## Personal Property Security Law

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INTRODUCTION TO THE LAW OF SECURED FINANCING

Unsecured debt
- Purely a personal obligation by the debtor to reimburse the creditor (with interest)
- If the debtor defaults, the creditor can sue the debtor to enforce the debt, but cannot immediately repossess the debtor's property (this is outside of bankruptcy)
- Must rely on the civil courts and judgment enforcement law (writ of enforcement, garnishment, appointment of receiver)
- Note that often, there is no property to get by the time the judgment is enforced

Secured debt
- The personal obligation remains, but the creditor's interest is secured with a collateral interest in the debtor's property
- Therefore, if the debtor defaults, the creditor can repossess the collateral
  - The seizure of the property is handled by the Alberta civil enforcement agency, no judgment or judicial action is required
  - Note that, in other provinces, there is no requirement to go through the provincial enforcement agency
  - Note that this is also outside of bankruptcy
- Can take many forms - businesses will secure debt against inventory, physical assets, real property
  - Consumer debts are often secured (i.e. car loans)
  - Intellectual property can also be used as security
Enforcement in Bankruptcy

- Recall that bankruptcy is federal jurisdiction
- The debtor declares bankruptcy if unable to pay debts (insolvency), and has made an assignment into bankruptcy or the creditor applies for a bankruptcy order against the debtor
  - In bankruptcy, a trustee is appointed, and the debtor's property vests in the trustee
  - The trustee is tasked with liquidating the property that is not subject to security interests and distributes this to unsecured creditors (pro rata, but subject to claims given priority in payment scheme). Judgment enforcement measures (if in force) are stayed.
  - Secured creditors are permitted to still pull secured property from the property held by the trustee
  - Normally, there is very little left for unsecured creditors once secured interests are accounted for
  - Therefore, bankruptcy is mostly concerned with unsecured debt, since secured debts can still be enforced as normal in bankruptcy

Debt Financing and Equity Financing

- Not the same thing
- 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

Inter Partes Rights

- Part 5 of the PPSA - rules that govern the secured party's right to enforce the promise to pay and the security interest
- For example, if the debt is valued at $5000, and the secured property is worth $10,000, the secured party has the right to repossess the entire secured property, sell it, take the value of the security interest, and return the balance to the debtor
- Alternatively, if the secured property is not valued as much as the debt, then the creditor is permitted to repossess the entire property and then use judgment enforcement law to obtain the balance (functions similarly to unsecured debt claims)
- If multiple creditors are trying to extract money and property from the same debtor, there might be a ranking of claims
  - This occurs if multiple creditors have the same security interest in the same property (i.e. multiple creditors for a house or car)
- Can get very complicated - what if the secured property is sold to a third party? What if an unsecured creditor obtains a writ of enforcement?

Old Forms of Securitized Transactions

- Chattel Mortgage
  - The creditor advances money to the debtor, and the debtor transfers the title to a piece of property owned by them to the creditor as collateral
  - Therefore, the creditor formally owns the property, while the debtor retains possession (except in event of default)
- Conditional Sale
  - The creditor advances credit (not money) to the debtor reflecting the full value of a chattel that the debtor wishes to purchase
  - The creditor retains legal title to the chattel until the credit debt is paid off
- Assignment of Accounts
The debtor is a corporation, issues invoices to customers for services rendered (called "account debtors"). The creditor (bank) can advance money to the debtor using the unpaid invoices as collateral. The debtor assigns the accounts over to the creditor, so the creditor has formal title to the unpaid accounts.

- **Floating Charge (Debenture)**
  - Remember debenture = loan agreement
  - This was mostly used to allow debtors to put inventory up as collateral for credit.
  - The creditor advances the debtor money, secured against the debtor's inventory. The creditor acquires a "floating charge", where the debtor's property is unencumbered for as long as they are not in default.
    - If the debtor defaults, the charge crystallizes and the collateral property's title is transferred to the creditor

**Priority**

- Fundamentally guided by the concept of nemo dat - priority is primarily determined by date
- Fragmentation of different legal forms of personal property debt makes it difficult to determine priority, precludes effective assessment of risk
- Early innovation was to create registries for security interests on personal property
  - The idea was that, in order to assert a security priority over personal property, you had to register it. That allows subsequent purchasers and lenders to more accurately assess risk in lending further money.
  - Problem (at first) was that each form of debt had a separate registry.
- **Rectifying this problem is the main purpose of the PPSA**
  - It provides a basis for determining inter partes rights and for determining priority between different creditors
- PPSA security interests may arise under:
  - A "security agreement" that explicitly confers a "security interest" (preferred approach)
  - A chattel mortgage
  - A conditional sale agreement
  - An assignment of accounts
  - Any other form of agreement that in substance creates or recognizes a property interest designed to function as a security interest
- **All transactions are treated the same - the creditor advances credit/money to the debtor, the debtor owns legal title to the collateral while the creditor acquires a security interest in the collateral (that crystallizes into full legal ownership if debtor's obligations are not met)**
- The PPSA can also deem other interests to be a security interest for the purpose of determining priority
- Under the PPSA, priority interests are determined primarily (but not exclusively) by when security interests are registered in the Personal Property Registry
  - If you register first with the PPSA, all subsequent security holders are deemed to have prior notice of the existence of the security interest
  - Conversely, if you do not register your security interest, then you will lose priority to subsequent creditors who do register their interests

**Other Relevant Statutes**

- Law of Property Act -
- Civil Enforcement Act -
- Factors Act -
- Sale of Goods Act
- Bank Act - federal legislation that is available only to banks under federal authority. A Bank Act security interest DOES NOT fall under the PPSA for purpose of inter partes enforcement or priorities due to federal primacy
  - Banks will often double-register their interests anyways
- The Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment
Will affect security interests for aircraft, significant since aircraft fly to multiple international jurisdictions, so the convention allows for security interests to be enforced internationally

THE SUBSTANCE TEST
- Secured transactions take one of two basic forms - creditors can either loan money to a debtor or extend credit for the acquisition of goods or services
- Unsecured debts can only be enforced through judgment enforcement law
- Property subject to security interest = collateral
- Other forms of security may be provided, including a third party guarantee or indemnity agreement
  - Guarantor signs a guarantee under which he or she promises to pay the debt owed by the debtor if the debtor defaults
- In business transactions - a master agreement will provide for a number of sub-agreements between the parties relating to new loans or advances on credit
  - i.e. A security interest in a changing pool of collateral, such as the debtor’s inventory or accounts receivable
  - Can also provide for a varying amount of debt (i.e. a variable line of credit)
  - If the debtor corporation defaults, the creditor has the option of appointing a receiver who will step in, run the business, and sell off assets until the debt is paid (receivership is a security enforcement device, it is NOT the same as bankruptcy - it is a single creditor that takes control for their benefit, not a trustee for all the creditors)

Perfection and Attachment
- Security interests are created by security agreements, comes into existence when it attaches in accordance with statutory rules
- May be **perfected** or **unperfected**
  - Concept of perfection not relevant to enforcing the security interest against the debtor, but it plays a critical roles in determining priority of a security interest as against a competing interest
  - "Attachment" merely means whether the Act recognizes that the security interest exists
    - Perfection is another step - an interest may attach but not be fully perfected
  - Unperfected security interests will often be defeated by competing claimants
  - A security interest acquires perfection when it has attached and the secured party takes one of the steps identified in the Act as conferring perfection (s 19) - often through registering a financing statement (not the same as a "financial statement" in the accounting sense) with the PPSR
- Remember, there are important policy reasons behind enforcing priority through perfection. Perfection is intended to provide subsequent creditors with notice of prior security interests registered against the property - this helps assess risk. Therefore, if a prior security interest is not properly perfected through registration or some other means, it should not get priority over subsequent security interests that are properly registered (since they were registered without knowledge of the prior, unregistered security interest)

Security Interests
- PPSA foundation is on *nemo dat* principle - no one can give what he or she does not have
  - Thus, priority is determined on the basis of which competing interest in or to the property first arose
  - The rules that apply to a specific security interest depends on the type of collateral involved (goods, chattel paper, document of title, instrument, money, investment property, intangible etc.)
- **The concept of a security interest is at the core of the PPSA**
  - Section 3(1) of the PPSA makes it clear that transfers of legal or equitable title are not relevant to determining status under PPSA
  - A generic security agreement provides for a hypothec - the debtor has or will acquire an in rem interest in personal property that will be charged with or encumbered by an interest granted in favour of the creditor for the purpose of securing performance of an obligation to the creditor.
    - *This DOES NOT deal with the title to or ownership of the collateral*
• It's role is to provide an alternative source of compensation should the debtor fail to perform obligations to the secured creditor
• Section 3(1)(b) defines the Act's scope of application, includes other forms of security that fall outside of hypothecation (ie. Security leases, security consignments etc.)
  ○ In those cases, the contracts will often reserve title to the seller until the debtor’s obligations have been fully performed
  ○ The purpose of including these other types of personal property transactions is to merge all of them into a single legislative scheme
• Security agreements can be assigned to other parties (often financial institutions) - the assignee obtains all of the rights that the original creditor held, including the creditor's priority position

| Security interest definition (under s 1(1)(tt)):

(tt) “security interest” means
   (i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, 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 investment property interest in the goods, and
   (ii) the interest of
      (A) a transferee arising from the transfer of an account or a transfer of chattel paper,
      (B) a person who delivers goods to another person under a commercial consignment, and
      (C) a lessor under a lease for a term of more than one year, whether or not the interest secures payment or performance of the obligation;

| Security agreements defined under s 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;

| Section 3(1) and (2) - Application of the PPSA

Application of Act
3(1) Subject to section 4, this Act applies to
   (a) 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
   (b) 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.
(2) Subject to sections 4 and 55, this Act applies to [THESE ARE THE DEEMED SECURITY INTERESTS]
   (a) a transfer of an account or chattel paper,
   (b) a lease of goods for a term of more than one year, and
   (c) a commercial consignment,
that does not secure payment or performance of an obligation.

APPLICATION OF THE SUBSTANCE TEST
• The "substance test" refers to determining what type of security interest is involved in a particular transaction
• Under s 3(1), the Act's scope is defined - transactions that, in substance, are security interests, and other transactions (as enumerated) that are deemed to be security interests for the purpose of the Act
• Recall that "security interest" is defined in s 1(1)(tt)
The Substance Test determines whether the transaction is structured as a lease of goods, consignment of goods, or trust of property.

Legal Consequences of Characterization

- Characterization of leases and consignments is relevant to inter partes rights.
- Under s 3(2) all features of the PPSA except its post-default enforcement provisions apply to true leases having a term of more than one year and commercial consignments.
  - If the transaction is a security lease or security consignment, the lessor or consignor is a secured party who is required to comply with the regulatory scheme applicable to enforcement of security interests.
  - If it is a true lease or true consignment, the lessor or consignor is in law the owner of the property that has been leased or consigned.
    - In that case, the lessor's or consignor's ability to recover the property will be governed by the contract with the lessee, not by the PPSA (under Part V).
- Also, characterization is important to establishing an in rem property interest that may be recognized by other statutes outside of the PPSA (i.e. in determining entitlements under bankruptcy proceedings).
- Remember, if the issue is priority, the characterization does not really matter, since the priority rules will apply regardless of characterization.
  - ONLY AFFECTS INTER PARTES ENFORCEMENT RIGHTS

True Leases v Security Agreements

- Most true leases will still fall under the PPSA EXCEPT for Part V (rights of the parties).
- There are no stated rules to determine whether a particular transaction is a true lease (where the chattel remains the legal property of the lessor) or a security lease (which is deemed to be a security interest under the PPSA, and therefore is treated as the property of the lessee).
  - Defined by caselaw
  - Involves a "weighing of the material matters"
  - What was the imputed goal or intention (not necessarily the expressed intention) of the parties to the transaction as determined by the surrounding circumstances.
- First approach is to determine whether the transaction is closer to a sale or a bailment.
  - Is the lessee simply paying for the temporary use of the goods or is the lessee in effect purchasing them from the lessor?
  - If it is basically a sale of goods, then the transaction is likely a security agreement.
  - Lease terms that impose all of the risks of ownership on the lessee are indications of a security agreement (i.e. requiring the lessee to purchase robust insurance). It is more like a purchase if all the fees associated with operation are borne by the lessee.
- For a lease, is it more like a financing plan? Or is it payment for the right to use the property for a period of time following which the property is returned to the lessor?
  - Option to purchase at the end of the lease period is an important consideration, will often reveal whether the transaction is a true lease or a security agreement.
  - If option involves payment of nominal sum at the end of the lease period, then it is likely a security agreement since the lease payments previously were likely equivalent to the market value of the chattel plus interest (in effect, a securitized purchase transaction).
  - Options that require payment of full market value at the end of the lease term are more likely true leases or bailments.
- Some factors are more important (primary factors) while others are only secondary.
  - Primary factors (from Re 843504 Alberta Ltd):
    - Relevance of the purchase option price - whether the purchase option price is nominal or reflective of fair market value.
    - Mandatory purchase options - whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term.
• Open-end leases or guaranteed residual clauses - whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term
• Sale-leaseback transactions - whether the transaction is structured as a sale and leaseback (if it is, then it is clearly a security interest)

True Consignment or Security Agreement
• 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 within its scope
• **Consignment**: Relationship of principal and agent between the transferor and the transferee of goods (basically, a bailment)
  ○ The owner delivers possession of goods to another person whose role is to sell the goods as agent for the owner
  ○ Creates an equitable relationship between the parties, will likely be written in contract
  ○ If the supplier wants to recover the goods, they can do so immediately because they retain legal title to the goods, and Part V of the PPSA will not apply
• Under a security agreement, the debtor is not an agent - he or she buys and sells on his or her own account
  ○ Essentially, under a security consignment, the consignee pays for the goods from the consignor upfront, and then turns around and sells it to a buyer
  ○ The goods are in the hands of the agent with the objective of having them sold by the agent on behalf of the transferor to a third party
  ○ In this case, the supplier can only recover the goods through Part V of the PPSA
• Determining nature of the relationship is difficult - performance is often very different than written contractual obligations
• ***Features of a true consignment*** (most important factors highlighted):
  ○ Merchant is agent of the supplier
  ○ Title in goods remains with the supplier
  ○ Title passes directly from the supplier to retail purchaser (does not pass through merchant)
  ○ *Merchant has no obligation to pay for goods until they are sold* (*SUGGESTS TRUE CONSIGNMENT*)
  ○ *Supplier has right to demand return of goods* (*SUGGESTS TRUE CONSIGNMENT*)
  ○ *Merchant has right to return unsold goods to supplier* (*VERY STRONG INDICATOR OF A TRUE CONSIGNMENT*)
  ○ Merchant is required to maintain separate books and records in respect to supplier’s goods
  ○ Merchant is required to hold sale proceeds in trust for supplier
  ○ *Supplier has the right to stipulate a fixed price or a price floor* (*STRONG INDICATOR OF TRUE CONSIGNMENT*)
  ○ Merchant has the right to inspect the goods and storage premises
  ○ Goods are shown as an asset in the books and records of the supplier and are not shown as an asset in books and records of the merchant
  ○ Shipping documents refer to the goods as consigned
  ○ *Supplier maintains insurance on the goods after they are delivered to he merchant* (*SUGGESTS TRUE CONSIGNMENT*)
  ○ *It is clear from dealings that the property belongs to the supplier rather than the merchant* (*AGAIN, STRONG INDICATOR*)
• True consignments (as above) will still apply to the PPSA, but the inter partes rights (Part V) will not apply (i.e. the contract between consignor and consignee will dictate the rights between them)

Security Agreement and/or Trust
• A simple trust is created when a person (called the settlor) executes a written declaration of trust which establishes the trust, names the trustees and spells out the terms and conditions upon which the trust will be conducted for the benefit of the beneficiary
  ○ I.e. settlor transfers legal title to a trustee and equitable title to the beneficiary
- It is also possible to transfer property to a trustee for the benefit of the beneficiary (often used for tax and estate planning purposes)
- Trusts can also be created by statute - used by governments to collect unpaid taxes (that is, they declare that the property of the taxpayer is subject to a deemed trust for the benefit of the government)
- Trustee has fiduciary obligation to carry out the terms of the 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
  - The defining question is whether the trust is being used as a device to secure an obligation that exists independently of the trust
  - Is the trust the SOURCE of the obligation, or is it used to secure an obligation that is INDEPENDENT of the trust?
    - This is the critical test to determine whether the trust will be classified as a security interest, or not
    - Essentially, is the sole purpose of the trust to secure payment for a debt that exists independently of the trust?
- Trust relationships can be parallel to debt relationships. Also, trust relationships can give rise to a debt relationship (i.e. if the fiduciary duty is violated and the trust funds are improperly depleted).

**Re Skybridge Holidays (BCCA 1999)**
- In Skybridge Holidays (BCCA 1999), customers of travel agency Skybridge paid money to the agency to purchase travel services, money held in trust account. When Skybridge went bankrupt, had to determine whether Skybridge and customers were in a debtor/creditor or trustee/beneficiary relationship
  - The travellers were considered consumers, not lenders. The dominant purpose of the transaction is determinative
  - Skybridge held legal title to funds, but customers were beneficial owners
  - Is the trust the SOURCE of the obligation, or is it being used to secure an obligation independent of the trust?
    - It was a true trust, the trust is the source of the obligation
  - If the customers' interest had been classified as security interests, they would have lost all their money in the subsequent bankruptcy proceedings

**Contech Enterprises Ltd v Vegher (BCCA 2015)**
- Agreement for sale of business assets
- Vendor of business retains ownership of the intellectual property but grants the purchaser license to use the vendor’s IP (separate agreement)
- Provides that the vendor will assign the IP outright to purchaser when purchaser’s obligations under the sale agreement are satisfied
  - Is the vendor’s interest in the IP "in substance" a security interest?
    - The separate agreement was a license to use, which is not a security agreement
    - However, the vendor retained title to the intellectual property for the sole reason of securing the obligations of the sale agreement (the purchaser gets full title to the IP only when the agreement has been satisfied)
    - The vendor did not have the right to unilaterally terminate the license agreement at any time

**Alignvest Private Debt Ltd v Surefire Industries Ltd (ABQB 2015)**
- Lease of commercial premises
- Tenant makes a pre-payment of money to be applied to rent at a future date
- Tenant is entitled to return of money if lease is terminated for reasons other than default by tenant before it is applied to rent
- Prepayment is described in the lease as security for performance of tenant's obligations under the lease
  - Is the landlord's interest in the money (title) "in substance" a security interest?
• Court concludes that this is a security interest (very borderline case)
• Need to construct prepayment of rent very carefully to make sure it is not actually a security interest

DEEMED SECURITY INTERESTS

• Two general sets of rights associated with a security interest:
  ○ Enforcement of the obligation secured through seizure and disposition of the collateral (inter partes rights)
  ○ Rights relating to the priority of the security interests vis-a-vis other creditors
• "Perfection" is the main method to determine priority
  ○ Primary means to achieve this is to register the security interest in the PPSR
  ○ The intention is to publish the existence of the security interest to facilitate the proper determination of credit risk by subsequent creditors
  • The requirement arises any time a person has acquired an interest that, in substance, is a security interest
  • However, there are four deemed security interests intended to prevent fraud (s 3(2)):
    1. S 1(1)(b) Assignment (sale) of an account
    2. S 1(1)(f) An assignment (sale) of chattel paper
    3. S 1(1)(h) Commercial consignment
    4. S 1(1)(z) A lease for a term of more than one year
  • The deeming does not extend to inter partes enforcement but it does apply to determine priority

• Conceptual difficulties can arise for consignments, leases and transfers of account with respect to the "attachment requirement"
  ○ A security interest comes into existence when it "attaches" (charges the property of the debtor)
  ○ In these cases, the debtor has no property rights to the property, all rights are retained by the "creditor"
  ○ The Act provides that, for the purpose of the attachment requirement, a lessee under a lease for a term of more than one year and consignee under a commercial consignment have rights in the goods when the lessee or consignee obtain possession of them (s 12(2))

PPSA Section 3(2) - Deemed Security Interests

(2) Subject to sections 4 and 55, this Act applies to
(a) a transfer of an account or chattel paper,
(b) a lease of goods for a term of more than one year, and
(c) a commercial consignment,
that does not secure payment or performance of an obligation.

PPSA Section 12(2) - Attachment of deemed security interests

(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

Commercial Consignments

• Recall that PPSA will apply to consignments that are, in substance, security agreements, and to true consignments (that are not in substance security agreements) for the purpose of determining priority only (not inter partes rights)
  ○ Note that the true consignment exception will only apply if both the consignor and consignee are in the business of dealing in goods of the description consigned
  • Alternatively, a consignment where a consumer delivers property to a commercial consignee it not caught by the Act
  • Consignments to auctioneers and to consignees who are known to creditors to be selling goods for others are excluded
That is, it is the actual creditors that must have general knowledge of this fact for the consignment to not be caught by the PPSA

The idea is that the policy reasons for registration are not present in these situations - if the creditors KNOW that the business they are lending money to regularly consigns other goods, then they can accurately assess credit risk without requiring registration of those goods

**CIBC v Williams (ABCA 2007)**

- Court considered what is required to show that creditors "generally" know that a consignee takes goods on consignment to sell to others
- Bonnett Farms sold cattle at auction on its property that was the property of others
- CIBC wanted to include the cattle that was being sold at auction within its security interest
- Court held that affidavit evidence given by consignors as to knowledge of Bonnett Farms' creditors was admissible, even though it is hearsay and comes from interested parties (After all, they don't want to lose their cattle)
  - The Court found that it is likely impossible to prove "general" knowledge without resorting to hearsay of multiple deponents
  - Nothing in the Act to indicate that only creditors may give evidence as to whether they possessed general knowledge of the nature of the debtor's business

**Lease for a Term of > One Year**

- Elaborate definition of a lease term of > one year in § 1(1)(z)
  - In effect 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 > 1 year (that's what all of the subclauses are for)
- Leases for less than one year that are automatically renewable for one or more terms are deemed to count
- If the lessee overholds with the consent of the lessor, even if not provided for in the contract, the interest will count under this exception as soon as the one year mark has passed
  - You must register the interest as soon as the one year mark is passed to protect the security interest, but you don't HAVE to
  - As soon as the lessor/lessee believes that the lease will extend beyond a year, then you should register the interest right away
- Leases of household goods that are incidental to the use and enjoyment of the land are outside the Act's scope
- Also, deeming effect will not apply if the lessor does not normally lease goods
  - Volume of business is not determinative, only if the lease was undertaken as part of the ordinary course of business

**PPSA § 1(1)(z) "Lease > One Year"**

(z) “lease for a term of more than one year” includes

(i) a lease for an indefinite term even though the lease is determinable by one or both parties within one year after its execution,

(ii) subject to subsection (3), a lease initially for one year or less than one year if the lessee, with the consent of the lessor, retains uninterrupted, or substantially uninterrupted, possession of the leased goods for a period in excess of one year after the date the lessee first acquired possession of the goods, and

(iii) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties, or by agreement, for one or more terms, the total of which, including the original term, may exceed one year,

...
**Stoke Resources & Consulting Inc v Auto Body Services (ABCA 2011)**

- 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 > 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)

**EXCLUSIONS FROM THE SCOPE OF THE ACT**

- Set out in Section 4
- For example, the Crown does not need to register an interest in any deemed lien on property to secure unpaid taxes

**Interests in Land**

- PPSA cannot ever apply to real property - that is what the Land Titles Act is for
- Also excluded are 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, or to mortgages
  - Why exclude these from the PPSA? That's because these types of interests can be registered via the Land Titles Act. Excluded them expressly from the PPSA makes it clear which registry applies to these transactions.
- Also applies to assignments or charges of mortgage payments or payments under an agreement for sale

**Security Agreements Governed by Federal Statute**

- Technically, an interest under s 427 of the Bank Act will create a security interest under the broad definition of the PPSA s 1(1)(tt)
- However, federal paramountcy dictates that the provincial legislation will not have application to transactions that are governed by federal statute
- So long as federal legislation addresses inter partes rights in a security agreement, or the rights of third parties (priority), then the PPSA will not apply to the extent of that the federal legislation governs the transaction
  - NOTE - that does NOT mean that, every time that a bank takes a security interest it must be under the Bank Act - the transaction will normally say if it is intended to fall under the federal provisions

**Insurance Interests**

- The rights of payment arising from a contract of insurance are intangible property and would ordinarily by caught by s 1(1)(tt)
  - However, insurance contracts are excluded by s 4(c)
  - This exemption 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 of or damage to collateral
    - What does that mean? A holds an insurance policy and has granted a security interest in the car to SP to secure a car loan. A's car is wrecked with the result that the insurance company owes A $$$$. The SP's security interest in the car extends to the money payable under the policy as "proceeds." If A were to try and assign the proceeds to a third party, that third party would have to have a perfected security interest in the car to have priority over the insurance company.
- Section 670(1) of the Insurance Act deals with life insurance

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When an assignee of a life insurance contract gives notice in writing of the assignment to the insurer at its head or principal office in Canada, the assignee has priority of interest as against any assignee other than one who have notice earlier to the insurer of the assignment in the manner provided for

- Therefore, no registration is required, simply must notify the insurer directly

**Security Interests in Wages**

- You cannot use future wages or other compensation for labour and personal services as collateral or security on a debt
- This is purely a policy decision - protects workers from what would essentially become indentured debt servitude

**PPSA s 4 - Non-Application of the Act**

4 Except as otherwise provided under this Act, this Act does not apply to the following:

   (a) a lien, charge or other interest given by an Act or rule of law [incl. common law] in force in Alberta;
   (b) a security agreement governed by an Act of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, and any agreement governed by sections 425 to 436 of the Bank Act (Canada);
   (c) the creation or transfer of an interest or claim in or under any 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;
   (c.1) a transfer of an interest in or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;
   (d) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services;
   (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;
   (f) the creation or transfer of an interest in land, including a lease;
   (g) 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 payable under a lease of land, but not including a right to payment evidenced by investment property or an instrument;
   (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;
   (i) a transfer of accounts made solely to facilitate the collection of accounts for the transferor;
   (j) the creation or transfer of an interest in a right to damages in tort;
   (k) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency.

