Commercial Law Framework

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# *Sale of Goods Act*

*Ashington Piggeries*: “provisions … ought not to be construed so narrowly as to force on parties to contracts for the sale of goods promises and consequences different from what they must reasonably have intended”

## (1) Scope

### (a) Does the *SGA* apply to your transaction?

**(i) Is it a contract of sale?**

2(1) *SGA*: A contract of sale of goods is a contract whereby the seller transfers *or* agrees to transfer the property in the goods to the buyer for a money consideration, called the *price*, and there may be a contract of sale between one part owner and another

All provisions apply to “contracts of sale” so this provision in effect determines whether the SGA applies to the transaction or not

“buyer” means the person who buys or agrees to buy goods

“seller” means a person who sells or agrees to sell goods

“goods” means all chattels personal, *other than* things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale

* Only tangible personal property is considered (choses in possession)
* Excluded: things in action (intangible property, e.g. IP), money, land, services, gifts
* Software on its own is not goods (e.g. if a program is installed directly at the buyer’s place of business) so the *SGA* does not apply (*St Albans*)
	+ Though software sold on a disc may be considered goods, held in *St Albans* in *obiter*
	+ But the court can always imply terms on the basis of contract law even if the *SGA* does not apply (*St Albans*)

property” means the general property in goods and not merely a special property

* Must have an ownership-like interest (general property)
* Special property examples = bailee, licencee, lease
* Special property in goods is likely mere possession

Excludes pure trades: Some money must be provided for the goods, but it can be a combination of money and goods in exchange for the goods (note: court may be reluctant to recognize trivial amount, e.g. $1)

Even if the SGA does not apply, the court may still imply terms into the contract on the basis of contract law (*St Albans*)

**(ii) Is it actually security agreement?**

57(3) *SGA*: The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale that is intended to operate by way of mortgage, pledge, charge or other security

* Substance over form
* Does not apply to security agreements, governed under separate legislation (e.g. loan money and in exchange have a security interest in a car)
* Pledge = handing over physical possession of property to secure a debt

**(iii) Mixed goods and service contracts**

Use the substance/essential character test (*Robinson*)

* If the primary purpose of the contract is to transfer property to the buyer, it is a contract for the sale of goods (*Robinson*)
* If the primary purpose is the performance of certain work, or services, the contract is not one for the sale of goods

For a contract whereby one party hires a painter to paint a painting, held to not be considered goods (the primary purpose of the contract is for the skill, labour and expertise of the painter; the physical canvas and paint is (actual goods) are secondary) (*Borek*)

For a contract to print 20,000 manuals, it was a sale of goods (service used to print was trivial; goods were the substance) (*Keillan*)

Sale of food at a restaurant is considered goods (*White Spot*)

### (b) Can the *SGA* be excluded and have the parties done so?

s 53 *SGA*: provisions in SGA **can be excluded or varied** by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract (subject to *CPA*)

**Cannot contract out of the SGA** if it is a consumer agreement: ss 9(2), 9(3) *CPA*

s 9(2) *CPA*: The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement

s 9(3) *CPA*: Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void

s 1: “consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

“consumer agreement” means an agreement between a supplier and a consumer in which, (a) the supplier agrees to supply goods or services for payment, or (b) the supplier agrees to provide rewards points to the consumer, on the supplier’s own behalf or on behalf of another supplier, when the consumer purchases goods or services or otherwise acts in a manner specified in the agreement;

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

## (2) Transfer of Property

### (a) Risk follows title

Generally, with title follows risk (s 21, *Carlos*). For instance, if the seller retains title while in possession and the goods are destroyed not at the seller’s fault, the seller is liable, and in the opposite situation, the buyer is out of luck.

However, there also is an inverse risk of bankruptcy. If the seller goes bankrupt and the title passes, the buyer can claim the goods, otherwise the buyer can sue seller for pennies on the dollar for whatever is left over in the bankruptcy

Also, 21(a) where delivery has been delayed through the *fault* of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault

### (b) Definitions

1(1) “specific goods” means the goods identified *and* agreed upon **at the time the contract of sale is made**;

*Kursell*: K for the sale of trees in a forest which conformed to certain measurements (15+ meters). Not specific because they were not identified at the time of the contract (merely being identifiable is not enough, must specifically be identified)

6(1) “future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale (future goods are unascertained goods)

1(4) Goods shall be deemed to be in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.

### (c) Provisions

17 Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained (goods must be ascertained for property to pass)

18(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract **intend** it to be transferred (property passes when the parties intend it to pass)

(2) For the *purpose of ascertaining the intention of the parties*, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case (consider all circumstances to determine the intention)

19 *Unless a different intention appears*, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: (if intention cannot be determined, rules for determining intention)

Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and *it is immaterial whether the time of payment or the time of delivery or both is postponed*. (unconditional contract for specific goods in deliverable state = property passes when contract is made)

Rule 2.—Where there is a contract for the sale of specific goods *and* the seller is bound to do something to the goods *for the purpose of putting them into a deliverable state*, the property does not pass until such thing is done *and* the buyer has notice thereof.

*Jerome*: advanced notice is insufficient. K for used car where seller was required to make repairs but car get destroyed

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods *for the purpose of ascertaining the price*, the property does not pass until such act or thing is done *and* the buyer has notice thereof.

*Jerome*: advanced notice is insufficient. K for used car where seller was required to make repairs but car get destroyed

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer; (if conditional contract = property passes on fulfillment of condition or where return is available, when the return period ends if buyer doesn’t signify approval earlier)

(i) when the buyer signifies approval or acceptance to the seller or does any other act adopting the transaction;

(ii) if the buyer does not signify approval or acceptance to the seller *but* retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, and what is a reasonable time is a question of fact.

Rule 5.—

(i) Where there is a contract for the sale of unascertained or future goods by description and goods of that description *and* in a deliverable state are **unconditionally appropriated** to the contract, either by the seller with the assent of the buyer, *or* by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and *such assent may be expressed or implied* and *may be given either before or after the appropriation is made*.

unascertained goods = property passes when they are:

(1) in a deliverable state

(2) of contract description

(3) unconditionally apportioned

(4) by one of the parties (seller or buyer) with the assent of the other

Note A: Assent may be implied and may be given *before* appropriation

Note B: Unconditionally apportioned = Some act is done which the parties agree earmarks or fixes the goods as the contract goods

(ii) Where in pursuance of the contract the seller delivers the goods **to** the *buyer* or to a *carrier* or *other bailee* (whether named by the buyer or not) for the purpose of transmission to the buyer *and* does not reserve the right of disposal, the seller shall *be deemed to have unconditionally appropriated* the goods to the contract. (delivery or shipping it out unconditionally means you unconditionally apportioned, but note no mention of assent – still required)

*Carlos*:

* in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer
* There may be an appropriation, constructive delivery, whereby the seller becomes bailee for the buyer, and then a subsequent actual delivery involving actual possession
* usually but not necessarily, the appropriating act is the last act to be performed by the seller
* Unconditional = usually but not necessarily, irrevocable appropriation (e.g. placing it in a corner designated for the buyer where it can easily be swapped may not be held to be an unconditional appropriation but shipping it is)
* Example: For instance, if delivery is to be taken by the buyer at the seller's premises and the seller has completed his part of the contract and has appropriated the goods when he has made the goods ready and has identified them and placed them in position to be taken by the buyer and has so informed the buyer, and if the buyer agrees to come and take them, that is the assent to the appropriation

*Goldcorp*

* Buyers purchased gold and received certificate of ownership and were told that they can either pick it up or leave it in their vault and pick it up at any time with 7 days notice
* They did not separate the gold into the specific portions for each buyer (in fact, there was less gold in the vault than was bought by the buyers); held that title did not pass
* **In order for title to pass, it must be separated from the bulk**

Remember that when property passes and the goods are in the seller’s possession, the seller is still a bailee for the buyer and may still be held liable for negligence (s 21(b) *SGA*, *Carlos*)

## (3) Seller Breach of Condition or Warranty?

13 In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is,

13(a) an implied condition on the part of the seller that in the case of a sale the **seller has a right to sell the goods**, and that in the case of an agreement to sell the seller will have a right to sell the goods at the time when the property is to pass

*Niblett*: Where goods infringe upon a trademark, breach of condition that seller has a right to sell the goods. (could extent to all IP)

* P agreed to buy 3000 cases of condensed milk, some of which contained counterfeit copies of Nestle milk infringing on their trademark. Goods were seized by customs. P removed labels and sold them. Seller did not have right to sell the goods (law prevented seller from selling the goods because it infringes another party’s legal rights).

*Rowland*: Seller does not have right to sell goods where sale of a car occurs without title (b/c it was stolen)

* P bought car from D and sold to X. P discovered the car it had bought and sold was stolen. P and X had the car for a total of 4 months by that time, then was returned to true owner. P wants to repudiate K and sued D (seller) for the return of the purchase price

*Butterworth*: Seller with no right to sell cannot cure defect if repudiation has occurred before title is cleared.

