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LAW 587: Personal Property Security Law

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CHAPTER 1: THE CONCEPT OF SECURITY

The Idea of Security

Security is a way to protect entities who lend money to others. The lender is called the creditor and the borrower is called the debtor. Without anything else, the debtor is under obligation to repay with the terms under the loan agreement

- If nothing else happens, the creditor is called an unsecured creditor
- In these cases, if the debtor defaults (ie, fails to pay), the creditor would need to get a judgement (default or summery) which would allow the creditor to enforce the judgement under the *Civil Enforcement Act*.
  - But, if there is bankruptcy (which is where most case law about security law arises from), all creditors for the debtor are shared.
- All to say, this is not ideal. Creditors will usually want assurance of greater recovery and less risk. To ensure this, the debtor will often grant them security for the loan

When security is granted on a loan, the creditor has what is called a "security interest".

- Security Interest: An interest in personal property that secures payment for performance of an obligation. Certain other transactions (such as a lease for a term of more than one year) are deemed to be security interests for the purposes of the *Personal Property Security Act* ("PPSA")
  - In simpler terms, it ensures the creditor has rights to reclaim something from the debtor should the debtor not perform their obligations/if they don't make their payments
  - This grants an interest in the creditor, without granting them actual ownership.
    - It is effectively granting property rights, but to a much more limited degree than if they were the true owner.
    - In the event of default – and *only* in the event of default – can the secured party exercise the specific remedies awarded to them under personal property security law
  - Note how this is for *personal* property – it is not for real property.
    - Real Property include corporeal interests in land (like owning a farm or a house) and incorporeal interests, where the owner has possessory rights to the land, but not the land itself (mining rights or easements)
    - All assets other than real estate like chattels real (leasehold agreements) and chattels personal which can be 1) chose in action (intellectual property) or 2) choses in person (tangible property)
- Secured Party: A party who has been granted a security interest. Under the PPSA, the term also refers to parties who have a deemed security interest (such as a lessor under a lease for a term of more than one year and a transferee of chattel paper).
  - A Secured Party would have priority over other parties in the event the debtor defaults - assuming their security interest was properly registered (more to come).
  - Being secured means the process is faster, easier and there are more avenues to your claim

        - A possible remedy to such an event would be for the secured party to go in and take possession of the property.
            - This means that the debtor will often try to argue there was no security, and the creditor will try to argue there is.
        - This property is called the *collateral* and it is *only* available to the secured creditor and not to any unsecured creditor. This is what ensures the priority of the secured parties
    - Secured parties have various rights:
        - Right to priority over unsecured parties
        - Right to enforce against the collateral on default
        - Right to follow the asset into the hands of the buyer; ie follow the object in a transaction from the debtor to a buyer. Since the right is enforceable against the world, they have this right
            - In the event the collateral is sold, the creditor will still have a superior claim over the property than the buyer, even if the buyer was of good faith
                - In equity, the purchaser would have the better right
                - But at common law, you cannot give what you do not have. A debtor can only give to a buyer subject to their property rights
            - This is why the registry system created by the PPSA is so important: a buyer can look into it before purchasing the property to know if there is a secured party that would have superior right to the object in the event of default
    - But, secured parties do not have right to use the collateral
- Collateral: Property that is subject to a security interest. Under the PPSA, virtually any form of personal property may be used as collateral.
    - Though not necessary in all cases, the creditor would ideally create a Security Agreement to dictate the obligations, payments and limits of a security interest
- Security Agreement: An agreement that creates or provides for a security interest. The term may refer to the notional agreement between the parties (whether or not there is any writing that evidences the agreement). In other contexts it may be a reference to the written security document.
    - The debtor would be the person to grant the creditor a security interest when going through with a transaction.
    - Once they do this, the creditor becomes a *secured party*
- Guarantees: A separate agreement for the performance of another person's undertaking (the principal debtor). In a commercial context, a guarantee typically takes the form of a promise to answer for another person's default in repaying a loan.
    - The guarantor becomes personally liable to pay the obligation upon a default by the principal debtor.
    - A guarantee is often an unsecured obligation, but the guarantor may in addition grant a security interest to the lender to secure it.
        - Both guarantees and security interests decrease risks, but a guarantee is not a security interest
        - It grounds secondary obligations of the guarantor to support the primary obligation
    - Where there is a debtor and a guarantor, the creditor has an additional resort to recover from the debtor *and* the guarantor in the event of default
        - But, the claim against the guarantor is a *personal* right
        - The claim against the debtor (if secured) is a *real* right
    - There is nothing preventing the guarantor from also granting a security interest to secure the obligation of the guarantee
        - In this case, the obligation is now secured

- The guarantor can also, instead of making an obligation, make a collateral.
  - Where in default, the creditor can sue the guarantor, but enforce the security interest (which is not personal)
- This means that security interests are a way to avoid risk, but not the only avenue

The 1990's brought a fundamental change with the way personal property security was done with the introduction of the *PPSA.* The Act was so comprehensive that it was an almost complete overhaul of the previous law on the matter. It was a massive simplification and rationalization of how personal property security law was performed.

- Anglo-Canadian secured transactions law provided a number of different security of quasi-security devices. Each was governed by a complex mixture of common law and equitable principles and statutory rules.
- American personal property security law also influenced Canadian law
  - The various devices would conflict, and it was hard to determine which was paramount.
  - They were all useful, but operated under their own principles and the registration system is different for each, so things got chaotic

Previous personal property security devices:
Pledge: A bailment of goods or other tangible personal property to a creditor as security. Basically, the borrower gives possession of some object to the security creditor as security, so that if the borrower does not repay, they have access to the aspect that was pledged. This is seen today as pawning

- The legal incidents of the security were formerly governed by the common law (the pledge is the oldest security device in personal property) but are now governed by the PPSA. The creditor obtains possession of the collateral, and the security interest is thereby perfected by possession.

Chattel Mortgage: A pre-PPSA security device under which the debtor (the mortgagor) conveyed ownership of property to a secured party (the mortgagee) by way of security. If the chattel mortgage conveyed legal title it was considered a legal chattel mortgage. If it conveyed merely an equitable interest, it was considered an equitable mortgage.

- An equitable mortgage was more flexible (it could be taken on after-acquired property), but it was somewhat inferior to a legal mortgage in priority competitions.

In these cases, the seller does not gain possession of the collateral (unlike the pledge), meaning it is a non-possessory device.

- Under the PPSA, the old form of chattel mortgage document can still be used, but its use does not have the effect of invoking pre-PPSA law. Rather, the use of the chattel mortgage will create a security interest which will be regulated by the PPSA.

Conditional Sales Agreement ("CSA"): A pre-PPSA security device under which the seller retains title until the buyer fulfils the terms of the agreement, at which time title is transferred to the buyer. Even though the seller retains title under this agreement, the buyer usually takes possession.

- The old form of conditional sales contract can still be used under the PPSA, but its use does not have the effect of invoking pre-PPSA law. The agreement creates a security interest which is governed by the PPSA.

An example of this is when a vehicle is repaid over three years to the seller. The CSA is a security device since the seller will retain title of the vehicle and protects them in the case the buyer defaults. But the buyer would still gets possession of the car, even if the seller has title to it

Floating Charge: A pre-PPSA security interest under which a financer was granted a security interest, usually in the entire undertaking of a debtor corporation. The floating charge created a non-specific equitable charge that did not specifically attach to any particular item until the charge crystallized (usually through the appointment of a receiver). The use of the floating charge permitted the debtor corporation to carry on in the ordinary course of business.

- Old forms of floating charge debentures can continue to be used under the PPSA. The floating charge provision creates a security interest, but the security interest will be governed by the PPSA and not by the prior law.
- While this is still used in England, there is nothing analogous to the non-specific (floating) interest under the PPSA the security interest will be regarded as simply a security interest in all present and after-acquired personal property.

Assignment of Debt Books: The transfer of a right to accounts receivable from a debtor to another party. Accounts financing is a common method of business financing. The business debtor grants a security interest to the secured party in the debtor's accounts receivable in order to secure repayment of a loan. In non-notification financing, the account debtor continues to pay the debtor (the person who owes money to the business debtor are referred to as account debtors). If the debtor defaults, the secured party will notify the account debtor of the transfer, and the debtors will then pay the secured party. In notification financing, the account debtor is immediately notified of the transfer, and is required to make payments to the secured party even though the security agreement is not in default.
- An assignment of accounts may also take the form of a non-security transfer of an account or accounts (i.e., an outright sale of the account at a discount).

As you see, these are all different devices, but when they all have their separate systems it can all be quite complicated even if they all have the same goal of protecting secured parties. The PPSA brought order to all of this. There are various underlying values to the PPSA:
- Facilitation: reforms promote the availability of secured credit in a simple and efficient manner
    - Secured credit is beneficial to all, so law should facilitate this to make it more available.
    - The more available it is, the more security can be granted and risk of loans goes down
- Comprehensiveness: reforms should not be limited to particular categories of assets, but should permit the use of all the debtors assets for credit support
    - In other locations without a comprehensive scheme like the PPSA, only certain assets could be used as collateral. Such limitations restrict creditors
        - The PPSA covers it all – a business can secure interest in all assets if it wants
        - Essentially red tape reduction since it makes law easy to do, fair and simple
- Flexibility: reforms should allow the parties to tailor the secured transaction to meet their specific needs.
    - Commercial entities and consumers both have flexibility to encourage party autonomy and freedom of contract
- Transparency: reforms should enhance risk-assessment by publishing the potential existence of a security interest
    - This alerts to world that the debtor awarded specific security interests in a certain asset
        - Ie, it is forewarning of other people's interest in assets
- Certainty and Predictability: reforms should provide clear rules as to the ranking of competing claims
    - Where two or more parties are vying for a particular asset, whoever has the better claim can be more easily adduced using the registry system
    - Makes certain of outcomes; you can know where you stand and if you have priority over others or not.
        - This decreases litigation substantially
- Efficiency: reforms should be designed so as to reduce cost of taking and enforcing a security interest

The major changes were:
(1) The PPSA adopted a single, unified concept of a security interest
    (a) No pledge, CBD, chattel mortgage anymore, just security interests all under the PPSA
(2) The PPSA creates a unified and rational priorities system
    (a) Provisions tell you the outcome of priority competitions.

    - (b) Where there are 2 or more parties with security interests, the competition between them is dictated by the PPSA, not common law or equity
- (3) The PPSA utilizes a unified registry system
    - (a) No corporate registries for each device, there is just the one registry
    - (b) All research into security interests of a debtor can be in one location
- (4) The PPSA adopts a single comprehensive enforcement system
    - (a) In a default, the remedies are under the PPSA that will apply regardless of the type of security.
    - (b) The risks are forefront and known ahead of time for greater rationality

The Alberta Law Reform makes recommendations to the government for ways to improve personal property security law. All recommendations are in line with the objectives of the PPSA, and are thus aimed at improving certain administrative processes. Most recommendations are small improvements:

- Preservation and promotion of uniform law
    - The main goal is that all jurisdictions have the same rules. In fact, each province has a PPSA and they are all very similar (if not identical).
        - A change in one may make it best that all change as well
    - Having a patchwork of PPSA legislation would not be ideal, particularly when transactions can occur between people in different provinces
- Red tape reduction and enhanced ease of doing business
    - Eliminate costly and unnecessary requirements
- Responding to modern market technologies and transparency
    - Accommodate electronic banking and e-commerce
- Advancing predictability, certainty and responsibility
    - Responding to issues that arise from case law.
    - Correcting errors, eliminating anomalies and clarifying outcomes
- Improving registry effectiveness
    - Clarifying registration requirements

<u>Classification of Collateral</u>

Though everything is now grouped under the PPSA, proper characterizing of collateral is still essential, since registration under the PPSA will depend on the type of collateral in question. Since registration has impacts on priority, this could be vital, particularly when large business transactions can be millions of dollars.

- Financing techniques are commonly used in the commercial world. Loans can be either commercial or consumer orientated, but in either case the borrower-lender relationship is made
- To minimize loss, the debtor can require the creditor to sign a security agreement that grants the creditor security to some or all of the debtors property
    - Usually the security agreement is a separate document in the loan agreement, where the former only creates the security interest that secures the security of the loan
- Often, loans are not tied and can be used freely. In some cases, it must be tied to a specific purpose (maybe the loan was made for the debtor to purchase a certain asset)
    - This is called an Enabling Asset
- If a loan is given to ensure a purchase from a seller (a third party), the secured party often takes interest in the new asset acquired by the debtor.
    - This is what happens when someone goes to the bank to purchase a new car since the bank will have a security interest in the car you purchased

As an alternative to a loan, debtors can obtain secured financing from the seller, through a special sales agreement, called a “Secured Installment Purchase Agreement” (“SIPA”)

- In SIPAs, the seller sells the goods and obtains a security interest in the asset to secure full payment which is secured over time in instalments.
- Sales Financing usually involves another sale. Usually, the seller will want the money right away, so they will sell the rights under the SIPA to a finance company.
    - For vehicles, this is often to an associate company of the company (Ford Credit or GMac). The finance company will notify the buyer of the assignment and direct the monthly assignments be paid to the assignee.

Other transactions for when you want to acquire a new asset through leasing rather than ownership, are called lease transactions. These consider two patterns:

1. More common with automobiles: Dealership lease vehicles to consumer, dealer will assign rights of lease to finance company who will tell the lessee that payments are to them rather than the dealership
2. If customer wants to acquire certain goods, can tell leasing company what they want. Leasing company buys the goods from the seller and leases them to the customer.
    a. Leasing company is providing financing and leasing the goods to the lessee
    b. This is in the form of the lease, but the lessee usually doesn't intend to give it back

Personal property is divided in to 7 categories: documents of title, instruments, investment property, chattel paper, money and intangibles

- Remember that this is all *personal* property – so land is not in question.
- These 7 are also watertight. Nothing will straddle the two categories and there are no overlaps
- While all 7 are distinct and have their specific defining features, intangibles are a wastebasket category – personal property that doesn't fit in one of the other 6 categories will be an intangible

It is also important to remember that all Security Agreements are consensual. They arise by agreement of the parties on mutually agreed terms. But, non-consensual security interests can exist, and they will still secure payments as the law will confer the creditor with a security interest.

- However, non-consensual security interests aren't by contract and are imposed by things like possessory liens or statutory liens.
- There is no consistency with these security interests (either in common law or statute), so they are not in the focus of this course.

Goods: All forms of tangible moveable personal property. The term does not include chattel paper, documents of title, instruments, investment property, money or intangibles. This can include fixtures, growing crops and the unborn young of animals, but does not include trees that are not crops until they are severed or minerals until they are extracted.

Goods must have a physical presence. Other categories like chattel paper or documents of title have a physical existence in the way that they are a piece of paper or a cheque and is thus technically tangible. This means that while a physical preference is necessary to be a good, it is not sufficient.

- The exceptions are where the personal and real property lines blur.
- Timber, until it is severed, is part of the land. It is thus real property, not personal.
    - Once it is cut, it is considered personal property and a good
    - Again, another exception is crops. Crops, whether harvested *or* growing, is considered a good. Under the PPSA, a crop includes grown or planted trees
        - Natural trees are not included unless they are nursery trees or trees grown for reforestation.
- Minerals are the same; extracted oil and gold are personal property, but are part of the real property when still in the ground

Anything that falls into the Goods category can be further classified:

1. Consumer Goods: Personal property which has been primarily acquired for personal, family or household purposes. Goods intended for resale or acquired for use in the ordinary course of business are not classified as consumer goods
    a. Personal, family or household purposes is key here. Importantly, only a natural person can hold these. A non-individual entity cannot satisfy this (ie, corporations)
    b. "primarily" is also important
        i. Primarily means more than half of the time (>50%). Somethings can be used personally and commercially.
            1. If it is personally more than half the time, it is a consumer good.
            2. If it is commercially more than half the time, it is equipment
        ii. Whatever it is used *more* as is where it falls

2. Equipment: The definition of "equipment " is a residual definition since it covers goods which are not classified as "consumer goods" or "inventory" under the PPSA.
    a. This is another wastebasket category. Anything that is a good, that is not a consumer good or inventory, will be equipment

3. Inventory: Goods which are held by a business for sale or lease, or that have been leased by that person. The term also includes raw materials used in production, goods furnished under a service contract, and materials used or consumed in a business
    a. As per its definition in the *PPSA*, there are four types of goods that are inventory:
        i. Held by a person for sale or lease
        ii. Will be furnished to a person under a contract of service
            1. So, when a plumber replaces a pipe in your business, there won't be a contract of sale for that pipe, but the business owner still acquires that pipe through a contract of services. The pipe would thus be inventory
        iii. The end products before, during and after the manufacturing process
            1. Rubber, processed tires and tires on a truck are all inventory
        iv. Materials used or consumed in the course of business
            1. This is a little tricky, since it requires using context to restrict goods in this category
                a. Considered broadly, this could be anything (cash register, truck, a garbage can)
                b. But this is too broad since there would be no equipment if this is the interpretation we use.
                c. This means the "used" and "consumed" needs to be coloured. Courts have read this to mean not just goods that are used, but used up
                    i. Paint being used on a car, but not the car
                    ii. Ink being used to print a book, but not the book
            2. Adding this in means that (i), (ii) and (iii) cannot predict the category just by looking at the good. It needs to be considered in the use of it
                a. What is a laptop? Depends how you use it
                    i. If you are a computer store, it is inventory for sale to consumers
                    ii. If you are a lawyer, it is equipment to use in the course of business
                    iii. If you use it at home, it is consumer goods for personal use
            3. To help out with this, s 1(5) of the PPSA says that the determination of inventory/consumer goods/equipment is made at a specific point in time: when the security attaches under s 12 (more to come). Attachment

is dealt with in chapter 4, but generally, an attachment is when a security interest comes into existence.

4. This means the categorization, as per the PPSA, is made then and there. Even if the use changes from equipment at the time of attachment to personal use at some other point in time, the categorization will still be considered equipment for the purposes of the PPSA

For example, something like a tractor is unable to distinguish if you don't know the debtor. It is unlikely a consumer good, but depending on how it is used, is it Inventory or Equipment? Depends on how its used

- What if the farm manufacturer has them for sale?
- The wheat harvested by a tractor (once severed) is inventory since it is harvested for resale.
    - Since it is a crop, even before it is harvested it has a security interest and is a good

Another example is a milk producer who owns fairy cattle. The cow itself is technically Equipment. While Equipment is usually considered being machinery, it does not fall into Consumer Goods or Inventory

- This is reason to not characterize based on lay person logic
- On the flipside, if it was a beef cow it would be inventory since you are actually selling the cow itself, whereas with the dairy cow, you are selling what it produces

Personal Property Security Act, RSA 2000, c P-7
Section 1 (1) In this Act, (i) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes. … (l) "crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, but includes trees only if they are (i) Nursery stock (ii) Trees being grown for uses other than the production of lumber or wood products, or (iii) Trees being grown for use in reforestation of land other than the land on which they trees or growing … (p) "equipment" means goods that are held by a debtor other than as inventory or consumer goods; … (v) "goods" means tangible personal property other than chattel paper, a document of title, an instrument, investment property and money, and includes fixtures, growing crops and the unborn young of animals, but does not include trees that are not crops until they are severed or minerals until they are extracted; … (w) "inventory" means goods (i) That are held by a person for sale or lease, or that have been leased by that person (ii) That are to be furnished by a person or have been furnished by that person under a contract of service, (iii) That are raw materials or work in progress, or (iv) That are materials used of consumed in a business …

(2) 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".

Documents of Title: Writings that are issued to a bailee of goods that identify the goods and state that the bailee is entitled to receive, hold, transfer and dispense of the goods covered in the writing. Documents of title are a form of personal property.

- There are two forms of documents of title:
  - bills of lading
  - warehouse receipts.
- Negotiable documents of title represent the underlying goods. Accordingly, a security interest in the goods is perfected by taking possession of the negotiable document of title. Non-negotiable documents of title lack this feature and a perfection step must be undertaken in respect of the underlying goods.

Though the definition is long winded, it basically means a receipt that deals with goods (or an identifiable portion of them) that will be delivered to the transferee. It is a special kind of document that is issued by the bailee.

- Order of Bills of Lading: made by the carrier when they board a ship or truck
  - It shows a receipt of identified goods
- Warehouse Receipts are made by a warehouse keeper for goods stored at a warehouse

This isn't just a receipt since it has negotiability. It has to be commercial practice that the warehouse keeper or carrier will not release the goods unless the buyer shows this document to the bailee

- Essentially, you have to transfer your rights in the goods by transferring the piece of paper

Chattel Paper: One or more documents that evidence both the debtor's monetary obligation and the property taken by the secured party in the debtor's personal property. In order to constitute chattel paper, the security interest must be restricted to specific goods (i.e., it does not include a security interest in after-acquired property other than an accession).

- Chattel paper also includes leases of goods whether or not they secure payment or performance of an obligation.
- Writings that connote monetary obligations and a security interest

With something like a vehicle dealership, they will have an inventory of cars to supply to customers. Some customers will have the cash, but most won't, so the dealership will provide financing.

- They will sell the goods and the consumer will pay in instalments until the car is paid off
- The car being sold is a Consumer Good – the buyer is giving a security interest to secure the end purchase price so that if they default, they have valuable purchase rights.
  - If the buyer is in possession the goods, the dealership still has a security interest.
  - The dealership has a valuable right, but it is not one of ownership. Instead, it is a right to payments *and* the security interest. They can bring action in the event of default
    - The dealership can also sell those rights. This financing agreement is a Chattel Paper since the agreement contemplates both rights (payments and security interest)
    - Almost always, the dealership will sell their rights in the Chattel Paper to a finance company (usually an associated company like GMac)
    - They could also borrow money on the security of the asset (get a bank loan that includes the chattel paper)

- However, this would not include specific goods acquired after. This ensures that things are identified at the time of contract and makes sure the debtor does not include everything thereafter

Instrument: Any writing that evidences a right to payment of money and is ordinarily transferred by delivery. The term includes a bill, note or cheque within the meaning of the *Bills of Exchange Act* or a letter of credit.

- It does not include other subcategories of personal property such as chattel paper, documents of title or investment property.

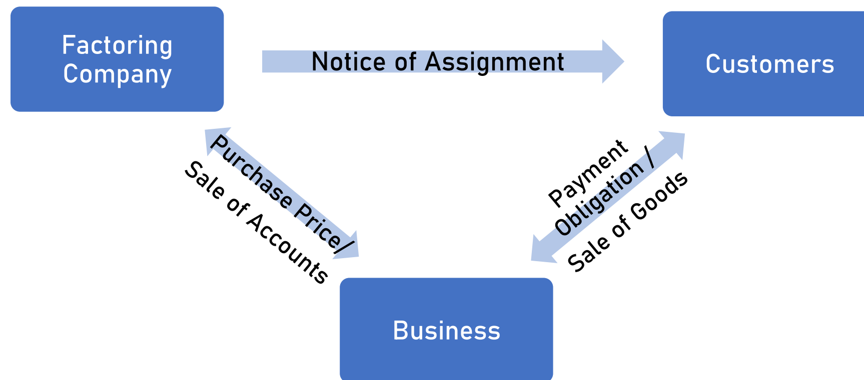
Under the PPSA definition, (ii) includes a kind of paper that has negotiability – the right is locked up in the piece of paper. This means you can transfer your right to paper to another by giving them the piece of money.

- Cheques, promissory notes, bills of exchange are all instruments under the *Bills of Exchange Act*
- It is similar to the Document of Title in that the rights in question can be transferred to another person by giving them the physical paper. In Instruments, the right is to be paid money which can be transferred by giving another person the paper
    - It isn't about the goods, but the right to be paid money
    - But since, there is no overlap allowed in personal property characterizations, Instruments cannot be Chattel Paper

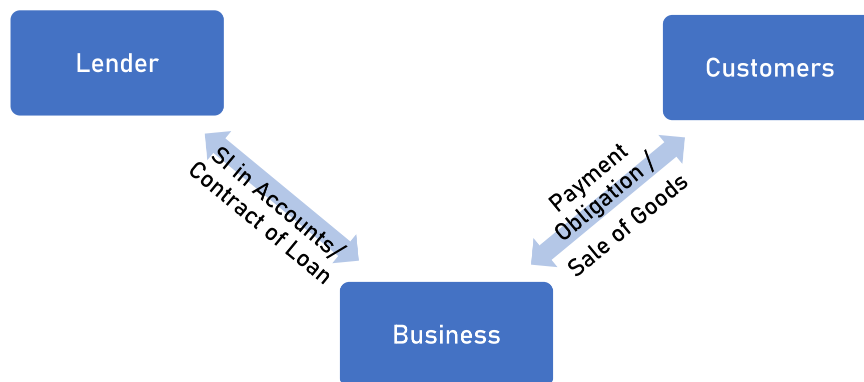
Intangible: the residual category – if it is personal property other than a Good, Document of Title, Chattel Paper, Instrument, Investment Property or Money, it is an Intangible

- By virtue of the other definitions, the most common intangible is an "account"
- Account: A right to payment of money which is not evidenced by chattel paper, an instrument or security. An account is a subcategory of intangible.
    - Right to payment does not have to be a current debt and it does not have to be earned.
- One of the most valuable things a business owns is an account receivable. Since they are so important commercially, it has a separate definition
    - The obligation is the right to be paid money not under a Chattel Paper.
    - This includes bank accounts since the bank is not holding the money as a bailee, it is a creditor/debtor relationship. The bank is your debtor since they owe you money
        - The right to paid that money is an account
- Financing on Accounts receivable (Accounts Financing)
    - Form of business financing; business generates revenue from sale of goods or services and invoices customers who then own money. The owed money are considered Accounts and are valuable forms of collateral. Two financing techniques are available for the accounts:
        - Accounts Financing: Business can obtain loan from bank or lender, and to secure the loan they can assign a security interest. This is on non-notification basis (business will continue to continue to collect accounts from customers, but if the business defaults on payments, the lender will enforce the security interest by notifying customers and require payment to go to the lender)
        - Factoring: Business can enter into factoring arrangement with a factoring company. In this case, they do not grant a security interest in the accounts, but selling the accounts outright to the factoring company (entire interest transferred so the factoring company becomes the new owner)
            - In consideration, business receives immediate payment from the factoring company at a discounted rate. The factoring company will then notify the customer that payments are to be made to them instead of the business

Factoring:



Accounts Financing:



But, accounts are not the only intangible

- There are also trade receivables, which are the accounts receivable owed to the business in connection with the sale of goods in the business
- Intangibles also cover intellectual property like patents, trademarks, copyright rights

Investment Property: Investment property means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account

- This is closely intertwined with the *Securities Transfer Act* ("STA")
    - All provinces have both a PPSA and a STA
    - So, Investment Properties will work with "security" under the STA
- A certificated or uncertificated (the right is embodied in a paper or not) that is a class or series like issue or shares or bonds
    - Personal Property needs to be divisible into a class. Corporate bonds and shares are included only if they are not exchangeable on a market
    - The rights of intellectual property are primarily shares of a company that are publicly available (more to come)
- When you have something like a Guaranteed Investment Certificate ("GIC"), where it is often a non-redeemable 3 year investment, it would be considered an Intangible, not Investment Property
    - It is not a right to money in a series (one time payment) and does not trade on the market, so it doesn't fall in the Investment Property category

- Also not an Instrument since it is not a piece of paper that can be transferred by signing it and giving it away

Securities Transfer Act, SA 2006, c S-4.5
Section 1 (1) In this Act, (ff) "security" means, except as otherwise provided in sections 10 to 16, an obligation of an issuer or a share, participation or other interest in an issuer or in property or an enterprise of an issuer, (i) that is represented by a security certificate in bearer form or registered form, or the transfer of which may be registered on books maintained for that purpose by or on behalf of the issuer, (ii) that is one of a class or series, or by its terms is divisible into a class or series, of shares, participations, interests or obligations, and (iii) that (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets, or (B) is a medium for investment and by its terms expressly provides that it is a security for the purposes of this Act

Money: A medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency. It does not include bank accounts, bonds or promises to pay money.

- If someone were to ask you how much money you have, you would likely count the money in your bank. But under the statutory definition of "money", bank money is an intangible.
- Instead, money needs to be currency: paper bills or coinage but nothing else
- A way to perfect a security interest is by taking possession, which means they need a physical possession – bank accounts do not have this, but bills/coins do
    - Includes Canada's currency, or other governments ($/£/€)
- As of now, Bitcoin has no physical existence so it is not Money. Rather it is Intangible.

Personal Property Security Act, RSA 2000, c P-7
Section 1 (1) In this Act, (b) "account" means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance, but does not include investment property; … (f) "chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions; … (h) "document of title" means a writing issued by or addressed to a bailee (i) that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and (ii) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of the person, to bearer or to the order of a named person

…

(w) "instrument" means

(i) a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(ii) any other writing that evidences a right to the payment of money and is of a kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(iii) a letter of credit or an advice of credit if the letter or advice states that it must be surrendered on claiming payment under it,

but does not include

(iv) chattel paper, a document of title or investment property, or

(v) a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing

…

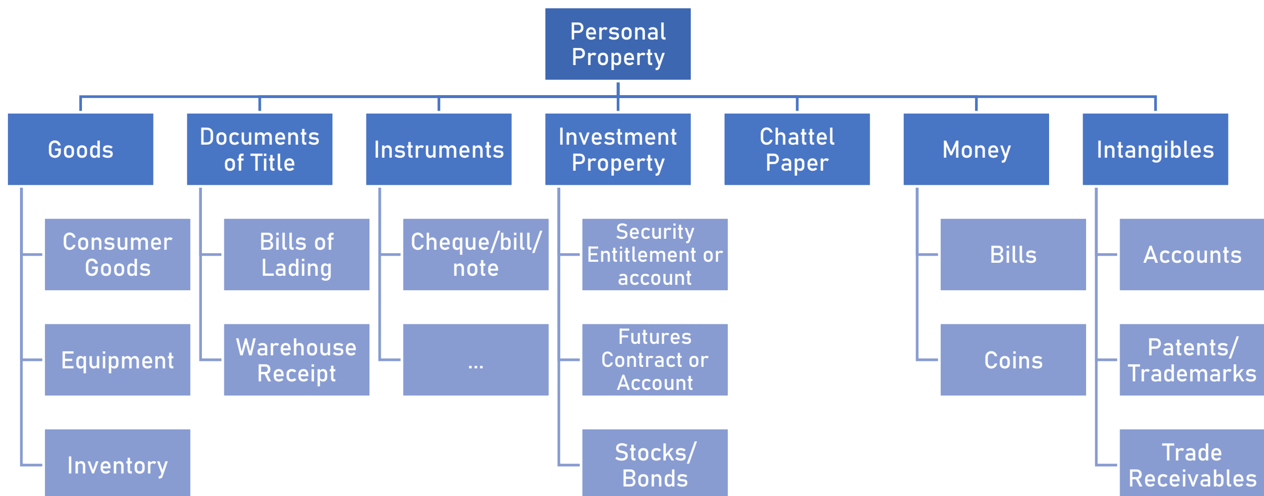
(x) "intangible" means personal property other than goods, chattel paper, investment property, a document of title, an instrument and money

…

(y.1) "investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, futures contract or futures account

…

(cc) "money" means a medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency



Unfortunately, with all these layers, uncertainty is common. What happens when an asset is used 50/50 personal and commercial? You have to make a determination on your own

- Also run into a chicken and egg problem
  - What about chickens being used for eggs but also for their meat?
    - If eggs, the chicken are equipment
    - If meat, the chicken are inventory

CHAPTER 2: SCOPE OF THE *PERSONAL PROPERTY SECURITY ACT*

Whether or not a personal transaction is governed by the PPSA is important because if it is not, we have to turn to another body of law (typically another statute or common law). This influences registration and priority.

- Typically, you look at property law and contract law if there is a property interest without a security interest.

As for the application of the PPSA, section 3 is the catch all provision. There are other sections for greater certainty, like saying real property is not contemplated by the PPSA, which we already knew, but there are other sections with true exceptions under section 4.

- The baseline is to assume the PPSA applies and then look at the exceptions under s 4

Personal Property Security Act, RSA 2000, c P-7
Section 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 (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. Section 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)*; (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.

Section 3(1) is the key for what are called True Security Interests ("TSI"). This is important because TSIs are fully under the ambit of the PPSA. In other words, the PPSA governs all aspects of the transaction when it is a TSI.

- Section 3(2) sets out what are called Deemed Security Interests ("DSI"). These interests are, at common law and at statute, not true Security Interests. However, by virtue of s 3(2), these transactions are still governed by the PPSA for everything but Part V, which is all about Remedies.
    - Since remedies are the end point of personal property security litigation (and usually the end result the client will be after), whether or not the PPSA remedies apply or not is of significant importance.
- So, even transactions that aren't true security interests will still fall under the PPSA because s 3(2) broadens the scope of the legislation to cover non-security interest transactions.

There are two reasons the PPSA would not apply:

1. Transaction does not fall within s 3 as a true or deemed security interest
2. Transaction does fall to s 3 but is excluded by s 4

Just because the PPSA does not apply, the claimant is not necessarily an unsecured creditor. It just means another legal avenue would apply, rather than the PPSA. It could mean the creditor has another proprietary right to give them priority over the other creditors. While this would not give them a security interest, it would give them a proprietary interest that could very well end up with the same conclusion

- Where a person declares trust for beneficiaries that does not secure performance of obligation, the PPSA wouldn't apply and it would instead be governed by the trust doctrine, where the beneficiary of the trust is viewed in equity as the beneficial owner of the trust property. They get an equitable interest and can allow the beneficiary to claim it from the trustee's insolvency administrator

Some notable section 4 exceptions:

- 4(a): Lien, charge or other interest given by an Act or rule of law
    - Would cover common law liens (rule of law
    - Possessory lien of a repairer
    - Statutory lien of a garage keeper under the *Garage Keepers Lien Act*
        - Statutory charges: WCB Act creates statutory charge in favour of WCB where assessments are unpaid. Charge does secure performance of obligation, but is statutory so excluded
- 4(b): federal security interests
    - Security agreements by another Act of Parliament
    - Cover federal ship mortgages (statutory provisions that govern these provisions – these Acts would apply rather than the PPSA)
    - *Bank Act* is particularly important
        - If it's a Federal security regime – the *Bank Act* Security governs
        - Excluded from the PPSA so you would look at the provisions in the Bank Act to deal with this, rather than the PPSA provisions
- 4(f) creation or transfer of an interest in land, including a lease
    - Makes sense since this is real property
- 4(g) covers transfers in interest in right to payment that arises in connection with an interest in land
    - Right to payment that is associated with a real property interest
    - Right to payment is usually an account

    - But we need to look at where this is registered – is it land titles or the Registry?
    - These things like rental payments associated with the lease of land should be under the Land Titles system
- 4(h) for a sale of accounts or chattel paper
  - A sale of accounts or CP is a deemed SI, so this would ordinarily be covered by Act and you would need to register it to be effective against 3rd parties
  - But where the transfer is part of the sale of business, then there is no reason to require registration, so is excluded from the Act
    - Unless the vendor remains in apparent control of the business
    - Then the public notification function is important and the PPSA will apply under s3(2) which deals with transfer of account or chattel paper

<u>True Security Interests</u>

Section 3(1) sets out the test for if a particular transaction is a security interest or not. Section 3(1)(a) lays out the test as: does the transaction create a security interest in substance.

- 3(1)(b) then, for greater certainty, clarifies other types that transactions that would fall under the TSI category: 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.

The s 3(1)(a) test is called the "Substance Test". This is because all it looks at is if the substance of the transaction creates a security interest or not. The legal title or the form of the transaction (ie, what the transaction is called/labelled) is irrelevant.

- Even if the title/form are silent on the transaction type, or even if they contradict the transaction being a security interest, if the substance of the transaction is a security interest, it will fall under s 3(1) and be totally under the PPSA
- This is based on economic realities: does it secure performance in another to give them a security interest? If it satisfies this it will be under the PPSA regardless of form or legal title.
- Does the other entity, in substance, get an interest in their property so that if the other does not perform an obligation (ie, paying), they are able to enforce against the property and payment (collateral)

The Substance Test is also Unitary. There is only one concept of the PPSA. There is no subdivision like a CSA, chattel mortgage, floating charge, pledge… There is no differentiation between them

- They are all security interests, and all are governed in whole by the PPSA
- Most countries take a non-unitary approach, though most of them are civil code countries.
- In countries that use the unitary approach, regardless if the seller retains title, it will still be a security interest since we are not looking at the title or form; legal title is not part of the test
  - So, a CSA would thus fall into this approach

There are a lot of transactions that transfer property rights without creating a security interest. If you sell your car outright, that is just a contract of sale. There is no security given, only absolute property transfer.

- But if you sell your car and take a security interest in the car to secure the payment price, that is both a contract of sale and a security interest.
- Under a contract of sale only, failure to pay would just be enforceable under contract through the enforcement system therein. This is why sellers often create security interests

But if you lease a property, it is not a security interest, just a bailment where the lessor is the owner, the lessee has possession. This doesn't grant any security interest such that if the lessee doesn't pay, the lessor can't use the PPSA to go after them.

- Where the lessee pays according to the lease over time and then gives the property back at the end of the term, no security interest is created. No obligations are secured, just payment for the use of goods. This is a true lease
    - Similar to holding property in trust for someone else.
    - Neither of these are security interests since s 3(1)(a) is not satisfied.

Most cases are usually pretty clear. The security agreement will be explicit when it says "the debtor grants a security interest to the following party to ensure payment is secured".

- Other instances, particularly leases, are not so clear. If they call it something other than a security interest, it may still be if it satisfies s 3(1)(a)
- True leases are not security interests, so the transactions needs to be analyzed as to if the lease *acts* like a security interest.

For example, if the lease is for three years with monthly payments, and there is an option to purchase the property for $1 at the end of the lease, this would, in substance be a security interest.

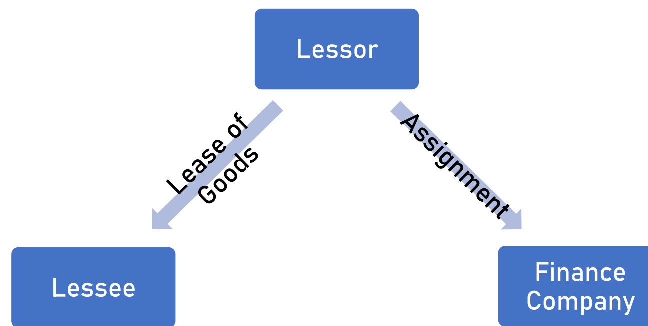
- Even if the person is a lessor, they are actually financing the purchase of the property to the lessee since any rationale lessee would acquire the significant goods for a single dollar
    - So it may not be called a security interest, but it functions as one
        - The creditor is recovering the costs plus a credit charge. Like a disguised CSA
    - However, just because a lease has an option to purchase the good does not mean it is a security interest (option to purchase clause is not sufficient).
    - If the purchase option is at the value of the goods at the end of the term, the lessee has an option to purchase it or not.
        - This is not a true security interest because it is not a financing. The lessor isn't financing – the lessor isn't financing the acquisition of goods. The lessee simply gets the choice to buy it or not
        - If the buying price was $1, this is a security lease since any rationale lessee will exercise this option and acquire the goods.
            - In this case, the lessor *did* finance the acquisition of the goods
    - The option price does not have to be nominal. If the option price is $100,000, but the expected value is $1,000,000, that is the same idea since a rational person would be expected to exercise the option to purchase significant goods for much less than their worth
        - Where there is significant differential between the predicted value of the good at the end of the lease and the offering price, we would expect the lessee to exercise the option and acquire them.

Alternatively, there doesn't even need to be an option to buy for a Security Lease to arise. If the lease is for 5 years, but the average lifespan for the good in question is only 5 years, then the lessor is effectively gaining possession of the good since the whole of the goods utility is in the possession of the lessee.

- Same thing, this may not be called a security interest, but it functions as one
- In cases like the above two examples, we would call those leases "Security Leases" since they are, in substance, security agreements under the ambit of s 3(1) and will be treated under the PPSA

<u>Security Leases</u>

Things get a tad more complicated when the lessor assigns the lease to an assignment company, as is common with car leases.



DaimlerChrysler Services Canada Inc v Cameron, 2007 BCCA 144

Facts:
Cameron (respondent) signed a lease for a truck, where Vernon Chrysler Dodge ("VCD") was named dealer and Cameron lessee. Under the agreement, VCD would assign the lease to DaimlerChrysler Services Canada ("Daimler", appellant). This assignment occurred on the day the lease was signed.

- Daimler claimed Cameron failed to make payments, repossessed the truck, and sold it
  - Daimler then brought action claiming $30,000 from Cameron
    - Cameron contended that damages were limited to Part 5 of the PPSA

Procedural History:
The trial judge found that Part 5 of the PPSA applies to the lease.

Issue:
Does Part 5 of the *Personal Property Security Act* apply to the impugned lease agreement?

Rule:
Section 2(1) of the *Personal Property Security Act* (BC):
(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
(b) without limiting paragraph (a), to … a lease … if … [it] secure[s] payment or performance of an obligation.

Analysis:
A "true lease" would fall outside Part 5 and remedies and rights would be those set out in the lease and under common law. True leases do not have the characteristics of a security lease.

- A "security lease" would be subject to Part 5, where relief is under statute
  - A secured party (in this case, the lessor) with collateral that is "consumer goods" must make an election to remedies and can sue under the security agreement, or enforce the security through repossession

The current lease was for 48 months, $1,092.3 monthly. Cameron had to keep it in good condition and make all repairs. There was no down payment. He could have purchased it for 54% of its value at the end of the lease ("Residual Value").
The court must scrutinize the lessor-lessee relationship to determine if there was indicia of security agreement. If there is a security interest it is thus a security agreement regardless of the form it took.

- Short term leases are usually indicative of true leases since it can likely be leased or sold again afterwards
- The absence of a down payment, obligation to return in good condition, obligation to use it lawfully and the option purchase price indicate it was a true lease since it was likely to be leased again or sold at the end of the lease term. The extra mileage charge also compensated for extra wear and tear

Some of the lease provisions indicate that it is a security interest: in default the lease allowed repossession (consistent with the PPSA) thanks to the acceleration clause.

- However, the chambers judge put too much emphasis on the default provisions of the lease to find it created a security interest.
  - The lease is a true lease

Conclusion:

Part 5 does not apply

Hold, Order:

Appeal allowed

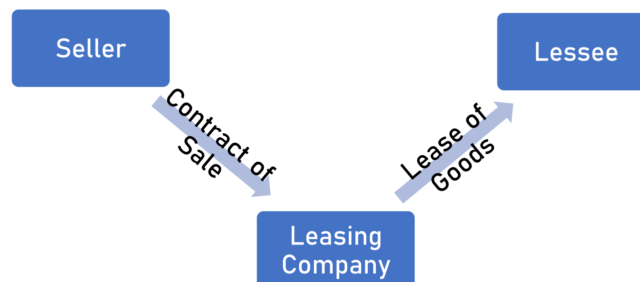
Ratio:

Mere presence of an acceleration clause is not sufficient to turn a true lease into a security lease

The transaction in this case is actually a DSI under (the BC version of) s 3(2) – it was a lease of more than one year, and the assignee is professional in the business of leasing. In the case of bankruptcy, resale or priority competition, this case would not have been litigated since the PPSA registration and priority provisions would apply

- But the issue in this case was whether remedies under (the BC version of) Part V applied or not
- Since DSI don't follow Part V, the delineation between a TSI and a DSI had to be made
  - The court only had to determine if it was a true lease or security lease for the purposes of remedies.
    - This is the only case the determination would be needed since Part V would apply to one but not the other
- There were a lot of factors to delineate, but the option price is highly significant. It is not the sole characteristic to consider, but it has a certain predominance over others.
  - The presence of an acceleration clause (on default, all future payments become immediately available and collapsed into a single payment and become due) was enough to convince the chambers judge that the lease was a TSI and Part V applied
  - But the BCCA said the acceleration clause is not determinative – in fact it is practically moot.
  - At one time, the lessor could not sue for future payments, but that has since changed. The SCC allowed recovery. Because of this, the acceleration clause has lost meaning.
    - In this case, the clause does not reflect one way or the other if the lease is a true lease or security lease
  - All other indicia pointed to it being a true lease, and thus Part V doesn't apply

The other Security Lease is the Financing Arrangement of the finance lease. In these cases, the company in the business of leasing goods to customers will often buy what the customer wants. The leasing company will buy equipment from a seller, and then lease the equipment to the lessee.



Re Cronin Fire Equipment Ltd, (1993), 14 OR (3d) 269 (Ct J (Gen Div))

Facts:

Toronto Dominion Bank ("TD") moved as assignee of the interest of the trustee in bankruptcy of Cronin Fire Equipment ("Cronin") against Transportation Lease Systems Inc ("TSL"). Under the assignment, certain leases made between Cronin and TSL which are in substance security leases which was unperfected would anchor TSLs interest as subordinate to the interest of TD.

- The Seller sold products to TLS who then leased the goods to Cronin. The lease of goods agreement had an Open-End lease clause.

Issue:

Is the lease in question a security lease or true lease?

Analysis:

There are many indicators as to why a security interest arises in this case. Predominantly, the open-end terms mean Cronin would either receive the benefits of the sale price if the vehicle was sold in excess of its termination value, or have to pay the proceeds if they were less.

- Cronin was required to pay all changes in connection with licensing and registration, as well as required to obtain and pay insurance.

Conclusion:

Security lease. Remedies of PPSA apply

Hold, Order:

Motion allowed

Ratio:

Open end leases create a security interest in substance.

- Option to Purchase leases reflect a security interest *only* when a reasonable person would be expected to purchase it (if low compared to market value)

An open end lease is a lease where the contract stipulates a final price that the good will be measured against. If the good is sold for more than that price, the excess value is given back to the lessor. But, if the goods sell for less, the lessor is required to pay the difference.