**ATTACHMENT**

- **Attachment** = the circumstances under which a security interest in personal property is recognized as having come into existence for purposes of the PPSA
  - Most often, attachment occurs through registration
- Remember, a PPSA security interest can only attach to personal property, not real property
  - Also, of course, a debtor can only give a security interest in THEIR property - remember *nemo dat*
- Remember, intangible property is included in the scope of the PPSA (Saulnier)
  - Saulnier was affirmed in Stout & Co v Chez Outdoors (ABCA 2009)
    - Chez was a hunting guiding company (they don't actually do the hunting themselves, but they help hunters facilitate their activities)
    - Court followed Saulnier and said that a license providing guiding services is "property" under the Civil Enforcement Act (and presumably could be extended to the PPSA)
**Saulnier v Royal Bank of Canada (SCC 2008)**

<table>
<thead>
<tr>
<th><strong>Facts</strong></th>
<th>Saulnier holds four fishing licenses, took out loan for closely held corporations, signed personal guarantee giving Bank a security interest in all present and after acquired personal property. Went bankrupt, with debts of $400k. The fishing licenses are valued at $600k. Saulnier argues that fishing licenses should not be considered &quot;property&quot; available for distribution under the BIA.</th>
</tr>
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<tbody>
<tr>
<td><strong>Ratio</strong></td>
<td>Are &quot;fishing licenses&quot; properly considered property available for distribution under the BIA?</td>
</tr>
</tbody>
</table>
| **Decision** | A commercial fisher with a crappy boat and a license to fish is much better off than a fisher with a nice boat but no license. Licensing is a tool in the arsenal of the federal Minister to manage fisheries in the interests of all Canadians. However, just because a "right" or "power" to fish has commercial value, it does not follow that licenses must constitute "property" under the BIA.

The purpose of the BIA is to regulate the orderly administration of the bankrupt's affairs, keeping a balance between the rights of creditors and the desirability of giving the bankrupt a clean break. The exemption of some property under s 67(1) is intended to facilitate the "clean break" principle. However, that exemption does not bear similarity to the proposed exempting of a valuable asset such as a fishing licenses, especially when the cash proceeds of such a sale (had it been sold prior to declaration of bankruptcy) would surely be available for distribution.

The fishing licenses are different from a regular licenses in that, in addition to giving the holder the right to do something that is otherwise illegal, it also is coupled with a proprietary element since the fish that are caught become the physical property of the fisher. The *Licensing Policy* indicates that licenses are not property interests, but that is not binding on the interpretation of "property" under the BIA. Fishing licenses also bear some resemblance to profits a prendre, which are undeniably property interests. Indeed old common law classifies fishing licenses on private property "profits a piscary." The argument that licenses are "transitory and ephemeral" is not relevant - an interest in physical property that can be terminated at will is still considered a property interest. Furthermore, "commercial realities" cannot legitimate wishful thinking about the interpretation of "property" under the BIA.

*Overall, fishing licenses qualify as property under the BIA and the PPSA. The licenses confer a limited property right in the fish, even though the full "bundle of rights" is not necessarily present. It is best described as a form of intangible property, that fits within the broad scope of the definition of "property" under s 2 of the BIA.* |
| **Ratio** | Fishing licenses qualify as "property" under the BIA and the PPSA. |

**Attachment Requirements**
- A security interest comes into existence when it attached to (or "charges") personal property
  - Without attachment, there is no security interest
- **Section 12(1)** indicates that security interests will attach when value is given and the debtor has rights in the collateral
  - Where the question of attachment involves the rights of third parties, then the security agreement must be enforceable pursuant to s 10 (that is, if there is a priority competition between different creditors to the same piece of securitized property, section 10 will apply)
    - Security interests are not enforceable unless the secured party is in possession of the collateral, the debtor has signed a written security agreement that describes the collateral
      - This is important in priority competitions
  - In short, there are two levels of attachment under s 12(1)
    - For inter partes enforcement of the security interest, must meet (a) and (b)
To assert priority against third parties, must meet (a), (b) and (c)
- Value must be given by the SECURED PARTY for attachment of security interests. "Value" is defined in s 1(1)(ww)
  - Any consideration sufficient to support a simple contract.
    - That is, it must meet the common law definition, EXCEPT that the statutory definition allows for antecedent debts and antecedent liabilities to count as proper consideration (contrary to common law contract law)
- The debtor must have "rights in the collateral"
  - Must be something more than a contractual right to possession, but could be less than full ownership (must have an in rem interest)
  - The debtor can give a security interest, in some instances, in more than his or her security interest (s 12(2))
    - For example, transactions that in substance create a security interest - the debtor is able to enter into security agreements even though a third party is the legal owner
- In short, the debtor is treated as the owner in deemed security interest situations

PPSA s 12(1) - Attachment Requirements

Attachment of security interests
12(1) A security interest, including a security interest in the nature of a floating charge, attaches when
  (a) value is given,
  (b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and
  (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10, unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.
(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.
(3) For the purposes of subsection (1), a debtor has no rights in
  (a) crops until they become growing crops,
  (b) the young of animals until they are conceived,
  (c) minerals until they are extracted, and
  (d) trees other than crops until they are severed.

PPSA s 1(1)(ww) - Definition of "value"

(ww) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability.

Enforceability Requirements
- Section 10 requirements are almost always met by signing a security agreement, although it can also be satisfied if the secured party is in possession of the collateral (almost never the case, the debtor almost always has actual possession of the secured property)
  - A written agreement must include a sufficient description of the secured property (and, potentially, how it is used to distinguish it from the statutory definitions of "equipment", "inventory" and "consumer goods"
  - If the goods are not sufficiently described to enable subsequent creditors to ascertain the interests that are attached, s 18 allows the debtor, civil enforcement agency, or creditor to demand more information to make it clear what the security interest is
    - What about a security interest in all of the "assets" held? Does not fit any of the definitions in s 10
Therefore, it would be permissible to compel additional details through s 18 if the security agreement describes the collateral as "assets".

What is a "signed security agreement"?

- Section 1(1)(ss) - security agreement means an agreement that creates or provides for a security interest.
- Typically must include a "charging clause" - a contractual provision indicating that the creditor is granted an interest in property under the agreement with the debtor.

Remember, you don't need a signed security agreement for attachment, but the attachment will only be recognized for inter partes enforcement, NOT for determining priority contests with third party creditors.

**PPSA s 10 - Enforceability of security interests**

10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only where:

(a) the collateral is not a certificated security and is in the possession of the secured party,

(b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the Securities Transfer Act pursuant to the debtor’s security agreement,

(c) the collateral is investment property and the secured party has control under section 1(1.1) pursuant to the debtor’s security agreement, or

(d) the debtor has signed a security agreement that contains:

   (i) a description of the collateral by item or kind or as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”,

   (ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as “investment property” or if it describes the underlying financial asset or futures contract,

   (iii) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property, or

   (iv) a statement that a security interest is taken in all of the debtor’s present and after-acquired personal property except specified items or kinds of personal property or except personal property described as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”.

(2) For the purposes of subsection (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor’s agent.

(3) A description is inadequate for the purposes of subsection (1)(b) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

(4) A description of collateral as inventory is adequate for the purposes of subsection (1)(b) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

**PPSA s 18(1) - Description Requirements**

18(1) The debtor, a creditor, a civil enforcement agency, or a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party at the secured party’s most recent address in a registered financing statement relating to the property, or a more recent address if known by the person making the demand, require the secured party to send or make available to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following:

(a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
(c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;
(d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
(e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it.

Interests in After-Acquired Property and Exceptions

- **Section 13(1)** allows a debtor to grant security interests in property they do not own yet, but which will be acquired in the future (that is, allows for security interests to be created in after-acquired property)
  - This will happen automatically as new property is acquired that falls under the definition of the goods that are to comprise the security interest
- The security agreement does not necessarily need to explicitly state that it is intended to apply to after-acquired property for it to so apply
  - For example, a security interest in "cattle" or "inventory" will, most likely, be interpreted as meaning present and after-acquired cattle and inventory
  - Best practice for lawyers - make this explicit in the initial contract, eliminates possible confusion
- **Exceptions in s 13(2):**
  - Security interests will not attach to crops that grow more than one year after the security interest is granted
    - That is, a security interest will attach to the crops for the year in which the agreement was first entered into, but will not attach thereafter
  - Will not attach to after acquired consumer goods (other than an accession - goods attached to other goods), unless the security interest is a purchase money security interest or a security interest in collateral obtained by the debtor as replacement for collateral described in the security agreement
    - Recall the definition of "consumer goods" in the PPSA - goods that are used or acquired for use primarily for personal, family, or household purposes
    - Also, the definition of "purchase-money security interest" - security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price, and also includes a commercial consignment.
    - In short, for a security interest to apply to after-acquired household goods, the security interest must be directly connected in some way to the property itself (i.e. the loan was given specifically to purchase that property), or fall under the category of a commercial consignment

**PPSA s 13 - After-acquired collateral**

After-acquired collateral

13(1) Except as provided in subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12, without the need for specific appropriation.

(2) A security interest does not attach to after–acquired property that is
   (a) a **crop** that becomes a growing crop more than one year after the security agreement has been entered into, except that a security interest in crops that is given in conjunction with a lease, agreement for sale or mortgage of land may, if so agreed, attach to crops to be grown on the land concerned during the term of the lease, agreement for sale or mortgage, or
   (b) **consumer goods**, other than an accession, unless the security interest is a purchase–money security interest or a security interest in collateral obtained by the debtor as replacement for collateral described in the security agreement.

**iTrade Finance Inc v Bank of Montreal (SCC 2011)**
Facts

iTrade loaned $$$ to Webworx on basis of fraudulent representations regarding Webworx's business operations. Webworx paid out these funds to its present Ablacksingh, who used the money to buy shares held in an investment account. He later pledged (that is, gave a security interest in) these shares as security for a line of credit from BMO. iTrade discovered shenanigans, sued Webworx and Ablacksingh. Shares held in trust account pending resolution.

Trial judge declared that any property purchased using the iTrade $$, including the shares, are to be held in constructive trust for iTrade (hence eliminating BMO’s security). However, the trial judge 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 rights to the shares.

Issues

Who rightly owns the shares, BMO or iTrade?

Decision

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. 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.

Ratio

All three requirements in s 12 must be met for a security interest to properly attach, including that the debtor have proprietary rights in the collateral when the security interest in that collateral is granted.

Quistclose Trusts

- Trusts may arise by operation of law
  - i.e. the iTrade case shows that equitable interests can arise that might be defeated by a security interest
- Quistclose trusts may have significant consequences on competing claims of a debtor’s property
- Arise when funds are advanced by person A to person B, to be used for a specific purpose, and if the funds are not used for that purpose, then they are to be returned to A
  - At law, B holds the funds in trust for A
  - The parties do not need to declare a trust, but it can be asserted in Court
Remember, if a Quistclose trust can be proven, that will affect what interests the debtor are able to transfer to a creditor, affecting the operation of section 12 (and, potentially, preventing attachment)

In Ontario v Two Feathers Forest Products (ONCA 2013) - the Court declared that you cannot have both a trust interest and security interest simultaneously (it can only be one or the other)
- The Court said that courts should generally be cautious about imposing Quistclose trusts, must consider the impact on the creditors of the borrower (since they will not have notice of the trust before agreeing to the security arrangement)

Deemed Security Agreements and "Rights in the Collateral"
- Recall that the PPSA is deemed to apply to four transactions that are not, in substance, security agreements
  - Assignment of accounts
  - Assignment of chattel paper
  - A lease for a term of more than one year
  - Commercial consignments
- Essentially, these transactions are deemed to create security interests
- These transactions involve two types of situations:
  - Where a lessor or consignor gives nothing more than possession to a lessee or consignee
  - Where a creditor sells and transfers ownership in an account or chattel paper to a buyer
- Since these are not actually security agreements, how do they "attach"? (s 12(2))
  - 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))

PPSA s 12(2) - Attachment of deemed security interests
(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

Sprung Instant Structures Ltd v Caswan Environmental Services (ABQB 1997)

<table>
<thead>
<tr>
<th>Facts</th>
<th>Sprung and RBC are creditors of Caswan. Sprung leased a structure to Caswan. RBC advanced funds to Caswan under the terms of a general security agreement. Sprung leased structure in 1994, initial term was 24 months. In 1995, renewed for an additional 7 months. Sprung did not register lease as a security interest until 1996. RBC advanced funds under general security agreements in 1994 (granting RBC a security interest in all present and after-acquired property of Caswan). Caswan went bankrupt - RBC is now trying to claim the structure as part of the secured goods it is entitled to, even though Caswan was only the lessee of the tents.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues</td>
<td>Can RBC claim the tent Sprung leased to Caswan to satisfy its security interest?</td>
</tr>
<tr>
<td>Decision</td>
<td>Sprung claims that the security agreement cannot cover the tents it leased to Caswan since Caswan did not actually own those tents, and therefore did not have a proprietary interest sufficient to allow a security interest to attach. RBC claims that this is really just a contest between two secured creditors, and RBC perfected its security interest before Sprung did. The security agreement between RBC and Caswan warrants that Caswan owns all of the collateral free of other encumbrances, so Sprung is trying to use this to show that the leased materials could not have been intended to be included as part of the collateral. Court</td>
</tr>
</tbody>
</table>
does not accept Sprung's argument, as the granting clause specifically grants a security interest in all property held "without limitation."

As for the operation of s 12, the first two requirements are met (that is, there is a signed agreement, and the creditor gave value for the security agreement) in both the Sprung lease and RBC's interest. Caswan did not have rights to the leased structure until Caswan was in possession of it (12(2)) which occurred in late 1994. At that time, a security interest in favour of RBC came into existence and attached to the structure (pursuant to its general security interest in after-acquired property). This was perfected by registration in December 1994.

For Sprung, the PPSA deems all leases > 1 year to be security interests for the purpose of determining priority contests. This is clearly a lease within the ambit of the PPSA, since its initial term was 24 months. Since the security interest was not perfected until 1996, RBC has priority over Sprung. Also, Sprung cannot claim priority as a result of seizing the structure after the bankruptcy, perfection cannot occur as a result of repossession (s 24).

Note that section 34(2) can give lessors with terms greater than one year super-priority over other creditors if they register their interest within 15 days of Caswan obtaining possession of the leased structures. Sprung did not comply with that section of the Act, and therefore cannot rely on it.

<table>
<thead>
<tr>
<th>Ratio</th>
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<tr>
<td>Leases &gt; 1 year will create security agreements, and attachment will be deemed to occur as of the date of possession by the debtor.</td>
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</tbody>
</table>

### Sprung Instant Structures Ltd v Caswan Environmental Services (ABCA 1997)

- The ABCA rules that no priority issues under the PPSA arise in this case, unless the RBC agreement purports to charge the structure
- The ABCA disagrees with the trial court that the security agreement was originally intended to apply to leased goods (essentially, the ABCA adopts Sprung's earlier argument with respect to the scope of the RBC security agreement)
- The RBC agreement does not purport to charge the structure, therefore Sprung's claim for a declaration of valid seizure is allowed
- Prof. Buckwold believes the ABCA's decision is wrong. The ABCA does not give due consideration to the fact that leases > 1 year are deemed to be security interests under the Act. The Court essentially started at the wrong end of the analysis - it looked at whether the structure was property at common law, and did not properly apply the deeming rules under the Act.

### 1777575 Alberta Ltd v Sprung Instant Structures (ABQB 2014)

- **No one followed the Caswan decision, because it is bad law and was effectively reversed by the SCC in Re Giffen.**
  - That is… until 1777575 Alberta Ltd v Sprung Instant Structures (ABQB 2014) - 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)
    - She declines to follow the earlier Caswan case, and instead properly applies the PPSA principles

### PPSA s 34(2) - Priority of Purchase Money Security Interests within 15 days

(2) A purchase-money security interest in
(a) collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible or, subject to section 28, its proceeds, that is perfected not later than 15 days after the day the security interest in the intangible attaches has priority over any other security interest in the same collateral given by the same debtor.

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**Re Giffen (SCC 1998)**

**Facts**

In October 1992, the lessor leased a Saturn to BCTel, which in turn leased the car to its employee, Giffen. Giffen went bankrupt. Giffen's lease with BCTel was for more than one year, and it gave her the option of purchasing it from the lessor. Although the lessor was not directly a party to the agreement between BCTel and Giffen, it did receive Giffen's deposit, it fixed the lease rates, and it was entitled to receive payments directly from Giffen if her employer stopped paying her. Furthermore, the lessor company was listed as an owner of the vehicle. Neither the lessor nor BCTel registered their interests. The trustee in bankruptcy is now claiming that it is entitled to the property since the security agreements were never perfected.

**Issues**

Do either Giffen or BCTel hold a valid security interest with priority over the trustee in bankruptcy with regards to the Saturn?

**Decision**

Leases for a term of more than one year are deemed to be included within the scope of the PPSA. The lessor's interest in the car is the reservation of title in the car - this interest (created by the lease agreement) falls within the ambit of the PPSA. The debtor obtains rights in goods leased to the debtor when he obtains possession of them in accordance with the lease according to s 12(2). Thus, upon delivery of the car to Giffen, the lessor had a valid security agreement in the car (attachment was complete at delivery). However, the attachment was never perfected, which leaves the interest vulnerable to later creditors whose interests did attach (including the trustee in bankruptcy).

Unlike the ABCA in Casawan, the SCC properly interprets the PPSA as modifying the common law rules of property characterization.

**Ratio**

For leases of more than one year, a security agreement will be deemed to attach to the chattel as soon as it is delivered to the debtor.

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**Power to Give a Security Interest**

- Essentially, 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 the common law *nemo dat* principle
- There are exceptions to the *nemo dat* principle, where a person with only possessory rights to property is empowered by law to convey or charge the full ownership right in the property held by someone else

**Disposition by a Mercantile Agent**

- *Alberta Factors Act s 2* indicates that a mercantile agent in possession of 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 or secured party takes in good faith and without notice that the mercantile agent is acting without authority from the owner.
  - The owner's consent to sell the goods or give a security interest in the goods is PRESUMED in the absence of contrary evidence
- ELEMENTS:
  - Mercantile agent = business seller of goods of this kind
  - In possession of goods with consent of the owner
Pledges goods (includes security agreements)
Made in the ordinary course of the mercantile agent's business (i.e. the goods cannot be used as collateral against mercantile agent's personal debts)

However, note that if the mercantile agent holds the goods as part of a commercial consignment, the PPSA will apply, not the Factors Act

- Remember, a commercial consignment can only be found if the consignor and consignee are in the business of selling goods of that type. If the person giving the good to the mercantile agent is not normally in the business of selling that good, then it will not be a commercial consignment.
- These cases are most normally found where a regular person gives their car or motorhome to a commercial seller to sell on their behalf - the regular person is not normally in the business of selling these goods, so the transaction cannot be classified as a commercial consignment.

Seller in Possession

- Section 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.
  - The seller of goods sells the goods to a buyer, and the buyer acquires title, but the seller is still in possession of the goods for a time until delivery
  - The seller has the power to grant a security interest in the goods to a third party (even though legal title has transferred to the buyer), but only if the seller delivers the goods to the secured third party
  - This does not come up very often

PERFECTION

- "Perfection" describes the priority status acquired by a security interest
- Section 19 PPSA indicates that perfection occurs when the security interest has properly attached (s 12) AND all steps required for perfection are complete
- It is an in rem interest in personal property
- At common law, nemo dat principle governs priority disputes - persons holding property interests first will have a greater claim to the property (subject to divestment) than successors who possess the property
- Remember iTrade! A prior equitable interest in property can be defeated by a bona fide purchaser for value without notice
- The PPSA does away with the nemo dat principle, and adds additional requirements to establish a creditor's claim over the collateral
- That PPSA does not explicitly define perfection, but it does indicate what can defeat interests that are not properly perfected
  - See section 20 (priority of unperfected security interests)
  - Section 35(1) - other secured creditors (from residual priority rules)
- Perfection is a requirement for priority to be recognized, but since it is not the sole factor upon which priority is based, perfection does not confer invulnerability to certain competing claims
- Perfection is IRRELEVANT for the issue of enforcing inter partes rights, it is used solely to determine priority status

PPSA s 19 - Perfection Requirements

Perfection of security interest
19 A security interest is perfected when
  (a) it has attached, and
  (b) all steps required for perfection under this Act have been completed, regardless of the order of occurrence.
PPSA s 20 - Priority of Unperfected Security Interests

Priority of unperfected and certain perfected security interests

20  A security interest

   (a) in collateral is not effective against
       (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or
       (ii) a liquidator appointed under the *Winding-up and Restructuring Act* (Canada) if the security interest is unperfected at the date the winding-up order is made;

   (b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who
       (i) acquires the interest under a transaction that is not a security agreement,
       (ii) gives value, and
       (iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

PPSA s 35 - Residual Priority Rules

Residual priority rules

35(1) Where this Act provides no other method for determining priority between security interests,

   (a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:
       (i) the registration of a financing statement, without regard to the date of attachment of the security interest,
       (ii) possession of the collateral under section 24, without regard to the date of attachment of the security interest, or
       (iii) perfection under section 5, 7, 26, 29 or 77, whichever is earlier,

   (b) a perfected security interest has priority over an unperfected security interest, and

   (c) priority between unperfected security interests is determined by the order of attachment of the security interests.