* But, a seller who fixes the defect in title after the sale but before the complaint, then it is only a breach of warranty as a result of s 12(3) (where buyer has accepted the goods
* Facts: Car sold from X to Y with no right to sell (hire-purchase agreement, payments not all made yet) and sold down a chain afterward. Some repudiated before final payment was made (and title cleared) but others did not. The ones who repudiated could do so but ones who didn’t could only claim damages as breach of a warranty

Buyer can always treat a seller’s failure to pass property as a right to return purchase price even after long period of continued use and substantial depreciation (*Rowland*, *Butterworth*)

Right to sell at the time of sale/when property passes, does not extend into the future (*Microbeads*; see below)

13(b) an implied warranty that the **buyer will have and enjoy quiet possession of the goods**

*Microbeads*

* P bought machine which infringed upon a patent held by a third party. At the time of sale the patent had not been published. Not a breach of 13(a) because at the time of sale the title was clear, but breach of 13(b) because it was a breach of quiet possession
* This applies not only at the time of sale but also *in the future*, unlike 13(a) which applies *at the time of sale* (words “will have and enjoy possession” apply to the future)
* if someone gets a patent later and you are as a result infringing on it, breach of warranty (quiet possession)

13(c) an implied warranty that the goods will be **free from any charge or encumbrance** in favour of any third party, not declared or known to the buyer before or at the time when the contract is made

“will be free” likely means it applies in the future as well (not just the time of sale)

*Zucker*: neither party knew of security interest; buyer did not conduct a search; seller breach of s 13(c)

*Wynowsky*: buyer conducted search and saw liens; relied on bad advice of creditor and completed purchase; no breach of s 13(c) by seller

14 where there is a contract for the *sale of goods by description*, there is an implied condition that the **goods will correspond with the description**, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

* A sale of unascertained goods *can only* be by description (*Leggett*)
* A sale of specific goods *may* be by description (*Leggett*)
	+ Sale of specific goods will not be by description (1) if goods are sold with no description, (2) if there is a statement made about the goods which is not essential to the goods’ identity, or (3) if the goods are described with a description not relied upon by the buyer (*Leggett*)
* **(1) when is a sale a sale by description?** (as compared to a sale by inspection)
	+ *Grant*: There may be “a sale by description even though the buyer is buying something displayed before him on the counter.”
		- “a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description” (*Grant*)
	+ May be a sale by description even when the buyer examines the good, but only where an inspection by a reasonable buyer would not reveal any defect (*Grant*, *Beale*, *Leggett*) (otherwise sale by inspection)
		- If you do a visual/basic inspection, it could still be held to be sale by description if an ordinary examination would not reveal any defects (*Grant*, *Beale*)
		- But if you do a full inspection and through that full inspection the reasonable buyer (in the context of the goods they are buying) would have found the defect, it is considered a sale by inspection, not description (*Leggett*)
		- If the buyer chooses to examine the goods but does not conduct a reasonable investigation, the risk will fall on the buyer (buyer must make a reasonable examination if they are going to examine at all) (*Thornett*)
* **(2) When do goods correspond with their description?**
	+ Answered by the test that ordinary people in the marketplace would apply: is this what was bargained for? (*Ashington*)
	+ *Ashington* states that the key to s 14 is **identification** of goods (the kind of goods), not their condition or quality (that is 15.1/15.2)
		- Sale by description is confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied (not their quality or condition) (*Ashington*)
		- E.g. *Ashington*: ingredient described as “herring meal” did not cease to comply with that description because it was manufactured from herrings to which a preservative had been added to prevent them from deteriorating (which with certain chemicals may react to form DMNA). This reaction may affect the quality of the meal, but it does not alter its identity as “herring meal”

*Grant* – Specific goods do not correspond with description; ordinary inspection

* Facts: P purchased underwear from display case and contracted dermatisis form the material of the underwear, which was defective
* Issue: Can there be goods by description when they are specific goods, i.e., right in front of you?
* Held: for P. Even though buyer was buying something placed before him on the counter, it is still sale by description since it is a thing corresponding to a description. An opportunity to examine goods may still result in sale by description where ordinary examination would not reveal that goods do not correspond with description

*Beale* – two cars welded together; sale by description because ordinary inspection would not have revealed it

* Facts: seller had a car that he thought was a specific model; puts it up for sale and buyer asks to test drive; seller agrees to test drive but the seller drives; buyer notices that it pulled to the left but still bought it. Turns out to be two difference cars welded together
* Issue: sale by description?
* Held: for buyer. Even though it was specific goods and buyer had an opportunity to examine it, the ordinary examination of the good would not have revealed that it did not correspond with its description
	+ Also there was a very specific description of the ad, unlike *Leggett* where there was no mention of the engine in the ad.
	+ Unlike *Leggett* where using a converted engine is relatively common, welding two cars is not common

*Leggett* –boat with Chrysler automobile engine – sale corresponds with description

* Facts: buyer bought boat with engine of Chrysler automobile. Buyer fully inspected it before and had calls w/ seller. Buyer was not an expert in engines, but had he been, he would have known it was a converted engine. Buyer sues
* Issue: sale by description or sale by inspection?
* Held: for seller. Buyer examined the boat, and an examination of the engine by someone who had knowledge about engines (reasonable buyer) would have been enough to reveal that is a converted engine. seller did not intend to mislead the buyer.
	+ Reconciling with *Beale*: there was no mention of the engine in the ad, unlike the very specific ad in *Beale*
	+ Also, converted engines are common unlike welding of two cars together in *Beale*

*Ashington* – mink feed that killed the animals but was still held to correspond with the goods’ description

* Facts: Hill, respondent, agreed to manufacture food according to U’s requests. At the time, he had never made this type of mink feed. Hill made the food and sold it to Ashington. Then it became apparent that the food was killing Ashington Piggeries’ animals
* Held:
	+ Appeal dismissed on s 14
		- This is not to be evaluated in terms of quality or fitness for purpose, but identity. Buyers contracted for mink food with herring meal in it and that is what they got
	+ Appeal allowed on s 15.1 / 15.2

15.1 Implied condition: **fitness for purpose**

Where the buyer, expressly or by implication, *makes known* to the seller the particular purpose for which the goods are required so as to show that the buyer *relies* on the seller’s skill or judgment, and the goods are of a description that it is in the course of the seller’s business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be **reasonably fit for such purpose**, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

**Elements:**

1. **Buyer makes known the “particular purpose” for which the goods are required**
	1. A particular purpose may mean the general purpose of such goods, or it may mean a special or unusual purpose (*Ashington*)
	2. There is no breach of condition when goods that would be fit for a “normal” buyer are unsuitable for a particular buyer because of the buyer’s unusual sensitivity to the goods (*Ashington*)
2. **Buyer relies on the seller’s skill or judgment**
	1. The finding of reliance, and the knowledge of that reliance by the seller, is very fact dependent (*Hamilton*)
3. **goods are of a description that it is in the course of the seller’s business to supply**
4. **goods will be reasonably fit for such purpose**

15.2 Implied condition: **merchantable quality**

Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be **of merchantable quality**, ***but*** if the buyer has *examined* the goods, there is **no** implied condition as regards defects that such examination *ought* to have revealed.

**Elements:**

1. **goods are bought by description**
	1. recall unascertained goods are *always* bought by description, while specific goods *may* be bought by description
2. **Goods are of description which is in seller’s business to supply**
3. **Goods will be of merchantable quality**
	1. merchantable quality’ is that the goods in the form in which they were tendered were of *no* use for ***any*** *purpose* for which goods complied with the description under which these goods were sold would normally be used, and hence not saleable under that description (*Kendall*)
	2. Objective test; would not have been sold for the same price to used for *any purpose* (*Kendall*)
		1. **Test**: If it could be sold at the same price for a different purpose, it is of merchantable quality (*Kendall*)
		2. Buyer will not be successful if goods are not suitable for her intended purpose but are suitable for other purposes (and would be bought for the same price for those other services) (*Kendall*)
		3. *Kendall*: Feed could not be used as pheasant food but could be used as cattle food (and could be sold at the same price for that purpose); therefore, no breach of merchantable quality
			1. Note: breached 15.1 b/c it is not fit for the buyer’s intended purpose (as pheasant feed)
	3. Able to judge merchantable quality in light of later knowledge (merchantable quality covers latent defects) (*Kendall*)
		1. This is an ongoing condition (not merely at the time of sale); could sue years later (*Kendall*)
4. **but if the buyer has examined the goods, there is no implied condition as regards defects that such examination *ought* to have revealed**
	1. Where the buyer has an opportunity to examine the goods and takes it but does an incomplete examination, cannot rely on this condition (*Thornett*)
		1. If the buyer examines the goods, must do a reasonable examination (*Thornett*)

**Time of payment not condition**: 11 Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale, and whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract

## (4) Sales Without Title

**General principle**: *nemo dat*: you cannot sell what you do not have (owner prevails) (“*nemo dat quot non habet*” = The transferor of goods cannot pass a better title than the tranferor possesses.)

22 Subject to this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless…

**Exception #1 – Estoppel**: 22 unless the owner of the goods is by conduct precluded from denying the seller’s authority to sell…”

*Simmons*: General principle: The rule of *nemo dat* will not apply if the buyer can show that the true owner acted so as to mislead him into the belief that the person dealing with the property had the authority to do so. If that can be shown, good title is acquired by the buyer.

Merely handing over possession of chattel will not be sufficient to sustain an estoppel argument (*Canaplan*, *Nachtigal*)

* *Nachtigal*: Mere possession alone does not invest the agent with power to give the purchaser, however innocent, the right of property against the owner

*Canaplan*: Merely handing over possession of chattel will not be sufficient to sustain an estoppel argument. There must be something more. (must be some *indicia* that they have authority to sell)

* In this case, the agent had other *indicia* of authority to sell, including: owner’s manual, keys, warranty books, and even endorsed the back of the registration (intended for the agent to sell the vehicle). This was sufficient to sustain an estoppel argument

*Central Newbury*: Denning (in dissent): difference between transferring possession and property of goods. Mere fact that owner was careless in custody of goods is not enough. Merely consenting to someone having possession is not enough. Merely giving the licence and registration to the vehicle is not enough.

