
	+ Section 66(1) provides that all rights, duties and obligations under a security agreement or the Act must be exercised or discharged in **good faith** and in a commercially reasonable manner
	+ Section 66(2) states that **a person does not act in bad faith merely because the person acts with knowledge of the interest of some other person**
		- Court does not articulate a standard of bad faith, however, it does focus on **actively** doing something (see below)

#### *Carson Restaurants International v A-1 United Restaurant Supplies Ltd*

* The court denied priority to the security interest that was registered first on the grounds that the SP’s representative had “deceitfully delayed” the claim of the competing creditor by his representations to that party when it was pursuing its security interest against the debtor, namely, by making false assurances that the competing creditor would be paid.

#### *CIBC v AK Construction*

* Court concluded that bad faith involves some form of positive conduct that would support a waiver or estoppel.

#### *Furmanek v Community Futures*

* CA applied estoppel to give priority to a SP that failed to register its interest. However, the estopped party’s conduct involved more than mere notice of the existence of the prior unperfected interest.
* Although knowledge of the existence of a prior interest is not relevant to the operation of the default priority rule contained in s 35(1), it plays a role under some of the other statutory priority rules
	+ **S 20(b)** 🡪 a transferee takes priority over an unperfected security interest only if he/she acquires the interest without knowledge of the security interest
		- Knowledge is defined in **s 1(2)**

### Solving a priority problem involving multiple claimants

* Dealing with a priority competition involving 3 or more parties, all of whom claim the same collateral. Assume all security interests are attached.
	+ SP1 registers on Day 1 and is perfected
	+ SP2 acquires an attached security interest on Day 2 but fails to perfect
	+ SP3 registers on Day 3 and is perfected
* To determine priorities, **apply the priority rules as between two parties at a time**:
* SP1 v SP2 = apply s. 35(1)(b) - SP1 (perfected) has priority over SP2 (unperfected)
* SP1 v SP3 = apply s. 35(1)(a) - SP1 (perfected) has priority over SP3 (perfected) because SP1 is first to register
* SP2 v SP3 = apply s. 35(1)(b) – SP3 (perfected) has priority over SP2 (unperfected)
* SP1 and SP3 both have priority over SP2. SP1 has priority over SP3. The net ranking of interests is SP1, SP3, SP2
* The same approach applies to competitions involving parties other than secured parties (e.g. SP1, SP2 and a buyer from the debtor)
* Sometimes (rarely) the operation of priority rules creates a “circular” priority outcome, e.g. SP1 has priority over SP2, SP2 has priority over SP3, SP3 has priority over SP1. The problem must be resolved through a conceptual or policy-based analysis.

### the relationship between priority and enforcement

* The conclusion that one security interest has priority over another does not mean that the subordinate security interest ceases to exist, or that the holder of that interest is not entitled to enforce the security interest through seizure of the collateral
	+ **Priority and enforcement** **are distinct**
* A secured party is entitled to enforce or “realize on” its security interest if the debtor defaults under the terms of the security agreement
	+ Generally enforced by seizing and selling the collateral
* The proceeds of sale are applied to the costs of enforcement and satisfaction of the secured debt
* When a secured party has collateral seized and sold to enforce a security interest, the buyer acquires whatever interest the debtor had in the property, **free of the security interest** and any interests subordinate to the interest of the debtor or the secured party (**s 60(12)**)
	+ If collateral is seized and sold by a secured party whose interest has priority over another security interest, the buyer will therefore acquire titled free of both interests
* **s 61(1) 🡪**  any surplus proceeds remaining after satisfaction of the cost of realization and the claim secured by the security interest that has priority it to be paid to the holder of the subordinate interest
* A security interest that has priority over the interest of a secured party who has taken steps to realize on its security is unaffected by a sale of the collateral
	+ The buyer acquires the property subject to the security interest
* A secured party holding such an interest may elect to release it, in which case the relative priorities of the interest holders will determine their entitlement to the proceeds of sale
* It is more common that the priority secured party will release the interest as a buyer is less inclined to buy with a security interest attached
* In most cases, a debtor who is in default with one secured party will be default with both
	+ SP1 and SP2 would both be entitled to seize and sell the collateral
	+ **S 64** 🡪 If the parties cannot agree on which of them should do so, a summary application can be made to the court for direction
		- More likely that the party with priority will be ordered to exercise its right to realize
		- Amount collected will likely be the same regardless of who realizes
* A court may order SP2 to not sell or seize collateral when a sale would not generate fund for the creditor instructing seizure or enforcement proceedings would otherwise jeopardize the position of the secured party with priority

#### *Holman West Material Ltd v Canadian Concrete Products Ltd*, [1995] 1 WWR 155 (ABQB)

*Ratio*: Court may issue an order precluding SP2 from seizing and selling the collateral when a sale would not generate funds for the creditor instructing seizure or enforcement proceedings would otherwise jeopardize the position of the SP with priority

* There was no equity left in the collateral to satisfy SP2’s debt – costs of realization and the remaining debt owed to SP1 greater than the equity in the collateral.

## tacking future advances

* Future advances 🡪 just an advance
	+ What scenarios involve “future” advances?
		- Multiple advances under one security agreement
		- Further advances under an amended security agreement
		- Further advances under a new security agreement
* Lines of Credit 🡪 the issue that this type of arrangement creates in the context of secured financing is the priority status of the creditor grantor’s security interest in the debtor’s property with respect to draws occurring after other interests in the collateral have arisen
* *PPSA* addresses the directly on the basis of policy choices
	+ S 1(1)(c) "advance"
	+ S 1(1)(u) "future advance"
	+ S 14 (1) A security agreement may provide for future advances.
	+ S 35(5) The priority that a SI has under subsection (1) applies to all advances, including future advances
		- Must look at the contest (s 31 - perfected v perfect; perfected v unperfected; or unperf v unperf).
	+ S 35(6) Only has priority over writ if advances made before SP acquires knowledge of writ within meaning of s 32 of CEA.
* For the most part, the Act rejects the common law approach

##### Scenario 1

**Multiple advances under one security agreement:** SP advances money or credit to Debtor in two or more installments over a period of time under the same security agreement – i.e. makes “future advances”. All installments are secured by a security interest in the property identified as collateral. Does SP’s security interest have the same priority ranking with respect to each advance? Yes.

#### *Thorp Finance Corp of Wisconsin v Ken Hodgins and Sons*

*Facts:* Aug 14, Thorp acquired a security in several items of equipment owned by Hodgins, not including the payloader

* Nov 2 – Hodgins purchased the payloader and executed a note and security agreement covering the payloader which Bark River subsequently assigned to State Bank on Nov 8 (Advance 1)
* Nov 10 – State Bank filed financing statement
* Feb 11 – Hodgins gave Thorp a promissory note and a security agreement
* Thorp filed a financing statement, which was an amendment to the previous one and listed the payloader in question and other goods
* March 20 – Hodgins gave Bark River a note which was subsequently assigned to State Bank
* The Note contained specific reference to the Nov 2 security agreement on payloader and the original note was marked “renewed” and advances further credit (Advance 2), and consolidates Advance 1
* State Bank did not file a new financing statement.

*Issues:* Whether a secured party’s perfected status continues as to a later advance without new filing, where a security agreement was executed and a financing statement filed followed by a later advance made pursuant to a subsequent agreement covering the same collateral and purporting to incorporate by reference the original security agreement.

* Does State Bank have a priority over Hodgins with respect to advance #2?

*Held:* State bank acquired a perfected SI in the payloader when the original financing statement was filed in 1971

*Reasons:* - Trial court adopted *Re Rivet* – court in Rivet first determined that the subsequent loans were not future advances because the sec agm contained no provision for future advances, but the (UCC) Code’s notice filing system intended to allow the first secured creditor to remain perfected and to have priority over intervening secured creditors who also perfected by filing without the necessity of subsequent filings by the first secured creditor

* “The policy of the UCC is merely to put potential lenders on notice of possible security interests”.
* CA: The present case falls within the Rivet rationale.

#### *CPC Networks Corp v Eagles Eye Investments Inc*, SKQB

*Facts:* CPCN entered into a loan agreement with BDC under which BDC agreed to lend $150,000 to CPCN

* As required by the loan agreement, a GSA was entered into by CPCN in favour of BDC
* BDC assigned the loan agreement and GSA to Black Dove
* Black Dove assigned to Eagle Eye
* Eagle Eye declared that CPCN’s refusal to provide certain financial information constituted a default under the GSA now held by Eagle Eye as a result of the assignment
* CPCN offered to pay out the amount owing on BDC loan but Eagle Eye refused to discharge the security agreement unless CPCN paid amounts additional to the amount outstanding on the BDC loan

*Issues:* Can an assignee tack a debt that is owed to them?

*Held:* The only amounts secured by the GSA were the amounts owing by CPCN to BDC and that the GSA does not cover any previously unsecured debts owed by CPCN to Eagle Eye.

*Reasons:*

*Does the GSA cover previously unsecured debts of Eagle Eye?*

* **S 65(3)** of PPSA mandates that the parties to a SA act in good faith and in a commercially reasonable manner
* Quotes Wood saying “The pervasive nature of this duty means that it must be kept in mind in interpreting every provision of the Act that deals with the rights and obligations of any person
* The rights and obligations under GSA acquired by Eagle Eye have not been exercised in good faith nor in a commercially reasonable manner, but rather in order to achieve an advantage on behalf of (disgruntled shareholders of CPCN) over the other shareholders in CPCN
* Wood: 3 reasons why courts have refused to convert unsecured claims into secured claims in assignment of security situations:
	+ (1) It would be unfair to debtor;
		- In this case, there is nothing in the loan agreement or GSA which would lead CPCN to consider or believe that its unsecured creditors might achieve secured creditor status with the ability to demand financial information such as that sought in this case by Eagle Eye.
	+ (2) It would have a destructive impact on principle of pro rata sharing in bankruptcy law;
		- At the time LA was entered into, CPCN had $480,000 in other investment which was raised by way of SH loans… an interpretation would allow EE to escape pro rata sharing principle of bankruptcy law in the event of insolvency of CPCN
	+ (3) It would have a disruptive effect on the PPSA priority regime with a subsequent loss of predictability.
		- If Court accepts EE’s submission, this could give rise to a situation where future secured creditor could be affected by the assignment and/or it could prevent CPCN from obtaining loans or financing from sources due to the uncertainty of priority that any future security agreement granted to them would bring.
* **NOTE**: “All obligations” clause is common and captures future advances
	+ The issue in this case is really an inter partes enforcement issue… but the same problem can arise in relation to priorities.

#### *Eagle Eye Investments Inc v CPC Networks*, SKCA

*Facts:* Same as above

*Issues:* Did the parties intend that the “all obligations” clause contained in the GSA means that an assignee from the Bank could secure its prior unsecured debts? Issue must be resolved vs the assignee, Eagle Eye.

*Held:* The point is that the agreements to be construed in the within appeal do not demonstrate that the parties intended at the time of contracting that the GSA would operate in a way suggested by EE. BY and large they hold that the particular drafting of the all obligations clause in the security agreement was not sufficiently clear and unequivocal to produce any other result than that the clause did not extend to the debtor’s past indebtedness to the assignee. Appeal by EE dismissed.

*Ratio:* For inter partes enforcement, case tells us clearly that the terms of the security agreement are the first consideration in determining whether the assignee can tack. What is not clear, is that what is the result if the SA does allow for tacking by an assignee – what consequence would that have on priorities?

*Reasons:*

* No provision in the loan documents or GSA clearly expresses an intention by the Bank with respect to the unsecured debts of a third party.
* **NOTE**: CA only relies on the unfairness to debtor. This is less clear than in the QB decision. Even though the agreement contemplated it, it would have had to have been much more explicit to allow the assignee to tack.

## the consequences of lapse in registration

##### Scenario 1

* Debtor grants a SI to SP1 who registers
* Debtor grants a SI in the same collateral to SP2 who registers
* SP1’s registration lapses, because SP1 forgets to extend the original period of registration before it expired, or the registration is discharged
* SP1 discovers that its security interest is no longer registered and re-registers

##### Results

* Under the ordinary priority rules of s 35(1)(a), SP2 would have priority over SP1 because, as between the two *existing* registrations, SP2 was first
	+ SP1’s initial registration would be irrelevant as it no longer exists
* **BUT** s **35(7) and (8)** create an exception in the circumstances defined
* If SP1 registers within 30 days after the lapse or discharge of its registration, SP1’s priority statues relative to SP2 is not affected in relation to any advances made by or contracted for by SP2 before the lapse or discharge and prior to the new registration

##### Scenario 2

* Debtor grants a security interest to SP1 who registers
* SP1’s registration lapses because SP1 forgets to extend the original period of registration before it expired, or the registration is discharged
* Debtor grants a SI in the same collateral to SP2, who registers
* SP1 discovers the SI is no longer registered and re-registers within 30 days of the discharge of its registration

**What is the priority of SP1’s interest as against SP2’s?**

* It only operates in relation to a competing perfected security interest.It did not have a subordinate position
* SP2 has priority over SP1 immediately prior to the lapse or discharge. 35(8) does not apply here
* SP2 has priority here because back to residual priority rule applies (35(1)).
* A secured party who re-registers under s 35(7) in order to preserve its priority position under s 35(8) must observe the requirements of s 18 of the PPSR in completing the statement
* A court cannot override the priority consequences dictated by the statute as a result of a lapse in registration on the grounds of unfairness
* *KBA Canada Inc v 3S Printers Inc*, BCCA 🡪 The overriding statutory goals of certainty and predictability in personal property financing would be undermined by giving those sections the broad interpretation applied to them by the chambers judge (allowed re-registration after 30 days)

## the consequences of a change in debtor name

* The provisions of Part 4 of the PPSA provide for amendment of registrations to reflect material changes
* SP2 is in better position to guard against the risk of a change of identity of the debtor by investigating its corporate history before making the decision to lend
* However, the parties' relative ability to manage that risk is different if SP1 learns of the change in name or corporate structure before SP2 registers its interest
	+ Under those circumstances, SP1 is obliged to amend its registration so as to identify the debtor by correct name
	+ If it fails to do so within stipulated time period, it will lose its priority position to SP2 and other competing parties.
* The operation of s **51(2) and (3)** are supplemented by s **30(5)** in cases involving a competition between a SI and a buyer or lessee of goods who acquires their interest within the 15-day period after a SP obtains knowledge of the debtor's change of name
* The rules are of similar effect when a SP learns that collateral has been transferred by the debtor to another person
	+ The SI will continue in the collateral as provided in section **28(1)(a)** if the transaction was not authorized by the SP and a priority rule does not operate to cut off or subordinate the SI in favour of the transferee.
	+ If the SP learns of the transfer, it must amend its registration to indicate the transferee as the new debtor in order to preserve the priority of a perfected SI against an interest arising after the date when knowledge of the new debtor's name is acquired
	+ Sections 51(2) and 51(3) apply
* If you are dealing with a corporate debtor, must be cognizant of debtor changing name

#### *Royal Bank of Canada v Head West Energy Inc*

*Facts:* Harrison Western entered into 4 trailer leases with Wells Fargo and WF registered its interest in the PPR

* Shortly after, Harrison changed its name to Head West
* RBC subsequently loaned money to Head West secured by a GSA
* RBC registered its interest against Head West on November 4, 2004
* WF alleged that it first learned of the company’s name change on Oct 18, 2005

*Issues:* Who has priority with respect to the trailers leased by WF to the debtor?

* When did WF have knowledge of the change in name?

*Held:* PPSA 1(2) knowledge is actual or constructive knowledge.

*Reasons:* - Although Head West had not received a specific notice of Harrison Western’s change of name before October of 2005 it had knowledge of the name change within the meaning of PPSA s 1(2)(c) based on information indicating that the name change occurred

* WF thus lost its priority to the sale proceeds of the 4 trailers by reason of its failure to register this name change in relation to the leases at the PPSR prior to that date.
* **S 51(2)** Where a security interest is perfected by registration and the SP has knowledge of:

(b) the new name of the debtor, where there has been a change in the debtor’s name,

the SI… in the collateral, where clause (b) applies is subordinate to the interests referred to in (3).

(3) Where subsection (2) applies, the SI… in the collateral, where subsection 2(b) applies, is subordinate to

(a) an interest, other than a SI in the collateral, arising in the period from the expiry of the 15th day after the SP first has knowledge of … the new name of the debtor… but not including, the day the SP amends the registration to disclose the … new name of the debtor … or takes possession of the collateral

(b) a perfected SI in the collateral registered or perfected in the period referred to in clause (a) or,

(c) a perfected SI in the collateral registered or perfected after the SP first has knowledge of the … new name of the debtor… and before the expiry of the 15th day referred to in clause (a), if, before the expiry of the 15 days

(i) the registration of the SI first mentioned in (2) is not amended to disclose the new name of the debtor… or

 (ii) the SP does not take possession of the collateral

* While no part of 51(2) applies to leases if WF did not have knowledge of the name change, it is nonetheless of some interest to examine this section to determine how it will apply to create subordination if WF is found to have that knowledge.
* **From Wood:** Section 51 is designed to preserve the integrity and usefulness of the registry where there is a change in debtor’s name or a transfer of all or part of the collateral to another person
* A searching party’s ability to discover the existence of potential existence of a SI is affected by changes of this kind.
* Section 51(3) creates three situations in which first-in-time registration may be defeated as a result of name change of debtor
* Section 51(3)(b) is relevant to this case
* WF did not take possession of the trailers at any time
* WF did not amend its registrations to reflect the name Head West until well after RBC perfected its SI in the trailers
* WF argues that s 51(2) does not strip it of its priority as it has no knowledge of the name change until the very date it amended its registration at the PPSR
* The Court found that communications received by senior employees responsible for managing Head West leases gave the company actual knowledge of the name change
* Even had this not been the case, the information contained in the June 21, 2004 letter and in the credit applications amounted to constructive knowledge of the name change because it was sufficient for a reasonable person to take cognizance of it, and to thereby be led to attempt to reconcile any internal inconsistency by taking steps to ensure that no name change was going to take place or by registering an update
* Case law supports the view that constructive knowledge is adequate (CIBC v Tux & Tails Ltd, Indian Head Credit Union v Andrew, HSBC Bank of Canada v Expressway Concrete Supply Ltd)
* NOTE: The decision was affirmed by CA.