- If the termination value is $15,000:
  - If the goods sell for $16,000, the $1,000 surplus is given to the lessee by the lessor
  - If the goods sell for $14,000, the $1,000 deficiency is paid by the lessee to the lessor

At this time, deemed security interests weren't in existence, so everything hinged on if this was a TSI or not. By extension, it turned on if it was a true lease or not.

- If this had been decided today, it would not have gone to litigation since both TSI and DSI would require registration.
  - Since the lessor didn't register, it would lose the priority, only if the PPSA applied.

The Court found that an open end lease is a security lease. Even if the lessee does not acquire ownership at the end, the lease, in substance, creates a security interest.

- The lessor is in the position of the owner. It has the residual claim and has the benefit of gain and takes all risk of loss.
  - The lessor ensures it gets the same recovery whether or not the goods are more, less or the same
  - Regardless of how it sells, the lessor obtains the same amount
    - The lessor is thus, in substance, in the same position if it buys the goods or if it asks the lessor to resale the goods on its behalf
    - This makes it a true security interest by being a Security Lease.
    - Basically, the Substance Test is not about legal ownership but the substance of the transaction, which can be applicable to more transactions that leases.

Livestock Produces: a bank makes a loan to feeder associations so the feeder association can finance the production of feed (effectively giving credit to producers to feed their livestock). The feeder association then tags livestock as their property.

- When the livestock products (ie, meat) are sold, proceeds of the sale would be used to pay the feed charges used by the producer so the producer would get the surplus, notwithstanding the ownership of the livestock by the feeder association.
    - Feeder association gets a fixed amount, producer gets all surplus (profit – feed expenses)
    - This is considered a security interest under s 3(1) in substance

Deemed Security Interest

Section 3(1) was already decently broad since it included transactions that were not typical security interest, but acted as one in substance. Section 3(2) broadens the applicability even more to transactions that are not security interests at all – in name, form or substance.

- They may not be security interests, but they are brought under the PPSA to achieve certain policy objectives.
- Sections 3(1) and 3(2) are again watertight: one cannot be both a TSI and a DSI. So, 3(2) will never be applicable to a TSI, which is already under s 3(1).
- The transactions that are covered by s 3(2) are:
    a. Transfers of account or chattel paper
    b. Lease of goods for more than one year
    c. Commercial consignments
        i. As long as they don't secure payment or performance
        ii. If they do, they would be a TSI under s3(1)
- This means that even true leases can be caught under the PPSA
- But only sections 4-55 of the PPSA will apply so enforcement remedies will not

Lease for a term of more than a year: The definition of a lease for a term of more than one year brings certain leases partially within the scope of the PPSA. The definition includes leases that are for an indefinite term, leases that are for a term of less than one year which are renewable for a term that exceeds one year, and leases which are originally for a term of less than one year where the lessee with the consent of the lessor continues in possession and this period exceeds one year.

- A lease for a term of more than one year is not governed by Part 5 of the PPSA (Rights and Remedies on Default) unless the lease secures payment or performance of an obligation.
- It does not extend to all leases for a term of more than one year a lease involving a lessor who is not regularly engaged in the business of leasing goods is excluded.
    - If the lessor is just leasing on the fly, that lease would not fall under s3(2); the lessor must be regularly in the business of leasing goods

Personal Property Security Act, RSA 2000, c P-7
Section 1 (1) In this Act, (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,

but does not include

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods,
(v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or
(vi) a lease of any prescribed goods, regardless of the length of the term of the lease;

…

(3) A lease referred to in subsection (1)(z)(ii) does not become a lease for a term of more than one year until the lessee's possession extends for more than one year.

Section (1)(z)(i) allows a lease for indefinite term to be treated as a lease for a period of more than one year and thus under s3(2). So, if there is no end date, it can be treated as more than one year.

- Also allows where the lease is automatically renewable or at the option of either party that could bring it over one year.

Section (1)(z)(ii) covers the overholding lease since it brings leases for *less* than a year in the ambit of s 3(2) if the lessee (with the consent of the lessor) remains "substantially uninterrupted" in possession of the leased goods for a period of more than a year.

- Say a lease was for 6 months with no renewal option. If after 6 months, the lessor continues the arrangement (lessee pays and lessor accepts without eviction), that counts as a lease of more than one year.
    - BUT only once it goes beyond one year of overholding, as per s 1(3)
    - Though it has to hit one year, section 1(3) allows registration from the outset, even if the term doesn't ever reach one year.
- If this is the case, registration would be required. This becomes very important if bankruptcy occurs before one year
    - In an indefinite/renewal lease, the trustee in bankruptcy would win out over the lessor
    - But, in an overholding lease, until one year has passed, it wouldn't have to be registered (though it could be as per s 1(3)) and the lessor would prevail

Using the *Cronin* logic, all open-end leases are TSIs. But, if the lease is over a year, wouldn't that be a DSI under s 3(2) for a lease of more than one year?

- No, since s 3(2) says a lease for more than one year is governed by s 3(2) if it does *not* secure obligation or performance.
    - An open end lease *will* secured obligation, so it is a TSI not a DSI
- The way you could look at it is:
    - First, ask if the lease is a TSI in substance, or a true lease.
    - Then, if it is a true lease, it could be a:
        - DSI if more than one year and the lessor is regularly in the business, or
        - Completely outside the PPSA if not

What is the point of deeming some transactions as security interests if they aren't at all?

Transfer of account:

(i) When customers owe money to a business, the business may transfer those accounts (money obligations) to someone else for instant payment
    (a) Recall this is the Factoring Agreement
(ii) In these cases, the customers would pay back the transferee, the factoring company
    (a) This is not a security interest at all.
    (b) But the architects of the PPSA found that this wouldn't be fair – what if the business sells the accounts to multiple transferees.

        (i) Priority by notice was the traditional way this was addressed, but this was not ideal since registration is a much simpler and clearer way to assign priority
            1. This is even if they are outright sales.
            2. Legislators see the PPSA as offering a superior resolution method and that it should be used.
                a. It isn't that these transactions are viewed as security interests, it is that the PPSA addresses issues in a superior way

Say Delta provided services to clients and these clients would receive invoices for payment. Delta then assigns these debts to Echo, who pays 90% of the amount owed by the clients. Where clients fail to pay the amount, Echo would enforce the claim and took the risk of loss

- This would be a deemed security interest since it is a transfer of accounts. This was not by way of a security interest.
    - Accounts financing is actually quite common where the customers would pay the bank instead of the seller
- Echo isn't making a loan to Delta and taking the accounts as collateral – it is buying the accounts and becomes the owner of the accounts and collects them. This means it cannot be a TSI. It is under s3(2) as a transfer of accounts, so it is a DSI.

Say Juliet borrowed $100 from Kris, who borrowed $150 from Leila. Kris transferred the $100 debt to Leila so Leila could collect the debt from Juliet only if Kris did not repay the $150 it owed to Leila.

- This would be a TSI since there is a transfer of accounts *but* the purpose was to secure payment or performance so that if Kris defaults Leila has a way to recover.
    - Again, a transfer of account is *only* under s 3(2) if it is not a TSI in substance (only if it does not secure obligation or payment). If it does, it will be a TSI, and if not it may be a DSI
        - Accounts Financing, by this logic, are a TSI

Say Romeo leased a laptop to Sierra for a 5 year term as a friend. The lifespan of the laptop is only 5 years and Sierra does not have the option to purchase it at the end of the lease.

- The transaction will still be a TSI, since the laptop will have lived in its entirety with Sierra. What's left after the lease is scraps.
    - Say the lifespan was 20 years, then what?
    - It wouldn't be under the PPSA at all
        - It may be for more than a year, but Romeo is not in the business of leasing, so it is not in the definition of a lease for more than one year.
        - As such, it cannot be a TSI or DSI

Why are Commercial consignments and Long-term leases treated as DSIs?

(i) Reason 1: if a lessor leases goods and the lessee sells to someone else, a priority competition arises.
    (a) In such cases, we would want a clear way for people to predict if something is a hidden interest. The registration system enables the purchaser to be aware of other competitors before getting involved
(ii) Reason 2: the United States does not bring Security Leases into the PPSA and there is huge amounts of litigation about whether the lease was a true lease or security lease
    (a) To treat it as the same as a security interest allows much more consistency to allow registration and priority rules always apply
        (i) The need to litigate then vanishes

When dealing with a lease, there are three ways it can be addressed:

1. If the lease obligation is a nominal sum, it would be under s3(1) since it is called a lease, but secured payment and is thus, in substance, a true security interest. Similarly where the lease is

for the full economic life of the good, it would also fall to this. These are considered "Security Leases" since they may not be a security interest in title, but are in substance.
    (a) All of the PPSA would apply
2. If the lease is a true lease, but falls into the definition of a lease for more than one year (the lessee returns it at the end of the term) or commercial consignment. It wouldn't secure payment or performance of an obligation, but it would fall under the definition of s3(2).
    (a) All of the PPSA would apply except Part V
3. If the lease is a true lease, but does not fall in the definition of a lease for more than one year, it is simply a true lease. This could be because it is for a year or less, or the creditor is not in the business of leasing.
    (a) None of the PPSA would apply
        (i) Then what? Common law?

Where leases for less than a year have a renewal option, it will automatically become a lease for a term of more than one year under the PPSA.

Say a secured party has taken a security interest in all of a debtor's present and after-acquired personal property. A lessor then leases goods to the debtor under a true lease, outside the scope of the PPSA. The secured party then registers a financing statement in the registry, but the lessor does not.
(i) The debtor then goes insolvent and the secured party and the lessor both claim the goods.
(ii) In that case, the lessor would actually have priority.
    (a) The lease is outside the PPSA, so it cannot apply and the registry system is useless. This means the only alternative dispute resolution we have is through property law
    (b) The lessor provided a good. The lessor would be the owner at common law. Even if the debtor granted a security interest to the secured party, it is only subject to the right of the owner.
        (i) In this case, the owner (lessor) did not have to sign a security agreement since the goods were outside the ambit of the PPSA
        (ii) As true owner, the lessor would prevail over the secured party
        (iii) This means that lessors are in a better position where the PPSA does not apply

In cases where a debtor goes bankrupt and the PPSA does not apply, the *Bankruptcy and Insolvency Act* can take over. But the *BIA* does not require registration. Section 20 of the PPSA states that if you don't perfect a security interest and you go bankrupt, the BIA will apply only if transaction is under the PPSA
(i) If the transaction is outside the PPSA, the BIA doesn't kick in.
    (a) The lessor has priority over a trustee in bankruptcy since they maintain legal title.
(ii) If the transaction was a DSI under s 3(2), the trustee would have priority under s 20 of the PPSA

It gets even more complicated where there is a transfer of property. Say there is a lessor who leases goods for goods not under the PPSA and does not register. If the lessee then sells the goods to the buyer, the lessor would still have priority
(iii) The lessee can only sell what it has rights to sell, which would be subject to the pre-existing owner. This means the buyer is at risk since the lessor is still the owner of the property.
    (a) This is exactly why the PPSA extends to cover DSIs.
        (i) If it has to be registered, the buyer would have to research in the registry if the lessee has a security interest in the goods at all

In events where the lessee defaults on a lease contract, the lessor has a right to sue for breach of contract as well as a right to seize and sell the goods.
(iv) Breach of lease is just a breach of contract where contractual damages are available
(v) But the lessor is also the owner of the property, and on default, will have the right to exercise self help remedies and obtain possession of the goods

(a) This isn't under the PPSA at all, but there are still property rights and strong claims for recovery

In *CIBC v Westfield Industries Ltd*, Westfield makes farm equipment and sells them to Schulzke's Service Centre Ltd on a Consignment Agreement (making SSC a consignee).

- If a buyer was found, they would sell the equipment to the buyer and pay the consigner a commission or sum of money. There are two ways this can be approached:
    - Sale or Return: Westfield provides goods to SSC to sell. If there is a customer, SCC would sell it and pay Westfield. If not, they just return it to Westfield
    - Agency Relationship: Westfield signs as owner and gives possession of goods to the consignee and the farm dealership is selling the goods as an agent of the owner.
- SSC then secures the goods with CIBC under a GSA.
- Is the transaction between Westfield and SSC in the definition of commercial consignment?
    - Sale or Return is not a SI since you are returning it or buying the goods.
    - But, like a lease these can be disguised as consignment to make it seem different (likely if they don't want to register).
        - If the substance is such that the consignee (SSC) is in the position of the owner (Westfield) where it can assign the goods, it could be a disguised SI
            - SO, in Agent Relationships, it will be a DSI
    - This makes the test for Consignment: Does the consignee have the right to return the goods where they can't sell?
        - If they can't return, it is just a disguised SI since they basically have to buy the goods if it does not sell
            - The consignee is on the hook
        - If they can, it is just a Sale or Return and not a SI
            - A true Consignment Agreement would have the right to return

The agreement in this case was a True Consignment Agreements – if SSC can't sell them, they must return the goods.

- But, s 3(2) is for commercial consignments. Even if a true consignment agreement, if it does not fit in the statutory definition of a consignment agreement, it can't be brought under s 3(2) and registration melts away
- For a commercial consignment, both consignor and consignee need to be in the business of transferring. Westfield produces, SSC sells. So, this is established
    - However, there is another carve out: if the transaction is between a creditor (CIBC) and they recognize that the consignee is selling goods belonging to another person, then it is not commercial consignment
        - The rationale is that no one is fooled that the consignee is the owner of the goods. So, we don't need public registration to otherwise give public notice
            - Where creditors are aware of this, it won't apply
    - SO, did CIBC know SSC was holding on behalf of Westfield?
        - Had Westfield registered, there would be no problem, but they didn't
            - Westfield thus does not want the PPSA to apply, so they argued that CIBC, as a sophisticated party, should generally know that farm products are generally assigned on a consignment basis so s 3(2) won't apply and they can prevail over CIBC
                - This argument fails: the knowledge needs to be shared between *all* creditors, not just the sophisticated party
        - Test: all creditors need to know that the consignee is selling goods of another, not only an experienced party
            - This means it is a fairly confined exceptions
                - So there is almost always publication needed for *all* creditors to be aware of it.

All to say, it isn't as simple as "if you have no security interest, you are an unsecured creditor".

<u>Transactions on the Periphery:</u>
There are other transactions that are common, but less so than leases, accounts financing

<u>Licensing and Quotas</u>
Licenses are effectively a permission to do something that would otherwise be unlawful. They can be governmental (like a fishing license) but also private (intellectual property rights for example). How does this work with securities?

Saulnier v Royal Bank of Canada, 2008 SCC 58

Facts:
Saulnier (appellant) had 4 fishing licenses and operated his business through loans – he signed a general security agreement ("GSA") with the Royal Bank of Canada ("RBC", respondent).

- The contract gave RBC security in personal property including intangibles. Intangibles, as per the GSA, were to be interpreted according to the *Personal Property Security Act* ("PPSA").

The fishing business became insolvent and he and his corporation owed a collective $297,731

- Under the *Bankruptcy and Insolvency Act* ("BIA"), his liabilities were of $400,330 and around $250,000 of that was to RBC
- The licenses were valued at over $600,000 and (if available for creditors) would have covered all debts.

4 months after bankruptcy, Saulnier leased one of his licenses. The receiver/trustee in bankruptcy signed an agreement to sell the leases to a third party for $630,000 but Saulnier refused to sign.

- The trustee and RBC brought application for declaratory relief.

Procedural History:
Supreme Court of Nova Scotia found there was no property in the licenses

- NS Court of Appeal found the license as property of the Crown, not the holder but the beneficial interest is with the licensee, and transferred to the trustee in bankruptcy.

Issue:
Does a fishing license constitute "property" available to a trustee under the BIA or a creditor under the PPSA?

Rule:
Section 2 of the (NS) *Personal Property Security Act*
"personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

Section 2 of the *Bankruptcy and Insolvency Act*
"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of equity, property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property

Section 16 of the *Fishery (General) Regulations*
(a) document is the property of the Crown and is not transferable.

Analysis:

In fishing, the license is a condition precedent to participating in the industry. The license unlocks the value in the fisher's other assets. This does not mean it counts as property. True meaning of "property" in both the BIA and PPSA must be ascertained

Fishing licenses are public resources. The fish are property of the licensee when caught. This means it is more than a license to do what is otherwise illegal – it assigns a proprietary interest in the harvest.

- Traditional Property Approach:
    - At common law, the license would not be property, though it is a major commercial asset. This basically makes it a profit a prendre.
    - Does this qualify it as "property" under the BIA or PPSA?
    - The license coupled with the proprietary interest is similar to the common law nature of property and fits in the definition of "property" under the BIA
        - Coupling the license with proprietary interests does not encumber the Minister of DFO's discretion; the license is no more and no less than what it is described as in legislation
- Regulatory Approach:
    - Since anyone is able to apply for a license, and everyone will be subject to Ministerial discretion, the licenses are not capable of constituting "property" in the license holder
- Commercial Realities Approach:
    - Also difficult since many things of commercial value are not property
        - This approach cannot legitimate property under the BIA or PPSA
- Preferred Approach:
    - While the license and proprietary interest are not the same bundle of rights of property under common law, they do possess some similarities
    - It becomes necessary to ask if they are sufficient to satisfy "property" under the legislation
        - BIA intends to fulfill objectives in the event of bankruptcy which require that non-exempt assets be made available to creditors.
            - This would extend to s7 fishing licenses.
            - The fact that catching fish is required to exercise the proprietary interest is contemplated in the BIA and does not invalidate the proprietary nature, even if contingent
            - The BIA defines the nature of the proprietary interest. The trustee is entitled to require Saulnier to execute the documentation to obtain a transfer of the fishing license to a third party
        - PPSA would also catch the license. "intangible" would include an interest created by statute having the characteristics of a license coupled with a common law proprietary interest.
            - This is sufficient to satisfy the definition under the PPSA and RBC can proceed with PPSA remedies

Conclusion:

License falls under both BIA and PPSA provisions

Hold, Order:

Appeal dismissed

Since a license is just permission to do something that would otherwise be unlawful, is that permission property? If not, then RBC's security interest wouldn't extend to them and could not enforce the license.

- Saulnier thus argued the license is not property. If it were, it would be an intangible
- RBC thus argued it was an intangible so their security interest is enforceable.

SCC: if it were transferrable, it would easily be considered property

- But other licenses are not transferable and the government says we remain the owner while the issuer has possession. If it is not transferrable, it could not be collateral.
    - You can't transfer a fishing license the same way you could a car
    - The government is amenable to this transaction
        - If I want you to get the license and me to get the money for it, I would ask DFO to cancel the license and re-issue it under a new license
            - This isn't a transfer, it is destroying my rights and creating yours
- The ONCA found that if the issuer had unfettered discretion, it is not property
    - Test of Unfettered Discretion
- The SKCA found that if trading the asset is allowed, the reality is that they are property and the security interest can be granted in that (economic reality)
    - Test is Economically Valuable
- The SCC used neither of these. They recognize property if sufficiently close to an established property right like a profit a prendre.
    - Licenses are not profits a prendres, but sufficiently close since you are entitled to the legal property of the fish which you otherwise would not have
        - As such, a license is considered property

This finding was contentious. Lots of things have value but are not property (like a law degree), meaning the economic realities test is kind of phoney.
- A lot of things have quotas but would be ill fitted to property law
    - A milk quota would not fall in this test since it is not a profit a prendre: the producer owns the cow and the milk, but the producer cannot sell the milk without a license.
        - They aren't acquiring anything they don't already own
        - So, it would not be sufficiently close to a profit a prendre.
- Expect this to be relitigated soon.

Flawed Asset Arrangements

Where a customer has an account with a Bank, they deposit their money and the Bank then owes them. A savings account is a debtor creditor relationship with you. If a bank loans money to another party in a separate transaction, it would still wish to be able to resort to the funds in the bank account in order to reduce risk of default
- Out of caution, the Bank or lender can make a "triple cocktail":
    - Security Interest in the Bank Account
        - This is a little weird since the Bank would be taking a security interest in the money *it* owed to the customer
            - Usually it would be the creditor taking out the security interest, not the debtor, but courts allow this
    - Contractual Right of Set-Off
        - Bank has the right to set off one obligation against the other in the contract
    - Condition on Repayment (flawed asset)
        - Bank is not required to repay the loan to its own customer (savings account) in respect of the deposit account until the customer has repaid the loan
            - Put a condition on payment of an account
            - Bank won't give you money until you do something (likely satisfy your loan)

Caisse Populaire Desjardins de l'Est de Drummond v Canada, 2009 SCC 29

Facts:

Caisse Populaire Desjardins extended a line of credit for $277,000 to Camvrac through 2 agreements.
- The first was a Terms Savings Agreement ("TSA") where Camvrac deposited $200,000

- The deposit was not transferable and only as security for Caisse's benefit
- The second was a Security Given Through Savings Agreement ("SGTSA") where Camvrac agreed to withholding the Caisse amount until all credits were paid
  - In the event of default, Caisse could claim compensation between the deposit and the amount owing

Camvrac failed to pay interest, but Caisse did not address their claim. Camvrac also failed to remit income tax premiums from deductions of salaries. Camvrac then assigned for bankruptcy. The Crown gave Caisse notice to pay the amount owing as from the statutory deemed trust.

Issue:
Is Caisse's right to compensation a "security interest" within the *Income Tax Act*?

Rule:
Section 224 of the *Income Tax Act*
(1.3) "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided

Analysis:
If Caisse's interest satisfies the *ITA* s 224(1.3), the Crown would be entitled to the proceeds of the deposit. If not, Caisse would be entitled to compensation and the deposit would not be property of Camvrac and the Crown would have no claim through the statutory trust

- Contractual rights to compensation don't preclude "security interest" considerations. Whether they do give rise to a security interest under s224 requires consideration of the contract terms to determine if the parties intended to confer interest in the property to secure payment or performance.

The five-year term in the TSA, retention of the deposit and the agreement to not transfer that created Caisse's interest in the property. Without these conditions, Camvrac could have withdrawn it at any time and become indebted, Caisse would have no security claim and only have a compensation claim.

- The conditions ensured that Caisse was continuously indebted to Camvrac and signed to Caisse's effective compensation. It thus conferred on Caisse a security interest in the property to satisfy s244 of the ITA
- Such encumbrances ensured that Camvrac's claim for deposit would continuously exist to ensure compensation would be effective.
- "Just because a creditor holding a security interest (the Caisse) is also the debtor (the Caisse owes the $200,000 deposited by Camvrac to Camvrac) does not make it any less of a security interest for the purposes of s. 224(1.3) ITA."

Conclusion:
The TSA and SGTSA created a security interest within s244 of the ITA. Caisse is liable

Hold, Order:
Appeal dismissed

Ratio:
It is necessary to consider all of the relevant terms of the agreements between creditor and debtor and not solely the provisions entitling the creditor to the remedy of compensation.

- Set off provisions alone will not create a security interest unless other features exist to prevent the debtor from accessing its own property.

In this case, the CRA has a deemed trust under the *Income Tax Act* where if the debtor fails to make source deductions, there is a deemed trust over those assets.

- The *ITA* says the deemed trust has priority over any security interest
- So, if the transaction made by the lender is a security interest, the CRA will have priority
  - Caisse obviously does not want this to happen, so they would argue it is not a security interest but something else.

- In this case, the two agreements did grant a security interest, but it didn't have to be asserted. If other rights were asserted, the security ones don't have to be. So, Caisse was saying they weren't even using their security rights in the deposit (if they did, CRA would have priority)
    - The Supreme Court said this is still within the definition of security interest
    - Key point: simple right of set off, whether that set off is permitted by law or contractual, does not create a security interest itself.
        - But, if it is created contractually with the other factors that prevent the deposit from taking out the funds (ie, encumber them), it will be
            - Camvrac has no means of accessing the term deposit (it is essentially encumbered). They cannot deal with that asset

CHAPTER 3: CONFLICT OF LAWS

Conflicts of laws deals with 1) questions of jurisdiction, 2) choice of law and 3) judgement. In terms of the PPSA conflicts, we focus on choice of law. Each province has their own PPSA and each have their own registration requirements.

- Most PPSA's are similar, but not identical.
- Most businesses cross provincial boundaries so this makes things complicated for security interests. This question effects where we should register.

Private International Law has a methodology to determine what the applicable law is. The PPSA substitutes statutory rules for the ordinary international law rules around choice of jurisdiction.

- If litigated in Alberta, you go to the Alberta PPSA to look at the jurisdiction rules in ss 5-7
    - Just because it is litigated in Alberta courts does not mean the legislation the court uses will be the Alberta PPSA
    - Whatever province you litigate in, you use that PPSA to determine which jurisdiction and provisions are used for the rest of PPSA disputes
        - If litigated in Alberta and the AB PPSA tells you that the BC PPSA is the one that applies, then the BC PPSA is used for the rest of the analysis.
- If you don't register in the right place, it won't be perfected and lower in priority (lower than a trustee in bankruptcy, perfected creditors and people who have knowledge of the security interest).
    - A lot of people just register everywhere the collateral is or is involved with. This helps, but you still need to know the governing law in case there is errors in how it is registered
        - If you improperly register the interest, it may only change the outcome for one province but not another.

Section 5 is the general rule and applies to the location of property. It adopts the rule of private international law: the validity and perfection of a security interest is to be determined by the law of the jurisdiction where the property is *located* at the time the security interest attaches

- As s 5(1)(a) and (b) lay out, not all property go by the Location rule – only security interest in goods or possessory security interest in chattel papers, document of title, instrument or money
    - 5(1)(a): Goods could also fall under ss 6 or 7
    - 5(1)(b): chattel papers, document of title, instrument or money are only under s 5 if there is a possessory security interest (chapter 5)
        - If the party has a non-possessory security interest in the collateral, then it is governed under s 7
        - Intangibles will never be under s 5 rules.
- "validity, perfection and effect of perfection" just means the priority rules laid out in the Act

When looking at the location of the collateral, you look at the time of attachment (governed by section 12 in Chapter 5). This is when the security interest arises

- If the collateral is located in another province at the time of attachment, registration must be there.
    - But section 5(2) states that if it is perfected and then relocated to Alberta, there is a limited period of continued protection of the other jurisdictions' security interest:
    - This means the security interest will be recognized as perfected for a grace period. Within this grace period, the secured party must register the collateral in the new province
    - Section 5(2)(a): 60-day grace period if the secured party did not know of the relocation
    - Section 5(2)(b): 15-day grace period if the secured party knew of the relocation
        - If, at the end of the grace period, the security interest is not registered in the new province, the old province's security interest is no longer perfected and will have no effect in the new province (section 5(3)).
- There is a notable exception to this rule. The temporary perfection afforded by s 5(2) is not effective where a buyer or lessee acquires an interest in the goods without knowledge of the security interest prior to the perfection of a security interest in the new jurisdiction.
- Section 5(2) also makes a priority rule:
    - If the goods move provinces and the old province's registration is recognized and a buyer in the new province buys the goods without knowledge of the original perfection, the buyer will win out
        - This is not for the creditor or debtor, only the buyer since they should have reasonable reliance on the seller.

Section 6 creates an exception to section 5. If (and only if) the parties both understand the goods are to be located to another jurisdiction, and this occurs no later than 30 days after the security interest attaches, section 6 will apply.
- In this case, validity and perfection is governed by the law of the jurisdiction into which the goods are re-located.
- This is common where a farmer in one province purchases machinery from a dealer in another. If the dealer is told the plans to relocate them to their province, and they do so within 30 days, section 6 will apply and the farmer's province is the proper place for perfection.

This is a fairly simple system, making the market more stable and predictable. However, this system does not work particularly well for certain kinds of property.
- For example, a truck. A truck could cross provinces frequently at any particular time, so the perfection by collateral location is not that helpful.
    - What about accounts? They have no physical existence so their location also doesn't make sense.
        - This is where section 7 comes in

Section 7 shifts the location of the collateral to the location of the debtor. Wherever the debtor is located is where the collateral is to be registered. Section 7(2) states that the debtor rule applies to:
- 7(2)(a)(i) intangibles
- 7(2)(a)(ii) mobile goods or lease inventory
- 7(2)(b) nonpossessory security interests in chattel paper, documents of title, instruments and money

Apart from the location of collateral changing to the location of the debtor, the rules are basically the same. Section 7(3) is effectively the same as section 5(2), where, if the debtor relocates, there is a grace period given to the secured party:
- Section 7(3)(a): 60 day grace period if the secured party did not know of the debtor's relocation
- Section 7(3)(b): 15 day grace period if the secured party knew of the relocation

Section 7(1) tells you how to determine the location of the debtor:

- Section 7(1)(a): debtor's place of business
- Section 7(1)(b): if multiple places of business, debtor's chief executive office
- Section 7(1)(c): if no place of business, the debtor's principle residence.

Personal Property Security Act, RSA 2000, c P-7
Section 5 (1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of (a) a security interest in goods, and (b) a possessory security interest in chattel paper, a negotiable document of title, an instrument or money, is governed by the law of the jurisdiction 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 (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. (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 6 (1) Subject to section 7, (a) 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 (b) 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. Section 7 (1) For the purposes of this section and section 7.1, a debtor is deemed to be located (a) at the debtor's place of business, if the debtor has a place of business,

(b) at the debtor's chief executive office, if the debtor has more than one place of business, and
(c) at the debtor's principal residence, if the debtor has no place of business.

(2) The validity, perfection and effect of perfection or non-perfection of
(a) 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
(b) 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.

(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
(a) 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,
(b) 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
(c) prior to the day that perfection ceases under the law of the first jurisdiction,
whichever is the earliest.

(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
(a) an interest in an account payable in the Province, or
(b) 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.

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

(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
(a) is provided for in a security agreement executed before the minerals are extracted, and
(b) 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.

Section 7.1
(1) The validity of a security interest in investment property is governed by the law, at the time the security interest attaches,
(a) of the jurisdiction where the certificate is located if the collateral is a certificated security,
(b) of the issuer's jurisdiction if the collateral is an uncertificated security,

(c) of the securities intermediary's jurisdiction if the collateral is a security entitlement or a securities account, or
(d) of the futures intermediary's jurisdiction if the collateral is a futures contract or a futures account.

(2) Except as otherwise provided in subsection (5), perfection, the effect of perfection or non-perfection and the priority of a security interest in investment property is governed by the law
(a) of the jurisdiction in which the certificate is located if the collateral is a certificated security,
(b) of the issuer's jurisdiction if the collateral is an uncertificated security,
(c) of the securities intermediary's jurisdiction if the collateral is a security entitlement or a securities account, or
(d) of the futures intermediary's jurisdiction if the collateral is a futures contract or a futures account.

(3) For the purposes of this section,
(a) the location of a debtor is determined by section 7(1);
(b) the issuer's jurisdiction is determined by section 44(5) of the Securities Transfer Act;
(c) the securities intermediary's jurisdiction is determined by section 45(2) of the Securities Transfer Act.

(4) For the purposes of this section, the following rules determine a futures intermediary's jurisdiction:
(a) if an agreement between the futures intermediary and futures customer governing the futures account expressly provides that a particular jurisdiction is the futures intermediary's jurisdiction for the purposes of the law of that jurisdiction, this Act or any provision of this Act, the jurisdiction expressly provided for is the futures intermediary's jurisdiction;
(b) if clause (a) does not apply and an agreement between the futures intermediary and futures customer governing the futures account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the futures intermediary's jurisdiction;
(c) if neither clause (a) nor (b) applies and an agreement between the futures intermediary and futures customer governing the futures account expressly provides that the futures account is maintained at an office in a particular jurisdiction, that jurisdiction is the futures intermediary's jurisdiction;
(d) if none of the preceding clauses applies, the futures intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the futures customer's account is located;
(e) if none of the preceding clauses applies, the futures intermediary's jurisdiction is the jurisdiction in which the chief executive office of the futures intermediary is located.

(5) The law of the jurisdiction in which the debtor is located governs
(a) perfection of a security interest in investment property by registration,
(b) perfection of a security interest in investment property granted by a broker or securities intermediary where the secured party relies on attachment of the security interest as perfection, and
(c) perfection of a security interest in a futures contract or futures account granted by a futures intermediary where the secured party relies on attachment of the security interest as perfection.

> (6) A security interest perfected pursuant to the law of the jurisdiction designated in subsection (5) remains perfected until the earliest of
> (a) 60 days after the day the debtor relocates to another jurisdiction,
> (b) 15 days after the day the secured party knows the debtor has relocated to another jurisdiction, and
> (c) the day that perfection ceases under the previously applicable law.
>
> (7) A security interest in investment property that is perfected under the law of the issuer's jurisdiction, the securities intermediary's jurisdiction or the futures intermediary's jurisdiction, as applicable, remains perfected until the earliest of
> (a) 60 days after a change of the applicable jurisdiction to another jurisdiction,
> (b) 15 days after the day the secured party knows of the change of the applicable jurisdiction to another jurisdiction, and
> (c) the day that perfection ceases under the previously applicable law.

Example:
Polyanna runs a business manufacturing business in Alberta, BC and Saskatchewan and gave a general security interest in all of its present and after acquired personal property to the Alberta Treasury Board (ATB) for it's line of credit. It was founded in Victoria, BC but it's head office is in Edmonton, where most of the business decisions are made, as well as manufacturing. The head office also has most of the office equipment of Polyanna. There is a second manufacturing plant in Saskatoon which also houses three trucks for local deliveries. The Victoria location has some computer systems and cash and cheques that have yet to be deposited, as well as their overdrawn bank account. Where should Polyanna register it's security interest(s)?

- Practically speaking, a good lawyer just register in all three.
- Otherwise, the different collateral need to be separated
- Assuming litigation is being brought in Alberta:
  - Alberta collateral: raw products, manufactured products, computers
    - These are all goods (inventory or equipment)
    - Register in Alberta, since that is where the debtor and the collateral is
      - Section 5 vs Section 7 makes no difference: both say register in AB
  - Saskatchewan collateral: raw and manufactured materials, trucks
    - Raw and Manufactured Materials are goods, so they must be registered via s 5 (collateral location). Since they are in Saskatchewan, these must be registered in Saskatchewan.
    - Recall that consumer goods can only be held by natural persons, not a corporation. So, the trucks are equipment.
    - The trucks are not only equipment, but highly mobile equipment, meaning they would be under s 7(2)(a)(ii)
      - This means they are to be registered at the location of the debtor
      - The head office is in Edmonton, so the trucks would need to be registered in Alberta
      - NB: It makes *no* difference if the trucks never leave Saskatchewan, they must be registered in Alberta. As long as the goods are mobile, they are to be registered where the debtor is
        - If it were otherwise, you would have to look into where mobile goods have ever been, which is a lot of work and not sensible.
        - It is only material if the goods *could* change provinces, not whether they actually do or don't.
  - BC collateral: cheques, cash, accounts, furniture and computers
    - Accounts are under s 7(2)(a)(i), so where the debtor's location is

            - Head office in Alberta, so the accounts are to be registered in Alberta
        - Equipment and furniture are immobile equipment, so they are under s 5
            - Since they are in BC, they would have to be registered in BC
        - Money in the till and undeposited cheques are under s 5(1)(b) if possessory
            - Possessory just means the secured party takes possession of the collateral during the transaction. ATB does not have these, so the money and cheques are non possessory
                - This means they fall to s 7(2)(b)
            - Head office in Edmonton, so they would have to be registered in Alberta
        - Overdrawn bank account?
            - This is a liability, not an asset. So the PPSA would not apply

Say ATB registered a financing statement in the Saskatchewan registry. On May 1, after the GSA was made, some machinery was moved from Saskatoon to Winnipeg. ATB learned of this on May 25 and registered a financing statement on June 5. But, on May 28, a Credit Union in Winnipeg made a loan to the corporation and took a security interest in the machinery now in Winnipeg and registered it. Assuming it is litigated in Alberta, who has priority between Credit Union and ATB?

- Machinery would be under s 5 as it is non-mobile equipment. Since registration is on the location of the collateral, it was properly registered in Saskatchewan, but then it moved.
    - The Saskatchewan perfection will be recognized in Manitoba, only within the grace period. If ATB registers in that grace period, they would have priority over Credit Union
        - Since they did not know of the move, they had a grace period of 60 days (s5(2)(a))
        - This means the registration carries over and ATB would have priority over Credit Union
        - When comparing priority, who was first?
            - ATB registered prior to May 1, and since they registered within the grace period, their registration date remains there.
            - Credit Union registered May 28, so they come second
- Practically speaking, this means that Credit Union cannot rely on the Manitoba Registry (since it would not have been there by May 28). They would have to be aware that since the goods were recently moved, it can still be a valid perfection within the grace period even if it wasn't in the registry
    - Whenever goods are recently brought into a province, the searching party (other than the unknown buyer) should see where the goods are removed from within the 60 day window and check that Registry
        - Otherwise, the Credit Union would have only looked in the Manitoba registry, found nothing since it was only in Saskatchewan's and register
- If the goods were sold before ATB perfected the goods in Manitoba (ie, June 5), the buyer would be prioritized if they were without knowledge
    - This is notwithstanding the continued perfection of the collateral in the 60 day window

Say Polyanna is actually two corporations: Western Pollyanna (WP) with head office in Edmonton, who owns all assets to the Alberta and BC assets, and Saskatchewan Polyanna (SP) with head office in Saskatoon, who owns all Saskatchewan assets. SP is a wholly owned subsidiary of WP

- ATB makes a loan to WP and SP guarantees the loan, and each give ATB a security interest in all of their present and after acquired property
- The trucks would only need to be registered in Saskatchewan
    - They are still mobile goods under s 7, but the head office is now in Saskatoon, which is where the debtor is as per s 7(1)(b)

Re Hughes, 2017 ONSC 2421

Facts:
Hughes purchased a truck in Alberta, with Snap Auto Finance Corporation ("Snap") providing financing. Later that month, Snap perfected the security interest by registering under the *PPSA*.

- Two days prior, the vehicle was registered with the Government of Alberta

Unknown to Snap, Hughes moved to Ontario the next year and brought the vehicle with him but travelled to Alberta for work frequently without the vehicle.

- The next year, Hughes assigned in bankruptcy and BDO Canada ("Trustee") served Snap with a Statement of Affairs with Hughes' Ontario address.
- Snap filed a proof of clam 20 days later and registered the vehicle under the Ontario *PPSA* but the Trustee disallowed the secured claim on the basis that it was not registered within 15 days of the vehicle being brought into Ontario

The Registrar overturned the disallowance snice the vehicle had not been "brought in" to Ontario since this should be determined by residence of the owner of a vehicle *and* the physical presence of the vehicle (he spent 20 days in Alberta, 10 in Ontario)

Procedural History:
Registrar found vehicle was not brought into Ontario but examined location of debtor and collateral

Issue:
Was the vehicle not "brought in" to Ontario to disallow the claim?

Rule:
Section 5 of the (Ontario) *Personal Property Security Act*

(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 Ontario continues perfected in Ontario if a financing statement is registered in Ontario before the goods are brought in or if it is perfected in Ontario,
   (a) within fifteen days after the day the secured party receives notice that the goods have been brought in; or

Analysis:
Mr. Hughes initial bankruptcy event occurred in Ontario, as was his sworn Statement of Affairs. Section 49(3) of the *Bankruptcy and Insolvency Act* mentions how assignment is to be in the locality of the debtor, which considers the date of initial bankruptcy event. In this case, day of assignment is this, which was in Ontario. There is no evidence he carried out business in Alberta

- Residency is not determinative of the issue but is still relevant

However, physical presence was held to be made out here

- He moved his vehicle to Ontario even if he spent a majority of time in Alberta – the vehicle remained in Ontario during this time.

The Registrar's decision was thus in error. Since he brought the vehicle in over a year before assignment, the security interest had lapsed, and it was not perfected.

Conclusion:
Vehicle was brought into Ontario as per s5(2)

Hold, Order:
Appeal allowed

Legal experts do not like this finding. The PPSA draws a sharp line between ss 5 and 7, but this case completely blurs the line between them since it considered both the debtor and the collateral's location.

- The car is a consumer good, not equipment. Section 5 should apply and section 7 wouldn't
- The car was brought into another province such that the location of the debtor shouldn't have even been considered.
  - Yet for some reason the Court did. No other provincial finding has followed this trend

- The Court accepted that residence of the debtor was a factor in determining if the goods had been brought into the province, though the PPSA makes it clear the only factor is the location of the collateral if section 5 applies.

- This was the turning point of the case to: was it brought into Ontario?
    - If yes, the trustee in bankruptcy would have won since Snap didn't register in 60 days
    - If no, Snap would win since it's registration in Alberta would still stand
        - The only way it could be considered not to have moved was if the location of the debtor was considered, since the car was permanently in Ontario now, whereas Hughes was residing in Ontario but in Alberta for a majority of the time

Gimli Auto Ltd v BDO Dunwoody Ltd, 1998 ABCA 154

Facts:

BDO Dunwoody ("BDO", defendant, bankrupt) was in the business of renting out trucks and campers to tourists for short periods. It would lease three years from the owner, Gimli Auto ("Gimli", plaintiff). Since Gimli operates in Manitoba, the lease was entered into there, though the chief executive office was in Alberta.

- Manitoba did not require registration of pure leases

The bankrupt company brought the trucks to Alberta (where the head office is) and used them there. At their branch in British Columbia, they made a long term lease of a vehicle owned by Eagle Ridge. It was registered and kept in BC.

- Bankruptcy then occurred before registration in Alberta.
    - The trustee then rejected claims from both Gimli and Eagle Ridge

Issue:

Does trustee have the right to all trucks over the secured party to the leases?

Rule:

Section 7 of the *Personal Property Security Act*

(1) The validity, perfection and effect of perfection or non-perfection of

(i) a security interest in

(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

Analysis:

The *PPSA* in Alberta provides that security interests of leases for over a year are not effective against a trustee of bankruptcy if it was not perfected prior to the bankruptcy.

- If the Alberta law applies, there was no registration though it was required
- If the BC law applies, Eagle Ridge will prevail since it was registered in BC
- If the Manitoba law applies, Gimli will prevail since it was not needed to register

The Alberta PPSA only covers rights of enforcement between the original parties like seizure. Sections 5-7 deal with perfecting.

- For the three Gimli trucks:
    - Section 7(2)(a)(ii) applies were goods used in >1 jurisdiction and they are leased by the debtor to others. The three trucks satisfy this since trucks can easily cross borders and thus jurisdiction.
    - Section 7 thus applies and the Alberta law governs since the chief executive office was in Alberta
        - Since there was no registration, the lessor's interest was not perfected and the trustee prevails
- For the Eagle Ridge trucks:
    - Passenger vehicles are of a kind that are normally used in more than one jurisdiction since it is plausible that personal trucks will cross borders in the ordinary course of life.

- This automobile was not leased or held for others. The car is not a consumer good and is thus "equipment" and satisfies s7(2)(a)(ii)
  - As such, the law of jurisdiction is where the debtor is located (place of business), which is in Alberta.
  - Alberta law applies, and since Eagle Ridge's registration was not perfected in Alberta, s20 of the trustee would prevail

As mobile goods, the trucks had to be registered in Alberta. Since they were not, Gimli, as a secured party, lost priority and the trustee in bankruptcy will prevail

Conclusion:

Trustee has right to all trucks.

Hold, Order:

Appeal allowed

Ratio:

The *PPSA* replaces private international law and common law rules around which choice of law

- Mobile goods are always under s7, regardless if they never have/will cross provincial borders

The court here clarifies that it is irrelevant that the cars are unlikely to ever cross provincial borders, the mere fact that they *could* is sufficient to classify them as a mobile good under s 7 and the location to be considered is that of the debtor, not the collateral

- Farming equipment is till fuzzy since it is mobile, but is it likely to cross borders? The courts haven't examined this issue yet, and thus for now it is best to err on the side of caution and register in both the location of the collateral and the debtor.

Unfortunately, "chief executive office" is not defined in s 7(1). Canadian courts haven't answered that issue, so we have to rely on American interpretation of the term for now.

- *Metro Communications* found that "chief executive office" means the place where the debtor manages the main part of its business operations and where debtors would look for credit information.
  - The court found that the law recognizes the legal distinctions of affiliated corporations. It would be unfair for creditors to analyze and understand the internal power structure of related corporations to determine whether the wholly owned subsidiary was "truly independent" from its parent corporation. This would only introduce uncertainty in commercial transactions, especially with registering and financing statements.

The Ontario PPSA changed their s 7 in how the debtor is determined. Under the amendment, you no longer look at the location of the chief executive officer, but instead look at the place of incorporation

- This is preferrable for corporate lawyers since the facts of business operation don't need to be considered at all, only the location of incorporation
  - This is more blackline, much easier and more predictable
- BC and Saskatchewan then also followed this approach
  - Alberta has yet to adopt this approach, which makes litigation complicated since all provinces strive for uniformity in the PPSA
  - If you litigate in Alberta, the chief executive office is still the determining factor. If dealing with Saskatchewan, it is where incorporation is, which could be different.
    - Depending on where you litigate, the outcome could be different

CHAPTER 4: SECURITY AGREEMENTS

The entire previous chapter on conflict of laws via ss 5 or 7 is only applicable if the security attaches. For a security interest to be in force it needs to 1) be enforceable and 2) attach.

Enforceability

Enforceability: A security interest is enforceable when it is capable of being asserted against third parties. Section 10 of the PPSA sets outs the pre-conditions for enforceability.

- A possessory security interest becomes enforceable when the collateral is in the possession of the secured party.
- A non-possessory security interest is enforceable when the debtor has signed a security agreement that contains an appropriate description of the collateral.
- If these requirements are not met, the security interest cannot be asserted against a third party, but may be asserted against the debtor if it is established that the parties entered into a contract (including an oral agreement).

Enforceability is not about giving publicity to a security interest. The public registry benefits of a security interest are laid out in the "perfection" stage (see Chapter 5). Enforceability is all about providing evidence that the secured party really did enter into a security transaction. The secured agreement has significant affects beyond the parties of the transaction.

- It is reasonable to expect the third party to say "you claim to have a security interest, but can you prove it?"
- That is exactly where enforceability comes in – how do you provide that evidence?