Time for Determining Characterization of Goods

- Section 1(5) of the PPSA indicates that goods will be classified as consumer goods, inventory, or equipment as of the date of attachment

Perfection Steps

- Remember, both the perfection steps and attachment requirements must be completed
- Note the section 19 indicates that the order does not matter, perfection occurs once the requirements are met regardless of the order they proceeded in
- Perfection can happen automatically in some circumstances (s 5 - temporary automatic perfection for interprovincial goods)
  - Also s 28(3) - perfection re proceeds

PPSA s 5(2) - Temporary automatic perfection for interprovincial goods

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province

   (a) not later than 60 days after the goods are brought into the Province,
   (b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or
(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached, whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer’s or lessee’s interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

PPSA s 28(3) - Perfection re Proceeds

(3) Where the security interest in the original collateral was perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.

Perfection by Possession

- Perfection can occur if the secured party (or an agent of the secured party) is in actual possession of the collateral
- Doesn't happen often, but will happen in pawn shops - you give the pawn shop personal property, they will loan you money and will hold the personal property for 30 days, at the 30 day mark, you have the option of either paying the loan with interest, or relinquishing the property to the pawn shop for them to sell for their own profit
- If the secured party is in possession due to seizure of collateral to enforce a security agreement, then perfection by possession will not apply
  - Side note - in Ontario, their PPSA does not have this qualifier, so you can perfect a security interest through seizure to enforce a security agreement

PPSA s 24 - Perfection by Possession

Perfection by possession

24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party’s behalf by another person, perfects a security interest in

(a) goods,
(b) chattel paper,
(c) repealed 2006 c5-4.5 s108(16),
(d) a negotiable document of title,
(e) an instrument, and
(f) money,

but only while it is actually held as collateral and not while it is held as a result of a seizure or repossession.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor’s agent.

(3) Subject to section 19, a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 68 of the Securities Transfer Act.

(4) Subject to section 19, a security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 68 of the Securities Transfer Act and remains perfected by delivery until the debtor obtains possession of the security certificate.

Perfection by Registration

- Recall that the registry system is a central feature of the PPSA
- Disclosure of the creditor's interest through the registry allows subsequent creditors to take precautionary measures to avoid a loss
- Section 25 allows registration in the PPSA to be used to secure perfection for any type of collateral
- However, s 31 provides an alternative perfection method that is superior to s 25 registration
Perfection can be achieved by taking possession of property where negotiable collateral such as money, a negotiable instrument, a security or chattel paper is involved.

- Note that s 47 indicates that registration of a financing statement IS NOT considered constructive notice of its contents.
  - However, note that the priority regime does not depend upon subjective or objective knowledge of prior registrations or the absence of registration.
  - **Priority is determined simply on the FACT of registration.**

- Also, note the difference between a financial statement and a financing statement:
  - Financial statements are statements of accounts prepared by company accountants showing assets and liabilities.
  - Financing statements are simply a statutory form under the PPSA.

**PPSA s 25 - Perfection by Registration**

Perfection by registration

25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

**PPSA s 31 - Protection of transferees of negotiable collateral**

Protection of transferees of negotiable collateral

31(1) A holder of money has priority over any security interest perfected under section 25 or temporarily perfected under section 28(3) if the holder
   - acquired the money without knowledge that it was subject to a security interest, or
   - is a holder for value, whether or not the holder acquired the money without knowledge that it was subject to a security interest.

(2) A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery.

(3) A purchaser of an instrument has priority over a security interest in the instrument perfected under section 25 or temporarily perfected under section 26 or 28(3) if the purchaser
   - gave value for the instrument,
   - acquired the instrument without knowledge that it was subject to a security interest, and
   - took possession of the instrument.

(4) A holder of a negotiable document of title has priority over a security interest in the document of title that is perfected under section 25 or temporarily perfected under section 26 or 28(3) if the holder
   - gave value for the document of title, and
   - acquired the document of title without knowledge that it was subject to a security interest.

(5) For the purposes of subsections (3) and (4), a purchaser of an instrument or a holder of a negotiable document of title who acquired the purchaser’s or holder’s interest in a transaction entered into in the ordinary course of the transferor’s business has knowledge only if the purchaser or holder acquired that interest with knowledge that the transaction violated the terms of the security agreement creating or providing for the security interest.

(6) A purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of the purchaser’s business and for new value has priority over any security interest in it that
   - was perfected under section 25 if the purchaser does not have knowledge at the time of taking possession that the chattel paper is subject to a security interest, or
   - has attached to proceeds of inventory under section 28 whatever the extent of the purchaser’s knowledge.

**PPSA s 47 - Registration Not Constructive Notice**

Registration not constructive notice

47 Registration of a financing statement in the Registry is not constructive notice or knowledge of its existence or contents to third parties.
"Notice" Registry and Pre-Agreement Registration

- Mechanism for registration is filing of a "financing statement" in the PPR
- Most essential components: name of the debtor and description of the collateral
- Regulations provide rules on how the collateral is to be described
  - Requirements for identifying the debtor's name provided in s 20 of the Regulation
  - Requirements for general collateral description rules provided in s 36 of the Regulation
  - **Purpose of the rules in to ensure that a person reading the financial statement could recognize and identify what property MAY be subject to a security interest (need not be 100% precise)**
    - Goods with serial numbers are governed by additional requirements under s 34(1)
      - Essentially, if the goods are "consumer goods" the serial number must be reported, but if they are classified as "inventory" or "equipment", the secured party MAY include the serial number, but is not required to
    - **Note that only minimal information about the terms of the credit contract are disclosed through the registry**
      - Also does not provide much information on the nature or extent of the secured interest in a particular piece of collateral
      - Section 18 provides mechanism for third parties to determine more information on extent of security interests
      - Demands can only be made from debtors, current creditors, sheriffs, or a person with an existing interest in the secured property
      - CANNOT be made from prospective creditors - the idea is that potential creditors can demand this information from the debtor directly without compelling it from existing creditors of that debtor
- Security interests can be registered early before the contract is finalized (i.e. a bank registering a prospective security interest in collateral while negotiating the loan)
  - This is used to protect the bank's priority against competing creditors
  - Again, remember that the order of perfection and attachment does not matter
    - In some cases, such as determining priority vis a vis the trustee in bankruptcy, the date of perfection is important (both steps must be fulfilled)

Debtor Name Requirements

- Note that, if you change your legal name, you must use the name in the "change of name" certificate issued by the province (According to PPR s 20)
- What about for married couples? You are not required to register a change of name certificate - therefore, you MUST use the birth certificate name (VERY IMPORTANT TO REMEMBER THIS)
  - This is how it applies in Alberta, but is different in other provinces

**PPS Reg s 20 - Name of Creditor**

Specifying names of individuals

20(1) This section applies where the name of the debtor or secured party to be set out in a financing statement or financing change statement is an individual.

(2) The last name followed by the individual’s first name and middle name, if any, must be specified.

(3) If the individual has more than one middle name, the first of the middle names must be specified.

(4) If the name does not consist of both a first name and last name, that name must be shown as the individual’s last name.

(5) Where the name includes a designation such as “Junior”, that designation must be specified following the first name.

(6) Where the individual carries on business under a name or style other than the individual’s own name, the individual’s own name must be given and must be indicated as the name of an individual for the purposes of section 19.

(7) The name of the individual is to be determined for the purposes of this section by the following:
(a) where the individual was born in Canada and the individual’s birth is registered in Canada with a
government agency responsible for the registration of births, the name of the individual is the name as stated in the
individual’s birth certificate or equivalent document issued by the government agency;

(b) where the individual was born in Canada but the individual’s birth is not registered in Canada
with a government agency responsible for the registration of births, the name of the individual is

   (i) the name as stated in the current passport issued to the individual by the Government of Canada,

   (ii) if the individual does not have a current Canadian passport, the name as stated in a current

   social insurance card issued to the individual by the Government of Canada, or

   (iii) if the individual does not have a current Canadian passport or social insurance card, the

   name as stated in a current passport issued to the individual by the government of a jurisdiction other than Canada

   where the individual habitually resides;

(c) where the individual was not born in Canada but is a Canadian citizen, the name of the individual
is the name as stated in the individual’s certificate of Canadian citizenship;

(d) where the individual was not born in Canada and is not a Canadian citizen, the name of the
individual is

   (i) the name as stated in a current visa issued to the individual by the Government of Canada,

   (ii) if the individual does not have a current Canadian visa, the name as stated in a current

   passport issued to the individual by the government of the jurisdiction where the individual habitually resides, or

   (iii) if the individual does not have a current Canadian visa or a current passport, the name as

   stated in the birth certificate or equivalent document issued to the individual by the government agency responsible for

   the registration of births at the place where the individual was born;

(e) notwithstanding clauses (a) to (d) and subject to clause (f),

   (i) if the individual changes name because of marriage or an adult interdependent relationship

   and that name is recognized under the law of the jurisdiction where the individual habitually resides, the name of the

   individual is the name adopted by the individual after marriage or becoming an adult interdependent partner, and

   (ii) if the individual changes name in accordance with change of name legislation, the name of

   the individual is the name as stated in the individual’s change of name certificate or equivalent document, as the case

   may be;

(f) where the law of the jurisdiction where the individual habitually resides allows a person to use
both the name adopted after marriage or becoming an adult interdependent partner and the name that person had
before marriage or becoming an adult interdependent partner, and the individual uses both names, clauses (a) to (d)
continue to apply and both the name of the individual determined in accordance with those clauses and the name
adopted after marriage or becoming an adult interdependent partner must be registered as separate individual names;

(g) in a case not falling within clauses (a) to (f), the name of the individual is the name as stated in
any 2 of the following documents issued to the individual by the Government of Canada or of a province or territory of
Canada:

   (i) a current motor vehicle operator’s licence;

   (ii) a current vehicle registration;

   (iii) a current medical insurance card.

(8) For the purposes of subsection (7), the name of the individual must be determined as of the date of the event or
transaction to which the registration relates.

(9) In addition to specifying the name of the individual in accordance with subsections (1) to (8), the secured party may
enter any other name of the individual of which the secured party has knowledge as a separate debtor or secured party
name.

Collateral Description Requirements

- General collateral description rules are subject to the more specific serial number rules that apply to consumer
goods (s 43(7))
Attachment requires a written security agreement, as provided in the PPSA, and perfection requires certain things to be satisfied on the financing statement (very similar operationally, but pertains to two distinct elements of the process).

Note that, for inventory, if the description simply says "inventory," then the security agreement will only apply to chattels so classified (that is, if something is taken out of inventory and becomes consumer goods or equipment, then it will no longer be subject to the security agreement).

Descriptions by "kind" are permitted - i.e. you may not need to specifically identify the specific chattel, just describe it generally:
- IF the collateral description in the registry is overly broad, the debtor can demand that the secured party amend the registration to make it more specific.

Describing goods in general terms can also give the first secured party greater priority than later creditors if they subsequently decide to extend additional loans to the debtor secured by property of the same kind:
- That's because the subsequent loans will be perfected on the basis of the earlier registration date.
- The debtor or other parties holding proprietary or security interests in the collateral can make a demand under ss 50(3)-(4) to amend the statement to either exclude property that is not within the ambit of the security interest, or amend the description of the collateral to make it more narrow.

**PPS Reg s 36 - Collateral Description Requirements**

Collateral to be described other than by serial number

36(1) This section applies where a financing statement is submitted for the registration of a security interest in:
   - (a) collateral other than serial number goods, or
   - (b) serial number goods not described in accordance with section 35 in the case of inventory or equipment.

36(2) Where collateral is to be described under this section, the secured party must set out the description under "Collateral: General" and must provide:
   - (a) a description of the collateral by item or kind or as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”;
   - (b) a statement indicating that a security interest is taken in all of the debtor’s present and after-acquired personal property;
   - (c) a statement indicating that a security interest is taken in all of the debtor’s present and after-acquired personal property except specified items or kinds of personal property or except personal property described as “goods”, “chattel paper”, “investment property”, “documents of title”, “instruments”, “money” or “intangibles”, or
   - (d) a description of the collateral as inventory, but such a description is valid for the purposes of this section only while the collateral is held by the debtor as inventory.

36(3) A description is inadequate for the purposes of subsection (2) if it describes collateral as consumer goods or equipment without further reference to the kind of collateral.

**PPSA s 50(4)-(4) - Demand to Amend a Financing Statement**

36(3) Where a financing statement is registered and:
   - (a) all of the obligations under the security agreement to which it relates have been performed,
   - (b) the secured party has agreed to release part or all of the collateral described in the financing statement,
   - (c) the collateral description in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor or does not distinguish between original collateral and proceeds, or
   - (d) no security agreement exists between the secured party and the debtor, the debtor or any person with an interest in property that falls within the collateral description in the financing statement may give a written demand to the secured party.

40(4) A demand referred to in subsection (3) shall require that the secured party, not later than 40 days after the demand is given, either
(a) register a financing change statement
   (i) discharging the registration, in a case falling within subsection (3)(a) or (d),
   (ii) amending or discharging the registration, as the case may be, to reflect the terms of the agreement, in a case falling within subsection (3)(b), or
   (iii) amending the collateral description in the registration to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor or to identify items or kinds of property as original collateral or proceeds, in a case falling within subsection (3)(c),
   or
(b) provide to the Registrar an order of the Court confirming that the registration need not be amended or discharged, accompanied with a completed financing change statement in respect of the order.

Serial Number Requirements
- The Regulations define certain items as serial number goods
- If the collateral falls within those types of property, then s 34(1) of the PPS Reg will determine whether the serial number is required
- Section 35 of the PPS Reg sets out requirements of the serial number description, which in addition to the serial number, also requires a make and model description
  - Note that characterization is determined as of the date of attachment - s 1(5) - Unless otherwise provided in this Act, goods are "consumer goods" "inventory" or "equipment" if at the time the security interest in the goods attaches they are consumer goods, inventory or equipment.
  - If the serial number goods are "consumer goods" - then the serial number must be included in accordance with s 35 (contents of serial number description)
  - If the serial number goods are "equipment or inventory", then the secured party may provide a description of the goods in accordance with s 36, or may register the serial number is accordance with s 35
    - HOWEVER, for equipment, a registration that lacks the serial number will not be effective to establish priority against other secured creditors (but it will establish priority against the trustee in bankruptcy and unsecured creditors)
      - **Section 35(4)** - Serial number goods held as equipment will not establish priority against other secured creditors
      - **Sections 30(6)-(7)** - serial number goods held as equipment will not establish priority as against a buyer of those same goods if the serial number is not included in the registration
    - Note that, as against the trustee in bankruptcy, a registration of serial number goods held as equipment that does not include the serial number will take priority
- Very important for motor vehicles - since no Canadian province uses a "title" system for vehicles, it is necessary for information about cars subject to security interests to be easily identifiable within the PPSA
  - Note definition of motor vehicle from Royal Bank v Steinhubl - Will apply to any vehicle that is intended to be driven on roads and natural terrain (could logically include golf carts and forklifts that operate on farms)
  - For consumer goods - both the debtor name AND the serial number of the goods must be registered (s 43(7))
  - For equipment - the secured party has a choice - can submit a financing statement that may include serial numbers (s 34(1)(b)) or can choose to not indicate the serial number
    - IF the serial number is not included, the security interest will not be considered perfected for priority contests against other secured creditors (s 35(4)) or against the buyer of lessee of the goods (s 30(6)-(7))
    - **Thus, a registration of equipment that gives a description but not the serial number of the collateral will only give the creditor priority over the trustee in bankruptcy and unsecured creditors, but not over other secured parties or subsequent buyers or lessees of the goods**
  - The purpose of this is to provide for allowance of human falliability - the registration does not need to be absolutely perfect for it to have SOME effect
    - Section 43(6)-(7) provides guidelines for how far a registration can deviate from absolute perfection and still be at least partially valid
PPS Reg s 34(1) - Serial Number Requirements

Collateral description
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.

PPS Reg s 1(1)(y) - definition of "serial number goods"

(y) “serial number goods” means,

(i) except in respect of a garage keeper’s lien, a motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat, and
(ii) in respect of a garage keeper’s lien, a motor vehicle or farm vehicle;

PPSA s 35(4) - registration without serial number will not perfect for certain priority competitions

(4) A security interest in goods that are equipment and are of a kind prescribed by the regulations as serial number goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (9) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

PPSA s 30(6)-7 - registration without serial number ineffective against buyer or lessee of goods

(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under section 25 if

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and
(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed by the regulations as serial number goods.

Request for Statement from Secured Party

PPSA s 18 - Request for Statement from Secured Party

Request for statement from secured party
18(1) The debtor, a creditor, a civil enforcement agency, or a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party at the secured party’s most recent address in a registered financing statement relating to the property, or a more recent address if known by the person making the demand, require the secured party to send or make available to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following:

(a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;
(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
(c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;
(d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
(e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it.
(2) A person with an interest in personal property of the debtor is entitled to make a demand under subsection (1) only with respect to a security agreement providing for a security interest in the property in which that person has an interest.

(3) The secured party, on the demand of the person entitled to receive a copy of the security agreement under subsection (1), shall permit that person to inspect the security agreement or a copy of it during normal business hours at the location referred to in subsection (1)(e).

(4) Where a demand is made in accordance with subsection (1)(c) and the secured party claims a security interest in all of the personal property of the debtor, in all of the property of the debtor other than a specified kind or item of property or in all of a specified kind of property of the debtor, the secured party may indicate this instead of approving or correcting the itemized list of the property.

(5) The secured party shall comply with a demand under subsection (1) or (3) not later than
   (a) 25 days after the secured party receives it, where the secured party is a trustee under a trust indenture, or
   (b) 10 days after the secured party receives it, in the case of any other secured party.

(6) If, without reasonable excuse, the secured party fails to comply with a demand under subsection (5) or, in the case of a demand under subsection (1), if the secured party’s reply is incomplete or incorrect, the person making the demand, in addition to any other remedy provided by this Act, may apply to the Court for an order requiring the secured party to comply with the demand.

(7) If the secured party who received a demand under subsection (1) or (3) no longer has an interest in the obligation or property of the debtor that is the subject of the demand, the secured party shall, not later than 10 days after receiving the demand, disclose the name and address of the secured party’s successor in interest and the latest successor in interest, if known to the secured party, and if, without reasonable excuse, this is not done, the person making the demand, in addition to any other remedy provided by this Act, may apply to the Court for an order requiring the person to whom the demand was made to comply with this section.

(8) On an application under subsection (6) or (7), the Court may make an order requiring
   (a) the secured party referred to in subsection (5) to comply with the demand referred to in that subsection, or
   (b) the person receiving the demand referred to in subsection (7) to disclose the information referred to in that subsection,
   and if the order is not complied with, may order that the security interest of the secured party with respect to which the demand was made is unperfected or extinguished and that any related registration be discharged, and may make any other order it considers necessary to ensure compliance with the demand.

(9) On an application of the secured party referred to in subsection (6) or the person receiving the demand referred to in subsection (7), the Court, subject to section 67(1), may exempt the secured party or person receiving the demand in whole or in part from complying with subsection (5) or (7), other than a demand made by the debtor, or may extend the time for compliance.

(10) A secured party who has replied to a demand referred to in subsection (1) is estopped for the purposes of this Act, as against the person making the demand and any other person who can reasonably be expected to rely on the reply, to the extent that the person making the demand or the other person, as the case may be, has relied on the reply, from denying
   (a) the accuracy of the information contained in the reply to the demand under subsection (1)(b), (c) or (d), and
   (b) that the copy of the security agreement that the secured party provided in response to a demand under subsection (1)(a) is a true copy of the security agreement required to be provided under subsection (1)(a).

(11) Subject to subsection (12), a successor in interest referred to in subsection (7) is estopped for the purposes of this Act, as against the person making the demand referred to in subsection (1) and any other person who can reasonably be expected to rely on the reply to the demand, to the extent that the person making the demand or the other person, as the case may be, has relied on the reply, from denying
   (a) the accuracy of the information contained in the reply to the demand under subsection (1)(b), (c) or (d), and
that the copy of the security agreement that was provided in response to a demand under subsection (1)(a) is a true copy of the security agreement required to be provided under subsection (1)(a).

(12) A successor in interest referred to in subsection (7) is not estopped under subsection (11) if

(a) the person who relied on the reply knew that the interest had been transferred and knew the identity and address of the successor in interest, or

(b) prior to the demand, a financing change statement was registered as provided in section 45 disclosing the successor in interest as the secured party.

(13) The person to whom a demand is made under this section may require payment in advance of a fee in a prescribed amount for each demand, but the debtor is entitled to a reply without charge once every 6 months.

(14) A secured party who receives a demand that purports to be made by a person entitled to make the demand under subsection (1) may act as if the person is entitled to make the demand unless the secured party knows that the person is not entitled to make it.

Defects in Registration

- The objective of the PPSA is to allow subsequent creditors to view security interests already attached and perfected in collateral
  - It is assumed that searching by debtor’s name will reveal security interests registered against property held by them
  - The Regulations prescribe how the name must be registered as (generally, must be legal name according to official documents)
  - A "perfect" registration will allow subsequent creditors to find the security interest by searching for the legal name alone (does not require reference to other information)
- Two search criterion are used in the algorithm that sorts the registry: debtor’s name and description of collateral
- Most searches are done using the debtor's name, the collateral description is used to assist in identifying security interests in collateral if the debtor's identity is not known
- Search results will also reveal SIMILAR matches that are close to the name that is entered
  - This is to account for mistakes made in entering the debtor’s legal name
- Section 43(6) - validity of registering a financing statement will not be affected by a defect unless the error is "seriously misleading"
  - String of case law interprets what the threshold of "seriously misleading" is
    - Objectively, if a reasonable searcher, conducting a reasonable search, would not be able to find the security interest
    - Even if the match is inexact, it must be close enough that a reasonable searcher will be prompted to look into it further

PPSA s 43(6) - validity of registrations with defects

(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.

PPSA s 43(7)-(8) - Registration requirements for consumer goods

(7) Subject to subsection (9), where one or more debtors are required to be disclosed in a financing statement or where collateral is consumer goods of a kind that is prescribed by the regulations as serial number goods, and there is a seriously misleading defect, irregularity, omission or error in

(a) the disclosure of any debtor, other than a debtor who does not own or have rights in the collateral,

(b) the serial number of the collateral,

the registration is invalid.
**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 Calgary'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?

**Decision**

Justice Cote indicates that a registration will pass the "seriously misleading" threshold if: (1) it would likely prevent a reasonable search under a reasonable filing or registration system 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.

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.

**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.
### GMAC Leaseco Ltd v Moncton Motor Home & Sales Inc (NBCA 2003)

**Facts**
GMAC looked to register its security interest in a car it was leasing out. Misspelled the lessee's name, but registered the car's serial number correctly. When a search was conducted of the registry, the lessee's name did not show up, but if the serial number was entered, it would show an active security interest registered against it.