## priority as between security interest and a writ of enforcement (judgment Creditor)

### the priority rules

* A creditor who has not obtained a security interest has no direct entitlement to have property of the debtor seized to satisfy the unpaid debt
* If the debtor defaults in his/her obligations, the creditor must sue for payment, and having obtained a judgment, initiate proceedings to have the judgement enforced
* AB – *Civil Enforcement Act*
	+ Under the *CEA*, both the right of a judgment creditor to have the judgment debtor’s property seized to satisfy the judgment and the priority of the judgment creditor’s claim to the property vis-à-vis other interests is dependent upon registration of a writ of enforcement in the PPR
* **Writ of enforcement** 🡪 a formal document issued by the clerk of court confirming that judgment has been granted against the judgment debtor for the amount indicated, with or without costs, and authorizing seizure of the judgment debtor’s property in the amount required to satisfy the judgment
* **S 33 *CEA*** 🡪Upon registration, the writ binds all of the personal property of the judgment debtor
	+ Does not create a property interest equivalent to a security interest
	+ The rights deriving from a registered writ are very similar to a perfect security interest
	+ The writ operates as a charge on the property of the judgment debtor to the extent of the amount owing on the underlying judgment
* Rules determining the priority of the writ as against a security interest closely parallel the *PPSA* priority rules determining priority as between security interests in the same collateral
	+ Priority is usually a combo of PPSA and provincial judgment enforcement statutes
* In AB, the priority rules are based solely on registration, and are contained almost entirely in the judgment enforcement statute
* **Ss 35 and 36(3) *CEA*** 🡪 the provisions determining the priority of a writ of enforcement are found in these sections
	+ Basic rule 🡪 a security interest that is perfected or registered in the PPR before the writ is registered will have priority over the writ
		- A security interest that is perfected after the writ is registered is subordinate to the writ
			* **s 35(3) *CEA*** 🡪 subject to the usual exception in favour of a PMSI, which will take priority over a previously registered write if the requirements in this section are satisfied
* **s 36(3)** ***CEA*** 🡪 a judgment creditor who wishes to ensure that his/her entitlement to serial numbered goods held by the debtor as consumer goods or equipment is not defeated by a secured party must include the serial number goods in the registration
* **s 35(6) *PPSA*** 🡪 a security interest that would otherwise have priority over a registered writ of enforcement will be subordinated with respect to future advances made after the secured party acquires knowledge of the writ
	+ **PPSA Regs** states that creditors should search by a person’s legal name to discover security interest and by common names to discover writs

**PRIORITY RULES WITH WRITS:**

**(1) First to register - Section 35(1). UNLESS a more specific rule applies.**

**(2) If PMSI, does it fit within 35(3)?**

**OR**

**(2) Is it serial number goods? Yes – is it consumer goods or equipment?**

**If consumer goods, SP who gives value for interest will have priority if the registration does not include serial number.**

**If equipment, SP who gives value for interest will have priority if the registration does not include serial number and the SP acquires the SI without knowledge of the writ.**

**BEWARE OF PMSI and SERIAL NUMBER GOODS when dealing with WRITS.**

### priority for costs of enforcement

* see *Fast Labour Solutions Ltd v Kramer’s Technical Services Inc*

### priority consequences of bankruptcy

*Bankruptcy and Insolvency Act*

* Section 69.3 – on the bankruptcy of a debtor, no creditor has any remedy against the debtor or the debtor’s property, or may commence or continue any action, execution or other process for the recovery of a claim provable in bankrutpcy, until the trustee is discharged
* Section 70(1) …
* The effect of these provisions is that the status of a judgment creditor acquires under provincial judgment enforcement law can no longer be asserted once the judgment debtor becomes bankrupt
	+ Consequently, the priority that a writ of enforcement is given over a SI under the CEA is extinguished
	+ The federal law creates a priority flip

# pruchase money security interests, subrogation, marshalling & subordination

## purchase money security interests

### introduction

* **s 1(1)(ll)** – PMSI is a central feature of a system that recognizes that a secured party can have an interest in future property and through registration of the SI, gain priority over any subsequent security interest in that property
* Without exceptions, debtors would have great difficulty in getting additional secured credit through which to acquire new assets
	+ Because, any new assets of the kind falling within the collateral description contain in SP1’s SA and registration would be caught by the after-acquired property clause in that agreement
* **Ss 22** and **34** 🡪 create a super-priority status for holders of PMSIs
	+ **Section 22** - competition with trustee in bankruptcy
		- A PMSI in collateral [OTHER THAN INTANGIBLE]
		- Perfected not later than 15 days after the day that:
			* (i) debtor obtains possession of collateral
			* (ii) a third party, at request of debtor, obtains possession of collateral
		- has priority over interests of persons referred to in s 20(a) [ie. trustee in bankruptcy]
	+ **Section 34**
		- 34(2) A PMSI in collateral [other than intangibles]
			* that is perfected not later than 15 days after the day debtor obtains possession of collateral
			* has priority over any other security interest in the same collateral given by the same debtor
		- 34(3) PMSI in inventory
* When do PMSIs arise?
	+ Debtor obtains a loan from CIBC for purpose of acquiring 50 refrigerators to be brought into inventory in Debtor's retail appliance store. CIBC takes a SI (a "lender pmsi") in the refrigerators and proceeds and registers an appropriate financing statement.
	+ D purchases 50 fridges from GSW under a credit sales contract providing that GSW has retained a SI in the fridges and proceeds. An appropriate financing statement is registered by GSW (a "vendor PMSI").
* A lessor under a lease for a term of more than one year and a consignor under a commercial consignment are treated as having PMSIs
* SP can only claim the special priority if the SI meets the definition in **1(1)(ll)**
* **PMSI priority depends upon:**
1. Is the interest in question a purchase money security interest within the definition in s. 1(1)(ll)?
2. If it IS a purchase money security interest, are the conditions of the relevant priority rule satisfied? Which priority rule applies? Consider application of s 34 rules.

#### *Agricultural Credit Corporation of Saskatchewan v Pettyjohn*

*Facts:* Pettyjohn got approval for a $50,000 loan from ACCS to purchase 70 head of cattle (1981)

* In 1984, ACCS agreed to lend an additional $40,000 to purchase cattle and Pettyjohn executed a security agreement providing for a SI in cattle and irrigation equipment
	+ However, Pettyjohn purchased 45 head of cattle before the money was actually released by ACCS
* He did not pay for the cattle, but obtained a receipt from the seller and gave it to ACCS
* ACCS gave cheque to Pettyjohn and the seller
* Pettyjohn then borrowed from BMO to purchase 5 head of cattle and some irrigation equipment
* Pettyjohn arranged to have ACCS issue cheque to BMO
* Both mortgage and security agreement executed by Pettyjohn provided that cattle would not be sold without ACCS’s consent
* Pettyjohn sold all 253 cattle (120 head were subject to ACCS’s security interest and 133 head in which ACCS had no interest)

*Issues:* Whether ACCS obtained a PMSI in the 1981 and 1984 cattle?

*Held:* Yes – PMSI obtained

*Ratio*: The fact that value was given after the purchase does not lead inevitably to the conclusion that its purpose was not enable the purchase, and looking at the entire series of transactions it is clear that this was in fact its purpose

* The Pettyjohns used the value given to them to pay off interim financing, but the interim financing had not be obtained as a separate transaction, but always with the view that it would be repaid through monies advanced by ACCS.

*Reasons:*

* Requirements:
	+ (1) Lender has taken a SI in the property
	+ (2) Lender has given value for the purpose of enabling the debtor to acquire rights in the property.
	+ (3) the value has in fact been used to acquire those rights.
* ACCS contends that the final loan approval letter which was sent to Pettyjohns can be treated as a unilateral contract and a binding commitment to advance credit (this is value)
	+ This would satisfy (2) and (3)
* A binding commitment is, by definition, consideration sufficient to support a simple contract
	+ It is, therefore, value in the eyes of the PPSA
	+ It is not entirely clear whether the loan approval letters issued in 1981 and 1984 themselves create a binding commitment
* Looked at the words of the loan approval – the words strengthen the implication that the final loan approval constituted an invitation to the Pettyjohns to borrow and/or purchase on the strength of the promised credit
* At least at the point when the Pettyjohns accepted this offer by relying on the final loan approval in making their purchase on credit and/or with the aid of interim financing, ACCS became subject to a binding commitment to extend credit
	+ This represents value given by ACCS to the Pettyjohns
* It is clear that the purpose of value given was to enable the Pettyjohns to acquire rights in the property in question
	+ It is equally clear that the Pettyjohns did, in fact, use this value in order to obtain those rights
* Look at the situation as a whole rather than sequentially
	+ If the value was functionally used to purchase the collateral, it is a PSMI
		- Doesn’t matter if the sequence is a little out of order (bought the collateral and then got the loan)
			* They knew the loan was coming in

**TEST: Was value given to acquire rights in the collateral** (the cattle) **and used as part of a larger commercially reasonable transaction to acquire rights in the collateral?**

#### *Battlefords Credit Union Ltd v Ilnicki*

*Facts:* - Ilnicki owes money to CU and other SPs who financed purchase of agriculture equipment and hold PMSIs in the equipment

* Ilnicki borrows from CU to consolidate his debt
* CU advances funds to Ilnicki, who pays out other secured parties

*Issues:* Is the security interest granted to CU to secure the loan a PMSI?

* With respect to the collateral in which CU previously held a PMSI? With respect to the other collateral?

*Held:* Whether the consolidation loan enabled the respondent acquire rights in or to those items which were subject to pre-existing PMSIs? The loan did enable the respondent to acquire rights in those items

* It enabled him to rid the items of PMSIs of others, interest which afford them rights in the items
* The respondent’s rights of ownership, incomplete before, became complete the moment the PMSIs of others were eliminated

*Reasons:* - So far as the security agreement covers items of that kind, it has to be taken as securing an interest of that nature

* All that distinguishes this case from *BMO v Tomyn* is that here, such prior PMSIs as existed were in some instances held by third parties, rather than by the CU
* **Refinancing of a PMSI is still a PMSI**
	+ Ilnicki acquired, when he paid off the other lenders, clear title
	+ So, it was given to enable him to acquire clear title rights (even for a moment)
	+ The moment those rights were discharged, the CU’s interest attached

*Note*: - This was about *inter partes* enforcement, but could be relevant to priorities

### conditions of pmsi priority

* PMSI as against other security interests, or PMSI against writ of enforcement
	+ PMSI in competition with trustee in bankruptcy – almost never going to apply

##### PMSI vs Trustee in Bankruptcy

* Section 22 – special priority rule that deals with the rare case of a PMSI that is perfected after debtor becomes bankrupt
	+ A PMSI is perfected within the specified 15-day period has priority over the trustee, even if the perfecting event does not occur until after the date of bankruptcy

Example:

* Day 1: SP loans D money to purchase computer equipment and D signs a security agreement giving SP a security interest in the computer equipment purchased with the loan.
* Day 2: D purchases the computer equipment using the money loaned.
* Day 10: D becomes bankrupt. SP’s security interest is unperfected at this time.
* Day 12: SP registers a financing statement.

What is the priority of the security interest v. the trustee?

* According to 20(1)(a), SP loses. However, s 22(1)(a) saves SP and they have priority.

##### PMSI v Security Interest

PMSI in all types of collateral except goods held as inventory

* Section 34(2)(a) sets out priority rule to a priority competition between a PMSI in collateral other than intangibles or inventory and any other SI in that collateral
	+ It must be a PMSI as defined in 1(1)(ll)
	+ The purchase money priority is only available if the purchase money financer perfects its security interest within 15 days after the debtor obtains possession of the collateral
* 34(2)(b) sets out priority for **intangible**
	+ Must be a PSMI (s 1(1)(ll))
	+ It must be perfected not later than 15 days after the day the security interest in the intangible attaches

**Scenario 1: PMSI v Trustee**

* January 1: SP1 takes a security interest in all D’s present & after-acquired personal property and registers describing collateral as all present & after-acquired pp
* August 1: SP2 loans D money to purchase computer equipment, and takes a security interest in the computer equipment
* August 2: D purchases the computer equipment using the money loaned by SP2
* August 10: SP2 registers describing collateral as computer equipment

**Who has priority with respect to the computer equipment?**

* Debtor bought the equipment on August 2, SP2 perfected by registration within 15 days. SP2 has priority over SP1.

**What would be the result if, instead of borrowing money from SP2, D purchased the computer equipment from SP2 under a secured installment sales contract?**

* It would not change, just a different type of PMSI.

**Scenario 2: PMSI v SI**

* January 1: SP1 takes a security interest in all D’s present & after-acquired personal property and registers describing collateral as all present & after-acquired pp
* August 1: SP2 loans D money to purchase computer equipment, and takes a security interest in the computer equipment.
* August 2: D purchases the computer equipment using the money loaned by SP2.
* August 20: SP2 registers describing the collateral as computer equipment

**Who has priority with respect to the computer equipment?**

* SP2 perfects by registration after the 15 days after the date that the debtor obtains possession of the collateral (requirements of s 34(2)(a) are not satisfied).
* If it does not have priority under s 34, then the residual priority rule applies in s 35(1)
* First to register has priority
* In this case, SP1

**Scenario 2 Variation: Additional Collateral**

* January 1: SP1 takes a security interest in all D’s present & after-acquired property and registers describing collateral as all present & after-acquired pp
* August 1: SP2 loans D money to purchase computer equipment, and takes a security interest in the computer equipment and in D’s photocopier.
* August 2: D purchases the computer equipment using the money loaned by SP2
* August 10: SP2 registers describing the collateral as computer and copying equipment

**Who has priority with respect to the computer equipment?**

* SP2 because perfected within 15 days – s 34(2)(a) applies

**Who has priority with respect to the photocopier?**

* The interest in the photocopier is not a PMSI
* The loan was not given to acquire rights in the photocopier; therefore, governed by s 35(1)
* SP1 has priority for photocopier.

**Scenario 3: PMSI in goods held as inventory**

* note: Not just serial number goods, ALL GOODS held as inventory
* January 1: SP1 takes a security interest in all D’s present & after-acquired personal property and registers a financing statement
* August 1: SP2 loans D money to purchase inventory, and takes a security interest in D’s inventory
* August 10: D acquires possession of inventory purchased using the funds advanced by SP2

First, did SP2 perfect on or before August 9. Did SP2 give notice before possession (Aug 10)? Did the notice describe the inventory by item or kind?

* If SP2 did register, and gave written notice to SP1 in the identified inventory before the debtor obtained the inventory, then SP2 has a perfected interest

**What should you advise that SP2 do to ensure it has priority?**

* If SP2 is a lender, register financing statement and deliver notice to SP1 before advancing funds or making a binding commitment to lend.
* If SP2 is a vendor, register financing statement and deliver notice to SP1 before delivering goods.
* The reason for the notice requirement 🡪 In order for the PMSI lender to take prioirity over the first financer, they must notify the first financer. This is so the first financer knows who they are being subordinated to

**Scenario 4: “in the same collateral given by the same debtor”**

in section 34(2) and 34(3)

* SP1 takes a security interest in a machine owned by D and registers a financing statement. The machine is not serial number goods.
* D sells the machine to Buyer outside the ordinary course of D’s business without SP1’s authorization (SP1’s security interest is not cut off or subordinated by the sale). Buyer borrowed the money used to purchase the machine from SP2.
* SP2 registers a financing statement within the 15-day period specified by s 34(2).

**Does SP2 have a purchase money security interest in the machine?**

**Who has priority with respect to the machine, SP1 or SP2?**

* SP2 has a purchase money security interest in the machine.
* However, s. 34(2) does not apply to give SP2 priority over SP1. SP1’s security interest is “in the same collateral” but it was not given “by the same debtor.” (SP1’s interest was given by D, SP2’s interest was given by Buyer)
* Priority is determined under s. 35(1) – SP1 has priority over SP2 as first to register OR under the “double debtor” rule in s. 35(9) – D (D1) transferred collateral subject to SP1’s perfected security interest so SP1 has priority over a security interest granted by Buyer (D2) before the transfer (agreement between Buyer and SP2 was made before Buyer acquired the machine).

**Scenario 5: “obtains possession”**

NOTE: ss 22, 34(2) and 34(3) refer to the date when the debtor obtains possession of the collateral subject to the PMSI

* In rare instances, the property in question is delivered to the debtor before a security agreement is entered into. In that case, the relevant date is the date on which he or she becomes a debtor under the security agreement.
* June 1 – Debtor obtains a loan from Bank and gives Bank a security interest in all Debtor’s present and after-acquired personal property. Bank immediately registers a financing statement.
* September 1 – Equipment Seller delivers possession of a piece of equipment to Debtor on a trial basis. Debtor is not obligated to purchase the equipment. [not a PMSI - yet]
* September 15 - Debtor agrees to purchase the equipment and signs a secured installment sales contract giving Equipment Seller a security interest in the equipment to secure payment of its price.
* September 22 – Equipment Seller registers a financing statement perfecting its security interest in the equipment.

Seller has a PMSI in the equipment (security interest secures payment of the purchase price of the equipment).

**Who has priority as between Bank and Seller?**

* Ask, when did D obtain possession *as debtor* under the security agreement with Seller?
* Debtor “obtains possession” of the equipment for purposes of s. 34(2) on September 15
* Seller perfected within 15 days of that date so has priority over Bank

**Scenario 6: PMSI v SI in serial number consumer goods**

Personal Property Security Regulation

34(1)  Where a financing statement is submitted for registration in respect of a security interest in collateral that is serial number goods,

(a) if the goods are consumer goods, the secured party must provide a description of the goods by serial number in accordance with section 35, and

(b) if the goods are equipment or inventory, the secured party may provide a description of the goods in accordance with section 36 or by serial number in accordance with section 35.

* SP1 lends D money to purchase a new family minivan and D uses the money to buy the van. D grants SP1 a security interest in the van to secure the loan.
* SP1 registers a financing statement before advancing the funds to D but does not include the serial number of the van or makes a seriously misleading error in entering the serial number (i.e., a serial number search does not produce the registration).
* SP2 lends money to D secured by a security interest in the minivan. SP2 registers a financing statement that includes the serial number of the van.

**Who has priority with respect to the new minivan? What priority rule governs? Does the fact that SP1 holds a PMSI in the minivan affect the outcome?**

* SP1 has an unperfect SI in the minivan (consumer good, needed serial number)
* SP2 is perfected
	+ But not under the PMSI rule because it only applies if the SI is perfected not later than 15 days after debtor obtains possession
* SP2 just wins under s 35(1)

**Scenario 7: PMSI v SI in serial number equipment**

* SP1 lends D money to purchase a new minivan for use in her business and D uses the money to buy the van. D grants SP1 a security interest in the van to secure the loan.
* SP1 registers a financing statement before advancing the funds to D but does not include the serial number of the van or makes a seriously misleading error in entering the serial number (i.e., a serial number search does not produce the registration).
* SP2 lends money to D secured by a security interest in the minivan. SP2 registers a financing statement that includes the serial number of the van.