Section 10 sets out enforceability requirements. Section 10 only applies when dealing with a third party. The creditor/debtor relationship is completely unperturbed by section 10. It is not a requirement between debtor and creditor of the transaction.

- It is only used when trying to enforce the security interest against a third party
- If section 10 is not satisfied, it cannot be used against a third party enforcing a claim

Sections 10(1)(b) and 10(1)(c) deal with investment property, which will be covered later so sections 10(1)(a) and 10(1)(d) are the ones of use for now. Under these two sections, there are two ways that a secured party can make their security interest enforceable:

1. By Possession
    a. Section 10(1)(a) for "possessory security interests"
    b. If the secured party can (legally) take possession of the collateral, this provides tangible proof that the debtor and secured party have some kind of arrangement with respect to the collateral
        (i) Otherwise, why would the secured party have it?
    c. This is not particularly common, since it is rare the secured party will have the property.
        (i) Most secured transactions involve the debtor maintaining possession
    d. It cannot be taken by seizure or repossession.
        (i) Where the collateral is repossessed via PPSA remedies upon default, that is not considered sufficient to be enforceable
    e. Obviously, this will only work for things that have a physical presence. An intangible or investment property will be unable to be possessed and thus unenforceable by this branch
    f. Section 10(2) also limits this provision – symbolic possession is not enough. It must be visible. The debtor cannot hold possession "on behalf of the secured party" or as agent for the secured party and still satisfy this requirement
2. By Written Security Agreement
    a. Section 10(1)(d) for "non-possessory security interests"
    b. If the secured party can procure a *written* security agreement that is signed by the debtor, and satisfies one of the 4 subclauses in (i) through (iv):
        (i) A description of the collateral by kind
            1. Talking about one of the 7 collaterals
            2. Not describing one particular property but all of them

        3. This can get a little ambiguous. Saying “all of the debtors cattle” may sound simple, but do they mean all cattle they owned or had interest at the time of the agreement? What about ones they acquired since?
            a. A good agreement will make this clear
    (i) A description of the collateral by item
        1. This is referencing one thing in particular
    (ii) Relates to investment property that we will deal with later.
    (iii) A statement that a security interest is taken in all of the debtors present and after acquired property.
        1. Called a “all PAAC” = All Present and After Acquired property Clause
        2. This is preferrable since it is all encompassing and can take security interest in all property that was acquired after the agreement was reached
    (iv) Combine (i) and (iii) where you have an all PAAC and then give a further condition/qualify it
        1. “All PAAC except cars”

b. Sections 10(3) and 10(4) provide further limitations
    (i) 10(3) says that if the good is a consumer good or equipment, 10(1)(d)(i) will be insufficient without further reference to the kind of collateral.
        1. This means just stating “consumer goods” or “equipment” is insufficient to make the security agreement enforceable
        2. This is because the terms “goods” or “equipment” tells us nothing about it being used
        3. To tell us something, it should be more qualified, like saying “construction equipment” whereas “equipment” alone would not cut it
            a. Ontario does not have this rule, so “equipment” would be enough
    (ii) 10(4) gives a little more wiggle room when it comes to inventory
        1. Classifying the collateral as “inventory” is adequate for s 10(1)(d), but only while it is held by the debtor as inventory.
        2. If the property becomes equipment, the “inventory” will no longer make the security interest enforceable against a third party
        3. This is the one exception to the general rule that you always characterize the good at the time of the attachment
        4. This means it is never preferrable to just have “inventory” in the agreement
c. Theoretically, an oral contract can be enforceable, though these are never practically advisable.
d. Additionally, it would only be good against third parties if section 10 is satisfied.

Personal Property Security Act, RSA 2000, c P-7
Section 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)(d) 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)(d) 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.

GE Capital Canada Acquisitions Inc v Dix Performance (Trustee of), [1995] 2 WWR 738 (BCSC)

Facts:

National Bank Leasing Inc leased equipment to Dix Performance (“Dix”, defendant), listed in the agreement as “shelving”. A week later, a statement of the lease was registered at the Personal Property Security Registry. The lease was letter assigned from National Bank to GE Capital (plaintiff)

- Dix later made an assignment in bankruptcy.

GE Capital commenced against the trustee in bankruptcy of Dix for the security.

Issue:

Does “shelving” comply with section 10 of the *Personal Property Security Act*?

Rule:

Section 10 of the (BC) *Personal Property Security Act*

(1) Subject to subsection, (2) a security interest is only enforceable against a third party where …

(b) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind, or by reference to one or more of the following: goods, securities, instruments, documents of title, chattel paper, intangibles, money, crops or licenses, …

(3) Subject to subsection (6), 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

Analysis:

In this case, the goods are neither inventory, nor consumer goods and are thus equipment. As per s10(3), this requires more description than just "equipment". But, is "shelving" sufficiently specific to satisfy this?

When interpreting commercial legislation of this nature and where it is consistent with the wording of the statute, the Court should try to achieve simplicity and certainty and recognize the importance of financial community as the Legislature intended.

- To require identification of collateral by more than item or kind would defeat the objective of simplicity
  - To require particulars sufficient for identification or to impose criteria like make model, manufacturer would also do this

Sufficiency of identification is absent in s10 and the only limits are "consumer goods" and "equipment".

Conclusion:

Petitioners registration is valid under the PPSA

Hold, Order:

Action allowed

Ratio:

PPSA does not require extensive descriptions of collateral to satisfy s 10

Prior to this case, courts were inclined to nitpicking by the previous tendencies from the common law where very extensive descriptions were the norm. But, after the PPSA, the court found the agreements don't need this specificity.

- If you say all PAAC that covers everything and everyone knows it, so these annoying lists are not needed
- When interpreting commercial legislation, courts should strive for simplicity and achieve compliance in as certain and simple manner as possible
  - Court won't read into additional requirements or take a strict approach

Practically speaking, many lawyers will still put an extensive description out of habit or completion sake, but it is not necessary

Guntel v Kocian, [1985] 6 WWR 458 (MBQB)

Facts:

Mr. Ward convinced Kocian (defendant) to purchase a GMC truck through a loan from Scotiabank. Kocian signed a security agreement with Scotiabank in the truck in August 1982, pursuant to the (Manitoba) PPSA.

- Scotiabank mistakenly substituted "8" by "B", which led the security interest in the register to not be found.

Kocian then transferred the title to Ward with Ward's solemn assurances that he would make all payments to Scotiabank as they became due. Should he default, Kocian would be entitled to the truck. Some handwritten documents were made to solidify the arrangement.

- The next month, no payments were made and Kocian ended her relationship with Ward
  - She then perfected her security interest by registering it in October

Ward sold the truck to Guntel, and used CIBC to get financing

- The bank manager found no security interests in the registry because of the error in the serial number and Guntel accepted the offer.
- Guntel received a security interest in the truck and perfected in November

Guntel learned of Kocian's interest and they discussed what to do with no conclusion so Kocian ordered seizure of the vehicle. Guntel claims ownership, but Kocian and CIBC claim security interests

Issue:

What validity of Kocian's security interest exists and how is it enforceable against Guntel and CIBC?

Rule:

Section 1 of the *Personal Property Security Act*

(1) Subject to subsection, (2) a security interest is only enforceable against a third party where …

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

(i) a description of the collateral by item or kind, or by reference to one or more of the following: goods, securities, instruments, documents of title, chattel paper, intangibles, money, crops or licenses,

Analysis:

The delivery of the truck to Ward passed title – it was an unconditional assignment of Kocian's entire interest. It did not even restrict Ward from further assignment. As such, Ward was allowed to provide for a security interest in the car and could offer it as collateral. But, when Ward signed the document, did he create a valid, non-possessory security interest in the truck for Kocian? Kocian argues that Ward granted a security interest in the car, which would give her the right to enforce it against third parties (ie, Guntel).

- Ward, in the document acknowledges a debt to Kocian for the truck. The description was itemized as per s 10(1)(d)(i)
- Kocian clearly intended to secure her interest in the truck as a condition of transfer to Ward – Ward agreed he would assume and perform Kocian's obligation to Scotiabank
  - This was intended to secure performance by Ward
  - This is a valid security agreement and provided Kocian with a valid security interest in the car
    - When Ward defaults, Kocian can exercise remedies under the PPSA

Kocian also perfected her ownership by the time it was assigned to Guntel and Guntel did not acquire any proprietary interest until after this. His possession of the vehicle was as bailee only – his title was subject to Kocian's security interest

- Kocian had priority over Guntel and CIBC

Conclusion:

Kocian has superior interest

Hold, Order:

Action dismissed

Ratio:

Some recognition in the security agreement that a security interest was contemplated is needed

Kocian registered in the morning and it wasn't in the system until later that day (this is a relic of the paper based system where workers had to manually input the interests which took time). This meant the interest was registered, but not searchable for half a day.

- Luckily, the handwritten note that Kocian and Ward was found to be a valid security agreement for Kocian to cement her security interest in the car. Since the agreement was itemized (for the car), it satisfied enforceability requirements of s 10(1)(d)(i) and was enforceable.
- The court found that since Kocian was reserving a security interest in the truck to secure indebtedness that Ward owed her because a reasonable person would see her transferring the truck on condition he pays as a way to secure that payment.
  - Since Kocian had a valid security interest, and registered and perfected it before Guntel did, she had priority over him

The court's finding is somewhat problematic. In some aspects, it is just a promise to pay and the description of the truck just describes what he is promising to pay for. There isn't a notion that Ward is giving a security interest or that Kocian is reserving a security interest in it

- There needs to be some recognition in the security agreement that a security interest was contemplated. A party reading that handwritten document probably wouldn't understand the relationship between the parties

- All to say, this should be treated with caution. Courts may not treat it the same again
- It should have had a provision that the debtor is granting a security interest and then describe the property
  - Kocian was lucky the court sympathized with her and found a security interest.

<u>Attachment</u>

Attachment: The time when a security interest comes into existence. This occurs when value is given (usually the extension of credit or a binding promise to extend credit), the debtor has rights in the collateral and the security agreement is enforceable. The parties may specifically agree in writing to postpone the time of attachment.

- The moment a security interest attaches is the moment it comes into existence and has some automatic force and priority over those that are unattached.
  - Sections 5 and 7 are both subject to attachment. If attachment has not occurred, section 5 and 7 are redundant.
  - Section 5 (location of the collateral) is important since the location in question is the location of the collateral when it attaches. If it is located in BC at the time of attachment, registration must be in BC

Section 12 governs how a security interest will attach. Section 12(1) states that there are 3 requirements before attachment. Once the last of the three requirements is done (in whatever order that may be), the security interest comes into existence and is considered "attached". The three requirements of 12(1) are:

(a) Value given by the creditor
   a. Any consideration will be good – even for past debts
      i. This is unlike contracts where past consideration is no consideration
      ii. This means that if you lend someone money and only sign a security agreement with the debtor for extra protection a decade later, it would be past consideration and valid for s 12 (but it would not have been in contract)
         1. No new consideration would be needed
   b. In terms of bankruptcy, if a party is elevated from unsecured to secured right before bankruptcy, it may be attacked to invalidate it under the *Bankruptcy and Insolvency Act,* but it would hold under the PPSA
   c. It also does not need to be actual advance of funds – a binding promise will be sufficient
      i. If I promise to send funds on May 1, but only do so on May 15, the security interest attaches on May 1 since a binding promise is sufficient consideration

(b) Debtor has rights in the collateral or power to transfer rights in the collateral to a secured party
   a. Since security rights are just a proprietary right, and all property rights need a subject this makes sense
   b. If the debtor has no rights in the collateral, then how could they grant it to someone else (including back to the secured party)
   c. The minimal power they need is to give it to someone else. Sometimes the law will say you don't have a right to transfer, but they will have the power
      i. For example, if you limit how someone can sell your property and they go beyond this, they will have the power but not the right to do this
   d. Transferee may need better title than the transferor in statute.
      i. Those cases, the transferor has the power to transfer an interest (this would be the secured party), but they would not have the right to do so
   e. Rights in Collateral
      i. Section 12(2) provides that for leases or consignment, the debtor has rights in the collateral when they obtain possession
   f. There also isn't always one point in time that the security interest attaches. If a bank teller takes a security interest in all accounts of a business, new accounts arise as the business grows to news clients.

i. The security interest would arise as those new accounts arise
ii. When the new account is created, that is when the debtor has rights in them and that is when the security interest attaches
1. You could have a new attachment every day, not a one time situation
2. This is because (a), (b) and (c) need to be satisfied and until the debtor has rights, there is no attachment
a. How can the debtor have rights in accounts that have not yet been created?

g. Section 12(3) also qualifies this section. Debtor only has no rights in:
i. Crops until they are growing
ii. Animal babies until they are conceived
iii. Minerals until extracted (real property before as part of the land)
iv. Trees until they are severed
1. This means, if value is given and it is enforceable, mineral security interests won't attach until they come out of the ground. But the moment they are mined out, attachment arises.

(c) Security interest is enforceable under s 10
a. This is only required when dealing with a third party (which we usually are)
b. Without a third party conflict, you would still need some sort of agreement, it just would not have to fit the enforceability requirements under s 10

Since it doesn't matter the order of (a), (b) and (c), the date of attachment happens on the last of them. This gets a tad messy when new assets are acquired.

- Say a bank and debtor come to an agreement, and funds are advanced at T_1
  - (or it was promised to be advanced at T_1)
    - Money doesn't have to be advanced for the "value given" but it is sufficient
  - This satisfies s12(1)(a) [requirement 1] and s12(1)(b) [requirement 2]
- The debtor then signs a security agreement at T_2 that has an all PAAC
  - This satisfies s10(1)(d) and thus s12(1)(c) [requirement 3]
- The debtor acquires a new asset at T_3
  - Since the security agreement has an all PAAC, every time new property is acquired, that is when the debtor gets rights and satisfies requirement 2
    - The value given requirement #1 was done at T_1 and the agreement for requirement 3 was enforceable at T_3
    - This means that as every new property was acquired, it fulfilled requirement 2 and at that time, the security interest attaches (at T_3/any other time thereafter)
  - If the agreement did not have an all PAAC, the new asset would never attach since the debtor would never get rights in them

Say the GSA was entered into [requirement 3] and executed by the debtor [requirement 2], both at T_1, but there has been no money advanced, nor any promise to do so (the security interest is unattached)

- At this point, the secured party has not committed, but reserve the decision to approve the loan and go ahead
- The money is advanced [requirement 1] at T_2. The moment it does, the security interest attaches
  - If a new asset is acquired at T_3, it would attach immediately if the GSA had an all PAAC

Personal Property Security Act, RSA 2000, c P-7
Section 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.

(4) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(5) The attachment of a security interest in a futures account is also attachment of a security interest in the futures contracts carried in the futures account.

Sprung Instant Structures Ltd v Caswan Environmental Services Inc, (1997) 198 AR 41 (QB)

Facts:

Sprung Instant Structures Ltd ("Sprung", plaintiff) leased a structure to Caswan in two agreements: August lease and September lease (both 1994). Sprung did not register the interest until May 1996.

- RBC (respondent) advanced funds to Caswan Environmental Services ("Caswan", defendant) under a GSA for the structure.
    - Under the GSA, Caswan agreed to pay rent but began to fall into rears in December 1995. The arrears totalled over $60,000 by the time Sprung registered the structure

The GSA gave RBS a security interest in "all of Caswan's present and after acquired personal property" and included all goods, instruments, intangibles, money and securities, all equipment other than inventory.

- By September 1996, Caswan owed RBC shy of a million dollars

In May 1996, RBC delivered notice to Caswan that it was in breach of the agreement and then remanded payment and delivered a Notice of Intention under the *Bankruptcy and Insolvency Act*.

- Sprung then became aware of the indebtedness of Caswan and then registered its interest in the lease under the PPSA
    - They instructed an Enforcement company to repossess the structure for Sprung
    - Sprung then began to dismantle the structure

RBC demanded Sprung delay dismantling. Discussions began for RBC, as trustee in bankruptcy, to lease the structure from Sprung.

- Sprung then testified that RBC allowed continued dismantling and would send a cheque and their lawyer, which they did not do.
- RBC sent a lawyers notice that any continued dismantling would be a breach of s 69 of the *Bankruptcy and Insolvency Act*

Sprung seeks a declaration that RBC has no security interest in a structure or that they have priority

Issue:
Does Sprung have priority over RBC's security interest in the structure?

Rule:

Section 35

(1) Where this Act provides no other method for determining priority between security interest:
    - (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 … whichever is earlier

Analysis:

RBC's position is that the GSA granted a security interest in the structure, but Caswan argues the GSA only allows RBC to take property *owned* by Caswan – since Caswan did not own the structure (only leasing it), the security interest does not attach. It can thus not ground the security interest in RBC or the trustee in bankruptcy.

<u>Does RBC have a security interest in the property?</u>

Section 9 of the PPSA says that a security agreement is effective according to its terms – so the parties have the contractual freedoms to specify this. This includes the type of collateral and the security interests that will attach with them.

- In the GSA, Caswan grants a security interest in the described collateral ("owned by") to secure payment. It also grants to RBC "a security interest… in all of Caswan's present and after acquired property including, without limitation…".
- To give this natural and ordinary meaning, it is clear that ownership is not required before a security interest attaches. The intention was that RBC is granted a security interest in present and after acquired property, which includes the structure.

<u>Who has priority?</u>

RBC:

Rules depend on the perfection of the security interests. Section 19 sets out conditions when a security interest is perfected: it has attached and all steps taken under the Act were completed. Section 12 ensures attachment occurs when (a) value is given, (b) debtor has rights in the collateral and (c) it becomes enforceable under s 10

- Value, Enforceability were anchored in the GSA when RBC advanced funds to Caswan
- But Caswan, did not have rights in the structure until it was in possession of it which was 8 months after the GSA was made
    - At this moment, a security interest in RBC came into existence and attached to the structure
    - The structure was perfected by registration in December 1994

Sprung:

PPSA does not separate leases of more than a year (as Sprung's was) and other security interests. This makes the lease a deemed security interest under s3(2) of the PPSA. As such, the lease was as security interest. Leases are subject to the same priority rules as other security interests

Priority:

The PPSA sets out priority provisions in s35. Caswan obtained possession in August 1994 which is when the security interest of both RBC and Sprung attached. However, Sprung did not register until May 1996. They cannot claim super priority under the PMSI rules. Since both perfected by registration, RBC in 1994 and Sprung in 1996, RBC has priority because it registered first (s35(1)).

- Sprung cannot claim priority from seizure under s 10(1)(a); does not permit a creditor to perfect his security interest from seizure or repossession
  - Even if they perfected by repossession, they did so after RBC registered, and RBC would thus still have priority.

Sprung did not register its security interest while RBC was diligent

Conclusion:

RBC has priority

Hold, Order:

Application denied

Ratio:

Charging clause do not require ownership of personal property before security interest can attach

Since the security agreement said "owned by", the courts evaluated what this meant. Since courts will respect the security agreement of the parties (ie, the parties make the terms), does that provision mean that the collateral is limited?

- Well, some of the property is leased, meaning the debtor/lessee is not the owner
  - Using "owned by" limits the collateral contemplated in the agreement, and would thus not include any leased property (ie, the structure)
  - So, ownership words restrict the scope of your security agreement
- Since Sprung did not register first, they would easily lose priority of the structure to RBC
  - This is why they tried the "ownership" argument. They tried to argue that since Caswan did not own the tent, RBC does not have a security interest in it. Only Sprung did since it owned the structure
    - But the lease being a TSI or a DSI makes no difference – they are under the ambit of the PPSA so Sprung loses because it registered second
- The GSA said: "all PAAC *and includes, without limitation,* [lots of collateral] now owned or hereafter owned or acquired.
  - This is called a "charging clause"; charging clauses are simply those that allow a creditor a charge over your asset
  - "*The Debtor hereby gives the Secured Party a security interest in all the Debtor's present and after-acquired personal property*" is a typical charging clause
  - The court says that this is not a limitation, PAAC is enough to cover it all (owned or not)
    - "Without limitation" is the only part that describes ownership and it came *after* the PAAC words, so it cannot limit the PAAC words
      - This is basic contractual interpretation.
- The takeaway is that charging clauses don't need ownership before a security interest to attach

This case was actually overturned at the ABCA, but the judgement is so short it is useless and does not deal with the ABQB analysis at all.

- It truly only says "it is doubtful the GSA covers the lease goods at all"
  - New Zealand case *Portacom* adopted the ABQB approach
- So, the "owned" language may or may not restrict the goods in question
  - In practice, ownership language should raise red flags as it has the possibility of limiting the security interest

The ABCA did also argue that even if the GSA included leased goods, the lessee's interest was worthless

- RBC security interest covers leased goods, but the lessee defaulted and the lessor terminated
  - Since the GSA only attaches to the lessee's interest, and they no longer have one, it doesn't advance RBC's claim
  - This is no good anymore since it applies the old law before the PPSA
    - The SCC overturned this logic in *Re Giffen*

- If you had a lease, even if the lease wasn't registered, the lessor would win since you need ownership, but this was swept away from the PPSA
  - This is what the SCC does away with in the *Giffen* case
  - The whole point of the PPSA was to bring leases in to the PPSA scope and use the priority rules of the PPSA to resolve things

After-Acquired Property and Future Advances

At common law, it was not possible to grant a security interest in future property. A new transfer was needed once the debtor acquired an asset at a date after the security agreement was made

- Equity eventually recognized a security interest in future property, but this only gave the secured party an equitable interest, which is inferior to legal title
  - This meant if someone who took possession of the good without legal knowledge of the security interest of after acquired property would have priority over the secured party who only had equitable rights.

Section 13 of the PPSA was made to avoid the common law approach. Assets are constantly being turned over as new inventory is bought and old ones sold. Creating a new security agreement constantly as you acquire new things would be a lot of work and red tape. Under section 13(1), a security interest can be granted in after acquired property. In other words, present property and after acquired property (AAP) had no different in terms of priority

- As per s12, AAP will attach without a new agreement of transfer, if the security agreement has an all PAAC clause
- If value has been given (s12(1)(a)) and the claim is enforceable (s12(1)(c)), then the moment a debtor acquires rights in future property, a security interest will automatically attach to that newly acquired property.

However, section 13(1) is only facilitative – it doesn't create a security interest in AAP if the security agreement does not allow this. Section 13(1) merely provides that *if* – and only if - an all PAAC clause is included in the agreement, it will be given effect and it will be granting the secured party a security interest in all AAP once the debtor acquires rights in it

- Section 9 states that the security agreement is enforceable according to its terms – meaning that the parties to the agreement lay the parameters of which the security interest will operate.
- A well-drafted security agreement will make it clear if the security agreement covers after-acquired property.
  - Poorly drafted agreements will sometimes provide for a security interest in "all accounts" or "all inventory".
  - Such agreements invite litigation, as it is an ambiguity as to whether the parties intended that the security agreement cover after-acquired property

Section 13(2) provides two exceptions to an AAP clause being effective and binding:

1. Future crops that become a growing one (s 13(2)(a))
   a. A currently growing crop can be encumbered by a security agreement, but a future one cannot if it is more than a year in the future
   b. A farmer would have to execute a new security agreement once it starts growing in order to give the secured party a security interest in the later growing crop
   c. You can put a positive covenant in the security agreement requiring the farmer to put a security interest on each new crop, and if they didn't it would be a default
      i. Saskatchewan has eliminated this since it has the strongest agricultural protection in the country.
         1. Alberta is debating currently whether to remove this as well
2. Consumer goods

    a. Policy is to preclude consumer debtors from granting a security interest in all their future assets
    b. It won't attach to AAP that is consumer goods, unless it is by:
        i. Accession
            1. If you have a vehicle and it gets a new motor, the security interest will cover the vehicle and the new engine even if it is after installed
        ii. Purchase-money security interest (more to come)
            1. Where finance is designed to permit the debtor to acquire new assets, it doesn't matter if it was acquired later
        iii. Replacement collateral
            1. New property just replaces the existing one

Future advance: value or money which has been given after a security agreement has been executed. If the security agreement provides for future advances, the future advances are secured by the security interest in the collateral and are generally entitled to the same priority as the original advance.

- You could get a one-time loan for $10,000 to buy a car and get a security interest in that. But a second loan won't be secured if it was a one-time loan.
- But if the security agreement allows for a security interest in all future advances, then subsequent loans will also attach (assuming ss 10, 12 are satisfied)

Section 14(1) covers future advances – it allows parties to create a security interest to cover future advances, not just the current one. It gives the ability, not the right.

- Again, this is facilitative, the security interest doesn't automatically cover all future advances, but it can if the security agreement states this
    - Parties thus have to bargain for it. If they do, it will be secured and not just the contemporaneous ones but future ones as well
    - This is particularly important for a line of credit since the secured party is making future advances during the course of the financial relationship, potentially on the daily

Personal Property Security Act, RSA 2000, c P-7
Section 9 Subject to this Act or any other Act, a security agreement is effective according to its terms. Section 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. Section 14 (1) A security agreement may provide for future advances.

(2) Unless the parties otherwise agree, an obligation owing to a debtor to make future advances is not binding on a secured party if, pursuant to section 35(6), the security interest does not have priority over a writ of enforcement with respect to those future advances.

The Security Agreement

Section 9 allows effect to be given to the security agreement as drafted by the parties. In *iTrade Finance Inc v Bank of Montreal,* there was a competition between a PPSA security interest and a constructive trust.

- Constructive trusts are not a security interest, but it is still a proprietary interest via a trust created by the operation of law the law (often in cases of unjust enrichment)
- Who has the better claim?
- iTrade loaned money to Webworx. Webworx then fraudulently funneled funds to the directors of Webwork (Ablacksingh) through a purchase of shares. They use these funds to acquire shares
    - Ablacksingh borrows more money from BMO through a possessory security interest by giving BMO a security interest
    - In effect, iTrade is given a constructive trust in equity in the shares of the investment account
        - But this is outside the scope of the PPSA
- While the PPSA priority rules are quite comprehensive, it is not exhaustive and cannot cover all competitions because there are so many property rights out there.
    - In some cases, there are no rules and the courts have to fall back on basic personal property security principles.
- The SCC looks at each interest and if/when the PPSA security interest comes into existence
    - Effectively looking at when attachment occurred.
- The constructive trust is beyond the PPSA, but it is a proprietary interest
- BMO's security interest is within the meaning of the PPSA
    - When does it arise? If section 12 isn't satisfied, it never arose and iTrade wins
    - BMO gave a loan (value requirement), it was a possessory security interest (enforceability requirement), but when did the debtor get the rights in the collateral?
        - There was an unlawful transfer from Webworx to the directors.
        - Since the directors were the ones to give the security interest to BMO, if it was fraudulent, do they have the right to the money at all?
        - When an innocent party consensually advances funds to another under an agreement, it voluntarily parts with those funds. This is subject to the innocent party avoiding the agreement by revoking their consent to it.
            - Until then, the agreement is effective by its terms
            - Webworx was entitled to the funds, so the directors were able to acquire the rights in the shares. They thus had rights in the collateral that cemented to pledge shares to BMO and created a security interest (attachment under s 12 is fulfilled)
            - Even if it was fraudulent, until iTrade rescinded, the directors actually had the rights to the files
- Conversely, if the goods were stolen, there would be no security interest at all since the debtor has no rights at all in the things it stole. But iTrade voluntarily gave the funds to Webworx
    - Even if fraudulent, the directors still had rights in those funds
    - Basically, section 12 is being applied to show that the debtor did have rights in the collateral, even if it was only made through fraud
    - This means that the security interest arose, it is true, and the competition of the constructive trust and security interest occurs.
        - Since iTrades interest is not in the PPSA, the PPSA priority rules are irrelevant.
        - Background rules of law and equity continue to apply

        - Section 65(3) of the PPSA expressly provides that common law and equity principles continue to apply, except when inconsistent with the provisions of the PPSA.
        - This means that this question has to be decided by common law property principles
- BMO's security interest was created by the PPSA. This means it is legal rather than equitable
    - A statutorily recognized security interest is considered legal
        - But this is only for the purpose of applying basic property law principles to resolve disputes
    - Basic property law principles state that legal interests are dominant to equitable ones if the legal party was without knowledge of the competing constructive trust (this is the bona fide purchaser rule in equity
    - BMO took a bona fide legal interest in the shares and did so without knowledge of the competing interest of iTrade's constructive trust
        - iTrade's equitable right in the property will be subordinate to BMO's legal right via the bona fide purchaser rule
- This case used and didn't use the PPSA. It used the PPSA to secure a legal interest, then went beyond the PPSA to resolve the conflict. Section 12 was helpful, but it went beyond this
    - If you steal property and then give it, no security interest would attach since you would have no rights in it at all
    - But if you defraud someone to get property and then transfer it, a security interest would attach since you have rights, *until* the creditor rescinds it

Often a bank will take a security interest in *everything* to secure every interest in all future and present property. However, despite broad language that speaks in "everythings", the court will say that you actually have less than everything

Suppose you have a debtor with a loan and a GSA to a secured party in all present and AAP that secures "all obligations". This is called an "all obligations clause" or "all moneys clause".
- If the debtor has borrowed from other unsecured creditors and then the secured party obtains an assignment of those obligations from the unsecured creditors in exchange for money
    - If the unsecured creditor assigns all benefits of agreement to the secured party, does the "all obligations" clause in the security agreement now cover the unsecured obligation that was assigned to the secured party?
    - In other words, can the secured party, by obtaining an assignment of the unsecured assignment, tack on the assignment to the security interest?
        - Yes, the security agreement doesn't just cover the debts and obligations of the GSA but also the obligations of third parties
        - This debtor would be surprised since they would presume the "all obligations" was only for the secured party, but when they learn that the secured party bought all obligations between the other third parties those obligations are not part of the security interest.

Suppose instead that the secured party assigns its rights under the security agreement to an unsecured creditor (the opposite of the above example). Does the unsecured party acquire rights by the secured party and can they claim secured party status? This is exactly what happens in *Eagle Eye*

Eagle Eye Investments Inc v CPC Networks, 2012 SKCA 118 Facts: CPC Networks (defendant) owns the largest fibre-optic network in Saskatoon. They loaned $150,000 from the Business Development Bank of Canada ("BDBC").

- As security, CPC granted the BDBC a security interest in all of its present and after acquired property. They agreed the General Security Agreement ("GSA") was assignable without notice.

Eagle Eye Investments ("Eagle Eye", plaintiff) had been loaning money to CPC to pay as the company grew. CPC was indebted $465,000.00. The loan was unsecured.

- Eagle Eye brought action against CPC after they refused to sign a security agreement.

The director and officer, Mr. Ayers, resigned and BDBC assigned the GSA to Black Dove. Eagle Eye

- Ayers then wrote to CPC demanding full repayment of the BDBC loan ($140,000)

Black Dove then assigned the BDBC loan to Eagle Eye who demanded payment as well as other information. Failure to provide was in default of the GSA

- CPC brought another action under s 63 of the PPSA for an order directing Eagle Eye to release the Bank security
- Eagle Eye also sought an order that CPC provide documentation under the GSA

Procedural History:
The Saskatchewan Court of Queen's Bench held that the only amounts secured were those owing by the debtor to the assignee at the time of assignment.

Issue:
Does an "all obligations" clause in an assigned security agreement secure previously unsecured debts of the debtor from a time before assignment took place?

Rule:
Section 62 of the *Personal Property Security Act*:

(1) At any time before the secured party or a receiver has disposed of the collateral or contracted for disposition pursuant to section 58 or 59 or before the secured party is deemed to have irrevocably elected to retain the collateral pursuant to s. 61:
    (a) a person who is entitled to receive a notice of disposition pursuant to subsection 59(6) or (10) may, unless that person otherwise agrees in writing after default, redeem the collateral by:
        (i) tendering fulfilment of the obligations secured by the collateral; and
        (ii) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

Analysis:
The controversy is fixed over whether the amount owing under the GSA is the amount owing under the BDBC loan only, or whether it includes the unsecured debt owing to Eagle Eye

- In essence, this asks the effect of an assigned security agreement that contains an "all obligations" clause. The Court is to determine whether the GSA secures the CPC unsecured debt to Eagle Eye
    - Requires analysis on what parties intended when entering into the Bank loan and GSA.

Security Agreements are, in the end, contracts. The overarching principle is that contracts are to be interpreted to give effect to the intention of the parties. This includes consideration on commercial reasonableness and good faith. The agreement must secure past and present indebtedness, as well as future – they must give effect to an "all obligations clause".

- Constrains on freedom of contract should not be frequented unless there is clear legislative direction.

Did the parties intend for the "all obligations" clause in the GSA to mean an assignee from the Bank could secured its prior unsecured debts? Need proof if the contracting parties intended the assignment to secure unsecured debts of a future assignee (in this case, Eagle Eye)

- If so, there must be a commercially defensible reason to prevent the GSA from operating as such

CPC was a start up that needed financing from the BDBC as the only loaner. The loan did not depend on assignment, including the "all obligations clause" to a third party
- CPC was in a position to "take it or leave it"

It doesn't appear that either party intended the GSA to cover unsecured debts of CPC that may be owed to a third party upon assignment
- Banks are often concerned about debts owed to them but without their clear words, it is hard to believe an "all obligations" clause would secured all unsecured debts to the assignee.

The clause was simply not clear and unequivocal enough to produce any other result than that the clause does not extend to the past indebtedness.

Conclusion:

Does not secure past indebtedness.

Hold, Order:

Appeal dismissed

Ratio:

Whether an "all obligations clause" will secure unsecured obligations through assignment will depend on interpretation of the parties to the security agreement's intentions. An "all obligations clause" alone cannot secured unsecured credit through assignment.
- However, parties can secure unsecured credit through assignment if the contract language is sufficiently clear that the parties intended to do so.

Eagle Eye tried to argue that the "all obligations clause" in the GSA covered the unsecured creditors through assignment, leapfrogging unsecured creditors by acquiring the GSA and securing previously unsecured obligations.
- To determine this, courts will have to examine what the parties objectively intended by using the all obligations clause, making this effectively a question of contractual obligation.
  - Did the parties intend for the security interest to cover all future obligations?
  - Though the language was broad, the debtor would have been very surprised to find that it's secured debts covered it's unsecured debts too
    - You need very specific language to find it's secured debts covered its unsecured credits and that notifies the counter party of this unexpected scenario
    - Standard "all obligations clause" alone will not do this
  - But this means that parties *can* secured unsecured parties credits through assignment with very clear contractual language.

Example of (Australian) all obligations clause allowing future assignment to secure unsecured credit:

> *"total amount owing* means, at any time, all money which one or more of you owe us, or will or may owe us in the future…
>
> This definition applies…
>
> (e) even if you owe an amount or obligation to us because it was assigned to us, whether or not
>
> (i) the assignment was before, or at the time as, or after this mortgage is executed;
>
> (ii) you consented to or were aware of the assignment;
>
> (iii) the assigned obligation was secured;
>
> (f) even if this mortgage was assigned to us, whether or not:
>
> (i) you consented to or were aware of the assignment;

Subsection (e) covers where the secured party obtains assignment of the unsecured party rights

Subsection (f) covers where the secured party assigns its rights to the unsecured party
- If the GSA in the *Eagle Eye* case had these provisions, Eagle Eye's unsecured credit would have become secured and they would have won

Various types of clauses:

- Granting or Charging clauses: ones that grant security interest in the identified property
    - Often with an all PAAC but can be anything when the debtor grants a security interest
- Acceleration clause: on default, all obligations become immediately payable
    - If payment is over 3 years, on default 3 years of payment become immediately available
- Representation and Warranties clause: debtor has good title to the collateral
- All Obligations clause: secured party has interest in all AAP that secures all obligations

CHAPTER 5: PERFECTION

The Concept of Perfection

Perfection is about publicizing the existence of a security interest. This is important because it impacts the way third parties know about them prior to purchasing a good. Whether or not the security interest exists will impact the third parties rights. As a proprietary right, security interests have impacts on third parties and this is precisely why you need to register the claim.

- This does not exist in civil code countries.

Perfection: In relation to security interests, perfection means a protective step taken that gives the security interest priority over seizing in creditors, the trustee in bankruptcy and other third parties.

- A security interest that has not been perfected is said to be unperfected.
- An unperfected security interest remains enforceable against the debtor.
- It is all about publication so is required to have a higher priority status against third parties
    - But a failure to perfect will not invalidate the claim – it won't even necessarily lose to all other third parties
- Perfecting is merely a way to guarantee you will have priority but without it you will be low in priority
    - You would be beaten by a trustee in bankruptcy, a judgement enforcement creditor and a perfected secured party without it

There are three ways that a security interest can be perfected:

1. Perfection by Registration
    a. By far the most common
    b. Registration of a "financing statement" to the personal property registry
    c. "Non Possessory Security Interest"
2. Perfection by Possession
    a. Take physical possession of the collateral
    b. This is through Section 24(1)
        i. Covers all collateral except intangibles or investment property, since they have no physical presence.
    c. Section 24(1) also states that possession by repossession or seizure is not sufficient to have security by perfection
        i. Ontario and Manitoba allow seizure for perfection, but not Alberta
    d. Section 24(2) says that possession only counts when not through agency or in apparent possession. If it isn't visible, then it can't be publicized
    e. "Possessory Security Interest"
3. Temporary Registration
    a. PPSA allows temporary perfection to allow a security interest to be perfected in a short period even before the good is not perfected by possession or registration
        i. Section 5 and 7 grace period for example
    b. When the collateral comes under control of the debtor, there is a 15-day period where the goods remain perfected to give the debtor a chance to register the goods for (a) instruments or investment property and (b) document of title or goods held by a bailee

                i. Often when it comes to bill of lading, perfection cannot be by possession since the document is given to the debtor
                ii. If the secured party registers in those 15 days it is continuously perfected since the day of the original registration
        c. Section 26
4. Perfection by Control
    a. Only in security interests for investment property (more to come)
    b. This trumps everything, even perfected security interests even if they were perfected earlier (ie, the temporal order is irrelevant)

The date of perfection is very important since priority will turn on this. Section 19 sets out that a security interest is perfected when 2 things happen (in any order):

1. The security interest is Attached (under s 12)
2. The security interest undergoes a Perfection Step

When the second of these criteria are fulfilled, the good is considered perfected. So, mere registration is insufficient as it needs to attach through 1) value, 2) debtor gets right and 3) enforceability.

- Where attachment is first and perfection second, the security interest is perfected as soon as the perfection step occurs
- Where perfection step is first, the time in between until attachment occurs, it is deemed an *unperfected security interest*
    - Once perfected, thereafter it would be considered a *perfected security interest*

You can take the perfection step (registration usually) before a security interest even comes into existence. This is actually good practice to register in advance so that the moment a security interest arises, it is perfected under the PPSA. There would be no lag or in between period in which the security interest is unperfected.

The effect of non-perfection is a dramatic loss in priority. An unperfected security interest will be subordinate to a trustee in bankruptcy, buyers without knowledge of the security interest and secured parties with a perfected security interest

- Buyer without knowledge
    - The whole point of perfection is publication for third parties. A buyer (third party) needs to know of an encumbrance before purchasing a good
    - This is why a buyer would get priority if the buyer did not know of the unperfected security interest under section 20(b)
- Perfected secured party
    - A competing secured party will want to know if other security interest are on a good
    - This is why, under s35(1)(b), an unperfected security interest is subordinate to a perfected one, regardless of the timing
        - Even if the second party receives their security interest after the first, if the second party was first to register, then they have priority
- Trustee in Bankruptcy
    - Once you have bankruptcy, the civil process is subject to a stay of proceedings (it grinds to a halt)
    - You cannot start action or cannot enforce rights through courts
    - Debtor can voluntarily go into bankruptcy or creditors can force them into bankruptcy
    - Section 20(b)(i) says an unperfected security interest is ineffective against a trustee in bankruptcy
    - Once there is bankruptcy, the trustee will have priority over the secured party that has not perfected their interest
        - If there is ever an issue with registration, this could have a large impact on the secured party if the debtor goes bankrupt
    - Does section 20 of the PPSA conflict with the *Bankruptcy and Insolvency Act*?
        - The SCC looked at this in *Re Giffen*

Personal Property Security Act, RSA 2000, c P-7
Section 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. Section 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. Section 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 cS-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. Section 25 Subject to section 19, registration of a financing statement perfects a security interest in collateral. Section 26 (1) A security interest perfected under section 24 in (a) an instrument or a certificated security that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,
(ii) presentation, collection or renewal, or
(iii) registering a transfer,

or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of
(i) ultimate sale or exchange,
(ii) loading, unloading, storing, shipping or trans-shipping, or
(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected, notwithstanding section 10, for the first 15 days after the collateral comes under the control of the debtor.

(2) After the expiration of the period of time referred to in subsection (1), a security interest under this section is subject to the provisions of this Act for perfecting a security interest.

Section 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.

Re Giffen, [1998] 1 SCR 91

Facts:

Telecom Leasing Canada ("TLC", lessor, respondent) leased a car to the BC Telephone Company. BC Telephone then leased it to an employee, Giffen (the bankrupt). Giffen and BC Telephone were parties to the lease for more than one year. The lease gave the bankrupt the option of purchasing the car.

- TLC was not party to the agreement but received a deposit from Giffen and was entitled to receive payment directly from her if BC Telephone stopped paying her
    - TLC and Giffen were also named as owners of the vehicle

Giffen made an assignment in bankruptcy. No parties had registered their interests under the PPSA for their leases. Without registry, TLCs interest was not perfected at the time of bankruptcy

- R West & Associates Inc (trustee, appellant) was appointed as trustee in bankruptcy
- TLC seized the vehicle and sold it with the trustee's consent
    - $10,154,54 were held in trust

R West brought action that they were entitled to the proceeds under s 20(b)(i) of the PPSA

- TLC opposed the claim because Giffen never owned the vehicle, so the trustee could not have a better claim to the car than the bankrupt had

Procedural History:

Supreme Court of BC held the unperfected security interest of the lessor was inferior to the trustee

- The BC Court of Appeal allowed the appeal as the proceeds belonged to the lessor

Issue:
Does s 20(b)(i) of the *Personal Property Security Act* render an unperfected security interest ineffective against rights acquired by a trustee in bankruptcy under the *Bankruptcy and Insolvency Act*?

Rule:
Section 20 of the (BC) *Personal Property Security Act*
A security interest
(b) In collateral is not effective against
(i) A trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy

Section 71 of the *Bankruptcy and Insolvency Act*
(2) … a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee …

Analysis:
The Provincial legislature set aside the traditional concept of title in the PPSA, to a certain extent. The common law comes second to what the statute says your property rights are.
- Section 2 shows that a transaction can be a security interest through substance rather than through title or form (this means a lease can be included under the PPSA). Section 12 provides that a security interest attaches. This requires the debtor to acquire rights in the collateral (value and enforceability are already satisfied)
  - Upon delivery of the car to Giffen, the interest attached and TLC had a valid security interest against a third party
    - However, until the car was registered, s 20 shows that the lessor is vulnerable to trustees in bankruptcy as an unperfected interest
  - In order to protect a security interest, the interest must be perfected through registration (s 25) or repossession of the collateral (s 24)
  - Neither of these were done, so the security interest was unperfected

Under the *BIA*, the car constitutes "property" under s 71(2). As such, the trustee assumes the bankrupt's possessory interest in the car through s 71(2)

In terms of the priority contest between TLC and the trustee, prior to bankruptcy, unsecured creditors can make claims against the debtor, with unperfected claims being inferior. However, once bankruptcy occurs, all claims are frozen and unsecured creditors must look to the trustee in bankruptcy
- The trustee thus has power to defeat unperfected security claims by s 20
- S 20(b)(i)'s purpose is to permit unsecured creditors, through the trustee, the same status as secured creditors who have not perfected their interest
  - The trustee's possessory interest in the car competes with the unperfected security interest of TLC
    - From s20(b)(i), the lessor's interest is ineffective against the trustee
      - 20(b)(i) doesn't grant title or proprietary interest to the trustee, but it prevents the lessor from exercising rights against a trustee

In this case, the trustee ends up with full rights to the car when the bankrupt only had right of use and possession
- There is a general principle that a trustee cannot obtain a greater interest in goods than what the bankrupt had. But s 20(b)(i) modifies that principle

Conclusion:
Unperfected security interest is ineffective against the trustee by s20(b)(i). The trustee has priority over the lessor and is thus entitled to the proceeds of the car.

Hold, Order:
Appeal allowed Ratio: Section 20 is not in conflict with the *Bankruptcy and Insolvency Act*.

There were a lot of confusing cases leading up to this one. There were parties who didn't like the outcome of bankruptcy trustee's collecting collateral, so they tried to argue the validity of the PPSA by claiming it is ultra vires of the provincial government since bankruptcy is a federal government (or that the BIA is paramount to s 20 of the PPSA)

- When the PPSA was first introduced, leasing companies weren't used to registering since they weren't under the common law system but were under s 3(2).
  - When lessees went bankrupt, leasing companies lost a lot of property
  - The solution is simple: register. How can a third party know if it isn't registered?

The SCC gave full weight to s20, saying it was constitutional and doesn't interfere with the BIA. There is no operational conflict (section 20 doesn't undermine the federal purpose of the BIA)

- As a lease, it was a DSI under s 3(2)
- The argument was that bankruptcy law states that only the debtors property is available to satisfy claims of creditors, not others. TLC argues that Giffen didn't have property in the car, so the trustee can't go after the truck.
- Remember that to attach the lessee needs rights. Possession is always considered a right, so section 12 provides that the debtor will have rights in the lease when the lessee has possession
- On bankruptcy, all property grants to the trustee from the lessee, so any rights the lessee had would vest in the trustee

Why do we give the trustee priority?