**Issues**
Does this cross the "seriously misleading" threshold test?

**Decision**
There is no requirement for a dual search (that is, search for both the lessee's name and the car's serial number). A "seriously misleading" error with either the serial number (where it is required, as in consumer goods, which is the case here), or the lessee's name will be sufficient to invalidate the entire registration. **Also, the subjective knowledge of the parties is irrelevant - the fact that the trustee in bankruptcy knew that GMAC had a previously registered security interest is irrelevant - the only relevant factor is whether the registration was effective at that point. This gives predictability in results and outcome.** The test for seriously misleading is as follows:

1. If a search using the correct information doesn't disclose the interest as either an exact or close match, then the error will be deemed seriously misleading.
2. If a search reveals one or more close matches, then further reflection is required by the aspiring creditor.
   a. Would reasonable searchers of the registry ignore the close matches, or would it be prudent to pursue at least those that are sufficiently similar?

**Note that, none of this applies if the serial number is mandatory, and is entered incorrectly. A correct lessee name will not save an incorrect serial number in those circumstances.**

Where a serial number is optional, or not required, an error in the serial number should be treated as an election to omit it entirely.

**What about serial number goods held as equipment?** The serial number is not mandatory, but is optional. However, PPSA s 35(4) indicates that the serial number must be registered to gain priority over subsequent secured creditors for the same chattel. Therefore, the incorrect serial number will give the first secured party priority over the trustee in bankruptcy, but not over subsequent secured creditors that properly register their interests. The same result will apply if SP1 decides to not register a serial number at all, or if SP1 registers an incorrect serial number.

**Ratio**
If a search using the incorrect information does not yield any reasonably close matches, then the entire registration will be deemed invalid. If the search using the incorrect information yields sufficiently close matches, then (objectively) further inquiries will be required by the prospective lessor to check the close matches.

### Harder (Trustee of) v Alberta Treasury Branches (ABQB 2004)

**Facts**
For a registration of consumer goods subject to a security interest, the serial number was entered incorrectly. However, the Trustee in Bankruptcy was informed separately that the security interest existed prior to the bankruptcy declaration.

**Issues**
Does actual knowledge of the prior security interest separate from the registration system count to validate the improper registration (and, thus, perfect the security interest as against the third party creditor with actual knowledge)?

**Decision**
An error in a serial number in a security interest registration will not defeat the claim of a secured creditor as against subsequent secured creditors or a trustee in bankruptcy who obtains actual knowledge of the existence of the security as a result of a name search or otherwise. **However, it can defeat a claim by the...**
trustee in bankruptcy, if the trustee gains actual knowledge of the existence of the prior security interest by other means and notwithstanding the error in registration. A correct debtor name for the purposes of registration does not need to be the name on the birth certificate, but could be the one under which they are commonly known (supplanted by Regulations s 20, which lays out precise requirement for debtor names).

This is a strange result, as it goes against the express wording of the PPSA, and is contrary to the objective test set forward by the ABCA in the Case Power decision. Note the limitation - this ratio only applies to competitions with the trustee in bankruptcy, not to competitions with other subsequent secured creditors.

Ratio
In a competition between a secured creditor who made an error in registration and the trustee in bankruptcy (where the serial number is required) and the trustee in bankruptcy, the secured creditor may still be able to win if the trustee in bankruptcy obtained actual knowledge of the prior secured interest via other means.

Amendment and Discharge of Registrations
- Errors in registrations can be corrected by registering a financing change statement
  - If the error affects perfection - the date of perfection will be the date the change statement was registered
  - For other information that does not affect perfection, the error can still be fixed, but there is no obligation on the creditor to do this (and the amendment will not affect the perfection date)
  - For example, if a security interest is transferred or assigned to another creditor, the registration need not be amendment to name the new secured party as that does not affect perfection of the security interest (s 45)
- The debtor can also insist on an amendment to a registration if the secured party has no right at all to maintain it in its existing format
  - For example, if a registration is made in anticipation of a security interest that never actually arises, then the debtor can insist that the registration be discharged (s 50)
- Secured parties that fail to take required steps to discharge a registration is liable for statutory damages (s 67)

PPSA s 45 - registrations of transfers and subordinations
Registration of transfers and subordinations
45(1) Where a secured party with a registered security interest transfers the interest or a part of it, a financing change statement may be registered disclosing the transferee.
(2) Where an interest in part of the collateral is transferred, the financing change statement shall disclose the transferee and shall contain a description of the collateral in which the interest is transferred.
(3) Where a secured party transfers an interest in collateral and the security interest of the secured party is not perfected by registration, a financing statement may be registered disclosing the transferee as the secured party.
(4) A financing change statement referred to in subsection (1) or (2) may be registered before or after the transfer.
(5) After registration of a financing change statement referred to in subsection (1) or (2), the transferee is the secured party for the purposes of this Part.
(6) Where a secured party has subordinated the secured party’s interest to the interest of another person, a financing change statement may be registered disclosing the subordination at any time during the period that the registration of the subordinated interest is effective.

PPSA s 50 - amendment or discharge of registrations
Amendment or discharge of registrations
50(1) In this section,
  (a) “debtor” includes any person named in a registered financing statement as a debtor;
  (b) “secured party” includes any person named in a registered financing statement as a secured party.
(2) Where a registration relates exclusively to a security interest in consumer goods, the secured party shall discharge the registration not later than one month after all obligations under the security agreement creating the security interest are performed, unless prior to the expiry of that one-month period the registration lapses.

(3) Where a financing statement is registered and
   (a) all of the obligations under the security agreement to which it relates have been performed,
   (b) the secured party has agreed to release part or all of the collateral described in the financing statement,
   (c) the collateral description in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor or does not distinguish between original collateral and proceeds, or
   (d) no security agreement exists between the secured party and the debtor,
the debtor or any person with an interest in property that falls within the collateral description in the financing statement may give a written demand to the secured party.

(4) A demand referred to in subsection (3) shall require that the secured party, not later than 40 days after the demand is given, either
   (a) register a financing change statement
      (i) discharging the registration, in a case falling within subsection (3)(a) or (d),
      (ii) amending or discharging the registration, as the case may be, to reflect the terms of the agreement, in a case falling within subsection (3)(b), or
      (iii) amending the collateral description in the registration to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor or to identify items or kinds of property as original collateral or proceeds, in a case falling within subsection (3)(c),
   or
   (b) provide to the Registrar an order of the Court confirming that the registration need not be amended or discharged, accompanied with a completed financing change statement in respect of the order.

(5) If a secured party fails to comply with a demand referred to in subsection (3), the person giving the demand may register the financing change statement referred to in subsection (4)(a) on providing to the Registrar satisfactory proof that the demand has been given to the secured party.

(6) A demand referred to in subsection (3) may be given in accordance with section 72 or by registered mail addressed to the address of the secured party as it appears on the financing statement.

(7) On application to the Court by the secured party, the Court may order that the registration
   (a) be maintained on any conditions and, subject to section 44(1), for any period of time, or
   (b) be discharged or amended.

(8) Subsection (5) does not apply to a registration of a security interest provided for in a trust indenture if the financing statement through which the security interest was registered indicates that the security agreement providing for the security interest is a trust indenture.

(9) Where a registration relates to a security interest provided for under a trust indenture and the secured party fails to comply with a demand referred to in subsection (3), the person making the demand may apply to the Court for an order directing that the registration be amended or discharged.

(10) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand referred to in subsection (3).

(11) Where there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations or otherwise give value, a secured party having control of investment property under section 25(1)(b) of the Securities Transfer Act or section 1(1.1)(d)(ii) shall, within 10 days after receipt of a written demand by the debtor, send to the securities intermediary or futures intermediary with which the security entitlement or futures contract is maintained a written record that releases the securities intermediary or futures intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party.

PPSA s 67 - statutory damages for failure to discharge
If a person fails, without reasonable excuse, to discharge any duties or obligations imposed on the person by this 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.

Where a secured party, without reasonable excuse, fails to comply with obligations or limitations

(a) in section 43(11), 49 or 50, or

(b) in section 17, 18, 60, 61 or 62 and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 43(11), 49 or 50, the person disclosed as the debtor in a registration, is deemed to have suffered damages not less than the amount prescribed.

Matco Capital Ltd v Ramparts Energy Ltd (ABQB 2008)

**Facts**
In 2006, Matco enters into agreement with Ramparts where Matco acquires preferred shares from Ramparts in exchange for an option for two years to retract those shares (that is, cash them in). If Ramparts could not complete the redemption, the amount of the Retraction Price was to become a debt owed by Ramparts to Matco, with Matco reserving the right to secure that debt against Ramparts' assets. After a falling out, Matco registered a security interest against all of Ramparts' property. Ramparts demanded that Matco discharge its registration.

**Issues**
Is the share retraction agreement a "security interest" that can be registered under the PPSA?

**Decision**
No, the share retraction agreement is not a security agreement, because the security interest contemplated was contingent on the satisfaction of an uncertain future event (namely, where Matco would exercise redemption rights and Ramparts is unable to redeem the shares). The PPSA allows for the registration of incomplete security interests that are in the final stages of being implemented, but it was not intended to register potential security interests that may or may not come into existence based on extraneous factors. Potential creditors are not allowed to register a financing statement "just in case" the interest may come into existence at some future date.

**Comment**
Prof. Buckwold thinks the Court screwed this up. Section 43(4) clearly states that a financing statement may be registered before a security agreement is made and before a security interest attaches. Nothing in the legislation indicates that registration can only happen where the agreement is in the process of being finalized. IT is still possible that Matco could have insisted on a discharge through s 50(3)(d), since no security interest existed at the time. However, even there, the agreement between Matco and Ramparts provided for a security interest in the future, which is within the definition of "security agreement" in section 1(1)(ss).

**Ratio**
Creditors cannot register financing statements for security interests that are contingent on uncertain future events coming into existence.

**Perfection by Delivery or Control**
- Special rules apply to perfection of security interests in collateral under the heading of "investment property" (s 1(1)(y.1))
  - Definition includes a "security" and "security entitlement" that simply adopt the definitions found in the Securities Transfer Act
  - "Security entitlements" are a new form a property that was created by amendments to the Alberta Securities Transfer Act in 2006
- Under sections 24(3) and (4), perfection for "securities" can be achieved by delivery of a physical document where the secured party perfects by taking actual possession of the document (a "certificated security")
  - If it is an uncertificated security, the secured party accomplishes perfection by becoming the registered owner of the security

**PPSA s 1(1)(y.1) - definition of "investment property"**
(y.1) “investment property” means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account;

PPSA ss 1(1)(rr) and (ss.2) - definitions of "security" and "security entitlement"

(rr) “security” means a security as defined in the Securities Transfer Act;

(ss.2) “security entitlement” means a security entitlement as defined in the Securities Transfer Act;

PPSA s 24 - perfection of "securities"

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor’s agent.

(3) Subject to section 19, a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 68 of the Securities Transfer Act.

(4) Subject to section 19, a security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 68 of the Securities Transfer Act and remains perfected by delivery until the debtor obtains possession of the security certificate.

Automatic Perfection

- In limited and specific circumstances, perfection can happen automatically
  - The idea is to give the secured party a limited period of time to perfect the security interest, but to protect that security interest in the meantime
- For example, s 5(2) grants automatic perfection for limited time in goods that are presently outside the province but are anticipated to be brought into the province within 60 days
- Section 28(3) also confers temporary, unconditional perfection in security interests in proceeds
- Can be conditional or unconditional
  - Conditional: Perfected for a specified period of time, but only if a perfection step is taken during that period, and if that step is not taken, then it is treated as if the interest NEVER HAPPENED.
  - Unconditional: Perfected for a specified period of time, and if a perfection step is not taken during that period, then the interest is still considered to have existed during that period.

PPSA s 5(2) - automatic perfection for goods outside of province

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province
   (a) not later than 60 days after the goods are brought into the Province,
   (b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or
   (c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached, whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer’s or lessee’s interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

PPSA s 28(3) - automatic perfection for "proceeds"

(3) Where the security interest in the original collateral was perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.
PRIORITY FUNDAMENTALS

- "Subordination" and "priority" both refer to the ranking of interests in the same property in terms of the entitlement of the competing interest-holders to claim it.
- The fact that one security interest is subordinate to another does not affect the lower-ranked interest's existence - that is, it can still take legal action to enforce the security interest upon debtor's default.
  - HOWEVER, it will affect the lower ranked secured-party's entitlement to the proceeds of disposition of the collateral.
- If the statute says that a competing party takes a security "free of" other encumbrances (such as under s 30(2)), that effectively means that they get priority over other security interests.
- In determining priority between competing claims:
  - First determine whether the PPSA applies to resolve the dispute.
    - Identify the parties - trustee in bankruptcy, secured creditor, unsecured creditor, buyer, lienholder.
  - If so, determine if the security interests are properly perfected, and what rules will apply to resolve the priority dispute.

PPSA s 30(2) - buyer or lessee of goods takes goods free of perfected or unperfected security interests

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

Subordination Relative to Trustee in Bankruptcy

- Section 71 of the BIA indicates that when a debtor becomes bankrupt, the property of the bankrupt "vests" in the trustee in bankruptcy, subject to the rights of secured creditors to claim secured property.
- Section 20(a) of PPSA provides that an unperfected security interest is not effective against a trustee in bankruptcy of the debtor.
  - This implies that the unperfected security interest has a subordinate interest to the trustee in bankruptcy.
- In priority competitions between lessors with leases for a period longer than one year and a trustee in bankruptcy (assuming the lessor did not register their security interest), the trustee in bankruptcy will be given greater priority if the lease is still in effect on the date of bankruptcy.
- Also, keep in mind the operation of the Civil Enforcement Act - the debtor may be given an exemption from enforcement for a portion of the value of collateral (i.e. allowances for vehicles, primary residences).
  - The ABCA in Direct Rental v Waring Associates found that, as between an unperfected security interest and the trustee in bankruptcy, the unperfected security interest holder will have priority to recover the exempt value of the collateral, and any surplus goes to the trustee.
  - The result of this is that the debtor loses their exemption, as the exempt value is taken by the unperfected security interest holder.

Re Giffen (SCC 1998)

Facts

In October 1992, the lessor leased a Saturn to BCTel, which in turn leased the car to its employee, Giffen. Giffen went bankrupt. Giffen's lease with BCTel was for more than one year, and it gave her the option of purchasing it from the lessor. Although the lessor was not directly a party to the agreement between BCTel and Giffen, it did receive Giffen's deposit, it fixed the lease rates, and it was entitled to receive payments directly from Giffen if her employer stopped paying her. Furthermore, the lessor company was listed as an owner of the vehicle. Neither the lessor nor BCTel registered their interests. The trustee in bankruptcy is now claiming that it is entitled to the property since the security agreements were never perfected.
**Issues**
What priority rules should apply between BCTel's security interest in the vehicle, the lessor's security interest, and the trustee in bankruptcy?

**Decision**
Prior to a bankruptcy, unsecured creditors can make claims against the debtor through provincial judgment enforcement measures. Successful claims will rank prior to unperfected security interests. The purpose of s 20(a), which gives the trustee in bankruptcy priority over unperfected security interests, is intended to maintain the rights of unsecured creditors in bankruptcy proceedings. Compliance with perfection requirements under the provincial PPSA is a precondition to maintaining priority order under the BIA. In the event of bankruptcy, the consequences of a failure to perfect are spelled out clearly in s 20. In effect, the secured party with an unperfected security interest becomes an unsecured creditor of the bankrupt.

Applied to the facts of this case, the lessor holds an unperfected security interest in the car. Through the operation of s 20(a) of the PPSA, the trustee in bankruptcy takes priority ahead of unperfected security interests, such as the interest held by the lessor. Therefore, the lessor's interest in the car is functionally equivalent to that of other unsecured creditors in bankruptcy.

**Ratio**
The trustee in bankruptcy as a superior claim to collateral relative to unperfected security interests.

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**PPSA s 20(a) - priority of unperfected security interests relative to trustee in bankruptcy**

20 A security interest
(a) in collateral is not effective against
   (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or
   (ii) a liquidator appointed under the Winding-up and Restructuring Act (Canada) if the security interest is unperfected at the date the winding-up order is made;

**Relative Priority of Secured Creditors**
- PPSA adopts a relatively rigid system of determining priority between secured creditors - helps foster certainty and enable accurate risk assessment, but can lead to unjust results
- Basic (default) rules in section 35
- **Section 35(1)** - Residual Priority Rule for Competing Security Interests
  - Order of occurrence of registration, possession by the secured party for the purpose of perfection, or temporary perfection
    - Essentially, the date of discoverability of the security interest determines priority ranking
  - Note the emphasis is on REGISTRATION, NOT the date of perfection
    - Perfection determines if the security interest is valid, but order of priority is determined based on the date of registration (the two dates may coincide, but often will not)
      - That means that it is not the first to perfect their security interest, it is the first to register that interest that will determine priority order
  - Establishment of priority under s 35 assumes that the registration is valid
    - Therefore, if the registration requires a serial number, which is incorrectly provided, the registration is not valid and cannot be used to obtain priority over subsequent perfected security interests through s 35(1)
- **Section 35(4)** changes priority rules for goods held has equipment that require serial number registrations
  - Section 35(4) indicates that improperly registered goods held as equipment that require serial numbers according to the regulations will not be granted priority through subsection (1)
    - Essentially, equipment registered without serial numbers will take priority over the trustee in bankruptcy and unsecured creditors, but not other secured creditors
  - Note that it only applies to equipment, and not inventory - therefore, the serial number will not be required to invoke the priority rules for goods held as inventory
- **Section 35(9)** - exception to first-in-time priority
This occurs where multiple security interests apply to the same property held by different debtors (the double debtor rule).

- i.e. Debtor 1 sells equipment that is subject to a security interest by SP1 to Debtor 2 (who has an existing security interest with SP2 for all present and after acquired personal property).
  - In the circumstances of this sale, Debtor 2 takes possession of the equipment subject to SP1's security interest (does not cut off the prior security interest).
  - Section 35(9) operates to give SP1’s security interest priority, regardless of whether SP2 registered its general security interest before.
  - That is, when you purchase items that are subject to prior existing security interests, those security interests will have priority over any security interests that apply to the buyer's present and after-acquired personal property.
  - There is an exception to the exception for FUTURE ADVANCES (the rest of subsection 9)
    - That is, if the secured party that obtains priority through this subsection decides to advance further credit, they will not be protected for the future advances (the idea is that they should be able to discover the prior existing security interest at the point that they decide to make the future advance).
    - The new secured party must amend the registration to disclose the name of the transferee as the new debtor or take possession of the collateral (they have 15 days to do this).

- **Section 35(1)** - Unperfected Security Interest v Unperfected Security interest
  - Determined based on date of attachment (earlier means higher priority).
  - No statutory priority rule to deal with a situation where two unperfected security interests attach at the same time.

**PPSA s 35 - default priority rules**

Residual priority rules

35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:

(i) the registration of a financing statement, without regard to the date of attachment of the security interest,

(ii) possession of the collateral under section 24, without regard to the date of attachment of the security interest, or

(iii) perfection under section 5, 7, 26, 29 or 77, whichever is earlier,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1), a continuously perfected security interest shall be treated at all times as having been perfected by the method by which it was originally perfected.

(3) Subject to section 28, for the purposes of subsection (1), the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.

(4) A security interest in goods that are equipment and are of a kind prescribed by the regulations as serial number goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (9) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

(5) Subject to subsection (6), the priority that a security interest has under subsection (1) applies to all advances, including future advances.

(6) A perfected security interest that would otherwise have priority over a writ of enforcement issued under the Civil Enforcement Act has that priority only to the extent of advances made before the secured party acquires knowledge of the writ within the meaning of section 32 of the Civil Enforcement Act.
(b) advances made pursuant to an obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in clause (a), and
(c) reasonable costs incurred and expenditures made by the secured party for the protection, preservation or repair of the collateral.

(7) Subsection 8 applies to the re-registration of a security interest the registration of which has lapsed as a result of a failure to renew the registration or has been discharged in error or without authorization.

(8) If the secured party re-registers a security interest within 30 days after the lapse or discharge of its registration, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest or registered writ of enforcement that, immediately prior to the lapse or discharge, had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration.

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

(a) after the expiry of 15 days from the day the secured party who holds the security interest in the transferred collateral has knowledge of the information required to register a financing statement disclosing the transferee as the new debtor, and
(b) before the secured party referred to in clause (a) amends the registration to disclose the name of the transferee as the new debtor or takes possession of the collateral.

(10) Subsection (9) does not apply where the transferee acquires the debtor’s interest free from the security interest granted by the debtor.

Relevance of "Knowledge" to Priority

• Under s 35(1), a perfected security interest is given priority over a prior unperfected security interest, even if the secured party holding the perfected security interest is aware of the existence of the prior unperfected security interest
  ○ This will only apply if the party holding the perfect security interest acted in good faith or took the steps necessary to establish its priority over the unperfected security interest
• That being said, section 66(2) indicates that a person does not act in bad faith merely because the person acts with knowledge of the interest of some other person
• Note section 20(b) will give buyers priority over an unperfected security interest only if they acquire the goods without knowledge of that prior security interest

PPSA s 20 - priority of buyers over prior security interests

20 A security interest

(a) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the Winding-up and Restructuring Act (Canada) if the security interest is unperfected at the date the winding-up order is made;

(b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,
(ii) gives value, and
(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

PPSA s 66(2) - bad faith

(2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.
Relationship Between Priority and Enforcement

- Remember, just because prior security interests will have priority over subsequent ones, that does not extinguish the subsequent security interests entirely - they still have the right to enforce their security interests against the collateral, even though they have lower priority
  - Subsequent secured creditors are still entitled to enforce their security interests - "enforcement" and "priority" are distinct concepts
  - Priority IS relevant to the rights of multiple secured creditors when a piece of collateral is sold (that is, if seizure and sale is instigated by a subsequent secured creditor, that will not affect priority rules for proceeds of the collateral)
  - Proceeds are paid out to reflect cost of the enforcement (Realization), and satisfaction of the secured debt
    - Section 61(1) indicates that any surplus funds after subtraction of realization and satisfaction must go to subsequent secured creditors
    - If a lower priority security interest takes possession, the higher priority security interest can opt to retain its security interest in the collateral. If not, it will be entitled to proceeds based on normal priority rules.
      - In practical terms, the higher secured party will likely opt to be paid out, as no buyer would be willing to purchase priority subject to a security interest for a loan held by someone else
  - Therefore, it doesn't matter whether a higher or lower priority secured party seizes property for enforcement - they will essentially be paid out the same in either case

PPSA s 60(12) - secured party enforcement proceedings

(12) When a secured party disposes of the collateral to a purchaser who acquires the purchaser’s interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

- the interest of the debtor,
- an interest subordinate to that of the debtor, and
- an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are, as regards the purchaser, deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

PPSA s 60(1) - disposal of collateral on default

60(1) Collateral may be disposed of in accordance with this Part in its existing condition or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order to

- the reasonable expenses of enforcing the security agreement, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

- the satisfaction of the obligations secured by the security interest of the party disposing of the collateral,

and the surplus, if any, shall be dealt with in accordance with section 61.

PPSA s 61(1) - surplus or deficiency

Surplus or deficiency

61(1) Where a security interest secures an indebtedness and the collateral has been dealt with under section 57 or has been disposed of in accordance with section 60 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested persons, be accounted for and paid in the following order to

- a person who has a subordinate security interest in the collateral
(i) who has, prior to the distribution of the proceeds, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or
(ii) whose interest was perfected by possession at the time the collateral was seized,
   (b) any other person who has an interest in the collateral, if that person has given a written notice of that person’s interest to the secured party prior to distribution of the proceeds, and
   (c) the debtor or any other person who is known by the secured party to be the owner of the collateral but the priority of the interest in the surplus of a person referred to in clause (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

Holnam West Materials v Canadian Concrete Products (ABQB 1993)

- A secured party with priority may apply to the court for an order staying enforcement proceedings by a subordinate secured party if sale of the collateral would not generate a meaningful amount of proceeds for the subordinate creditor (i.e. if the collateral is fully encumbered by the interest held by the party with higher priority), OR enforcement by the subordinate creditor would otherwise unduly jeopardize the position of the secured party with priority.
  - In this case, the subordinate secured party sought to seize the delivery vans of a delivery company. The higher priority secured party applied to stay the enforcement order, since the seizure would effectively cease the business and completely prevent the business from meeting its obligations.