**Who has priority with respect to the minivan? What priority rule governs? Does the fact that SP1 holds a PMSI in the minivan affect the outcome?**

* SP1 has a perfected security interest in the minivan as equipment (serial no. not required)
* Is this a PSMI? Yes. Is it perfected? Yes. Within 15 days of possession? Yes.
* SP1’s perfected interest has priority under s 34(2) as a PSMI
	+ No priority under 35(1) without the serial number
* **Buckwold**: this is a mistake in the statute, shouldn’t be allowed to win under s 34(2) but not 35(1)
	+ Can’t think of the policy rationale to allow priority without a serial number if the equipment is a PMSI but not as a regular security interest

### competing pmsi and pmsi in proceeds

* You can have two PMSIs in the same collateral
* There could be two lender PMSI in the same collateral or one lender PMSI and one vendor PMSI in the collateral
* **S 34(5)** 🡪 gives priority to the vendor PMSI in the second case above
* A competition between two lender PMSIs will be resolved under the residual rules of s 35 since no specific priority rule applies

**Scenario 8: Vendor PMSI v Lender PMSI**

* D obtains a loan from a bank (SP1) to make a down payment on a new car, and uses the money for that purpose.
* D finances the balance of the purchase price under a secured installment sales contract with the seller (SP2).
* Both SP1 and SP2 register proper financing statements within 15 days after D takes possession of the car.

**Who has priority with respect to the car?**

* SP2: the seller
* If D defaults, there won’t be enough $ to pay out both SP

**Scenario 9: Lender PMSI v Lender PMSI**

* D obtains a loan from a bank (SP1) to make a down payment on a new car, and uses the money for that purpose.
* D finances the balance of the purchase price under a secured installment sales contract with the seller (SP2).
* Both SP1 and SP2 register proper financing statements within 15 days after D takes possession of the car.

**Who has priority with respect to the car?**

* S 35(1) applies – first to register wins
* If we applied the PMSI priority rule, priority would be circular
* If no rule applies, resort back to s 35

### cross-collateralization

* Gives rise to complex priority problems

**Scenario 10**

* SP loans $20k to D to enable D to purchase a new car and D uses the money for that purpose
* Under the security agreement SP is given a security interest in the car and in “all present and after acquired property” of D

In this instance, SP has a purchase money security interest in the car, and a nonpurchase money security interest (ordinary security interest) in D’s other personal property. If SP were to attempt to enforce its security interest through seizure and sale of property other than the car, SP would not be entitled to claim PMSI status as against another other secured party holding a security interest in the property in question.

**NOTE/Buckwold:** Students are expected to be able to recognize the extent of the PMSI in a scenario of this kind (i.e. the amount that remains outstanding on the $20,000 loan with respect to the security interest in the car).

**Scenario 11**

* SP loans $20,000 to D to enable D to purchase a new car and D uses the money for that purpose
* Under the security agreement SP is given a security interest in the car to secure the money advanced for its purchase, and to secure any other obligation that might be owed by D to SP
* SP subsequently loans an additional $5,000 to D, which is used for purposes other than purchasing the car

SP has a purchase money security interest in the car to the extent of any unpaid balance of the $20,000 purchase money loan. However, SP’s security interest in the car does not have PMSI status with respect to any unpaid balance of the $5,000 non-purchase money loan. It will be necessary in a case of this kind to determine whether payments made by D to SP should be allocated to satisfaction of the purchase money loan or to satisfaction of the non-purchase money loan in order to determine the priority status of SP’s interest as against a competing secured party

**NOTE/Buckwold**: Students are expected to be able to recognize the extent of the PMSI in a scenario of this kind but are not expected to determine allocation of payments unless payment allocation is explicitly specified.

##### Summary: Solving a priority competition involving a security interest that may be a PMSI

* Is each security interest attached and perfected with respect to the collateral in question?
* Is either security interest (or both) a PMSI with respect to the collateral in question?
	+ Apply the definition.
* If a PMSI is involved, what is the relevant priority rule?
	+ If the competition is with a trustee – consider s 22(1) - but note that if the security interest is perfected **before** the date of bankruptcy, it will have priority whether or not it is a PMSI – applicable rule is s 20(a)
	+ If competition is with a competing security interest given by the same debtor, is the collateral non-inventory goods [s 34(2)], intangibles [s 34(2)], or goods held as inventory [s 34(3)]?
	+ If competition is between competing PMSIs – does s.34(5) apply? (i.e. vendor PMSI v. lender PMSI)
* Are the requirements of the priority rule satisfied?

## subrogation

* Developed in equity
* In certain categories, will permit one party to exercise the rights of another
* Not explicitly recognized in the PPSA but has been given effect in terms of priority
* Can change priority contractually
* Doctrine permits one party to exercise the rights of another
	+ E.g. Debtor owes money to Creditor A
		- Creditor A has a right to recover from Debtor
		- Third Party B pays Debtor's debt to Creditor A
		- Third Party B is subrogated to Creditor A's right to recover the debt.
* QUESTION: Can you assume a priority status based on the exercise of subrogated rights?
	+ PPSA does not explicitly recognize subrogation
	+ Following case involves an *inter partes* dispute between SP and a trustee in bankruptcy, but the doctrine might also operate where the priority dispute involves competing SPs.

#### *N’Americ Logistix Inc, Re*

*Facts:* Feb, 2001 – Bankrupt’s banker, the BNS, issued a demand requiring that the Bankrupt (B) repay the sum of approximately $400,000 within 45 days.

* B could not do so, therefore, it sought financing from a factor EBF to permit N’Amerix to operate and to repay BNS
* March 27, 2001 – N’Amerix entered into an agreement in writing with EBF to factor some of its A/R
	+ The factoring agreement expressly contemplates EBF registering its SI, however, there is an error in the name of Debtor.
* Aug 20, 2001 – First PPSA Search did not indicate a registration by EBF against the Factored Receivables or any receivables or other collateral of the Debtor.
* Aug 30, 2001 – reflects same results as First PPSA Search
	+ EBF registered a financing statement in the incorrect name
* Aug 31, 2001 – N’Amerix filed an Assignment in Bankruptcy. EBF sent letters to N’Amerix’s customers advising that upon receipt of the notice “you are required to remit any and all payments owed to N’Amerix to EBF”
* Sept 5, 2001 – Third PPSA Search indicates that EBF filed a Financing Change Statement on September 4, 2001 to amend the business debtor name

*Issues:* If the security interest held by the BNS had priority over the debtor’s trustee in bankruptcy, can EBF assert priority over the trustee with respect to the amount advanced to pay out BNS?

*Held:* EBF is entitled to assert its claim for subrogation pursuant to the perfected SI held by BNS

*Reasons:*

*Law*

* **S 20(1)(b)** provides that until perfected, a SI in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy
* **S 72** – principles of law and equity… shall supplement this Act and shall continue to apply.
* Ziegel text: Subrogation as an available remedy is explicitly recognized in s 63(11) of Ontario PPSA and is implicitly recognized in s 72 of the Act preserving the general principles of common law
	+ Subrogation is a broad and flexible remedy seemingly available, to prevent unjust enrichment, where a person makes payment to a creditor at the debtor’s request or guarantees payment at the creditor’s request, or where the payment is made to a creditor to protect the legitimate interest of the payor.
* Note: AB PPSA – s 66(3) preserves the general principles of common law.

*Analysis*

* Defines subrogation from Black’s
* The fundamental principle underlying the doctrine is one of fairness in light of all circumstances (Mutual Trust Co)
* Based on the material, EBF has paid an obligation of N’Amerix to BNS with the knowledge and approval of all parties on the understanding that EBF would thereby obtain a first priority position over the A/R of N’Amerix charged in favour of BNS
* This arrangement meets the criteria for subrogation by EBF to the position of BNS to the extent of the funds advanced by EBF to pay out the operating loan of N’Amerix
* Subrogation does not create a new SI, but rather determines who may exercise and/or receive the benefit of the SI
	+ If it does create a new security interest, it would mess up priorities under the PPSA
* However, this is kind of a legal fiction because usually, once debt is paid out, there is no interest
	+ A security interest is ancillary to a debt, if there is no debt, there is no security interest
* Nothing in the PPSA requires the subrogation right of EBF to be perfected by registration in order for the BNS SI to be regarded as perfected
* Accordingly, s 20(1)(b) does not impede the recognition under s 72 of subrogation right of EBF

*Note:* this case was between a secured party and trustee, but the doctrine of subrogation may also operate where the priority dispute involves secured parties

* What is the difference between subrogation and assignment?
	+ For an assignment to be recognized, there must be an agreement
	+ Subrogation is a right that arises by operation of law
		- With subrogation, they are acquiring the right to assume the debt
	+ In an assignment, you are effectively acquiring the entire agreement

### Subrogation in a priority competition between security interests

* Principle in the above case can be applied to priority competitions as between SPs.
	+ SP1 registers a financing statement in respect of a SI that secures a loan of $50,000. Later, SP2 is given a SI in the same collateral, which SP2 perfects by registration. SP3 then makes a loan of $100,000. Half of these funds are used to pay out SP1’s loan, while the other half is used as a general operating loan.
		- Because SP3 is subrogated to SP1’s interest, SP3 can claim priority over SP2 to the extent of the value of the obligation owed to SP1 when SP1 was paid out; that is, to the extent of $50,000.
* Normally, when a debt is paid out, the security interest is discharged. However, the courts have been prepared to adopt the legal fiction that the paying creditor may take the benefit of the paid creditor’s security even though the debt supporting the security and the rights associated with it have been extinguished. It is not clear though whether the subrogated creditor is treated as having assumed the pre-existing security interest of the paid creditor or whether the subrogated creditor’s rights are based on a new SI or charge arising in equity. *N’Amerix Logistix* appears to have adopted the first view.
* Some authorities suggest that a right of subrogation might arise when a person’s money is used to pay a debt even if the person did not intend it to be so used. The availability of subrogation in such a case may depend on whether the debtor misappropriated the money received from a third party.

##### Application of subrogation to *Battlefords Credit Union v Illnicki*

* Most commentators would say that subrogation would be a better way to approach the particular case.
* If CU funds are used to pay out SP=A - D, is CU subrogated to the rights associated with their PMSIs? Yes.

## marshalling

Another equitable doctrine that may be invoked in the context of competing claims to property asserted by secured creditors is the doctrine of marshalling.

#### *Holnam West Materials Ltd v Canadian Concrete Products*

*Facts:* ATB held a SI in a variety of assets of the debtor, including a number of gravel trucks

* Holnam also held a SI in the trucks
* When Holnam had the trucks seized to enforce its security interest, ATB applied to the Court for a declaration of its priority, for an order setting aside the seizure and for an order prohibiting the removal of the truck

*Issues:* Whether Holnam was entitled to claim the trucks as against ATB under the doctrine of marshalling?

*Held:* No (?)

*Reasons:*

*First Investors Corp v Veeradon Developments*

* Where there are two creditors of the same debtor, one creditor having a right to resort to two funds of the debtor for payment of his debt, and the other a right to resort to one fund only, the court will so marshall or arrange the funds that both creditors are paid as possible
* Marshalling would apply if ATB had enforced its security producing sale proceeds more than adequate to satisfy its debt
* Marshalling would then compel it to turn last to the gravel truck proceeds, thereby allowing Holnam the balance of those proceeds.
* However, ATB has not enforced its security
	+ Equity does not allow or compel this Court to require it to do so to see Holnam paid
	+ Marshalling does not deprive the senior creditor of its right to decide when to enforce its security

### Notes

* There are two theories of marshalling
	+ Coercion theory
	+ Subrogation theory
* Scenario:
	+ SP1 has a security interest in collateral X and collateral Y
	+ SP2 has a subordinate interest in collateral X only
* Coercion theory – the court would order SP1 to satisfy its calim by proceeding first against collateral Y, leaving X to SP2
* Subrogation theory – SP1 would be permitted to proceed against collateral X if it wished to do so, but SP2 would be subrogated to SP1’s interest in collateral Y, in which SP2 does not have an independent interest
	+ SP2 is entitled to assume SP1’s position as against Y to the extent of SP2’s claim
* **Predominate view** 🡪 Canadian courts will apply the subrogation theory of marshalling
* Marshalling is not allowed where its application would prejudice the interests of third parties in the property

**Scenario**

* SP1 holds a security interest in Debtor’s manufacturing equipment and inventory.
* SP2 holds a security interest in Debtor’s manufacturing equipment.
* SP2’s security interest is subordinate to SP1’s
	+ Debtor owes SP1 $50,000
	+ Debtor owes SP2 $30,000
	+ The manufacturing equipment is worth $30,000
	+ The inventory is worth $60,000

**If SP1 takes action to enforce its security interest, can SP2 do anything to protect it’s right to recover from the manufacturing equipment?**

* SP2 might seek a marshalling order against SP1. Either:
1. The coercion theory: SP1 must recover the $50,000 debt by seizing the inventory, leaving the manufacturing equipment available to SP2, or
2. The subrogation theory (more likely): SP1 may choose to enforce by seizing the manufacturing equipment (or some equipment and some inventory), but SP2 is subrogated to SP1’s rights against the inventory (i.e. SP2 may exercise SP1’s rights).

**RESULT**: Both SP1 and SP2 recover in full. Without marshalling, SP1 could enforce against the manufacturing equipment leaving nothing available to SP2.

## subordination

* Several features of the Act give rise to the necessity to use subordination agreements
	+ The ability to take and perfect broadly-based security interests in a debtor’s allpaapp
	+ The effect of the first in time priority rules of s 35
	+ The ability to register a financing statement before a security agreement has been executed (s 43(4))
	+ The power to tack future advances as provided in s 35(5)
* The PPSA permits the secured party who first deals with a debtor to establish a priority position with respect to the debtor’s property that may seriously constrain the debtor’s ability to obtain financing from other credit providers
* Subordination agreements are used to reverse the priority rules that would otherwise prevail where a debtor is seeking non-purchase money financing from a creditor who is not the first to register
	+ A subordination agreement can be between
		- subordinating creditor and benefiting creditor
			* E.g. In scenario, SP1 agrees with SP2 to subordinate SP1's interest to SP2 to the extent of a specified amount.
		- subordinating party and the debtor for the benefit of another person or persons claiming an interest in D's property
			* E.g. In scenario, SP1 enters into an agreement with D to subordinate SP1's interest to a subsequent SP to the extent of a specified amount.
* **S 40** of PPSA recognizes the effectiveness of both kinds of subordination agreements
	+ Doesn’t **create** subordination

**Scenario:**

1. SP1 has a security interest in all D’s present and aapp perfected by registration. The amount currently owed to SP1 under the security agreement is $100,000.
2. D approaches SP2 for further non-purchase money financing SP2 requires an assurance that she will have priority with respect to any proceeds of realization after SP1's senior claim to $100,000 is satisfied.

**The solution:**

SP1 (the subordinating creditor) agrees to subordinate any claim in excess of $100,000 to the claim of SP2, to the extent of an identified sum (e.g. maximum of $40,000).

* + SP1 ultimately loans $130,000 to D.
	+ SP2 loans $30,000 to D.
	+ The collateral is worth $150,000.

**Result:** SP1 is entitled to the first $100,000 of the proceeds of sale of the collateral. By virtue of the subordination agreement, SP2 is entitled to the next $30,000, and SP1 will receive the remaining balance of $20,000 for a total of $120,000 (less costs of realization).

If SP2 loaned $50,000 to D, $100,000 goes first to SP1, then $40,000 to SP2, the balance of $10,000 to SP1 (SP1 agreed to subordinate to a maximum of $40,000).

**Note:** Would a subordination agreement be required if SP2 were advancing funds or credit to enable D to acquire new property? No, in this case, SP2 would be acquiring PMSI-status and therefore, as long as there is attachment, perfection and it meets the definition of PMSI, **s 34 priority rules apply.**

#### *Royal Bank of Canada v General Motors Acceptance Corp of Canada*

*Facts:* CIBC, GMAC, and RBC all had perfected SIs in eight units of equipment owned by HEL, who had become bankrupt in March of 2002

* It was established that the priority ranking of the 3 SPs’ claims as determined by the PPSA priority rules were
	+ (1) CIBC
	+ (2) GMAC,
	+ (3) RBC
* However, CIBC and RBC had entered into a subordination agreement under which CIBC agreed to subordinate its interests to RBC

*Issues:* : Whether by virtue of subordination (a) RBC moves up to stand in place of CIBC and thereby gains priority over GMAC; or (b) while CIBC ranks in priority behind RBC, nonetheless GMAC retains its priority over RBC.

*Held:*

*Reasons:* - Looks at s 40 of the *PPSA*

* (1) Case law establishes that from the fund, the amount secured by the subordinated security interest is set aside to pay the benefiting creditor’s claim first
	+ The balance, if any, then goes to pay the subordinated creditor’s claim, and then to pay any intervening creditor’s claim, if there is still a balance
* (2) If the subordinate creditor chooses not to enforce its subordinated SI, the balance, after payment of the benefiting creditor’s claim first, then goes to pay any intervening creditor’s claims
* (3) Thus, the benefiting creditor, by virtue of subordination, is paid first, but only to the amount of the subordinated creditor’s claim or the benefiting creditor’s claim, whichever is less..

*Application*

* CIBC chose not to enforce its higher ranking SI, the balance, after payment of the debt amount secured by RBC’s lower ranking security interest first, goes directly to pay the debt amount secured by GMAC’s intervening SI
* Because there is no balance, GMAC is not entitled to any payment from the fund
* Thus, RBC, by virtue of CIBC’s higher ranking subordinated SI, is paid first, but only to the amount secured by CIBC’s high ranking subordinated SI, to which GMAC’s security interest was, in any event, junior
* CIBC did not seek to enforce its high ranking SI, but if it did it would have received what it expected, the fund less the amount secured by RBC’s lower ranking benefiting security interest
* **The result is equitable**

**When does a negative pledge clause in a security agreement operate as a subordination agreement in favour of the interests named in the clause?**

* Subject to the exceptions below, the [debtor] warrants that the property that is collateral under this agreement is not subject to any security interest, lien or encumbrance and that the [debtor] shall not give any other security interest or charge on the said property without the express consent (which shall not be unreasonably withheld) of the [secured party]. The exceptions are:
	+ (a) a purchase money security interest;
	+ (b) a lien arising in ordinary course of business.
* **IDEA**: If the debtor does give a security interest to someone else, the debtor is in default which means the SP can seize the collateral. BUT except that, the debtor gives someone a PMSI, that will not be regarded as a default.