- Public disclosure of the security interest is required to prevent innocent third parties in granting credit/acquiring an interest
  - But public disclosure is not required when the third party is a trustee
  - The trustee doesn't rely on a search in the registry the way a buyer/secured party would
  - So why do we protect the trustee?
    - Not because the trustee will personally want the goods, but because the trustee acts as a representative of the unsecured
    - Bankruptcy proceedings take over from civil enforcement ones, meaning unsecured creditors cannot take action once bankruptcy is declared and must look to the trustee to assert their claims
- Section 20 does not re-order bankruptcy, it allows proper integration of BIA and PPSA. Compliance with perfection requirements of the PPSA is simply a precondition to maintaining secured creditor status
  - Unsecured creditors just have to perfect their interest to win out against unperfected ones, but they cannot do this when civil enforcement is frozen
  - To adjust for this, the trustee in bankruptcy recognizes that they have a representative capacity, so they have the same rights that unsecured creditors would have had, had they perfected their claim
    - Secured creditors are largely outside the bankruptcy system, it's only the unsecured parties that come into play
  - Although bankruptcy law proceeds on the basis that it is only the bankrupt's property that vests in the trustee, provincial law modifies this by giving the trustee a greater interest that was enjoyed by the bankrupt

<u>Effect of Non-Perfection</u>

Section 20 is all about the effect of non perfection

- Unperfected Secured Party vs Buyer: section 20(b) buyer without knowledge wins
- Unperfected Secured Party vs Trustee in Bankruptcy: section 20(a), trustee wins

- Unperfected Secured Party vs Perfected Secured Party: perfected party wins
- Unperfected Secured Party vs Registered Creditor: section 35 of *Civil Enforcement Act*

When applying section 20 priority, we are determining perfection at a single point in time: date of bankruptcy vs date of sale.
- Was the security interest perfected or not on the date of bankruptcy/sale

Once the GSA is made at T1, the security interest attaches since all three requirements are fulfilled. Until it is registered, it is an unperfected interest (until T2). When a secured party registers, they have the choice for how long it will last (more expensive to for a longer registration life). If it runs out, the registration lapses and is dead (so you have to renew before it lapses) though the interest still exists
- At T4, the interest is again an unperfected security interest
    - The secured party would still have priority over the buyer since section 20 only operates on the date of sale (T3)
    - At this date, the security interest was perfected and thus the buyer cannot prevail
        - The buyer would have to check the registry at the date of sale
        - Even if it lapses afterwards, there are no consequences (say if SP brought action at T5)
- There may be other buyer protection rules that may give the buyer priority of a secured party that will allow them to take priority over a perfected party, but this is outside the PPSA

If the sale occurred after the lapse, the buyer would have priority as long as the buyer was without knowledge (had no duty to investigate)
- The Security interest would be unperfected on the date of sale in this case

Suppose T3 was a date of bankruptcy, the perfected party would still have priority since at the date of bankruptcy, the interest was perfected. If it wasn't, the trustee would win. Bankruptcy occurs at:
- If voluntary: when the bankruptcy makes the assignment
- If involuntary: when the order (applied for by the creditors) is given by the courts

When there are multiple secured parties competing, things get complicated. The priority is *not* like it is under s 20, but rather under ss 34 and 35. When you have competition between secured parties that all have perfected secured interests, priority goes to the first to *register,* not to the first to *perfect*. Recall that perfection requires attachment and perfection step (registration). This means that whoever registers first, even if the security interest hasn't formed yet (and thus not attached), gets priority.
- Say SP1 registers the interest on January 1, and the GSA is then made on February 1
- Say SP2 enters into a GSA and registers it on January 15
    - SP2's security interest existed before SP1's did, but SP1 will have priority since they registered first
    - So even if SP2's interest was perfected first, it will lose priority
        - Not the first to perfect that wins, but the first to register
        - This is under s 35(1)(a)
- If neither are perfected, run to the registry and perfect before the other party does. If neither do this, the first to attach wins

There also runs the issue of the Two Debtor problem. We know that an unperfected secured party will lose to a buyer without knowledge, but if they have knowledge, can they take advantage of section 20(b)
- What if buyer, who has knowledge, sells to a second buyer who is without knowledge?

- Can Buyer 2 claim the advantage of 20(b), if the interest was unperfected and their interest was acquired without knowledge.
- Argues that section 20 should/should not be available to buyer 2. There are two thought so this:
  - Argument 1: The text of section 20 would have nothing to prevent its application. Buyer 2 took without knowledge, the security interest is unperfected and all of s 20 is satisfied so Buyer 2 would prevail
  - Argument 2: More policy oriented. Buyer 2 winning would be more consistent with the policy objectives of s20
    - Buyer 2 would have to look at the existence of the interest before buying. A failure to register would have a consequence to buyer 2.
    - Buyer 2 would benefit from searching the registry and the chain of title. If Buyer 2 searches by Buyer 1's name, they wouldn't find anything since the security interest was registered through the debtor, not the buyer
      - If Buyer 2 searches former owners, it would find the debtor's security interest. The argument is that Buyer 2 should be protected since they should rely on the registry rather than searching for the whole line of ownership

What if there was registration, but no attachment, when the debtor sold the Buyer 1? If there is no attachment, there is no security interest at all

- If the secured party takes a security interest after the time of sale, the goods were unencumbered so the buyer took the goods unencumbered. The later attachment would simply be too late since the debtor had no rights in the good anymore
  - The PPSA would not apply at all
  - A trustee in bankruptcy would also easily win.

CHAPTER 6: THE REGISTRY SYSTEM

Fundamentals of Registration

Registration is the process by which you input a security interest into the Personal Property Registry as a means of both perfecting a security interest by registration under s 19 (a step in perfection), and as a way of publicizing the security interest for third parties to see when conducting their search.

Registry: The Personal Property Registry ("PPR") is a computerized registration system for the purpose of registrations under the Personal Property Security Act.

- It also is used for registration of certain other interests, including writs of execution, garageman's liens and matrimonial property orders.

There are a lot of principles about the PPR:

- Notice Filing System:
  - Document you file is not the security agreement, but a notice that provides details about a transaction or potential transaction
  - This is different from "document filing"
    - Pre PPSA was only document filing (would file the security agreement itself)
    - Post PPSA registers the notice, called a "Financing Statement" that has brief details about the parties and the collateral
- Pre-Agreement
  - Going from document filing system to a notice filing system allows you to register before the security agreement is made
    - This allows you to reach an agreement and immediately advance funds since the registration is already done, so there will be no lag time (don't have to wait for registration to get money)
- Blanket Registration

- Once you have a notice based system, it allows blanket registration where one registration can cover multiple security agreements so long as the information in the registration is applicable to the first one registered.
- Disclosure
  - With a notice filing system, not all of the details of the security agreement are registered, just a limited for of disclosure
    - The parties and the collateral are essentially the only things registered
  - There are various provisions regarding disclosure of security agreements – third parties can demand disclosure of the security agreement or other relevant information
- Impact of First to Register
  - You can rank first in priority just by being registered first, even if your security agreement came second in perfection (perfection needs attachment and perfecting step)
  - It isn't that the perfected party wins, it is the first registered party who will get priority
    - Often perfection and registration occur at the same time
- Abuse of System
  - If you can file in advance before a security agreement is made, there is a possibility that you maintain a registration even if there is no prospect of the negotiation
  - Need some provisions where the security agreements that are not likely to happen can be removed from the system.

The Financing Statement

Financing Statement: A prescribed form which must be filed with the Registrar in order to register a security interest. A financing statement is also used to register writs of execution and matrimonial property orders, and to re-register pre-PPSA security interests.
- The Financing Statement is what you actually fill out and submit

What information is recorded on the Financing Statement?
- Registration Life:
  - Registering party can chose from 1 – 25 years or infinite time
    - Infinity is rare since they are expensive
    - You would usually match the period the expected financing term
      - If it's a 5 year loan, you would usually register 5 or 6 years (in case there is a default)
- Secured Party and Debtor address and names
  - A third party who demands further details will need the name and address of both the secured party and the debtor
    - However, the Search function on the PPR only allows the search to be done from the Debtors name
  - Section 20(2) of the *Personal Property Security Regulations* ("PPSR") sets out requirements for an Individual debtor's name
  - Section 20(7) of the *Regulations* determines what their legal name is for the purposes of the registry system
    - Which documents to look at (passport, birth certificate, drivers license)
    - Sets out the documents and hierarchy (since not everyone has a passport)
  - Artificial Bodies (usually corporations) have to use their corporate name as in the public records
    - This is the Numbered name given by the government, not the colloquially known name; section 21(2)
- Collateral Description
  - Descriptions can be by item, or by all AAP
  - Serial numbers can be given for certain, high value goods

- In terms of registration, the PPSA makes a distinction between "Serial Number Goods" under ss34, 35 and "General Collateral" under section 36 of the *Regulations*
- Section 36 is similar to the collateral description under s 10 (referring to the security agreement)
    - But these should not be confused – section 10 is only for the security agreement, section 36 of the *Regulations* is for financing statements
- Serial Number Goods are not all items that have serial numbers (like computers). Rather, they are expensive, mobile goods as defined under section 1 (y) of the PPSR
    - motor vehicle, a trailer, a mobile home, a designated manufactured home, an aircraft, a boat or an outboard motor for a boat
- Serial Number Goods ("SNG") are distinguished since their registration is different. When registering a SNG is mandatory, their serial number must be input into the "Serial Number Field" of the Financing Statement. If it is not, or if it is put into the "General Collateral Field" of the Financing Statement, the registration will be invalid and perfection will fail (unless held by possession)
- Depending on how SNG are held, they may require registration as per section 35 of the PPSA
    - If held as Consumer Goods, serial number registration is mandatory
    - If held as Equipment, serial number registration is optional, but recommended
        - It is recommended in practice for priority purposes
        - If you don't register by serial number (just general collateral description), it will be perfected and will have priority over a trustee in bankruptcy, but there is a potential for loss to certain parties
            - Will lose to a buyer without knowledge and a secured party who does record the serial number in the financing statement
    - If held as Inventory, serial number registration is optional, but inadvisable
        - It wouldn't make sense to record the serial number since the inventory is constantly circulating; it is constantly sold and acquired
        - You would be constantly adding and deleting these numbers as they were sold, so it is much better to just describe the inventory in the "general collateral field"

Registration can be both changed and renewed through a "Financing Change Statement"

- As per s35(3) of the PPSA, registration takes effect from the time the change is made, so it is not retroactive
    - New collateral that is added to the Financing Statement will be valid from that date, not the date of the original registration.
    - Section 44 of the PPSA: Adjusting the collateral name or debtor name won't be retroactive either. The changes will only be from the date they were edited
- Renewal must be done before the registration lapses
    - The Financing Change Statement must be filed to indicate the years to be added
    - If this is done before lapse, the years get tacked on, so the registration is still considered from the date of the original registration, but extended by the length indicated in the Financing Change Statement
    - If it has lapsed, it cannot be renewed and you would need to re-register, but the registration would only take effect on that
        - There are time limits to re-registration as under s35(7), (8) of the PPSA

Personal Property Security Regulation, Alta Reg 95/2001
Section 1 (1) In this Regulation, (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

Section 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:
    (i) 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;
    (ii) 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;
    (iii) 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;
    (iv) 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;

(v) 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;

(vi) 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;

(vii) 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.

Section 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.

(2) Where a financing statement is submitted for registration of a security interest in collateral that is other than serial number goods, the secured party must provide a description of the collateral in accordance with section 36.

Section 35

(1) Where collateral is required to be described under this section, the description must be set out in the space provided for serial number description, and must include

(a) the last 25 characters of the serial number for the collateral or all the characters if the serial number contains less than 25 characters,
(b) the 4 digits for the model year of the collateral,

(c) the make and model of the collateral, and
(d) the appropriate category of collateral as set out in Schedule 3.

(2) For the purposes of subsection (1)(a), the serial number fora trailer, mobile home, designated manufactured home or motor vehicle, other than an automobile or truck, is the serial number located on the chassis,
(a) the serial number fora trailer, mobile home, designated manufactured home or motor vehicle, other than an automobile or truck, is the serial number located on the chassis,
(b) an automobile or truck is the vehicle identification number located on the body frame,
(c) a boat that is of a type
(i) that can be registered, recorded or licensed under the Canada Shipping Act (Canada) is the registration, recording or licence number that is assigned to the boat, or
(ii) not referred to in subclause (i) is the serial number of the boat,
(d) an aircraft that must be registered under the Aeronautics Act (Canada) is the registration marks assigned to the airframe by the Department of Transport (Canada), omitting any hyphen,
(e) an aircraft, other than an aircraft referred to in clause (d), that must be registered under the law of a state that is a party to the Convention on International Civil Aviation 1944 (Chicago) is the registration marks assigned to the airframe by the relevant licensing authority, omitting any hyphen, and
(f) an aircraft, other than an aircraft referred to in clause (d) or (e), is the serial number of the airframe.

(3) For the purposes of subsection (1)(c), ditto marks may be used to indicate that the make and model of serial number goods is the same as that for the immediately preceding serial number goods described.

(4) Where the registration relates to a lien on an airplane under the Garage Keepers' Lien Act, the serial number of the airplane is the serial number of the airframe pursuant to subsection (2)(d), (e) or (f).

…

(7) In completing a serial number, the secured party must not include
(a) any hyphens, nor
(b) any words, punctuation marks or symbols that are not part of the serial number.

Section 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.

(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.

(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.

Personal Property Security Act, RSA 2000, c P-7

Section 35

(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.

(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.

Section 44

(1) Subject to the regulations, a registration under this Act is effective for the period of time indicated on the financing statement by which the registration is effected.

(2) A registration may be renewed by registering a financing change statement at any time before the registration expires, and, subject to the regulations, the period of time for which the registration is effective is extended by the renewal period indicated on the financing change statement.

(3) An amendment to a registration may be made by registering a financing change statement at any time during the period that the registration is effective, and the amendment is effective from the date the financing change statement is registered to the expiry of the registration being amended.

(4) When an amendment of a registration is not otherwise provided for in this Part, a financing change statement may be registered to amend the registration.

Renewals get tricky.

- Say SP1 registers a financing statement for 5 years, and SP2 is granted a security interest and registers as a competing secured party 1 year after. SP1 would get priority
- On Year 4, SP1 advances new loans from same creditor under the same security agreement and registers a new financing statement for a new 5 year term
  - This was a huge mistake. The moment the initial registration expires on Year 5, it is taken off the system. The new registration will be respected, but only from Year 4
    - Then SP2 would have priority since Year 2 is before Year 4
    - SP1 should have kept the original registration alive and simply amended it rather than making a new one
    - Had they used a Financing Change Statement to extend the original registration, the Year 1 date would still have held for the new collateral
- What if the Year 1 registration was for certain goods, and the Year 4 one was for all AAP?
  - The Year 1 registration could have been extended for the original goods but a new financing statement would have been needed for the additional collateral
    - The new collateral security would only be effective from the day of the new registration, whereas the old goods are continuous from the original.

<u>Searching the Registry</u>

From a third party searcher side, you can look if the collateral is subject to a security interest by searching either the Debtor Name or the Collateral Description

- If I am purchasing a car, I would search the seller's name and/or the serial number
  - I would not search the secured party name or the general collateral field

There are benefits to searching either the debtor or collateral over the other.

- Say the secured party has a security interest in the debtor's collateral, but the debtor then transfers that collateral to a buyer.
  - If you are a third party looking to buy that collateral from that buyer, you would search the buyers name in the PPR
    - You wouldn't find anything because the security interest is under the debtors name, not the buyer
    - You would buy the car thinking there was no security interest but the Secured Party, if they perfected the interest, would have priority over you in default
  - This means the Debtor name search does not have the possibility to search for upstream transferors
    - You would have to search the name of the buyer but also upstream buyers/debtors if you even know them
      - This is costly and cumbersome
  - Whereas a Serial Number search will allow you to disclose any upstream registration because you are searching the good itself. It shows you all security interests in one foul swoop without you having to go look for upstream transferors
  - The Serial Number search doesn't have to be used, but it is certainly advisable
    - But serial numbers are only searchable if they are in the serial number field
    - Serial numbers that are recorded in the general collateral field are not searchable and if it is a consumer good, putting it here instead of the Serial Number field may invalidate the registration

Section 35(1) tells us that there is a general 'first to register' priority. Section 35(4) tells us that a financing statement without serial number for a serial number good should invalidate the claim

- But the court in *Commcorp* found that a serial number registered in the general collateral is still valid as long as the serial number is somewhere in the financing statement (ie, it complies with s35(4))

- Doesn't that undermine the whole idea of there being a Serial Number search option?
    - If you do a serial number search, you won't find the registration that is found in the general collateral field, so how could you find it even if you searched it?
    - PEI and Nova Scotia changed their legislation to require the serial number to be in the right field, and Alberta has proposed the same (Recommendation 23 of the ALRI report)

As of now, section 35(4) only applies to equipment, but description by serial number is mandatory for consumer goods too. May be simplest to modify this so they are both mandatory or both optional.

- There is also a drafting error in section 35(4); it provides a rule that you are not perfected for the purpose of s35(1) but PMSIs are governed by s34 not s35
    - So if you have a PMSI for goods as equipment, s35(4) would not apply and you wouldn't have to register a serial number. This wasn't intended, it was just an oversight

Recommendation 23 would make s35(4) as such:

35(4) A security interest in goods that are consumer goods or 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) or subsection 34(2) unless a financing statement relating to the security interest that includes a description of the goods by serial number is registered with the serial number entered into the field labelled for the receipt of serial numbers

- Would fix the different application of equipment/consumer goods (both mandatory)
- Would integrate the PMSI scheme in s34 to the registration process
- Would require serial number to be input into the serial number field

Registration Errors

Failure to register your Financing Statements or engage appropriate procedure can result in considerable loss

- If you are a lawyer and don't register, it is unperfected and your priority is very low and that can result in losses and lots of your clients money

If the way you register either the Debtor name or the Collateral description is incorrect and a third party cannot find the security interest in the search, the financing statement could be misleading.

- If you over or under describe the collateral, that is also an issue.
- The registry may be good for what you describe, but not for all the things you didn't describe

Not all errors in registration will invalidate the perfection of a financing statement. To err is human, but there are certain errors that will invalidate perfection and the security interest will be of much lower priority

- Section 43(6) gives the test for invalidating errors:
    - Validity will not be affected by defect, irregularity, omission or error unless it is "seriously misleading"
        - So not every error will invalidate, only the serious ones
        - It becomes necessary to look at the case law to determine when and how courts will find an error "seriously misleading"
- Section 43(8) states the s43(6) test is objective. Nothing shall require proof that someone was actually misled, or even aware of it. It also doesn't ever have to have been searched
    - We are only looking at if the error, in isolation, could ever mislead a party
    - This is efficient. Litigation costs would be huge if every claim would have a fact finding mission on if someone was actually misled
        - All you have to do is put it through the search and see what it spits out
- Section 43(7) provides more details:

- Where multiple debtors are required to be disclosed or the collateral is a serial number good and there is a seriously misleading error in (a) the disclosure of the debtor or (b) the serial number, the registration is invalid.
- This is considered the "dual criteria" – where there are 2 search criteria, if either of them have a seriously misleading error, it is fatal, even if the other is correct
  - Section 43(7)(a): seriously misleading error in the debtor name will invalidate it
    - Does not matter if the serial number is correct, error in debtor name is fatal and cannot be cured by the serial number
  - Section 43(7)(b): seriously misleading error in the serial number invalidates
    - This is only when the goods are consumer goods, not equipment
    - Again, it does not matter if the debtor's name is correct.
    - An error in the serial number for a serial number good held as consumer goods is fatal and cannot be cured by getting the debtor right.

- If there is an error in the serial number of equipment and in a competition with a trustee in bankruptcy, the secured party would still win since the equipment does not need to have the perfect serial number
  - But, if the competition is from an unknown buyer, or a secured party who did not register by serial number, then the error becomes relevant as they will lose priority to them
  - So there isn't a universal priority ranking on if the error will be fatal, so 43(7) wasn't worded to include the serial number goods as equipment
- Section 43(9) provides that failure to provide description for any kind of collateral will not respect validity with respect to other collateral
  - If the Financing Statement perfects two collaterals, but not a third because of an error in the serial number, the other two will not be affected
  - For example, if a secured party takes a security interest in a camera, it would not need to be registered in the serial number field (its not a serial number good) and only the general field.
    - But if you put the serial number in the general field, but misdescribe it, it is possibly seriously misleading since a searching party would think it is a different camera
  - Or, if the description is underinclusive, it can be seriously misleading. If a secured party has a security interest in all AAP of a dairy farmer, but only describes livestock in the registration, the cows will be covered, but not the dairy or the milking equipment
    - The description will be valid for the cows, but not for the others (they would be unperfected security interests)

Personal Property Security Act, RSA 2000, c P-7
Section 43 (6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading. (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, or (b) the serial number of the collateral,

the registration is invalid.

(8) Nothing in subsections (6) and (7) shall require, as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was actually misled by it.

(9) Failure to provide a description in a financing statement in relation to any item or kind of collateral does not affect the validity of the registration with respect to other collateral.

So what is a seriously misleading error? *Case Power* is the go to on this analysis:

Case Power & Equipment v 366551 Alberta Inc (Receiver of), 157 AR 212 (CA)

Facts:
Case Power (appellant) had various equipment under security:
- Their bulldozer was registered under the correct debtor name, but incorrect serial number
  - GBC0001839 instead of GBE0001839
- Their excavator was registered under the incorrect name, but the correct serial number.
  - "MST Trucking Co 366551 Alberta" instead of "366551 Alberta"
- Their loader was registered under the wrong debtor name and correct serial number
- Their rammer was registered under the wrong debtor name and correct serial number

First Calgary (366551 Alberta Inc, respondent) makes a GSA with Case Power for all equipment and registers the debtor name correctly but does not input the serial number in the serial number field, only the general field.
- Case Power then amended their registrations to correct the debtor name of rammer and loader, but not the excavator. They didn't amend anything with the bulldozer
- First Calgary then amended their registrations by serial number for all four

Debtor went into bankruptcy. For all items, priority between appellant and respondent is disputed

Issue:
Where errors occur in registration, how is priority affected?

Rule:
Section 35 of the *Personal Property Security Act:*
(3) 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), (6) or (7) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

Section 43
(6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.

Analysis:
All vehicles are equipment rather than consumer goods. Section 35(1) states that priority depends on order of registration, but section 35(3) qualifies s 35(1). Section 35(3) says that for serial number goods, the first registration giving *serial numbers*, not the first to register for priority.
- Since the goods in question are all serial number goods, s35(3) applies
- As such, Case Power wins the priority for all four pieces.
  - Had s35(3) not existed, First Calgary would have been the first to correctly register and would have won

- Had there been no errors, this would be the end of the story. But since there are errors, there are more things to be considered.

Amending Registration

Errors in registration can be amended under s44(3) without altering priority. If the amendment occurs before anything else happens, the original error is irrelevant. Parts of the original registration which were valid continue to be from Day 1, but the parts which were not valid from when they were made count from the date of the amendment.

- Loader/Rammer: Case Power gave the right serial number and wrong debtor, which was amended before First Calgary registered anything.
  - Case Power gets priority
- Bulldozer: debtors name was wrong but amended before First Calgary registered. But, the serial number was wrong and not amended.
  - Section 43(6) only invalidates registrations that are "seriously misleading". This is strong language such that any error which is not seriously misleading will not impact registration priority. Seriously misleading would be if:
    - (i) It would likely prevent a reasonable search under a reasonable filing or registration system from disclosing the existence of the registration, or
    - (ii) It would make a person who did somehow become aware of the registration think that it was likely not the same chattel.
  - While the computer programmes are sensitive to the letter (an I instead of l would not find the exact match), it is capable of finding closer numbers as "inexact matches". As such, the computer can overcome small errors.
    - Neither (i) or (ii) are misleading and their validities thus hold
    - Case Power has priority
- Excavator: The serial number was correct, the debtor wrong. No amendment fixed it so we can only assess the original registration.
  - The name was seriously misleading and thus the registration is invalid
  - If the name of the debtor is seriously misleading alone, it does not cease to be so because of the chattel description (serial number included)
    - The misleading name is fatally defective
    - First Calgary has priority

Conclusion:

Defects only fatal if "seriously misleading"

Hold, Order:

Appeal allowed for first three equipment

Ratio:

Description is seriously misleading if:

(i) It would likely prevent a reasonable search from disclosing the existence of the registration, or

(j) It would make a person who did somehow become aware of the registration think that it was likely not the same chattel.

This was complicated because of the amount of errors and amount of collateral.

- All four collateral pieces were equipment, and serial number goods. This means that section 35(4) applies such that they are not perfected until the description by serial number is correct
- Under section 35(1), the first to register *properly* will have priority
  - Case Power had the correct debtor name (via amendment) first for the rammer and loader so they won those two
- For the bulldozer, the incorrect serial number was not seriously misleading since if you input the correct serial number in the registry search, the bulldozer appears as an "inexact match"

- For the excavator, the debtor name was never corrected.
    - They entered the trade name, not the numbered name which is improper
    - This would not be an inexact match, is that a "seriously misleading error"? To determine this, the ABCA invented the two part test for seriously misleading:
        - Is it likely to prevent a reasonable search under a reasonable filing or registration system from disclosing the existence of the registration, or
        - Is it likely to make a person who did somehow become aware of the registration think that it was likely not the same chattel.
            - Either branch would constitute a seriously misleading error and invalidate the registration
    - But, in concurring (which was actually the majority), they removed the "under a reasonable filing system" from (i) of the test, since that implies the court also has to evaluate the computer system on what it *should* do rather than the system they have. This is based on what the judge thinks. A judge could validate an invalidating error by saying "it looks close to me". Since it was 2 against 1, the test is actually:
        - Is it likely to prevent a reasonable search ~~under a reasonable filing or registration system~~ from disclosing the existence of the registration, or
        - Is it likely to make a person who did somehow become aware of the registration think that it was likely not the same chattel.
- In essence, if you search the correct name OR the correct serial number and the match doesn't come up (exact or inexact), that would probably be a seriously misleading error under the first branch of the test.
- If the inexact match shows up, it may still be a seriously misleading error if a person would likely think it is not the same chattel under (ii) of the test.

Two ways for an error to be seriously misleading:
- Match doesn't come up as "inexact" or "exact" match
- If it is an inexact match, would a reasonable party look at the inexact match and say "that isn't the debtor/serial number I am trying to find"

But, where do we go if you have serial numbers *and* debtor names available?
- If you have one wrong and one right, can it be ok?
- This has been litigated extensively

The *Stevenson* case evaluated this question. In that case, the vehicle dealership gets into a Secured Instalment Purchase Agreement with Moncton Motors and then assigns the rights to GMAC
- There is an error in the debtor name registration (Moncton Motorhome used instead of Moncton Motor Home). This looks close enough, but the majority in *Case Power* said that isn't the approach we take:
    - If you search using the correct name, the search did *not* reveal the right debtor through an inexact match.
    - This fails the first branch of the *Case Power* test
        - Even if the serial number is correct, and would have revealed the correct interest, the error is seriously misleading and the registration is invalid
        - In other words, the fact that the serial number would have found the thing in question is *irrelevant*
        - *Both* debtor and serial number need to be correct to avoid invalidation
- The ONCA in *Lambert* found that if the serial number search found what you are looking for, that would save the incorrect debtor. They justify this since the Serial Number search is better so people are more likely to use that anyway
    - The Court in *Stevenson* does not take this approach
    - The system allows the third party to chose to search by debtor or serial number

        - A party may not be commercially sophisticated to know the serial number search is better
        - Sometimes the debtor sense makes more sense – if you are searching 50 different serial number goods the debtor search would reveal all at once and be much more efficient.
            - You should be able to rely on either search
    - Both the legislation and the public policy favour the approach that an incorrect serial number cannot be cured by a correct debtor and vice versa

Then came the *Harder* case which really messed everything up.

Harder (Trustee of) v Alberta Treasure Branches, 2004 ABQB 285

Facts:
On March 28, Harder obtained a loan from the Alberta Treasury Branches ("ATB", defendant, respondent) and granted a GSA with a security interest in their trailer. ATB registered the GSA on April 17 with the correct debtor name but the incorrect serial number (using an 0 instead of a Q).
- Harder then filed for bankruptcy and their trustee (plaintiff, appellant) was made aware of their security interest with ATB
    - Unsurprisingly, a search of their names came up, but not the serial number

The trustee disallowed ATB's claim as secured creditor claiming the registration was ineffective
- ATB appealed to the Registrar who allowed the appeal

Issue:
Was ATB's registration of the erroneous serial number "seriously misleading" to invalidate the registration?

Rule:
Section 20 of the *Personal Property Security Act*
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 the bankruptcy

Section 43
(6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading

Analysis:
At common law, a trustee who has actual knowledge of a secured creditor is not granted a superior position even if the serial number is incorrect. The appellant argues the PPSA displaces this common law rule via s 20. The trustee is entitled to take possession if the ATB interest was not perfected from the registration. The only way the security interest will be non perfect is if the serial number is "seriously misleading"
- The trailer is a serial number good and thus s 43(7) and s 43(8) apply
    - By extension, it does not matter if the search would have appeared in the "inexact matches".

The debtor went bankrupt voluntarily and disclosed the security interest to the trustee in bankruptcy.
- The trustee had knowledge, so it cannot be seriously misleading

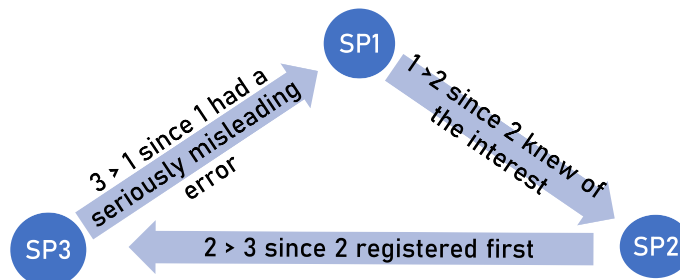
Conclusion:
Registration not invalid

Hold, Order:
Appeal allowed

Ratio:
An error in registration does not defeat secured parties priority against subsequent creditor/bankruptcy trustee who obtains knowledge of the security by debtor name search

This case is very problematic. A search of the serial number did not reveal any exact or inexact match
- Isn't that a slam dunk? Under (i) of *Case Power* this is a seriously misleading error and should have been invalid right?
- Well the ABQB said no.
    - The court really looked at the second branch and found that since the debtor went voluntarily into bankruptcy, the creditor informed the trustee of the interest.
        - Since this was a competition between the bankrupt and secured party, the trustee was imputed with knowledge of the security interest
        - This makes it seriously misleading apparently.

Most PPSL scholars hate this finding and see it as a misapplication of the PPSA
- The test in *Case Power* was an alternative test – failing either one was fatal for the registration
    - Failing the first shouldn't have even prompted this consideration of the trustee
    - This moves from objective to subjective
        - What the individual challenging it knew sidesteps the efficiency of the PPSA and desire to not go through huge litigation of fact finding
- Suppose SP1 registers with an invalidating error, then SP2 has knowledge of SP1's interest but SP3 didn't
    - It would only be misleading against SP3 but not SP2
    - This creates cyclical priority
        - SP1 would have priority over SP2 who would have priority over SP3, but then SP3 would have priority over SP1 since it was a misleading error.
            - This makes a cycle and priority becomes impossible to ascertain priority



- The reason we give priority to the trustee is not because they would search the registry, *Giffen* said they represent the unsecured creditors and if they didn't have priority, the system would be messed up.

John Deere v Standard Oilfield explored when there is no error in debtor name, serial number or description.
- Deermart had a security interest of serial number goods with Standard Oilfield. Deermart then assigns its rights to John Deere in a transfer of chattel paper
- Two contracts are made:
    - On one, "Standard *Bobcat* Services" was used instead of "Standard Oilfield Services"
        - Searching in the registry did not find this match, but searching the serial number would have
        - *Case Power*: it is seriously misleading since it didn't appear in the search

- The second was not as easily decided
  - Standard Oilfield then refinances and John Deer backed out (eliminating the assignment)
  - Now it is just Deermart as secured party since John Deere isn't involved
  - Standard Oilfield was the correct debtor, but Deermart registered John Deere as the secured party rather than itself
  - The secured party name is incorrect, but that is not part of the two part test
    - Would the secured party being wrong invalidate it?
    - You don't search the secured party name
    - But here, the secured party was completely different, so it would have bene a seriously misleading error

- The PPSA adopts a notice filing system and alerts you if a security interest exists. Details of the security interest can be demanded under section 19
  - If the secured party is completely the wrong company, that inquiry will be directed to the wrong person. This should thus be a seriously misleading error
    - It wouldn't if it was missing a letter or something, it isn't the debtor name approach using the two party test
    - Test: do you get enough information so you could properly direct the information to the right person.

The *Service Foods Manawatu Ltd v NZARFD* is a New Zealand case that deals with an overinclusive collateral description. No Canadian case has addressed the same issues.

- If you grant a security interest in a computer, but I register as all AAP, that is claiming more than I am entitled to.
- But the court said this was ok. Although it is overinclusive, a searching party would not be mislead to thinking the property in question was not unencumbered.
  - But this is not an invitation to just always register AAP, as this would come with a myriad of other problems

The ALRI report calls for statutory effect to the seriously misleading error from *Case Power*.

- Registration invalid if registry debtor search doesn't' disclose the goods
- Registration invalid if registry serial number doesn't disclose the goods (if required)
  - This does away with the "just seriously misleading error" which gives courts too much wiggle room
  - Makes the test more express (avoids *Harder v ATB*)
  - Codifies (i)
- Disclosing a registration would not make the registration valid if not an exact match

CHAPTER 7: COMPETITION WITH BUYERS

When it comes to competitions between secured parties and a buyer (particularly buyers under s 30 of the PPSA), they are treated differently than competitions between secured parties.

- The application of priority rules between secured parties don't result in a loss of security interest, rather just their ranking in priority
- But when it comes to competitions between secured parties and buyers, in situations where the buyer would prevail under the PPSA, the security interest of the secured party is effectively extinguished
  - This is not ranking as it was between secured parties, it essentially means the security interest does not exist (or if it does, it is futile)
- So rather than calling these resolutions "priority rules", we call them "cut off rules"

Buyers get priority under various sections of the PPSA, but the most important is section 30, which is really aimed exclusively at buyer competitions. Other provisions we have seen:

- Section 5(2): where a security interest is perfected in another jurisdiction and then brought into Alberta, section 5(2) protects a buyer without knowledge
- Section 10(1): deals with enforceability and if this is not achieved, then the security interest is unenforceable against a third party (including a buyer)
- Section 12(1): if no security interest attaches, then the buyer buys free. There is no security interest in existence at all
    - The seller has unencumbered ownership and title of goods at the time of same. So of course they can transfer good title to the buyer
    - This is completely independent of knowledge of the security interest
- Section 20(b): unperfected security interests will be subordinate to a buyer without knowledge
- Section 28(1)(a): authorization rule, where there is a right to follow collateral
    - A secured party would expect inventory to be sold so there is implied authority
    - Or where you are dealing with really expensive equipment, the secured party requires authorization to sell

In terms of section 30, there are four large Cut Off Rules, but these are not exhaustive (ie, cut off can occur in ways that are not one of these 4)

1. Section 30(2): Ordinary Course Buyer Rule
    a. Where a debtor grants a security interest to a secured party, and then the debtor sells goods in the "ordinary course of it's business", s 30(2) provides that the buyer takes free of the goods regardless of the security interest in the goods
        i. Buyer will take free even if they knew of the security interest at the time of sale
        ii. This is only for goods, other personal property don't apply
    b. The only thing that matters is that the buyer does not know that the purchase was a breach of the security agreement.
        i. If they don't know it is a breach, they are protected
    c. So the buyer will win if 1) the secured party authorizes it (like s28(1)(a)) or 2) it falls within the ordinary course of business
        i. These are independent – so if it is in the ordinary course of business, it could be fine even without authorization.
    d. Section 30(1)(b) defines "ordinary course of business"
        i. Business as part of a contract for services or materials
    e. Also note how the buyer will take free of any perfected or unperfected security interest given by the seller of those goods
        i. This means other secured parties will still have interest in the goods and the "taking free" is limited.
    f. Say that if the Debtor sells goods to Buyer 1 not in the ordinary course of business
        i. Buyer 1 will not take free of the security interest
        ii. Buyer 1 then sells the goods to Buyer 2 in the ordinary course of Buyer 1's business.
            1. Buyer 2 would *not* get the benefit of s 30(2) since the rules only operate for Buyer 2 to take free of the security interest by the seller (who, in the second transaction, is Buyer 1).
                a. Buyer 1 did not grant the security interest, it was the upstream party (Debtor) from whom Buyer 1 acquired the goods
                b. So, Buyer 2 cannot take advantage of the protection of s 30(2).
2. Sections 30(3), (4): Consumer Buyer Rule
    a. This applies to low value consumer goods
    b. If a debtor grants a security interest to a secured party and then sells the collateral, the buyer takes free if 1) they buy them for consumer purposes, 2) the price was less than $1,000 and 3) the buyer is without knowledge of the security interest
    c. This is also not subject to the same s30(2) limitation: if there is a sale with a subsequent sale, Buyer 2 will take free of *any* security interest pre-given (by Buyer 1 or the debtor)

            i. This rule is less restrictive than the Ordinary Course Buyer Rule
    d. The rationale is that it is unreasonable for a buyer to search the registry for such low value goods
        i. Called the "garage sale exception"
3. Section 30(5): Temporary Perfection Rule
    a. If a secured party has not yet perfected their security interest granted by the debtor by registration or by possession, there is a temporary perfection that operates as a grace period
        i. However, if a buyer without knowledge of the security interest buys the property within that grace period
    b. This will not hold if the perfection is done by possession or registration
4. Sections 30(6), (7): Serial Numbered Equipment Rule
    a. If the debtor grants a security interest in serial numbered goods *as equipment* to a secured party and the secured party perfects by registration but does not describe the collateral with the serial number in the serial number field (ie, just the general collateral description), a buyer without knowledge will take free
    b. The solution is simple for the secured party, if it is registering serial number goods, then register the serial number in the right place and then ss 30(6) and (7) would not apply at all

Personal Property Security Act, RSA 2000, c P-7
Section 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. (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.

(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.

Lanson v Saskatchewan Valley Credit Union Ltd, (1998) 172 Sask R 106 (CA)

Facts:

Lanson (plaintiff) loaned Nickel $16,000 to purchase a mobile home and Nickel granted a security interest in the mobile home and Lanson registered the financing statement.

- Lanson was aware than Nickel planned to rent or sell the mobile home

Nickel sold the home to Spruce Meadow Trucking Ltd ("SMT") but did not disclose this to Lanson. SMT didn't require financing and did not search the Registry

- SMT then sold the mobile home to Rempel, who obtained financing from Credit Union (defendant)
    - Credit Union registered a financing statement claiming a SI in the mobile home

Lanson discovered the mobile home was sold and attempted to seize it, and the Credit Union resisted.

- Lanson then brought action to find the priority between the parties.

Procedural History:

The Saskatchewan Court of Queen's Bench concluded Lanson didn't authorize the sale and was not in the ordinary course of business under s30(2) such that the Lanson took priority.

Issue:

Does a security interest of the security holder authorize a debtor to sell the goods as contemplated under the PPSA? If not authorized, was it in the ordinary course of business?

Rule:

Section 28 of the (Saskatchewan) *Personal Property Security Act*

(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 authorizes the dealing

Analysis:

The debtors right to deal with collateral is subject to the security interest granted to the creditor unless the secured party authorizes expressly, or by implication, the dealing with the security. Lanson's security interest was property perfected and was prior to the registration by the Credit Union, so section 20 will not apply

- The only way Credit Union can succeed is if the Credit Union can demonstrate Lanson lost priority from section 28(1). Credit Union will lose (ie, take the goods subject to the security agreement) unless they can assert one of the buyer rules.
- Lanson knew that Nickel was buying the home to rent or resell it – the issue thus becomes whether the agreement or conduct of Larson authorized the sale

Section 28(1) allows Lanson to authorize the debtor to deal with the secured creditor but does not contemplate authorization to a third party to deal with the collateral. Was the authorization subject to the precondition of payment in full?

- The authorization to sell must be given before the sale. Lanson clearly gave Nickel authority to deal with the security, including resale. The failure to pay the secured creditor does not invalidate the sale to the buyer
- By authorizing the dealing, security interest does not continue and title passed to the buyer. Do not need to consider section 30(2) or ordinary course buyer rule at all.
  - Credit Union thus acquired the collateral without any security interest and they thus have priority over Lanson

Conclusion:

Sale was expressly authorized

Hold, Order:

Appeal allowed

Ratio:

Conditional Authorization is sufficient to satisfy section 28(1)(a), even if the condition is not executed

The idea of a conditional authorization (allowing the collateral to be sold or leased) is sufficient to ground authorization under s28(1)(a) and thus the secured party did not need to be notified of the sale for the buyer to take free.

- What if the authorization was not granted?
  - In this case, you would have to look to the ordinary course business rule under s30(2).
    - The court didn't even need to go here in this case
  - First question: was this in the ordinary course of business of Nickel?
    - Obviously yes
  - Second question: did the buyer have knowledge that this would breach the security agreement
    - Obviously no
      - Needs to be knowledge of the *breach* not just knowledge of the security agreement.
      - Banks will often authorize ordinary course sales with knowledge of the security interest
  - So s30(2) engaged and Spruce Meadow Trucking takes free
  - But then what happens with the sale to Rempel?
    - We apply the Shelter Principle: if the buyer has good title, they are able to pass title on unencumbered and all subsequent buyers could gain good title as well
      - This is not a PPSA principle, just a principle of property law
    - If you have a person who acquires the goods free of a security interest, the security interest is essentially cut off so the first buyer is able to pass title free of encumbrance to any other party
    - So if Spruce Meadow Trucking took free, they would be unencumbered to sell it to anyone else, in this case Rempel, and Rempel could take it even if they knew of the security interest
      - So if Rempel grants to Credit Union after this, they are free to do so
      - Lanson was cut off from the moment Nickel sold to Spruce Meadow Trucking
- What if the s 30(2) criteria were not met?
  - Assuming Spruce Meadow Trucking sold in their ordinary business, section 30(2) still would not apply
    - This is because the buyer only takes free of the security interest of the seller.
    - Rempel did not buy from the one granting the security interest, it bought from the first buyer, Spruce Meadow Trucking

- This means s30(2) would not apply Rempel would not take free

Say a security agreement expressly prohibits the debtor from selling the collateral without the secured party's authorization. What if the debtor sells the goods to a buyer in the ordinary course of business but the buyer was aware of the security agreement and the debtor falsely informed the buyer that the secured party authorized the sale?

- Step 1: Was there authorization? [section 28(1)(a)]
    - No there was not, so s28(1)(a) cannot apply
- Step 2: If not authorized, was the sale in the ordinary course of business? [section 30(2)]
    - Recall that s 30(2) allows *either* authorization or the ordinary course business rule to apply, so even if there was no authorization the buyer could still take free under s 30(2).
    - In this case, it was in the sale of business
        - If it was not, then the buyer would not take free, end of story
- Step 3: If it was in the ordinary course of business, did the buyer know the purchase was a breach of the security agreement?
    - The buyer in this case knew that authorization was required
    - But they did not know the purchase was a breach since they were told by the debtor there was authorization.
        - Since the buyer was misled, they did not have the requisite knowledge
        - Mere knowledge of the security agreement is insufficient
    - So, the buyer would take free
- Say that the buyer, having taken free, then sold it to buyer 2 who was aware that the debtor had given a security interest and that the sale was unauthorized.
    - Under the shelter principle, buyer 2 would also take free of the security interest since that interest was cut off by the previous sale and buyer 1 is able to pass on title unencumbered.

Say a security agreement similarly provides that the debtor shall not sell the collateral without the written consent of the secured party. The debtor then sells the collateral without authorization and outside the ordinary scope of business. The buyer then sells to buyer 2 for $850 to use in buyer 2's home. Neither buyer knew of the security interest at all.

- Step 1: was there authorization?
    - No
- Step 2: if no authorization, was the sale in the ordinary sale of business?
    - No it was not
- Step 3: if in the ordinary sale of business, did they have knowledge
    - Not applicable
- Step 4: do other cut off rules apply?
    - Yes, s30(3) applies since:
        - The goods were less than $1000
        - Buyer 2 was without knowledge
            - There is no limitation as there is in s30(2)
        - Buyer 2 acquired as consumer goods
- This means that buyer 2 takes free of the security interest under s30(3), but buyer 1 did *not* take free of the security interest
    - Practically, in cases like this, the secured party has lost their ability to enforce, but they can still bring an action against the person who interfered with your immediate right of possession (in this case, that would be buyer 1 since they did not take free)
        - So the secured party would lose to buyer 2, but could sue buyer 1 for conversion and obtain the value of the collateral as damages
            - This would be a personal right of action since there is no property right in the oven

Say a construction company granted a security interest to CIBC for all present and after acquired property ("PAAP") to secure a loan. CIBC then properly registered the financing statement and included the serial numbers of all bulldozers and excavators. Then the company acquires a new excavator and sold it, along with a bulldozer, to a buyer. The buyer did not search the registry and did not know of CIBC's interest.

- Step 1: Was there authorization?
  - No
- Step 2: If not authorized, was this a sale of goods in the course of ordinary business?
  - No, it is equipment
- Step 3: If in the ordinary course of business, was the buyer without knowledge?
  - Not applicable
- Step 4: Do other cut off rules apply?
  - Section 30(6), (7): serial number goods
    - Are the goods held as equipment? Yes
    - Were the serial numbers correctly registered?
      - For the bulldozer yes
      - Not for the after acquired excavator
    - This means that the buyer takes free of the excavator, but not the bulldozer
  - The company could have saved the excavator by registering a financing change statement with respect to the new excavator and register its serial number properly
    - Even if the debtor might have been required by contract to fulfill that obligation to tell them when they bought new goods, this would not change the priority rules if it was not done.

In the *Bank of New Zealand v Waewaepa Station 2002 Ltd* case, the New Zealand courts adopted the Canadian version of the PPSA.