Role of Nemo Dat in Priority Competitions

- The common law nemo dat principle will still apply in a few rare circumstances to determine priority competitions
- Where a competition arises between a secured party and a person who acquires an interest in the collateral after the debtor has transferred it to a buyer, the effect of the transfer must be considered to determine priorities
- Section 30 indicates that, a buyer or lessee of goods sold or leased in the ordinary course of business will take free of any perfected or unperfected security interest in the goods given by the seller or lessor, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach in the security agreement.

PPSA s 20(b) - transferees without knowledge

(b) A security interest in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who
   (i) acquires the interest under a transaction that is not a security agreement,
   (ii) gives value, and
   (iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

PPSA s 30 - buyer or lessee takes free of security interest

Buyer or lessee takes free of security interest
30(1) For the purposes of this section,
   (a) “buyer of goods” includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods’ becoming a fixture or accession to property in which the person has an interest;
(b) “ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials;
(c) “seller” includes a person who supplies goods that become a fixture or accession
   (i) under a contract with a buyer of goods, or
   (ii) under a contract with a person who is a party to a contract with a buyer of goods.
(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.
(3) A buyer or lessee of goods that are acquired as consumer goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee
   (a) gave value for the interest acquired, and
   (b) bought or leased the goods without knowledge of the security interest.
(4) Subsection (3) does not apply to a security interest in
   (a) a fixture, or
   (b) goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000.

Determining Priority Between More than Two Parties
- You can only apply the priority rules between two parties at a time
- Therefore, if there are multiple secured creditors, you need to analyze the priority relationship between the parties relative to each other
- i.e., as between SP1, SP2, and SP3, you need to analyze the priority relationships between:
  - SP1 and SP2
  - SP1 and SP3
  - SP2 and SP3
- After conducting this analysis, you can determine the priority rules as between the three parties
- Sometimes, this method will produce a circular outcome (i.e. SP1 > SP2, SP2 > SP3, SP3 > SP1
  - The PPSA does not help with resolving these situations (for purpose of this course, you don't need to know how to resolve these)

Future Advances
- Common practice in business financing is for a lender to agree to provide a line of credit to business debtor
  - The borrower can access portions of the credit when needed
  - Will often contain an "all obligations clause" that secures the debt up to whatever amount that may be advanced in the future
- Section 35(5) makes it clear that if future advances are made under a single security agreement, the priority status of the security interest will be the same with respect to all advances
- Therefore, you need to register a financing statement at the beginning to set priority for all draws made under that line of credit
- In all cases, future advances will take on the priority of the initial advance
  - Includes advances made under an initial security agreement that contemplates future advances (such as lines of credit), amendments to original security agreements providing for additional advances, and registering a new financing statement pertaining to an older security agreement advancing additional money under the same terms
  - For amended or new security agreements, see Thorp Finance v Hodgins
    - Even if the original security agreement does not contemplate future advances, if an amendment is filed granting additional collateral or allowing for more advances, the priority will still be preserved

PPSA s 35(5) - future advances
Subject to subsection (6), the priority that a security interest has under subsection (1) applies to all advances, including future advances.

### Thorp Finance Corp v Hodgins (Mich CA 1977)

<table>
<thead>
<tr>
<th><strong>Facts</strong></th>
<th>Thorp acquired security interest in equipment owned by Hodgins not including payloader on August 1970. In November 1971, Hodgins purchased payloader, gave security interest to Bark River. In February 1972, Hodgins gives Thorp a promissory note, Thorp amended 1970 financing statement to include the payloader plus the original loan. Hodgins then declared bankruptcy. Bark River is claiming it has priority over Thorp for the payloader.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Issues</strong></td>
<td>Who has priority?</td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td>Facts clearly show that Bark River security interest was perfected before Thorp's interest in the payloader. Thorp's original security agreement did not provide for future advances. The Uniform Commercial Code provides that the first secured creditor who perfects the security interest and registers it as a continuing concern will have priority over subsequent creditors, even if further advances under that agreement are given. The amendment to the 1970 financing statement constitutes a future advance under the same security interest. Therefore, Thorp's security interest will take precedence over Bark River.</td>
</tr>
<tr>
<td><strong>Ratio</strong></td>
<td>The first secured creditor who perfects the security interest and registers it as a continuing concern will have priority over subsequent creditors, even if further advances under that agreement are given.</td>
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</tbody>
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### CPCN v Eagles Eye Investments (SKQB 2011)

<table>
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<tr>
<th><strong>Facts</strong></th>
<th>CPCN entered into loan agreement with BDC where BDC lent $$$ in exchange for a general security agreement on all present and after acquired personal property of CPCN. The Agreement specifically stated that it shall be a general and continuing security for the payment and performance of all indebtedness, including prior security interests, renewals, advances and extensions. The loan was eventually assigned to Eagle Eye. Eagle Eye also had an unsecured loan to CPCN from before when it was assigned the BDC debt. Eagle Eye claimed that CPCN's non-disclosure of certain financial information constituted a material breach. CPCN offered to pay off the balance of the loan, but Eagle Eye refused. Eagle Eye is now stating that the security agreement covers the previously unsecured loan as well as the original loan from BDC, and is demanding enforcement for all of the debt.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Issues</strong></td>
<td>Can Eagle Eye obtain a security interest for its previously unsecured loan by succeeding BDC's loan and invoking the security agreement?</td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td>The BDC loan was assigned to Eagle Eye without CPCN's knowledge or consent. Eagle Eye has not discharged the rights and obligations under the GSA in good faith or in a commercially reasonable manner, but rather to achieve an advantage over CPCN. The GSA contains a future advances (&quot;all obligations&quot;) clause. The PPSA does not deal with whether an assignee can take advantage of a security agreement it has been assigned to secure other unrelated debts. However, the common law indicates that courts have been unwilling to permit an assignee to claim the benefit of an &quot;all obligations clause&quot; in respect of obligations incurred by the assignee before the assignment. In this case, allowing Eagle Eye to claim the benefit of the all obligations clause to secure its otherwise unsecured loan would be unfair to the debtor, it would have a destructive effect to bankruptcy law, and it would disrupt PPSA priorities.</td>
</tr>
</tbody>
</table>
| **Ratio** | Courts have been unwilling to permit an assignee to claim the benefit of an "all obligations clause" in respect of obligations incurred by the assignee before the assignment.
CPCN v Eagles Eye Investments (SKCA 2012)

- Same facts as QB decision
- The SKCA agrees with the Chambers judge in result, but narrows the legal analysis
- However, it restricts the ratio - it is not necessary that, as a matter of contract law or secured transactions law, a debtor and a secured party can never agree to an assignment of an agreement containing an "all obligations clause" to have the effect of securing a previously unsecured debt held by the assignee
- The intention of the parties should govern whether it is possible for this type of assignment to occur
- In this case, the parties did not intend to allow for the all obligations clause to secure debts held by the assignee - it was only intended to apply to other debts and future advances held by BDC
- This is a bit of a weird decision, because it could prejudice the priority interests of other secured creditors

Near Horbay Inc v Great West Golf (ABQB 2000)

- Same fact scenario as CPCN, essentially (an unsecured creditor tries to retroactively secure the debt by taking an assignment of a secured debt from another party that contains an "all obligations clause")
- ABQB agrees that allowing assignees to take the benefit of "all obligations" clauses to secure previously unsecured debt is unfair to other secured creditors that may lose their priority as a result (suggests that this may not be permissible as a matter of law, but does not explicitly state this)
- What about the effect on bankruptcy? Would there be anything to prevent an unsecured creditor for doing this AFTER the debtor declares bankruptcy? No clear answer, but there is a clear problem if that were allowed - it would frustrate the priority order in bankruptcy.
- Did not clarify whether this was a general rule, or if this decision was based on the specific construction of the security contract (as in the SKCA’s decision in CPCN)
  - Therefore, the basic principle remains - look at the construction of the contract to determine if an assignee is able to take the benefit of an "all obligations clause" to secure previously unsecured debts

Lapse in Registration

- If a registration lapses, but the secured party re-registers the same security interest within 30 days of the lapse, then that will preserve the original priority from lapsing (ss 35(7) and (8))
- Section 18 of the Regulations indicates the requirements for re-registering a lapsed registration
  - Under "additional information" must specify the registration number of the lapsed registration, and that it is a re-registration
- If the competing secured party makes further advances after the lapse in registration of the other secured party, but before that other secured party re-registers within the 30 day period, the competing secured party will have priority to the extent of that further advance (assuming it would otherwise have been subordinate to the other secured party had its registration not expired)
- What if another secured party takes a security interest after the superior secured party's registration lapses but before it re-registers within the 30 days period?
  - The second secured party will take precedence over the superior secured party, because it could not have discovered the existence of the security interest since it had expired. They were not subordinate to SP1 at the time that the registration lapsed.

PPSA ss 35(7) and (8) - lapses and re-registration

(7) Subsection 8 applies to the re-registration of a security interest the registration of which has lapsed as a result of a failure to renew the registration or has been discharged in error or without authorization.

(8) If the secured party re-registers a security interest within 30 days after the lapse or discharge of its registration, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest or registered writ of enforcement that, immediately prior to the lapse or discharge, had a subordinate priority
position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and prior to the re-registration.

**PPS Reg s 18 - requirements for re-registration after lapse**

18(1) A secured party may re-register a security interest pursuant to section 35(7) of the Act by registering a financing statement.

(2) Where a financing statement is to be registered under subsection (1), the secured party must, in the area for “Particulars”, select the heading “Additional Information” and specify

(a) that the registration is a re-registration pursuant to section 35(7) of the Act, and

(b) the registration number of the registration that lapsed or was discharged.

**Change in Debtor’s Name**

- Provisions in part IV of the PPSA address amendments to registrations of material changes, including to the name of the debtor
- For corporations, if the first secured party does not realize that the debtor's corporate name has changed, then it will not affect the priority rules (i.e. subsequent creditors must look at corporate history to ascertain all security interests held by successor corporation)
- However, if the first secured party learns of the change to the debtor’s corporate name, it is OBLIGED to amend the registration to affect the change in name
  - If it fails to do so within the stipulated period (15 days), then it will lose priority to all subsequent creditors

**PPSA ss 51(2)-(3) - changes to debtor’s name**

(2) Where a security interest is perfected by registration and the secured party has knowledge of

(a) information required to register a financing change statement disclosing the transferee as the new debtor, where all or part of the debtor’s interest in the collateral has been transferred, or

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

the security interest in the transferred collateral, where clause (a) applies, and in the collateral, where clause (b) applies, is subordinate to the interests referred to in subsection (3).

(3) Where subsection (2) applies, the security interest in the transferred collateral, where subsection (2)(a) applies, and in the collateral, where subsection (2)(b) applies, is subordinate to

(a) an interest, other than a security interest in the collateral, arising in the period from the expiry of the 15th day after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, to, but not including, the day the secured party amends the registration to disclose the transferee of the collateral as the new debtor, or to disclose the new name of the debtor, as the case may be, or takes possession of the collateral,

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

(c) a perfected security interest in the collateral registered or perfected after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, 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 security interest first mentioned in subsection (2) is not amended to disclose the transferee of the collateral as the new debtor or disclose the new name of the debtor, as the case may be, or

(ii) the secured party does not take possession of the collateral.

(4) This section does not have the effect of subordinating a prior security interest under prior registration law deemed under section 77 to be registered under this Act.

(5) Where the debtor’s interest in part or all of the collateral is transferred without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party acquires knowledge of the name of the most recent transferee, the secured party is deemed to have complied with subsection (2) if the secured party registers a financing change statement not later than 15 days after
acquiring knowledge of the name of the most recent transferee and of the information required to register a financing change statement, and the secured party need not register financing change statements with respect to any intermediate transferee.  

(6) This section does not apply to a registration made at a land titles office pursuant to section 49.

**PPSA s 1(2) - "knowledge"**

(2) For the purposes of this Act,

(a) an individual knows or has knowledge when information is acquired by the individual under circumstances in which a reasonable person would take cognizance of it;

(b) a partnership knows or has knowledge when information has come to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) a corporation knows or has knowledge when information has come to the attention of

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates, under circumstances in which a reasonable person would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for service for the corporation;

(d) the members of an association know or have knowledge when information has come to the attention of

(i) a managing director or officer of the association,

(ii) a senior employee of the association with responsibility for matters to which the information relates, or

(iii) all the members under circumstances in which a reasonable person would take cognizance of it;

(e) the Government knows or has knowledge when information has come to the attention of a senior employee of the Government with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it.

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**Royal Bank v Head West Energy (ABQB 2007)**

**Facts**

Harrison Western entered into four trailer leases with Wells Fargo, Wells Fargo registered the security interest. Shortly after, Harrison Western changed name to Head West Energy. RBC subsequently loaned money to Head West secured by a general security agreement. Wells Fargo alleges that it first learned of the company's name change when bankruptcy was declared, well after RBC granted its security interest. RBC is claiming that Wells Fargo had constructive knowledge of the name change, and did not register the change in name within the 15 day period prescribed in the PPSA - therefore contends that its security interest should take priority over Wells Fargo interest.

**Issues**

Who has priority, RBC or Wells Fargo?

**Decision**

The PPSA requires secured parties to amend registrations in the PPSR within 15 days of receiving actual or constructive knowledge that the lessee had changed its name. IF this is not done, then it will lose priority to subsequent creditors. Wells Fargo changed the name in the registry well after RBC entered into its security agreement - however, Wells Fargo argues that it did not learn of the name change until the very date it registered. However, there were communications between senior employees at Wells Fargo and at Head West which gave Wells Fargo constructive knowledge of the name had changed. Note that section 1(2)(c ) of the PPSA indicates that a corporation will have constructive knowledge of something if senior employees become aware of it. Therefore, the 15 day rule applies to give RBC a higher priority than Wells Fargo.

**Ratio**

If a creditor obtains constructive knowledge that a debtor with a registered security interest has changed its
name, then the creditor is obligated to amend the registration to show the new name within 15 days.

**Bona Fide Purchasers v secured creditors**

- What happens when collateral is sold to a third party in such a way that the security interest is not terminated?
- Buyers who have no knowledge of the secured party's interest will have priority if SP1's interest will not be disclosed by a registry search using the debtor's NEW name
  - Therefore, if SP1 grants a security interest to A Corp, A Corp changes its name to B Corp, and B Corp then sells the collateral to a third party that has no knowledge of SP1's interest, then the buyer will have higher priority than SP1 to the goods
  - IF the buyer purchases the goods within the 15 day period after SP1 acquires knowledge of the name change to the debtor, and SP1 amends its registration to show the new name within the 15 day period, then 30(5) will not apply (SP1 will be given priority)

**PPSA s 30(5) - priority against buyers and lessees of goods**

(5) A buyer or lessee of goods takes free from a security interest that is temporarily perfected under section 26, 28(3) or 29(4) or a security interest the perfection of which is continued under section 51 during any of the 15–day periods referred to in those sections, if the buyer or lessee
- gave value for the interest acquired, and
- bought or leased the goods without knowledge of the security interest.

**Priority Between a Security Interest and Judgment Creditors**

- A creditor who does not have a security interest has no direct entitlement to have property of the debtor seized to satisfy the unpaid debt - they must sue for payment and then use judgment enforcement measures to collect
- Upon registration, a writ of enforcement "binds" *all the personal property of a judgment debtor* (according to the Civil Enforcement Act, s 33)
  - Does not create a property interest equivalent to a security interest, but the rights are similar
  - Operates as a charge on property of judgment debtor to the extent of the amount owing under the judgment
  - Will still have priority status against competing claims - functions in the same way as a normal secured property interest
- **Basic rule: A security interest that is perfected or registered in the PPR BEFORE the writ is registered will have priority over the writ (CEA s 35(2))**
  - Conversely, a security interest that is perfected and registered after the writ is registered is SUBORDINATE to the writ (CEA s 35(1))
  - Subject to usual exception in favour of a purchase money security interest, which will take priority over a previously registered writ if the requirements of CEA s 35(3) are satisfied
- **Serial number goods rules will also apply (CEA s 36(3))**
  - Drafted somewhat strangely - if the writ does not include the serial number, and the goods are consumer goods, then secured parties with properly registered interests will have priority over the writ
  - IF the writ does not include the serial number, and the goods are equipment, secured parties that register their interests afterwards and have no knowledge of the existence of the writ acquires the interest free of the writ
    - There is no good policy reason to distinguish between consumer goods and equipment in this way, but that is how it is drafted
    - What about inventory? Not included in the Civil Enforcement Act. Therefore, the default rules will apply (no serial numbers are required)
- **For future advances, they will be subordinated to the writ of enforcement if they are advanced after the writ is registered AND the secured party has no knowledge of the writ**
  - This is the only "writ" provision that is found in the PPSA under s 35(6)
What about the name of the debtor? The CEA is different from the PPSA, in that it has different registration requirements for the name of the debtor as it is registered.

- The CEA requires that the writ be registered using the name as it appears in the judgment (not necessarily the legal name)
- Doesn't matter - the writ will have priority even if the name in the judgment is different from the legal name (as would be required under the PPSA for security interests)
- Therefore, you should search registries by both the legal name (For PPSA registrations), and under names that the debtor is commonly known as (to discover writs of enforcement)

**Civil Enforcement Act, s 33(2) - writ binds all personal property**

(2) A writ,

- (a) in the case of personal property, on being registered in the Personal Property Registry binds all of the enforcement debtor’s exigible personal property;
- (b) in the case of land under the *Land Titles Act*, on being registered under the *Land Titles Act* binds all of the enforcement debtor’s exigible land described in the certificate of title against which the writ is registered;
- (c) in the case of land that is not under the *Land Titles Act*, on being registered, filed or otherwise recorded in accordance with the regulations, binds or otherwise affects the enforcement debtor’s interest in that land to the extent permitted by the enactments that govern
  - (i) that land, and
  - (ii) claims made against interests in that land.

(3) Subsection (2)(a) applies to after-acquired personal property of the enforcement debtor from the time that the enforcement debtor acquires that property.

**Civil Enforcement Act, s 35 - priority rules relative to writs of enforcement**

35(1) Except as otherwise provided in this Division, a security interest in personal property is subordinate to a writ that binds the property regardless of whether the security interest attached before or after the personal property became bound by registration of the writ in the Personal Property Registry.

(2) Subject to section 35(5) and (6) of the *Personal Property Security Act*, a security interest in personal property has priority over a writ that binds the property if at the time the writ is registered in the Personal Property Registry

- (a) the security interest is perfected or registered in the Personal Property Registry, or
- (b) the secured party or a person acting on behalf of the secured party has possession of the personal property under section 24 of the *Personal Property Security Act*.

(3) A purchase money security interest in personal property has priority over a writ that bound the personal property before the purchase money security interest was registered or perfected if the security interest was registered or perfected not later than 15 days from the day that

- (a) the debtor, or another person at the request of the debtor, obtained possession of the collateral, or
- (b) the security interest attached, in the case of personal property other than goods, chattel paper, a security certificate, a document of title, an instrument or money.

**Civil Enforcement Act, s 36(3) - serial number rules apply**

(3) Where serial number goods that are bound by a writ are not described by serial number in the registration of that writ in the Personal Property Registry,

- (a) in the case of consumer goods, a buyer, lessee or secured party who gives value for an interest in the goods acquires the interest free of the writ, and
- (b) in the case of equipment, a buyer, lessee or secured party who gives value for an interest in the goods without knowledge of the writ acquires the interest free of the writ.

**PPSA s 35(6) - future advances and writs of enforcement**
A perfected security interest that would otherwise have priority over a writ of enforcement issued under the **Civil Enforcement Act** has that priority only to the extent of

(a) advances made before the secured party acquires knowledge of the writ within the meaning of **section 32** of the **Civil Enforcement Act**, 

(b) advances made pursuant to an obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in clause (a), and

(c) reasonable costs incurred and expenditures made by the secured party for the protection, preservation or repair of the collateral.

**PURCHASE MONEY SECURITY INTERESTS**

- Purchase money security interests have an almost unassailable priority over other security interests, provided the requirements of the Act are met
- What is a purchase money security interest?
  - Funds that are advanced specifically to acquire a specific chattel, and a security interest attaches to that chattel for the amount loaned
  - The PPSA gives these secured creditors a higher priority for the goods that were purchased using the money loaned for that purpose than prior secured parties that have interests in "all present and after acquired personal property"
- Need to ask whether the loan was intended to be used to purchase specific goods
  - i.e. car loans are a common form of "purchase money security interests"

**PPSA s 1(1)(ll) - definition of "purchase money security interest"**

(II) “purchase-money security interest” means

(i) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its purchase price,

(ii) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights,

(iii) the interest of a lessor of goods under a lease for a term of more than one year, or

(iv) the interest of a person who delivers goods to another person under a commercial consignment,

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, “purchase price” and “value” include credit charges or interest payable in respect of the purchase or loan;

**PPSA s 1(1)(ww) - definition of "value"**

(ww) “value” means any consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability.

**Agricultural Credit Corp of Saskatchewan v Pettyjohn (SKCA 1991)**

**Facts**

In 1981, Pettyjohn was approved for a $50k loan from ACCS to buy 70 head of cattle. The money was advanced, and the cattle was purchased. In 1984, entered into new agreement with ACCS to purchase $40k more in cattle. However, Pettyjohn purchased the cattle **BEFORE** the money was advanced - the seller of the cattle essentially billed ACCS directly rather than running the transaction through Pettyjohn. He also obtained a separate loan from BMO to purchase an additional five cattle - ACCS then paid out the BMO loan for that additional amount as well. Pettyjohn later sold all of his cattle (including those to which security
interests applied), and did not obtain ACCS' consent to the sale.

### Issues

Can a purchase money security interest be found where the money to purchase the item is advanced after the debtor takes possession of that item?

### Decision

In order for the special priority rules for purchase money security interests to apply, the transaction must meet the statutory definition. To find a PPSI: the lender must take a security interest in the property, the lender must have given value for the purpose of enabling the debtor to acquire rights in the property, and the value must in fact be used to acquire those rights.

In this case, ACCS clearly took a security interest in the cattle. ACCS contends that the final loan approval letter that was sent to Pettyjohn can be interpreted as a binding commitment to advance credit, and this was used to by Pettyjohn to purchase the cattle. The language in the contract can be interpreted as a unilateral contract that Pettyjohn could reasonably rely on to purchase the cattle. Therefore, the order does not matter - the loan was clearly intended to enable Pettyjohn to purchase the cattle that ACCS later took a security interest in. It is commercially unreasonable to divide the transactions so minutely to apply the statutory test - must look at the effect the transaction had, and the intention behind it.

### Ratio

It is commercially unreasonable to divide the transactions so minutely to apply the statutory test - must look at the effect the transaction had, and the intention behind it. If the creditor gives the debtor a unilateral contract that is then used to obtain chattels based on the binding promise to extend credit, that is sufficient to meet the definition of "value" in § 1(1)(ii).

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**Battlefords Credit Union v Ilnicki (SKCA 1991)**

### Facts

In this case, the Credit Union had the option to purchase the other secured creditors' purchase money security interests, and in return it would obtain an assignment of all contractual rights allowing the Credit Union to enforce those debts against Ilnicki. Instead, the Credit Union chose to loan money to Ilnicki directly, which Ilnicki used to pay out the existing purchase money creditors, who then discharged their purchase money security interests. The Credit Union then took a security interest in the same collateral to secure the new loan.