* “The mere fact that the true owner is careless in the custody of his goods or in the indicia of title to his goods is not sufficient to prevent him afterwards asserting his title. There is a difference between transfer of possession and of property – if you transfer property estoppel arises, but if the intent of the owner is to merely transfer possession, then that is not enough.”

*Eastern*: Successfully estopped from claiming nemo dat because owner gave Coker the apparent authority to sell

* Did more merely give Coker possession and registration for the car, but gave other things with the intention of Coker being able to sell the car
* Owner signed a hire-purchase agreement to make Coker appear to be the owner of the vehicle.

*Estie*: Successfully estopped from claiming nemo dat because bank said logs were sold to the party

* McKendrick has possession of logs but the bank was the owner
* D was thinking of buying the logs and called the bank inquiring about them, bank says they were sold to McKendrick
* This is sufficient to cloak him with the necessary *indicia* indicating that he has the authority to sell

**Exception #2 – Mercantile Agent**: *SGA* 22(a) but nothing in this Act affects, (a) the *Factors Act* or any enactment enabling the apparent owner of goods to dispose of them as if he, she or it were the true owner thereof

Thumb rule: when there are two innocent parties, the party that left their property in the hands of the mercantile agent should be responsible.

*Factors Act* s 2(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, a sale, pledge or other disposition of the goods made by the agent when acting in the ordinary course of business of a mercantile agent is, subject to this Act, as valid as if the agent were expressly authorized by the owner of the goods to make the disposition, if the person taking under it acts in good faith and has not at the time thereof notice that the person making it has not authority to make it.

**Elements:**

1. **Must be a mercantile agent**
	1. *Factors Act* s 1(1) “mercantile agent” means a mercantile agent having, in the customary course of business as an agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods
		1. Mercantile agent is more than a bailee or lessee
		2. They must be in the business of selling goods
2. **Must be with the consent of the owner**
	1. Presumed unless there is evidence to the contrary
	2. Continues to operate if withdrawn unless buyer is notified
3. **Mercantile agent must have possession of the goods**
	1. Possession that the mercantile agent has must be ***in its capacity***as a mercantile agent
	2. Does not apply to friends, only business
	3. E.g. Car given to repair shop which has a used car sales shop, their possession is in the capacity as a bailee not a mercantile agent
4. **Mercantile agent must act in the ordinary course of business**
	1. From the perspective of the reasonable buyer (*St John*)
		1. *St John*: Not requesting transfer papers was fine in this case because buyer was planning to flip it
		2. If the mercantile agent forges documents, it does not mean it is not in the ordinary course of business, because it is the perspective of the buyer that matters (*St John*)
			1. When there are two innocent parties who have lost, it should be the party who chose to leave their goods in the possession of the MA who bears the loss (*St John*)
	2. Relevant factors:
		1. Price (significant factor) (*MR Jones*)
		2. The setting (location) (*MR Jones*)
		3. Time of sale (e.g. Saturday at midnight is not in the ordinary course of business for a car dealership to sell cars) (*MR Jones*)
		4. Standard sale (sale of an asset or all assets?)
			1. E.g. car dealership usually does not sell all their cars at once
5. **Buyer must buy without notice and in good faith**
	1. *SGA* s 1(2): A thing shall be deemed to be done in good faith within the meaning of this Act when it is in fact done **honestly** *whether it is done negligently or not*
		1. *Patry*: *SGA* provision regarding deemed good faith could be used as guidance for the purpose of defining good faith in the Factors Act
	2. If they knew something was wrong or had notice that MA did not have authority to sell
	3. note: not ought to have known, because of *SGA* (whether done negligently or not); but wilful blindness would suffice (*Patry*, *MR Jones*)
	4. *MR Jones*: good faith means that the buyer acted honestly; bar for good faith is low
		1. The buyer is not required to make inquiries or conduct due diligence (unless they suspect something is wrong – then wilfully blind) (*Patry*, *MR Jones*)
	5. *Patry*: Bad faith means that the buyer suspected something that was wrong but did not make any inquiries because they are afraid of what they would find out
	6. Generally, “good faith and notice coincide”
		1. if you have notice that they do not have authority to sell, then they are not acting in good faith

*St John*

* ordinary course of business is looked at from the perspective of the buyer
* even though the mercantile agent forged documents, it did not constitute outside the ordinary course of business because from the buyer’s perspective there is nothing suspicious about the forged signature (merely looked like the owner authorized it)

*Patry*

* P wants to sell boat, agreed to give it to dealer who would refurbish it and then sell it. Dealer mortgages assets to GMAC which held a security interest on the boat. Dealer goes bankrupt and GMAC realizes its security interest
* Held: Factors Act applies because dealer was a mercantile agent, has possession w/ owner’s consent, dealer acted in the ordinary course of business by mortgaging boat to GMAC, GMAC has no notice (buyer did not need to do due diligence or make inquiries; there was no wilful blindness)

*MR Jones*

* Respondent gave boat to dealer to sell it but required consent. appellant bought it from the dealer w/o buyer’s consent, and dealer went bankrupt
* Sale in ordinary course of business from buyer’s perspective; there was no bad faith (acted honestly, no notice that something was wrong, even if they were careless)

**Exception #3 – Seller In Possession (see the summary as well)**

Occurs when buyer 1 buys some goods but leaves it in seller’s possession who goes rogue and sells it to buyer 2. Contest between buyer 1 and buyer 2,

25(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer.

**Elements:**

1. **Seller must have sold goods**
2. **Seller must continue or be in possession of goods**
	1. Means there is no break in physical possession (*Pacific Motors*, *Mitchell v Jones*, *Staff Motors Guarantee*)
		1. *Pacific Motors*: “Possession of, not property in, the thing disposed of is the cardinal fact.”
	2. *Mitchell v Jones*: seller sells horse to buyer 1, delivers it, and then under a separate lease transaction, buyer 1 delivers it back to the seller, who then sells it to buyer 2. Seller in possession exemption does not apply because there is a physical break in possession
	3. *Staff Motors Guarantee*: seller sells truck to buyer 1 then buys back on a hire-purchase agreement, who later sells it to buyer 2. Here there is no break in possession, only legal ownership of truck has changed
3. **Goods or title documents must be delivered to buyer 2**
	1. Delivering goods of control could suffice
4. **Buyer 2 must act in good faith and without notice of the prior sale**
	1. *SGA* s 1(2): A thing shall be deemed to be done in good faith within the meaning of this Act when it is in fact done **honestly** *whether it is done negligently or not*
	2. If they knew something was wrong or had notice that MA did not have authority to sell
	3. note: not ought to have known, because of *SGA* (whether done negligently or not); but wilful blindness would suffice (*Patry*, *MR Jones*)
	4. *MR Jones*: good faith means that the buyer acted honestly; bar for good faith is low
		1. The buyer is not required to make inquiries or conduct due diligence (unless they suspect something is wrong – then wilfully blind) (*Patry*, *MR Jones*)
	5. *Patry*: Bad faith means that the buyer suspected something that was wrong but did not make any inquiries because they are afraid of what they would find out
	6. Generally, “good faith and notice coincide”
	7. if you have notice that they do not have authority to sell, then they are not acting in good faith

*Pacific Motors*

* Motordom buys cars and then sells them to Motor Creditors for 90% of purchase price and keeps 10% as a commission for selling it to others
* Motor Credits tells Motordom they do not have authority to sell their cars anymore, but they sell all of the cars anyway to Pacific Motors, outside business hours (mercantile agent exception does not apply)
* Held: for Pacific Motors by virtue of s 25(1)
* “Where a person having sold goods continues or is in possession…” has the purpose of protecting innocent buyers where estoppel gives insignificant protection. Seller’s possession gives buyer impression that seller has authority to sell
* “Possession of, not property in, the thing disposed of is the cardinal fact.”
	+ “… the words ‘continues … in possession’ were intended to refer to the continuity of physical possession regardless of any private transaction between the seller and purchaser which might alter the legal title under which the possession was held.”

*Bartin*

* Facts:
	+ Western sells pipe to Epscan.
	+ Western continues to have access to the site where it was located but Epscan was given time to cut and remove the pipe
	+ Western in the meantime sells to Bartin and Epscan sues
* Held: for Bartin
* Western maintained physical possession, which is what matters – appeared to be the owner of the goods
* Buyer 2 bought it in good faith, whether negligently or not does not matter, only cannot be wilfully blind which they weren’t here

**Exception #4 – Buyer In Possession**

Very similar to seller in possession. Buyer 1 goes rogue in this case and seller 1 and buyer 2 are innocent fighting over the property. Buyer 2 wins if test is met.

25(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title, under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

**Elements:**

1. person having bought or agreed to buy goods obtains possession of the goods or the documents of title to the goods
2. with the consent of the seller
3. the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title
4. in good faith and without notice

## (5) Remedies

12(2) For any condition, the party suffering as a result of the breach is *allowed to treat the contract as repudiated* (no longer perform their obligations) and *sue for damages*

12(2) For any warranty, the party suffering as a result of the breach *must still perform their obligations under the contract*, but *may sue for damages*

12(1) You can treat a breach of a condition as a warranty and sue for damages (*Niblett*)

12(3) If buyer accepts goods, cannot can only treat breach of condition as a breach of warranty (cannot repudiate):

* 12(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated

1 “delivery” means “a voluntary transfer of possession from one person to another”

26 It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale

* For delivery, handing over keys = okay (recognizes a transfer of control over the goods)

33 Rights of buyer to examine goods upon delivery

* 33(1) Where goods are delivered to the buyer that the buyer has not previously examined, the buyer shall be deemed not to have accepted them until there has been a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract
* 33(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller shall, on request, afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract

34 The buyer shall be deemed to have accepted the goods when the buyer, (a) intimates to the seller that the goods have been accepted; (b) after delivery, does any act in relation to them that is inconsistent with the ownership of the seller; or (c) after the lapse of a reasonable period of time, retains the goods without intimating to the seller that they have been rejected.