- In this case, Te Rimu granted a GSA to the Bank of New Zealand on all property
- Then Te Rimu sold 1004 ewes and 1347 lambs to Waewaepa quickly due to a drought
- The court answered three questions:
  - First: Can the BNZ sue Waewaepa in conversion?
    - Tort of conversion requires substantial interference with ones property
    - Asserting ownership of property with a security interest on it is substantial interference
    - This is a strict liabilty tort, so you commit it with or without innocence
    - Once the party makes good on judgement (pays), then they acquire rights in the property (like in a forced sale)
    - The secured party (BNZ) won't have possession, but the breach of the GSA is a default, which gives an immediate right to possession for BNZ
      - This was then interfered with by Waewaepa
      - So yes, the tort of conversion would be allowed
  - Second: Was Waewaepa an ordinary course buyer under (NZPPSA) s 53?
    - Have to make 3 determinations:
    - 1. What was the ordinary course of business of Te Rimu?
    - 2. Was the sale of the sheep in the ordinary course of business of Te Rimu?
      - Not a typical sale, the livestock was dealt with quickly due to loss of value since Te Rimu couldn't afford to feed them from the drought
      - The fact that it was forced by insolvency pushes it outside the normal course of business
    - 3. Did Waewaepa know that the sale of the sheep was a breach of the GSA?
      - Waewaepa would have known the terms of the security agreement (and thus that the sale was a breach) since the directing mind of Te Rimu was the same as that of Waewaepa
  - Third: Did BNZ authorize the sale under (NSPPSA) s 45?

- The policy around *Lanson* was to protect interests of innocent purchasers
- Consent to sell in the debtors own name "provided" that the seller remits by its own cheque to the bank is not a true conditional sales authorization
  - Such a control makes the buyer an insurer of acts beyond its control
- The purchaser would have no realistic ability to determine if the debtor really does use the proceeds to pay down the secured party at all so it cannot be authorization

Camco Inc v Frances Olson Realty (1979) Ltd, (1986), Sask R 161 (CA)

Facts:
Camco Inc (appellant) manufactures and sells washers, dryers, fridges and stoves. Muxlow was in the business of property development and management but had no retail outlets to sell personal property

- Muxlow was developing a condominium project in Regina. They planned to sell some units to third parties and some would be rented out to other individuals.
- Muxlow was required to furnish all units with all appliances
  - Muxlow arranged to purchase appliances from Camco and an Agreement was signed

Camco was unaware that Muxlow intended to transfer any interest in the appliances to third parties.

- A CSA was registered in the Registry and Camco delivered the appliances as requested

Frances Olson Realty ("FOR", defendant, respondent) provides property management services to the condominiums

- Individual unit owners were unaware that the appliances were encumbered
- Muxlow defaulted in its obligations under the CSA and Camco wished to seize all appliances

Issue:
Are the respondent buyers of household appliances, who purchased the same with the condominium units, protected under this section from a security interest created by their seller?

Rule:
Section 30 of the (Saskatchewan) *Personal Property Security Act*

(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against the seller or lessor or arising under section 29, whether or not the buyer or lessee knows of it, unless the secured party proves that the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement.

Analysis:
The major issue in this case is whether or not Camco (who has a potential security interest in the appliances) has priority over the individual condominium unit owners with respect to the major appliances located in individual units. The appellant argues the trial judge erred on various grounds:

1. FOR condominium unit purchasers were not "buyers" of the appliances as in s 30(1) of the PPSA, but merely as "agents"
   a. The Act does not define "buyer" or "sale". This means whether or not FOR is a buyer within s 30(1) is a question of fact for the trial court to determine.
      i. They should thus not be disturbed unless the standards of appellate review mandate it.
   b. In the Condominium Agreement, there is no support that Muxlow acquired the appliances for the respondents as their agent. Muxlow purchased the appliances from Camco and sold the appliances to FOR when sales of units were made
      i. This is passing of title from Muxlow to each respondent at a set price
         1. They were delivered to unit owners before Muxlow defaulted
   c. This ground of appeal must be rejected.
2. The sale of appliances was not "a sale in the ordinary course of business of the seller" in s 30(1) of the PPSA

a. Section 30(1) is an exception to the priority rules of the Act which protects a buyer from a security interest created by his seller even though the security interest is perfected and the buyer knows of it's existence (unless the buyer knows the sale violates the security agreement)
    i. The security interest remains good against the debtor and various third-party claimants but not good against *bona fide* purchasers in the ordinary course of business of the seller
b. Here, FOR unit purchasers were unaware of Camco's security interest and thus the scope of the limitation ("ordinary course of business") is not important.
c. Section 30(1) represents an outgrowth of the notion that a "buyer in the ordinary course of trade" should take free of a security interest
    i. The protection of these buyers rests on principles of justice and commercial utility
    ii. In most cases the seller will pay the secured party, but whether he does or not is of no concern to a s 30(1) buyer
d. Section 30(1) is primarily for inventory, but not so limited by wording or implications
    i. The question is not whether the appliances are inventory, but whether the buyer is a buyer of goods sold "in the ordinary course of business of the seller"
    ii. The trial court must consider the business of the particular seller rather than limit the inquiry to the ordinary course of business in the trade or industry as a whole
        1. This is a question of fact and the phrase "buyer of goods sold in the ordinary course of business of the seller" should be given a broad interpretation in order to carry s 30(1) out
e. This ground of appeal must also be dismissed

Conclusion:

Respondents were buyers in the ordinary course of business

Hold, Order:

Appeal dismissed

There are always tricky cases when considering "the course of regular business". They are always fact specific. To make this determination, you need to consider what kind of business the debtor does. Courts have struggled with a few particular industries:

- Short term rental companies for landscaping
    - If the company also sells companies in 10% of their business, but advertising is mostly for rental purposes, are sales regular business?
        - Courts have said yes this is in the ordinary course of business
        - So, even if it is a small part of their business, it is still ordinary
- Used Car dealerships
    - Some cars are there for a while without ever being purchased
    - So the dealership will sell them to another dealership periodically
        - Have to find a fact specific determination of what the business practices of the debtor are and if it falls in the ambit
        - If the sale was at a regular frequency or not
- Manufacturing Firms
    - Uses equipment but then occasionally will sell them off
        - Again, it depends on if the sale was in the regular periodic sales or not

Royal Bank of Canada v Wheaton Pontiac Buick Cadillac GMC Ltd, (1990) 88 Sask R 151 (QB)

Facts:

Royal Bank of Canada ("RBC") entered into a security agreement with Key West Motor Products ("Key West") whereby RBC got a security interest in Key West's inventory, particularly a 1986 Fiero

- RBC registered the interest in the Registry but the Fiero was inventory at the time of the registration and thus the Bank was not required to register the serial number

Key West went into liquidation and their inventory was sent to an Auction Mart and most of which were sold, but the Fiero (and 3 others) were not.

- Mr. Stieben of K&R Kustom Autoboy entered into a security agreement with Key West to purchase them
- Prior to this, Mr. Stieben has an arrangement with Mr. Deschner (respondent) where Deschner would provide money for Stieben to purchase and fix up vehicles which would eventually be sold and the profits divided.
    - This arrangement was done when Mr. Deschner agreed to purchase the Fiero from Mr. Stieben (after serial number searching the AB and SK Registries, which did not disclose RBC's interest)

Deschner then bought a Grand Am from Wheaton Pontiac (defendant) with a trade of his Fiero free of encumbrances. Wheaton then sold the Fiero to Ms. Morin.

- RBC seized the Fiero from Ms. Morin and claimed it was subject to the security interest
    - Wheaton had to give RBC $7,000 so Ms. Morin could get the car back

RBC applied to the courts for a determination of the order of priority for the Fiero

Issue:
Did the Fiero, subject RBC's security agreement, change from "inventory" to "consumer goods", thereby requiring RBC to register the serial number to maintain perfection?

Analysis:
There is no provision in the *PPSA* or *Regulations* where the secured party must change registration when goods change from one category to another. This means that RBC's perfected security interest has priority over both Key West and Dreschen *unless* the transaction (between Key West and Stieben) was made in the ordinary course of business.

Conclusion:
Change immaterial to registration

Issue:
If no, was the Key West-Stieben transaction made "in the ordinary course of business" under the protection of s 30(1) of the *Personal Property Security Act*?

Rule:
Section 30 of the (Saskatchewan) *Personal Property Security Act*

(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against the seller or lessor or arising under section 29, whether or not the buyer or lessee knows of it, unless the secured party proves that the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement.

Analysis:
"A sale in the ordinary course of business" is one that is consistent with the "general commercial practice". This is a question of fact, depending on the facts of the case.

- Factors to consider (*Fairline Boats Ltd v Leger*):
    - whether the sale was made at the normal place of business, the quantity of the goods sold, and the price of the goods, having regard to goods of a comparable nature.
- Key West had no place of business when they sold to Stieben since the inventory was in the Auction Mart
- K&R was not in the business of dealing in automobiles, nor did it have a license to do so (not inventory transaction between dealers)
    - The 4 automobile transfer was not "general commercial practice"

- Thus, Stieben acquired the Fiero subject to RBC's security interest, as did Deschner and so too Wheaton Pontiac
  - Section 30(1) offers Stieben, and thus Deschner, no protection
  - Deschner warranted clear title of the Fiero to Wheaton Pontiac
    - This was thus a breach of warranty such that Wheaton is entitled to recover from Deschner in the amount of Wheaton's liabilty to RBC (which arose from Wheaton's breach of warranty to Ms. Morin)

If s30(1) was to protect all consumers, there is a gap in the provision.
- Morin was protected by buying from an authorized dealer.
- Wheaton protected itself by obtaining warranty of clear title from Deschner.
- Deschner (who conducted a serial number search) would be left out to dry without the ability to collect from Stieben or Key West

"there is a lurking danger to purchasers of automobiles secured by lenders as inventory, but it is for the legislature, not the courts, to remedy this deficiency"

Conclusion:

Not in "ordinary course" and thus no s30(1) protection

Hold, Order:

RBC has priority

This case is complicated because the amount of transfers:
- Key West to Stieben: not in regular business
- Stieben to Deschner: not in regular business
- Deschner to Wheaton: in regular business
- Wheaton to Morin: in regular business

Because Wheaton did not grant the security interest, one of the upstream sellers did. If Wheaton did grant the interest, then Morin could take free
- But since it was Key West that granted the interest, Morin took subject to it
  - Wheaton was a good company since they took the vehicle back and reimbursed Morin
- Only Stieben could take free under s 30(2) if they didn't know it was a breach of the GSA
  - But it was outside the course of business because it was through the auction rather than through a true purchase
  - If it was in the regular business, Stieben would have taken free and all subsequent buyers could buy it unencumbered whether or not the purchases were in regular business since the cut off rule applied and no interest would fall into any subsequent buyer
- So, if Stieben was in regular business, Morin would have prevailed

On a practical note, if Wheaton didn't reimburse Morin, Morin would be able to sue Wheaton for breach of contract (breach of implied warranty of title unencumbered).
- Wheaton could then sue Deschner, Deschner could sue Stieben
  - Technically, Stieben could sue Key West, but Key West was insolvent so Stieben would have been the big loser in any case
  - As a buyer, it is better to take free from s30(2) so you don't have to chase damages up the list of buyers through the courts.

Most issues on s 30(2) are to do with what is in the "ordinary course of business". But in *Royal Bank of Canada v 21600 Alberta Ltd,* the Saskatchewan Court of Appeal analysed if the transaction was a "sale"
- Debtor company sold furniture to customers, and they did so in the ordinary course of business, but it was unclear if it was a sale since some customers would pay in full when the store wouldn't have the product in stock
  - Sometimes the buyers were owed refunds
- The SKCA interpreted a "sale" as one that passes from the seller to the buyer as per the *Sale of Goods Act*

- The distinguishment between "sale" and an "agreement to sale where property has not yet passed hands" blurs this line
    - Parties can contract to specify when sales occurs, though most won't
        - So without a contract provision, the *Sale of Goods Act* gives a presumption
        - Where goods are identified at the time of contract, the general rule is that the sale occurs the moment the contract is created, not when the goods are transferred
        - Where goods are not identified (called "unascertained goods"), it is when there is an unconditional appropriation of the contract. Where earmarking of specific goods used for the contract is irrevocable, that is when the sale occurs
            - If the item is sold by description, it is when the seller tenders the contract good for delivery (tender of delivery is when property passes for unascertained goods under sales law)
    - The SKCA uses these definitions
- So, when the seller does not have the goods on hand at all, there is no way there was a sale since there is no subject matter, so property could not pass to the buyer snice the seller doesn't even have them yet
    - Even if the seller has the goods, sales law kicks in and buyer may not automatically win
    - If you say "I would like this particular [couch]", it would be ascertained
        - An identical couch in stock would not be unascertained, but one that requires a tender to constitute a sale as per the *Sale of Goods Act*
    - This all makes sense – if property hasn't passed, you have nothing but a contractual right against the seller
        - You can sue for damages, but you don't have any property rights until it passes to you as per the *Sale of Goods Act*.

Spittlehouse v Northshore Marina Inc, (1994), 18 OR (3d) 60 (CA)

Facts:

Spittlehouse (plaintiff) entered into a contract with Northshore Marina (defendant) for a boat. Spittlehouse paid 90% of the purchase price and were to pay the balance on delivery of the boat as provided in the contract of sale.

- The contract of sale provided that title to the boat shall be "transferred to the buyer when the buyer has made payment in full for the equipment"
- Transamerica has a perfected security interest for assets of Northshore (including the boat)

During delivery, Northshore advised Transamerica that Northshore failed to pass on trust moneys. From this, and a general default by Northshore, Transamerica perfected its security and seized the boat in question.

- Spittlehouse then brought action for the boat

Issue:

Was the boat "sold" in order to engage section 28 and allow Spittlehouse to take free of Transamerica's security interest?

Rule:

Section 28 of the (Ontario) *Personal Property Security Act*:

(1) A buyer of goods from a seller who sells the goods in the ordinary course of business takes them free from any security interest therein given by the seller even though it is perfected and the buyer knows of it, unless the buyer also knew that the sale constituted a breach of the security agreement.

Analysis:

Transamerica had a perfected security interest against the boat and Spittlehouse has no title to the boat since the right was merely contractual, not one of property

The contract was in the ordinary course of business as Northshore was a boat dealer. Spittlehouse had no idea of the Transamerica-Northshore agreement
- The only issue is whether the plaintiffs were buyers of the boat and if Northshore was the seller
  - On the evidence, both were
- The Act has no definitions, but in common parlance, the transaction was clearly a sale (with title withheld until purchase price is fully paid)
  - This protects the seller until full payment and no more
  - It is only valid for the purchasers not demanding transfer of title until all purchase price is paid
    - It cannot be regarded as anything but a sale

As such, Spittlehouse is entitled to protection under s 28(1)
Conclusion:
Sale complete; Spittlehouse takes free
Hold, Order:
Appeal dismissed

Ratio:
Sale occurs when goods being purchased are sufficiently identifiable

In this case, the ONCA rejects the SKCA logic in *RBC.* They find that using the SKCA clause wouldn't work since property had not yet passed to the buyer, so the buyer cannot claim the ordinary buyer course rule, giving it priority.
- It is not when property sells under the *Sale of Goods Act,* but when the goods are sufficiently identifiable.
  - This seems fair since 90% of the payment was made
  - Under the *Sale of Goods Act,* Spittlehouse wouldn't have anything
- So, the ONCA uses this approach so the secured parties interest was cut off.

Things were pretty unclear between the *RBC* and *Spittlehouse* cases. Luckily, the *Calidon* case solved the impasse:

Calidon Financial Services Inc – Calidon Equipment Leasing v Magnes, 2021 SKCA 106

Facts:
Calidon Financial Services ("Calidon", plaintiff) enters into lease for a tractor to Valley Side Dealership. Valley Side then sold it to Magnes (defendant).
- Valley Side incorrectly told Magnes that Calidon repossessed the tractor and that Valley Side had purchased it from Calidon, when in reality it was still just a lease
- Magnes then looked into the Personal Property Registry, but was unable to find the Financing Statement since Valley Side had given him the wrong serial number.
  - Valley Side did this so Magnes would not find Calidon's registration

Valley Side entered into a Secured Installment Purchase Agreement with Magnes that included a Title Retention Clause ("TRC") where ownership would not pass until the full purchase price was paid by Magnes to Valley Side
- Calidon eventually wished to exert it's security interest but Magnes resisted, so Calidon brought action.

Issue:
Did Valley Side sell the tractor to Magnes to enforce the cut off rule under s 30 of the PPSA?
Rule:
Section 30 of the (Saskatchewan) *Personal Property Security Act*:

(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 that is given by the seller or lessor or that arises pursuant to section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement pursuant to which the security interest was created.

Analysis:

The issue in this case boils down to whether the TRC delays passage of property to the buyer until the full price is paid.

- If this is the case, as Calidon asserts, then section 30(2) will not apply and Magnes won't take free, allowing Calidon to enforce
- If this is not the case, section 30(2) is engaged and Magnes can take free

Previous jurisprudence of this course in *RBC* says we should look to sales law for whether the item was indeed "sold", we must follow a different analysis given the TRC

- Where there is a provision in the contract, such as a TRC which states that property does not transfer until the full purchase price is paid, it only creates a security interest for the seller
  - It should *only* have impacts on the security interest
  - It should *not* delay the passage of property to the buyer
    - Even if the full purchase price has not been paid
- According to sales law, the tractor in this question was specific, so title transfers the moment the contract was made
  - The TRC will not influence this since it only impacts the security interest
  - As such, buyers who have not yet paid the full purchase price can still take advantage of s30(2) and take free, TRC notwithstanding.

Conclusion:

Magnes purchased the tractor under s30(2) and takes free

Hold, Order:

Appeal dismissed

Ratio:

TRC's can be seen as only creating the security interest and not impacting or delaying the passage of property, notwithstanding the full purchase price being paid or not.

This was a solution to the previous impasse. Now, even where there is a Title Retention Clause, the sales law approach from *RBC* can be used to determine whether the contract has formed to solidify the sale (and thus engage s 30(2)).

- Going forward, title retention clauses will only be used to influence the security interest, but it won't have an impact on the passing of property unless the wording expressly says so
- In this case, the SKCA said the agreement only had 3 purposes:
  - Constituted an unconditional sale of a specific and deliverable good under which the purchase price had been paid in full by deposit
  - Constituted an assignment to FCC for financing of all of Valley Side's rights and interests in the tractor as the seller
  - Created a PMSI in favour of the financer, FCC. The TRC does not have a legal impact, but it is a matter of form, not substance since it granted a security interest in the tractor, but does not detract from the plain meaning to create a PMSI for the Agreement

CHAPTER 8: COMPETITION WITH SECURED PARTIES

When one or more secured parties are competing with eachother, the PPSA creates a scheme where there is a general priority rule that is residual in the sense that it applies unless some other special rule is applicable.

- But there is also a number of exceptions to the priority rule as well. Unless one of these exceptions apply, we apply the "General Priority Rule"
    - The most important special rule pertains to purchase money security interests ("PMSIs")

<u>The General Priority Rule</u>
Section 35 encompasses the residual general priority rule. Section 35(1) is broken down into three parts, all related to the perfection of the security interest
- Section 35(1)(a): Perfected SI vs Perfected SI
    - The first party to complete a perfection step wins the competition
- Section 35(1)(b): Perfected SI vs Unperfected SI
    - The perfected party will win the competition over the unperfected party
- Section 35(1)(c): Unperfected SI vs Unperfected SI
    - The first party to have their security interest to attach will win the competition

NB: Section 35(1)(a) does *not* create a first to perfect rule. It makes a first to first to register rule. If a secured party registers a financing statement at T1 but their security interest actually attaches at T3, it would still have priority over a secured party who registered and attached at T2
- Even if SP2 is the first to perfect, SP1 has priority since they registered first
    - However, SP1 will only have priority if the security interest has actually attached at the date of conflict. If it hasn't attached, they have no security interest at all, regardless if they were first to register or not
- Technically this can also apply to registration by possession (ie, first to possess regardless of attachment), but this is quite rare.
    - In essence, it is the first to complete a perfection step that gets priority, even if attachment and perfection come after another's.

Other section 35 provisions:
- Section 35(2): when something is continuously perfected, it is being treated at all times as having been perfected by the method in which it was originally perfected.
    - If SP perfects by possession at T1, then SP perfects by registration at T2, and then gives the debtor possession at T3, when would the first be perfected?
        - T1 since the perfection is continuous between possession and registration
    - If SP perfects by possession at T1, then the debtor gets possession at T2, and then SP perfects by registration at T3, when is the time of perfection?
        - T3 since the continuity is broken – possession was lost before registration occurred, so there is a break in continuity at T2
            - For priority purposes, we would use T3.
        - However, if the time between T2 and T3 was within the temporary perfection period under s 26 (15 days if document of title, instrument or investment property), then the continuity is not broken
            - First by possession, then by temporary, then by registration
            - For priority purposes, we would use T1 again

- Section 35(3): original collateral perfection extends to proceeds

- Section 35(4): the security interest for equipment as serial number goods need a financing statement relating to the security interest and containing a description of the goods
    - This means a SI in goods held as equipment is not registered in the eyes of s 35 unless a financing statement related to the security interest and containing a description of the goods by serial number is registered

- Section 35(5): provides basic rule that the priority rule under s35(1) will extend to future advances as well as original monies

- Section 14(1) provides that a security agreement can cover future advances, and under s35(5) they are given the same priority rule as original monies (not treated differently)
- Say SP1 advances $100 at T1, SP2 advances $50 at T2, SP1 advances a further $50 at T3
  - SP1 has priority over both the $100 and $50
  - SP1 having knowledge of SP2's advance is irrelevant (differs from common law)
- But recall that future advances under s 14 are only permissive – there needs to be a future advances clause in the security agreement
  - If the clause is included, it will get priority over all advances (future or original)

- Section 35(6): deals with competition between a secured party and a writ holder
  - Notwithstanding the secured party registering first and the writ coming second, the secured party cannot make a future advance and claim priority over that writ if they knew of that writ
  - Ensures that the writ creditor who has registered is not going to take priority over future advances
  - However, if the secured party knew of the writ via notification, the secured party is released of the binding obligation to make future advances as per s 14(2).
    - Say SP1 advances $100 at T1, Writ advances $100 at T2 and SP1 advances $50 at T3 with knowledge of the writ at T2
      - Then SP1 will lose priority to the writ for the $50 (future advance) because it had knowledge
      - This means a writ holder will prevent the SP having priority over future advances if they give notice to the SP
        - Incentivizes writ holders to always provide notice

Personal Property Security Act, RSA 2000, c P-7
Section 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
  (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

Examples:

- SP1 properly registered a financing statement against a Debtor in all PAAP on March 1.
  - Debtor then gave SP2 a security interest in all of their PAAP, which SP2 registered on April 13
  - Debtor then granted to SP1 a security interest in all present and after acquired accounts.
  - The ranking of the claim would be:
    - SP1 would only have priority over SP2 for the accounts.
    - SP1 only has a SI in the accounts
      - SP1 filed a financing statement in all PAAP, but no SI was given to them until May 1, when the Debtor gave a SI in accounts
      - SP2 filed a statement in all PAAP, and a SI was given on April 1
    - But recall that section 35 grants a priority to the first to *register* not the first to *perfect*
      - So SP1, being the first to register, will have priority over SP2 in all property they actually have a SI in
      - In this case, that would only be the accounts
  - Say SP1 was given a SI in all of the Debtors PAAP on June 1, and SP1 registered a financing statement against all PAAP that same day.
    - SP1 would have priority in relation to all assets
    - We know that registration can cover more than one security agreement, so the March 1 financing statement was sufficient to cover the June 1 security interest – the June 1 financing statement was unnecessary
    - Since SP1 registered first (March 1), and the SI now exists for all PAAP, SP1 has priority over SP2 for everything since they registered second (April 1) even though their SI attached (April 1) before SP1 (May 1 accounts and June 1 everything else)
- Debtor gives a possessory interest in a warehouse receipt to SP1 on May 1
  - Debtor gives a security interest in all of the Debtors PAAP to SP2, who registers it properly on June 1
  - SP1 registers the financing statement for all PAAP on July 1
  - On July 5, SP1 redelivered the warehouse receipt to the debtor
    - SP1 would still have priority over the warehouse receipt
    - This is because there is a continuity of perfection under s 35(2): since it was perfected by possession, and then by registration the perfection step date counts from the date of possession
      - Even if SP1 released possession on June 25 (before registration on July 1), SP1 would still win since there was no breach in continuity
- Debtor gave a SI in all PAAP to SP1, who registers on October 10. SP1 did not advance funds until December 15

- On November 10, W obtained a writ against the debtor and registered it
- On November 30, debtor have SP2 a SI in all PAAP, which SP2 registered December 5
  - SP1 searched the registry prior to advancing the funds
    - W has top priority, SP1 is second and SP2 third
      - There was no notice made by SP1 originally. So, the future advance on Dec 15 was subordinated to the writ creditor as per s 35(6) for future advances
      - SP1 searched so had knowledge of SP2 and W's interests
        - But knowledge does not matter compared to SP2

- Debtor gave SP1 a SI in all PAAP, which SP1 registers on January 10, 2016 with a 5 year registration life
  - Debtor then gives a SI to SP2 for all PAAP, which SP2 registers on April 1, 2020
  - On May 10, 2021 SP1 registered another financing statement with the same information as the first
    - SP2 has priority
    - The continuity of perfection only applies when the method of perfection changes (ie, from possession to registration)
      - It does not apply from a financing statement and then a subsequent one to claim priority if there is a lapse in the original one
      - Since the SP1 interest lapsed, it was dead and no priority continued
      - SP1 should have registered a financing change statement before the lapse date to continue its perfection
- Debtor gave SP1 a SI in a drill press, which SP1 registered on Jan 10, 2016 with a 5 year life
  - Debtor have SP2 a SI in all PAAP, which SP2 registered on April 1, 2020
  - On May 2021, the debtor voluntarily gave possession of the press to SP1
    - SP2 would still have priority since the lapse occurred before possession was given – there cannot be any continuity
    - If the debtor gave possession before January 10, 2021, the SI would have lasted after the lapse and SP1 would have priority.

KBA Canada, Inc v Supreme Graphics Limited, 2014 BCCA 117

Facts:

3S Printers gave a security interest to Supreme Graphics ("SG", defendant, appellant) and SG registered on May 31, 2012.

- Wells Fargo then acquired a printing press of 3S through a purchase money security agreement, but then transferred it's security interest to KBA Canada ("KBA", plaintiff, respondent).
  - In May 2010, and in an error, Wells Fargo discharged the registration; without authority, they registered a financing change statement
  - The notice of discharge was not sent to KBA, so KBA was unaware of their loss of registration

KBA found out about the loss of registration in July 2010, beyond the 30-day lapse period under s35(7) to re-register their security interest and keep the original registration date

- KBA brought action to enforce their priority against SG

Procedural History:

At trial, accepted KBA's priority as SG had a subordinate claim, notwithstanding the lapse

Issue:

Does KBA have priority over Supreme Graphics for the press, notwithstanding the discharge of registration by Wells Fargo?

Rule:

Section 35 of the (BC) *Personal Property Security Act*:

(7) If … a registration has been discharged without authorization or in error, and the secured party re-registers the security interest not later than 30 days after the … discharge, the … discharge does not affect the priority status of the security interest in relation to a competing perfected security interest that immediately before the … discharge had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the … discharge and before the re-registration

Analysis:

When Wells Fargo discharged the registration, KBA lost its registration such that the security interest was not even registered anymore.

- Although the PPSA provided a method by which KBA could have re-registered it's security interest over SG, it failed to do so within the 30 day period.
  - The first to register rule of priority applies
  - The trial judge misinterpreted the PPSA; s35 does not give the court the ability to determine priority based on their own desires – the priorities in the PPSA need to be respected.
  - It would completely override the system if courts decide this
    - Keeping costs down for red tape reduction, efficiency

KBA also contends they have a claim in unjust enrichment over SG

- This cannot be accepted since there is a juristic reason for the retention of the benefit
  - The PPSA intended that the competing secured party was entitled to claim priority if the re-registration did not occur within the stipulated time period.
  - It would be a windfall to allow them to claim unjust enrichment
    - Wells Fargo is in the wrong, but unjust enrichment and equity cannot be used to undermine predictability

Conclusion:

KBA lost priority with the discharge of registration.

Hold, Order:

Appeal allowed

Ratio:

Lapse of discharge of registration may cause a loss of priority, whether accidental or intentional.

A lot of this case depended on PMSIs (more to come in Chapter 9) which, in essence are given priority over all other security interests so long as it is registered properly. However, since the PMSI was discharged and not recovered within the 30 day period, the PMSI priority was lost

- Even if KBA was wronged by both Wells Fargo and the notice system of the PPSR, the BCCA said the PPSA cannot be read fluidly to give them priority when inconsistent with the clear rules in the PPSA
- There may be some remedy available to KBA against Wells Fargo, but it will not be in the PPSA

So, any lapse or discharge will lose a security interest if not recovered in the PPSA specified time limit – the courts have no power to edit this

Exceptions to the General Rule

Multiple Agreements

When multiple security agreements are at play, the description of collateral subject to a security interest is very important.

- Say SP1 is given a Security Agreement in all goods, but registers all PAAP at T1
- Say SP2 is given a Security Agreement in all PAAP, and registers all PAAP at T2
  - At this stage, SP1 would only have priority over the goods, SP2 would have priority over all else

- This is notwithstanding SP1 registering first
  - SP1 was overbroad in its financing statement. This is not an error, but it means it only has a security interest in goods
  - It cannot claim priority over all other property because it has no security interest in all other property, even if it registered first
    - Registration won't create a SI in property, only the GSA does that
- SP2 still has to be very careful here: they would have searched the PPSR and found the Financing Statement by SP1 claiming all PAAP
  - Even if SP2 knows that SP1 only has a claim in goods, because a financing statement can cover multiple security agreements, any future security agreements given to SP1 that broadens the collateral subject to the SI will be covered by the financing statement at T1
    - Since SP1 registered first, it will have priority over all collateral that is made subject to the security interest, regardless if the collateral is made subject to that security interest after SP2 registers
  - So, if SP1 is given a Security Agreement in all PAAP at T3, they will have priority over SP2 for all property

- Some may say this is patently unfair to SP2
  - SP2 does have a number of responses, but they are out of luck if there was another registration first in time
  - SP2 has the remedies under:
    - Section 50: Get the debtor to force SP1 to narrow it's registration in the PPSR before they give SP1 any more security interest
    - Section 40: Subordination agreement to allow the SP1 to take a subordinate interest in all property other than goods to SP2.
    - If SP2 is financing the acquisition of a new asset, they can use a PMSI, so long as the proper steps are taken

Agricultural Credit Corp of Saskatchewan v Royal Bank of Canada, (1994) 115 DLR 569 (SKCA)

Facts:

The Yaddofs had a beekeeping business. They secured a loan from Agricultural Credit Corp of Saskatchewan ("ACS", plaintiff) one shot loan for $90,000 on September 28, 1979.

- The ACS registered this loan in the Registry
- A subsequent agreement in 1981 covered all present and after acquired property

Royal Bank of Canada ("RBC", defendant) obtained a security interest in the loan

- RBC registered a GSA with the Registry in April 1982 that covered all property

On September 24, 1985, ACS enters into another GSA for a $130,000 loan but this security agreement did contain a future advances clause

- This GSA was immediately registered. ACS then made another loan of $30,000

The Yaddofs then default on all payments and ACS brought action to recover, but RBC argues they have priority over the 1985 loan.

Issue:

Does ACS or RBC have priority over advances made after 1981?

Rule:

Section 35 of the (Saskatchewan) *Personal Property Security Act*:

(1) If no other provision of this Act is applicable, priority between conflicting, perfected security interests in the same collateral is determined by the order of:
   (a) registration;
   (b) possession of the collateral by the secured party pursuant to section 24;
   (c) perfection;

whichever is earliest, and, as between unperfected security interests, by the order of attachment.

Analysis:

The initial loan of $90,000 was for the one-time loan – the security agreement did not cover future advances. The various sections of the PPSA cover the situation here in regards to future advances:

- Section 43(5): registration can cover more than one security agreement
- Section 35(1): competition between two parties is settled by who took the first perfection step, not who perfected first.
  - Since ACS registered before RBC, they took priority since it covered subsequent agreements
  - The registration in 1985 by ACS was unnecessary.

Conclusion:

ACS has priority over all loans

Hold, Order:

Motion dismissed.

Ratio:

Because future security agreements can be covered under one security agreement, priority will depend on first to register, not first to perfect.

This case is a lesson in divorcing from the idea of perfection being the important step for priority. It is true that a security interest needs to be perfected in order for the priority to cover the collateral, but it is the registration that will determine that priority

- RBC was just out of luck because they did not register first and the ACS agreement covered future advances since it's registration was overbroad
- Again, RBC seems unfairly treated
  - Their solution would have been to enter into an inter-creditor agreement.

Change of Name or Transfer

Section 51 of the PPSA applies to where the secured party knows of a change of name or transfer by the debtor. It is a priority rule rather than a perfection rule

- The security interest does not become unperfected when the name changes or is transferred
  - Rather, the secured party will lose priority against certain subsequently created interests unless it acts to change the financing statement in the PPSR
- This is because a change of debtor name will mean third parties are unable to find your name in the Registry
  - Do you put the risk on the Secured Party or the Searching Party?
  - The PPSA takes a middle ground: some risk on both
    - If the secured party is unaware of the name change, it is not effective so the risk will be on the searching party
    - If the secured party is aware of it, they have to register a financing change statement so the searching party is not detrimentally affected
      - Section 51 grants a 15-day period for the secured party to register this change after they become aware of the change
      - So long as the financing change statement is registered with the new name in the 15 days after acquiring knowledge, the secured party is OK
      - If the secured party does not register in the 15 day period, they will lose priority but the security interest is still perfected
        - Hence s 51 being a priority rule not a perfection rule
  - Moral of this is that if you are aware of a name change, amend it in 15 days. If not, s51 will subordinate your claim to others

- However, in that 15 day period (after knowledge but before amendment), if a buyer without knowledge buys the collateral, the 15 day period will not help the secured party
  - The buyer will take free by virtue of the special buyer rule in s30(5) not s 51
- Say a perfected security interest arose at T1 and the SP became aware of the debtor's name change at T2. The 15-day period lapsed at T3 and then the SP amended the registration at T4
  - The secured party risks losing priority to people who acquire their interest in that gap between T3 and T4
  - If there is a competition with another party between T2 and T4, that secured party will prevail over the SP
- Lets say SP1 registers a financing change statement 10 days after learning of the change and SP2 registers its interest in that 15 day period
  - If SP1 registers a financing change statement in the 15 day period, it won't lose priority
  - It only loses priority if it does not take that step to register a financing change statement that its vulnerability will be on display for those who acquire their interest in the gap
    - If SP1 registers on Day 20 and SP2 registers on Day 14, SP2 will win
- Say there is a competition between SP1 and a buyer without knowledge, where secured party amends the financing statement in the 15 day window
  - Buyer without knowledge is not in the ordinary course of sale
  - The buyer will win even if not in the gap period
    - This isn't under s 51 but the buyer rules
    - If there is a temporary perfection (or grace period in s 51), a buyer without knowledge will win out
    - So, this s 51 grace period wins against another secured party, but not a buyer without knowledge or trustee in bankruptcy.

Whenever there is a name change, should immediately send red flags to go to s 51
- Or if there is a transfer and the buyer does not take free.
- If the secured party knew of the transfer, then the secured party has to do something – amend by recording the name of the transferees in the Registry so someone searching the transferee would still find the security interest.

Examples:
1. D gave SP1 a security interest in all of D's PAAP, which SP registered on August 15
   a. D gave SP2 a security interest in all of D's PAAP, which SP2 registered on September 5
   b. On October 10, D legally changed its name which SP1 learned about on November 15
   c. On December 20, SP1 filed a financing change statement that added the new name
      i. Failure by SP1 to amend within the 15 day grace period under s 51(3) does not lose perfection, it only subordinates SP1s claims to security interests that arise after the time SP1 learned of the name change up until the time SP1 amended the registration.

2. D gave SP a security interest in all of D's PAAP, which SP registered on August 15
   a. On October 10, D legally changed its name which SP learned about on November 15
   b. On November 20, D sold the goods to B, who did not know of SP's interest
   c. On November 25, SP registered a financing change statement that added the new name to the registration.
      i. B would take free of SP's security interest
      ii. Section 51(3) would not give priority to the buyer since non secured parties must acquire their interest in the period from the end of the 15 day grace period up until the time of the amendment
      iii. But, the temporary perfection rule in s30(5) applies and protects a buyer without knowledge who buys goods during the 15 day grace period.

3. D gave SP a security interest in all of D's PAAP, which SP1 registered on August 15
    a. On October 10, D legally changed its name which SP1 learned about on November 15
    b. On November 20, D gave SP2 a security interest in all PAAP, and SP2 registered that day
    c. On November 25, SP1 registered a financing change statement that added the new name to the registration.
        i. SP1 would have priority since SP1 amended in the 15 day grace period and therefore won't lose priority under s 51(3)

4. D gave SP a security interest in all of D's PAAP, which SP1 registered on August 15
    a. On October 10, D legally changed its name which SP1 learned about on November 15
    b. On November 20, D gave SP2 a security interest in all PAAP, and SP2 registered that day
    c. On December 10, SP1 registered a financing change statement that added the new name to the registration.
        i. SP2 can assert priority since SP1 did not amend in the 15 day grace period and therefore won't get the protection under s 51(3)
        ii. SP2 can assert priority over SP1 if its interest is registered or perfected anytime between the acquisition of knowledge by SP1 and amendment by SP1's registration
        iii. NB: The interests of non-secured party claimants only prevail if they arise in the period that runs from the end of the 15 day grace period to the time of amendment
            1. Therefore, if the competing priority was a trustee in bankruptcy in respect of a bankruptcy that occurred during the 15 day period, SP1 would prevail even though SP1 failed to amend within the 15 day period

Royal Bank of Canada v Head West Energy Inc, 2007 ABQB 143

Facts:

Harrison Western (defendant) entered into 4 trailer leases with Wells Fargo on April 23 and May 10, 2004. Wells Fargo then registered the leases in the Registry under the name "Harrison Western"

- Harrison Western then amended it's name to "Head West Energy Inc" on July 8, 2004.
- Wells Fargo became aware of the name change on October 18, 2005, and amended their registration

The Royal Bank of Canada ("RBC") then loaned money to Head West and secured a GSA, registering it with the name "Head West" on November 4, 2004

Issue:

Did Wells Fargo have knowledge of the name change prior to October 2005 to subordinate its claim against RBC?

Rule:

Section 1 of the *Personal Property Security Act*

(2) For the purposes of this Act

(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 of the corporation

Analysis:

When a party obtained knowledge, or constructive knowledge, of a name change is a question of fact. This requires looking at the specific facts of the case.

- In this case, three credit applications were submitted to Wells Fargo on behalf of Harrison/Head West on June 21, 2004
  - These applications had a note stating they were changing their name
- Section 1(2)(c) of the PPSA says that when information in writing has been delivered to the registered office, that would constitute knowledge of the name change

A reasonable person in this case would have taken notice of the name change, so Wells Fargo had constructive knowledge of the name change, prior to October 2005.

Conclusion:

Wells Fargo had knowledge; claim subordinate

Hold, Order:

Action allowed

Ratio:

Section 1(2)(c) clarifies when "knowledge" was obtained to start the 15 day timer under s 51.

- Knowledge is a determination of fact rather than believing the companies words.

Section 1(2)(c) is quite helpful in telling us when knowledge could be found, however it is still a fact finding mission. So Section 1(2)(c) only helps us use the facts to determine when knowledge was found, but all evidence is needed prior to

- You cannot just believe the defendant when they say they did not know of the name change since they will always say they had no clue in order to keep priority in line with s 51
- Since the registration change was 15 months after the name change, Wells Fargo could only claim they had no knowledge (it was well beyond the 15 day period)
  - With knowledge, their priority was lost (but not the perfection)

Lapse or Discharge

Lapse: A registration lapses upon the expiration of the period of registration chosen by the registering party, unless it is renewed by registration of a financing change of statement. Once the registration lapses it is removed from the computerized registry system.

Discharge: A secured party may discharge a registration by registering a financing change statement or verification statement. A secured party will typically discharge a registration when the secured obligation has been satisfied and there is no further prospect advancing further sums to the debtor.

- A secured party who maintains a registration even though no such prospect exists can be compelled to discharge its registration.

Say SP1 registers a security interest at T1 for 5 years (T3) and within those 5 years, SP2 registers a security interest at T2.

- SP1 will prevail over SP2 as long as the registration is kept alive.
- If the registration lapses at T3, the registration will be lost in the system and SP2 has priority
  - If SP1 re-registers its interest after T3, it will *not* revalidate the interest
  - So, SP1 should never let their interest lapse, but rather tack on years with a financing change statement before the end of the 5 year period

However, there are certain provisions in the PPSA to protect the secured party from lapse. It also works in tandem to with registration capability where there has been a discharge by someone who does not have authority to discharge

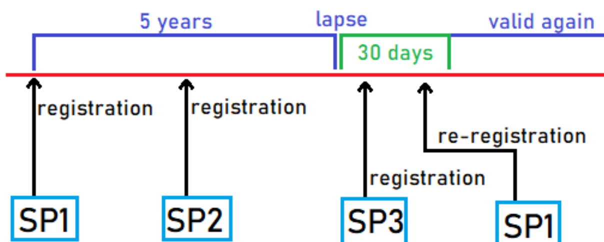
- Section 35(7): Applies to re-registration after a lapse or erroneous discharge or a discharge without authorization
- Section 35(8): The secured party has a 30-day grace period after the lapse/discharge to re-register it's interest without loss of priority against parties it was dominant to before the lapse

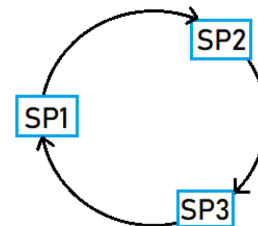
- Priority only maintained subject to competing perfected secured interest or a writ enforcement
- If re-registered in this 30-day period, the secured party will have the same priority as it did prior to the lapse/discharge.
  - The re-registration under s 35(8) must comply with the procedure under s 18 of the *Personal Property Security Regulations,*
  - Registering a new financing change statement will not qualify for the purposes of s 35(8).
  - There are effectively two requirements to maintain priority under s 35(8): 1) have to re-register in the 30 day period and 2) do it in accordance with the *Regulations*

- The Alberta Personal Property Registry will send a secured party a notice of discharge, but it will not send one for a lapse
  - A party who does not have authorization may affect the discharge so they can take steps to re-register through s 35(8)
- Say SP1 re-registered its SI within the 30-day window
  - In between the lapse and the re-registration, SP2 registered a security interest for the first time
  - Section 35(7)/(8) would thus not apply because s35(8) only maintains priority that the secured party had before the lapse
    - If SP3 was not in the picture before the lapse, there is no priority to maintain
    - SP3 would have registered before SP1 re-registered and thus SP3 would prevail
      - If SP looked in the registry after lapse but before re-registration, SP1 would not show up, so SP3 should prevail
      - It makes sense to only maintain priority over the secured party who was insubordinate before the lapse as they would expect SP1 to re-register
  - In the case where a buyer without knowledge or a trustee in bankruptcy assert their interest after lapse but before re-registration, it is the same
    - The security interest of SP1 is unperfected compared to a buyer without knowledge or a trustee in bankruptcy such that s 20 will apply and unperfected claims will be ineffective

The scheme of s 35(7)/(8) can create a circular problem

- Say SP1 registered first
- Then SP2 registered second
- Then SP1's interest lapsed
- Then SP3 registered in the 30 day window
- Then SP1 re-registered in the 30 day window
  - Well, SP1 would lose to SP3 since SP1 cannot claim s 35(8) against SP3 (after lapse)
  - But SP3 would lose to SP2 since SP2 registered first
  - But SP2 would lose to SP1 since SP1 can claim s 35(8) against SP2 (before lapse)
    - This creates a circular priority competition





How do we solve the circular issue?

- SP1 would turn over their amount to SP3 up to the extent of SP3's claim and give the rest back to SP1
  - SP2 would then get their crack at what is left
  - If there is anything left over after SP2 goes, then SP1 gets paid out the remainder
- Say the parties had the following claims:
  - SP1 had a claim for 100
  - SP2 had a claim for 200
  - SP3 had a claim for 50
  - There is 200 available
    - Take the 100 that SP1 claims, and dish out SP3's claim: 50
      - The 50 that remains goes back to SP1
    - That means there is only 100 left over, so that goes to SP2
- Say the parties had the following claims:
  - SP1 had a claim for 50
  - SP2 had a claim for 200
  - SP3 had a claim for 100
  - There is 200 available
    - Take the 50 that SP1 claims, and dish out as much of SP3's claim as you can: 50
    - That means there is only 150 left over, so that all goes to SP2
      - SP1 walks away with nothing

Examples:

1. D gives SP1 a SI in all of D's PAAP, which SP1 registers on August 15
   a. On August 30, D gave SP2 a SI in all of D's PAAP which SP2 registers
   b. On September 20, SP1's registration was inadvertently discharged
   c. On September 30, SP1 re-registered using the *Regulations*
      i. SP1 would have priority since ss 35(7) and (8) allow SP1 to re-register using the *Regulation* procedure and retain it's priority over SP2 as it did before the lapse.
2. D gives SP1 a SI in all of D's PAAP, which SP1 registers on August 15
   a. On September 20, SP1's registration was inadvertently discharged
   b. On September 25, D then gives SP2 a SI in all of D's PAAP which SP2 registers
   c. On September 30, SP1 re-registered using the *Regulations*
      i. SP2 would have priority since ss 35(7)/(8) are not applicable since SP2's interest was perfected after the discharge of SP1's registration
3. D gives SP1 a SI in all of D's PAAP, which SP1 registers on August 15
   a. On September 20, SP1's registration was inadvertently discharged
   b. On September 25, D made an assignment in bankruptcy
   c. On September 30, SP1 re-registered using the *Regulations*
      i. The trustee in bankruptcy would have priority since ss 35(7)/(8) only preserve SP1's priority ranking against a competing SP or registered writ – it does not apply with a trustee in bankruptcy
         1. Since SP1 had lapsed, SP1's interest is unperfected and therefore ineffective against the trustee under ss 20(1)
      ii. NB: The ALRI Report recommends that SP1 should win against the trustee in bankruptcy as well if it reregisters within the 30 day period, but this is not yet the law in Alberta

Personal Property Security Act, RSA 2000, c P-7
Section 35 (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.