### Issues

Does the Credit Union’s new loan count as a PMSI, since the loan was expressly advanced to pay out other PMSI loans held by other creditors, and a security interest was obtained by the Credit Union to the same collateral as the previous loans had applied to?

### Decision

The main question is whether Ilnicki acquired rights in or to the items that were subject to the pre-existing PMSIs through the new loan from the Credit Union, since one of the statutory requirements is that the loan must enable the debtor to obtain rights in the goods it applies to. It is clear that the loan did enable Ilnicki to acquire proprietary rights - it allowed him to discharge the old PMSIs, which eliminated the rights previously held by the old creditors and returned them to Ilnicki. Ilnicki’s ownership was previously incomplete, and the Credit Union’s new loan allowed him to complete his ownership over the items, albeit temporarily. Therefore, the loan can be best characterized as a PMSI.

### Ratio

Loans that are advanced to pay out other PMSIs, and are themselves secured against the same items, can also be classified as PMSIs. Really, the Credit Union should have just taken assignments of the previous PMSIs, that would avoid this whole situation, or they could have entered into a subrogation arrangement to obtain the contractual rights of the previous creditors.

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**Priority for PMSIs**

- **Section 34** of PPSA gives PMSI financiers priority over other security interests granted by the debtor under prior security agreements, even if the latter are perfected at the time that the PMSI arises.
The financier must satisfy the statutory rules to be granted this superpriority

- That is, it must meet the definition in § 1(1)(l) of "purchase money security interest"
  - The interest must be perfected within 15 days after the day that the debtor, or another person at the request of the debtor, obtains possession of the collateral
  - If the goods are intangibles (which cannot be "possessed"), then the date of attachment is used to determine the beginning of the 15 day period
  - If the registration does not occur within 15 days, then the PMSI will not have superpriority over pre-existing security interests (the residual priority rule will apply to determine priority competitions in this case)

- Section 34(3) sets specific rules for PMSIs in inventory
  - The debtor must take possession of the goods
  - The secured party must send a notice out to all other subsequent secured creditors that have registered financing statements that include the goods
  - That notice must state that the person giving the notice expects to acquire a PMSI in goods of the same description as the other secured creditors have registered
  - The notice must be given before the debtor, or the debtor's agent, takes actual possession of the goods
  - This is intended to protect perfected security interests in inventory held by general creditors from losing priority without notice to PMSIs registered against inventory

- The normal priority rules are described in § 34(2)

- Section 22 deals with the rare case where a PMSI is perfected after the debtor becomes bankrupt
  - Essentially, a PMSI that is perfected within the specified 15 day period will have priority over the trustee, but others will not
  - The perfection must occur within 15 days of:
    - The debtor obtains possession of the collateral
    - A third party, at the request of the debtor, obtains possession of the collateral

- Note that the general PMSI priority rule is anomalous in how it applies to serial number goods held as equipment
  - Recall, security interests in serial number goods held as equipment is perfected by registration of a financing statement that does not include the serial number of the goods (§ 34(1)(b)) - however, that registration without the serial number will not perfect the security interest as against other security interests
  - There is no corresponding qualification with respect to serial number goods held as equipment subject to a PMSI
    - Therefore, serial number goods held as equipment that are registered as a PMSI will obtain the superpriority, notwithstanding the lack of a serial number in the registration
    - This is a drafting error that has never been fixed by the legislature

- Also, note that PMSI priority ONLY applies to security interests in the same collateral given by the SAME DEBTOR
  - Therefore, if another security interest is given in the same collateral by a DIFFERENT debtor, then the PMSI will not have priority over that interest if it is registered first
  - This can happen if the debtor sells the machine to another party in a way that does not cut off the first secured party's interest
    - Assuming the purchaser borrowed money to purchase the machine from the debtor (a PMSI), the creditor of the purchaser now has a PMSI in the same collateral, but it applies to a different debtor than the first secured party (which applied to the original owner)

<table>
<thead>
<tr>
<th>PPSA s 34 - Priority of Purchase Money Security Interests</th>
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<tbody>
<tr>
<td>34(1) In this section, “non-proceeds security interest” or “non-proceeds purchase-money security interest” means a security interest or purchase-money security interest, as the case may be, in original collateral.</td>
</tr>
<tr>
<td>(2) A purchase-money security interest in</td>
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</tbody>
</table>
(a) collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible or, subject to section 28, its proceeds, that is perfected not later than 15 days after the day the security interest in the intangible attaches

has priority over any other security interest in the same collateral given by the same debtor.

(3) Subject to subsection (6), a purchase–money security interest in inventory or, subject to section 28, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if

(a) the purchase–money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

(b) the secured party gives a notice to any other secured party who has, before the registration of the purchase–money security interest, registered a financing statement containing a description that includes the same item or kind of collateral,

(c) the notice referred to in clause (b) states that the person giving the notice expects to acquire a purchase–money security interest in inventory of the debtor, and describes the inventory by item or kind, and

(d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(4) A notice referred to in subsection (3) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the financing statement referred to in subsection (3)(b).

(5) A purchase–money security interest in goods or, subject to section 28, its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected

(a) in the case of inventory, at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

has priority over any other purchase–money security interest in the same collateral given by the same debtor.

(6) A non–proceeds security interest in accounts given for new value has priority over a purchase–money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase–money security interest is perfected or a financing statement relating to it is registered.

(7) A non–proceeds purchase–money security interest has priority over a purchase–money security interest in the same collateral as proceeds if the non–proceeds purchase–money security interest,

(a) in the case of inventory, is perfected at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, is perfected not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(8) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor is deemed not to have obtained possession of the goods until the debtor, or another person at the request of the debtor, has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

(9) A perfected security interest in crops or their proceeds, given for value to enable the debtor to produce or harvest the crops and given

(a) while the crops are growing crops, or

(b) during the 6–month period immediately prior to the time when the crops became growing crops,

has priority over any other security interest in the same collateral given by the same debtor.

(10) A perfected security interest in fowl, cattle, horses, sheep, swine, fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the fowl, animals or fish has priority over any other security interest in the same collateral given by the same debtor other than a perfected purchase–money security interest.
PPSA s 22 - priority of PMSI in bankruptcy

Priority of purchase-money security interest

22(1) A purchase-money security interest in

(a) collateral, other than an intangible, that is perfected not later than 15 days after the day that
   (i) the debtor obtains possession of the collateral, or
   (ii) a third party, at the request of the debtor, obtains possession of the collateral, whichever is the earlier, or
(b) an intangible that is perfected not later than 15 days after the day the security interest attaches

has priority over the interests of persons referred to in section 20(a).

(2) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor does not have possession of the goods until the debtor or the third person, at the request of the debtor, has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

Competing PMSIs

- In a competition between a lender PMSI and a vendor PMSI in the same chattel, section 34(5) will give priority to the vendor PMSI
- A competition between two lender PMSIs will be resolved under the residual priority rules in s 35, since no specific priority rule will apply (therefore, the first to register or obtain perfection will have priority)

PMSI v Writ of Enforcement

- Found in s 35(3) of the Civil Enforcement Act - as long as the PMSI is registered or perfected within 15 days of the debtor acquiring possession of the collateral, the PMSI will have priority over a previously-registered writ

Civil Enforcement Act, s 35(3) - priority of PMSIs v writs

(3) A purchase money security interest in personal property has priority over a writ that bound the personal property before the purchase money security interest was registered or perfected if the security interest was registered or perfected not later than 15 days from the day that

(a) the debtor, or another person at the request of the debtor, obtained possession of the collateral, or
(b) the security interest attached, in the case of personal property other than goods, chattel paper, a security certificate, a document of title, an instrument or money.

Cross-collateralization

- Cross-collateralization occurs when a debt is secured against a PMSI AND against other collateral that is not a PMSI
- the value of the collateral is subject to the purchase money debt (that interest will have PMSI priority), and how much of the value of the collateral is subject to an ordinary security agreement
- For example, if a creditor gave a loan for a car that is secured by a PMSI on the car and a security interest in "all present and after acquired personal property" - the creditor will only have a PMSI security interest with respect to the car (will have superpriority over previous secured interests in the car), and will be treated as an ordinary secured creditor with respect to the other assets (will be subordinate to previously perfected and attached security interests)
- Another example: if a creditor loans $20,000 for a car, and then advances an additional $5000, only the $20,000 is considered a PMSI (will not apply to advances). Therefore, the creditor will have a PMSI interest up to $20,000, and the other $5000 is treated as a normal security interest
- Another example: SP loans $20k to purchase a car, and another $30k to purchase a truck. Both are registered to the amount of $50k on a security agreement in both the car and truck. For the car, the creditor has a PMSI security interest up to $20,000, and a non-PMSI security interest in the truck to the extent of the $20k car loan. Conversely, the creditor has a PMSI security interest up to $30k in the truck, and a non-PMSI security interest in the car up to $30k for the truck loan.
SUBROGATION

- The doctrine of subrogation was developed in equity - essentially, it permits one party to exercise the rights of another
  - Essentially, the substitute is able to exercise the rights of the original creditor via subrogation
- This will apply if one creditor purchases the credit interests of other creditors - that creditor is entitled to "step into the shoes" of the other creditors and assert their rights against the debtor
- Subrogation is allowed under s 66(3), which indicates that all common law and equitable principles continue to apply so far as they are consistent with the provisions of the PPSA
  - Remember, equity will only assist those who come to the court with "clean hands" - so you need to look at the claimant's conduct

PPSA s 66(3) - common law and equity continues to apply

The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply.

Re N’Amerix Logistix Inc (ONSC 2001)

**Facts**

N’Amerix went bankrupt after its principal determined that it could not make a viable proposal. Five months earlier, Scotiabank issued a demand requiring the Bankrupt to repay a sum of $450k in 45 days. A month later, Bankrupt entered into an agreement in writing with EBF to factor some of its accounts receivable - agreement provided that EBF would obtain a security interest in all of N’Amerix's existing and future accounts receivable AND contract rights. Scotiabank agreed to subordinate its interest to EBF, provided it be paid out from operating line from monies advanced to EBF (essentially, EBF is agreeing to pay obligations to Scotiabank on N’Amerix's behalf). The trustee found that, at the date of bankruptcy, $384k of accounts were pledged to EBF. Trustee searched the PPSA, which did not reveal a registration by EBF against the Factored Receivables or any other collateral held by the Bankrupt. This was because the debtor's name was entered incorrectly (Logistics Inc. instead of Logistix Inc.). EBF asserts that the error does not prejudice its security interest, and it should be enforceable against the trustee. EBF later registered a financing change statement (After bankruptcy) changing its interest to the correct name.

**Issues**

Does EBF have a validly perfected security interest as against the trustee in bankruptcy? Can EBF use the doctrine of subrogation to rely on Scotiabank's previous security interest since its funds were used specifically to pay out that loan?

**Decision**

The Trustee's position is that the defective registration renders EBF's security interest unperfected, meaning that the trustee has a superior claim to the accounts in question. EBF claims that it should be able to assert Scotiabank's rights, which were acquired via subrogation.

The PPSA explicitly states that equitable doctrines still apply insofar as they are consistent with the provisions in the act - this means that subrogation is still valid. It is intended 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 - the junior secured party is then allowed, through equity, to assert the rights of the previous party.

The effect of the agreement between Scotiabank, EBF and N’Amerix was that EBF would have the benefit of Scotiabank's security, presumably up to the amount originally owed to Scotiabank. EBF paid an obligation that was owed by N’Amerix to Scotiabank with the knowledge and approval of all parties that EBF would obtain a first priority position over the accounts receivable of N’Amerix that are charged in favour of Scotiabank.

The question is whether EBF can rely on Scotiabank's proper registration to defeat the claim of the trustee.
The subrogation does not create a new security interest, rather it determines who may exercise and receive the benefit of the security interest. Therefore, it is not necessary to re-register to perfect, since the security interest is still operable. If EBF were not able to rely on Scotiabank’s registration, then that would create a windfall to N’Amerix.

**Ratio**

EBF is entitled to assert its claim by relying on Scotiabank’s prior registration, since it was subrogated to Scotiabank’s interest. It is not necessary to re-register a subrogated security interest for it to be perfected - the subrogated party has the right to assert all rights of the previous creditor, including its priority position. You CAN amend a subrogated security interest to show the new creditor’s name, but this is not strictly required to maintain priority.

**MARSHALLING**

- Another equitable doctrine that is recognized via s 66(3)
- Marshalling allows the court to arrange different pools of security and enforcement on them to allow all creditors to be out the maximum possible
  - This occurs if SP1 has security in Collateral 1 and Collateral 2, and SP2 only has security in Collateral 2
    - The Court can insist that SP1 enforce against Collateral 1 first to leave Collateral 2 to satisfy the loan to SP2
  - However, marshalling cannot force the senior secured party to not enforce against the common collateral prospectively
    - If the senior secured party enforces against the common collateral, then the junior secured party will be permitted to enforce against the other collateral that it does not technically have an interest in
- This doctrine was initially created for real property, and there is some academic debate as to whether it can apply to personal property
  - However, see Holnam - the ABQB clearly thinks that it can apply to personal property

**Holnam West Materials v Canadian Concrete Products (ABQB 1994)**

<table>
<thead>
<tr>
<th><strong>Facts</strong></th>
<th>ATB held security interest in variety of CCP assets, including gravel trucks. Holnam also held a security interest in the trucks. When Holnam had the trucks seized to enforce its security interest ATB applied to the Court for declaration of its priority. Holnam admitted that ATB had priority, but claimed entitlement under the doctrine of marshalling. Holnam argued that, if ATB enforced its security interest against other assets that it held collateral in, that would discharge ATB’s interest AND allow Holnam to enforce its own security interest.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Issues</strong></td>
<td>Can Holnam insist that ATB enforce its security interest on other collateral, so that both creditors might get paid out?</td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td>Doctrine of marshalling is where there are two creditors of the same debtor, one has the right to resort to two funds, and the other has a right to one fund only. The court will &quot;marshal&quot; or arrange the funds so that both creditors are paid out as much as possible. However, marshalling does not deprive a senior creditor of its enforcement rights. If the senior secured party enforces against the common collateral, that is permissible - <strong>the junior secured party will then be subrogated to the senior secured party's collateral interest in the other collateral, and the courts will allow the junior creditor to enforce against that</strong>. In this case, this is very important - if Holnam was allowed to enforce against the gravel trucks, CCP would go out of business, which ATB did not want (they want CCP to continue in business and continue paying its loans).</td>
</tr>
<tr>
<td><strong>Ratio</strong></td>
<td>Marshalling allows the court to arrange different pools of security to allow all creditors to be paid out the maximum possible.</td>
</tr>
</tbody>
</table>

**SUBORDINATION**
Not an equitable doctrine! This is a contractual arrangement where one party agrees to subordinate its priority interest to another creditor.

The priority rules in the PPSA permits the secured party to establish a priority position with respect to the debtor’s property that may seriously constrain the debtor’s ability to obtain additional financing from other credit providers.

Subordination agreements can be used to reverse the normal priority rules.

Recognized in s 40 of the PPSA

- ALSO, s 40 allows for the debtor and creditor to enter into a contract that benefits a third party creditor by subordinating the contracting creditor’s interest to the third party creditor’s interest (assuming that the contracting creditor would otherwise have a superior priority position over the third party creditor via the operation of PPSA priority rules). The third party creditor is permitted to enforce these agreements (even in the absence of privity) via s 40.

- The subordination agreement will NOT be effective against PMSIs or liens

Can cause craziness to ensue with priority rules if a third party secured creditor is interposed between the two parties that enter into a subordination agreement

For example: SP1 is secured up to $200, SP2 is secured up to $100, and SP3 up to $150. SP1 and SP3 enter into a subordination agreement where SP1 agrees to postpone his claim until SP3’s claim is fully realized. If the collateral is seized and sold for $225, the priority competition is resolved as follows: The amount of SP1’s interest is set aside, and SP3’s interest is paid out of that fund ($200 set aside, from which SP3’s full interest is paid out at $150). The remaining $50 from this fund is paid out to SP1. SP2 then gets to realize on the remainder ($25).

PPSA s 40 - subordination agreements enforceable

Subordination of interest

A secured party may, in a security agreement or otherwise, subordinate the secured party’s security interest to any other interest, and the subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of a class of persons for whose benefit the subordination was intended.

Royal Bank v General Motors Canada (NLCA 2006)

| Facts | HEL goes bankrupt, has assets worth $890k available for distribution to creditors. The dispute centers around the effect of a subordination agreement between Royal Bank and CIBC, and how this agreement affects the position of General Motors. The PPSA priority rules would set the priority as (1) CIBC, (2) GMAC, (3) RBC. However, CIBC and RBC entered into a subordination agreement under which CIBC agreed to subordimate its interest to RBC. However, it claims that it should retain its superior position over GMAC, and RBC argues that it should also have a superior position over GMAC as a result of the subordination agreement. GMAC argues that it should have a superior claim to RBC. |
| Issues | Can a subordination agreement alter the relative position of a third party in the priority order? |
| Decision | Trial court found that the subordination agreement did NOT give RBC a superior claim over GMAC, only over CIBC.
RBC argues that it would be inequitable to allow GMAC to claim a superior position, stating that, in equity, GMAC expected to receive the proceeds of the sale, minus the amount required to satisfy the superior creditor's debt. Since the agreement essentially allows RBC to take the position of CIBC in the queue, RBC argues it should stand in CIBC's position and take before GMAC, giving GMAC exactly what it expected to receive.

The way to resolve this is to set aside the amount of the collateral that would have been used to satisfy the original superior creditor's debt (in this case, CIBC's debt). The subordinated party (in this case, RBC) is permitted to satisfy its debt via the subordination agreement up to that amount. If the subordinated...
secured party does not require the full amount of the collateral to satisfy its debt, the remainder will go to the original superior secured party. Then, any remainder outside of the amount that was set aside will go to the second secured party.

In this case, the amount of CIBC’s interest is set aside, and RBC is allowed to satisfy its debt from that fund. Any remainder in the fund will go to CIBC. If there is any amount available outside of the amount that is set aside from CIBC’s interest, that amount goes to GMAC.

Ratio
For subordination agreements that affect third parties that hold priority positions between the parties to the subordination agreement, the amount of the fund that would have gone to the original superior secured party (via the PPSA) will be set aside, and the subordinated party will be paid out of that fund first. Any remainder in the fund goes to the original superior secured party. Any remainder outside of the fund goes to the intermediary secured party.

PROCEEDS
• The PPSA gives statutory recognition of a right to assert a security interest in the "proceeds" of collateral
• If a debtor sells property that is subject to a security interest, the secured party is automatically given a security interest in the property that was received in exchange for that secured property, so long as that property falls within the statutory definition of "proceeds"
  o If the proceeds are sold, that property can also be considered proceeds (you can have many "generations" of proceeds)
• Note that s 28(1)(a) indicates that the security interest will also continue in the collateral when sold, unless the secured party expressly or impliedly authorized the dealing (or the security interest is otherwise cut off by a priority rule in favour of the buyer)
  o Therefore, if the security interest continues in the collateral itself, the secured party will have security interests in both the collateral itself and the proceeds generated from the sale
• This often comes up for security interests in inventory
  o The inventory will continually be sold, and the proceeds interest means that, if there is insufficient inventory to satisfy the debt when enforced, proceeds from sales of past inventory can be used to satisfy the debt as well
• Also, if the original collateral was a PMSI, then the proceeds from that collateral will also be treated as a PMSI
• In most cases, sale of the collateral will subordinate the original security interest to the property interest acquired by the buyer
  o In rare circumstances, the prior security interest will not be cut off by a sale - in those cases, the secured party can enforce against the collateral AND the proceeds, but the rights of enforcement against the original collateral are limited
  o Note also that if a secured party tries to enforce against both the collateral and proceeds, they will be limited to the market value of the collateral at the date of the dealing
• Therefore, if the debt is worth $30 secured against a widget, and the widget is sold for $20, the secured party can enforce for up to $20 against the collateral AND the proceeds, but $20 is the maximum (i.e. cannot get back the full $30 by taking from both the proceeds and collateral)

PPSA s 1(1)(jj) - definition of "proceeds"
(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, and
(iv) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and
(v) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

**Perfection of a Security Interest in Proceeds**

- **Section 28 PPSA** sets out perfection rules for proceeds
- Proceeds are treated as separate property for the purpose of perfection (that is, they do not automatically acquire perfection by virtue of the fact that the original collateral was perfected)
  - For attachment, so long as the original collateral was properly attached before the sale, then the attachment will transfer automatically to proceeds generated from the sale of that collateral
- The approach taken essentially treats the proceeds as if they were separate ORIGINAL collateral, for the purpose of perfection
- Therefore, if the original financing statement that secured the original collateral contains a description that would cover the proceeds, then nothing more need be done (basically, ask yourself whether the financing statement description would cover the proceeds property if it was original collateral - if yes, then the financing statement will perfect all proceeds)
  - However, if the description in the registration is not sufficient to cover proceeds, then it must be amended for the proceeds to be perfected
  - Note that if the proceeds consist solely of money held at a bank, then it is not necessary to amend the statement - it is assumed that the original financing statement will extend to these deposits
- You have fifteen days to amend the financing statement to include the proceeds, if necessary - otherwise, you lose priority
- **Note that, for inventory, the PPSR requires that the description actually include the word "proceeds" for the financing statement to extend to proceeds**

**PPSA s 28 - perfection in proceeds**

Perfection re proceeds

28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

(1.1) The limitation of the amount secured by a security interest as provided in subsection (1) does not apply where the collateral is investment property.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected

(a) by the registration of a financing statement that contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) by the registration of a financing statement that covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) by the registration of a financing statement that covers the original collateral, if the proceeds consist of money, cheques or deposit accounts in a financial institution.

(3) Where the security interest in the original collateral was perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.
SCOPE OF PROCEEDS RULES

Identifiable or Traceable
- Under the definition of "proceeds", personal property must be IDENTIFIABLE or TRACEABLE as property derived from a dealing with original collateral or proceeds of the original collateral
  - Accepted law in Saskatchewan is that personal property is identifiable proceeds when the evidence discloses a direct connection between the property and the original collateral or an earlier generation of proceeds
- Tracing rules are not provided in the PPSA - courts have derived them from the law of trusts
  - Note that mingling of funds in a single bank account does not automatically eliminate the trace
  - The rules are more flexible than trust tracing rules to achieve the flexibility and certainty required by the PPSA
    - For example, in trusts, there must be a fiduciary relationship between the parties to trace - this is explicitly NOT REQUIRED under s 1(6) of the PPSA
- Important policy considerations
  - Property that is proceeds is subject to a security interest, and is therefore unavailable to unsecured creditors in bankruptcy
  - Therefore, expansive and flexible tracing rules favour secured creditors over unsecured creditors, which matches the policy objectives of both the PPSA and the BIA

Lowest Intermediate Balance Rule
- For cash proceeds that are mixed with other deposits in the same bank account, the lowest intermediate balance rule is often invoked to determine if the proceeds are traceable
  - Withdrawals are presumed to be made first from the trustee's own funds, and then from the proceeds that are in the account
  - Where withdrawals are made from the proceeds, that derogates from the amount that can then be claimed as security
  - Subsequent deposits will be treated as the trustee's property not subject to a security interest, unless the trustee evidences an intention to replenish the depleted proceeds
- Note also the Rule in Clayton's Case
  - The first funds deposited are presumed to be the first drawn out
  - This is no longer strictly followed. In cases where different proceeds are mixed together, you look at the proportion of the proceeds that existed in the account at the time of the mixing. Any withdrawals are deemed to come pro rata from these proportions until they are derogated completely.
  - In Ontario v Greymac Securities, the Court decided to apply a different principle - the pro rata ex post facto principle - in cases where fraud or deceit was involved, and the creditors were all innocent victims of the fraud. Essentially, the remaining funds are distributed pro rata on the basis of the size of the initial value of the proceeds, instead of applying the lowest intermediate balance rule
    - In Boughner v Greyhawk Equity Partners, the Court modified this somewhat by indicating that the lowest intermediate balance rule should be used in most cases, as the pro rata ex post facto rule should only be applied if it is too difficult to trace the funds to calculate the lowest intermediate balance

<table>
<thead>
<tr>
<th>Universal CIT Credit Corp v Farmers Bank (US Dist Montana 1973)</th>
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<tbody>
<tr>
<td><strong>Facts</strong></td>
</tr>
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</table>
essentially put out of business by this move, and also owed money to the defendant bank. The bank debited the chequing account for $12,000. Dealership then withdrew the remaining funds. There were outstanding loans that had yet to be paid to CIT.