27 Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods

* note: usually specified differently by contract

29(1) Where the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them, but if they are accepted, the buyer shall pay for them at the contract rate

29(2) Where the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or may reject the whole, and if the buyer accepts the whole of the goods so delivered, the buyer shall pay for them at the contract rate

29(3) Where the seller delivers to the buyer the goods contracted to be sold *mixed with goods of a different description* not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest, or may reject the whole

30(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments

**Rights of the unpaid seller *against the goods* (“real remedies”) – ss 37-46**

37(1)

**Unpaid seller’s lien**: 39(1) Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price, (a) where the goods have been sold without any stipulation as to credit; (b) where the goods have been sold on credit but the term of credit has expired; or (c) where the buyer becomes insolvent.

**Right of stoppage in transit**: 42 Subject to this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in the course of transit, that is to say, the unpaid seller may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price

Rights preserved 46 Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of a right of lien or retention or stoppage in the course of transit

**Sellers resale rights**: 46(3) Where the goods are of a **perishable nature** or **where the unpaid seller gives notice to the buyer of intention to resell and the buyer does not within a reasonable time pay or tender the price**, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by a breach of contract

**Rights of the unpaid seller *against the buyer* (“personal remedies”) – ss 47-48**

**Action for the price of goods** (useful in cases when damages are less than the price of the goods)

* 47(1) Where, under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods
* 47(2) Where under a contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

**Action for damages** (difference in contract price and market price at the time the goods ought to have been accepted)

* 48(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance
* (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer’s breach of contract
* (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept

**Rights of the buyer**

See s 12: can repudiate and sue for damages for breach of a condition (or choose to treat it as a warranty and continue to perform but still sue for damages), or sue for damages in the case of a breach of a warranty

Buyer can maintain action for non-delivery

* 49(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery
* (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach of contract
* (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver

# *Consumer Protection Act*

## (1) Scope

**Substance, not form**: 11 In determining whether this Act applies to an entity or a transaction, a court or other tribunal shall consider the real substance of the entity or transaction, and in doing so may disregard the outward form

2(1) *CPA*: this Act applies in respect of all consumer transactions\* if the *consumer*\* or *the person engaging in the transaction with the consumer*\*is **located in Ontario when the transaction takes place**

1 Definitions

* “**consumer transaction**” means “any act or instance of conducting business or other dealings with a consumer\*, including a *consumer agreement*”
* “**consumer agreement**” means “an agreement between a *supplier and a consumer* in which the supplier agrees to supply goods or services for payment”
	+ Contrast w/ *SGA* which only applies to the sale of goods
* “**consumer**” means “an individual *acting* for ***personal, family or household purposes*** and does not include a person who is acting for business purposes”
	+ A consumer cannot be a corporation; must be an individual
	+ A consumer is determined by the **motive** for the transaction (to use it for personal versus business use)
		- Not by the goods or services purchased (same item purchase may be considered a consumer if purchased for personal use versus not a consumer if purchased for business use (e.g. coffee maker for home versus office)
	+ Uncertainty regarding purchases for mixed business and personal use; but will likely be treated as a consumer (*Dell*: sought to have a class action dismissed b/c computers were used partially for business purposes; court erred on the side of personal use so *CPA* applied)

## (2) Structure of CPA

* **PART I**: Interpretation and Scope
* **PART II**: Consumer Rights
* **PART III**: Unfair Business Practices
* **PART IV**: Specific Consumer Agreements
* **PART V**: Advance Payments Prohibited
* **PART VI**: Repair of Motor Vehicles
* **PART VII**: Credit Agreements
* **PART VIII**: Leasing Transactions
* **PART IX**: Remedies

## (3) Consumer Rights

6 Nothing in this Act shall be interpreted to limit any right or remedy that a consumer may have in law.

Codifies common law rule of contra preferendum: 11 Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer

**Arbitration**

* Cannot waive rights: 7 The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary
* 7(2) forced arbitration clauses when signing agreement are invalid (may commence an action in the Sup Ct J)
* 7(3) however, after they sign the agreement, the consumer and supplier may choose arbitration
* *Telus v Wellman*
	+ *Dell* and *Rogers Wireless* stand . . . for the enforcement of arbitration clauses *absent legislative language to the contrary* 🡪 in Ontario legislation, clear legislative intent not to enforce arbitration clauses for consumer transactions
	+ But businesses customers are not consumers and as such as bound by arbitration clauses
* *Douez v Facebook*
	+ Forum selection clauses (Different from arbitration clauses) are entitled to deference but can be overruled using the *Pompey* test
	+ *Pompey* test
		- (1) party seeking a stay based on the forum selection clause must establish that it is “valid, clear and enforceable and that it applies to the cause of action before the court”
		- (2) fi that is established, the plaintiff must show strong reasons why the court should not enforce the forum selection clause
			* Consumer agreements are considered differently for the second part of the test
			* Courts must take into account public policy considerations, nature of the rights at stake, etc.
	+ In *Douez*, P met the second part because it includes a consumer contract of adhesion (no choice) and the subject matter is privacy which is a key Canadian value and it is important that this issue be decide by a local court rather than a California court
* *Heller v Uber* ONCA (note: pending SCC judgment)
	+ Uber driver (so not consumer; employee or independent contractor) which had a mandatory mediation and arbitration clause in the Netherlands (with governing law in Netherlands); cost was $20k upfront not including travel costs or retaining counsel; agreement entered into was held to be unconscionable

**SGA deemed to apply**: 9(2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement

* Applies to goods that are leased or traded as well

**Any term waiving implied condition/warranty in *SGA* is void**: 9(3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the SGA … is void

**Reasonably acceptable quality**: 9(1) The supplier is deemed to *warrant* that the services supplied under a consumer agreement are of a reasonably acceptable quality

* Applies to SERVICES, unlike merchantable quality under SGA which applies to goods (is this a different requirement than merchantable quality? Open question)
* Note that this is a warranty unlike merchantable quality under SGA which is a condition

10 **Estimates**:

* 10(1) If a consumer agreement includes an estimate, the supplier shall not charge the consumer an amount that exceeds the estimate by more than 10 per cent
* 10(2) If a supplier charges an amount that exceeds the estimate by more than 10 per cent, the consumer may require that the supplier provide the goods or services at the estimated price

## (4) Unfair Business Practices

14(1) It is an unfair practice for a person to make a false, misleading or deceptive representation

14(2) contains 17 examples of unfair, misleading, or deceptive representations

15(1) It is an unfair practice to make an unconscionable representation

**Rescission for unfair practice**: 18(1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages

## (5) Specific Consumer Agreements

* **Future performance agreements**
	+ Means “a consumer agreement in respect of which delivery, performance or payment in full is not made when parties enter the agreement”
	+ Every future performance agreement shall be in writing, shall be delivered to the consumer
	+ If not delivered within one year of entering into the agreement, consumer may cancel the future performance agreement
	+ Rights in other goods unenforceable: 24 Any provision in any future performance agreement or in any security agreement incidental to such an agreement under which the supplier may acquire title to, possession of or any rights in any goods of the consumer, other than the goods passing to the consumer under the agreement, is not enforceable
	+ Limit on security interest: 25 Where a seller has taken a security interest and purchaser has paid 2/3rds or more of the purchase price, the seller cannot reclaim the goods except with leave of court (i.e. repossession clause in security agreement is not effective)
* **Time Share Agreement**
* **Personal Development Agreements**
	+ E.g. fitness club
* **Internet Agreements**
	+ Online
* **Remote Agreements**
	+ Supplier is far away – e.g., mail, phone
* **Direct Agreements**
	+ Door-to-door; can be cancelled within 10 days (“cooling-off period”)
* **Repair to Motor Vehicles**
* **Credit Services & Loan Agreements**
	+ E.g., towing and storage

# *Personal Property Security Act*

## (1) Introduction

Pre-PPSA Forms of Security: (these are **all trumped by the PPSA now – and substance governs over form (doesn’t matter what you call it now**)

* Pledge
	+ Give someone physical possession of the property in exchange for the loan (e.g. loan for $50, give watch as collateral, watch given back when you pay the loan off)
* Chattel Mortgage
	+ Essentially a mortgage over goods – enables the debtor to have the collateral while transferring a property interest to the creditor
* Conditional Sales Contracts
	+ Hire-purchase agreement (i.e. rent to own agreement)
* Charge or Hypothecation
	+ Similar to a mortgage
	+ Charge is an equitable interest (unlike mortgage – legal interest)
* Floating Charge
	+ Answers problems of chattel mortgage for inventory (can’t gain interest in something that the debtor has not yet acquired)

The secured creditor has a remedy in the form of collateral (they have a property interest); the unsecured creditor has no such remedy (e.g. a bank that lends money and then that takes a security interest vs. a friend who merely lends money)

**Business loans are usually provided by two sources:**

1. Sellers of goods
2. Third party lenders

**Methods lender use to reduce risk:**

* Good credit-granting policies and procedures
* Guarantees
* Security interests (the one we will be exploring)

Note: it is possible to have secured guarantees

**Advantages of secured creditors:**

* Priority over trustee in bankruptcy (under *BIA*, not *CCAA* in some cases (but that’s for very large corporations)
	+ You have a property interest in the collateral, can claim it ahead of the unsecured creditors so it does not get split to the pool of unsecured creditors
	+ Secured creditors are outside the scope of the bankruptcy procedure (therefore ahead)
* Need not rely on legal process
	+ Self-help; obtain your property upon default