**Scenario**:

* SP1 takes a security interest in all present and after-acquired personal property of Debtor and registers. The security agreement between SP1 and Debtor contains a provision similar to that reproduced above.
* Debtor borrows money from SP2 to acquire inventory or other goods and gives SP2 a security interest in the goods – i.e., SP2 has a purchase money security interest in the goods acquired. SP2 fails to perfect its security interest within the period of time required to establish the PMSI priority under s. 34(2) or (3) or does perfect but allows its registration to lapse
	+ SP1 has priority over SP2 under the PPSA rules. But is SP1’s interest subordinated to SP2’s purchase money security interest on the basis of the wording of the agreement [regardless of whether it is perfected]?
		- In this case, there is no express wording in this agreement that talks about priority.

#### *Kubota Canada Ltd v Case Credit Ltd*

*Facts:* - Kubota held a first-ranking PMSI in equipment supplied to the debtor but had allowed its registration to lapse, with the result that Case Credit’s competing general SI took priority under the default rule in s 35(1).

* Kubota argued it took priority over CC as a result of a negative pledge clause in the SA between the debtor and CC
	+ The clause held that the debtor would keep the collateral free from other Sis (essentially a subordination clause)

*Ratio:* Not a subordination agreement unless the wording used in the perfected security agreement acknowledges a priority for the PMSI.

* “An unperfected PMSI will have priority over a perfected security interest where the agreement creating the latter contains subordination provisions to that effect. Those provisions need not be express, **but before subordination will be implied, the wording used in the perfected security agreement must acknowledge a priority for the PMSI**. Here, there is no such implication in the wording, but merely a warranty as to ownership of the collateral, and a covenant to maintain it free from encumbrances other than PMSIs.”
* It has to do more than the debtor may give a PMSI, it has to include language that says that any PMSI given by the debtor will have **priority.**

**Compare:**

***Kubota*: Not a subordination agreement**

…the Debtor will not… create… any… encumbrance (on the property subject to this agreement)… other than… [a PMSI]

 **(Arguably) is a subordination agreement**

. . the Debtor will not … create … any… encumbrance (on the property subject to this agreement)… ranking or purporting to rank or capable of being enforced in priority to or *pari passu* with the Security, other than … [a PMSI].

* That could be a subordination agreement.

NOTE: This is an artificial distinction. The Court will not readily find a subordination agreement with a negative pledge.

# proceeds and negotiable property

**Strategy for Considering a SI in Proceeds**:

1. Attachment: is the property in question “proceeds” as defined by **s. 1(1)(jj)**? If the original collateral was subject to a SI, the SI will attach to “proceeds” by operation of **s. 28(1)(b)** – i.e. automatically. No need to consider **s. 12(1)** for the proceeds of the SI
2. Perfection: if the problem involves a priority competition, is the SI in the proceeds collateral perfected? **(s. 28(2))**
3. Priority: what priority rule applies?
	1. A SI in proceeds is simply a ‘SI” and is subject to the priority rules that apply to SI’s generally **(s. 35(1))**
	2. A special priority rule may expressly apply to a SI in original collateral “or its proceeds” (**s. 34(2),(3)** and **(5)** PMSI priority rules)
	3. In a few instances there are a special priority rules for a SI in proceeds (**s. 34(6)** and **(7)** PMSI priority rules)

## proceeds: the concept and its function

* PPSA provides a statutory right to assert a security interest in “proceeds” of collateral (**s 1(1)(jj)** and **28(1)**)
* If a debtor sells property that is subject to a security interest, the secured party is given an automatic statutory security interest in property received in exchange so long as that property fits within the definition of proceeds
	+ The SA does not have to explicitly provide for an interest in proceeds
* **S 28(1)** limits the ability of a secured party to enforce a security interest in both original collateral and proceeds if the security interest in the original collateral continues in the hands of the person who takes it from the debtor
	+ The security interest in the collateral is limited to the market value of the collateral at the date of the dealing
		- E.g. Debtor sells widget worth $30,000 for $20,000
		- SP can enforce against the widget (if the interest was not cut off or subordinated) and the cash proceeds but only to the extent of the $20,000
			* SP cannot recover the full $30,000 by enforcing against proceeds and widget

#### *Canadian Imperial Bank of Commerce v Marathon Realty Co Ltd* (SKCA)

* CA held that the Bank’s PMSI in the original inventory carried through into the proceeds generated by its sale and on into the subsequent generations of proceeds created by subsequent transactions
* The result is that if a SI in original collateral is a PMSI, the SI in proceeds of the original collateral or in proceeds arising under s 28(1) is a PMSI (don’t take this too literally).
* The effect of s 28(1) is that a security interest attaches automatically to property that meets the definition of “proceeds”
	+ **Does s 13(2) create an exception where the proceeds of property is consumer goods?**
		- It is unclear whether it would prevent attachment, but **Wood** would think it shouldn’t
		- Proceeds do not constitute after-acquired property in the sense of bringing new value into the debtor’s assets base so as to fall within the policy of underlying the restriction
			* It’s an exchange of value of the original collateral
* **S 35(3)** 🡪 provides that the priority status of the SI in the original collateral carries over to the proceeds when a competition with another SI is involved
* If a SI in original collateral is a PMSI,  **s 34** allows the secured party to claim the special PMSI priority status for an SI in proceeds
	+ The proceeds SI is technically not a PMSI because it doesn’t fall within the definition, but the fact that it may have PMSI priority status explains the fact that such an interest is referred to in some provisions of the Act as a “PMSI in proceeds”
		- Proceeds PMSI

## perfection of a security interest in proceeds

* A SI in proceeds is treated as a continuation of the SI in the original collateral, but the proceeds are treated as separate property for the purposes of perfection of the SI that continues in them
	+ **S 28(2)-(3)**
* **28(2)** **RESULT:** A security interest in proceeds is perfected if the security interest in the original collateral was perfected by the registration of a financing statement and:
	+ the collateral description provided in the financing statement meets the requirements of (a) or (b), or
	+ the proceeds are money, cheques, or deposit accounts under (c)
* The need for a perfecting step in relation to a SI in proceeds follows from the reference to s 28 in the priority rules themselves
* **S 35(3)** 🡪 subject to s 28, for the purpose of default priority rules in s 35(1) the time of registration, possession or perfection of a security interest in proceeds is deemed to be at the time of registration, possession or perfection of the SI in the original collateral from which the proceeds were derived
* **S 28(2)-(3)** 🡪 provide the rules applicable to perfection of an SI in proceeds
	+ With one exception, the approach taken is to treat proceeds collateral as if it were separate *original* collateral
		- If the original financing statement does not contemplate proceeds, a new statement must be registered to include an appropriate description
			* **S 37 regs** specifies the description requirements relating to proceeds in cases that fall within ss 28(2)-(3)
* An SI in proceeds is perfected by registration of the financing statement relating to the original collateral if:
	+ **S 28(2)(a)** and **PPSR s** 37 🡪 The security interest in the original collateral was perfected by registration of a financing statement containing a description of the original collateral **and the proceeds**
		- E.g. automobiles and proceeds: accounts, chattel paper
	+ **S 28(2)(b)** 🡪 the proceeds collateral and the original collateral are of the same kind
		- E.g. there is no need to describe the collateral as “automobiles and proceeds in the form of automobiles”
	+ **S 28(2)(c)** 🡪 the proceeds consist of money, a cheque or a deposit account in a bank or other deposit-taking institution such as a credit union
		- **Assumption**: everyone should know that a secured party claims property of this kind as proceeds
* Temporary Perfection
	+ **S 28(3)** 🡪 confers temporary, unconditional perfection of a SI upon proceeds
	+ If the case doesn’t fall into one of the above, perfection terminates upon the expiration of 15 days after the SI attaches to the proceeds unless the proceeds SI is otherwise perfected by some other method

## the scope of the concept

### identifiable or traceable

* The definition of proceeds in **s 1(1)(jj)** requires that, in order to qualify as proceeds, personal property must be identifiable or traceable as property derived from a dealing with original collateral or proceeds of the original collateral
	+ The Act does not explicitly indicate what constitutes “identifiable” personal property
* SKCA 🡪 personal property is “identifiable” proceeds when the evidence discloses a direct connection between that property and the original collateral or an earlier generation of proceeds
* No longer identifiable if it is comingled with other property
	+ Could still be traceable
* E.g. debtor sells inventory and receives cash: first generation proceeds, identifiable
	+ The cash is deposited in a bank, the debtor ceases to have an interest in the cash but now acquires an account: second generation proceeds
		- This account will be identifiable only if there are **no** other funds deposited in the account
	+ The cash can be withdrawn and used to purchase a car: third generation proceeds
* Traceable is separate from identifiable
	+ Tracing rules are a central feature in the law of trusts, which is in turn a branch of the law of equity
	+ Using tracing rules, a court can conclude that the beneficial interest in the original trust property can be traced into other property acquired by the trustee even though there is no demonstrable factual connection between the two
* **S 1(6)** confirms that the existence of a fiduciary relationship is not a necessary precondition to the right to trace proceeds
	+ "Proceeds are traceable whether or not there exists a fiduciary relationship between the person who has a SI in the proceeds as provided in s 28 and the person who has rights in or has dealt with the proceeds".
* Tracing remedy is not concerned with fairness between debtors and creditors, but fairness amongst creditors

#### *Universal CIT Credit Corp v Farmers Bank of Portageville,* US District Court for the Eastern District of Missouri

*Facts:* Universal CIT has a security interest in automobiles in Ryan’s inventory

* As cars are sold, the cheques given in payment are deposited in Ryan’s account with Farmers Bank
* Funds from other sources are also deposited in the account, and withdrawals are made for various reasons
* When Universal CIT terminates its financing arrangement with Ryan, Farmers Bank debits the account in the amount of $12,000 in satisfaction of the debt owed to the Bank by Ryan

*Issues:* Whether funds in Ryan’s bank account applied by the bank to repayment of Ryan’s indebtedness to it were subject to Universal CIT’s SI as proceeds of automobiles financed by Universal CIT?

*Held:* Yes, $7,605.86 is proceeds

*Reasons:*

*The lowest intermediate balance rule*:

* Where trust funds are commingled in an account with the trustee’s own funds, withdrawals are presumed to be made first from the trustee’s funds.
	+ The withdrawal must therefore come from the trust funds to the extent of any amount greater than the amount of the trustee’s own funds in the account
* Where deposits are subsequently made to the account, they are presumed not to be in restitution of trust funds previously withdrawn
	+ Unless the trustee evidences an intention to make restitution

*As applied to a security interest*:

* Where proceeds funds are commingled in an account with the debtor’s own funds, withdrawals are presumed to be made first from the debtor’s funds
	+ The withdrawal must therefore come from the proceeds funds to the extent of any amount greater than the amount of the debtor’s own funds in the account
		- Withdrawals come first from non-proceeds.
* Where deposits are subsequently made to the account, they are presumed not to be in restitution of proceeds funds previously withdrawn
	+ Commentators argue that whether the debtor intended to make restitution by depositing additional funds is not relevant to tracing under the PPSA
	+ Once proceeds funds are withdrawn from the account they are gone and cannot be regarded as having been replaced by a subsequent deposit of non-proceeds funds



In *PPSA* terms, A has property subject to SP’s security interest. A sells the property gets $1,000 in proceeds. A deposits $1,000 in a bank account with $1,000 of A’s own money. A then withdraws $1,500 out of the account ($500 remains). Money first comes out of A’s own money. A later deposits $1,000 of his own in the account, bringing the balance to $1,500. SP is only entitled to $500



Debtor has bank account with $5,000 (none of it is proceeds). Debtor deposits $15,000 in proceeds. Debtor then withdraws $10,000 – withdrawal comes first from debtor’s own money (that is $5,000 is proceeds, and $5,000 is non-proceeds). Subsequent non-proceeds deposits do not reimburse proceeds.

**NOTE**: They would still have a unsecured claim for the balance of the proceeds.

##### Notes Post Case

* Where proceeds funds are deposited with other funds in the debtor’s bank account, the lowest intermediate balance rule assumes that withdrawals from the account are made first from the debtor’s own funds
	+ This presumption will not always work in favor of the secured party claiming the proceeds SI

**Scenario One**

* SP1 has a security interest in Debtor’s bike and SP2 has a security interest in Debtor’s TV.
* Debtor sells the bike and deposits the $200 proceeds in her bank account (creating a balance of $200).
* Debtor subsequently sells the TV and deposits the $200 proceeds in her bank account (creating a balance of $400).
* Debtor withdraws $250 from the account (leaving a balance of $150).

How should the balance of $150 be allocated as between SP1 and SP2?

* 2 possible tracing rules applied.

Consider:

* The Rule in Clayton’s case: The first funds deposited are presumed to be the first drawn out.
	+ **First in first out.** First funds deposited are the first to be withdrawn. If you applies this, SP1 gets nothing and SP2 gets $150.
* The “pro rata ex post facto” approach (see non-PPSA tracing case *Ontario (Securities Commission) v Greymac Credit Corp*)
	+ You look at the proportion of the fund that was contributed from each of the two sources. Before the money was withdrawn, there was $400 in the account… ½ came from SP1 and ½ from SP2. What is left is divided ½ and ½ between SP1 and SP2 – each gets $75.
		- This is more likely the approach that will be applied

**Scenario Two**

* SP1 has a security interest in debtor’s bike and SP2 has a security interest in debtor’s TV.
* Debtor sells the bike and deposits the $200 proceeds in her bank account (creating a balance of $200).
* Debtor withdraws $100 from the account (leaving a balance of $100).
* Debtor subsequently sells the TV and deposits the $200 proceeds in her bank account (creating a balance of $300).
* Debtor withdraws $100 from the account (leaving a balance of $200).

Consider:

* The rule in Clayton’s case: The first funds deposited are presumed to be the first drawn out.
	+ SP1 would get nothing. SP2 would get $200.
* The “pro rata ex post facto” approach.
	+ SP1 gets $100 and SP2 gets $100. BUT THAT IS WHAT YOU DO ACCORDING TO THE FOLLOWING CASE.
* The “pro rata on the basis of tracing, or LIBR” approach. (See non-PPSA case *Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)*)
	+ $200 in the bank account that is SP1’s proceeds. D withdraws $100 leaving $100 in the account. How much in the account is SP1’s proceeds? $100. Anything that goes back into the account does not replace the proceeds that are withdrawn.
	+ SP2 goes in creating a balance of $300. At that point, amount in account is 1/3 SP1 and 2/3 SP2’s
	+ From the mixed funds, debtor withdraws $100
	+ The $100 withdrawn is 1/3 from SP1 and 2/3 SP2’s
	+ Therefore, SP1 gets 200/3 and SP2 gets the remainder
		- IE: Only apply the pro rata sharing to the mixed funds.

**Scenario Three**

* Debtor has $100 of her own money on deposit in a bank account
* SP1 has a security interest in debtor’s bike and SP2 has a security interest in debtor’s TV
* Debtor sells the bike and deposits the $200 proceeds in her bank account
	+ Creating a balance of $300
* Debtor withdraws $200 from the account
	+ Leaving a balance of $100
* Debtor subsequently sells the TV and deposits the $200 proceeds in her bank account
	+ Creating a balance of $300
* Debtor withdraws $100 from the account (leaving a balance of $200).
	+ SP1 has 1/3 and SP2 has 2/3. Answer is the same in previous question.
* **Apply lowest intermediate balance thinking**

#### *Agricultural Credit Corp of SK v Pettyjohn*

*Facts:* The proceeds of the sale of ACCS cattle were deposited in Pettyjohn’s Bank of Montreal bank account, along with proceeds of the sale of cattle in which ACCS has no interest

* Sums deposited to the account by Pettyjohn were routinely credited to his overdraft with the BMO
* Pettyjohn drew on this account to purchase the new herd of cattle
* CA declined to apply the equitable principles applied to tracing money through a mixed funds; instead, it articulated a new “functional” principle

*Issues:* Whether a smaller herd of a different breed of cattle purchased by Pettyjohn to replace his original herd constituted proceeds of the original cattle in which ACCS held its PMSI?

*Held:* ACCS may trace from 1981 and 1984 cattle to the new Watusi cattle because the new Watusi cattle replaced the 1981 and 1984 cattle in the farming operations of the Pettyjohns as a matter of commercial reality.

*Ratio*: Appropriate principle of tracing is that where a set of chattels is replaced by another of like function in the affairs of the debtor, it shall be open to the Court to find that the proceeds from the first were used to acquire the second, no matter what the form of the transaction is. Formalities of transaction might be important for whether the transaction is characterized as a replacement.

* **FUNCTIONAL REPLACEMENT TRACING RULE** (cows for cows rule)

*Reasons:* Section 28(1) of PPSA provides that a security interest in the collateral extends to any proceeds of that collateral

* The PPSA defines “proceeds” as identifiable or traceable personal property derived directly or indirectly from any dealing with the collateral or proceeds therefrom
* PPSA does not contain any definition of tracing; therefore, must reference common law and equity
* Tracing at common law and equity is a proprietary remedy
* In establishing that one piece of property may be traced into another, it is necessary to establish a close and substantial connection between the two pieces of property, so that it is appropriate to allow the rights in the original property to flow through to the new property
* In establishing close and substantial connection, the CL and equity have focused on the form of the various transactions
	+ However, CL and equity have run into problems where the proceeds of a transaction are mixed with others; therefore, presumptions and rules have been established.
* In order to apply doctrine of tracing by subrogation in this situation, must establish:
	+ (1) Since there were a number of sources of funds both into and out of account, must connect the payments in with the appropriate payments out, using an appropriate principle of tracing
		- The principle which would cover the situation best is the rule of Clayton’s Case – in a case of a continuing account a payment shall be taken to apply to the oldest non-statute barred debt then in existence
		- Thus, the first debt would be paid by the first payment
			* **APPLICATION TO CASE**: some of the debt incurred in purchasing Watusi cattle can be connected to proceeds of 1981 and 1984 cattle, while other cannot.
	+ (2) What rights ACCS could obtain by subrogation
	+ (3) Whether the proceeds listed in the table as resulting from the sale of 1981 and 1984 cattle did result from the sale of those cattle?
* However, it will not be necessary to settle these questions.
* To hold that a **close and substantial connection** established through the substance of a series of transactions through which one set of chattels replaces another of the same kind can be sufficient to found a tracing remedy irrespective of the form in which the transactions take place
	+ Extends equitable concept of tracing to PPSA
	+ The rules are designed to ask “when do we think there is a close and substantial connection?”
* To examine the substantive nature of the transactions in question to establish a close and substantial connection between old and new property is consistent with this focus upon commercial realities (**s 64(1)**)

### the extended definition

* The definition of proceeds extend the concept somewhat beyond property received by the debtor through a dealing with the original collateral or its proceeds
* **1(1)(jj)** "proceeds" means identifiable or traceable personal property, including fixtures and crops,
	+ (i) derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and
	+ (ii) in which the debtor acquires an interest, and includes
	+ (iii) 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,
* **S 4(c)** excludes from the scope of the Act the creation or transfer of an interest in a policy of insurance "except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral"
	+ Allows the SP to claim a security interest in a right to payment under a policy of insurance where the payment constitutes proceeds under **s 1(1)(jj)(iii)**

### property in which the debtor acquires an interest

* The definition of proceeds requires both that the property in question be identifiable or traceable property deriving from dealing with the collateral or the proceeds of the collateral and that it be property in which the debtor acquires an interest

**Scenario**

* Debtor gives a security interest in a Ford automobile to SP. The security interest is perfected by registration.
* Debtor, in violation of the security agreement and without the knowledge of SP, sells the Ford to Buyer. Buyer acquires the Ford subject to SP’s security interest.
* Buyer thereafter sells the Ford to C but takes as part of the price a Chevrolet automobile from C.
* Is the Chevrolet "proceeds" of SP's security interest in the Ford?
	+ Is the Chev identifiable and traceable property? Yes, you can trace it directly to the Ford
	+ **BUT**, Debtor does not have an interest in the Chev because the buyer owns the Chev
	+ Therefore, Chev is not proceeds. SP does not acquire a SI in the Chev.
* SP has a security interest in the money given by the buyer if you can identify and trace because that is property acquired by debtor which they have rights in

## special prioirty rules applicable to a pmsi in proceeds

* **S 34** contains special priority rules applicable to priority competitions involving a PMSI in proceeds

##### S 34(6): Non-Proceeds Security Interest in Accounts v PMSI in Accounts as Proceeds of Inventory

* D takes a loan from SP1, secured by an interest in D’s accounts receivable
* SP1 perfects its SI by registration, describing the collateral as “accounts”
* D purchases inventory from SP2 on credit terms and signs an SA giving SP2 an SI in the inventory purchased to secure payment of the purchase price
* SP2 registers describing the inventory and claiming “proceeds: accounts”
* D sells inventory on unsecured credit terms, generating AR owed to D by purchasers

Does SP2 have priority over SP1 with respect to the proceeds account?