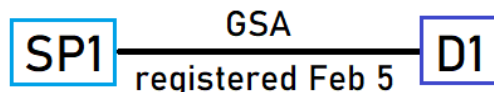
(8) If the secured party re-registers a security interest within 30 days after the lapse or discharge of its registration, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest or registered writ of enforcement that, 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.

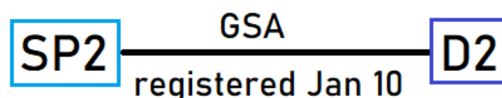
Personal Property Security Regulations, Alta Reg 95/2001
Section 18 (1) A secured party may re-register a security interest pursuant to section 35(7) of the Act by registering a financing statement. (2) Where a financing statement is to be registered under subsection (1), the secured party must, in the 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.

Two Debtor Problem

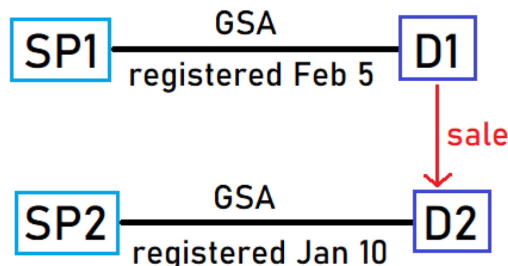
Debtors will often grant a security interest to various parties. Most priority disputes will involve competitions between 2 security interests granted by the same debtor But there are also issues where there are competing security interests granted by competing debtors

- Debtor 1 gives a SI to SP1 on February 5 and Debtor 2 gives a SI to SP2 on January 10
  - There is no competition between them as the debtors are different





- The problem arises where Debtor 1 sells the item to Debtor 2. Now there is a competition between SP1 and SP2, who will both claim that object of sale



- SP1 will claim their security interest followed into the hands of D2 and can enforce against D2
- SP2 will claim the same item that an after acquired property clause means any interest acquired by D2 will be subject to the security interest

- Section 35(1)(a) would say that SP2 wins since they registered first, but the wording of s35(1)(a) does not cover the two debtor problem

- Section 35(9) is for the two debtor problem
  - 35(9) will give priority to SP1 subject to two exceptions:
    - If the transferee takes free of SP1s interest, the transferee gets it
      - If D1 sells to D2 and D2 can take advantage of a buyer rule, it will prevail under s 35(10)
        - Section 35(10) is another example of the sheltering principle: if the buyer has good title, they are able to pass title on unencumbered and all subsequent buyers could gain good title as well
        - This means the two-debtor problem only arises when D2 does not take free (not ordinary course of sale or not authorized)
    - If SP1 knew of the transfer and SP2 makes a future advance:
      - If this occurs 15 days after SP2 had knowledge but before SP1 amends the registration to disclose the transferee as a debtor, then SP2 will have priority but *only* for the future advances
      - This is the basic premise of s 51 in the two debtor context
        - Limited subordination of SP1s priority over SP2
        - Only if SP1 1) knew of transfer and 2) doesn't do a financing change statement for future advances
        - SP2 will have priority but only for future advances after the 15 day period ends and before the change is registered

<u>Examples</u>:

1. Desert Fox Clothing (DFC) gave ATB a security interest in all of its PAAP, which ATB registered on February 25
   a. On March 10, Canabrain Enterprises (CEL) gave CIBC a security interest in a computer, which CIBC immediately registered
   b. On April 15, CEL sold the computer to DFC but it did not cut off CIBC's security interest
   c. On May 5, CIBC learned of the sale
   d. On May 15, ATB made a future advance of $10,000 to DFC
      i. CIBC has priority over ATB
      ii. Notwithstanding that ATB had the earlier registration, s 35(9) makes it clear that s 35(1)(a) does not operate when two different debtors granted the competing security interests
         1. So long as CIBC's security interest is not cut off by virtue of the sale from CEL to DFC, CIBC would win
      iii. Although s35(9) provides an exception when ATB makes a future advance, the advance must occur in the period from the end of the 15 day grace period to the time of amendment.
         1. Here, the advance was made within the 15 day grace period and therefore ATB cannot benefit from that exception

Personal Property Security Act, RSA 2000, c P-7
Section 35 (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.

Fraud and Bad Faith

Section 35 only looks to priority in terms of timing for registration. How does it interact with bad faith?

- If SP2 knows of SP1's unperfected security interest, does it preclude SP2 from registering and getting priority?
    - No, knowledge has no impact
- But if there is more than knowledge, but lack of good faith or dishonesty, then s 66(1) and (2) kick in.
    - There is a requirement of parties acting in good faith
    - A party that doesn't just know but acts fraudulently with that knowledge won't be able to claim priority under s 35
- Section 66(1): Obligation to act in good faith and a commercially reasonable manner
    - Breach of good faith may occur where (*Carson Restaurant*):
        - Secured party misled the other secured party into thinking that it's security interest was properly perfected
        - Performing some act which had the effect of delaying the perfection of the other party's security interest
    - If there is a breach of good faith, this will preclude the secured party from relying on the priority that is otherwise available to it
- Section 66(2): mere knowledge is not considered bad faith
    - Makes it clear that someone isn't acting in bad faith under s 66(1) simply because they know of an unperfected security interest
- Section 66(3): common law continues to apply to the extent that it does not conflict with PPSA

Personal Property Security Act, RSA 2000, c P-7

Section 66

(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

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

(3) 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

There is also the doctrine of subrogation. If, at the request of a debtor, you pay out a senior secured party, in equity you are entitled to be subrogated to any creditor paid out

- Subrogation: The substitution of one person in the place for another with reference to a lawful claim, demand or right so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities
- Where a third party at the request of a mortgager pays off the first mortgage with a view of becoming himself a mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee
    - Principle underlying this doctrine is one of fairness in light of all the circumstances.

In *Re N'Amerix Logistics*, BNS had a GSA which EBF took over by entering into a factoring agreement. However, the registration of the factoring agreement had an error. EBF wanted to buy out the accounts, but BNS was preventing them as they had priority. There was then a bankruptcy.
- EBF argues they are entitled to be subrogated to the perfected interest of BNS
- Court: EBF can step into the shoes of BNS so long as BNS would have priority over the trustee in bankruptcy then EBF will prevail over the trustee
    - EBF can surmount that by saying that against the trustee in bankruptcy, the factoring agreement won't prevail.
    - BNS was already paid out, so BNS had a right in equity to be paid subrogated
- The doctrine of subrogation can also help a party obtain priority in the right circumstances
    - This is an equitable doctrine/remedy but not a guarantee you can always win using this principle – tread carefully with this one
        - When paying out, you should get an assignment of their security interest claim

Marshalling of Securities: the equitable doctrine applies where a senior creditor has a higher ranking security interest in two different funds and a junior creditor has a lower-ranking security interest in only one of the funds
- Where there are two funds and one creditor can enforce its claim against both, but another creditor can only enforce against one, the doctrine of marshalling operates to compel the creditor who has recourse to both estates to exhaust the assets against which it alone has a claim before having recourse to the assets in which the other claimant has an interest
- In cases where SP1 has a security interest in Goods and Accounts, but SP2 only has a security interest in Accounts, the court could use Marshalling in two ways:
    - Old Doctrine (Compulsion Theory): Court can order SP1 to enforce against the Goods so SP2 can go after the Accounts
    - New Paradigm ("Subrogation Theory"): SP1 gets to choose, but if it chooses to go after the only collateral available to SP2, SP2 can become subrogated to SP1s right to fill their debt

CHAPTER 9: PURCHASE MONEY SECURITY INTERESTS

A Purchase Money Security Interest ("PMSI") is a specific type of security interest. It, as defined by the PPSA includes four different arrangements:
- Security interest taken by seller on goods sold to secure the unpaid purchase price
- Security interest taken by a lender to secure a purchase money loan (a loan that enables the debtor to acquire new property). The loan must be used to acquire the new asset and a security interest must cover the new asset acquired.
- Lease for a term of more than one year (deemed security interest)
- Commercial Consignment (deemed security interest)

In essence, a PMSI is a loan taken out for a specific purpose: money is given for a specific purpose of making a defined purchase

Section 34 has special priority rules when it comes to PMSIs. It alters the residual "first to register" or "first to perfect" rule of priority that would otherwise apply under s 35. If section 34 applies, then the residual priority rule in s 35 will not apply.

- If section 34 applies, the PMSI has priority over a normal security interest even if the PMSI was not registered first in time (ie, it was registered after another security interest was registered or perfected)
  - PMSI priority is often called a "Superpriority"

Section 34 is subject to certain limitations:

- A PMSI will have priority over any other security interest in the *same* collateral given by the *same* debtor
  - So, if you have a two debtor problem, where SP1 gets a SI from D1 and SP2 gets a SI from D2, and then D1 sells the property to D2, under s 35(9) D1 SP1 would win
    - The Superpriority under s34 would NOT apply since the security interests were not given by the same debtor
      - It would resolve by s 35 (SP1 has priority unless it was cut off and SP2 can shelter under D2's good title)

There are various procedural requirements over PMSIs

- Section 34(2): Applies to all property but inventory:
  - A PMSI has priority over a competing security interest if the PMSI is perfected
    - Not later than 15 days after the debtor obtains possession for all property except inventory and intangibles
    - Not later than 15 days after attachment in the case of intangibles
  - For example:
    - D signs a GSA with SP1 in all PAAP and SP1 registers at T1
    - D then grants a PMSI to SP2 at T2
    - D then obtains possession of the goods subject to the PMSI
      - This starts the 15-day clock
      - If SP2 registers and perfects the PMSI in 15 days, then SP2 will have Superpriority
        - SP2 can register earlier too (which is advisable)
      - If SP2 registers and perfects the PMSI in 16 days or more, 34(2) would not apply so s 35(1) would prevail and SP1 would win out since they were first to register.
- Section 34(3): Applies to inventory but is more onerous because banks heavily rely on inventory in accounts; if someone suddenly gets priority over inventory, they will have a strong interest in learning there is a new PMSI financers who would have financing. Given them notice so they may adjust the loan to reflect the greater risk they have over someone getting higher priority
  - No 15-day grace period that benefits the secured party as in s 34(2)
    - Perfection must occur *before* the debtor obtains possession of the inventory, and
    - A PMSI notice must be given prior to prior registered secured parties before the debtor obtains possession of the goods and inform those parties that the new secured party intends to take a PMSI and describe the collateral it intends to take a security interest in by type or kind (called a "PMSI Notice")
  - For example:
    - D grants a SI in all PAAP to SP1 and SP1 registers at T1
    - D then grants a PMSI to SP2 and SP2 immediately registers at T2
    - D then gets possession of the goods subject to the PMSI at T3 ("goods 1")
    - SP2 then gives a PMSI notice to SP1 at T4
    - D then gets possession of the another set of goods at T5 ("goods 2")
      - SP2 can claim priority over goods 2 but not goods 1

            - To get Superpriority, SP2 must have registered before possession *and* given notice before debtor gets possession
                - PMSI Notice had not been given at time of possession of goods 1
                - So SP1 would win for goods 1 under s 35(1) (first to register) but SP2 would prevail over goods 2 under s 34(3)
    - The best practice for granting a PMSI in inventory:
        - First: Register
        - Second: Search registry and see if there are any other secured parties that has a security interest in the collateral you are acquiring a security interest in
        - Third: Give those parties PMSI Notice
            - It needs to be proven that they received the PMSI notice (can't just mail it out): take further steps to assure they got it.
            - But no obligation to prove that it was read ("knowledge" is defined as a reasonable person taking cognizance of it)
                - If it just sat on their desk, too bad for them
        - Fourth: deliver possession of collateral to the debtor
            - Doing this will always make you good to assert Superpriority

Section 34 covers competitions between multiple secured parties, but section 22 covers competition between a secured party with a PMSI and a trustee in bankruptcy

- A PMSI that is not perfected at the date of the bankruptcy of a debtor nevertheless has priority over the trustee in bankruptcy if the PMSI is perfected no later than 15 days after the debtor obtains possession of the collateral
    - Section 20(a) states that a normal security interest that is not perfected is subordinate to a trustee in bankruptcy but this is not true for unperfected PMSIs
- Also applies to all collateral (inventory and non inventory)
- Example:
    - D grants a PMSI to SP at T1 but SP doesn't register immediately
    - D then gets possession at T2
        - This starts the 15 day timer
    - D then goes bankrupt at T3
    - SP then registers at T4
        - If T4 is before the 15 day expiry, s 22 gives SP priority over the trustee
        - If T4 is after the 15 day expiry, s 20(a) applies and the trustee prevails

What happens when there is a competition between two secured parties, both having a PMSI?

- Can't apply s34(2) rules since both have a PMSI and both could claim Superpriority
- Section 34(5): special priority rule where one secured party is a seller with PMSI and the other is a lender with a PMSI
    - Gives priority to the seller over the lender as long as the seller registers:
        - Not later than 15 days after the debtor obtains possession of the collateral in the case of collateral other than inventory
        - Before the debtor obtains possession of the collateral in the case of inventory
- Section 34(5) only applies when there is one seller and one lender but both are PMSI parties
    - What happens when both PMSI holders are lenders? Like SP1 financed half the purchase price and SP2 financed the other half?
        - Well there are no provisions in the PPSA that cover that situation
        - Which means that the residual rule will apply: s35(1)
            - First to register wins

Personal Property Security Act, RSA 2000, c P-7
Section 1

(1) In this Act,

(ll) "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;

Section 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.

Section 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.

(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.

(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.

<u>Examples</u>

1. On January 10, SP1 was given a security interest in all D's PAAP and it was registered that day
    a. On June 10, SP2 was given a security interest in all of D's PAAP to secure a loan to D and SP2 registered the financing statement describing collateral as "goods"
    b. On June 15, D used SP2's loan to purchase a photocopier
    c. On July 5, SP3 made a loan so that D could acquire a computer and SP3 registered on July 10
    d. On July 15, D used the loan proceeds to pay creditors
    e. On July 16. D used revenue from sales to acquire the computer
        i. SP1 has priority over the computer and the photocopier since it registered first
        ii. SP2: the purpose of the loan was not specific to something, the debtor just happened to buy something with it
            1. The loan needs to be for a specific thing as discussed when securing the loan (an "enabling loan")
            2. Calling something a PMSI doesn't make it one; intention needs to be there
            3. The definition of PMSI is not satisfied – s35 applies
        iii. SP3: loans were advanced to buy a computer, but the loans need to be demonstrably shown to exercise the right to acquire the asset
            1. Here, the loan was used to pay off creditors first, so they were not used to buy the computer first
                a. If you were the lender, how do you assure the debtor uses the money to satisfy the PMSI?
                    i. Give the money directly to the seller
                    ii. If you do not do this you are at risk that the debtor won't use it for that purpose and you lose the ability to assert the PMSI and the Superpriority that comes with it
            2. The definition of PMSI is not satisfied – s35 applies

2. D started a microbrewery; SP1 took a security interest in all of D's PAAP and registered on January 10
    a. On September 5, SP2 agreed to supply barely and hops to D to make beer
    b. On September 10, SPs registered this agreement
    c. On September 15, SP2 gave SP1 notice that SP2 intended to take a PMSI in barely and hops
    d. On September 20, SP2 delivered a quantity of barely to D
    e. On September 25, D signed a security agreement under which SP2 retained a security interest in all of barely and hops supplied to D
    f. On September 30, SP2 delivered a quantity of hops to D
        i. This is inventory, so s 34(3) applies: needs to be perfected at the time of the debtor get possession and have to give PMSI notice
        ii. Barley:
            1. SP2 registered on Sep 10 and gave notice Sept 15
            2. Perfection was not until the SA was made on Sep 25.
            3. Possession was Sept 20, which is after registration, but before perfection
                a. This means the PMSI requirements weren't satisfied so s35 applies; SP1 registered first
                b. SP1 prevails for barely
        iii. Hops:
            1. SP2 registered on Sep 10 and gave notice Sept 15
            2. Perfection was not until the SA was made on Sep 25.
            3. Possession was Sept 30, which is after perfection
                a. This means the PMSI requirements were satisfied so s34(3) applies for the Superpriority
                b. SP2 prevails for hops

3. SP 1 was given a security interest in all D's PAAP and registered on January 10
    a. On January 5, D sold a generator that it held as equipment to B
        i. The sale was not authorized or in the ordinary course of business for D
    b. SP2 made an enabling loan that permitted B to acquire the generator and the loan funds were used for that purpose.
        i. SP2 registered before B obtained possession of the generator
        ii. This means that SP1 is entitled to priority of the generator
            1. We don't know if its inventory or equipment, but we don't have to
            2. Under both s 34(2) and (3), it needs to be given by the same debtor
            3. The SP1 debtor was D, the SP2 debtor was B
                a. Section 34 does not apply at all
                b. Section 35 applies – SP1 registered first

4. SP1 made a loan to permit D to acquire a printing press to use as equipment. D used the loan to make a downpayment on the press with the balance financed by the seller who reserved a security interest in the printing press to secured the unpaid purchase price
    a. D obtained possession of the printing press on May 18
    b. SP1 registered on May 20
    c. SP2 registered on May 30
        i. SP2 will have priority under s 35(5) since it is the seller and it registered no later that 15 days after D got possession
        ii. It was only 12 days, s35(5) satisfied and the PMSI seller beats out PMSI lender
    d. If possession was on May 10
        i. SP1 registered in the first 15 days, but SP2 did not
        ii. This means SP2 only has an ordinary security interest while SP1 has a PMSI

                1. So section 34(2) applies at SP1 wins
    e. If possession was on May 1
        i. Neither SP1 nor SP2 could claim a PMSI since neither of them registered in the 15 day period
        ii. So, section 34 does not apply and section 35 does – SP1 was first to register and thus SP1 wins

5. On June 5, SP made a loan to D to acquire an auger to be used by D as equipment, and SP granted a security interest in the auger
    a. D used the funds to acquire the auger and gained possession on June 10
    b. On June 15, D made an assignment in bankruptcy
    c. On June 20, SP registered.
        i. Section 34 is not applicable – section 34 only governs between two competing security interests. One of these parties is a trustee in bankruptcy
        ii. But s 22 covers this instead
            1. If it is not inventory and you register within 15 days of possession, the PMSI will have priority over the trustee if the bankruptcy occurs in the 15 day grade period (which it did)
        iii. SP has priority over the trustee in bankruptcy

Wheatland Industries Ltd v Baschuk

- Baschuk wants a combine and wants to repair it but couldn't obtain a loan to do it, so sells it to Wheatland
- Wheatland then sells it back to Baschuk under a conditional sales contract (a secured installment sale)
    - This technically falls in the definition of a PMSI in the PPSA, but the deal is to allow the debtor to acquire some new asset
        - This isn't the case: Baschuk already owned it and sold it back to the owner
        - Has to provide financing to allow the debtor to expand it's asset pool
            - Can't just finance to improve it's existing asset pool
            - If this qualified as a PMSI, anytime you sell something back, s34 would apply and you get Superpriority so any subsequent lender could obtain priority over a general sale
                - This would undermine the PPSA
    - Ratio: the loan must be to expand your asset pool to qualify for a PMSI

Mack Canada v Essential Concrete Ltd

- December 20, 2000: Vesdar registers a GSA
- June 18, 2001: Mack delivers two trucks
    - Mack doesn't intend to finance those trucks and assumes a third party will finance them so Mack will be paid in full
    - This doesn't happen, but Mack already gave possession
        - Mack thus has to provide financing as a back up plan
- September 14, 2001: Mack creates a security agreement to finance the trucks it provided
- September 19, 2001: Mack registers the financing agreement
    - If 34(2) requires registration in the relevant time period, this was not satisfied since possession (June 18) to registration (Sept 14) was over 3 months
    - The court allowed Mack to claim s34(2)
        - They considered the 15 day clock to not start after possession, but after possession *as a debtor*
            - Vesdar did not have possession as a debtor until the security agreement was made on September 14

            - This is when the obligation to Mack arose, so registration was within the s 34(2) period
    - Ratio: Section 34(2) clock does not begin at possession, but at possession as a debtor
- This scenario is not as rare as you think:
    - Often vehicle suppliers will give customers an excavator or something for a 3 week trial and if the customer likes it, the supplier will finance it
        - Customer tries it for 3 weeks, and wants to buy it and asks supplier for financing and the supplier will register it in 10 days
            - Technically 31 days is outside the period, but the 3 weeks don't count since the customers is not in the capacity as a debtor until they say the customer says they want to buy it

<u>Preservation of PMSI Status</u>

Does the use of an "add on" clause result in the loss of a PMSI or will a consolidation of loans or refinancing cause loss of PMSI status?

- An agreement that creates a PMSI may also give the secured party a non-PMSI in additional collateral.
- The agreement therefore gives rise to a PMSI in the new collateral that is being financed and a non PMSI in the additional collateral
- A security interest may cover both a purchase money obligation and a non-purchase money obligation
    - It qualifies as a PMSI only to the extent that it secures the purchase money obligation
    - The security interest in the collateral is a non PMSI to the extent that it secures the non PMO

Clark Equipment of Canada v Bank of Montreal

- Maneco granted Clark a security interest in all PAA Products
    - "products" includes all new equipment and machinery offered for sale by Clark and used equipment and machinery of the same general type whether or not manufactured or offered for sale by Clark
- Essentially granting a security interest not just in equipment but any other equipment (securing PMSI and additional collateral)
    - This is called an "add on clause"
    - The Add on Clause does not change the PMSI status, just severs it
- Ratio: If GSA secures both PMSI and non PMSI material, this does not destroy the PMSI status of the PMSI items, but rather makes the PMSI interest severable from the non-PMSI interest.

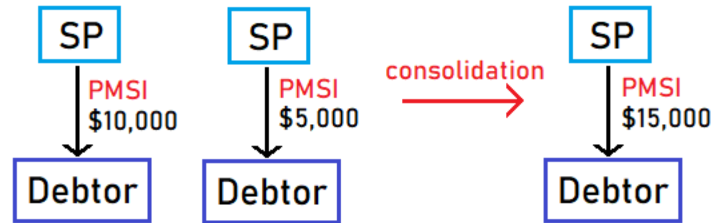
The Dual Status Approach stood for the notion that a PMSI should not lose its status because of the inclusion of these add on features: the security agreement creates a PMSI and a non-PMSI

- Where there is an add on collateral feature, you have a PMSI for the purchase money obligations, but to the extent that the other non purchase money loans are secured by the security agreement, this gives rise to a non PMSI

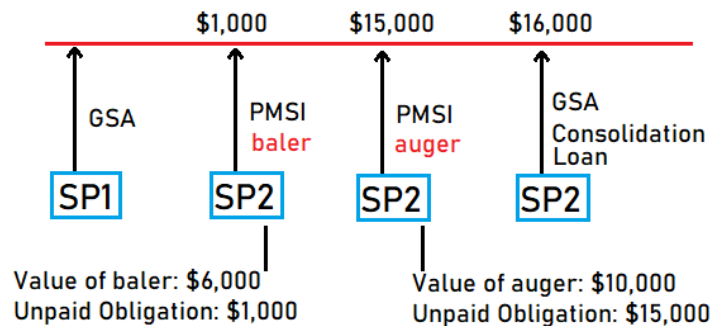
Is a PMSI lost when loans are consolidated or there is refinancing?

- A debt consolidation occurs when two or more obligations owed to a creditor are combined into a single obligation
- A refinancing involves the replacement of one loan arrangement with another and will often involve the provision of additional funds by a lender
    - Courts in Saskatchewan have consistently held that PMSI status is not lost by virtue of a refinancing or consolidation

- Doesn't matter if it is multiple PMSIs are combined, or some PMSI and some non PMSIs are combined, the status is not lost by virtue of being combined with another



- Nonetheless, we need to be careful with consolidation into a single obligation: it doesn't mean we can simply take all the collateral and PMSI obligations and say 'combine it all, done'
- Suppose SP1 is a general creditor and registers at T1
  - SP2 is financing particular equipment to farmer (takes a PMSI in this; could be seller or purchase money lender)
    - SP2 takes a PMSI in a baler
    - SP2 then takes a PMSI in an auger in a separate transaction
  - Now SP2 has a PMSI so they have priority over SP1
    - Suppose the debtor has almost completely paid off the baler ($1,000 left)
    - But there is a lot more unpaid on the auger ($15,000)
      - Absent of a consolidation, how would the proceeds of sale be distributed as between SP1 and SP2?
      - Suppose we do consolidate into $16,000, just because they're combined doesn't give SP2 the ability to claim priority over SP1 for the full amount
      - The ideal is if the parties specified anything in their agreements
      - If they haven't….we don't really know what to do



- Assume that the two PMSIs are consolidated together with a new loan for $50,000 made by SP2 and the debtor later pays $15,000 towards the consolidated obligation.
  - To what extent does this payment reduce the PMSI obligations?
- The ALRI report suggests, in Bill 9, to add in the provision to the PPSA:

Section 8.3
Subject to section 68 of the *Consumer Protection Act,* a payment made by a debtor to a secured party must be applied

(a) In accordance with any method of application to which the parties agree,
(b) If clause (a) does not apply, in accordance with any intention of the debtor manifested at or before time of payment, or
(c) If neither clause (a) nor (b) applies, in the following order:

(i) To obligations that are not secured, in the order in which those obligations are incurred
(ii) To obligations that are secured, other than those secured by purchase money security interests, in the order in which those obligations were incurred
(iii) To obligations that are secured by purchase money security interests, in the order in which those obligations were incurred

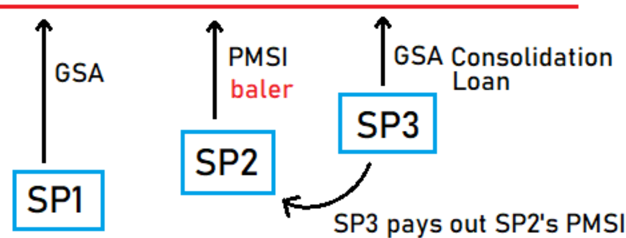
- Translation:
  - First, if the parties have specified allocation formula, use that
  - If not, if the debtor (at the time of payment) chooses where to allocate it, that will govern (rarely this will happen since debtors rarely specify where it should go)
  - If not that, then clause c gives a formula
    - Payment goes first to obligations not secured (if some secured and some unsecured, first go to unsecured)
    - If you have non PMSI obligations, payment then goes to them
    - If you have PMSI obligations, then payment goes to them

Accepting the Dual Status approach means that a determination needs to be made when payment is made to the secured party, if the payment reduces the PMSI obligations or the non-PMSI obligation
- If the parties agree to a formula for allocation of payments, their agreement will govern
- If they parties have not agreed, then the debtor is entitled to choose which it should be allocated against
- If there is no contractual formula, or if the debtor doesn't specify who it is going to at the time of payment, then the courts will need to decide
  - One approach courts will use is the rule from *Claytons Case*
    - First in First out Approach: the payment is directed against the debt that was created first
      - It is unclear if courts will follow this approach
      - Saskatchewan has a legislative formula for how payments are allocated
      - But in the absence of the legislative formula (as is the case for most provinces), courts will have to decide what the best allocation is where the agreement and debtor are silent on the matter

Paying out a PMSI of a third party is also a different analysis
- Some Canadian courts have held that a loan that enables the debtor to pay out a PMSI held by a third party qualifies as a purchase money loan because it enables the debtor to acquire greater rights in the collateral
  - The rationale is that it enables the debtor to acquire greater rights in the collateral
  - They have a greater bundle of rights such that their collateral is no longer subject to the security interest that was paid out
    - This has been criticized on the basis that it does not enhance the debtors asset pool, but merely replaces one security interest with another and so it should not be seen as creating a PMSI
- The alternative approach uses Subrogation
  - A lender that pays out the PMSI of the third party is entitled to be subrogated to the rights of the PMSI holder but acquires no better rights than those enjoyed by the third party
    - The difference is instead of viewing the loan in itself as a PMSI, we view the secured party interest as being derivative – it is by virtue of the equitable doctrine of subrogation that the person who pays out a loan is entitled to be

subrogated, substituted to the position of the secured party who had been paid out

- Take a scenario where a bank takes a security interest in everything and registered at T1
    - SP2 then finances a baler, registers at T2
        - Since they have a PMSI, SP2 would have priority over T1
    - SP3 then comes in and pays out SP2



- This is exactly what happened in *Battlefords Credit Union*, where the SKCA said SP3 acquires SP2's priority
    - The inclination is that SP3 should be able to claim that superiority is right by the reason they gave left much to be desired
- The ONCA took the same approach in *Unisource*
    - Said that it was ok that if you make a loan that pays out another secured creditor your loan is an enabling loan
        - Why? You're increasing the bundle of rights held by the debtor – your loan is being used to pay out secured parties so the debtor is getting a greater bundle of rights so they are no longer unencumbered
    - SP3 paying out SP2 would essentially give SP3 a PMSI
        - But SP3 getting a PMSI even though it paid out a non PMSI doesn't make sense
            - SP3 could pay out the second ranking SI and rank over SP1
            - It would destroy the priority system if you allow SP3 to take priority
        - What if SP2 did not register?
            - Well the analysis would be the same
- Courts in the US have adopted the subrogation approach: SP3 is subrogated by paying out SP2
    - If you pay out secured loan with consent of debtor, you would get to be subrogated
    - That would be a more satisfactory answer, but this has not been applied in Canada yet
        - Would prevent SP3 from paying out a junior secured party and getting higher priority
- Again, Bill 9 attempts to resolve this:
    - Section 34(11) and (12) would give a refinancing secured party the same priority that it would have if the PMSI had been assigned to the financing creditor.
    - So you could step into the shoes of a secured party – you don't have to use the doctrine of subrogation or the SKCA/ONCA approaches – statutory entitlement saying pay out a third party and you can assume their position, but need to register in 15 days
- In any event, the best protection is obtaining assignment of rights from the PMSI holder who is being paid out
    - If this is done, then they don't have to argue that the payout loan is a PMSI or that the doctrine of subrogation applies, the lender just wins since it took the precaution of obtaining an assignment from the PMSI holder of that interest

There is a current ALRI Recommendation (#7) to add a provision to the PPSA related to Add on Clauses:

Section 1(9)

A purchase money security interest does not lose its status because

(a) The purchase money collateral also secures an obligation that is not a purchase-money obligation
(b) Collateral that is not subject to a purchase-money security interest also secures the purchase money obligation, or
(c) The purchase-money obligation has been renewed, refinanced, consolidated or restructured.

- This is not the law yet, but it could very well be soon
  - (a) is about add on obligations
  - (b) is about add on collateral
  - (c) is about loan refinancing
    - PMSI status won't be lost by virtue of consolidation or refinancing (but Saskatchewan courts have come to this conclusion without this provision)

PMSI in Proceeds

We will discuss proceeds in chapter 10, but this gives a preview

- The idea of proceeds is that if you take a security interest in collateral and the debtor deals with the collateral and obtains something by way of substitution (usually sells for cash)
  - The security interest had in collateral extends into proceeds at hand of debtor
  - If you grant a security interest in your car, and then you sell the car to a buyer who gives you a cheque, a trade in automobile, and a promise to pay the rest, that security interest extends to proceeds (cheque- instrument, trade in car – goods, promise to pay rest – account)

Chrysler Credit Canada v Royal Bank of Canada

Facts:

RBC had a GSA with White Motors. After the GSA was registered, Chrysler took a PMSI in all inventory of White Motors and properly registered their interest.

- White then sold the vehicles to customers, where the customers would give trade in vehicles as well as funds
  - In the end, White had 44 second hand vehicles in stock

White then went insolvent and a Receiver assumed control of the business. The 44 cars fell into three categories:

- 4 were identified as first trades on the sale of new cars 0 the loans for whose wholesale purchase by White had not repaid to Chrysler
- 31 were first or later trades traceable to the sale of new cars, the loans for whose wholesale purchase by the dealer had been repaid to Chrysler Credit
- 9 were incapable of being linked, either directly or indirectly, to the sale of new cars

Issue:

Can Chrysler claim a PMSI in the trade in vehicles?

Analysis:

If Chrysler can establish that the cars are "proceeds", the Superpriority of the PMSI would extend to them.

Generally, the dealership has an inventory list of all the new vehicles for sale. Once sold, the dealer would pay the wholesale price back to Chrysler and once that is paid, they would be removed from the list

- The 4 vehicles that were first trades, the loans had not been repaid to Chrysler Credit.
  - In this case, Chrysler would have a PMSI since they weren't paid out
- The vehicles that cannot be traced (category 3) simply go to Royal Bank

The issue is that Chrysler is trying to claim all the trade-in vehicles. Some of these loans had already been repaid to Chrysler Credit – should Chrysler

Conclusion:
Chrysler can look to all the trades

Hold, Order:
Motion allowed

This seems to violate some PMSI principles - how can you have a PMSI in collateral that has been fully paid? Some jurisdictions have put in legislation to reverse this decision. In Alberta, we haven't addressed it yet

- Preferred Result: They can only look to the trades that haven't been fully paid out
- Solution is pooling. All the secured party to take a PMSI in all the inventory

Bill 9 – PMSI in inventory (ALRI recommendation 8)

Section 1(7)

A purchase-money security interest in inventory

(a) secures any obligation arising out of a related transaction creating an interest referred to in subsection (1)(ll)(i) or (ii), and

(b) extends to other inventory in which the secured party holds or held a security interest under a related transaction that secures or secured an obligation referred to in subsection (1)(ll)(i) or (ii).PMSI in inventory

This recommendation covers not only proceeds like *Chrysler v RBC* scenario, it also covers inventory itself

- Suppose you have retail seller – grocery store – and they are acquiring quantities of some cans of sardines
  - SP supplies 10k cans of sardines for 20K
  - Every month you supply quantity of goods and have PMSI under those goods
  - Problem = if you're inventory financer can you see accounting nightmare you'd have to go through in this case
    - You have PMSI in first 10k cans of sardines but doesn't secure later supplies under separate PMSIs
    - You would have to try and trace all these cans
  - Real problem for inventory financer trying to track; have to identify which collateral were associated with PMSI and which transaction was it directed to
    - Maybe its impossible to show that in which case you can't show PMSI – not traceable
      - This cures that problem, don't have to track the cans, covers everything instead
    - AKA will have PMSI in all of the CANS to secure all of the purchase money security obligations

CHAPTER 10: PROCEEDS

The Concept of Proceeds

The basic idea of proceeds is that, where a debtor grants a security interest in collateral to the secured party and the debtor disposes of the collateral and obtains something in exchange, that thing in exchange is "proceeds" and the secured party's interest extends to those proceeds.

- Proceeds: Identifiable or traceable personal property acquired by the debtor out of a dealing in the original collateral or its proceeds. A secured party automatically obtains a security interest in such proceeds.

The right to claim a security interest in proceeds is given to the secured party by section 28(1) of the PPSA.

- If collateral gives rights to proceeds, the security interest extends to those proceeds; so the secured party has a security interest in proceeds regardless if the security interest in the original collateral is lost
- The proceeds will be particularly important if the secured party's interest in the original collateral had been cut off
  - For example, if the secured party's interest was cut off by one of the buyer rules where the buyer takes free, the secured party can claim against the proceeds of that collateral even if they cannot enforce a claim against the original collateral
- However, the right to claim proceeds is not limited to the situation where the security interest in the original collateral has been cut off
  - If the security interest is in a truck that is purchased by a buyer, but the buyer does not take free, the secured party can still enforce the security interest for the truck
  - Or, the secured party can enforce the security interest for the proceeds of the truck
- But, section 28 limits the secured party's recover: if the secured party enforces it's interest in the truck as well as the proceeds, they can only recover as much as the market value of the collateral (in this case, the truck) at the date of dealing. This cap limits the secured party from getting a windfall
  - If the truck was only worth $10,000 at dealing, and the secured party enforces against the truck when it was only $4,000, the secured party can only enforce for $6,000 in proceeds.
  - If the goods didn't depreciate at all, you can the whole collateral, but then none of the proceeds
    - This does not apply to investment property

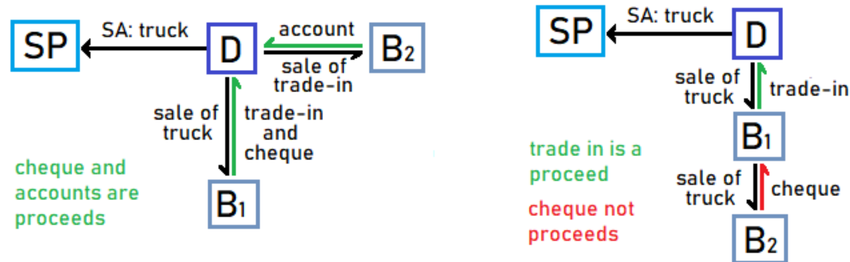
Proceeds make the secured party's property rights more robust as they are not easily lost.
- Advantages:
  - Extension of the collateral into the other collateral
    - It expands the collateral you can claim for
    - Collateral may be off limits in a true sale, but the proceeds won't be
  - Extension of the priority status of the security interest
    - A PMSI Superpriority will continue into any proceeds

Critical Issues arise when it comes to Proceeds:
- When can a claim to proceeds be made?
  - Proceeds will be irrelevant when a security agreement has an all PAAP clause since the collateral acquire would just be the AAP
    - The AAP would be covered by the original collateral anyway
- How do you perfect a security interest in proceeds?
- How does a security interest in proceed rank against other claims?
  - Say a SP makes an enabling loan to purchase a car (PMSI from bank), but the security agreement has an add on clause that says all other property is a non PMSI
  - If there is an earlier who registered first, SP would win for the car PMSI but would be subordinate for all other property
    - Proceeds now become very important
    - You would want to assert your Superpriority over the proceeds over the earlier registered property
    - If you can identify the proceeds and all other requirements, you can assert the Superpriority over the proceeds
      - PMSI is not lost

Section 1 of the PPSA defines "proceeds" with three important elements
1. Proceeds must be identifiable or traceable personal property

    a. Identifiable is easy: you can point to the proceeds that were created by virtue of dealing with the collateral
        i. A truck was sold and a trade in was given in exchange
            1. The trade in is identifiable
    b. Traceability is more complex
        i. PPSA relies on tracing rules of common law and equity (incorporating them into the definition)
        ii. Covers situations where the proceeds are no longer identifiable
            1. Usually by some kind of mixing
            2. Like if funds are deposited into an account with other funds already within it. The newly deposited funds would not be identifiable, but they would be traceable
            3. You cannot say which part of the bank account is the proceeds, but it is in there.
        iii. To the extent that you can show the proceeds are traceable (ie, show that some of the funds in the account are proceeds), that satisfies this part of the definition of "proceeds" and you can claim priority over it
        iv. Tracing rules incorporate the common law and equitable rules to apply when determining if the proceeds cannot be identified.
2. The property must be derived (directly or indirectly) from the collateral *or* the proceeds of the collateral (i)
    a. The "or" is important to say that the idea of proceeds is not limited to dealing with the original collateral
    b. A dealing with the proceeds can produce further proceeds and the secured party will have a security interest in those proceeds as well
        i. If that truck is traded in for another truck, and that second truck is sold for cash, the secured party has a security interest in that cash
    c. The proceeds of proceeds (called the "Second Generation Proceeds") concept is not limited to just the proceeds of proceeds
        i. The security interest can apply to the proceeds of proceeds of proceeds…
        ii. So it can apply to third, fourth, fifth… nth generation proceeds
    d. There is no legal impediment from enforcing against proceeds well down the line, but there is a logistical issue since it gets harder to prove in fact the further removed it is from the debtor
        i. But if the secured party can prove it, there is no reason they can't go after multigenerational proceeds.
    e. As an example:
        i. D gives SP a security interest in a truck through a security agreement
        ii. D then sells the truck to B1 and B1 pays for the truck by giving a cheque and a trade in automobile.
            1. The cheque and trade-in are first generation proceeds
            2. It could be that the secured party's interest in the truck has been cut off by D by virtue of the buyer rules or the secured party's interest may have survived
                a. This is not the main focus since we are focused on proceeds
        iii. D then sells the trade in to B2 and B2 promises to pay
            1. The promise to pay is an account
            2. The account is a second generation proceed
                a. SP can go after this account as per s 28 and the definition of "proceed" in s 1
3. The debtor must acquire an interest in those proceeds (ii)
    a. In order for the property to be considered proceeds, the debtor must acquire an interest
        i. Say SP has made a loan to D and D gives SP an interest in the truck

ii. D sells the truck to B1 and B1 pays in party by giving D a trade in automobile
iii. The trade in falls in the definition of proceeds since the debtor acquires an interest in the proceeds by virtue of the transfer from B1 to D
    1. If SP's interest in that truck is not lost, SP can assert it against B1
    2. Then B1 sells the OG truck to B2 and B2 gives B1 a cheque for it
        a. The cheque is *not* proceeds since D does not have an interest in it. SP *cannot* claim against that cheque: it isn't proceeds
        b. B1 has an interest in the cheque but D does not



Personal Property Security Act, RSA 2000, c P-7

Section 1

(1) In this Act,

(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;

Section 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.

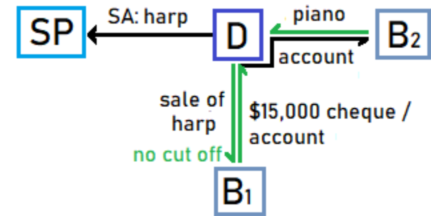
We already saw s28(1)(a): being a proprietor at right allows you to follow the collateral into the hands of a third party, subject to buyer rules where the buyer can claim protection to cut off the security interest (authorization rule – if the SP authorizes the sale, they cannot assert security interest over the buyer)

- Section 28(1)(b) extends the security interest into the proceeds of the collateral – you don't have to bargain for this in the agreement (it is a right given to you by statute)

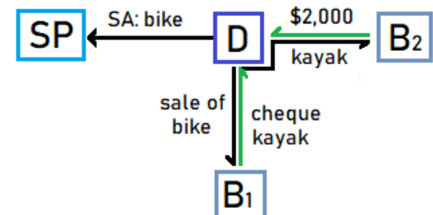
- Particularly valuable if your interest in the collateral was cut off by buyer rules since the proceeds is all you have a claim against
- Again, this only applies to personal property. If proceeds are used to buy land, that is not proceeds since land is real property
  - The proceeds are there and out of reach of s 28
- Section 1(jj)(iii)-(v) just ensure that insurance proceeds are also covered by s 28
  - Insurance money in the event that the collateral was damaged is still proceeds that the secured party has an interest in

<u>Examples</u>

1. SP was given a SI in D's concert harp.
   a. D then sold the harp to B for its fair market value of $15,000 and D received a cheque in that amount
      i. The sale did not cut off SP's security interest in the harp
   b. D opened a bank account and deposited the cheque into it
      i. No other funds were added to the account
   c. D has drawn on the account to pay creditors such that there is only $5,000 left in the bank account
   d. D then uses the $5,000 to buy a piano
   e. SP can enforce security interest in:
      i. Piano and harp, but only to the extent of $15,000
         1. Harp was OG collateral and it was not cut off
         2. Piano is a multigenerational proceed
            a. First: $15,000
            b. Second: Bank Account
            c. Third: Piano

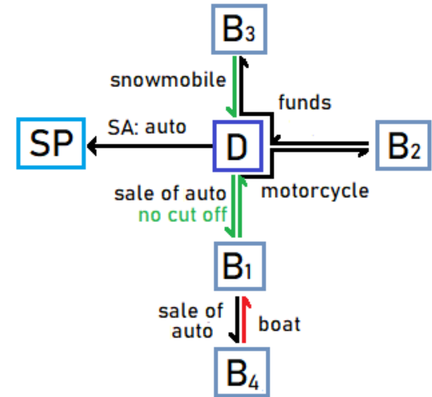


2. SP was given a SI in D's racing bike
   a. D sells the bike to D for a cheque of $5,000 and a kayak
   b. D sold the kayak to B2 and received $2,000 in cash
   c. SP can enforce a security interest in:
      i. Cash, Cheque and Kayak
         1. Cheque and Kayak are first generation proceeds
         2. $2,000 in cash are second generation proceeds
            a. All are subject to section 28



3. SP was given a SI in D's automobile
   a. D sold the automobile to B and D received a motorcycle in trade
      i. The sale to D did not cut off SP's security interest in the automobile
   b. D then sold the motorcycle and used the funds received to buy a snowmobile
   c. B later resold the automobile and received a boat in partial payment of the purchase price
   d. SP has proceeds in the following assets:
      i. Motorcycle and snowmobile

ii. Automobile is original collateral
    1. We would want to know if B4 took free
    2. Need to know more if auto is fair fame or just it's proceeds
iii. Motorcycle is first generation proceeds
    1. Funds traded in were second
    2. Snowmobile is third generation
        a. Snowmobile is for sure fair game
    3. We would apply buyer rules to see if sale cut off proceeds of for motorcycle
iv. Boat cannot be claimed against
    1. D had no interest in the boat, only B1 does



Tracing Rules

Section 1(1)(jj) references the tracing rules, and the PPSA references common law and equitable doctrines still applying, but it does not set out what these would look like. So, we have to look to case law for that

- The most common issue arises around trusts: trustee wrongfully selling property to purchase
    - If the purchaser is a bona fide good faith purchaser, they would take free
    - But the beneficiary would not be out of luck, if there was value exchanged for that purchase, the beneficiary would have some rights to follow the property

The Courts of Equity developed a set of tracing rules that were of significant when funds belonging to one person were mixed with those belonging to another

- These rules involve a search of the transactional links between the original property and the proceeds
- Suppose SP has a SI in the debtors truck and the debtor sells the truck to a buyer and gets $10,000 in exchange. He does not put it into an account but gambles it away
    - The debtor may have $10,000 in their account, but the SP cannot claim a proceed in that money since the $10,000 in cash was not deposited
        - In other words, there is no transactional link between the cash received by the debtor and the bank account the SP wants to enforce against

Most cases will involve times where the debtor does deposit it into their account so it is mixed with other funds. Tracing rules allow the secured party to trace their interest into the funds of the account What if the debtor withdrawals from the account?