## (2) Scope

**Definitions** (s 1)

“**security interest**” is an interest in personal property\* that *secures payment or performance of an obligation*

“**personal property**” means chattel paper\*, documents of title\*, goods\*, instruments, intangibles\*, money and investment property, and includes fixtures but does not include building materials that have been affixed to real property

“**document of title**” means a written description or identification of goods, authorizing the holder of the documents to receive, hold or dispose of the goods

“**chattel paper**” means a writing that evidences both a monetary obligation and a security interest in, or lease of, specific goods

“**goods**” means tangible personal property *other than* chattel paper, documents of title, instruments, money and investment property

“**consumer goods**” mean goods that are primarily used or required for personal, family or household purposes (consumer goods can never be inventory or equipment)

“**inventory**” means goods that are intended for resale (not consumer goods – intended for resale is not consistent with personal, family or household purposes)

“**equipment**” means goods that are not inventory or consumer goods (residual category (remember, equipment cannot be inventory))

“**intangible**” means all personal property, including choses in action[rights], **that is *not*** goods, chattel paper, documents of title, instruments, money or investment property (another residual category)

“**Instruments**” means (a) a bill, note or cheque within meaning of *Bills of Exchange Act* or any other writing that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment (or a letter of credit), or (b) a letter of credit and an advice of credit if the letter or advice states that it must be surrendered upon claiming payment thereunder,

“**Investment property**” means a security, securities account, securities entitlement, futures contract or futures account

* Indirect holdings create securities entitlements and usually securities accounts
* Accounts are intangibles, so they are covered as personal property

**Are licences/quotas “personal property”?**

* Licence = gives you legal permission to do something that without the license you would not be able to do
* Quota = entitlement to grow/sell/harvest/fish/etc. a proportional amount of things
* Both of these things are valuable and often used as collateral
* Can there be a security interest in them?
* Need to analyze to determine degree to which license or quota is (1) discretionary, transferable, revocable, etc. and (2) the commercial reality (*Saulnier*)
	+ Historically it depended on the discretion of the licencing board (little discretion = more likely a property right; more transferability = more likely a property right (but not essential (*Sugarman*))) (*Bouckhuyt*)
	+ Later, push for commercial reality approach (these are commercial statutes and to ignore commercial reality is not good)
	+ Uncertainty b/c SCC rejects the regulatory approach which focuses on discretion but also criticizes the commercial reality approach
		- Rather it seems to be a mix of the regulatory and commercial reality approach that the court is using
	+ Licences starting to look more like a right and less like a privilege, and thus more similar to personal property
* CASES:
	+ *Bouckhuyt*: tobacco quota was not personal property (licensing board had broad discretion)
	+ *Hallan*: milk quota not personal property (followed Bouckhuyt; broad discretion)
	+ *Sugarman*: nursing home licence was personal property (little discretion)
	+ *Re Foster*: tax licence was personal property (little discretion)
	+ *Saulnier*: fishing licence was personal property (right to fish coupled with a proprietary interest in the fish caught – deployed regulatory and commercial reality approach

**Are trusts “security interests”?** (*Skybridge*)

* Must consider:
	+ purpose of the transaction
	+ roles and relationship of parties
	+ practical and commercial reality
	+ intention of the parties
* In *Skybridge*: travelers paid $1k to Skybridge which it was supposed to use to buy airplane tickets
	+ They went bankrupt, question is whether consumer were unsecured creditors (get almost nothing) or whether Skybridge was holding the money in trust for the consumer
	+ Held: holding the money in trust for the consumer (constructive trust) – legal realism here (King suggests this is troubling)
		- Note: context of consumer; these people would have been screwed; keep that in mind

2 – “Subject to subsection 4(1) [specific excluded transactions], this Act applies to…”

**Included transactions**

1 “**personal property**” means chattel paper, documents of title, goods, instruments, intangibles, money and investment property, and includes fixtures but does not include building materials that have been affixed to real property

1 “**security interest**” is an interest in personal property\* that *secures payment or performance of an obligation*

2(a) **every transaction** without regard to its form and without regard to the person who has title to the collateral that ***in substance* creates a security interest\*** including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and

(ii) an assignment, lease or consignment that secures payment or performance of an obligation; (a “financing lease” – a lease that in substance is a security interest)

**Deemed included transactions**

2(b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and

* Account example: accounts receivable
* If transferee of an account wants to be protected, they must register to be a secured creditor

2(c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation. (a lease of goods in general, not in substance a security interest)

* This is a true lease (unlike 2(a)(ii) where it is a security interest disguised as a lease)
* It matters whether a lease of goods is included by virtue of (a) or (c) because they have different remedies
* **True lease vs financing lease** (*Daimler*)
	+ Essential thing to consider: If you pay over time and at the end of the lease, it does not have any value, then it is likely a financing lease
	+ is there an obligation to purchase?
	+ is there an option to purchase?
	+ is the lease open-ended?
	+ what are the terms of the lease?
	+ what business are the parties in?
	+ how long is the lease?
	+ Ends of the spectrum
		- Financing lease
			* Not in the business of leasing vehicle, you want to acquire a vehicle, but I am concerned because I do not want you to default
			* You enter into something for the “lease” whereby you will pay monthly and at the end of the five year lease you will own the car
			* This is a financing lease
		- True lease
			* You’re paying monthly and at the end you have an option to buy for $15k (then it’s a true lease most likely)
			* But if the option is $1 then it’s likely a financing lease

**Excluded transactions**

4(1) Except as otherwise provided under this Act, this Act does not apply,

1. to a **lien** given by statute or rule of law, except as provided in subclause 20(1)(a)(i) or section 31;
	1. If granted by statute or rule of law, do not need to register your interest
	2. Mostly non-consensual
	3. a lien is similar to security interest which is why there’s a carve-out
	4. *Harry Shields* (ONCA)
		1. Contest between landlord’s right of distress (statutory lien) and security interest registered under the Act
		2. Landlord has a right to seize the property
		3. **However, no priority mechanism exists**; question of whether lien has priority of security interests under PPSA remains unsolved
		4. King’s advice: take possession
2. to a **deemed trust** arising under any Act, except as provided in subsection 30(7);
	1. Deemed trusts are devices used by governments to ensure government has first claim on money collected on behalf of government (e.g. obligation to collect and remit HST to government)
		1. Deemed trusts are non-consensual
	2. There are common law or statutory deemed trusts
	3. *BIA*: property held in trust in bankruptcy does not form part of the bankrupt’s estate
		1. SCC: Provincial deemed trusts do not count as trusts in the BIA because of s 91 of the Constitution – provinces cannot make laws in respect of bankruptcy
		2. Federal deemed trusts still used to count as trusts in the BIA
			1. But then BIA amended (s 67(2)) so that deemed trusts do not count for federal government either unless it is an actual trust
			2. s 67(3) sets out exceptions – broadly speaking, deemed trusts for purposes of CPP, EI and certain federal income tax will count as trusts even if they are not actual trusts
3. to a transfer of an interest or claim in or under any **policy of insurance** or contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;
	1. *Stelco*: insurance financing contract held to be an insurance contract and outside the *PPSA* on the basis of this provision, but King thinks that is wrongly decided
4. to a transaction under the **Pawnbrokers Act**;
5. to the creation or assignment of an interest in **real property**, including a mortgage, charge or lease of real property, other than,
	* 1. an interest in a fixture, or
		2. an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor’s interest in the real property;
6. to an assignment for the general benefit of creditors to which the Assignments and Preferences Act applies;
7. to 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;
8. to an assignment of accounts made ***solely*** to facilitate the collection of accounts for the assignor; or
9. to an assignment of an unearned right to payment to an assignee who is to perform the assignor’s obligations under the contract

## (3) Validity and Enforceability

1 “**security agreement**” is an agreement that creates or provides for a security interest\* (see above for definition of SI)

9 Except as otherwise provided by this or any other Act, a security agreement\* is **effective according to its terms** between the parties to it and against third parties.

* Secured parties may design their own agreements; do not need to follow a specific form
* Can range from one short clause in a sentence compared to a 30-page security agreement
* But attachment must occur for it to be enforceable (11(1) A security interest is not enforceable against a third party unless it has attached)
* However, there are limitations on what you can draft (cannot circumvent the registration requirements, priority rules in a security agreement, alter some of the parties obligations under Part V)
	+ You can make more strict rules but not less strict

10 Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor within **ten** days after the execution thereof, and, if the secured party fails to do so after a request by the debtor, the Superior Court of Justice, on the application of the debtor, may order the delivery of such a copy to the debtor.