* Under **s 34(6)**, SP1’s non-proceeds SI in the accounts has priority over SP2’s PMSI
	+ S 34(3) does not apply

##### Variation

* Same facts, except SP1 has an interest in D’s account at XBank and,
* D sells the inventory and deposits the proceeds in its account with XBank
* The proceeds funds are identifiable or traceable in the account

Does SP2 have priority over SP1 with respect to the proceeds?

* S 34(6) applies and the results are the same as above
* There are two exceptions
	+ SK PPSA 🡪 s 34(7) states that (6) does not apply to an account in the form of a DTI, s 34(3) would govern and SP2 would get priority
	+ AB 🡪 Result *might* differ if SP1 and XBank were one and the same (Xbank loaned the money)
		- *Transamerica Commercial Financial Corp Canada v RBC* is viewed by some as authority for the proposition that s 34(6) does not apply where the previously registered SI in accounts is an interest in a deposit account held with the SP
			* **Note:** not a highly regarded proposition
				+ **Buckwold won’t examine us on this case**

##### S 34(7): PMSI in Property as Original Collateral v PMSI in Property as Proceeds

* D borrows money from Bank to purchase a herd of cattle, giving Bank an SI in cattle
* Bank perfects by registration, description is livestock
* 1 year later, D sells the cattle and uses the proceeds to make a down payment on the purchase of 50 head of bison from Bison-R-Us
* D finances the balance of the purchase price under an SA with BRU, pursuant to which BRU is given an SI in the Bison to secure payment of the unpaid price
* BRU registers and gives Bank the notice required by s 34(3) before delivering Bison to D
* Both the cattle and the bison are inventory

Assuming the Bison are proceeds of the dairy cattle, who has priority wrt the bison as between Bank and BRU

* Bank has a perfected PMSI in the cattle as original collateral and in the bison as proceeds
* BRU has a perfected PMSI in the bison as original collateral
* BRU PMSI was perfected when D obtained possession of the bison and under s 34(7), has priority over Bank’s PMSI

##### Variation

* Same facts, but D then sells some of the bison, depositing the proceeds in her Scotiabank account

Assuming the funds in the account are proceeds of the bison, as between Bank and BRU, who has priority wrt to the account?

* The funds in the account are proceeds of both cattle and bison
* Both Bank and BRU have a perfected PMSI in the account as proceeds
* S 34(7) does not apply, nor does s 34(6)
	+ Go back up to s 34(3), but this will lead to circular priority, and won’t work.
* Consider s 34(5)
	+ A seller PMSI has priority has priority over a lender PMSI

## security interest in negotiable property: proceeds and the position of deposit-taking institutions

### context: ppsa prioirty rules and the implications of set off

* **Section 31** priority rules are addressed to types of property that are regarded as negotiable
	+ Traditionally, a person who acquires negotiable property for value takes it free of prior interests
	+ S 31 recognizes that a person who acquires an interest in money or an “instrument” should generally be protected against a previously granted SI, subject to some qualifications
* A deposit-taking institution can be
	+ A buyer of proceeds
	+ An account debtor to the inventory seller (debtor), its customer
	+ A creditor to the inventory seller to the extent that it has made advances to the seller under a secured or unsecured loan agreement
* It is clear that when a deposit is made into an account, the bank becomes a debtor of the depositor
	+ As such, it has the rights and obligations of a debtor
	+ Some of these rights and obligations arise form law of set-off when the bank is also a creditor of the depositor
* Law of set-off: where two persons owe each other reciprocal debts, one debt can be set off against the other such that both debts are in effect cancelled to the extent of the lowest amount
	+ Set off originated as defence in a CL action
	+ Set-off (both legal and equitable) is a self-help remedy available where judicial proceedings have not been initiated by either obligor/debtor
* What kind of money is applying here?
	+ If it is either money or instrument, then consider whether these apply or not
		- **S 31(1)**: Security Interest in Money (ie. physical currency) v a Transferee or “Holder”
		- **S 31(2)**: Security Interest in an instrument drawn or made by the debtor v a creditor receiving the instrument in payment of debt
		- **S 31(3)**: Security interest in an instrument v a “purchaser” of the instrument – includes a person who acquires a subsequent SI
			* And see s 31(5) regarding the requirement of lack of knowledge

### basic principles of set off

* Bank *might* recover the debt owed to it by Customer by asserting set-off
	+ They do not need to sue
	+ Has to be (1) mutual (2) debts
* There is an exception to set-off: precluded if person asserting set-off has knowledge of a 3rd party’s interest in the obligation against which set-off is asserted before the right of set-off accrues
	+ E.g. if funds deposited in the account are subject to a SI. Bank cannot assert set-off against the account and defeat the SI if it has knowledge of the SI before or at the time funds are deposited.
* Application of s 31 priority rules: *PPSA s 31* priority rules may apply in favour of Bank
	+ Funds may be deposited in a bank deposit account by an account holder customer in cash, by cheque or by electronic funds transfer – i.e. Bank receives cash, cheque or funds transferred and credits Customer’s account with an equivalent amount.
	+ If the property received by Bank is subject to a security interest held by SP, SP may claim the value of that property as against Bank (i.e. Bank took subject to SP’s interest – see s. 28(1)(a)). Consider the potential application of the s. 31 priority rules *with respect to the particular type of property in question.*
		- If deposit is cash, does Bank take priority over SP with respect to the cash as a “holder” of money under s 31(1)?
		- If deposit is by cheque, does Bank take priority over SP with respect to the cheque as a “purchaser” of an instrument under s. 31(3)? See *Flexicoil*.
		- If deposit is by electronic funds transfer, does s. 31(3) apply by analogy to give priority to Bank with respect to the funds received? See *Flexicoil*.
	+ Note: If Bank receives a cheque from its customer *in payment of a debt* (rather than for deposit to the client’s account) Bank may have priority over a security interest in the cheque under s. 31(2).

*SO, if the claim relates to funds in the account, then set-off applies; if they relate to the cheque or instrument, then s 31 priority rules apply.*

##### Current Account Set-Off (Non-Contractual)

* Current account set-off or “combination” of accounts is a category of legal set-off (distinct from equitable)
* Available to a DTI that holds two current accounts of a depositor when there is a credit balance in one and a deficit in the other
* The deficit account represents a debt
* Some courts will imply a contractual term into the institution-depositor relationship that allows the institution to “net” the accounts and in his way obtain a discharge of the debt owed to it by its depositor
* The two accounts must be “current”

##### Contractual Set-Off

* The deposit agreements between a DTI and its customers typically include “boilerplate” provisions designed to eliminate some of the restrictions of ordinary set-off rules
* If the contract provides, the institution may set-off a debt owed by the depositor against a term deposit

##### Set-Off in Equity

* A DTI may defeat an SI in the deposit account through set-off in equity if both claims arise out of the same transaction or closely related transactions before the institution acquires notice of the SI prior to maturity of the cross-claim

### applying the rules to a proceeds claim

#### *Flexi-Coil Lts v Kindersley District Credit Union Ltd*

*Facts:* Churchill Farm Equipment was a farm equipment dealer

* + They became bankrupt
* Flexi-coil Ltd was a LT Churchill supplier and Kindersley District CU was Churchill’s banker
* Following deposit, Churchill wrote cheques to other creditors completely drawing on the LOC
* Churchill and Flexi-coil had security agreement covering inventory supplied by Flexi-coil plus any proceeds generated from sale of inventory; this was registered
* Churchill and CU had a loan agreement, however, Churchill did not grant a SI to the CU with respect to any of the collateral or proceeds claimed by Flexi-coil

*Issues:* Who is entitled, between Flexi-coil and CU, over $86,659 which had been deposited in Churchill’s account and applied to the line of credit supporting the account?

*Held:* Flexicoil had no claim to the account as proceeds because the deposit of proceeds cheques and electronic funds transfers did not create proceeds.

*Ratio:* A deposit of proceeds into an account in negative balance does not create proceeds in the account if the balance remains negative after the deposit.

*Reasons:* - Whether the cheques were taken by the CU free of Flexi-Coil’s Interest? Yes.

* Section 31(3) of PPSA provides that a purchaser of an instrument has priority over any SI perfected under s 25 if the purchaser gave value for his interest, acquired the instrument without notice that it was subject to a SI, and took possession of the instrument.
* The cheques deposited to the CU were instruments, Flexi-coil’s interest was perfected by registration under s 25, and CU took possession without notice of Flex-coil’s prior SI
* Two remaining issues: whether CU was a purchaser when the cheques were deposited? Did the CU give value?
* It is not necessary to determine the CU’s exact status as a holder or collective bank
	+ It is only necessary to determine whether it acquired an interest to bring it within ss 2(ff) and 2(hh) of PPSA
* The CU’s reduction of Churchill’s debt and the grant of further credit gave CU a sufficient interest in each cheque to make it a purchaser for purpose of s 31(3)
* Value was given in exchange for the cheques when the amount owing on the line of credit was reduced and, of course, when the right to draw additional funds was made available
* Whether second generation proceeds were created? No.
* Proceeds must be personal property, must be identifiable or traceable, and must arise from a commercial dealing (can be derived either from a dealing with the original collateral or other proceeds)
* In the excerpt by Cuming, a SI, whether in original or proceeds, collateral can attach only to personal property in which the debtor has a proprietary interest
	+ “As long as an account is in funds, the customers is the creditor of the banker. However, once an account has a negative balance or a deficit, the relationship is reversed and the banker becomes the creditor of the customer.”
* Thus, when a cheque is deposited with a DTI when an account is in positive balance, the debtor-creditor relationship between the institution and the depositor gives rise to a monetary obligation on behalf of the bank
* Under the PPSA a “monetary obligation not evidence by chattel paper, an instrument or security” is an account
* The account which comes into existence when a cheque is deposited to an amount in positive balance is the proceeds of a dealing with the cheque

*Application*

* In our case, the account was never in positive balance
* Once Churchill directed the CU to credit the account, when in negative balance, there were no proceeds of the cheque to which Churchill was entitled or to which Flex-coil’s SI could attach
* When cheques deposited, CU’s only obligation was to credit over-draft and make further credit available
* The CU’s obligation to credit the account is not an intangible to which a SI can attach to permit recovery; therefore, Churchill did not have any rights in the property to which Flexi-coil’s SI could attach
* Credit transfers and the cheques should be treated alike judicially and priority given to the CU with respect to the credit transfers as well

##### Notes Post Case

* *CFI Trust (Trustee of) v Royal Bank of Canada* – Debtor company maintained an operating account with RBC
	+ CFI held a PMSI in some of the vehicles held in inventory by the debtor
	+ Funds generated by sale of CFI – financed vehicles were deposited in the RBC account by way of cheques and electronic transfers
	+ The Court applied s 31(3) in favour of RBC with respect to the cheques
	+ The fact that RBC may have known of the SA between the debtor and CFI was not “knowledge” of CFI’s security interest. S 31(5) makes it clear that RBC would have “knowledge” within the meaning of that provision only if it knew that the deposit violated the terms of the SA
	+ The Court held that the electronic funds transfers did not fall under 31(3) as they were not an “instrument”.
* There is a proposal that the DTI would acquire an automatically perfected, first priority SI in the account that would defeat Lender’s perfected SI in the proceeds deposited in the account. This is so even though the proceeds were derived from the sale of inventory and/or accounts in which Lender had a prior registered SI.
* **ON TEST**: Talk about both the Sask authority when it comes to electronic funds in Flexi-coil and the BC authority in CFI.

# priority of security interest as against transferees of the collateral

## security interest “continues in the collateral”: s 28(1)

* **S 28(1)** 🡪 states a fundamental rule of property law (*nemo dat*) that is at the base of the priority system of the Act as it applies to interests other than security interests
* When a debtor disposes of property subject to a security interest the security interest “continues in the collateral, unless the secured party expressly or impliedly authorized the dealing”
	+ OR a specific priority rule provides otherwise
* When a debtor sells or leases the collateral *without* the secured party’s authorization, the buyer or lessee takes subject to the right of the secured party to seize the collateral from the buyer or lessee to enforce its security interest in accordance with Part 5 of the Act should the debtor not discharge the obligation secured, unless one of the priority rules of the Act operates to protect the buyer or lessee

## authroized dealings

* If the secured party has authorized the debtor to sell or otherwise deal with the collateral there is no need to look to a priority rule protecting the buyer or transferee
	+ S 28(1) provides in effect that if the dealing is authorized the security interest does not continue in the collateral
	+ Keep in mind, the separate operation of ss 28(1)(a) and 28(1)(b) – if a security interest does not continue in the collateral, ***that does not necessarily mean that the security interest will not extend to its proceeds***
* A secured party will sometimes authorize the sale of collateral subject to conditions
	+ E.g. conditions met before the disposition is to take place (SP must approve the buyer), conditions to be met after disposition (obligation to deliver to SP all of the proceeds of sale)
* If the debtor violates these conditions, he/she will be in breach of the contract and liable to the SP for damages
* **Further questions raised by breach**: whether such restrictions affect the position of the buyer or lessee of the collateral, or a subsequent SP who takes an SI in the collateral

####  *Lanson v Saskatchewan Valley Credit Union Ltd*

*Facts:* - A mobile home subject to Lanson’s security interest was transferred by the debtor, Nickel, to Spruce Meadow Trucking

* SPT transferred it to Rempel
* Rempel gave an SI to a credit union
* Lanson had perfected his SI by registration of a financing statement
* The only priority rule that could cut off his SI as a result of Nickel’s sale to SMT is s 30(2)
* **IMPT Factor:** Lanson lends to Nickel and holds a perfected SI in a mobile home
	+ Lanson knows that Nickel intends to sell the mobile home.
		- Nickel states (covenant): “I will look after the property and keep it in good repair. I will not sell it nor grant another SI in it, without repaying in full my indebtedness to the SP”.

*Issue:* Whether Lanson’s SI was cut off or subordinated before the mobile home was transferred to Rempel

* If it was not, a priority competition between Lanson and the CU would be resolved under s 35(1). If it was cut off, no priority competition would arise since Lanson wouldn’t have an SI

*Held:* Lanson authorize the dealing – therefore, the SI terminates. The clause needs to explicitly indicate that the dealin will only be authorized is certain conditions are satisfied

*Ratio:* Must look to the contract itself to determine whether the secured party expressly or impliedly authorized the dealing. If so, then the dealing will result in the termination of the security interest

*Reasons:*

* (1) **Authorization subject to a condition for payment**: Where SP expressly or impliedly authorizes the debtor to sell the collateral on condition that the proceeds of sale be paid to SP, the dealing is “authorized” for purposes of s 28(1)(a) even though the condition is not satisfied. The SI is cut off by the sale (so subsequent transferees take free)
* (2) **Distinguish conditional authorization per *CCB v Tisdale Farm Equipment***: SP agrees that the SI will only be released upon payment of the proceeds of sale to SP, where Buyer as well as Debtor knows the condition. Sale is not authorized for purposes of s 28(1)(a). The SI is not cut off by the sale unless SP is paid.
* Rationale: In Case 2, Buyer is aware of the risk and can protect itself by paying directly to SP
	+ If advising SP, stipulate the Buyer pay directly to SP as a condition of releasing the SI.
* NOTE: The time for determining SP’s consent to the dealing is the time of the transaction and consent must be informed
	+ E.g. SP must have knowledge of transfer
		- *TD Auto Finance (Canada) Inc v Yan* (ABCA 2015)

## priority rules protecting a transferee of collateral

### overview of the rules

* The PPSA contains a number of priority rules designed to protect buyers and lessee in circumstances in which, as a matter of policy, it is inappropriate to subject them to loss of the property purchased or leased to the holder of a pre-existing security interest
1. *Unperfected security interest v transferee for value – s 20(b)*
* Unperfected security interest is subordinate to transferee
* A "transferee" of collateral, including a buyer or lessee, who gives value and acquires an interest in the collateral without knowledge of the SI in it, takes the property free from the SI
* Read ss 20(b) and 1(2)
* **POLICY**: potential buyers and lessees should be able to rely on the registry when assessing the risk of acquiring or leasing property
1. *Temporarily perfected SI in goods v buyer or lessee – ss 5(2). 30(5)*
* SI can be temporarily perfected without registration of a financing statement and without the SP having taken possession of the collateral (ss 5, 26, 28(3))
	+ In such circumstances, third parties dealing with debtor are not alerted to potential existence of SI either by notification through registry or by SP’s possession of collateral
	+ **However, the preferred status associated with perfection, when granted by these sections, usually cannot be asserted against buyers or lessees of good who acquire their interests without knowledge of the temporarily perfected SI (ss 5(2) and 30(5))**
* NOTE: Protection is limited to buyers and lessees of goods, as distinguished from other types of collateral
1. *The “garage sale rule”: perfected or unperfected SI v buyer or lessee of low value consumer goods – ss 30(3) & 4*
* Priority of SI not affected by change in debtor’s name unless SP acquires knowledge of change and fails to amend registration
* When SP does acquire knowledge of change, the SI may be subordinated to a transferee of the collateral who acquires his or her interest before registration is amended (ss 51(3)(a) and 30(5))
* Low value is less than $1000

##### Scenario

* + February 1 - SP takes a security interest in all present and after acquired personal property of Ajax Ltd. and registers a financing statement
	+ November 1 - SP learns that Ajax Ltd. has changed its name to Mapex Ltd.
	+ November 8 - Buyer buys a photcopier from Mapex Ltd.
	+ November 10 – SP amends its registration, changing the debtor name to Mapex Ltd.