The funds in the chequing account at the time came primarily from the sale of six autos, most of which were subject to security interests in favour of CIT.

<table>
<thead>
<tr>
<th>Issues</th>
<th>Can the funds in the bank account be adequately traced to the autos that were subject to a security interest? If so, can that security interest then be enforced against the Farmers Bank itself?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision</td>
<td>The Bank contends that it was entitled to withdraw the funds to satisfy its loan because the funds in the account were not adequately traceable to CIT's security interest in the autos. The mere fact that proceeds from the sales of the six autos were commingled with other funds does not render the proceeds unidentifiable. The facts show that the dealership and the Bank clearly intended to construct the transactions to prefer the bank's loan over CIT's, the transaction was therefore not in the ordinary course of business. When tracing funds held in a bank account that is commingled with other funds, it is presumed that any withdrawals are first made from funds that are not subject to security interests; if they make withdrawals that dissipate the value of the traced funds, and then make subsequent deposits, the tracing interest will not extend to the subsequent deposits and can only be enforced against what is left of the original traced funds (the &quot;lowest intermediate balance rule&quot;). However, if the debtor makes additional deposits with an intent to make the collateral whole again, then the additional deposits will be included in the traced funds subject to a security interest. Overall, the lowest intermediate balance that can be traced is $11,429 (which is less than the original value of the autos as sold). The bank is therefore only entitled to debit funds in excess of that intermediate balance. The additional funds that the bank debited over that amount are traceable to the bank, and can therefore be enforced as a security interest against the bank.</td>
</tr>
<tr>
<td>Ratio</td>
<td>Funds that are traceable to collateral that are commingled with other funds in a single bank account can still be traced back to the original collateral by applying the lowest intermediate balance rule.</td>
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**Boughner v Greyhawk Equity (ONSC 2012)**

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<tr>
<th>Facts</th>
<th>Greyhawk was a fraudulent investment scheme, court is looking at how to distribute funds remaining with Greyhawk to the defrauded non-secured investors. Some investors are arguing that the funds should be distributed pro rata on the basis of the size of the original investment. Others are arguing that distribution should be based on actual fund performance using the lowest intermediate balance rule, which requires tracing all of the original contributions to determine what value is left.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues</td>
<td>Which method should be used to distribute remaining funds to defrauded investors?</td>
</tr>
<tr>
<td>Decision</td>
<td>If the Lowest Intermediate balance rule is applied, earlier investors are likely to receive less than subsequent investors. Gibson argues that this is appropriate, since it values the claims on the basis of the value of the funds at the time that the commingling happened. Also, Gibson argues that this method is the most just since it properly traces deposits, and does not allow other creditors to take more than the amount of money that can legally be traced to them. On the other hand, if equitable doctrine is applied and funds are distributed pro rata on the basis of original contributions, that would be supported if funds were commingled by a wrongdoer and the funds were intended to be disbursed to innocent beneficiaries (Waldock claims that this is the most just and equitable distribution in the circumstances).</td>
</tr>
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The Court finds that the pro rata ex post facto approach based on original contribution size should only be used if the LIBR approach is not practically possible. That is not the case here, the LIBR values can be calculated properly. The LIBR approach is preferable to the pro rata ex post facto approach, provided it is not too difficult to trace the funds and calculate the LIBR values. The pro rata ex post facto rule will only be used where the LIBR approach is impractical. Therefore, the method of distribution suggested by Gibson will be followed, since the LIBR values in this case can be properly calculated.

**Ratio**

the pro rata ex post facto approach based on original contribution size should only be used if the LIBR approach is not practically possible.

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**Agricultural Credit Corp of Saskatchewan v Pettyjohn (SKCA 1991)**

| Facts | In 1981, Pettyjohn was approved for a $50k loan from ACCS to buy 70 head of cattle. The money was advanced, and the cattle was purchased. In 1984, entered into new agreement with ACCS to purchase $40k more in cattle. However, Pettyjohn purchased the cattle BEFORE the money was advanced - the seller of the cattle essentially billed ACCS directly rather than running the transaction through Pettyjohn. He also obtained a separate loan from BMO to purchase an additional five cattle - ACCS then paid out the BMO loan for that additional amount as well. Pettyjohn later sold all of his cattle (including those to which security interests applied), and did not obtain ACCS' consent to the sale. The proceeds from the sale were deposited into a BMO bank account. Pettyjohn was also continually borrowing funds from a line of credit into the same account, and paying out amounts to the line of credit from that account. Therefore, the proceeds were immediately used to pay the BMO line of credit. The BMO line of credit was later used to purchase additional cattle. |
| Issues | Can the funds advanced to Pettyjohn be adequately traced to enable the security interest to continue? |
| Decision | In this case, the funds from the sale of the cattle were deposited into the BMO bank account, and those funds were then immediately used to pay a balance on the line of credit held with BMO. That line of credit was then used to purchase other heads of cattle. The traditional view in equity is that, if traced funds are used to pay another debt, the security interest is no longer traceable and has been dissipated. However, if the donee spent the loan on an asset that is still in his possession, then the tracing can continue. IT is possible that tracing by subrogation would apply. The Credit Union can be considered subrogated to the BMO line of credit if the proceeds generated from the sale of the collateral were used to pay off the BMO line of credit, thereby transferring the rights held by BMO to the Credit Union. The Court specifically decides to not look at this question further, since the situation can be resolved using another method. A close and substantial connection must be proven between the original collateral and the items that can be traced to that collateral as proceeds. In this case, essentially, new cattle replaced old cattle once all of the transactions were concluded. This is consistent with the normal business practice of farmers, and establishes a close and substantial connection between the sale of the old cattle, that was then used to purchase new cattle (originally through the line of credit that was then paid by the sale of the old cattle). The form of the transaction is irrelevant provided the close and substantial connection test is met. Overall, the Credit Union can trace its security interest to the new cattle not by the form of the transactions that led from one to another, but by the fact that new cattle replaced the old as a matter of commercial reality. Where one set of chattels replaces another of like function in the affairs of the debtor, it is open to the Court to find that the proceeds from the sale of the old chattels can be traced to the new ones. |
| Ratio | Where one set of chattels replaces another of like function in the affairs of the debtor, it is open to the Court to find that the proceeds from the sale of the old chattels can be traced to the new ones. |
Extended Definition for Insurance Payments

- Note that the definition in section 1(1)(jj) is extended beyond property received by the debtor through the dealing with the original collateral and its proceeds in the insurance context - a right to insurance in compensation for loss of the collateral is considered proceeds if the insurance is payable to the debtor (subclause 3)

"Property in Which the Debtor Acquires an Interest"

- Remember, for collateral to be identifiable or traceable, the property derived from the disposition of the collateral must be traceable and identifiable AND it must also be property in which the debtor acquires an interest

Cooper v Bar XH Sales (ABQB 2011)

- Airplane was leased by Bar XH to Peace Air Ltd under a term of lease for more than one year, but the lease was not registered. The terms of lease required the lessee to obtain insurance on the plane naming the lessor as the insured with loss payable to the lessor directly instead of going through the lessee. Peace Air then entered into a loan agreement with AFSC giving them a general security interest. AFSC registered a financing statement with the serial number of the plane included. The plane crashed, and the insurance company paid out proceeds to both Bar XH and AFSC. AFSC is claiming the amount received by Bar XH, as Bar XH's security interest was not registered.

- The only question is whether AFSC's security interest extended to the bank accounts in which the insurance payments resulting from the claims on the policies insuring the aircraft against loss were deposited.
  - The Court concluded that AFSC's security interest in the aircraft extended to Peace Air's right as an insured under the policies to file a proof of loss and to claim an indemnity under the policy.
  - Therefore, Peace Air's right to the insurance payment is first generation proceeds, and the cheques issued by the insurer to both Bar XH and AFSC were second generation proceeds
  - HOWEVER, while the bank accounts created by deposit of the cheques arose from a dealing with second generation proceeds, the accounts could not be considered proceeds because the debtor had no interest itself in the accounts held by Bar XH

SECURITY INTERESTS IN NEGOTIABLE INSTRUMENTS

- Note that "money" is defined under section 1 to mean physical currency (coins and bills), and "instrument" is defined as a bill, note or cheque within the meaning of the Bills and Exchange Act

PPSA Priority Rules and Implications of Set-off

- Some problems associated with security interests in proceeds arise in situations where the competition is between a secured party holds a PMSI in inventory that is then sold and converted into cash, and a deposit-taking (and credit-granting) institution that receives those proceeds when they are deposited, and are then claimed to be payments for debts held by that institution.

- Discussed in s 31 PPSA
  - Traditionally, a person who acquires negotiable property for value takes it free of prior interests
  - This section recognizes that a person who acquires an interest in money should generally be protected against a previously granted security interest in that physical money or negotiable instrument (cheques), subjection to some qualifications
  - Note the qualification in subsection 3 - for purchasers of an instrument, they will have priority over a security interest in the instrument perfected or temporarily perfected if they gave value for the instrument or security, acquires the instrument or security WITHOUT KNOWLEDGE that it was subject to a pre-existing security interest, and if they take possession of the instrument or security

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Knowledge is irrelevant under subsections (1) and (2) - if cash is used, then knowledge does not matter, and if a negotiable instrument is used to pay another creditor off, then knowledge is not relevant.

Subsection 5 defines "knowledge" as meaning that the purchaser in subsection 3 knew that the transaction violated the terms of the prior security interest attached to the instrument - therefore, simple knowledge that the prior security interest exists is insufficient to trigger the "knowledge" requirement in subsection 3.

Canadian banks take the position that they should be allowed to compensate themselves for funds advanced to customers from deposits made by those same customers.

- Note that, when a deposit is made to a bank account, the bank becomes a debtor to the depositor.
- Essentially, the bank is claiming a right of set off, where their debt interests should be set off against credit owing by the same party.
- It is now generally accepted that set off can be a "self-help" remedy where judicial proceedings have not been initiated yet by the obligor/debtor.
- Note that set-off will only apply if the Bank asserting set-off does not have knowledge of a third party's interest in the obligation against which set-off is asserted BEFORE the right of set-off accrues.

Basic Principles of Set off

Current Account Set off: Where two bank accounts are held by the same institution, and one has a positive value and the other is in overdraft, the Bank can combine the accounts so as to set off the overdraft with funds in the second bank account.

- Accounts must be due and payable at the same time for set off to apply.
- If the institution has notice of a security interest or other interest before the deposit is made, then it cannot exercise current account set off.

Contractual Set off: Deposit agreements between banks and customers will typically include contractual provisions that allow the Bank to overcome some of the obstacles to set off.

- Will often allow contingent obligations to be set off against current accounts (note that, normally, the contingency must be satisfied before the set off can take place, but this can be done away with by contract).
- Again, if the institution has notice of a security interest prior to entering into a contract with the depositor, then the claim cannot be set off regardless of whether it is conditional or unconditional.

Equitable Set off: Governed by distinct rules from legal set off.

- Deposit taking institutions can claim equitable set off if the prior credit interest in the proceeds arose from the same transaction or closely related transactions before the institution acquires notice of the security interest prior to the maturity of the cross claim.

PPSA s 31 - protection of transferees of negotiable collateral

31(1) A holder of money [that is, physical currency] has priority over any security interest perfected under section 25 or temporarily perfected under section 28(3) if the holder

(a) acquired the money without knowledge that it was subject to a security interest, or
(b) is a holder for value, whether or not the holder acquired the money without knowledge that it was subject to a security interest.

(2) A creditor who receives an instrument [this is a defined term in the PPSA, most commonly applied to cheques] drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery.

(3) A purchaser of an instrument has priority over a security interest in the instrument perfected under section 25 or temporarily perfected under section 26 or 28(3) if the purchaser

(a) gave value for the instrument,
(b) acquired the instrument without knowledge that it was subject to a security interest, and
(c) took possession of the instrument.
(4) A holder of a negotiable document of title has priority over a security interest in the document of title that is perfected under section 25 or temporarily perfected under section 26 or 28(3) if the holder
   (a) gave value for the document of title, and
   (b) acquired the document of title without knowledge that it was subject to a security interest.

(5) For the purposes of subsections (3) and (4), a purchaser of an instrument or a holder of a negotiable document of title who acquired the purchaser’s or holder’s interest in a transaction entered into in the ordinary course of the transferor’s business has knowledge only if the purchaser or holder acquired that interest with knowledge that the transaction violated the terms of the security agreement creating or providing for the security interest.

(6) A purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of the purchaser’s business and for new value has priority over any security interest in it that
   (a) was perfected under section 25 if the purchaser does not have knowledge at the time of taking possession that the chattel paper is subject to a security interest, or
   (b) has attached to proceeds of inventory under section 28 whatever the extent of the purchaser’s knowledge.

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Flexi-Coil Ltd v Kindersley District Credit Union (SKCA 1994)

**Facts**

Priority dispute between a lender and an inventory supplier following bankruptcy of mutual customer, a retail farm equipment dealer, Churchill. Both claim priority over cheques deposited by the customer to a revolving account in negative balance and to funds deposited by electronic transfer to the same account.

Churchill had a security agreement with Flexi-coil covering inventory and proceeds of inventory that was supplied by Flexi-coil. Churchill also had a line of credit with the Credit Union that was secured by an interest on land and all stock and equipment. Churchill DID NOT grant the Credit Union a security interest in the inventory that was subject to Flexi-coil's claim. Therefore, the priority competition in this case is between Flexi-Coil (as a secured creditor), and the Credit Union (which is unsecured relative to that collateral). As Churchill sold Flexi-coil's machinery, it would deposit the sales cheques into an account at the Credit Union. In due course, Churchill would pay Flexi-coil the amount owed by cheques drawn from that same account. Credit Union testified that it had no knowledge of that practice, or of the secured relationship between Churchill and Flexi-Coil. In period immediately preceding insolvency, Churchill used its line of credit to pay Flexi-Coil's invoices. At insolvency, about $87,000 that had been deposited in the Credit Union account remained unpaid to Flexi-Coil. Flexi-Coil is suing the Credit Union to obtain that money, that it claims is traceable.

**Issues**

Can Flexi-Coil's PMSI interest be traced to the Credit Union's bank account? IF so, can the Credit Union defeat Flexi-Coil's claim by setting off the account against what is owed under the line of credit?

**Decision**

Credit Union is arguing that it should be able to defeat the tracing because it took Flexi-Coil's money free of knowledge of the security interest, and should be treated therefore as a bona fide purchaser of value. Also argues that, when the proceeds were deposited, second generation proceeds were not created because the account was in negative balance when the deposit was made (and was therefore used to pay the line of credit directly). Flexi-Coil argues that, when the line of credit was paid off (and an equivalent amount of credit was thereby advanced), the Bank was advancing other money that it held, and not the money that was owed to Flexi-Coil.

There is no agreement governing the revolving nature of the deposit account and the line of credit, and the linkage between the two. Section 31(3) of the PPSA indicates that a purchaser of an instrument has priority over any security interest in the instrument if the purchaser gave value for the interest, acquired the interest without notice that it was subject to a security interest, and it took possession of the instrument.

The cheques that were deposited are instruments (via the definitions section of the PPSA). When Churchill presented cheques for deposit, one must infer that Churchill gave the cheque to the Credit Union for the
purpose of reducing the line of credit balance. The Credit Union's reduction of Churchill's debt with the deposit of the cheques and the grant of further credit to Churchill in the same amount gave the Credit Union a sufficient interest in each cheque to make it a "purchaser".

However, were second generation proceeds created with the deposit of the cheques? NO. Once the payments were made, Churchill ceased to have any interest in the proceeds (that is, it could not sue the bank for repossession of the amount that was deposited, since it was used immediately to pay another debt). Therefore, Flexi-Coil can be put in no better position than Churchill.

| Ratio | For tracing to be operative, the debtor must retain an interest in the resulting proceeds. If the proceeds are used to pay other debts, and the other creditor has no knowledge of the security interest that is attached to the negotiable instrument, then the other creditor will take those instruments without the security interest continuing in them. |

**PMSI Priority Rules for PMSI Proceeds**
- Essentially, in a competition between a non-proceeds security interest in accounts given for new value and a purchase money security interest in the accounts that are *proceeds of inventory*, the non-proceeds security interest will take precedence provided it was perfected before the purchase money security interest was perfected
  - This is an exception to the normal superpriority rule under s 34(3) that applies to PMSI security interests
  - *Note that the same rule would apply if the non-proceeds security interest for new value was through a security interest in all present and after acquired personal property (which includes accounts)*
- PMSI interests in original collateral will take precedence over PMSI interests in the same collateral as proceeds, even if the PMSI interest in the same collateral as proceeds was registered before
- *Another anomaly: The subsequent PMSI in original collateral DOES NOT need to give notice to the previous holder of the PMSI in proceeds.*
- Keep in mind that this will not affect priority competitions between two PMSI interests in accounts that are both proceeds of original collateral
  - *Keep in mind the effect of s 34(5), which gives PMSIs held by sellers priority over PMSIs held by lenders*

**PPSA s 34(6) - competition between non-proceeds security interest in accounts and PMSI proceeds**

6 A non–proceeds security interest in accounts given for new value has priority over a purchase–money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase–money security interest is perfected or a financing statement relating to it is registered.

**PPSA s 34(5) - competition between PMSI held by seller and other PMSIs**

5 A purchase–money security interest in goods or, subject to [section 28](#), its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected
  - (a) in the case of inventory, at the date the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and
  - (b) in the case of collateral other than inventory, not later than 15 days after the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

has priority over any other purchase–money security interest in the same collateral given by the same debtor.

**TRANSFEREES**
- *Section 28(1) PPSA* restates the nemo dat principle, which still applies to interests other than security interests
  - That is *when a debtor disposes of property that is subject to a security interest, the security interest continues in the collateral, unless the secured party expressly or impliedly authorized the dealing*
  - Therefore, the buyer will take the property subject to the secured party's right to seize the collateral
Keep in mind the separate operation of ss (a) and (b) - if a security interest does not continue in the collateral that does not necessarily mean that the security interest will not extend to the proceeds. The two rules operate independently from each other.

PPSA s 28(1) - perfection re proceeds

28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

Authorized Dealings

- If the secured party HAS authorized the debtor to dispose of the collateral, then the buyer will take free of the security interest
  - This is common for security interests in inventory - the agreement will expressly authorize the disposition of inventory to consumers
  - Conditions can also be placed on authorized dispositions that must be met for the transfer to be effective

Lanson v Saskatchewan Valley Credit Union (SKCA 1998)

| Facts | A mobile home subject to Lanson's security interest was transferred by the debtor, Nickel, to the purchaser, Rempel. Rempel gave a security interest in the mobile home to the Credit Union. Lanson knew that Nickel was likely to sell or lease the mobile home, and agreed to this eventual sale on condition that Lanson's loan be paid in full prior to the transfer. Lanson is arguing that his security interest subsists, as the conditions were not met prior to the transfer to Rempel. |
| Issues | Will Lanson's security interest subsist in the collateral, taking priority to the Credit Union's interest? |
| Decision | Section 28(1) contemplates the secured creditor (Lanson) authorizing the debtor to deal with the collateral, NOT authorizing a third party to deal with the collateral. The authorization to sell must be given before the sale - in this case, Lanson clearly gave express authority to deal with the security. The fact that the debtor failed to pay the secured creditor does not invalidate the sale to the buyer. |

Section 28(1) also provides that the security interest shall continue unless the dealing is expressly or impliedly authorized. Therefore, the security interest will not continue when the secured party authorizes the transaction. In this case, Lanson authorized the dealing. Therefore, the security interest terminates. The clause needs to explicitly indicate that the dealing with ONLY be authorized if certain conditions precedent are satisfied. You should structure the contract to indicate that the BUYER must pay the purchase price directly to the secured party. In particular if the purchaser for value has actual knowledge of the prior security interest and the conditions attached to it, that will be highly persuasive in determining whether the security interest subsists.

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. |
Priority Rules Protecting a Transferee of Collateral

- The PPSA contains a number of rules intended to protect transferees from having purchased goods seized from them that are subject to security interests

Unperfected security interest v Transferee for value s 20(b)

- Under section 20(b), a transferee who gives value and acquires an interest in the collateral without knowledge of the security interest in it takes the property free of that security interest
- Therefore, if the interest isn’t properly perfected (that is, registered), then the transferee takes free of the security interest by the operation of this section

PPSA s 20(b)

A security interest

(b) in goods, chattel paper, a negotiable document of title, an instrument, an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,
(ii) gives value, and
(iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

Temporarily perfected security interests v Buyer or Lessee - ss 5(2) and 30(5)

- Recall that, in specific circumstances, security interests can be temporarily perfected for defined periods without registering a financing statement and without the secured party having taken possession of the collateral
- Since a bona fide purchaser for value would have no way to determine the existence of the security interest, buyers or lessees who lack knowledge of the existence of the security interest will take the collateral free of the interest

PPSA s 5(2)

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province

(a) not later than 60 days after the goods are brought into the Province,
(b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or
(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached, whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer’s or lessee’s interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

PPSA s 30(5)

(5) A buyer or lessee of goods takes free from a security interest that is temporarily perfected under section 26, 28(3) or 29(4) or a security interest the perfection of which is continued under section 51 during any of the 15-day periods referred to in those sections, if the buyer or lessee

(a) gave value for the interest acquired, and
(b) bought or leased the goods without knowledge of the security interest.
Change in Debtor Name in a perfected security interest - ss 51(3)(a), 30(5)

- Recall that, when the debtor changes its name, the secured party must amend the financing statement within the prescribed period upon receiving actual or constructive knowledge of the name change.
- If the property is transferred before the name change is recorded, the transferee will take the collateral free of the security interest.

PPSA s 51(3)(a)

(3) Where subsection (2) applies, the security interest in the transferred collateral, where subsection (2)(a) applies, and in the collateral, where subsection (2)(b) applies, is subordinate to:

(a) an interest, other than a security interest in the collateral, arising in the period from the expiry of the 15th day after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, to, but not including, the day the secured party amends the registration to disclose the transferee of the collateral as the new debtor, or to disclose the new name of the debtor, as the case may be, or takes possession of the collateral,

"Garage sale rule" - transfers of low value goods with security interests - ss 30(3)-(4)

- Consumers and farmers who buy or lease small value goods (that is, worth $1000 or less) take free from perfected security interests in the goods so long as they acquire the goods without knowledge of the security interests.