* Merely an administrative requirement; not fatal to your claim

## (4) Attachment

Attachment = point at which a security interest becomes enforceable

11(1) **Three elements for attachment**

* **Value** is given
	+ “value” means any consideration sufficient to support a simple contract and includes an antecedent debt or liability
	+ This means that pre-existing debt is fine; amends the common law rule regarding past consideration
* Debtor has **rights** in the collateral
	+ Must exist (not future goods)
		- Recall: cannot have rights to something that does not exist
	+ What sorts of rights the debtor must have? Owner is easy. This is difficult to determine when it pertains to other rights
	+ *Kinetic*
		- Debtor must have more than possession, but less than full ownership
			* Must have some degree of control/authority over the collateral
		- Bank had a security interest in inventory
		- Inventory was supplied to the debtor but supplier retained title, and then the debtor would combine the inventory with its own products to manufacture goods and sell it back to the supplier
		- Held that bank has a sufficient security interest
	+ *Ellingson*
		- E buys a truck and drives it away without finalizing the financing agreement
		- Trustee in bankruptcy argued that it was a sale and that the dealer was just an unpaid seller
		- Dealer argued there was no sale because financing was a condition precedent to the sale – the buyer held the truck in trust for them
		- Held for the dealer (constructive trust)
	+ *RSL*
		- 994 has a perfected GSA
		- En-Plas supplies goods to RSL
		- En-Plas had a conditional sales agreement (title retention agreement) contingent on meeting regulatory safety standards
		- En-Plas wins against 994 in dispute
		- Court held that it title retention only valid because it did not go to payment (outside the scope of the PPSA) – otherwise the PPSA would have applied irrespective of title (overrules title retention clause)
			* Therefore attachment did not occur (994 never got rights to the collateral)
	+ 12(1) A security agreement may cover after-acquired property
* Debtor has **signed a security agreement** that contains a description of the collateral sufficient to identify it
	+ Or the collateral is in the possession of the secured party

11(3) Parties can agree to postpone the time for attachment

12(1) A security agreement may cover **after-acquired** property (note: PMSIs have super-priority)

Reiteration of s 11:

11(1) A security interest is not enforceable against a third party unless it has attached.

(2) Subject to section 11.1 (not 11(1)!), a security interest, including a security interest in the nature of a floating charge, attaches to collateral only when (1) **value\* is given**, (2) the **debtor has rights in the collateral** or the power to transfer rights in the collateral to a secured party and,

(3) (a) the debtor has **signed a security agreement** that contains,

(i) a description of the collateral sufficient to enable it to be identified, or

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

(b) the collateral is not a certificated security and is in the possession of the secured party or a person on behalf of the secured party other than the debtor or the debtor’s agent pursuant to the debtor’s security agreement;

(c) 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, 2006*pursuant to the debtor’s security agreement; or

(d) the collateral is investment property and the secured party has control under subsection 1 (2) pursuant to the debtor’s security agreement.  2006, c. 8, s. 129.

## (5) Perfection

19 A security interest is perfected when,

(a) it has attached; and

(b) all steps required for perfection under any provision of this Act have been completed,

**regardless of the order of occurrence.** (The other thing (b) you do in order to perfect may occur *before* attachment)

11(3) Parties can agree to postpone the time for attachment

* e.g. statement that it is contingent on them registering first – then attachment occurs. But better method would be to register first and then sign the contract likely

**Methods of Perfection**

1. Possession
2. Registration
3. Delivery
4. Control (note: this isn’t really a method of perfection; instead, you are ahead of all security interests)
	* therefore even better than perfecting

Possession (note: *restricted* to certain security interests – tangible forms of personal property)

22(1) Possession or repossession of the collateral by the secured party, or on the secured party’s behalf by a person other than the debtor or the debtor’s agent, perfects a security interest in,

 (a) chattel paper;

 (b) goods;

 (c) instruments;

 (d) negotiable documents of title; and

 (e) money,

but only while it is actually held as collateral

Possession and re-possession are not defined by the Act

Limited to the types of personal property described above (unlike registration)

**Possession must be *continuous* in order to maintain perfection**

* if you lose possession for a period of time, you are not perfected for some time and then reperfected when you gain possession back (no deemed continuous perfection like in 30(6) for registration)

**“Repossession”**

* Act is silent on whether it means (a) simply reacquiring possession; or (b) seizing the collateral from the debtor upon default
* Must have meant repossession on enforcement (which won’t count as perfection by possession, but in Ontario it will – *Sperry*)

**Constructive possession**?

* Common law recognizes possession of goods without actually being able to put your hands on it – e.g., taking the keys to a car
* Unclear whether constructive possession counts as possession for the purposes of the PPSA (*Raymond* – judgment does not go far enough to delve into whether constructive possession counts)
	+ Possession for perfection must be actual, physical possession. Notice of possession or intent to retain possession will not count. But again, unclear about constructive possession
* PSA in Part V (enforcement) allows for constructive possession but doesn’t answer whether allowed for s 22

**Deemed agent issue**

* *Sperry v CIBC*: contract says that receiver manager is deemed to be the agent of the debtor (not the secured party)
* Contest between CIBC and Sperry as secured parties for the collateral; question of whether receiver manager taking possession constitutes possession for CIBC for purposes of PPSA
* Possession by the receiver manager was the debtor’s agent; therefore it was not the agent of the secured party (CIBC) in this case; so the other secured party won
* Practical workaround: Deemed agent for the debtor for the purposes of liability
	+ But not deemed agent for the debtor for the purposes of possession

Registration (available for any type of collateral; unlike possession)

23 Registration perfects a security interest in any type of collateral

45(1) In order to perfect a security interest by registration under this Act, a financing statement shall be registered.

* Register security interest in PPSA by filing a financing statement
* Effect of filing a financing statement is that you have accomplished registration
	+ That is not perfection – it is the combination of registration and attachment which constitutes perfection
* Notice filing system
	+ Does not have the security agreement in there – only puts people on notice and then they must inquire further to get information

45(2) Where the collateral is consumer goods, the financing statement referred to in subsection (1) shall not be registered before the security agreement is signed by the debtor and, where a financing statement is registered in contravention of this subsection, the registration of the financing statement does not constitute registration or perfection under this Act

* Consumer goods: can’t register FS until after debtor signs the security agreement, otherwise does not constitute registration/perfection

45(3) Where the collateral is not consumer goods, the financing statement referred to in subsection (1) may be registered before or after the security agreement is signed by the debtor

* Not consumer goods – may register FS *before* or after SA signed by debtor

**Financing Statement**

* Debtor Name (required)
	+ This is crucial – otherwise registration may be invalid
	+ What to accept:
	+ Individual:
		- Birth Certificate, or
		- Citizenship Document
	+ Corporation:
		- Certificate of Incorporation
		- Certificate of Amalgamation
		- Certificate of Amendment
* Secured Party Info (required)
	+ Not critical – will most likely not invalidate registration
* PPSA or RSLA (Repair and Storage Liens Act) – both under the same registration regime (required)
* Registration Period (required)
	+ 1-25 years or infinite (99 years)
* Collateral Classification (required)
	+ Consumer goods, inventory, equipment, accounts, other
	+ Cannot tick off all boxes for same asset – recall definitions of consumer goods, inventory & equipment
	+ Corporation cannot be a consumer (therefore cannot acquire consumer goods)
	+ For consumer goods, VIN must be registered
	+ For non-consumer goods, VIN advisable but not required t be registered (see cases afterward)
	+ When dealing with consumer goods, be careful: s 42(2) PPSA and Consumer Protection Act
* Collateral Description (optional)
	+ King: don’t fill this in b/c you’re opening yourself up to unnecessary liability

**PPSA searches**

* Four kinds of searches
	+ Individual specific (first name, middle name, last name, date of birth)
	+ Individual non-specific (First name, last name)
	+ Business debtor (name)
	+ VIN
* Will give you the option for display versus ordering a certificate (instant vs few days)
	+ Order certificate to be able to sue registry

**Renewal of registration**

* 52(1) Where a security interest has been perfected by registration, the registration may be extended before the registration ceases to be effective by the registration of a financing *change* statement
	+ May only renew before the financing statement has expired; otherwise reperfected
	+ Also recall: 30(6) gap in perfection by registration = deemed continuously perfected except against persons who acquired rights during unperfected period
* 52(2) Where a security interest has been perfected by registration and the registration has ceased to be effective, the security interest may be perfected again by the registration of a financing statement
	+ Reperfected but not renewed if registration lapses
	+ But recall 30(6) gap in perfection by registration = deemed continuously perfected except against persons who acquired rights during unperfected period

**Ways registration may become unperfected**

* 48(1) **transfer of collateral** w/ consent of SP – 15 days
	+ Where a security interest is perfected by registration and the debtor, with the prior consent of the secured party, *transfers* the debtor’s interest in all or part of the collateral, the security interest in the collateral transferred becomes unperfected **fifteen days** after the transfer is made ***unless*** the secured party registers a *financing change statement* within such fifteen days
* 48(2) **transfer of collateral** w/o consent of SP – 30 days after SP learns info required to register a financing change statement
	+ Where a security interest is perfected by registration and the debtor, **without** the prior consent of the secured party, *transfers* the debtor’s interest in all or part of the collateral, the security interest in the collateral transferred becomes unperfected **thirty** **days** after the *later* of,
		- (a) the transfer, if the secured party had prior knowledge of the transfer and if the secured party had, at the time of the transfer, the information required to register a financing change statement; and
		- (b) the day the secured party learns the information required to register a financing change statement,
	+ ***unless*** the secured party registers a financing change statement or takes possession of the collateral within such thirty days.
* Deemed for (2) – 48(4) Transferee in possession – subsequent transfers w/o consent of SP – need to register financing change statement within 30 days against name of transferee and no intermediary transferees
	+ Where the debtor’s interest in all or part of the collateral is transferred by the debtor **without** the consent of the secured party and there is one or more subsequent transfers of the collateral **without** the consent of the secured party *before* the secured party learns of the name of the transferee who has possession of the collateral, the secured party shall be *deemed* to have complied with subsection (2) ***if*** the secured party registers a financing change statement within thirty days of learning of the name of the transferee who has possession of the collateral *and* the information required to register a financing change statement and the secured party need not register financing change statements with respect to any intermediate transferee.
* 48(3) **change of debtor name** – 30 days after learning of name change and new name
	+ Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected **thirty days** after the secured party learns of the change of name and the new name of the debtor ***unless*** the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

**Consumer goods**

* No registration before SA signed (s 45(2) *PPSA*)
* Separate registration for each SI
* No collateral other than the goods financed (s 24 *CPA*)

**Registration errors**

Framework

* (1) is there an error in the registration?
* (2) does 46(4) save it? (is a reasonable person likely to be misled materially by the error?)