**Who has priority as between SP and Buyer?**

SP’s security interest continues perfected and is not subordinated to Buyer under s51(3)(a) because Buyer’s interest arose *during***,** not after the 15 day period. However, Buyer purchased before SP amended the registration. Consider s 30(5).

NOTE: If SP fails to amend its registration within the 15 day period, the security interest is subordinate to the interest of a person who buys the collateral after that period has expired and before the registration is amended. See s. 51(3)(a).

1. *Serial number goods rule: SI in serial number equipment v buyer or lessee s 30(6) & 7*
* The effect of s 30(6) and (7) is that a SI in equipment perfected without the serial number will be subordinate to a buyer or lessee who acquires their interest without knowledge of the SI
1. *The “ordinary course of business” rule: perfected or unperfected SI v buyer or lessee of goods in the ordinary course of business – s 30(2)*
* Examined below

### The ordinary couse buyer or lessee

* **Section 30(2)** – there are circumstances in which buyers or lessees of goods should be protected when they acquire property even though the SP has a perfected security interest in the property and even though conditions that preclude the transaction from being an authorized dealing within meaning of s 28(1) have been imposed on any disposition by debtor
	+ NOTE: That this rule is different in that **it does not matter whether the buyer had knowledge of SI or not.**
	+ Applies to both perfected and unperfected security interests
* **TEST**: Whether this seller sells goods of this kind as part of its ordinary business undertaking? If yes, you then need to look at whether the particular sale was consistent with the seller’s ordinary practices?

#### *Camco Inc v Olson Realty Ltd*

*Facts:* - Camco sells major appliances, Muxlow is a developer

* In 1982, Muxlow developed a condo; the marketing scheme called for Muxlow to furnish the individual condos with four major applicants
* In Sept 1982, Muxlow agreed to purchase from Camco 171 fridges, washers, dryers and stoves
	+ Written agreements were signed and registered
* Camco was unaware that Muxlow had transferred (or intended to transfer) any interest in appliances to third parties until Feb 1985, when Camco acquired knowledge of existence of the terms of agreement between Muxlow and the indiv. unit holders
* New residential premises are not *ordinarily* sold complete with washers, dryers, fridges and stoves include in the purchase pirce
* Buyers were unaware of Muxlow’s deal with Camco

*Issues:* Whether buyers of the household appliances who purchased the same with their condo units are protected under s 30(2) from Camco’s perfected SI in the appliances

*Held:* Yes.

*Reasons:* - The Act does not define buyer of goods sold in ordinary course of business of the seller

* This is primarily inventory, however, there is no explicit language that limits it only to SIs in inventory
	+ There is no intention of this by implication
* **Must consider the business of the particular seller** rather than limit the inquiry to ordinary course of business in the trade or industry as a whole
* The court should give a generally liberal interpretation to the phrase “buyer of goods sold in ordinary course of the business of the seller” in order to carry out the purpose of s 30(3)
	+ Purpose: To protect the buying public in cases where the SP furnishes goods which are sold to public by the debtor in the debtor’s ordinary course of business
* In this case, the seller was involved in an economic enterprise – selling condo units – and this fact was known to Camco
* There mere fact that the seller engaged in selling of appliances as an incident of his primary business of selling condos does not preclude the operation of s 30(2)
	+ Muxlow did typically include appliances in purchase prices (including other, previous condo builds)

##### Notes Post Case

* …a sale in the ordinary course of business includes a sale to the public at large, of the type normally made by a vendor in a particular business where the basic business dealings between buyer and seller are carried out under normal terms and consistent with general commercial practices. It does not include private sales between individual buyers. See *Alberta Pacific Leasing Inc v Petro Equipment Sales* quoting Cuming, Walsh & Wood.

#### *Royal Bank of Canada v 216200 Alberta Ltd*

*Facts:* Royal Bank holds a security interest in all present and after-acquired personal property of Debtor furniture store and perfects by registration

* Debtor defaults and Bank appoints a receiver to realize on the security interest through sale of Debtor’s assets
* Some of the furniture in Debtor’s inventory is claimed by customers
* These customers agreed to buy the furniture from Debtor and prepaid part of the purchase price but had not taken delivery of the furniture

*Issue*: Do the customers take free of RBC’s security interest? Are they “buyers” of goods under s 30(2)?

*Held*: A person is a buyer under s 30(2) only when that person has acquired title to the goods

* A person who has agreed to buy goods but not acquired title is not a buyer
* Passage of title is determined by the rules in the *Sale of Goods Act*
* Royal Bank was entitled to enforce its security interest against the furniture in inventory except against furniture that had been sold to customers (i.e. where title had passed).\*

**BUT SEE**: *Spittlehouse v. Northshore Marine Inc* (Ont. C.A.) for the contrary view: A person who has agreed to buy goods under contract but not acquired title is a “buyer”.

* NOTE: You are not required to know the passage of title rules for exam purposes. **Where a sale of goods is involved, you may assume that title has passed to the buyer unless the facts state otherwise**.

“Sale in ordinary course of business includes a sale to public at large, of the type normally made by vendor in a particular business where the basic business dealings between buyer and sellers are carried out under normal terms and consistent with general commercial practice. It does not include private sales between individual buyers.”

* HOWEVER, the sale in ordinary course of business need not involve a sale by a retail seller to a customer on retail business premises. It may include:
* Sale from one business to another (*Alberta Pacific Leasing Inc v Petro Equipment Sales Ltd*)
	+ Evidence indicated that while Universal ordinarily leased rather than sold cranes to others, it occasionally sold a crane if it was in the economic interests of the company to do so. The practice was consistent with that of others in the crane rental business.
	+ “It can, however, include sale between sellers who ordinarily do not sell to each other but to the general public… Section 30(2) protects a buyer of goods sold in ordinary course of business “of the seller”. Section 30(2) focuses on the business of the seller and not the manner in which goods of the kind involved are generally sold”.
* It, at least, has to be related to their primary business. Does not have to be their primary business however.

##### Scenario

* Furniture store borrows money from the Bank and the Bank gives an SI in all of the stores’ present and after-acquired personal property. Bank perfects by registration
* Buyer agrees to buy an expensive Woodsmith Model XYZ dining room suite from the store and makes a substantial deposit on the purchase price
* Store becomes bankrupt. Store has Woodsmith Model XYZ dining room suite in inventory at the date of bankruptcy but it has not been allocated to the contract of sale so title has not passed to the buyer

**Result**

* Since title to the furniture has not passed to B, it will vest in the trustee who will have priority over B
* However, Bank will have priority over the trustee on the basis of its perfected SI in the furniture
* If the store were not bankrupt, the *Spittlehouse* approach would characterize B as a buyer in the ordinary course of business, even though B has not acquired title
* Buyer would therefore have priority under s 30

#### *General Motors Acceptance Corp of Canada v Owens*

*Facts:* - Diacom and JLV bought a truck from an automobile dealer under a conditional sale agreement (just an SA)

* The dealer assigned the SA to GMAC
* Diacom and JLV subsequently sold the truck back to the dealer from whom they originally purchased it
* The dealer then sold the truck to Owens
* The dealer was the SO, then they buyer and then the seller

*Issues:* The priority of Owens as a buyer against the SI held by GMAC

*Held:* Owens bought the truck subject to GMAC’s SI

* GMAC had priority and was therefore entitled to seize the truck from the buyer when Diacom and JLV defaulted in making the payments due to GMAC under the SA
* The issue does not fall within s 30(2)

*Reasons:* - s 30(2) ensures that a buyer who acquires an interest in goods from a seller under a transaction carried out in the ordinary course of the seller’s business need not be concerned about prior security interests in those goods created by the seller

* The purpose is to avoid disruption to commerce and injustice to unsuspecting ordinary course buyers
* The fact that the buyer is aware of the existence of a SI in goods of the seller does not disqualify the buyer from seeking the protection of the section
* S 30(2) states that a statutory priority rule which cannot be displaced by agreement
* S 30(2) does not shield the buyer from an SI in the goods by someone other than the seller
* Accordingly, if the goods are subject to a perfected SI when they were acquired by the seller, the buyer cannot rely on s 30(2) as a basis for asserting priority over the holder of such interest
* The SI was not given by the dealer (seller), it was given by the purchasers Diacom and JLV.

##### Shelter Principle

* A person who acquires an interest in goods from someone who takes free of SI in goods under s 30(2) is “sheltered” from the SI by the operation of the priority rule that applies to the previous transaction.
	+ *Willi v Don Shearer Ltd*

##### Perfected or Unperfected Security Interest in Serial Number Equipment v Buyer or Lessee

* See sections 30(6) and 30(7), and also s 1(5)
* E.g. In a priority competition between a buyer and a SI in serial number equipment, if the serial number goods held as equipment does not contain a serial number (*PPSR* s 34(1)(b)) and the buyer did not have knowledge of the SI, then the buyer takes free of the SI
	+ If buyer 1 had knowledge, but buyer 2 does not: s 30(6) applies to buyer 2, but not buyer 1

##### Compare *Royal Bank v Wheaton Pontiac* serial number goods held as inventory

***Royal Bank v Wheaton Pontiac* (1991), 88 Sask R 151 (QB)**

* Court addressed the question of whether a change in the category in which collateral falls obliges the SP to register a new financing statement that describes the collateral in the manner relevant to the new category to maintain its perfected status
* The court concluded that “there is no requirement in the Act or Regulations which dictates that a SP must change registration in the event that goods change from one category to the other

**Scenario**

* D, who is a car dealership, gives a security interest to SP in motor vehicles held in inventory. SP registers a financing statement that describes the collateral as “automobiles” but does not include serial numbers.
* Serial number is optional under Reg. s. 34(1)(b) for serial number goods held as inventory – i.e. the security interest is perfected without serial number if a general collateral description is provided.
* D sells a car to B1 in a transaction that is not in the ordinary course of D’s business (because D has gone out of business). The security interest “continues in the collateral”. s. 30(6) does not cut off the security interest because the car was inventory when the security interest attached, not equipment or consumer goods.
* B1 sells the car to B2, who trades it to B3 (Wheaton Pontiac), who sells it to B4. Although the sale B3 to B4 is in the ordinary course of B3’s business, the security interest was not given by B3 (the seller), so s. 30(2) does not apply.

**Result**: Royal Bank is entitled to seize the car from B4.

* Moral of the story: second hand buyers are not always protected
	+ If you are buying used goods, make sure you are buying from a reputable place

**Note**: The vehicle is characterized as inventory as at the date the security interest attaches. The fact that it may have become consumer goods or equipment at some point in the chain of transactions does not affect SP’s priority

* When you are doing these questions, does the security interest survive the first sale? If no, then it cannot carry on to the second. If yes, then does it survive the second sale?

### Summary: Protection of Transferees of Collateral

1. **Authorization by SP** – authorized transaction cuts off security interest – s.28(1)(a)
2. **Priority rules in favour of transferee**
* **Section 20:** Unperfected security interest (all collateral except investment property) v. transferee for value without knowledge - s.20(b).
* **Section 30 rules:** security interest in goods v. buyer or lessee of goods
	+ The “garage sale rule”: perfected or unperfected security interest v. buyer or lessee of consumer goods worth $1,000 or less - s.30(3) & (4).
	+ The ordinary course of business rule: perfected or unperfected security interest v. buyer in the ordinary course of business – s.30(2).
	+ Serial number goods rule: security interest in serial number equipment v. buyer or lessee - s.30(6).
	+ Temporarily perfected security interest in goods v. buyer or lessee – s. 30(5)
		- Proceeds: Temporarily perfected security interest in proceeds v. buyer or lessee of goods - s.30(5) and see s. 28(3)
		- Change of debtor name: Perfected security interest in goods “continued” for 15 days after SP acquires knowledge of change in debtor’s name v. buyer or lessee of goods – s. 30(5) and see s. 51
* **s. 31 rules (negotiable collateral) – see Chapter 8**
* **Other rules:**
	+ Change in debtor name (any property) s. 51(3)(a) – change in debtor name – perfected security interest v. *transferee who acquires property after 15 day period* and before SP amends registration (c.f. previous slide for related rule)

# accounts, chattel paper & investment property

## accounts financing & factoring

### sources and concepts

* Account – generally refers to an obligation to pay money
	+ PPSA **s 1(1)(a)** reflects this concept, but excludes from the scope of the provisions dealing specifically with “accounts” those monetary obligations that are embodied in chattel paper, instruments or securities
* Account for PPSA purposes is simply a monetary obligation
	+ Can be an existing debt or obligation that will come into existence in the future
* **Deposit accounts** (accounts held with banks or other financial institutions) and **accounts receivable** (obligation to pay for goods received on credit terms) are particularly important in secured financing
* Accounts are “intangibles” (**s 1(1)(x)**)
* The priority rule of the PPSA apply to both a security interest in **s 3(1)** and an outright sale of an account, **s 3(2)**
* **Note** 🡪 an outright transfer of accounts is treated for priority purposes as a deemed security agreement
	+ The transferor of the account is the debtor and the transferee is the secured party
	+ Account transferees must register a financing statement in order to perfect their interest and protect their entitlement to payment of the accounts as against third parties

Most Common Types of Arrangements Involving Accounts as Security

* Wholesale financing acquires an SI in accounts as proceeds of inventory collateral (**s 28(1)**)
* A lender grants a line of credit to a manufacturer, wholesaler, or retailer secured by a “general assignment of accounts”
* A lender makes a loan to a borrower (e.g. construction company), on the security of an assignment of amounts payble under specified contracts
* A factor purchases accounts under a financing agreement
* A sale of accounts as part of a sale of the business out of which they arose is **NOT** treated as a SA (**s 4(h)**)

### factoring

* Factoring refers to mercantile agents – persons who acted as agents or consignees of goods for sale on behalf of others
	+ *The Factors Act*
* Bare essentials of a factoring arrangement 🡪 a seller of goods or services makes sales to customers on short-term unsecured credit. He/she assigns the legal right to collect some or all of these accounts to a factor (generally a financing organization established specifically for this purpose)
	+ Fundamentally, the transaction is an assignment of the accounts to the factor
* Assignments under factoring arrangements are, for most purposes, legally indistinguishable from assignments of accounts as security under lending transactions
	+ **But** where the accounts assigned are secured, it is generally recognized that “chattel paper” (**s 1(1)(f)**) is involved
		- Since for the purposes of the PPSA accounrs are by definition monetary obligations not evidenced by chattel paper, the payment obligations embodied in such transactions do not fall subject to the provisions of the Act dealing with accounts
* Financial services supplied by a factor may include
	+ Purchase of the accounts for immediate cash, thus providing a cash flow for the seller
	+ Provisions of ledge and other bookkeeping services relating to the accounts
	+ Collection of the accounts for the seller
	+ Assumption of loss in the events of default in payment by customers
* More important factoring relationships
	+ Full service factoring – a continuous relationship in which the factor purchases substantially all of the accounts of the sell and provides cash advances, guarantees against non-payment by the seller’s customers
	+ Maturity factoring – all features of full service factoring without prepayment
	+ Recourse factoring – factoring on the basis that the seller assumes all liability for non-paymnet by the customers whose accounts have been factored
	+ Bulk factoring – this involves the purchase of accounts by the factor, but on a recourse basis and with no administrative services
* **Exemption s 4(J)** 🡪 arrangement under which all accounts are transferred to a third party solely to facilitate collection of the accounts

### priority of a si in accounts

* A security interest may attach to accounts
	+ As original collateral (e.g. security agreement provides for a security interest in “accounts” or in “all present and after-acquired personal property”, or creates an “assignment” of accounts)
	+ As proceeds of original collateral: s. 28(1)(b)
* A priority competition involving a security interest in accounts is governed by the ordinary rules:
	+ Has the security interest attached?
	+ Is the security interest perfected?
	+ What priority rule applies?
* Recall that special priority rules may apply where accounts are proceeds of collateral subject to a PMSI (s 34).

# interjurisdictional issues (conflicts of law)

## perection and prioirty

### introduction

* Conflicts law is compromised of the principles of law designed to determine which source of law applies to the transaction, or particular aspect of the transaction
* Secured financing is mostly provincial law
	+ Each province and territory is a foreign jurisdiction for conflicts purposes
* Most “foreign” jurisdictions have a legal system very similar to Alberta’s, so there are few legal issues in regard to conflicts
	+ A security interest in AB will likely be recognized in other Canadian PPSA jurisdictions
* The PPSA provides choice of law or recognition rules of foreign security interests
	+ **S 5** applies where the collateral is
		- (a) goods or
		- (b) negotiable or quasi-negotiable collateral in the possession of the secured party
	+ **S 6** applies to the very narrow situation in which the collateral is goods located in one jurisdiction that are intended to be and in fact are subsequently taken to another jurisdiction
	+ **S 7** applies generally where the collateral is
		- (a) an intangible
		- (b) mobile goods held by the debtor as equipment or as inventory for a lease
		- (c) negotiable or quasi-negotiable collateral that is *not* in the possession of a secured party
	+ **S 7.1** applies to security interests in “investment property”
* In each case, the conflicts rules point to the jurisdiction whose laws are to be used by courts when determining the issues of
	+ **Validity** of a security interest
	+ **Perfection** of a security interest
	+ The effect of perfection or non-perfection (the **priority** of a security interest)
	+ A different rule determines the law governing enforcement of a security interest (i.e. *inter partes* rights)
* The test differs depending on the nature of the collateral
* The PPSA does not define validity
	+ A valid SI is one that the applicable law recognizes as an existing interest
* Location of the secured creditor does not affect choice of law.
* Where either the debtor or the collateral are or were previously located outside Alberta, consider whether the law of another jurisdiction may apply (the PPSA of another province or, in practice, the CCQ for Quebec, Article 9 for a U.S. state or more generally the law of another country).