PPSA ss 30(3)-(4)

(3) A buyer or lessee of goods that are acquired as consumer goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee:

(a) gave value for the interest acquired, and
(b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in:

(a) a fixture, or
(b) goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000.

Serial Number Goods Rule - ss 30(6)-(7)

- Recall that security interests in serial number goods held as equipment can be perfected by registration of a financing statement that does not include a serial number description.
  ○ However, according to ss 30(6)-(7), these secured interests will be subordinate to buyers or lessees who acquire their interest without knowledge of the security interest.

PPSA ss 30(6)-(7)

(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under section 25 if:

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and
(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed by the regulations as serial number goods.

Ordinary Course of Business Rule

- This is the most significant buyer protection rule in the PPSA, discussed in further detail below.

Ordinary Course of Business Rule
• **Section 30(2)** indicates that, in certain circumstances, buyers or lessees of GOODS should be protected when they acquire property even though the secured party has a perfected security interest and even if the transaction was not authorized in accordance with s 28(1)
  ○ Note that this rule is different in that it is **does not matter whether the buyer has knowledge of the transaction or not.** That is, the buyer will take free of the security interest even when they have actual or constructive knowledge of the existence of the security interest.

• Applies to both perfected and unperfected security interests

• This will apply if goods subject to a security interest are leased to a lessee in the ordinary course of business of the lessor. If the lessor defaults under its security agreement with the SP, then the SP will not be able to enforce its interest through enforcing against the leased goods from the lessee during the term of the lease

• **What is the "ordinary course of business"?**
  ○ **Test is 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.
    • Also, the fact that the sale of goods is an incidental part of the seller’s primary business does not preclude the application of this rule.
      ▪ i.e. sale of appliances as part of condo sales - even though the condo sellers are not actually in the business of selling appliances, that does not matter. The inclusion of the appliances as part of the condo sale brings them within the condo sellers’ "ordinary course of business"
  ○ For example, if the seller has inventory (goods) that are subject to security interests, and it is in the business of selling those types of goods in the ordinary course of their business, then any purchasers will take free of the prior security interests

• Who is a "buyer" for the purpose of this rule? Does it include a purchaser that has not yet taken possession or legal title, but will at some point in the future according to a contract?
  ○ NO, title must be transferred for the person to be considered a "buyer" under the ordinary course of business rule
    • Remember, delivery and transfer of title are two distinct concepts under commercial transactions law, may not go together

• **What about for serial number goods?**
  ○ This is referring to a competition between a perfected or unperfected security interest in serial number EQUIPMENT v buyer or lessee
    • Remember, you don't need to register the serial number to perfect a security interest in serial number goods held as equipment
    • Under s 30(6), the buyer will acquire the goods without the security interest if the serial number is not included in the registration (and if they have no actual knowledge of the security interest notwithstanding the lack of serial number registration)
    • *The same analysis will apply if an error is made in the serial number registration*

• **Also, for the rule in s 30(2) to apply, remember that the SELLER must be a party to the security interest that is transferred to the buyer**
  ○ If the security interest is not cut off by the first transfer, then subsequent transfers will not cut off the original security interest
  ○ The opposite is also true, if the first buyer takes free of the security interest, then all subsequent buyers will also take free of the interest (essentially, *nemo dat*)

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**PPSA s 30(2) - ordinary course of business rule**

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

**SECURITY INTERESTS IN ACCOUNTS**
• Under section 1(1)(b), accounts are defined as a monetary obligation not evidenced by chattel paper, instruments or a security, whether or not it has been earned by performance
• All general security agreements will include accounts
• Also, if the agreement indicates that the debtor "assigns" accounts to the creditor, it is still in substance a security agreement
• Section 57 of the PPSA allows for the creditor to collect on accounts that are subject to a security interest in its favour
• However, note that you can also sell accounts to another party. In that case, the other party becomes the actual owner of the accounts, it is NOT a security interest.
  o However, section 3(2)(a) indicates that actual transfers of accounts will still be treated as a security interest for priority purposes only
  o Remember, if SP1 has a security interest in goods that is later sold, the security interest will continue in the proceeds. Those proceeds are also considered "accounts," so if there is another party that has a security interest in "accounts" specifically, then you will have to resolve a priority competition between the two
• Note the distinction between an assignment of accounts, and an assignment of the entire security interest (NOT THE SAME THING)

**PPSA s 57 - collecting on assigned accounts**

57(1) Where so agreed and in any event on default under a security agreement, a secured party is entitled
   (a) to notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification, and
   (b) to apply any money taken as collateral to the satisfaction of the obligation secured by the security interest.
(2) A secured party may deduct the secured party’s reasonable collection expenses from
   (a) money held as collateral, or
   (b) an amount collected
      (i) from a debtor on an intangible or chattel paper, or
      (ii) from an obligor under an instrument.

**PPSA s 3(2) - Application to account transfers**

(2) Subject to sections 4 and 55, this Act applies to
   (a) a transfer of an account or chattel paper,
   (b) a lease of goods for a term of more than one year, and
   (c) a commercial consignment,

that does not secure payment or performance of an obligation.

**INTERJURISDICTIONAL ISSUES (CONFLICT OF LAWS)**

• Oftentimes, a single transaction may have dimensions of it that fall within two or more legal jurisdictions
  o Conflicts law provides a set of principles designed to determine which source of law applies to a given transaction with interjurisdictional characteristics
  o The PPSA contains conflicts provisions to help resolve these types of disputes
• In many cases, conflicts problems won't create many practical issues if the multiple jurisdictions all have similar PPSAs in place
  o Today, all provinces (except Quebec) have enacted PPSAs, and the conflicts provisions in them are identical
  o This makes resolving interprovincial conflicts problems very easy, just read the relevant jurisdiction provisions

Conflicts for Tangible Goods
Section 5 PPSA indicates that the validity, perfection and effect of perfection or non-perfection will be determined by the laws of the jurisdiction where the collateral was situated AT THE TIME OF ATTACHMENT.

This rule applies to tangible goods (essentially, anything that does not fall under s 7).

Section 5(2) addresses what happens when a good moves from one province to another:
- Must re-register not later than 60 days after the goods are brought into the province.
- Not later than 15 days after the day the secured party has knowledge that the goods have been brought into the province.
- Prior to the date that perfection ceases under the law of the jurisdiction in which the goods were previously situated.

This is a window of opportunity for the party to preserve perfected status when goods move from one jurisdiction to another.

Also, note that buyers will have priority if they purchase the goods without knowledge of the security interest and before the creditor changes the registry.

Conflicts for Mobile Goods and Intangibles
- For security interests in intangible goods or "mobile goods" (i.e. goods that are normally used in more than one jurisdiction, such as long haul trucks or rental cars), or negotiable instruments (i.e. documentary collateral), and intangibles, section 7 applies to determine jurisdiction.
  - Generally speaking, for these types of goods, the law of \textit{where the debtor is located} within the definition of section 7 will determine which law will apply.
  - You need to ask yourself whether the goods are of the type that often cross borders. If so, then section 7 will apply, as these goods will be classified as "mobile goods."
  - Therefore, you will search the registry of the province that the debtor is located in to determine if the security interest was properly perfected.
  - What happens if the debtor relocates to a different jurisdiction?

PPSA s 5 - interjurisdictional application rules for tangible property

5(1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of
- a security interest in goods, and
- a possessory security interest in chattel paper, a negotiable document of title, an instrument or money,
is governed by the law of the jurisdiction \textit{where the collateral is situated at the time the security interest attaches}.

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province
- not later than 60 days after the goods are brought into the Province,
- not later than 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or
- prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached, whichever is the earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the buyer’s or lessee’s interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

(3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected in the Province under this Act.

(4) If a security interest referred to in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act.
Section 7(3) indicates that perfection will continue, provided the secured party takes a perfecting step in the new jurisdiction within the prescribed time (60 days)

- Therefore, the new registration will calculate its priority based on when it was registered in the old jurisdiction
- If registration in the new jurisdiction takes place after the 60 day period expires, then perfection will be measured from the date that the registration takes place in the new jurisdiction (this will affect priority competitions)
- Note that the 60 day period applies regardless of whether the creditor knows of the relocation. If the secured party finds out about the relocation more than 60 days after it happens, that's too bad.

### PPSA s 7- interjurisdictional application rules for intangibles, "mobile goods," negotiable instruments

#### 7(1)
For the purposes of this section and section 7.1, a debtor is deemed to be located

- at the debtor’s place of business, if the debtor has a place of business,
- at the debtor’s chief executive office, if the debtor has more than one place of business, and
- at the debtor’s principal residence, if the debtor has no place of business.

#### 7(2)
The validity, perfection and effect of perfection or non-perfection of

- a security interest in
  - (i) an intangible, or
  - (ii) goods 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, and
- a non-possessory security interest in chattel paper, a negotiable document of title, an instrument or money,

must be governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located at the time the security interest attaches.

#### 7(3)
If the debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a security interest perfected in accordance with the applicable law as provided in subsection (2) continues perfected in the Province if it is perfected in the other jurisdiction

- not later than 60 days after the day the debtor relocates or transfers an interest in the collateral to a person in the other jurisdiction,
- not later than 15 days after the day the secured party has knowledge that the debtor has relocated or has transferred an interest in the collateral to a person located in the other jurisdiction, or
- prior to the day that perfection ceases under the law of the first jurisdiction, whichever is the earliest.

#### 7(4)
If the law governing the perfection of a security interest referred to in subsection (2) or (3) does not provide for public registration or recording of the security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to

- an interest in an account payable in the Province, or
- an interest in goods, chattel paper, a negotiable document of title, an instrument or money acquired when the collateral was situated in the Province, unless it is perfected under this Act before the interest arises.

#### 7(5)
A security interest referred to in subsection (4) may be perfected under this Act.

#### 7(6)
Notwithstanding section 6 and subsection (2) of this section, the validity, perfection and effect of perfection or non-perfection of a security interest in minerals or in an account resulting from the sale of the minerals at the well-head or minehead that

- is provided for in a security agreement executed before the minerals are extracted, and
- attaches to the minerals on extraction or attaches to an account on the sale of the minerals

is governed by the law of the jurisdiction in which the well-head or minehead is located.

### Conflicts for Goods to be Immediately Moved
Section 6 applies in the very narrow situation where goods are located in a different jurisdiction, but are intended to be immediately moved to another jurisdiction (and this, in fact, happens)
- In short, the law of the place that the goods are intended to be moved to will govern

**PPSA s 6 - interjurisdictional application rules for goods to be immediately moved**

6(1) Subject to section 7,
- if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and
- if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches, the validity, perfection and effect of perfection or non-perfection of the security interest shall be governed by the law of the other jurisdiction.

(2) If the other jurisdiction referred to in subsection (1) is not the Province and the goods are later brought into the Province, the security interest in the goods is deemed to be a security interest to which section 5(2) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

BANK ACT SECURITY INTERESTS
- The federal Bank Act contains a unique form of security that is available to chartered banks (not credit unions or other financial institutions)
  - The Business Development Bank (federal) can also access this system
  - Bottom line: These types of security interests allow banks to avoid certain provincial restrictions on enforcement through the federal paramountcy rule. In some circumstances, it will give the bank a better priority position than under provincial PPSAs.
- Section 427 creates the Bank Act security interest

Constitutional Considerations
- Supreme Court ruled in Bank of Montreal v Hall that the Bank Act is validly enacted under federal head of power (banking), and it will take precedence over any provincial PPSA to the extent of any conflict
- Note that the Bank Act gives banks less restrictive enforcement rights - provincial PPSAs cannot be used to further restrict these interests

Conceptual Basis of Bank Act Security
- The conceptual basis for Bank Act security interests is very different from the PPSA
  - Section 427 identifies the type of borrower to whom a bank may lend money on the security of a Bank Act 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
  - 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.

**Bank Act s 427(1) - types of Bank Act security**

- **427.** (1) A bank may lend money and make advances
  - (a) to any wholesale or retail purchaser or shipper of, or dealer in, products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers or goods, wares and merchandise, manufactured or otherwise, on the security of such products or goods, wares and merchandise and of goods, wares and merchandise used in or procured for the packing of such products or goods, wares and merchandise,
  - (b) to any person engaged in business as a manufacturer, on the security of goods, wares and merchandise manufactured or produced by that person or procured for such manufacture or production and of goods, wares and merchandise used in or procured for the packing of goods, wares and merchandise so manufactured or produced,
  - (c) to any aquaculturist, on the security of aquacultural stock growing or produced in the aquaculture operation or on the security of aquacultural equipment or aquacultural implements,
  - (d) to any farmer, on the security of crops growing or produced on the farm or on the security of agricultural equipment or agricultural implements,
  - (e) to any aquaculturist
    - (i) for the purchase of aquatic broodstock or aquatic seedstock, on the security of the aquatic broodstock or aquatic seedstock and any aquatic stock to be grown therefrom,
    - (ii) for the purchase of pesticide, on the security of the pesticide and any aquatic stock to be grown from the site on which the pesticide is to be used, and
    - (iii) for the purchase of feed, veterinary drugs, biologicals or vaccines, on the security of the feed, veterinary drugs, biologicals or vaccines and any aquatic stock to be grown in the aquaculture operation on which the feed, veterinary drugs, biologicals or vaccines are to be used,
  - (f) to any farmer
    - (i) for the purchase of seed grain or seed potatoes, on the security of the seed grain or seed potatoes and any crop to be grown therefrom, and
    - (ii) for the purchase of fertilizer or pesticide, on the security of the fertilizer or pesticide and any crop to be grown from land on which, in the same season, the fertilizer or pesticide is to be used,
  - (g) to any aquaculturist on the security of aquatic plants and animals, but security taken under this paragraph is not effective in respect of any aquatic plants and animals that, at the time the security is taken, by any statutory law that is then in force, are exempt from seizure under writs of execution and the aquaculturist is prevented from giving as security for money lent to the aquaculturist,
  - (h) to any farmer or to any person engaged in livestock raising, on the security of feed or livestock, but security taken under this paragraph is not effective in respect of any livestock that, at the time the security is taken, by any statutory law that is then in force, is exempt from seizure under writs of execution and the farmer or other person engaged in livestock raising is prevented from giving as security for money lent to the farmer or other person,
  - (i) to any aquaculturist for the purchase of aquacultural implements, on the security of those aquacultural implements,
  - (j) to any farmer for the purchase of agricultural implements, on the security of those agricultural implements,
  - (k) to any aquaculturist for the purchase or installation of aquacultural equipment or an aquacultural electric system, on the security of that aquacultural equipment or aquacultural electric system,
  - (l) to any farmer for the purchase or installation of agricultural equipment or a farm electric system, on the security of that agricultural equipment or farm electric system,
  - (m) to any aquaculturist for
    - (i) the repair or overhaul of an aquacultural implement, aquacultural equipment or an aquaculture electric system,
(ii) the alteration or improvement of an aquacultural electric system,
(iii) the erection or construction of fencing or works for drainage in an aquaculture operation for the
holding, rearing or protection of aquatic plants and animals or for the supply of water to such plants
and animals or the disposal of effluent from them,
(iv) the construction, repair or alteration of or making of additions to any building or structure in an
aquaculture operation, and
(v) any works for the improvement or development of an aquaculture operation for which a loan, as
defined in the Canada Small Business Financing Act, or a business improvement loan, as defined in the
Small Business Loans Act, may be made,
on the security of aquacultural equipment or aquacultural implements, but security taken under this
paragraph is not effective in respect of aquacultural equipment or aquacultural implements that, at the
time the security is taken, by any statutory law that is then in force, are exempt from seizure under
writs of execution and the aquaculturist is prevented from giving as security for money lent to the
aquaculturist,

(n) to any farmer for
(i) the repair or overhaul of an agricultural implement, agricultural equipment or a farm electric system,
(ii) the alteration or improvement of a farm electric system,
(iii) the erection or construction of fencing or works for drainage on a farm,
(iv) the construction, repair or alteration of or making of additions to any building or structure on a
farm,
(v) [Repealed, 2009, c. 15, s. 13]
(vi) any purpose for which a loan as defined in the Canadian Agricultural Loans Act may be made,
on the security of agricultural equipment or agricultural implements, but security taken under this
paragraph is not effective in respect of agricultural equipment or agricultural implements that, at the
time the security is taken, by any statutory law that is then in force, are exempt from seizure under
writs of execution and the farmer is prevented from giving as security for money lent to the farmer,

(o) to any fisherman, on the security of fishing vessels, fishing equipment and supplies or products of the sea,
lakes and rivers, but security taken under this paragraph is not effective in respect of any such property that,
at the time the security is taken, by any statutory law that is then in force, is exempt from seizure under
writs of execution and the fisherman is prevented from giving as security for money lent to the fisherman,

(p) to any forestry producer, on the security of fertilizer, pesticide, forestry equipment, forestry implements
or products of the forest, but security taken under this paragraph is not effective in respect of any such
property that, at the time the security is taken, by any statutory law that is then in force, is exempt from
seizure under writs of execution and the forestry producer is prevented from giving as security for money lent
to the forestry producer,

and the security may be given by signature and delivery to the bank, by or on behalf of the person giving the
security, of a document in the prescribed form or in a form to the like effect.

Registration as a Condition of Validity

- The ABCA has held that a Bank Act security was void against subsequent interests in the property subject to the
  security when notice of intention to create the security was registered AFTER the agreement creating the security
  was signed
  - The order is important here (unlike the PPSA), the registration of the notice under s 427(4) MUST PRECEDE
    the giving of the security itself

- In sum, there are two steps that must be taken in order for the interest to be valid:
  - Notice of Intention must be filed within three years before the security is given
  - The actual security contract is executed after the Notice of Intention is filed

Bank Act s 427(4) - filing notice of intention

Notice of intention

(4) The following provisions apply where security on property is given to a bank under this section:
• (a) the rights and powers of the bank in respect of property covered by the security are void as against creditors of the person giving the security and as against subsequent purchasers or mortgagees in good faith of the property covered by the security unless a notice of intention signed by or on behalf of the person giving the security was registered in the appropriate agency not more than three years immediately before the security was given;

• (b) registration of a notice of intention may be cancelled by registration in the appropriate agency in which the notice of intention was registered of a certificate of release signed on behalf of the bank named in the notice of intention stating that every security to which the notice of intention relates has been released or that no security was given to the bank, as the case may be;

• (c) every person, on payment of the fee prescribed pursuant to subsection (6), is entitled to have access through the agent to any system of registration, notice of intention or certificate of release kept by or in the custody of the agent;

• (d) any person desiring to ascertain whether a notice of intention given by a person is registered in an agency may inquire by sending a prepaid telegram or written communication addressed to the agent, and it is the duty of the agent, in the case of a written inquiry, only if it is accompanied by the payment of the fee prescribed pursuant to subsection (6), to make the necessary examination of the information contained in the system of registration and of the relevant documents, if any, and to reply to the inquirer stating the name of the bank mentioned in any such notice of intention, which reply shall be sent by mail unless a telegraphic reply is requested, in which case it shall be sent at the expense of the inquirer; and

• (e) evidence of registration in an agency of a notice of intention or a certificate of release and of the place, date, time and serial number, if any, of its registration may be given by the production of a copy of the notice of intention or certificate of release duly certified by the agent to be a true copy thereof without proof of the signature or of the official character of the agent.

Future Advances and Antecedent Debt
• Generally, the registration of a notice of intention and execution of the security agreement will set the priority date
• This will apply to all future advances and antecedent debt created under the same agreement thereafter
• Section 429(1) of the Bank Act modifies this rule with respect to

**Bank Act s 429(1)**

• 429. (1) A bank shall not acquire or hold any warehouse receipt or bill of lading, or any security under section 427, to secure the payment of any debt, liability, loan or advance unless the debt, liability, loan or advance is contracted or made
  • (a) at the time of the acquisition thereof by the bank, or
  • (b) on the written promise or agreement that a warehouse receipt or bill of lading or security under section 427 would be given to the bank, in which case the debt, liability, loan or advance may be contracted or made before or at the time of or after that acquisition, and such debt, liability, loan or advance may be renewed, or the time for the payment thereof extended, without affecting any security so acquired or held.

Determination of Priority
• Prior to 2011, there were no provisions that dealt with priority under the Bank Act, SCC determined that priority would be governed by common law nemo dat principle
  • The idea was that, if there was a pre-existing security interest in the property, the Bank would acquire the property subject to that interest, since the debtor could not give the Bank more than they owned themselves (that is, priority was determined by attachment alone, perfection was not relevant - therefore, under the old regime, unperfected security interests would take priority over Bank Act interests)
• The Bank Act was amended in 2011 to correct this (s 428)
  • Essentially, it indicates that the Bank Act interest will take precedence over any unperfected interest under provincial PPSAs, overriding the nemo dat principle in this case
Note the exception in subsection (2) - the Bank's interest will not have priority if it has actual knowledge of the unperfected security interest prior to granting its security interest.

Another exception: If the agreement is a title retention sales agreement (that is, the agreement indicates that the debtor retains title to the chattel), that is not considered a security interest under the Bank Act. Therefore, unperfected security interests will still have priority over the Bank's interests in this case only.

Also, if the a perfected interest under the PPSA later lapses (that is, becomes unperfected), that does not matter. It will still have priority over Bank Act interests (perfection is only relevant at the time that the Bank Act interest came into being).

**Bank Act s 425(1) - definition of "unperfected"**

"unperfected", in relation to a security interest, means that the security interest has not been registered in a public register maintained under the law under which the security interest is created, or has not been perfected or published by any other means recognized by that law, where the registration or other means of perfection or publication would have made the security interest effective against third parties or would have determined priorities in rank in respect of rights in, on or in respect of the property that is subject to the security interest;

**Bank Act s 2 - definition of "security interest"**

"security interest” means an interest in or charge on property by way of mortgage, lien, pledge or otherwise taken by a creditor or guarantor to secure the payment or performance of an obligation;

**Bank Act s 428(1)-(2) - priority of Bank interests**

Priority of bank's rights

428. (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor or of any person who has a security interest in that property that was unperfected at the time the bank acquired its security in the property.

(2) The priority referred to in subsection (1) does not extend over the claim of any unpaid vendor who had a lien on the property, or of any person who has a security interest 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 that unpaid vendor’s lien or that other person’s security interest.

**Proceeds**

- Unlike the PPSA, the Bank Act does not make specific reference to proceeds interests.
- However, the Supreme Court has ruled that, effectively, banks will continue to have an interest in any proceeds generated from the sale of goods subject to a Bank Act security.
- The theory is that the bank is the legal owner of the goods -- as the legal owner, the Bank is entitled to the proceeds of the disposition of its property.

**Selection of either PPSA or Bank Act**

- Can banks select which registration system they wish to operate under?
  - A Bank Act security is NOT recognized as a security interest under the Alberta PPSA (s 4(b)) - therefore, registration under the Bank Act will not count as registration under the PPSA.
  - A bank can opt in or opt out of the PPSA by registering a financing statement under the PPSA.
  - Where a prior unperfected PPSA security interest is in competition with a subsequent Bank Act security, the priority rules in the BANK ACT will apply to resolve the dispute.
• It is possible to have two separate and enforceable security interests under BOTH the PPSA and the Bank Act at the same time (that is, the Bank can register its interest under both regimes)
  ○ Essentially, the Bank can then rely on whichever regime gives it a higher priority status when it seeks to enforce its interest

**PPSA s 4(b) - Bank Act security interests are not valid under PPSA**

Non-application of Act

4 Except as otherwise provided under this Act, this Act does not apply to the following:
   (a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;
   (b) a security agreement governed by an Act of the Parliament of Canada that deals with rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, and any agreement governed by sections 425 to 436 of the Bank Act (Canada);