- Presumption of Honesty: when funds that belong to another are mixed with the debtor's own funds, the debtor will be presumed to spend the debtors own funds first
    - The debtor will withdraw their own funds until they are exhausted.
    - Then, and only then, do they begin to erode the SP's proceeds

Proceeds	Non-Proceeds	Withdrawals	End Balance	Proceeds Remain
	$1,000		$1,000	
$2,000	$1,000		$3,000	$2,000
$2,000	$1000	$1,000	$2,000	$2,000
$2,000	$0		$2,000	$2,000

- The debtor will withdraw their own funds until they are exhausted.
- Then, and only then, do they begin to erode the SP's proceeds

Proceeds	Non-Proceeds	Withdrawals	End Balance	Proceeds Remain
$2,000	$0		$2,000	$2,000
$2,000	$0	$1,500	$2,000	$2,000
$500	$0		$500	$500

What if there are new additions into the account where they are the debtors?

- Intermediate Balance Rule: If after applying the Presumption of Honesty, the account balance dips below the total amount of proceeds, the security interest is adjusted downwards. New additions of non-proceed funds do not accrue to the proceeds balance
    - Subsequent additions will not cause proceeds to increase, even if they were depleted

Proceeds	Non-Proceeds	Withdrawals	End Balance	Proceeds Remain
	$1,000		$1,000	
$2,000	$1,000		$3,000	$2,000
$2,000	$1000	$1,000	$2,000	$2,000
$2,000	$0		$2,000	$2,000
$2,000	$0	$1,500	$2,000	$2,000
$500	$0		$500	$500
$500	$2000		$2500	$500

Most case law has to come from American cases since there is little to no case law in Canada about tracing. Most Canadian cases are about trusts, not secured transactions

- *Universal CIT Credit Corporation v Farmers Bank* is the best as it Applies Presumption of Honesty and Intermediate Balance Rule

What if there is wrongdoing?

- Effect of Wrongdoing: if a person acted wrongfully, the innocent party is able to adopt the position that is most favourable to the innocent party so long as it was possible for the funds to have been used to acquire the asset against which a tracing claim is asserted
    - Say a debtor has $1,000 in their account, and without authorization sells collateral that is subject to a security interest and deposit the proceeds ($2,000) in their account
        - Since the sale is without authorization, the Wrongdoing Principle applies.
    - Then $1,000 is withdrawn to buy an oven
    - Then $2,000 is gambled away
        - If we used the presumption of honesty, the secured party would not have a claim against the oven (that was the debtors funds)
        - But, since it is the Wrongdoing Principle, we give the secured party the election.
        - The funds may have been derived from the proceeds amount, and the secured party can cast the light in the manner most favourable to it
            - They could claim the oven as proceeds
    - NB: the effect of wrongdoing only applies if the Intermediary Balance Rule is used
        - If additions of the debtors own money was put in to buy the oven, the wrongdoing principle wouldn't have applied because all the proceeds would have been gone
        - Only applies when it is possible that some of the mixed funds could have been used
- Some commentators argue that the Wrongdoing Principle should not be applied to the PPSA context and that a more mechanical presumption that the debtor withdraws the debtor's own funds first should be applied regardless of the conduct of the debtor

What happens when proceeds of one secured party are mixed with another secured parties proceeds, and then some amounts are withdrawn?

- A different approach must be used that the above principles.

Proceeds from SP1	Proceeds from SP2	Withdrawals	End Balance
$1,000			$1,000
$1,000	$3,000		$4,000
?	?	$2,000	$2,000

- Since only $2,000 remain, both secured parties cannot be paid out. Who bears the risk?
- There are two approaches:
    - First in, First Out (*Clayton*)
        - First moneys put in are the first money to be taken out
        - This means all of SP1s proceeds would have been exhausted since SP1 put first
        - SP2 would thus earn the entire claim amount of $2000

Proceeds from SP1	Proceeds from SP2	Withdrawals	End Balance
$1,000			$1,000
$1,000	$3,000		$4,000
$1,000	$3,000	$2,000	$4,000
$0	$2,000		$2,000

-
    -
        - The Supreme Court rejected this approach in *Greyback*

    - Pari pasu ex post facto
        - Loss not born on one party, it will be a pro rata depletion of the fund
        - [(Party X's Contribution)/(Total Party Contributions)] x (Withdrawn amount)
        - SP1 payout: [SP1 contribution/(SP1+SP2 contribution)] x (Withdrawn amount)
            - [$1000/($1000 + $3000)] x $2000)
            - $500
        - SP2 payout: [SP2 contribution/(SP1+SP2 contribution)] x (Withdrawn amount)
            - [$3000/($1000 + $3000)] x $2000)
            - $1500

Proceeds from SP1	Proceeds from SP2	Withdrawals	End Balance
$1,000			$1,000
$1,000	$3,000		$4,000
$1,000	$3,000	$2,000	$4,000
$500	$1,500		$2,000

The pari pasu ex post facto rule must be calculated at each withdrawal. This is so it will not affect the Intermediate Balance Rule

- If D adds $1,000 of SP1 proceeds, and then $1,000 is withdrawn, the amount will be $0
- If SP2 proceeds then add $1,000, there are the two approaches:
    - Intermediate Balance Rule
        - SP1: $0
        - SP2: $1,000
    - Pro Rata Ex Post Facto Approach
        - SP1: $500
        - SP2: $500
- *Law Society of Upper Canada v TD Bank*
    - A court may choose between the lowest intermediate balance rule or the pari passu ex post facto approach depending on which was more just, convenient, and equitable under the circumstances
        - A lot of commentators did not like this and subsequent case law reversed this logic
- *Boughner v Greyhawk Equity Partners Limited Partnership*
    - The lowest intermediate rule is the general that is to be applied unless it is practically impossible to do so

- If the lowest intermediate balance rule cannot be applied because of the lack of evidence or other reason, then a court may use the pari pasu ex post facto approach
  - Only depart from Intermediate Balance Rule when it would be impractical to
- Pari pasu and Intermediate Balance Rule can be used in tandem
  - Say SP1 supplies $1000 and SP2 gives $1000 ($2000 total)
  - Then $1000 is withdrawn
    - We immediately apply the Pro Rata Approach
    - SP1 has 500 and SP2 has 500
  - Then SP2 gives $2000 more so the end balance is $3000
    - We now apply the Intermediate Balance Rule
    - SP1 has $500 and SP2 has $2500
- This means that the Pro Rata Approach is not a global approach – we are recognizing that only $500 of SP1's proceeds remain after the withdrawal
  - The subsequent addition of SP2's proceeds would not replenish SP1's

When it comes to Backwards Tracing, there is a lot of uncertainty.
- Backwards Tracing occurs when the debtor incurs a debt in connection with the acquisition of a new asset, and the funds of another are later used to pay that debt. Can the funds be traced into the new asset in respect of which the debt was incurred?

Example:
- September 1: D buys cattle from a seller for $10,000. The seller stipulates that the purchase price must be paid within 30 days after delivery.
  - It is common for a seller to give the buyer a credit period
  - D is the owner of the cattle (title has passed)
- September 15: D sells some of SP's collateral, and the proceeds of sale are used by D to pay the $10,000 purchase price to the seller.
  - Unsecured debt that D owes to the seller was paid using proceeds
  - Does this mean the secured party can trace through the debt and claim the cattle that was purchased?
    - The proceeds were used to pay the debt and the debt was used in the acquisition of the cattle
  - Expert commentators have split as to what the law should be
  - Courts have generally insisted that there must be a sufficient linkage between the transactions
    - Suppose that the Debtor obtains a bridging loan from Lender 1 and these funds are used to buy a new asset. It is understood that the bridging loan will be paid out using the loan funds of Lender 2.
    - Courts have regarded this as enough of a connection so to permit Lender 2 to trace its value into the new asset
      - The mere fact that the proceed are used to pay a debt and that debt was used in acquisition of the debt won't be enough on its own

Example:
- SP1 reserved a security interest in ovens it supplied to D. SP1 properly registered on June 1
- SP2 reserved a security interest in fridges that is supplied to D. SP2 registered on July 1
  - D sold the ovens and fridges in the ordinary course of business to its customers and deposited the proceeds in to its bank account

Proceeds SP1	Proceeds SP2	Non-Proceeds	Withdrawals	End Balance	Remaining Proceeds SP1	Remaining Proceeds SP2
$10,000				$10,000	$10,000	
		$10,000		$20,000		

			$15,000	$5,000	$5,000	
		$20,000		$25,000		
				$40,000		$15,000
			$30,000	$10,000	$2,500	$7,500
	$15,000			$25,000		$22,500
		$10,000		$35,000		
			$25,000	$10,000	$1,000	$9,000

What difference, if at all, would it make if SP1 registered and SP2 did not?

- It would not change SP2's $9,000 since it is different registration
  - The Intermediate Balance Rule and Pro Rata Approach don't involve priority at all so don't look at priority rules
  - SP1 has an interest in the account, but only to the extent of $1,000, and SP2's failure to register does not influence it

What difference, if at all, would it make to your answer if

(1) SP1 registered and SP2 did not, and
(2) D made an assignment in bankruptcy
   a. SP2 did not register, meaning it's interest is ineffective against a trustee in bankruptcy under s 20(a) and it would lost the interest altogether
   b. SP1 wouldn't be benefited anyway, it would still get the $1,000

What difference, if at all, would it make to your answer if

(1) SP1 registered and SP2 did not, and
(2) SP1's security agreement contained an add on clause under which D gave SP1 a security interest in all of its PAAP as additional collateral?
   a. This add on is only a security interest, not a PMSI
   b. Now SP1 prevails over SP2 for the full $10,000
      i. SP1 still has a proceeds security interest in the $1,000, but an add on security interest in all assets (including the proceeds)
      ii. Since SP2 didn't perfect, then SP1 prevails under s 35(1)(b)
         1. This is the only time there is a competition for the same asset since they are claiming the entire amount from the all PAAP clause (they have a security interest in the money that SP2 subsequently put in)

Agricultural Credit Corp of Saskatchewan v Pettyjohn, (1991) 90 Sask R 206 (CA)

Facts:

The Pettyjohn (defendant) family owned a farm in Saskatchewan. They obtained financing for a group of cattle from the Agricultural Credit Corp of Saskatchewan ("ACCS", plaintiff) who took a PMSI in the cows.

- Before the money was provided to the Pettyjohn's, they acquire a bridge loan with which they purchase the cattle.
  - The family then uses the ACCS loan to pay off the bridge loan
  - The family already owned the cattle when they acquired the ACCS loan

The cattle were then sold by the debtors without any authorization and subsequently replaced them with African cattle.

- The Pettyjohn's then defaulted and the ACCS claimed a PMSI in the original cattle and claimed they could trace that PMSI to the African cattle.

Issue:

Does the ACCS have a PMSI in the cattle and would it give the ability to trace it's PMSI into the speciality cattle?

Rule:

Backwards Tracing Rule: In order to claim the backwards tracing to the speciality cattle, there must be a binding commitment by the Pettyjohn's to the ACCS to extend the funds for the purpose of purchasing those cattle.

Analysis:

ACCS intended their loan to be for the acquisition of cattle, so it was an enabling loan and they took a security interest in it

- ACCS had to show that they took a security interest in the thing acquired by the loan and the loan was used to actually acquire the thing
- Here, the ACCS approved the loan but it was not used to purchase those cattle
- If the debtor incurs a debt in connection with the acquisition of a new asset and the funds of another are used to pay that debt, the funds can be traced into the new asset that was acquired.
    - There needs to be sufficient connection in order to perform this backwards tracing.
- In this case, the loan from BMO was paid off by the ACCS loan, so there is a close connection that is sufficient to say the enabling loan *was* used to acquire the cattle
    - There were just two stages of the same transaction
    - So ACCS does have a PMSI in the original cattle.

However, the specialty cattle were purchased before the original cattle were sold. Nonetheless, ACCS claims they are still proceeds

- Using backwards tracing, if the debtor incurs a debt in connection with the acquisition of the new asset, and funds of another are used to pay that debt, tracing into the asset is allowed. If proceeds are used to pay that debt, you can trace into the assets for incurring that obligation

It seems fit to adopt a Functional Equivalence Rule

- The appropriate principle of tracing in such a case is that where a set of chattels is replaced by another of like function in the affairs of the debtor, it shall be open to the court to find that the proceeds form the first were used to acquire the second, whatever the formalities of the transactions in question
    - Won't adopt a transaction by transaction basis
    - Since the original cows and speciality cows were both used, this is similar enough in function to permit backwards tracing.

Conclusion:

PMSI established and backwards tracing permitted

Hold, Order:

Motion allowed

Ratio:

If chattels are replaced by another of like function, backwards tracing is allowed to find funds of the first were used to acquire the second.

This case is extremely problematic and most commentators take big issues with it. For starters, this isn't a tracing rule really. The way we view tracing is that you have to show a connection of the property and what you obtain in exchange. You need to show that in order to trace

- But in this case, the SKCA don't care about the sequence or where the money went, all they looked at is if one thing was similar to another
- If you could show that the proceeds from the first cows were used to pay creditors it wouldn't be an issue. But they used other revenue to buy the new cattle
    - Not one cent could flow between the two chattel, but using the Functional Equivalence Rule would still allow you to trace it because they are close enough or similar
        - That isn't even tracing at all
    - Also what is "functionally equivalent"? If they bought elk instead? Emus?

        - There is no way to determine what is close enough
- The SKCA says that the debt incurred from the purchase of the speciality cattle was paid down through the deposit of the proceeds of the sale of the original cattle into the bank account
    - This is tough to justify since what other funds have also been deposited into the account such that it could not be shown that all PMSI proceeds have been used to pay down the debt associated with the acquisition of the speciality cows

Perfection of Proceeds

How does a secured party perfect a security interest in proceeds?

- As between a secured party and the debtor, it is unnecessary to perfect a security interest in proceeds

Perfection only becomes relevant when there is a competition with a third party

- As between a secured party and a third party, a failure to perfect will usually result in a loss of priority under section 20 and section 35
    - If a competition is with a trustee in bankruptcy and the proceeds are unperfected, s20(a) applies and the trustee in bankruptcy gets priority such that the security interest is ineffective against the trustee
    - If a competition is with a buyer without knowledge, if the proceeds are unperfected, s20(b) applies and the trustee in buyer gets priority due to the lack of knowledge
    - Where competitions arise between two secured parties, one who claims a security interest in the property as original collateral and the other as proceeds, a failure to perfect the security interest in the proceeds will mean that s 35 applies
        - If one perfected the Security interest and the other didn't, s35(1)(b) applies (perfected has priority over unperfected)
            - Failure to perfect a security interest in proceeds will result in a loss in priority against a third party who did their security interest in the collateral

Section 28(2) sets out three ways to perfect proceeds:

- Section 28(2)(a): including proceeds description in registration
    - Perfection in proceeds when financing statements can include a proceeds description in the general collateral field
    - Usually looks something like:

        Motor Vehicles

        Proceeds: goods, chattel paper and intangibles
- Section 28(2)(b): collateral description for the original collateral also covers proceeds
    - Security interest in proceeds perfected by registration of a financing statement that covers the original collateral if the proceeds are a kind in the original collateral
    - If you finance motor vehicles and they describe the collateral as "motor vehicles" (they didn't include "and proceeds")
        - "Motor vehicles" won't cover other types of property, but if there was trade in automobiles (as a form of payment), then the automobile trade would be a motor vehicle and be covered under the financing statement.
- Section 28(2)(c): automatic perfection
    - Security interest is automatically perfected if the proceeds are money, cheques or deposit accounts in a financial institution
    - Suppose again, we have a secured party who registers "motor vehicles" in the general collateral field. This is not broad enough to cover cheques or cash
        - But (c) provides that you don't need to describe those forms, they are automatically perfected.
        - The thinking of this is that these are the types of property that would be generated on a sale, so they don't need to be specifically identified.

Section 28(3) is another avenue that applies when the secured party does not perfect according to (a)(b) or (c); it almost serves as a break. The security interest will be temporarily perfected for 15 days after the security interest attaches to the proceeds

- This allows the secured party to perfect the security interest by some other means within this grace period (registration or possession)
- Once the proceeds attach (usually when the debtor gets possession of the trade in property), the 15 day timer has started and the secured party has 15 days to register or get possession
  - If the debtor goes bankrupt in those 15 days, the secured party is protected and still has a claim in those proceeds
  - If the bankruptcy is on day 16, the secured party will lose
- But, a buyer without knowledge would win even with the 15 day period, since s 30(5) says a buyer without knowledge takes free against a temporary perfection

Personal Property Security Act, RSA 2000, c P-7
Section 28 (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.

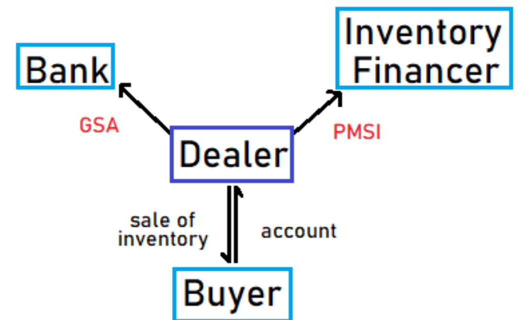
Priority of Proceeds

Section 35(3) and Section 35 provide that a security interest in proceeds enjoys the same priority as that of the original security interest. This is the basic rule we presume applies.

- But, this requires the security interest to be continuously perfected
- Section 35(3) says that if you apply the original priority rule, the time of registration of the original collateral is treated as the time of registration for the proceeds
- In terms of PMSIs, the Superpriority will apply to all collateral as it would to any proceeds under s 34
- But, there are certain exceptions to this general rule.

Section 34(6): non proceed security interests in accounts for new value has priority over a PMSI in the accounts as proceeds of inventory

- Where SP1 has a PMSI in inventory and that inventory is sold to produce accounts, in a subsequent competition between SP1 and SP2 who claims the accounts as an original secured party rather than the proceeds (they are the accounts financer)
    - In this case, section 34(6) says the accounts financer is given priority under the conditions:
        - If the financing statement is registered before the PMSI is perfected
        - If the accounts financer is registered first, it will beat out a subsequent PMSI in the inventory where it is sold and accounts are taken by way of proceeds.
- Suppose a dealership grants a GSA to the bank to secure an operating line of credit and the Bank properly registered it by filing a financing statement with the collateral described as all PAAP in the general collateral field
    - An inventory financer provides financing in respect to the acquisition of the inventory by the dealer and takes a PMSI in that inventory
    - The inventory financer does all the things it has to do under s 34(3) (registers before dealing *and* provides a PMSI notice with it's intention to take a PMSI)
    - The dealer then sells some inventory and customers then owe money to the Dealer – the money owed is an account

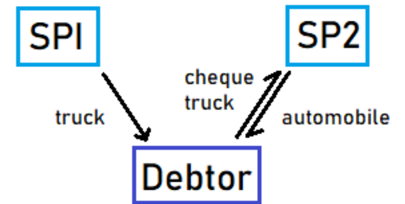


        - The Bank is claiming the account as part of the original collateral under the all PAAP clause
        - The Inventory Financer will also claim the account, not as original collateral but as proceeds from the same inventory
        - This creates the competition contemplated in s34(6):
            - Priority will be given to the bank under s 34(6)
            - Bank had a security interest in everything, including the accounts so it is an account financer. They registered before the inventory financer, so they have priority with respect to the accounts before the inventory financer
            - This is one of the few instances that the ordinary PMSI Superpriority is superseded
            - Otherwise, the PMSI would have priority
- This is all about policy: bank financing on the accounts is relying heavily on those accounts as collateral, so they shouldn't be cut off by the inventory financer whose accounts are generated from the sales
    - The Bank and Inventory Financer will generally enter into an agreement ("Inter-creditor Agreement") that specifies who is entitled to what
        - Unless money is deposited into a blocked account, the Bank will have priority
        - So s34(6) just replicates what the parties bargain for in any event
- NB: The PPSA in Ontario and Atlantic Canada do not adopt this approach; they give priority to the inventory financer so long as the inventory financer gives a PMSI notice to the accounts financer
    - West: Accounts Financer gets priority
    - East: Inventory Financer gets priority if PMSI notice is given

Section 34(7): Competition between two PMSIs, one in the original collateral and the other in the proceeds

- Rule says that the non proceeds PMSI (original collateral) wins out against the PMSI proceeds if

  - PMSI is registered in the original collateral in the appropriate timeframe (inventory before delivery, all other types within 15 days of delivery)
- Say SP1 finances the acquisition of a truck of the debtor, and takes a PMSI in the truck
- SP2 then finances the acquisition of the automobile by the debtor
  - Debtor gives SP2 a cheque and a truck as trade in
- Now there is a competition in respect of the automobile between SP1 and SP2
  - SP2 is claiming as original collateral (non proceeds PMSI)
  - SP2 is claiming a PMSI in the truck that was sold (proceeds PMSI)
  - 34(7) will give priority to SP2 for the automobile provided that the PMSI notice was properly registered
    - No later than 15 days after debtor obtained possession of the automobile



Personal Property Security Act, RSA 2000, c P-7
Section 34 (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 (c) 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. (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.

Transamerica v Royal Bank of Canada, [1990] 4 WWR 673 (SKCA)

Facts:

Reidy Motors Limited maintained a bank account with the Royal Bank of Canada ("RBC", appellant). On June 21, 1982, RBC registered a security interest in all present and after-acquired property (including book debts and all book accounts of Reidy).

- Reidy granted RBC a further security interest by debenture in all present and after-acquired property
- The accounts Reidy used were used for all facets of its business and all sale funds were deposited there.
  - RBC loaned money to Reidy periodically prior to the security interest and after loaned Reidy by operating loans (on a revolving basis). Loans were repaid by RBC withdrawing from Reidy

On April 25, 1988, Reidy and Transamerica Commercial Finance Corporation ("Transamerica", respondent) into an inventory security agreement with Transamerica with the financing statement registered three days prior.

- Reidy filed for bankruptcy on June 28, 1988

Issue:

Does Transamerica's PMSI priority render its claim superior notwithstanding s34(6)?

Rule:

Section 34 of the *Personal Property Security Act*

(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.

Analysis:

RBC conceded that some monies from the inventory sale (of which Transamerica had a security interest in) was applied by the Bank in payment of outstanding loans. They argue that the funds from the sale of inventory were not proceeds. Since Transamerica cannot trace the proceeds in the mixed fund, they cannot claim priority under s34(2).

- Transamerica contends that the proceeds don't need to be traceable because the PPSA gives a secured party the right to trace the funds
- s34(6) means the bank account is an account and the non-proceeds security interest will override the PMSI held by Transamerica in their proceeds interest.

In this case, s34(6) has no application since the RBC was not the recipient of money nor an instrument; the disputed account was money the bank itself owed to the debtor.

- This may technically fit in the wording of s 34(6), but would be contrary to the purpose of the provision
  - Section 34(6) is to preserve priority of an account financer over that of a purchase money financer. Accounts financing ought not to be jeopardized by the creation of the financing. RBC asserts priority to an account which is not an account given to secure financing. The money in this case was identifiable or traceable personal property derived from any dealing with the collateral – it is not an account.

- Meant to cover a situation where you have the sale of inventory generating the accounts as their main form of collateral that are owed to the dealer, and the Bank lends on the security of those trade accounts so it won't be subordinated under the PMSI
  - It wasn't designed to cover an account that is actually a bank account held by the secured party (in this case, the bank itself)

Conclusion:
Transamerica PMSI has priority

Hold, Order:
Action allowed.

Ratio:
Section 34(6) only applies to accounts that a third party owes to the debtor, not the money the bank itself owed.

Based off of this case (which is technically only the law in Saskatchewan), section 34(6) is really narrowed more than you would expect it to be.

- A third party must owe the account, not the account financer.

CHAPTER 11: SPECIAL PRIORITY RULES

Recall how section 35 priority only holds if no other priority rules apply. There are various exceptions that will be discussed here.

The Negotiable Collateral

Negotiable collateral covers 5 different cases, but all have one thing in common: there is a competition with a prior secured party who perfected by registration (or temporary perfection) and a subsequent purchaser who acquired a highly negotiable asset

- Recall that negotiable assets are assets where rights are locked up in the piece of paper
- If the purchaser fulfills the requirements of s31, they will prevail over the secured party.
- The rationale is that we want to ensure the debtor can pay back it's creditors. Where the secured party takes a GSA (which have an all PAAP clause), the secured party can intercept every payment that the debtor makes to it's creditor(s) by saying that is their collateral
  - This would make loans very precarious so the PPSA protects the creditors under s 31
  - It would freeze up any business financing if you couldn't pay creditors

Case 1: Section 31(1) Holder of Money

- Holder of money (bills and coins) has priority over the secured party if the holder:
  - is without knowledge *or*
  - if the holder gave value (with or without knowledge)
- Basically, if a creditor is paid money, they take free
- Say a secured party has a GSA (with an all PAAP clause); they will have a security interest in money (cash in a till) but if that cash is transferred to a third party, the security interest is quickly lost to a party who gives value, regardless of what they knew or if there was no consideration as long as they were without knowledge.

Case 2: Section 31(2) Creditor Paid with a Cheque

- If a debtor writes a cheque in payment of the creditor, a secured party who has a security interest in everything would claim they beat out the creditor
- But under s 31(2), a creditor who is given a cheque will have priority for the cheque and it does not matter what the state of knowledge of the creditor being paid is
  - The creditor will win even if they knew of the security interest

- So, under both s 31(1) and (2), the security interest may include money in the till and cheques, but when they are given to the creditor, the secured party will lose in priority.
    - The issues with s 31(1)(2) are that they were enacted before electronic banking, so there is no provision to address this (statutory obsolescence); Bill 9 addresses this to add a provision that if a payment is made electronically, it will still be covered by s 31(1)(2) and the creditor will still take free.

Sections 31(3),(4),(6) don't deal with payment per se, but with security interests in certain types of collateral that have a negotiable quality in the sense that they can convey your rights in the property by delivery with any necessary endorsement (usually a signature) and subsequent delivery

- Your right can be transferred simply by signing the back and transferring it and the transferee becomes the person entitled to it
- These collateral are cheques (s31(3)), chattel paper (s31(6)), documents of title (s31(4))

NB: Sections 31(3) and (6) use the word "purchaser" and this immediately triggers the idea that this means "buyer". But the PPSA does not restrict "purchasers" to buyers.

- Anyone who acquires under a voluntary transaction is considered a purchaser
- Someone who buys a negotiable property is obviously a purchaser (and a buyer), but a party that takes a possessory security interest in the property would also fall under this definition
    - This broadens the protections given
    - If a debtor sells a negotiable property to another property OR grants a security interest to another party and gives possession to them, they will prevail over the first secured party who has a registered security interest (if the second secured party is without knowledge).

In essence, if you are a secured party and dealing with negotiable property, it is actually safer to have a possessory security interest in the negotiable property than registering (possessory will be superior to registration)

- Even if you register, there is a chance that the debtor grants a competing security interest or gives possession to another party and that other party would prevail.

Case 3: Section 31(3) Purchaser of an Instrument

- A purchaser of an instrument will prevail over the secured party if they:
    - takes for value (consideration),
    - buys without knowledge and
    - takes possession of the paper

Case 4: Section 31(4) Holder of Document of Title

- The exact same as s 31(3) but instead of purchasing an instrument, they are holding a document of title (bill of lading or warehouse receipt)

Case 5: Section 31(6) Purchaser of Chattel Paper

- The exact same as s 31(3) but instead of purchasing an instrument, they are purchasing a chattel paper (lease of goods)

There is one difference between section 31(6) and section 31(3)/(4).

- Section 31(5) states that if a secured party is claiming chattel paper as proceeds of inventory, then the chattel paper transferee (ie, the purchaser) will prevail regardless of their state of knowledge.
- So, if it is an instrument purchaser (3) or a document of title holder (4), who acquired their negotiable document in ordinary course of business, and they knew it violated the terms of the security agreement

Personal Property Security Act, RSA 2000, c P-7

Section 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
  - (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 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.

Flexi-Coil Ltd v Kindersley District Credit Union, (1994), 107 DLR 129 (SKCA)

Facts:

Flexi-Coil Ltd (plaintiff) took a PMSI for inventory they supply to Churchill. Churchill then sells and obtains payment for customers. Those cheques it receives in payment are then deposited into their account with Kindersley District Credit Union ("Kindersley", defendant)

- Kindersley is otherwise an unsecured creditor

Flexi-Coil brings action against Kindersley to try and claim the moneys that arise from the sales on the inventory that was then deposited into the accounts at Kindersley

- Flexi-Coil claimed they were proceeds in inventory so they want to claim for them and since Flexi-Coil registered properly, they want to have priority.

Issue:

Is Flexi-Coil's PMSI cut off by the deposit into the operating bank account with Kindersley?
Does Flexi-Coil have a security interest in the operating account as second generation proceeds?

Rule:

Section 31 of the *Personal Property Security Act*

(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.

Analysis:

Flexi-Coil claims that Kindersley is subordinate since they are not even a secured party and only form a bank-debtor relation with Churchill whereas Flexi-Coil has a security interest in collateral, which are sold.

- The cheques produced in exchange for the sales are first generation proceeds, which Flexi-Coil has an interest in

Kindersley claims that the moment the proceeds (the cheques) are deposited into the account, Flexi-Coil's security interest is cut off by s 31(3).

Section 31(3) requires Kindersley to:

- Take possession of the cheque
  - It was deposited into their account, so this was proven
- Be without knowledge
  - They were unaware of the PMSI Flexi-Coil had
- Give Value
  - It is unclear whether Kindersley gave any value when the cheques were deposited
  - When cheques are deposited, there is a process where the bank clears the cheque – the bank will decide whether or not to pay it depending if there is enough money in the account
    - If your bank instantly credits your account and lets you draw it out, it is really giving you a short term loan based on the face value of the cheque until it clears
      - For that short-term, the cheque is not in the account but you have access to the money
    - But, if the Bank puts a hold on the cheque until it clears, the bank is merely collecting it as your agent and can't be considered a lender or a purchaser
  - In this case, Kindersley immediately credited the account before the cheque was cleared, so it was granting a short term loan
    - This satisfies that Kindersley is a purchaser and gave value

Section 31(3) criteria being met, Kindersley cut off Flexi-Coils security interest.

Flexi-Coil also argued that, even if their security interest is lost by s 31(3), they have a claim in the second generation proceeds (ie, the accounts in which the cheques were deposited)

- This argument does not hold since Churchill didn't obtain a new asset by virtue of the accounts. Having an obligation paid down is not acquiring new property
- Churchill did not obtain any interest in personal property as a result of the dealing
    - The account was overdrawn so that the deposit of funds from the cheque simply reduced the debt owed by Churchill
- Line of credits are not a new asset, they are a liability and thus the accounts are not a second generation proceed

Conclusion:
Section 31(3) allows Kindersley to prevail.

Hold, Order:
Action dismissed.

Ratio:
Where the bank immediately credits a cheque while it is cleared, this is a short term loan that satisfies the Bank as a purchaser and means they gave value

Proceeds in the form of accounts will only constitute true proceeds where there is a positive balance in the account; paying down a line of credit will not constitute proceeds (no new asset was acquired)

Non-Consensual Security Interests

Once we enter into the realm of Non-Consensual Security Interests ("NCSI's"), we are outside the scope of the PPSA. But, when there is competition between a NCSI and a PPSA SI, there are certain PPSA – provisions to pay attention to.

- While NCSIs still secure obligation for performance or payment and are a proprietary right, they are not made under the scope of the PPSA so cannot be governed by PPSA priority rules

There are various types of non-consensual security interests. Some from common law, but usually from statute

- Liens
    - Can be common law or statutory
    - Common law: repairers lien
    - Statute: *Garage Keepers Lien Act* and *Warehouse Keepers Act*
- Rights of Distress
    - Rights given to a landlord for unpaid rent so they can go onto leased property and seize personal property
- Deemed Trust
    - Created by statute by the Canadian Revenue Agency or pension legislation
    - Imposes a deemed trust on assets of the debtor to secure some monies that need to be paid
- Statutory Security Interest
    - *Workers Compensation Act* secured WCB assessments that are to be paid to the WCB
- Statutory Demand
    - Garnishment Process: when a third party owes money to debtor, by virtue of the demand, their payment is intercepted so it is paid to the creditor rather than the debtor
    - Under section 222 of the *Canadian Revenue Agency Act* or *Income Tax Act*.

The crucial issue with all of these cases are determining priority. Since the NCSIs are not created under the PPSA, they cannot necessarily be beholden to PPSA priority rules. The general process for determining priority becomes:

1. Determine if Section 32 of the PPSA applies
    a. Will only apply for liens, not statutory or deemed trusts
2. If section 32 does not apply, determine if a non-PPSA priority rule exists

    a. Often, statutes will include a priority ranking if there is a statutory security interest
        i. If there is, use that rule
3. If no non-PSPA rules apply, fall back to property principles.
    a. The first interest to come into existence (by order of attachment) will have priority over later interests.

Section 32 contains a priority rule that governs a situation with a dispute between a secured party within the PPSA, and a competing party with a lien NCSI. But this rule is rather limited

- A competing party with a NCSI lien will have priority if:
    - Person furnishes materials or services subject to a security interest
    - If the furnishing is in the ordinary course of business (repairer or storer (like garage keepers))
    - If the lien is for goods
    - The Act in which the lien is given does not state the lien doesn't have priority
        - (Ie, if the Act states the lien will not have priority, the lien holder won't have priority)
- This applies regardless whether the PPSA SI was perfected or not
- The rationale behind this is that if goods/materials are furnished for storage or repairs, it will enhance the goods value and justifies giving priority to the lien holder over the secured party
    - If the lien in the Act says the lien does not have priority, the Act will prevail over s 32
    - Section 32 would still apply, but it is subject to a different statutory priority

Personal Property Security Act, RSA 2000, c P-7
Section 32 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority.

Garage Keeper's Lien under *Garage Keepers Lien Act*

The common law gave a lien to garage keepers when debtors put their vehicles in the garage keeper's possession, but if they gave possession back to the owner, they lost the lien (possessory retention was required)

- For vehicle repairs, this presents a dilemma. If they get it back, they lose the repairer's lien
- If the repairer wants to get paid, they need to keep the vehicle
    - This wouldn't really work for someone like a trucker who needs the truck to get paid

In response, the *Garage Keepers Lien Act* ("GKLA") creates a non-possessory lien in favour of the garage-keeper

- Section 2 gives the garage keeper a non-possessory lien if the garage keeper obtains a written acknowledgement of indebtedness
- Section 3 provides that the nonpossessory lien terminates 21 days after the garage keeper returns the possession to the owner unless the garage keeper registers the lien
- Section 4 provides the lien is subordinated to certain competing parties
    - This is laid out in s 32 of the PPSA, where it states if the legislation that enabled the lien gives a priority provision, that will be the rule followed.
        - Section 32 is thus still operating, but it is operating to give effect to section 4 of the GKLA rather than the s 32 priority rule
    - However, the lien is only subordinated to certain security interests. It will be subordinate to any encumbrance (ie, a security interest) on the vehicle if the encumbrance was

        - In good faith
        - Without notice
        - Arose before registration of the financing statement
    - So, the lien holder will lose to any secured party that was created before the garage keepers financing statement was made
    - If these conditions are not met, the s 32 rule applies and the garage keepers' lien will have priority

Alberta courts have interpreted s 4 differently.

- The provision is not to subordinate the lien to any secured party, it is merely to give priority to a secured party who acquires interest after the debtor obtains possession but before the garage keeper registers (in the 21 day period under s 3 of the GKLA).
- To the rest of the world, no one would know the garage keeper has an interest since they returned it but haven't registered it
    - So, section 4 only provides protection (via priority) to people
    - Only a secured party who acquires after release but before registration of the garage keepers lien would be able to take advantage of s 4
        - Limited priority rule
        - So, the secured party who registered before the garage keeper got possession back or a secured party who registered after registration would be subject to s 32 of the PPSA, and not s 4 for the lien to prevail

Garage Keepers' Lien Act, RSA 2000, c G-2
Section 2 (1) In addition to every other remedy that a garage keeper has for the recovery of money owing to the garage keeper for (a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or (b) the price of accessories or parts furnished for a motor vehicle, farm vehicle or part of a motor vehicle or farm vehicle, a garage keeper who is entitled to payment of a sum for the storage, repair or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle or part of it or the farm vehicle or part of it for the sum to which the garage keeper is entitled. (2) No garage keeper is entitled to a lien under this Act for the price of fuel, oil or grease furnished for a motor vehicle or farm vehicle. (3) No garage keeper is entitled to a lien under this Act unless the garage keeper retains possession of the motor vehicle or farm vehicle or the garage keeper obtains from (a) the person who authorized the storage, repair or maintenance or the person's authorized agent, or (b) the person who ordered that accessories or parts be furnished for the motor vehicle or farm vehicle or the person's authorized agent, an acknowledgment of indebtedness by requiring that person or that person's agent to sign an invoice or other statement of account. Section 3 (1) A lien referred to in section 2 terminates on the 21st day after the day (a) on which possession of the motor vehicle or farm vehicle is surrendered to the owner or the owner's agent,

(b) on which repairs were completed to the motor vehicle or farm vehicle or any part of the motor vehicle or farm vehicle if the vehicle was not at the time of repair in the possession of the garage keeper, or

(c) on which the accessories or parts for the motor vehicle or farm vehicle were furnished,

as the case may be, unless on or before the 21st day the garage keeper registers in the Registry a financing statement indicating a claim of lien on the motor vehicle or farm vehicle.

(2) A financing statement referred to in subsection (1) must be signed by the garage keeper or by a person authorized by the garage keeper.

Section 4
Every lien on a motor vehicle or farm vehicle under this Act shall be postponed to an interest in or charge, lien or encumbrance on the motor vehicle or farm vehicle,

1. that is created or arises
   (i) in good faith, and
   (ii) without express notice of the first mentioned lien,

and

2. that was created or arose before the registration of a financing statement referred to in section 3(1).

The *Income Tac Act,* s 227 creates a priority rule that depends on remittances.

- Often, business don't remit when they should when they are in hard times. So, a deemed trust will be imposed so the debtor holds all property in trust, out of which payment in respect to the remitted source reduces the assets
- Section 227 ensures that the deemed trust for unremitted source deductions will prevail over all security interests even if the security interest was created ahead of time
- Essentially, this is a NCSI that contains an express priority rule.

Section 224(1.3) defines what the *ITA* considers a security interest (that will be subordinate to the deemed trust)

- Certain agreements would be a security interest under the PPSA (like a conditional sales agreement clearly under s 3(1)), but the question is *not* whether it is a SI in the eyes of the PPSA since we are dealing with the *Income Tax Act*, not the PPSA
- Case law helps us out with this.
- Section 224(1.3) defines a security interest as one that is created or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance
- All case law comes to the same conclusion: a title retention device does not fall in the definition of security interest according to the Income Tax Act
  - So a conditional seller or leaser would have priority over the CRA deemed trust since the statutory priority rule doesn't apply since the conditional sales contract or conditional lease did not fall to the definition
    - This was the finding in *DaimlerChrysler Financial Services v Mega Pets Ltd*
- The definition are all given by a grant rather than retention of interest by a conditional lessor

Subordination Agreements

Even if the PPSA gives a party priority, that secured party may agree to, in the security agreement, subordinate their secured interest to another party

- This subordination agreement can be directly in the security agreement between the secured party and the debtor, or it can be in any other agreement

    - Subordination provisions in an intercreditor agreement is still fair to apply to the secured party and debtor
        - These usually involve the creditors deciding amongst themselves what the payout schedule should be
    - Or if the subordination clause is in another contract between secured parties.
        - It is common for a secured party to agree to being subordinate to another secured party through agreement (in exchange for something else)
        - These agreements will still hold even if it isn't the original security agreement between the secured party and the debtor
        - A bank will often say they have priority over the accounts and inventory, but the other financer would have priority over equipment
            - This gives surety to what will happen in the event of default and avoid litigation
- Section 40 allows this to occur and states that the subordination is enforceable according to it's terms
    - This avoids privity of contract problem where the subordination provision is not in the security agreement – s 40 will allow it to still hold
        - Even parties not party to the contract will still be subject to it
    - It also allows subordination in whole, or in part just in respect to certain property
- What section 40 means is that the contract must be read in order to know priority.

There is a lot of case law arising out of interpretation of subordination agreements. Need to interpret the parties intentions with the subordination

- Often, a GSA will have a subordination clause in respect to PMSIs (debtor is allowed to obtain and grant PMSIs to others)
- Then the financer will forget to comply with s 34 but doesn't (say registration was improper) and then the s 34 Superpriority will not be available to it.
    - Well then you can look to the GSA, since the subordination clause will allow the Superpriority even if it was lost under s 34, since s 40 will give effect to it
- This means how the provision is drafted is very important.

Euroclean case:

- Agreement: "the Corporation may give mortgages or liens in connection with the acquisition of property after the date hereof…and any such mortgage lien or other encumbrance shall rank in priority to the charge hereby created."
- This meant the security interest in connection with the acquisition of property (PMSI) will rank ahead of a SI created in this GSA
    - The PMSI will rank in priority even if the PMSI neglected to register in time and failed to obtain Superpriority

Chiips

- Provision: "The Company shall not create any other encumbrance ranking in priority to the Security other than a purchase-money security interest."
- Also found to be a subordination
    - Often when you have negative covenants, permission is not the same as priority
    - But the majority said the language is intended to subordinate the security interest to a PMSI

Kubota Canada

- Provision: "The Debtor warrants that the Debtor is the owner of the Collateral free of all encumbrances and security other than Permitted Liens.

The debtor agrees that it shall keep the Collateral free of liens, encumbrance or security interests, other than Permitted Liens."

- Court concluded that "Permitted Liens" were defined to include PMSIs, but this is not a subordination
- The first statement is just a promise that it is free of all security interests other than PMSIs
  - Not subordinating a claim, just allowing PMSIs to be made and promise that your security interest won't be encumbered
- The second statement is a positive covenant to keep it free of other encumbrances other than permitted liens (a PMSI)

General Motors Acceptance Corporation of Canada Ltd v Royal Bank of Canada

- CIBC, GMAC and RBC all had perfected security interests in units of things owned by HEL, who went bankrupt
- It was established that the priority ranking of the secured parties' claims, as determined by the PPSA were CIBC > GMAC > RBC
- However, CIBC and RBC entered into a subordination agreement under which CIBC agreed to subordinate it's interest to that of RBC
- This creates the circular issue again, where CIBC > GMAC > RBC > CIBC…
- The court took the following approach:
  1. Set aside the amount of SP1's claim
  2. Satisfy SP3's claim out of this fund
  3. Any remaining balance is given to SP1
  4. SP2 is paid out of funds remaining after SP1's was put aside
  5. Any remaining balance is paid off first to SP3 and next to SP1
- So, say the assets were $2.5M; SP1 claimed $1.5M, SP2 claimed $1.75M, SP3 claimed $1.0M
  1. Set aside the amount of SP1's claim
     - $1.5M taken out of the $2.5M
  2. Satisfy SP3's claim out of this fund
     - $1.0M given to SP3
  3. Any remaining balance is given to SP1
     - Then remaining $0.5M given to SP1
  4. SP2 is paid out of funds remaining after SP1's was put aside
     - There is only $1.0M remaining, and it all goes to SP2
  5. Any remaining balance is paid off first to SP3 and next to SP1
     - There is no remaining
     - SP1: $0.5M, SP2: $1.0M, SP3: $1.0M

- Say the assets were $3M; SP1 claimed $0.5M, SP2 claimed $1.5M, SP3 claimed $2.0M
  1. Set aside the amount of SP1's claim
     - $0.5M taken out of the $3M
  2. Satisfy SP3's claim out of this fund
     - $0.5M given to SP3
  3. Any remaining balance is given to SP1
     - Nothing remaining
  4. SP2 is paid out of funds remaining after SP1's was put aside
     - There is $2.5M remaining, and $1.5M of it goes to SP2
  5. Any remaining balance is paid off first to SP3 and next to SP1
     - There is $1.0M remaining, all of it goes to SP3
     - SP1: $0M, SP2: $1.5M, SP3: $1.5M
- In all cases, SP2 was unaffected – they get whatever they would have received had the insubordination not occurred.

Personal Property Security Act, RSA 2000, c P-7
Section 40 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.

Fixtures, Accessions and Commingled Goods

What happens when things that are subject to a security interest are fixed to land, accessed to other property or commingled with other goods (secured or not)?

- The PPSA defines "fixtures", but it is incomplete, simply saying it does not cover building materials. This means we use the common law definition of fixtures

Fixtures

Fixture: personal property affixed to land so that it is considered to be part of the realty but which does not include building material. When considering whether a goods has become a fixture, the courts will look at the degree of annexation, the intention of the party who annexed the good to the realty and the use that may be made of the good.

- The PPSA alters the common law by providing that a security interest in an item of personal property persists even after the goods are affixed to real property.
- At common law, the fixing of goods to land considered the good part of the realty and thus outside the scope of personal property security law.

Competitions when it comes to Fixtures isn't between secured parties, instead they are between the fixture financer and the real property interest holder. The Secured party will take an interest in something that becomes affixed to the land, but the real property interest holder will want to claim it as part of their land.