### section 7: location of the debtor rule

* Determines the law governing validity, perfection and priority of a security interest in intangibles, some “mobile goods” and non-possessory Sis in documentary collateral
* **S 7(2)** the validity, perfection and priority of
	+ A security interest in
		- An intangible, or
		- Mobile goods, if the goods are held as equipment or are inventory leased
	+ A non-possessory SI in chattel paper, a negotiable document of title, an instrument or money
	+ **MUST BE GOVERNED BY LAW WHERE THE DEBTOR IS LOCATED AT THE TIME OF ATTACHMENT**
* **Se 7(1)** debtor is deemed to be located
	+ (a) At debtor’s place of business
	+ (b) At debtor’s chief executive office
		- Where is the chief executive office? From US case law
			* TEST: Where does the debtor manage the main part of its business?
			* Factors:
				+ Location of the main part of debtor’s business
				+ Location where the decision-making in respect of the business is taking place
	+ (c) At debtor’s principal residence
* Debtor location rules in Ontario have changed as of December 31, 2015
	+ A debtor company incorporated in Canada is located **in the jurisdiction in which it was incorporated** (i.e. registered office as required by corporations law)
	+ These changes **may** be implemented in other jurisdictions.
* Therefore, may have to register in chief executive office and place of incorporation – due to Ontario change.

#### *Gimli Auto Ltd v BDO Dunwoody Ltd*

*Facts:* Bankrupt was in the business of renting out trucks with campers on them tourists for short periods of time

* It didn’t own three trucks, but leased them from their owner, Gimli who works in Manitoba
	+ Leases were created there
* The leases were not registered anywhere
* The Bankrupt brought the trucks to Alberta, where its chief place of business was
* Other cars were rented in Surrey and used by staff there, leased by Eagle Ridge
* Since bankruptcy occurred before any registration in Alberta, the trustee has rejected the claims of the lessors
* If BC law applies to the automobile, the lessor ER will prevail because the lease was registered in BC

*Issues:*  Which provincial PPSA applies?

*Held:* AB – no registration, trustee wins

*Reasons:* - don’t need to consider a choice-of-law clause in a lease, for the statute sets out which law applies

* The whole point of the PPSA is to overrule certain contractual or property rights
* The lessor and lessee could not, by contracting that the lease would be valid even if not registered, bind others
* Section 5 through 7 of the PPSA deal with which law governs perfection or priorities
* S 7(2)(a)(ii) applies to “good that are of a kind that are normally used in more than one jurisdiction, if the goods are equipment or are inventory leased or held for lease by the debtor to others”
	+ *Are the goods used in more than one jurisdiction?*
		- COTE JA “I conclude that all passenger motor vehicles are “of a kind that are normally used in more than one jurisdiction”.
			* **TEST**: Are the goods of a kind that are “normally used in more than one jurisdiction?”
				+ **NOT,** whether these goods were normally used in more than one jurisdiction – this is an important distinction.
* s 7 applies to all three pickup trucks; AB law governs because the debtor had its chief executive office in AB

*The BC Automobiles*

* There is no Canadian authority directly on the subject of passenger automobiles
	+ Cote still concludes that all motor vehicles are goods of a type used in more than one jurisdiction
* This does not complete the s 7 test, the car was not leased or held for a lease by others
	+ There are two branches to s 7
		- The reference to equipment
		- And to leased inventory
	+ These are separated by “or” and “are”, so equipment need not be held for re-lease
* The cars are therefore equipment (not inventory or consumer goods)
	+ S 7 satisfied
* AB PPSA applies due the chief executive office being there

### section 5: location of the collateral rule

* If the collateral is **goods of any kind other than mobile goods held either as equipment or as inventory for lease** (see above), the governing law is the law where the goods are located when the security interest attached.
	+ Basically anything that s 7 doesn’t apply to
* Same rule applies to *possessory* security interests in documentary collateral (e.g. instruments, money).
	+ E.g. SP has taken possession
* **To perfect or search for a perfected security interest in this collateral, use the registry in the province where the goods are located.**
* **Section 5(1)**
* Example: Debtor has inventory and office equipment at branches located in BC, Alberta, and Ontario – should search in all the provinces that the Debtor operates.

### change in the location of the debtor or the collateral

* The PPSA choice of law rules also provide for a change in the location of goods or of the debtor where those locations, respectively, determine the governing law
* **S 7(3)** 🡪 deals with a security interest in intangibles, negotiable property or mobile goods held as equipment or inventory for lease, where the debtor moves from the jurisdiction in which it was located when the security interest attached into another jurisdiction
	+ **S7(3)** – if the debtor relocates to another jurisdiction a security interest perfected in accordance with the applicable law as provided for in subsection 2 continues perfected in the Province IF it is perfected in the new jurisdiction
		- a) **not later than 60 days** after the debtor relocates;
			* apply if secured party does not have knowledge of relocation
		- b) **not later than 15 days after the day the secured party has knowledge** that the debtor has relocated
			* apply if secured party DOES acquire knowledge of relocation
		- c) prior to the day that perfection ceases under the law of the first jurisdiction
		- **whichever is EARLIEST**
			* \*\* the interest is not re-perfected, it is continued – the original date of perfection applies
			* If, for some reason, the SP finds out on day 50, the clock does not start at that moment 🡪 they only have 10 days left to perfect
	+ This process creates a temporary perfection until one of these measures have been taken
* Example: Assume D relocates from Sask to Alberta.
	+ Result:
		- A security interest perfected in the original jurisdiction (Saskatchewan) “continues” perfected in Alberta if the SP takes a perfecting step in Alberta within the time periods prescribed (registers in Alberta).
			* Priority of the security interest will date from the date of the perfecting step in the original jurisdiction (registration in Saskatchewan).
		- If SP takes a perfecting step in Alberta after the time has expired, priority will date from the time of the new perfecting step (registration in Alberta).

## enforcement

* Procedural issues
	+ **s. 8(1)(a)** - collateral other than intangibles = **location of collateral**
	+ **s. 8(1)(b)** - intangibles = **law of the forum**
* Substantive issues (e.g. right to reinstate the security agreement under the PPSA by paying arrears in default)
	+ **s. 8(1)(c)** = **proper law** of the contract
	+ Will the court (e.g. in Alberta) enforce a contractual choice of law provision that designates the governing law as the law of another jurisdiction if the result is to avoid the application of local law (i.e. Alberta law) that would otherwise restrict the secured party’s rights of enforcement?
	+ See *Northern Transportation Co (Re)* 2016 ABQB 🡪The answer: It depends/isn’t clear
		- Factors include: location of the debtor and the collateral, character and sophistication of the debtor, nature of the collateral and the transaction

#### *Northern Transportation Co. (Re)*

*Facts:* - NTCL leased 19 vessels and related assets from ITB

* NTCL is located in AB but the assets were located in the NWT to service remote communities
* It was undisputed that the leases were security leases under the PPSA
* NTCL was late in making two payments under the lease whereupon ITB notified NTCL of the default and its intention to enforce its rights, including a right to demand immediate payment of the full balance of the purchase price of the vessels under a related purchase agreement
* NTCL tendered payment of the instalments in arrears and sought an order declaring that the lease was not in default by virtue of s 63(1)(b) of the PPSA
* Both the lease and purchase agreement contained a choice of law clause providing that they were to be governed and construed in accordance with the laws of BC, where ITB operated

*Issues:* Which PPSA legislation applies to this case

*Held:* BC

*Reasons:* - The case highlights a tension between two conflicting policies: debtor protection and the freedom of contract

* If debtor protection were applied, it would meant that NTCL would be entitled to benefit from the reinstatement rights permitted under the AB PPSA (for paying off their debts)
* S 8 does seem trump to over freedom of contract
* Where the parties are of equal bargaining power, it makes less sense to allow a debtor to rely on the more favorable legislative regime of its domicile when the parties have agreed to something else, particularly where the collateral is in a different location that the debtor
* Lessee's rights were determined by s. 8 of respective statutes providing for substantive issues to be governed by proper law of contract between parties
* In this factual matrix, policy interests served by enforcing freedom of contract were more compelling than affording lessee additional statutory protections
* Exercise of discretion under s. 62(3) of BC PPSA was not appropriate in light of lessee's intentional disregard of primary contractual obligation of lease agreement, NTCL remained in default under the lease

##### Notes Post Case

Extent to which a contractual choice of law clause can oust substantive legal rules designed to protect the debtor:

* Debtor and consumer protection legislation generally would be construed as intended to protect a local debtor in respect of locally situated collateral regardless of whether the secured party is a local or extra-provincial entity, and regardless of whether the contract contains a choice of law clause in favor of a different, less restrictive law
* The position is a little more complicated if the secured party pursues enforcement action in a different province or territory than the one in which the debtor or the collateral are located
	+ There is little to no authority on this issue
* As a practical matter, it will often not be in the interest of a secured party to attempt to obtain a judgment in a different province from the one in which the debtor and collateral are located
	+ To enforce that judgment will require the cooperation of the courts in the debtor’s province who likely will refused enforcement on the basis that recognition of the judgment would be contrary to the debtor-protective public policy of the forum

# post-default rights and remedies

## the enforcement process

### overview

* A security agreement gives the secured party two related sets of rights
	+ The first 🡪 arises from the debt, which is enforceable *in personam* against the debtor
		- These rights can only be enforced by suing to obtain judgment for the amount of the debt
	+ The second 🡪 arises from the security interest conferred upon the secured party, which is a proprietary interest enforceable *in rem*
		- These rights entitle the secured party to look to the collateral for satisfaction of the debt through its seizure and sale
		- The creditor can choose to enforce the debt by taking action *in personam* without enforcing the debt through seizure
			* As a practical matter, a secured party will rarely choose to rely upon his/her *in personam* rights, other than for purposes of recovering any deficiency remaining unpaid after the collateral has been seized and sold and the proceeds applied towards satisfaction of the debt
* Part 5 of the PPSA governs the enforcement of the rights of secured parties
	+ There is little scope for consensual modification of the procedures prescribed through the provisions of the security agreement (**s 56(1)-(2)**)
	+ **S 64** 🡪 the regulatory scheme prescribed by the PPSA is subject to the overriding jurisdiction of the courts under this section

##### Default

* **s 58(1)** 🡪 part 5 becomes operative upon default by the debtor
* Default 🡪 the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event or set of circumstances, whereupon, under the terms of the SA, the security becomes enforceable (**s 1(1)(n)**)
* The parties are free to define what amounts to default
	+ The debtor’s failure to pay in accordance with the terms of the SA is the primary and most common act of default
* Most SAs provide that the debtor is in default upon the occurrence of other events
	+ Permitting judgement to be entered against him
	+ The commission of an act of bankruptcy
	+ Putting the collateral in jeopardy
	+ Attempting to remove the collateral from the jurisdiction
* If the debtor is not in default, the collateral cannot be seized

##### Acceleration

* Acceleration provisions stipulate that if the debtor commits an act of default, the entire amount secured by the agreement is immediately due and payable
* If a debtor fails to make one of the prescribed series of periodic payments on time or commits another at defined as a default under the agreement, the secured party is entitled to take action to enforce the entire debt secured, which would otherwise be paid in installments over a course of months or years
* The Act prevents a secured party from accelerating payment in order to recover the entire debt by improperly declaring a default under a “deemed insecurity” provision in the SA
* **S 16** 🡪 provides that the secured party must have commercially reasonable grounds upon which to accelerate payment under such a provision

##### Pre-Seizure Notice

* Once it is established that the debtor is in default under an SA, the debtor is given notices required by the common law and the *BIA* (if applicable) before the collateral is seized
* The **PPSA itself does not** include a requirement that the notice be given before the seizure

##### Seizure of the “collateral by any method permitted by law”

* **S 58(1)(a)** 🡪 the secured party has the right to take possession of the collateral or otherwise enforce the SA by any method permitted by law
* In most jurisdictions, a secured party may take possession directly or through a private agent
* **BUT, in AB**, all seizures must be undertaken by a civil enforcement agency qualified and licensed under agreement with the provincial government, except where the seizure is effected by a receiver
	+ A civil enforcement agency will seize the collateral on instructions received from the secured party
		- Governed by s 13 of the *Civil Enforcement Act*
* **S 58(2)-(8)** 🡪 contain provisions relating to a manner in which collateral may be seized by an agency for purposes of enforcement of a security interest
* Once the collateral has been seized, the civil enforcement agency may surrender the possession to the secured party (**s 58(5)**) who may thereafter exercise his/her rights of sale or retention directly
* A secured party or civil enforcement agency must “use reasonable care in the custody and preservation” of collateral in their possession
	+ The cost of insuring and maintain the collateral are chargeable to the debtor and secured by the collateral (**s 17**)

##### Redemption or Reinstatement

* The debtor and prescribed third parties are given notice of the right to redeem the collateral or reinstate the SA
	+ **S 60(4)-(10), (15),** and **62**

##### Sale of Collateral

* Once the period of time extended to the debtor for redemption of the collateral or reinstatement of the SA has expired, the collateral may be sold (**s 60(1)-(3)**)
* The purchaser acquires the collateral free of the interest of the debtor, any interest subordinate to that of the debtor and any interest subordinate to that of the secured party (**s 60(12)**)

##### Disposition of Proceeds

* The proceeds of the sale are applied, first, to the expenses of realization, including necessary repair or preparation of the collateral for sale and secondly, to the satisfaction of the obligations secured by the security interest of the secured party (**s 60(1)**)
* If the proceeds of the sale are greater than the sum secured and the cost of realization, the surplus is paid to (**s 61(1)**)
	+ A person who has a subordinate SI in the collateral, perfected by registration or possession of the collateral at the time of seizure
	+ To any person with an interest in the surplus who has given a written notice of that interest to the SP
	+ To the debtor or any other person known by the SP to be the owner of the collateral

##### Action for a Deficiency

* If the proceeds of the sale are insufficient to satisfy the debt and the cost of realization, the SP may, subject to any law to the contrary, sue to recover the deficiency from the debtor (**s 61(4)**)
	+ The SP may seize and sell additional collateral (if any)
	+ SP may sue debtor for the deficiency
		- Once judgment is obtained, must enforce it against property of the debtor as permitted by judgment enforcement law
			* “Seize or sue” exception: *Law of Property Act*. If the security interest is a seller PMSI in consumer goods, seller may EITER enforce the SI or sue for the unpaid purchase price, but cannot enforce both to recover the deficiency. Comparable provisions exist in other jurisdictions.

##### Foreclosure (Retention of Collateral by the Secured Party) as an Alternative to Sale

* As an alternative to sale of the collateral, the SP may, with the agreement of the debtor and the other persons who have interests in the collateral, keep the collateral in full satisfaction of the obligation secured (**s 62**)

### limitations of actions

* *Limitations Act* - claimant must seek a remedial order within 2 years of the date on which the claimant knows the injury for which the order sought has occurred - begins when the debtor defaults
	+ **BUT** may be suspended if payment is subsequently made toward the debt - the limitation period would start again from date of payment
	+ Limitation period can be expressly extended by provisions in the agreement
* *Preece* - if the expiry of the limitation period precludes enforcement of the underlying debt it also precludes enforcement of a security interest

### pre-seizure notice

* **S 58(2)(a)** 🡪 upon default the SP may take possession of the collateral
	+ This provision does not require notice be given prior to seizure, but it is subject to the common law notice requirement in *Lister v Dunlop*
* The SCC established that a secured creditor who intends to take action to enforce a SA on the grounds of default in payment by a debtor must give the debtor reasonable notice of his intention to do so (*Lowen v Superior Acceptance*)
	+ This rule prevents a secured creditor from taking enforcement action through appointment of a receiver to take possession of the collateral without first giving the debtor reasonable notice
* Factors to assess in determining “reasonable notice:
	+ The amount of the loan
	+ The risk to the creditor of losing the money or the security
	+ The length of the relationship between debtor and creditor
	+ The character and reputation of the debtor
	+ The potential ability to raise the money required in a short period
	+ The circumstances surrounding the demand for payment
	+ Any other relevant factors
* s 58(1) is also subject to another pre-seizure notice requirement 🡪 s 244 of the *BIA* in the event the debtor is bankrupt
	+ where the collateral is all or substantially all of the debtor’s inventory, AR or other property

### redemption and reinstatment

* **PPSA s 63**
* The PPSA offers debtors the opportunity to recover collateral that has been seized by a SP as a result of default through the exercise of the right to redeem the collateral or the right to reinstate the SA
* **Redemption** 🡪 involves the release of the collateral from the SI through payment of the debt secured and whatever expenses the SP has incurred in connection with the enforcement of the SA
* **Reinstatement** 🡪 does not affect the SA; the debtor is permitted to recover possession of the collateral and to resume his/her obligations under the SA as if the default had not occurred
* Persons other than the debtor are entitled to redeem the collateral
	+ Include SPs who hold subordinate interests and others who claim an interest in the collateral and have notified the SP before disposition
		- A subordinate secured party may elect to redeem the collateral in order to prevent loss of his/her security interest through a sale by the secured party who is enforcing a security interest having priority
			* This will rarely be advantageous
			* If the collateral is worth more than enough to satisfy the debt secured by the SI having priority, the holder of a subordinate interest will be paid the surplus
				+ Redemption will not ordinarily offer a subordinate secured part a greater return

### sale of the collateral

* A secured creditor who has seized collateral may elect to sell the collateral to generate proceeds to be applied to the outstanding debt or, with consent of the debtor or other interested parties, to retain it in satisfaction of the obligation secured
	+ Sale is the more common approach
* **S 60(3)** 🡪 a SP can delay disposition until it is commercially viable
	+ Failure by the SP to proceed expeditiously or properly is remediable by court order
* **S 60(4)** 🡪 the SP must give notice of the sale to the debtor and to any other person who, to the knowledge of the party, has a SI in the collateral
* **S 60(15)** 🡪 the notice need not be given in cases where the collateral is perishable or where the secured party believes on reasonable grounds that the collateral will decline speedily in value
* **S 60(5)(h)** 🡪 makes special provision for a sale of collateral by auction
	+ The pre-disposition notice must include the date, time and place of any sale by public auction
* **S.66(1)** 🡪 a secured party must act in good faith and a commercially reasonable manner
	+ May require taking into account usual market practices
	+ Trying to get best price possible
	+ May need to take positive steps such as repair or cleaning
		- Recoverable from proceeds of sale under **s.60(1)**
* Buyer takes free from subordinate and debtor’s interests, but subject to priority interests UNLESS that interest holder consents to the sale

### Failure by SP to perform statutory obligations

* S 67
* **Liability in damages:** If SP fails, without reasonable excuse, to discharge any duties or obligations imposed by the Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.
	+ In *Loewen v. Superior Acceptance Corp*., the court awarded punitive damages for the misleading and high-handed conduct of the SP in seizing the collateral.
	+ 67(2) If a SP without reasonable excuse fails to comply with specified obligations, including the notice of sale requirements, the debtor is deemed to have suffered damages in the amount prescribed
		- As in *Loewen v. Superior Acceptance Corp*
* **Defence to a deficiency claim:** If SP fails to comply with the obligations specified, including the notice of sale requirements, the failure may be raised as a defence to an action for a deficiency if it affected the debtor’s ability to protect their interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, or made the accurate determination of the deficiency impracticable
	+ See *National Leasing Group v. Raymond Veterinary Clinic Ltd*

### Overarching principles

* **66(1) 🡪** All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.
* Any interested person may apply to the court for an order declaring rights or providing directions. The court may not modify the substantive rights and obligations of the parties under the security agreement or the Act. (*Rapid Transit Mix Ltd v Commcorp Financial Services Inc*)
	+ Stay of enforcement by a subordinate secured party may be granted where enforcement proceedings will prejudice the interest of a secured creditor who has priority and will not produce funds to satisfy the claim of the subordinate creditor
		- *Holnam West Material Ltd v Canadian Concrete Products Ltd*
	+ Parties may agree to arbitrate disputes relating to the agreement but may not by agreement waive or vary rights and duties established by the Act
		- *Bobcat of Regina Ltd v Powersports Regina Ltd*

### Exemptions from seizure

* Provincial exemptions law does not affect secured creditors in most jurisdictions, including Alberta (but compare Saskatchewan).
* But s. 89 of the federal *Indian Act* provides that the personal property of “an Indian or a band situated on a reserve” may not be seized unless the SP is an Indian or a band.
	+ Application of the provision requires determination of the location of the property in question (cases).
	+ Exception for title reservation sales agreements between the seller of a chattel and a “band or member of a band”.
	+ May be waived in the security agreement (MBCA).