46(4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled *materially* by the error or omission

* Reasonable person is an objective, not subjective test (*Re Lambert*, *Fairbanx*)
	+ Reasonable person = person generally familiar with PPSA and search capabilities (not expert) (*Re Lambert*)
* Incorrect debtor name usually fatal (except for motor vehicle where VIN correct) (*Fairbanx*)
* Incorrect collateral classification with no description = fatal (*Adelaide*)
* Incorrect collateral classification with correct description = cured (*Adelaide*)
* Correct collateral classification with limiting description = limited (to the personal property you have a SI in) (*Adelaide*)
* Motor vehicles
	+ For consumer goods, VIN must be set out and in the designated place, otherwise fatal (46.2)
	+ For equipment/inventory, if VIN set out (even though not required) but incorrect tor not in the designated place, fatal (46.2)
* *Re Lambert*
	+ Facts: registration with debtor name incorrect but correct DOB and VIN. Creditor searched legal name and nothing showed up, but did not search by VIN.
	+ Held: reasonable person would have known that you can do a VIN search and done that; reasonable person not likely to be materially misled; cured by 46(4)
	+ Objective, not subjective test – would a reasonable person have been misled? It doesn’t matter whether the error actually misled anyone?
	+ Reasonable person = person generally familiar with PPSA and search capabilities, not the most sophisticated or perfect user, not someone with an intimate knowledge of PPSA, but someone who is aware that a search can be done with debtor name and also the VIN
		- Reasonable person for motor vehicle security would have done a search by name *and* VIN
	+ Obiter statements codified in 46.2
* *Fairbanx*
	+ Facts: Debtor name wrong (technology spelled with ‘h’). RBC (new SP) searched both with and without the ‘h’. Disputing the other SP’s registration. They argued that RBC searched both and thus reasonable person would have searched both given the unconventional spelling.
	+ Held: reasonable person likely to be materially misled. Test is objective (not subjective). Reasonable person would have searched correct name, and even if they searched the incorrect name, would not have known which registrations are from that debtor or another debtor
		- Doesn’t matter what RBC actually did
* *Adelaide*
	+ See above – regarding collateral classifications and descriptions

46.1(1) deemed not likely to be misled materially – motor vehicle

* 46.1(1) For the purposes of subsection 46 (4), in the case of a financing statement or financing change statement in respect of collateral that is or includes a **motor vehicle** a reasonable person shall be deemed ***not*** likely to be misled materially, insofar as the security interest in the motor vehicle is concerned, by the fact that the statement has one or more errors or omissions described in subsection (2) of this section, **if**,
	+ (a) VIN is set out correctly in the designated place on the statement;
	+ (b) the statement sets out at least the name of one debtor and, if the debtor is a natural person, his or her date of birth; and
	+ (c) the statement otherwise substantially complies with the requirements that apply for the purposes of subsection 46 (1)
* (2) The following are the errors or omissions to which subsection (1) applies:
	+ 1. Regarding any debtor named in the statement, the debtor’s name is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection 46 (1).
	+ 2. Regarding any debtor named in the statement who is a natural person, the date of birth of the debtor is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection 46 (1).

46.2 – deemed likely to be misled – motor vehicle – VIN wrong or in wrong place

* 46.2 For the purposes of subsection 46 (4), in the case of a financing statement or financing change statement in respect of collateral that is or includes a **motor vehicle** a reasonable person shall be deemed ***likely*** to be misled materially, insofar as the security interest in the motor vehicle is concerned, by any one or more of the following errors or omissions in the statement:
	+ 1. In the case where the motor vehicle is classified as **consumer goods** on the statement,
		- i. VIN is *not* set out on the statement,
		- ii. VIN is set out on the statement but *not* in the designated place, or
		- iii. VIN is set out on the statement but is incorrect.
	+ 2. In the case where the motor vehicle is classified as **equipment or inventory** on the statement and the statement sets out a vehicle identification number for the motor vehicle *even though that information is not required*,
		- i. VIN is not set out in the designated place on the statement, or
		- ii. VIN that is set out is incorrect.

**Limiting Collateral**

46(2.1) where a FS or FCS sets out a classification of collateral and also contains words that appear to limit the scope of the classification, **then**, unless otherwise indicated in the FS or FCS, the secured party may claim a security interest perfected by registration *only in the class as limited*

* *Adelaide*: correct collateral classification but limiting collateral description = limiting the personal property you have a SI in

### Delivery

22(2) A secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under s 68 of the *Securities Transfer Act*

Note: practically, you would want to take control

Control – method by which you gain control is found in the *Securities Transfer Act* – only for investment property

30.1(2) Control = super-priority

**Basics**:

* “control” of certificated securities occurs on
	+ **delivery** to secured party, *plus*:
	+ (a) an endorsement, ***or*** (b) registration in the name of the secured party.
* “control” of uncertificated securities occurs on:
	+ (a) registration in the name of SP,
	+ (b) control agreement from issuer, or
	+ (c) someone else having control for the benefit of the SP
* “control” of a securities entitlement occurs on:
	+ SP is recorded as entitlement holder,
	+ control agreement from issuer, or
	+ someone else having control for the benefit of the SP.

22.1 A security interest in investment property may be perfected by **control** of the collateral under subsection 1(2)

1(2) 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 under section **23** of the *Securities Transfer Act*, 2006;

(b) a secured party has control of an uncertificated security if the secured party has control in the manner provided under section **24** of the *Securities Transfer Act*, 2006;

(c) a secured party has control of a security entitlement if the secured party has control in the manner provided under section **25** or **26** of the Securities Transfer Act, 2006;

(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, secured party and 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; and

(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***

Purchaser’s control of certificated security

STA 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. (registered in name of SP)

Purchaser’s control of uncertificated security

STA 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.

Purchaser’s control of security entitlement

STA 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. 2006, c. 8, s. 25 (1).

(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.

Securities intermediary’s control of security entitlement

STA 26 If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder’s own securities intermediary, the securities intermediary has control of the security entitlement.

Back to PPSA – losing control (not very important)

PPSA 23(2) A security interest in investment property is perfected by control under subsection 1(2) from the time the secured party obtains control and remains perfected by control until,

(a) the secured party does not have control; and

(b) one of the following occurs:

(i) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate,

(ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner, or

(iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

### Continuous perfection; deemed method of perfection, etc.

21(1) Changing method of perfection without break = continuous perfection

* 21(1) If a security interest is originally perfected in any way permitted under this Act and is again perfected in some way under this Act without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Act.

30(6) gap in perfection by registration = deemed continuously perfected except against persons who acquired rights during *unperfected* period

* 30(6) where SI perfected by registration becomes unperfected and is again perfected by registration, SI shall be deemed to have been continuously perfected from the time of first perfection *except* if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected
* What acquiring rights means is ambiguous 🡪 registration not enough (no rights), but is attachment enough with perfection coming later? Unsure about this.
	+ Creates problems for priorities

30(2) continuously perfected SI shall be deemed perfected by method it was *originally* perfected if method of perfection changes

* E.g. registration 🡪 possession = deemed perfected by registration (so long as there was no gap)

### Unperfected Security Interests

SI is unperfected if not perfected

* If SI has not attached, we are not even talking about it b/c it’s not enforceable. We are talking about security interests that has attached but is unperfected

An unperfected security interest is **subordinate** to the interest of:

* 20(1)(a)(i) perfected security interest
* (i) lien arising outside the PPSA
* (ii) execution creditors
	+ Persons who obtained a judgment and enforced that judgment
* (b) trustee in bankruptcy
	+ If perfected after trustee received representative status, lose to trustee (regardless of when attachment occurred)
* (c) BFPV (bona fide purchaser for value)
	+ in *chattel paper*, *documents of title*, *instruments* or *goods* is not effective against a transferee thereof who takes under a transaction *that does not secure payment or performance of an obligation* and who gives value and receives delivery thereof without knowledge of the security interest
	+ **Elements:**
		- (1) Transferee of chattel paper, documents of title, instruments or goods.
		- (2) Delivery.
		- (3) Does not secure payment or performance of an obligation (i.e. not security interest).
		- (4) Gives value and receives delivery thereof without knowledge of the security interest.
* (d) in *intangibles* other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest
	+ Delivery is missing b/c they are intangibles
	+ It excludes accounts 🡪 they are deemed to be a security interest
		- Chattel paper should also be excluded (b/c also deemed to be a security interest) – was not b/c it’s tangible

## (6) Priorities

**Framework**:

(1) Are there competing security interests in the same collateral? If not, 30(1) not applicable.

(2) Does some other rule apply? If not, continue with s 30(1) priority rules.