- Say D owns land upon which a manufacturing plant is located. The land is subject to a mortgage in favour of M.
- SP supplies manufacturing equipment to D under a security agreement. This equipment becomes affixed to the land
  - In this case, SP would get priority under s 36 of the PPSA
  - The mortgagee is not misled since at the time of the loan, the land did not have a fixture, so the mortgagee never relied on the land having those goods associated
    - Giving the fixture financer the right to remove is not prejudicial to the bank
- The fixture financer can protect itself for future mortgagees by filing a fixture notice in the Land Title System, then the mortgagee can search the system and find the fixture in question
  - If the secured party files a fixture notice then they can exercise a right of removal against the mortgagee and all subsequent interest holders

Building Materials: materials that are incorporated into a building and includes goods attached to a building so that their removal would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to it or which could result in weakening its structure or exposing it to weather damage or deterioration.

- Building materials do not include heating, air conditioning or conveyancing devices or machinery installed in a building.

Building materials are the things that form part of the realty that cannot be removed or that would cause great damage if they were removed

- Generally, fixture financers will have the right to remove fixtures, but these definitions make it unreasonable for them to yank out the bricks of the building
  - They can remove fixtures, but not the building materials

Section 36 of the PPSA deals with fixtures. But, it distinguishes between three scenarios

1. Materials are building materials incorporated into the building
   a. The goods have become part of the land and are not considered fixtures
   b. Section 36 does not apply and the secured party does not have a right to removal
2. Materials are not fixtures under the common law tests
   a. There may be some degree of attachment to the land, but not so sufficiently to lose their separate identity under the common law test for fixtures
      i. Manufacturing equipment belted down would be attached to the land but not sufficiently attached to be a fixture
   b. Section 36 would still not apply
      i. A priority dispute with a real property claimant will not arise because the goods do not form part of the land
3. Materials are fixtures and are not within the definition of "building materials"
   a. Section 36 will apply and the secured party will have the right of removal if the requirements of the section are satisfied
   b. They would have the right to removal if procedural requirements are followed
   c. If section 36 applies, we need to determine if the fixture financer is in competition with another who has taken an interest in the land
      i. Who has the better claim? Person with the real interest or the personal interest (fixture financer)?

Section 36(2): Priority will be given to a fixture financer over a real property interest holder if the fixture security interest before or at the time the goods became a fixture

- But this is subject to the exception laid out in s 36(3)
- Section 36(3) relates to timing
  - The exception covers situations where the fixture financer takes a security interest in goods which then become part of the land and then after they become part of the land, the debtor grants an interest in the land to someone else.
    - Ie, it is dealing with a subsequent real property interest holder
  - (3) will give priority to the subsequent real property holder, unless the fixture financer files a fixture's notice in the Land Titles System
    - This is because a notice in the system will mean the subsequent interest holder can be made aware after a Land Titles search
- Section 36(3)(b) states that a prior mortgagee or a bank that has taken a mortgage in the land before the goods become fixtures, has priority to the extent that it makes further advances after the goods become fixtures
  - But, only to the extent of further advances
  - If you have a land taking a mortgage, and the fixture notice is not filed by the fixture financer, the bank will have priority for all later advances after the goods become fixtures before the fixture notice is filed

Where you have cases of two competing secured parties having an interest in the same goods affixed to the land, sections 36(2) and (3) won't influence the priorities at all

- Either SP1 or SP2 can enforce s 36 and has a right to remove them from the land
- The priority between the two of them will be resolved under s 35

NB: even if the fixture financer has priority and the right to remove, they have to pay for damages incurred during the removal process. You don't have to pay for the depreciation in land value, just the damage incurred by the removal

- Also, section 36 only applies where the goods are fixtures. If they are not fixed, then they are just normal goods and don't need to follow the s 36 framework.

In *GMS Securities & Appraisals Ltd v Rich-Wood Kitchens Ltd*, there was an issue of circular priority again

- National Trust took a real property mortgage and Rich Wood took a security interest in the cabinets that it sold to the debtor, but failed to register a fixtures notice
- GMS then took a second mortgage on the land
    - RW wins against a prior mortgagee (National Trust) under s 36(2)
    - RW loses against GMC since GMS is subsequent and no fixture notice filed s36(3)
    - GMS loses to NT since it is second on the land titles system
- How do you break the circularity?
    - NT would have to compensate RW for the interest that is dealt with since it had no right to go after cabinets while RW had priority
    - But NT would be subrogated to any right that other parties have
        - This doesn't helps us since NT is subrogated to RW's rights and RW has no rights over GMS since GMS has priority
    - Basically, NT needs to pay the value to RW and is subject to their rights (but those rights are valueless). So, all the loss is on NT

This decision was problematic. This puts all the risk on the party that didn't cause the loss

- RW would have priority if they just filed a fixture notice and avoided this whole mess
- The loss is placed on whatever party enforced first
    - RW yanked the cabinets first, but doing so appropriated the rights belonging to GMS
        - So, RW should pay GMS for the interest it appropriated, and then RW would be subrogated to any GMS right (which doesn't exist)
    - If RW lost first, the loss would be on them. But if NT enforced first, they would bear the loss
        - This sucks because it makes the whole thing a standoff – whoever moves first loses
- What is the solution:
    - Order the party at fault as the first position. RW could have filed a fixture notice, but didn't. Then NT and then GMS third
        - So, RW should subrogate and from their amount, pay out GMS
        - Put party at fault first and then subrogate their rights to the party that is over them

Personal Property Security Act, RSA 2000, c P-7
Section 1 (1) In this Act, (e) "building materials" means materials that are incorporated into a building and includes goods attached to a building so that their removal (i) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or (ii) would result in weakening the structure of the building or exposing the building to weather damage or deterioration, but does not include heating, air conditioning or conveyancing devices or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land; … (t) "fixture" does not include building materials

Section 36
(1) Subject to the regulations, this section applies only with respect to land for which a certificate of title has been issued under the *Land Titles Act*.

(2) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land.

(3) A security interest referred to in subsection (2) is subordinate to the interest of
  (a) a person who acquires for value an interest in the land after the goods become fixtures, including an assignee for value of the interest of a person with an interest in the land at the time the goods become fixtures, and
  (b) a person with a registered mortgage on the land who, after the goods become fixtures,
    (i) makes an advance under the mortgage, but only with respect to the advance, or
    (ii) obtains an order confirming sale or a vesting order in a foreclosure action
    (iii) without fraud and before the security interest is registered in accordance with section 49.

<u>Accessions</u>
Section 38 delineates the provisions around property that becomes accessed to others. The rules are almost the same as they are in s36 for fixtures.

- Instead of registering the fixture notice in the Land Titles System, the accession financer must register a financing statement in the Personal Property Registry in order to prevail over a subsequent interest holder.
- If you have an accession financer (for example, financed the acquisition of a new engine in a car), they have the priority to remove that engine as against a prior secured party who has a security interest in the vehicle and that is so regardless of whether or not it was registered
  - But, if the competition is with a subsequent party, the engines needs to be registered in the PPSR in order to prevail over the subsequent holder.

Accessions: the installation or affixation of goods to other goods. Under the PPSA, chattels do not lose their identity simply because they become affixed to other chattels. Rather, a secured party may continue to hold a security interest in the collateral even though the collateral has been affixed to another chattel.

Personal Property Security Act, RSA 2000, c P-7

Section 1
(1) In this Act,
  (a) "accessions" means goods that are installed in or affixed to other goods;

Section 38
(1) In this section,
  (a) "other goods" means goods to which an accession is installed or affixed;
  (b) "the whole" means an accession and the goods to which the accession is installed or affixed.

(2) Except as provided in this section and section 30, a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over a claim to the goods as an accession made by a person with an interest in the whole.

(3) A security interest referred to in subsection (2) is subordinate to the interest of
  (a) a person who acquires for value an interest in the whole after the goods become an accession, including an assignee for value of the interest of a person with an interest in the whole at the time the goods become an accession, and
  (b) a person with a security interest taken and perfected in the whole who, after the goods become accessions,
    (i) makes an advance under a security agreement, but only with respect to the advance, or
    (ii) acquires the right to retain the whole in satisfaction of the obligation secured
  without knowledge of the security interest in the accession and before it is perfected.

(4) A security interest in goods that attaches after the goods become an accession is subordinate to the interest of a person who
  (a) has an interest in the other goods at the time the goods become an accession and who
    (i) has not consented to the security interest,
    (ii) has not disclaimed an interest in the accession,
    (iii) has not entered into an agreement under which a person is entitled to remove the accession, or
    (iv) is not otherwise precluded from preventing the debtor from removing the accession,
  or
  (b) acquires an interest in the whole after the goods become an accession, if the interest is acquired without knowledge and before the security interest in the accession is perfected.

(5) A secured party who, under this Act, has the right to remove an accession from the whole shall exercise that right of removal in a manner that causes no greater damage or injury to the other goods and that puts the person in possession of the whole to no greater inconvenience than is necessarily incidental to the removal of the accession.

<u>Commingled Goods</u>

Commingled Goods are covered by s 39 of the PPSA.

- Section 39(1): perfected security interest in goods that then becomes a product/mass and if the goods are so manufactured, processed… such that their individual character is lost
  - This covers mixing (oil or grain) and transformations (grapes into wine, leather into shoes)
  - Section 39(1) allows the security interest in the goods to continue into the mixture/transformation
    - This departs from common law which states that your interest was lost when it was made into another product
    - The PPSA gives secured parties a stronger right
- Section 39(3): any priority that a perfected security interest that has been continued in the product/mass under s39(1) has over a perfected commingled mass is limited to the value of the goods at the time they became a part of the product or mass
  - You cannot claim more simply because it was commingled
- Section 39(4): covers the situation where you have multiple component financers and the component are turned into a single product or mass

- You don't look to priority, but share proportionately according to their security interest obligation
    - One caveat: your obligation secured is capped at the value of the component that is combined to form the product or mass
    - If you had $10k worth of interest in grapes and the final value is $100k worth of wine, you only get $10k worth

In essence, because priority is brought forward, a competition between secured parties is resolved through s 35. If you have an interest in leather that becomes shoes, but another SP has an interest in the shoes and registers first, you are out of luck even if your security interest extended into the shoes

- The continuation of security interest into the commingled good doesn't mean you have priority, it just brings whatever priority you had in the constituent element forward into the end product
- Section 39 also brings PMSI forward into the commingled goods as well, subject to limitations in s 39(4).

Say SP1 supplied D with steel, and SP2 supplied plastic. Both have a GSA with D. The goods are combined to make blenders

- If SP1 secured obligation for $10,000 and SP2 secured $40,000, but the end value was only $25,000, how do we reconcile that?
    - Claim the proportion of the constituent as the proportion of your claim
    - SP1: [$10,000/($10,000 + $40,000)] * $25,000 = $5,000
    - SP2: [$40,000/($10,000 + $40,000)] * $25,000 = $20,000
- The claim you have is according to the ratio of the obligation secured compared to the sum

Personal Property Security Act, RSA 2000, c P-7
Section 39 (1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product. (2) For the purposes of section 35, perfection of a security interest in goods that subsequently become part of a product or mass is also to be treated as perfection of the interest in the product or mass. (3) Any priority that a perfected security interest that has been continued in the product or mass under subsection (1) has over a perfected security interest in the product or mass is limited to the value of the goods at the time they became part of the product or mass. (4) Subject to subsection (6), if more than one perfected security interest continues in the same product or mass under subsection (1), and each was a security interest in separate goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum of the obligations secured by all the security interests.

Investment Property

Everything we have learned about the PPSA (perfection, priority, etc) does not apply for investment property. The PPSA creates a completely different framework for investment property than it does for all other types of collateral

- These rules are significantly different than the usual perfection and priority rules of the PPSA

- Perfection by Control becomes the gold standard – if you want your security interest to prevail, you focus on perfecting by control

There are three times of Investment Properties:

1. Certificated Securities
    a. Traditional form of securities where you have a paper certificate
    b. Corporate shares and bonds
2. Uncertificated Securities
    a. Like certificate, there is a direct relationship between the issuer and the holder
        i. The issuer knows who the holder is (it is in the books)
    b. But, there is no paper certificate; instead the issuer has it recorded in their records
    c. These aren't very common and is restricted to the mutual fund market
        i. If you purchase mutual funds, they will record your holdings without a certificate but you know that you have a certain proportion of the funds
3. Security Entitlements
    a. These are completely indirect
    b. The issuer of the corporate bond or share does not know who their ultimate holder is because of the indirect holding system
    c. Securities intermediate (like a broker) holds quantities of shares for you, but have not earmarked/ascertained/segregated them yet (not certificated). The depository (CDS in Canada) houses them in their vaults. The certificates are in the vaults but they hold proportions for certain brokers
        i. The broker will likely hold themselves through a security entitlement with an investment bank/securities depository
        ii. Don't have any certificates or records held by an issuer, but the broker indicates that they are holding a certain amount of investment property on your behalf
    d. If you invest $100,000 in Air Canada, you cannot go back to your broker and ask to see the shares – you can only see your security entitlement.
        i. Your interest isn't in the security, but the security entitlement
    e. This is the most common form of holdings in the modern stock market

There are three methods of perfection for investment property:

- Perfection by Control
    - Highest priority ranking
    - Perfection by control occurs when the creditor has taken whatever steps are needed in order to be in a position to sell the collateral without any further action or consent or approval by the debtor
    - Implemented differently depending on the 3 types of intellectual property
- Perfection by Delivery
    - Only for certificated securities
    - When transfer of possession occurs but where the party has not endorsed it yet (usually just sign the back) to properly transfer it
        - Have done what is needed by control but missed the endorsement
- Perfection by Registration
    - Same as we have already seen

To perfect by control, the section will depend on the type of investment property in question. Section 1.1 is a gateway provision that basically just says whatever the *Securities Transfer Act* says applies (incorporation by reference)

- If you want to know how to perfect investment property by control, s1.1 tells you that the *STA* will have the rules on how to do that. If they are followed, the PPSA will respect the interest as perfected by control
    - Certificated Securities

        - PPSA s1.1(1)(a) → STA s 23
    - Uncertificated Securities
        - PPSA s1.1(1)(b) → STA s 24
    - Security Entitlements
        - PPSA s1.1(1)(c) → STA s 25

Section 23 of the *STA* for Certificated Securities

- Provides two rules, depending on the form of certificated security
    - If in the bearer form, whoever has possession of the paper, all that is needed is delivery of the paper to the purchaser
    - If in registered form, delivery alone will not be sufficient
        - Need endorsement by the person who is registered as the owner of the certificated security
        - If your security says the shares are registered in the name of John Smith, then John Smith must transfer the piece of paper and endorse his name on the back of the instrument
        - If the certificate is in registered form, perfection by control needs both possession and endorsement.

Section 24 of the *STA* for Uncertificated Securities

- Method 1: If the purchaser gets delivery, then they qualify
- But how do you deliver something that doesn't have a certificate?
    - "Delivery" in the STA means that if the purchaser is recorded as the owner of the uncertificated security, then there is delivery to that person
    - So, a secured party can perfect by control by having the secured party record it as the owner of the uncertificated security, even if the owner doesn't have physical possession
- Method 2: If the issuer agrees with instructions that are originated by the purchaser without further consent of the registered owner
    - Control agreement between the owner, issuer and purchaser
    - Tripartite agreement under which the issuer will follow the purchaser instructions with no further consent of the owner
        - If the purchaser instructs the issuer to sell and give it the proceeds, then it would do so
        - It is usually the owner saying "go follow the directions of the bank", and that is a consented instruction to follow the bank
        - Called a control agreement

Section 25 of the *STA* for Security Entitlements

- Three mechanisms
- First 25(a): the purchaser becomes the entitlement holder
    - If the secured party is recorded as the entitlement holder, that is perfection by control
- Second, 25(b): control agreement
    - Agreement between the securities intermediary (broker), purchaser and entitlement holder
    - Like control agreement for the uncertificated securities, but not between issuer, but the securities intermediary, purchaser and entitlement holder
- Third, 25(c): if the third party has control of security entitlement and acknowledges that they are holding as an agent (on behalf) of the purchaser

Personal Property Security Act, RSA 2000, c P-7
Section 1.1

(1) For the purposes of this Act,

   (a) a secured party has control of a certificated security if the secured party has control in the manner provided for in section 23 of the *Securities Transfer Act*;
   (b) a secured party has control of an uncertificated security if the secured party has control in the manner provided for in section 24 of the *Securities Transfer Act*;
   (c) a secured party has control of a security entitlement if the secured party has control in the manner provided for in section 25 or 26 of the *Securities Transfer Act*;
   (d) a secured party has control of a futures contract if
      (i) the secured party is the futures intermediary with which the futures contract is carried, or
      (ii) the futures customer, the secured party and the futures intermediary have agreed that the futures intermediary will apply any value distributed on account of the futures contract as directed by the secured party without further consent by the futures customer;
   (e) a secured party having control of all security entitlements or futures contracts carried in a securities account or futures account has control over the securities account or futures account.

Securities Transfer Act, SA 2006, c S-4.5

Section 23

(1) A purchaser has control of a certificated security that is in bearer form if the certificated security is delivered to the purchaser.

(2) A purchaser has control of a certificated security that is in registered form if the certificated security is delivered to the purchaser and
   (a) the security certificate is endorsed to the purchaser or in blank by an effective endorsement, or
   (b) the security certificate is registered in the name of the purchaser at the time of the original issue or registration of transfer by the issuer.

Section 24

(1) A purchaser has control of an uncertificated security if
   (a) the uncertificated security is delivered to the purchaser, or
   (b) the issuer has agreed that the issuer will comply with instructions that are originated by the purchaser without the further consent of the registered owner.

(2) A purchaser to whom subsection (1) applies in relation to an uncertificated security has control of the uncertificated security even if the registered owner retains the right
   (a) to make substitutions for the uncertificated security,
   (b) to originate instructions to the issuer, or
   (c) to otherwise deal with the uncertificated security.

Section 25

(1) A purchaser has control of a security entitlement if
   (a) the purchaser becomes the entitlement holder,
   (b) the securities intermediary has agreed that it will comply with entitlement orders that are originated by the purchaser without the further consent of the entitlement holder, or
   (c) another person has control of the security entitlement on behalf of the purchaser or, having previously obtained control of the security entitlement, acknowledges that the person has control on behalf of the purchaser.

(2) A purchaser to whom subsection (1) applies in relation to a security entitlement has control of the security entitlement even if the entitlement holder retains the right
  (a) to make substitutions for the security entitlement,
  (b) to originate entitlement orders to the securities intermediary, or
  (c) to otherwise deal with the security entitlement.

<u>Priority of Investment Property</u>

The non-temporal priority rules that govern investment property displace the ordinary PPSA priority rules that govern competitions between secured parties

- The PMSI concept has no application to security interests in investment property.
- The temporal priority rule under s 35 does not apply
- Instead, investment property uses non temporal rules. You can be first in priority even if you are not first to perfect your security in the investment property
  - If someone registers before another party who perfects by control, the perfection by control will still win.

The dominant rule is laid out in s 35.1(2)

- The secured party who has perfected by control has priority over secured parties who have not perfected by control
- Say a debtor gives SP1 a GSA (covers all PAAP and Investment property), it is properly registered and "all PAAP" is in the general description field
  - This is perfected by registration
- Say the debtor then gives SP2 a security interest in investment property and SP2 perfects by control. The debtor gives possession of the certificate to SP2 and endorses it
  - SP2 has perfected by control and thus has priority over SP1
  - Even if SP2 knew of SP1's interest, SP1 wins
    - Knowledge is irrelevant
- Perfection by registration will be effective against a trustee in bankruptcy in s 20(a) still as per s35.1(8), but as against another secured party who perfected by delivery or control, that other party will prevail

Personal Property Security Act, RSA 2000, c P-7
Section 35.1 (1) The rules in this section govern priority among conflicting security interests in the same investment property. (2) A security interest of a secured party having control of investment property under section 1(1.1) has priority over a security interest of a secured party that does not have control of the investment property. (3) A security interest in a certificated security in registered form that is perfected by taking delivery under section 24(3) and not by control under section 24.1 has priority over a conflicting security interest perfected by a method other than control. (4) Except as otherwise provided in subsections (5) and (6), conflicting security interests of secured parties each of which has control under section 1(1.1) rank according to priority in time of (a) if the collateral is a security, obtaining control, (b) if the collateral is a security entitlement carried in a securities account,

(i) the secured party's becoming the person for which the securities account is maintained, if the secured party obtained control under section 25(1)(a) of the *Securities Transfer Act*,

(ii) the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account, if the secured party obtained control under section 25(1)(b) of the *Securities Transfer Act*, or

(iii) if the secured party obtained control through another person under section 25(1)(c) of the *Securities Transfer Act*, when the other person obtained control,

or

(c) if the collateral is a futures contract carried with a futures intermediary, the satisfaction of the requirement for control specified in section 1(1.1)(d)(ii) with respect to futures contracts carried or to be carried with the futures intermediary.

(5) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(6) A security interest held by a futures intermediary in a futures contract or a futures account maintained with the futures intermediary has priority over a conflicting security interest held by another secured party.

(7) Conflicting security interests granted by a broker, securities intermediary or futures intermediary that are perfected without control under section 1(1.1) rank equally.

(8) In all other cases, priority among conflicting security interests in investment property is governed by section 35.

In *Atlas (Brampton) Limited Partnership v Canada Grace Park Ltd,* Romlex owned 55% of AS shares and Canada Grave held the other 45%.

- Romlex agreed to pledge all it's shares to Canada Grace such that, on default by AB the shares would be transferred to Canada Grace for $2/share paid in advance.
    - In essence, the controller of Canada Grace received an irrevocable power of attorney to effect the transfer of AS shares from Romlex to Canada Grace on AB default
    - Romlex couldn't change their mind since they gave an irrevocable power of attorney
- The ONCA found that this created a control agreement between the parties. The parties to the Security Agreement included all the parties necessary to the control agreement, including the issuer of shares (Atlas Springbank), the registered owner (Romlex), the debtor (Atlas Brampton) and the secured party (Canada Grace)
    - Since these were uncertificated securities, the control agreement was made out and it was thus perfected by control.

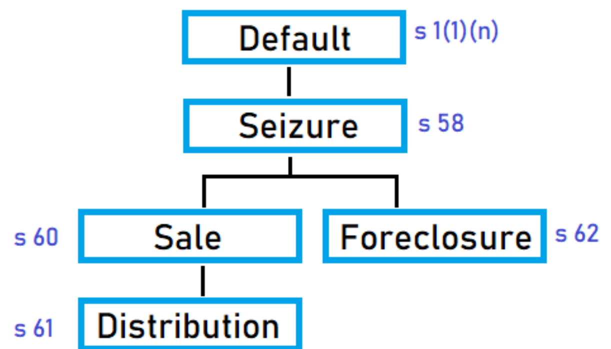
CHAPTER 12: ENFORCEMENT

Enforcement remedies are laid out in Part V of the PPSA. Section 55(1) states that remedies only apply to true security interests

- So, if you have a lease for more than one year or a commercial consignment (deemed security interests) under s 3(2), Part V won't apply and you need to look at the common law for remedies
- The remedial scheme in Part V is mandatory, as stated by s 56.

When it comes to remedies, start with default. On default, all remedies under Part V become available to secured parties.

- The first thing a secured party will do is seize. Section 58 will permit the seizure to occur if it is physical property
- After they seize, the secured party has a choice.
  - They can sell the goods under s 60
    - Cause the property to be sold and look at distribution of proceeds (s61)
  - Or they can foreclose them under s 62
    - Not sale of property, but secured party retains the collateral in satisfaction of the debt



Default and Seizure

Section 1(1)(n) defines "default" as the failure to pay or otherwise perform the obligation secured when due or whatever else the security agreement needs to become enforceable. Most security agreements will have a long list of events that would constitute a default.

- A positive or negative covenant can give rise to a default if it is violated
- All enforcement remedies are premised on their being a default; if the secured party acts without default they are acting unlawfully and the debtor can bring action against them for breach of contract, conversion, and a statutory right of action under section 7
  - So, you would want to ensure default did occur before acting

Security agreements often carry a "insecurity clause" where the secured party can accelerate performance or declare an event of default if the secured party considers that the secured party is insecure or that the collateral is in jeopardy.

- This is permitted under s 16, but section 16 also limits this
  - To trigger this clause, there needs to be commercially reasonable grounds. The secured party cannot just have subjective reasons as to their insecurity.

Alberta is a little different that most provinces, who have restricted self help remedies upon default. In other properties, the secured party can seize the property (through employees or a private bailer)

- This is not allowed in Alberta; section 9(3) of the *Civil Enforcement Act* provides that the seizure must be carried out by a civil enforcement agency pursuant to Part II

Seizure is not required to do the next steps of sale or foreclosure, but it is a practical step (no one is going to buy a car they can't test drive). The PPSA provides that the secured party can seize on default, but there are two limitations on the ability to immediately seize:

- First, the common law rule in *Lister v Dunlop* requires the secured party to give the debtor a reasonable time to pay following a default
  - What is a reasonable time?
    - Depends on the circumstances
    - This becomes hard to predict, but is anywhere from a couple days to 3 weeks
- Second, section 244 of the *Bankruptcy and Insolvency Act* requires that the secured party give the debtor a ten-day notice for intention to enforce.
  - Only applies to inventory, accounts or substantially all assets
  - Where you have the all encompassing security (looks at most of inventory or assets), s 244 will kick in and the 10 day notice is required.
  - In that 10 day period, they cannot enforce. If the secured party is worried that the collateral is in danger in that period, they can hire a receiver to protect the property for that 10 day period.

- Designed to cover situation where a bank would make a demand loan to pay and they would change the locks an hour later so the debtor company was screwed
  - The 10 day period inhibits from enforcing immediately

Personal Property Security Act, RSA 2000, c P-7
Section 1 (1) In this Act, (a) "default" means the failure to pay or otherwise perform the obligation secured when due, or the occurrence of any event or set of circumstances on which under the terms of the security agreement the security interest becomes enforceable; Section 16 Where a security agreement provides that the secured party may accelerate payment or performance if the secured party considers that the secured party is insecure or that the collateral is in jeopardy, the security agreement shall be construed to mean that the secured party has the right to do so only if the secured party, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy. Section 55 This Part does not apply to a transaction referred to in section 3(2). (1) The rights and remedies referred to in this Part are cumulative. (2) Notwithstanding subsection (1), this Part does not apply to a transaction between a pledgor and a pawnbroker. (3) Subject to any other Act or rule of law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may (a) proceed under this Part as to the personal property, or (b) proceed as to both the land and the personal property, as if the personal property were land, in which case (i) the secured party's rights, remedies and duties in respect of the land apply to the personal property as if the personal property were land, and (ii) this Part does not apply. (4) Subsection (4)(b) does not limit the rights of a secured party who has a security interest in the personal property taken before or after the security interest mentioned in subsection (4). (5) The secured party referred to in subsection (5) (a) has standing in proceedings taken in accordance with subsection (4)(b), and (b) may apply to the Court for the conduct of a judicially supervised sale under subsection (4)(b). (6) For the purpose of distributing the amount received from the sale of the land and personal property where the purchase price is not allocated to the land and the personal property separately, the amount of the purchase price that is attributable to the sale of the personal property is that proportion of the total price that the market value of the personal property at the time of the sale bears to the total market value of the land and the personal property. (7) A security interest does not merge merely because a secured party has reduced the secured party's claim to judgment.

Section 56

(1) Where the debtor is in default under a security agreement,

(a) except as provided by subsection (2), the secured party has against the debtor the rights and remedies provided in the security agreement, the rights, remedies and obligations provided in this Part and in sections 36, 37 and 38 and when in possession or control, the rights, remedies and obligations provided in section 17 or 17.1, and

(b) the debtor has against the secured party, the rights and remedies provided in the security agreement, the rights and remedies provided by any other Act or rule of law not inconsistent with this Act and the rights and remedies provided in this Part and in section 17 and 17.1.

(2) Except as provided in sections 17, 17.1, 60, 61 and 63, no provision of section 17 or 17.1 or sections 58 to 67, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

Section 58

(1) Subject to Part 2 of the *Civil Enforcement Act* and sections 36, 37 and 38, on default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

(b) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and any method of enforcement that is available with respect to the document of title is also available, with all the necessary modifications, with respect to the goods covered by it,

(c) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate alternative storage facilities are not readily available, the collateral may be seized without removing it from the debtor's premises in any manner by which a civil enforcement agency may seize without removal under subsection (2)(b) to (d), if the secured party's interest is perfected by registration, and

(d) where clause (c) applies or where the collateral has been seized by a civil enforcement agency as provided in subsection (2)(b) to (d) and the collateral is of a kind mentioned in clause (c), the secured party may dispose of the collateral on the debtor's premises, but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal.

(2) To make a seizure of property, the civil enforcement agency may

(a) take physical possession of the property,

(b) give to the debtor or the person in possession of the collateral a notice of seizure in the prescribed form,

(c) post in some conspicuous place on the premises on which the property is located at the time of seizure a notice of seizure in the prescribed form, or

(d) in the case of property in the form of goods, affix to the goods a sticker in the prescribed form,

and seizure by the civil enforcement agency shall continue until possession of the property is surrendered to the secured party or the secured party's agent, or the seizure has been released.

Sale of Seized Collateral
After seizure, the secured party has the option to sell the property or foreclose it.

Traditionally, seized collateral could be sold in a public auction or liquidation sale. But these produced very low value results and imposed low standards on the secured party.

- Section 60(2): expands the ability of the secured party to conduct the sale other than a means of a public sale, so long as it is done in a commercially reasonable manner
  - If appropriate, they can sell by private sale
  - The private almost always gets the secured party more money; getting top value is beneficial to both the secured party and the debtor, so there is no real reason to resist the private sale
- If the sale is not in a commercially reasonable manner, the secured party could be liable to other subordinate creditors
  - From this, a lot of subordinate creditors will say, "Wait, if you sold it for more (as was available), I would have been paid out in full. This was an improvident sale so I will sue you for the amount you could have got in excess that I did not get"
  - This is not commercially unreasonable. If the goods are just low value goods, you just may not get much out of it
  - The process rather than the end value achieved has to be looked at
    - Needs reasonable differential to market value; you can't just seize it and sell it to yourself for $1.
      - You could do this if it is reasonably comparable to the fair market value
- Section 60(4) requires the secured party to give a 20 day notice to the debtor prior to the sale
- Section 60(11) governs the situation where the secured party is proposing to purchase the collateral at the sale in which case s 60(11) will limit this right
  - They may only purchase the collateral if the price bears a reasonable relationship to the market value
- Section 60(12): the buyer who purchases the collateral for sale will take free of *any* interest subordinate to that of the secured party
  - This means that the sale usually can only safely be done by the senior secured party, or if it is conducted by the subordinate secured party, they will have the consent of the superior secured party to do so

In *CNH Capital Canada Ltd v Diamond 4 Holdings Ltd*, CNH Capital leased an excavator to Diamond 4 under a security lease and took a security interest in another piece of machinery as additional collateral. On default, CNH seized the excavator and additional machinery

- A notice of private sale was given to Diamond 4 that indicated it would be offered for private sale in 20 days
- The excavator sold for $60,000 and the additional piece for $5,000. They produced a deficiency of $163,000.00
- Issue: was the online auction a public or private sale?
  - Online auction sites blur the lines on this. If it is public, you have to give details as to when and where it is, but if private all you have to say is that you are intending to have the sale
  - Look to the extent to which there is actual bidding
    - If just a way of advertising and selling for a set price, without the active bidding process, it would be private. If bidding on the online site, it would be public
      - Just because it is online does not tell you what it is
  - "The purposes served by having the additional information in the notice of disposition to a debtor … is to ensure that the debtor who has an option to redeem may also be able to encourage prospective purchasers to participate and/or to ensure that the sale process is conducted reasonably. In a private sale, a creditor determines whether the sale will

occur or not and is therefore more directly accountable; it can ensure that a reasonable price is obtained. In an auction, that control, or at least some of it, is lost."

It is no longer good enough to act in good faith/honestly, the SP must also act in a commercially reasonable manner

- If not, the subordinate party could potentially recover damages on the basis that there was an improvident sale and the SP failed to satisfy its obligation
- *Copp v Medi-Dent*
  - Two dentists had bad relationship, and there was a seizure of equipment in the office
  - The lessor sold the equipment to one of the dueling dentists and the question was if that was a commercially reasonable manner
  - No attempt at advertisement. It was a private sale adverse to the joint debtor
    - No appraisal or value added
    - Old test of honesty and good faith is not enough, need commercially reasonable manner

When it comes to the funds generated out of a sale of collateral, there are statutory requirements for allocations (they are not priority rules, but procedural rules)

- Surplus: The sale proceeds are enough to pay out the SP's interest
  - Section 61(1): if there is a surplus following a sale, the secured party must return it to a subordinate secured party, claimant, or the debtor
- Deficiency: The sale proceeds are not enough to pay out the SP's interest
  - Section 61(4); if there is a deficiency, the secured party will normally be permitted to sue for it as an unsecured creditor (but this will not be under the PPSA as those remedies have been exhausted)
  - The right to sue is subject to any legislation to the contrary
    - In Alberta, the only current Act that is contrary to this is the *Law of Property Act,* which provides a limitation on a secured parties right to sue for a deficiency
      - Applies only to a PMSI in consumer goods that is taken by a seller
        - Won't apply to a lender based PMSI in consumer goods
      - The limitation is that the secured party is given a choice: can seize collateral or sue as an unsecured creditor – not both
      - Can forego any remedy against the collateral and recover as an unsecured creditor, or seize and sell the property (consumer goods) and if it does so, that is all it has
        - It will not have any right thereafter to sue for deficiency
    - So a bank, as per s 58 of the *Law of Property Act* can seize my car if I default, sell it and if there is a deficiency, sue me for the rest
      - But, if it is a dealership financing (usually dealer will transfer the chattel paper to financing company), they have to make a choice: either seize my car and that's all they get, or sue me as an unsecured creditor

Personal Property Security Act, RSA 2000, c P-7
Section 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 (a) 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

(b) 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.

(2) Collateral may be disposed of as follows:

(a) by private sale;
(b) by public sale, including public auction or closed tender;
(c) as a whole or in commercial units or parts;
(d) if the security agreement so provides, by lease or by deferred payment.

(4) Not less than 20 days prior to the disposition of the collateral, the secured party shall give notice of disposition to

(a) the debtor and any other person who is known by the secured party to be an owner of the collateral,
(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party, and
  (i) who has, prior to the date that the notice of disposition is given to the debtor, 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 secured party seized the collateral,

and

(c) any other person with an interest in the collateral who has given notice to the secured party of the person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(11) The secured party may purchase the collateral or any part of it only at a public sale and only for a price that bears a reasonable relationship to the market value of the collateral.

(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

(a) the interest of the debtor,
(b) an interest subordinate to that of the debtor, and
(c) 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).

Section 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) 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.

(4) Unless otherwise agreed, or unless otherwise provided in this or any other Act, the debtor is liable for any deficiency.

Foreclosure

Instead of selling the collateral, the secured party may propose to take the collateral in satisfaction of the obligation secured by giving a notice of intention to the debtor and other interested parties. Foreclosure's are less common but still allowed. The issue is that if it was sold and there was a surplus, other parties would have got their cut, but if you foreclose, all subordinate parties don't get anything

- Section 62(1): When the secured party forecloses the collateral, they become the legal owner of the property and all debts and obligations are released
    - Called strict foreclosure
- Also under s 62(1), you must give a notice of intention to the debtor and other interested third parties before you foreclose
    - Either can object to the foreclosure under s 62(2).
    - When they do this, the secured party will either have to sell the property, or go to court for an order invalidating the objection
    - *Romlex* told us that sufficient notice can include: Cite PPSA, amount of secured obligation, description of collateral, clear indication that they intend to retain and a period that objections will be accepted
        - This is an example of what is required to totally ensure you are covered
        - But this isn't required – there can be other sufficient notice

However, what does a secured party do when the collateral is an intangible? Sale or seizure aren't really possible.

- If you have some third party who owes money to the debtor in an account, you don't seize the account, but you go to the account and ensure that the payment is not made to the debtor but to the secured party
- This is called Direct collection and is allowed under s 57
    - The secured party may notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party.
        - This "debtor" is not the debtor of the secured party, but the debtor who owes money in connection with the intangible or other asset

Section 63(1)(a) allows Redemption: the debtor or a third party may redeem the collateral by paying the obligation secured

- The debtor will pay out the obligation in full to redeem the collateral

Section 63(1)(b) allows Reinstatement: the debtor may reinstate the security agreement by paying the amount in arrears or by curing the default

- Don't pay out the full amount of the obligation, just the arears or curing the default
- In other words, you are putting the agreement back in to good standing

    - This is only given to the debtor and the debtor can only do this so many times
        - No debtor would rationally default multiple times since in order to reinstate, you have to make good and pay the costs of enforcement, which can be considerable

The courts also have supervisory power under s 64 – on application the Court may make any order necessary to ensure compliance with Part V, give directions and may also stay enforcement of rights and grant relief from compliance with Part V.

There are two kinds of receivership: court ordered or private (SA delineates when receivership can occur)

- The PPSA provides that the SA, if it has the power given to the SP to appoint a receiver, that will be accepted
- So, if you draft a GSA, you would want to provide that you can appoint a receiver as a remedy
    - You cannot appoint one without a receivership provision
    - This is in almost every GSA
- Receiver manager will go in and take control of the business, and basically superseded the Board of Directors
    - So control shifts form Board to receiver
    - Take control and change locks with a view of trying to sell the business as a going concern

Personal Property Security Act, RSA 2000, c P-7
Section 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. Section 62 (1) After default, the secured party may propose to take the collateral in satisfaction of the obligations secured, and shall give a notice of the proposal to (a) the debtor or any other person who is known by the secured party to be the owner of the collateral, (b) a creditor or person who has a security interest in the collateral whose interest is subordinate to that of the secured party, and (i) who has, prior to the date that the notice of the proposal is given to the debtor, 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, (c) any other person with an interest in the collateral who has given a written notice to the secured party of an interest in the collateral prior to the date that notice is given to the debtor, and

(d) the civil enforcement agency, unless possession or seizure has been surrendered or released by the civil enforcement agency pursuant to section 58(5) or (7).

(2) If any person who is entitled to notification under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal gives to the secured party a written notice of objection not later than 15 days after giving the notice under subsection (1), the secured party shall dispose of the collateral in accordance with section 60.

Section 63

(1) At any time before the secured party has disposed of the collateral or has contracted for its disposition under section 60 or before the secured party is deemed to have irrevocably elected to take the collateral under section 62,

(a) any person entitled to receive a notice of disposition under section 60(4) or (8) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral, or

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

Section 64

On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,

(b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,

(c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,

(d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

CHAPTER 13: *BANK ACT* SECURITY

The federal *Bank Act* system is similar to NCSIs in the sense that it is outside the ambit of the PPSA. But the *Bank Act* security system is much more limited than the PPSA.

- Section 427 of the *Bank Act* states that securities in the system can only be given to a bank
- This is because of the constitutional division of power

    - Federal *Bank Act* (“BA”) is limited to banking, but provinces have property and civil rights so they have the PPSA
    - But the two are exclusive – the PPSA will not apply to *Bank Act* Securities (“BAS”)
- BA security devices can only be given to certain classes of debtors and only in certain kinds of goods, but the PPSA allows any personal property to be used as collateral and any debtor can grant it
    - You have to look at s 427(1) of the BA to see if the debtor and collateral qualify. If they don’t, you cannot take a BAS for that transaction
- The collateral is limited to goods and you cannot take a SI in accounts or chattel paper, nor can you take a GSA under the BAS system
- BAS are only available to Banks
    - Technically, ATC would not qualify as it is not a chartered bank
- BA is skeletal for the workings of BAS, so the courts have to fill in a lot of the gaps

History behind it: banks played a different role in the 1950s than now. Back then, banks were only deposit taking institutions and were prohibited from lending on the basis of security except for real property mortgage – they weren’t lenders like they are today
- The BAS gave them the ability to take an interest in debtors assets to secured loans.
    - This grew and grew but is still limited and all anomalies are just historical
- The BA was ahead of the curve for notice filing and future advances compared to the PPSA

The issue with the BAS is that the PPSA was enacted and the restriction of banks for financing was eliminated. Banks now frequently take interest in debtor’s assets, so the need for BAS has diminished almost entirely. Comparing the BAS to the PPSA:
- PPSA had no restriction on collateral that you can take interest on
    - BAS has a list for debtor and goods to be able to take a SI
- PPSA had no restrictions on who can grant a SI
    - BAS only certain kinds of debtors can grant a SI
- PPSA has more powerful remedies (like appointing a receiver
- PPSA covers proceeds
    - BA does not

The general nature of the security (ie, the right that the Bank gets by virtue of a BAS) is more obscure
- Section 427 states that the Bank obtains the same rights as if it had acquired of bill of lading or warehouse receipt covering the property
    - This means that the Bank gets the same rights that the debtor had in terms of property
    - If the Bank transferred the bill of lading or warehouse receipt, they would have obtained the debtors rights for that
        - So a *nemo dat* approach (bank gets whatever the debtor had)

Section 427(2): the security attaches to property owned by the debtor, upon delivery of the document to the bank. In respect of AAP, it attaches automatically once the debtor becomes the owner
- The obligations secured by the BAS:
    - The BAS cannot secures past advances
        - PPSA allows this by considering “past” advances. Unsecured creditor can be given past security but not in the BAS
    - The BAS permits the bank to take future advances
        - This is the same as the PPSA; future advances have the same priority as contemporaneous advances

Sections 427(4)-(5): Registration is effected by the Bank of Canada office in the province in which the principal place of the debtor is located
- Use a notice filing system rather than a document filing system

- So, similar to the PPSA but the notice of intention that is filed is quite different than the PPSA financing statement
    - Notice of Intention (the BAS version of a financing statement) discloses the name and the address of the debtor. But that is all
        - There is no collateral description box
        - So, a third party needs to make inquiries to the Bank to find out details about what collateral is covered by the BAS, there is no collateral description, no serial number, there is no indication whatsoever so this information would have to be taken from the Bank.
- Section 427(4)(a): A failure to register BAS will subordinate the Bank to subsequently created security interests that are taken without knowledge of the Banks security
    - This is fundamentally different to the PPSA where the registration is linked to priority
        - It merely has a negative effect such that if you fail to register you may be subordinated to certain parties provided they are without knowledge
        - This means knowledge is very relevant and we are not linking priority to registration with a BAS, it is basically a first in time system, but if you fail to register, you will lose to a later party who is without knowledge

When it comes to priorities, there are two large things to remember:
- Bank Act does not contain a complete set of priority rules
    - There are a few rules, but they are pretty loose, so the gaps have to be filled with property law principles
- Priorities are not determined by a first to register rule of priority. The priorities are generally determined by the nemo dat rule (first come into existence prevails)
- The *Bank Act* has two specific priority rules:
    - 427(4)(a) tell us that the priority status of a BAS that is not registered is subordinate
    - 428(1) tells us that a BAS has priority over subsequently creates rights in the property as well as against a competing security interest that was unperfected at the time the BAS was acquired.
        - It beats out later interests *and* beats out prior PPSA SIs that were unperfected.
- This means that if a BAS was made before a PPSA SI, it will win out
    - But, if the BAS failed to register its NOI in the Bank Act Registry, it would be subordinate to SP1 if the SP was without knowledge of the BAS
- If the PPSA was made prior to the BAS, that is the *BMO v Innovation Credit Union case*
    - SP wins even if they weren't registered in the PPSR because the PPSA does not apply, so lack of registration wouldn't affect the BAS
    - The BA uses a "first to arise" system, so the PPSA would win (essentially nemo dat)
        - The BAS only attaches to the interest of the debtor, which is subject to a pre-existing legal interest
    - The *Innovation* logic was changed in 2010; s 428(1) and (2) were amended so that the secured party will lose it's priority if the SI is unperfected at the time the Bank acquires its security interest, unless the Bank knows of the unperfected security interest
        - This invites a ton of litigation to find out what they knew

Say SP1 took out a GSA and then the BAS applied to it. Then some after acquired property arose.
- SP1 would take the GSA with an all PAAP and the BAS is also in play
    - The new assets would cause a competition between the GSA and the BAS
    - We give priority on the first to arise – both the security interests attach when the debtor gets rights to it for the future advance
        - Both attach at the exact same time they get rights to the AAP
        - How do you use first in time when it is the exact same time?
        - *RBC v Radius Credit Union*: priority given to the first agreement to be entered into (consistent with equitable rules of simultaneous attachment)

        - This means SP1 would win, but if the BAS came first they would have won

Do PMSI's change anything? Can't just say PMSIs under s 34 are given Superpriority, since the PPSA does not apply at all

- Does the *Bank Act* have an answer for this?
    - If you can't find a statutory rule, then look at property to fill in the gaps
- If the secured party is a seller and reserves title to the goods that are sold, then basically the Bank never acquires the property because the seller retained title under the Conditional Sales Agreement.
    - Section 438 doesn't apply since the Bank never obtains legal title under the CSA
    - This would be an entirely different approach, using property law rather than the PPSA (which doesn't care about legal title)
        - If you have a seller under the CSA, the debtor never acquires legal title so the Bank SI never attaches
        - So, the seller based PMSI would prevail over the BA
        - This would be the case even if the PMSI wasn't registered
    - But, this would not hold true for a lender based PMSI (*RBC v Moosomin Credit Union*)
        - If seller retained title, they would prevail over the BAS
        - But if the lender based PMSI, we use the first in time because the lender does not have title that it retains (it was granted)
    - However, in Ontario, they do not have a s 4284(a), so this analysis does not apply there
        - The BAS is not necessarily excluded from their PPSA
        - Their analysis becomes very complex so don't bother
            - Can use some BA provisions and some PPSA provisions.