### Other restrictions on enforcement

* Enforcement may be precluded or circumscribed where third party rights protected by law are violated or at risk.
	+ Seizure and sale of patient medical records not permitted unless conducted in a manner that does not interfere with patients’ rights
		- *Maximum Financial Services Inc v 1144517 Alberta Ltd.*

### Enforcement through receivership

* SP may appoint a receiver to seize and sell collateral if the security agreement so provides, or may apply to court for the appointment of a receiver.
* Receivership will likely be used where all the debtor’s business assets or a substantial bulk of assets are being seized. The receiver may sell the business as a going concern if the security agreement encompasses all assets of the business, or may sell the assets on a piecemeal basis.
* PPSA contains rules regulating the conduct of a receiver.
* *Bankruptcy & Insolvency Act* provisions are likely to apply where a receiver is appointed over all or substantially all of an insolvent business debtor’s assets, or a category of assets. These include provisions dealing with a receiver’s liability for environmental harm and unpaid wages, as well as special priority rules governing unpaid suppliers as well as the priority of wage and pension claims.

### Other alternatives

* Bankruptcy or restructuring proceedings under the *Bankruptcy & Insolvency Act* or the *Companies’ Creditors Arrangements Act*

# bank act security

* **S 427** of the *Bank Act* creates the *Bank Act* security interest
	+ Used to be s 88 and 178 (watch for this in cases)

## constitutional consideration and the *bank act* advantage

* Paramountcy 🡪 if there is an actual conflict in operation between the *Bank Act* and a provincial legislation, the *Bank Act* prevails and the provincial legislation is inoperative to the extent of the conflict
* *BMO v Hall* 🡪 SK legislation imposing special procedural requirements on the enforcement of a security interest in agricultural machinery did not apply to the enforcement of the *Bank Act* SI in assets of that kind since the *BA* contains enforcement provisions that give banks less restrictive rights of enforcement
	+ Banks may therefore choose to take a *BA* SI to avoid application of provincial farm protection legislation or other forms of debtor protection legislation
	+ The case also holds that a bank may enforce a *BA* SI in property that would otherwise be exempt from seizure under provincial legislation, since the operation of provincial exemptions law restricts the rights of enforcement granted in the *BA* (**in SK**)
		- This doesn’t really apply in other provinces because provincial exemption legislation generally applies only to the enforcement rights of judgment creditors and does not restrict those of secured creditors

## the conceptual basis of bank act security

* *Very*  different from a PPSA SI
* **Impt provisions**: ss 435, 427(2), (3), (4)(a) and 428(1), (2), (7)-(12)
* S 427 specifically identifies both the type of borrower to whom a bank may lend money on the security of the *BA* interest, and the type of property the bank may take as collateral in such a transaction
	+ Includes wholesale and retailer purchasers, shippers or dealers in products of agriculture, aquaculture, forestry, mines and quarries, seas, lakes and rivers or goods, wares and merchandise
	+ Persons (not incorporated) that are engaged in manufacturing, aquaculture and farming
	+ Also applicability to companies in hydrocarbon and mineral extraction
* What rights and powers does the bank have if it acquires a warehouse receipt or bill of lading with respect to the property?
	+ **S 435** 🡪 The bank has the right and title to the property of the owner/debtor.
* The transaction has been described as essentially a mortgage transaction and subject to the general law of mortgages insofar as it is consistent with the Act itself
	+ The Bank essentially takes a legal ownership interest in the collateral, leaving the equitable interest to the borrower
	+ Therefore, Bank Act interests are in the nature of a fixed and specific charge with a license to sell inventory
	+ A fixed charge of all present and after acquired interest is therefore a proprietary interest over a dynamic collective of present and future assets
		- In effect, the fixed and specific charge gives the secured creditor the title to the present inventory of the debtor, as well as the after-acquired inventory of the debtor
* Scope of the *BA* SI
	+ Available only to chartered banks under the Bank Act and to the federal Business Development Bank (not credit unions, trust companies, etc.).
	+ Falls within federal jurisdiction over banks and banking
	+ Allows bank lenders to avoid certain restrictions on enforcement rights under provincial legislation due to the doctrine of paramountcy (federal law prevails in case of a conflict in operation)
	+ May give the bank a better priority position than it would have under provincial law (i.e. the PPSA).

#### *Royal Bank of Canada v Sparrow Electric Corp*

*Facts:* - The appellant submits that the respondent banks *BA* SI is in the nature of a floating charge over the inventory

*Issues:* What is the nature of a *BA* SI?

*Held:* The *BA* SI is in the nature of a fixed and specific charge with a license to sell the inventory

*Reasons:* - The security does not operate to transfer absolutely the ownership in the goods, but the transaction is essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided

* S 427 of the *BA* enables manufacturers, who desire to obtain large loans from their bankers in order to carry on their industrial activities, to give to the bank a special and convenient form of security for the bank’s protection
	+ Until the moneys are repaid, the banks is the legal owner of the goods
* A bank taking security under s 427 effectively acquires legal title to the borrowers interest in the present and after-acquired property assigned to it by the borrower
	+ The bank’s interest attaches to the assigned property when the security is given or the property is acquired by the borrow and remains attached until released by the bank
	+ The borrower retains an equitable right of redemption, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time

##### Notes Post Case

* *Sparrow Electric* confirms that a bank that takes *Bank Act* security is vested with whatever title the debtor holds in original collateral subject to the SA and falling within the categories set out by the Act
* In the case of future property, the bank’s interest arises when the property is acquired by the borrower
* The *Bank Act* creates an inchoate proprietary interest in after-acquired property from the time of delivery of the SA, but the interest does not attached until the property is acquired

## registration as a condition of validity

* **Impt provisions**: s 427(4)
	+ Notice of intention to take *BA* SI must be registered within 3 years before the security is given
	+ If it is not registered, the *BA* interest is void as against other creditors and subsequent purchasers of the collateral in good faith
	+ Registration is NOT in the provincial PPSA registries. Registration is at the office of the Bank of Canada or authorized representative in the province in which the borrower’s business is located.
	+ Registration has no priority implications (i.e. date of registration is not a factor in determining priority)
* *CIBC v 281787 Alberta Ltd (Crockett’s Western Wear)* 🡪 ABCA held that a s 427 of the *BA* SI was void against a subsequent interest in the property subject to the security when notice of the intention to create the security was registered after the agreement creating the security was singed
	+ S 427(4)(a) requires that the registration of the notice precede the giving of the security

## future advances and antecedent debt

* **Impt provisions**: s 429(1)
* *RBC v BMO* 🡪 SKCA concluded that the registration of a notice of intention and execution of the SA set the priority date for the RBC security interest even though advances were not made under the agreement until after BAM advanced money under its later executed *BA* SI to the same debtor
* What is the policy basis for preventing banks from taking s 427 security to secure antecedent debt?

## the determination of priority

* **Impt provisions**: ss 2 (definition of “security interest”), 425(1) (definition of “unperfected”), 427(4), and 428(1)

#### *Bank of Montreal v Innovation Credit Union*

*Facts:* - James Buist, a farmer in Saskatchewan, borrowed money from the Innovation Credit Union in October 1991

* In return, he provided the credit union with a security interest in all of his present and after-acquired personal property, which would be governed by the SK *Personal Property Security Act*
* The interest was not entered into Saskatchewan's PPSA registry until June 2004
* After this loan was provided, Buist also borrowed money from the Bank of Montreal, and several security agreements were executed between 1998 and January 2004
* Buist did not disclose to the bank the loan from the credit union or its security interest, and, as it had not been registered, its existence did not appear in searches of the *PPSA* and *Bank Act* registries
* The Bank's security interest was registered under the *Bank Act*, and the *PPSA* in Saskatchewan does not allow parallel registration of such interests in its registry
* Buist became insolvent, and the Bank seized some of his property that was covered by its security in December 2004
* The credit union applied to the SKQB for a declaration that it had a priority claim over the proceeds of the disposition of that property

*Issues:* Was a registered security interest under the Bank Act able to defeat an unregistered security interest that operated under provincial legislation?

*Held:* A proper interpretation of the Bank Act gives an earlier unperfected PPSA interest priority over a subsequent Bank Act interest, and there is no provision in the PPSA which subordinates an unperfected PPSA interest to a Bank Act interest

*Reasons:* The SKCA had relied on its previous decision in *Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan*, which had laid down some basic rules for resolving priority issues:

1. Set aside the PPSA from the analysis and determine the priority as if the PPSA did not exist;
2. Determine the priority pursuant to [applicable provisions of the Bank Act] to the extent it is possible to do so;
3. Where appropriate, apply the first-in-time priority rule.
* The SCC stated that, while this approach did not lead the Court of Appeal into error in deciding this case, this formulation does not accurately reflect the applicable constitutional principles at play
* Step 2 is correct, but Step 1 properly means that internal priority rules of the PPSA have no bearing on determining a priority dispute between Bank Act and PPSA security interests
* However, the PPSA retains importance in resolving the priority dispute at issue:
	+ As held in *Hall*, the Bank Act security provisions are valid federal legislation which cannot be subject to the operation of provincially enacted priority provisions
		- Thus, where the Bank Act contains an express priority provision that is applicable to a particular priority dispute, that provision will govern
	+ In determining what interest the debtor may have already conveyed to another creditor and, in such circumstances, what interest he or she had left to convey to the bank at the time of execution of the *Bank Act* SA, it becomes necessary to resort to the provincial property law, either at common law or under applicable provincial statutes
		- It is at this point that resorting to the PPSA becomes relevant
	+ It is true that the internal priority rules of the PPSA cannot be invoked to resolve the dispute
		- However, it does not follow that the provincial security interest created under the PPSA does not exist outside these priority rules
		- Nor can the fundamental changes brought about by the PPSA be ignored in determining the nature of the prior competing interest
	+ Far from being irrelevant under the Bank Act, provincial property law plays a complementary role in defining the rights granted under the Bank Act
		- A PPSA security interest, just as a Bank Act security interest, is a statutorily created interest and, as such, an interest recognized at law.
	+ Having a PPSA security interest in collateral does not give a creditor full right and title to the collateral
		- Rather, a PPSA security interest gives the secured creditor an interest in the property to the extent of the debtor's obligation
* It is not open to the Bank in this appeal to now argue that the statutory interest conveyed to the Credit Union is not analogous to a proprietary right
	+ At the time Buist gave the Bank of Montreal its Bank Act security interest, Innovation Credit Union already held a valid security interest in the nature of a fixed charge
	+ This means that any subsequent interest could only be taken in respect of Buist's equity of redemption in the property.
* The lack of perfection does not affect this characterization
	+ Under the PPSA, the time of perfection, or the lack of perfection, determines which of two or more competing security interests takes priority
	+ It does not determine the nature or validity of the interest
	+ With the introduction of the PPSA, the legislation no longer declares unregistered interests void
		- Section 10 of the PPSA specifies what criteria must be met for a security interest to be enforceable against third parties.
			* In this case, all requirements of s 10 are met.

#### *Royal Bank of Canada v Radius Credit Union Ltd*

*Facts:* Wayne Hingtgen, a SK farmer, borrowed money from Radius CU

* In order to secure the debt, Wayne executed a GSA on January 24, 1992, giving the CU a SI in all of Wayne’s current and after-acquired property
* The CU did not perfect its interest until September 24, 1998
* After the GSA was executed, Wayne went to RBC for additional financing
* The Bank first registered its NoI to take a *BA* SI on January 22, 1996, and it first took *BA* security on June 10, 1997
* As with the CU’s PPSA SI, the *BA* SI was an allppaap
* Wayne defaulted on his loans and RBC seized and sold some of the collateral that was covered under both interest
	+ The collateral that was sold was acquired *after* both SI’s were obtained

*Issues:* Who has priority to the collateral and proceeds?

*Held:* The CU

*Reasons:* There was no basis upon which the court could create a first-to-register priority rule as proposed by the bank without doing violence to the terms of the Bank Act in its current manifestation

* Such a rule would have to be enacted by Parliament, if it saw fit to do so
* The credit union acquired a statutory and therefore legally cognizable interest in the assigned property at the time of the execution of its security agreement
* By the combined effect of ss. 427(2) and 435(2) of the Bank Act, the bank subsequently acquired no greater interest than the debtor himself had at the time of the execution and delivery of its security interest.
* The bank took its security interest subject to the PPSA security interest held by the credit union.

##### Notes Post Case

* S 428(1) was amended in response to the above cases
	+ The new provisions now contains a priority over any person who has a SI in that property that was unperfected at the time the bank acquired its security in the property
* S 428(2) as amended to provide that the priority referred to in ss (1) does not extend over the claim of “any person who has a SI in the property that was unperfected at the time the bank acquired its warehouse receipt, bill of lading or security, if the bank acquired it with **knowledge** of the other person’s SI”
* These amendments ensure that the *BA* SI is not subordinated to an unperfected PPSA SI unknown to the bank
* These provisions have created new problems of interpretation
	+ Determining the time the bank acquired its SI in the property
		- Wrt property already owned by the debtor, that time is undoubtedly the time the debtor signs and delivers the security documents to the bank
		- But the meaning is unclear wrt after-acquired property
			* Does the bank acquire its SI with respected to after-acquired property when the security document is delivered or only when the property is acquired?
* **Security interest (s.2)** – includes a PPSA security interest that is in substance a security interest – EXCEPT for a seller’s interest under a title retention sales agreement
	+ **EXCEPTION 2**: If the PPSA security interest is a title retention sales agreement (ie. Provides that the seller retains title to goods sold until the price is paid, the PPSA interest will have priority whether or not it is perfected)
		- This is because the seller’s interest is not a ‘security interest’ within the meaning of the Bank Act definition
		- Nemo dat governs 🡪 buyer/debtor does not have title so title cannot vest in the Bank
* **Unperfected (s.425(1))** – ‘unperfected’ means that the security interest has not been registered in the PPR or perfected by other means
* **PPSA Interest attaches first?**
	+ PPSA security interest that attaches before a Bank Act interest has priority based on nemo dat
		- UNLESS the PPSA security interest was unperfected at the time the bank acquired its security
			* Bank Act has priority over prior Unperfected PPSA interest, subject to
				+ EXCEPTION: knowledge of PPSA security interest
				+ EXCEPTION: title retention sales agreements, always have priority
* **Bank Act interest attaches first?**
	+ PPSA security interest that attaches after the Bank Act interest is subordinate to the Bank Act interest (nemo dat)
		- EXCEPTION: if the subsequent PPSA agreement is a title retention sales agreement – the PPSA interest has priority regardless of whether it is perfected
* **What if the PPSA registration lapses?**
	+ A PPSA security interest that is perfected when a Bank Act interest arises has priority even if the PPSA security interest subsequently becomes unperfected (e.g. registration lapses).
		- *Lack of perfection is only relevant “at the time the Bank acquired its security” (s. 428(1)).*
			* Relevant date is arguably the date the Bank Act agreement is signed and given to the bank
* **What about after-acquired property?**
	+ If Bank Act and PPSA security interests attach to after-acquired property simultaneously, priority will go to the first agreement to be signed (*Radius CU*)
		- EXCEPTION: If the PPSA agreement is signed first, the PPSA interest (*likely*) has priority ONLY if the secured party has registered before the Bank Act agreement is signed (i.e. before the Bank’s “acquires” its inchoate interest in after-acquired property) (s. 428(1))
			* So PPSA agreement must be:
				+ Signed first; AND
				+ Perfected before the Bank Act agreement is signed

## proceeds

* The Bank Act does not expressly give the Bank a security interest in proceeds
	+ The types of collateral enumerated in the Bank Act as property in which the bank may take a security interest does NOT include accounts
* BUT in *United Grain Growers –* bank is entitled to accounts generated as proceeds of the sale of property subject to the Bank Act security interest (ie. The Bank is the owner of the original collateral and the proceeds)
	+ Case involved proceeds accounts, but reasoning presumably applies to proceeds in any form

## can a bank elect to claim priority either under the bank act or the ppsa?

* In Alberta, a Bank Act security interest is NOT a security interest under the PPSA (s.4(b) and *Radius Credit Union*)
	+ In Ontario a Bank Act security interest may be characterized as a security interest subject to the PPSA – so the bank can claim priority either under the PPSA or the Bank Act on the basis of a single agreement
		- Ie. Bank can register under the PPSA and claim a perfected PPSA security interest with priority OR can claim a Bank Act security interest with priority under the Bank Act
* In Alberta a bank can take two SEPARATE enforceable security interests in the same collateral as security for the same debt – one under the Bank Act and one under the PPSA
	+ Bank can rely on whichever gives them higher priority status
* Saskatchewan – if a bank attempts to take both a Bank Act interest and a PPSA security interest in the same collateral the PPSA security interest is void