* Investment property, PMSIs, proceeds, protection of transferees in the ordinary course of business
* **COVER THIS!!**

### Basic Priority Rules

30(1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the **same** collateral: (not different collateral and not if another rule in the Act applies (Investment property, PMSIs, proceeds, protection of transferees in the ordinary course of business))

* 1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the **order of registration** regardless of the order of perfection
* 2. Where priority is to be determined between a SI perfected by registration and a SI perfected otherwise than by registration,
	+ (i) the SI perfected by registration has priority over the other SI if the **registration** occurred before the ***perfection* of the *other* SI**, and
	+ (ii) the SI perfected *otherwise* than by registration has priority over the other SI, if the SI perfected otherwise than by registration was **perfected before the registration** of a financing statement related to the other SI
* 3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the **order of perfection**
* 4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment

Plain explanation:

* #1 b/w 2 perfected SI by registration, order of registration
* #2: b/w 2 perfected SI, one by registration and one otherwise than by registration, if registration occurs before other method perfects, registration wins; otherwise other method wins
	+ NOTE: for #1/2 perfection by registration only considers when financing statement is registered (not actual attachment which can be later and therefore not perfection), BUT for perfection otherwise than by registration, the date of actual perfection counts (i.e. with attachment)
* #3 b/w 2 SI perfected otherwise than by registration, order of perfection
	+ Happens with continuous possession 30(2) – were in possession but then registered (deemed to be perfected by possession) and then another party perfects by possession
	+ Could be used for constructive possession (but then again, we don’t know if constructive possession is within the scope of the Act)
* #4 b/w 2 unperfected SI, order of attachment

**Remember continuous possession (21(1)) and deemed original method of perfection for continuous perfection for purposes of priority (30(2)) and deemed continuous perfection for lapses w/ registration (30(6))** – explained above in *“Perfection” section*!! For the purposes of these rules!!

Also remember **s 48 rules**!!! E.g. transfer of collateral, debtor name change, etc. **Can lead to perfected interest losing perfected status!!**

**Cases:**

* *Bank of Nova Scotia v Gaudeau*
	+ Rules of priority not predicated on knowledge
	+ NBC was found to be acting in bad faith, but that is not enough to change priority rules (they are not affected by bad faith or knowledge – it is irrelevant for the purposes of priority)
* *Carsons* – equitable subordination? Likely not
	+ Facts:
		- Skuter controlled both Carsons and Yorkton
		- Yorkton granted Carsons a GSA with AAP
		- Yorkton gave a SI to A-1
		- A-1 registered, but got Yorkton’s name wrong
		- Skuter searched and realized A-1’s mistake
		- Skuter and Carsons registered several financing statements against Yorkton
		- A-1 amended its FS to correct the name error
	+ Equitable subordination 🡪 appears in the US but not in Canada
	+ Can argue that this is a case regarding piercing the corporate veil

### Control and delivery

30.1(2) Control = super-priority – A security interest of a secured party having **control** of investment property has priority over a security interest of a secured party that does not have control of the investment property.

30.1(3) deliver = beats other methods of perfection but subordinate to control. A security interest in a certificated security … which is perfected by taking delivery under s. 22 (2) … has priority over a conflicting security interest perfected by a method other than control

### Circular Priorities

Happens in two situations:

1. Registration during gap
	1. e.g. A 🡪 B 🡪 C (registered during A’s gap) 🡪 A … etc.
2. Subordinated debt
	1. e.g. A 🡪 B 🡪 C. A has a subordinated debt agreement with C.
	2. **Ask**, is it a turnover, partial subordination (then use Gilmore) or is it contractual, complete subordination? (Dixon) \*\*\*
		1. Partial = agreement between two SPs (or more but not all)
		2. Complete = agreement between one SP and the rest to subordinate to all (or rearrange rankings somehow)

**Approaches to resolve it:**

**(1) Dixon approach (Ziegel)**

1. Pay C the amount of the fund less B’s claim.
2. Pay B the amount of the fund less A’s claim.
3. Pay A the remainder.

E.g. A 🡪 B 🡪 C (registered during A’s gap) 🡪 A

In this case, A has priority over B (s 30(6)), B has priority over C, C has priority over A

Assuming A is owed $200k, B is owed $100k, C is owed $150k and the collateral is $225k

Using the formula:

* C gets $125k (225k – B’s claim)
* B gets $25k ($225k – A’s claim)
* A gets $75k

**(2) Gilmore approach (*RBC*, *CIF*)** – specifically if there is subordinated debt, use this method:

1. Set aside from the fund the amount of A's claim.
2. Pay the amount so set aside to
	1. C, to the amount of his claim;
	2. A, to the extent of any balance remaining after C's claim is satisfied.
3. Pay B the amount of the fund remaining after A's claim has been set aside.
4. If any balance remains in the fund after A's claim has been set aside and B's claim has been satisfied, distribute the balance to
	1. C,
	2. A, to the extent of any balance remaining after C's claim is satisfied.

e.g. A 🡪 B 🡪 C. A has a subordinated debt agreement with C.

Assuming A is owed $200k, B is owed $100k, C is owed $150k and the collateral is $225k

Using this formula:

* C gets 150k
* A gets 50k
* B gets 25k

This approach protects B (B expects that A has $200k and after that it’s theirs)

## (7) Purchase Money Security Interests (PMSIs)

Recall, 30(1) basic rules apply *if no other provision of this Act is applicable*. This is one of those exceptions (s 33(1))

**Framework:**

(1) Is it a “purchase-money security interest” as defined in s 1?

(2) Have the procedural requirements in s 33(1) been met?

**Step One: Is it a “purchase-money security interest” as defined in s 1?**

* 1 “purchase-money security interest” means,
	+ (a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of ***its*** price,
		- Vendor PMSI
	+ (b) 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 or to the collateral, to the extent that the value is applied to acquire the rights, or
		- Lender PMSI
	+ (c) the interest of a lessor of goods under a lease for a term of more than one year,
	+ but does ***not*** include a transaction of sale by and lease back to the seller
* **Cases:**
	+ *ACC*
		- Facts: Pettyjohns = farmers, ACC = lender. Essence of the transaction was for ACC to loan money to Pettyjohns to buy cattle
			* The way they did this is – Pettyjohns would get short-term loan from BMO to buy cattle and then ACC would lend Pettyjohns the money so they could pay off short-term loan
			* Later, Pettyjohns sold cattle and bought Watusi cattle against SA with ACC
			* Issue: do they have a PMSI in Watusi cattle?
		- HELD: it is a PMSI. Also touches upon proceeds but we’ll save that for later
		- Must take a **holistic view of the transaction**. The essence of the transaction was a loan in order for Pettyjohns to buy cattle. Even though technically they were loaning money to pay off the short-term loan
	+ *Unisource*
		- Facts: sale lease-back agreement w/ RBC. Laurentian agrees to refinance printing place and
		- Held: Trial level – held there were no additional assets coming into the company – mere balance sheet manipulation – no PMSI
			* CoA: overturned; emphasized title transferring – but this does not accord with PPSA
		- King: Wrongly decided – court wrongly emphasized title
		- *Also: could be easily avoided by having RBC assign their SI*

**Step Two: Have the procedural requirements in s 33(1) been met?**

1 “**inventory**” means goods that are held by a person for sale or lease or that have been leased or that are to be furnished or have been furnished under a contract of service, or that are raw materials, work in process or materials used or consumed in a business or profession.

**PMSI in Inventory**: 33(1) A PMSI in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if

1. SP must perfect before debtor (or agent of debtor) obtains possession of collateral.
2. SP must give notice before date of registration (of party obtaining a PMSI) to all parties who have previously registered financing statements that cover inventory or accounts.
	1. Notice must be in writing and describe inventory by item or type.

*Clark*

* Question of whether Clark complied with procedural requirements set out in s 33
* Held: s 45(4) one financing statement can relate to more than one SI
	+ Description of collateral does not need to be detailed (can be broad)
		- E.g. “sauce and sauce containers”

*North Platte*

* Failed to give notice within designated timeframe after the collateral came into the debtor’s possession

**PMSI in goods other than inventory**: 33(2) Except where the collateral or its proceeds is inventory or its proceeds, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the same collateral given by the same debtor if the purchase-money security interest,

1. SP must perfect before debtor (or agent of debtor) obtains possession of collateral or within 15 days.
	1. if intangible, within 15 days of attachment
2. There is **no** notice requirement.

**Priorities between PMSIs:**

* 33(3) Seller PMSI vs lender PMSI = seller PMSI wins
* How about two lenders?
	+ Nothing in s 33. Might split it evenly, might do first to register. Who knows?!

## (8) Purchasers in the ordinary course of business

Proceeds is connected to this – because this deals with when the debtor sells the collateral

**Analysis**: (POCOB wins meaning they get the collateral free the SI)

(1) s 25(1)(a) – is the sale authorized expressly or impliedly by the seller? If so, POCOB wins

(2) s 28(1) – unaware that sale constituted a breach of the security agreement? If so, POBOC wins

(3) s 20(1)(c) does the buyer fall within the scope of 20(1)(c)? If so, POBOC wins

**(1) is the sale authorized expressly or impliedly by the seller?**

1 “proceeds” means identifiable or traceable personal property in any form *derived* directly or indirectly from any dealing with collateral or the proceeds therefrom

25(1) Where collateral gives rise to proceeds, the SI therein,

* (a) continues as to the collateral, ***unless*** the SP expressly or impliedly authorized the dealing with the collateral free of the SI; and
	+ This is implied for inventory
* (b)extends to the proceeds.

**(2) does the buyer know that the sale constituted a breach of the SA?**

1 “**goods**” means tangible personal property other than chattel paper, documents of title, instruments, money and investment property, and includes fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted

28(1) A buyer of **goods** from a seller who sells the goods in the OCOB takes them free from any SI 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*.

* Applies to perfected and unperfected SI
* **Elements:**
	+ (1) buyer of goods
	+ (2) must be goods (only tangible personal property)
	+ (3) buyer must buy in the ordinary course of business
		- E.g. buy TV from best buy during regular store hours = yes; buy all cars from call dealership at 11pm on weekend = no; buy TV from neighbour = no.
		- Question of fact
		- *Camco*
			* **Relevant factors:**
				+ Whether transaction one normally entered into by people in the seller’s business.
				+ Where and when the agreement was made.
				+ Who the parties are.
				+ The quantity of goods sold.
				+ The **price**

The price is always an important consideration in these cases

* + - * Facts: Camco had perfected SI in appliances; buyers purchased condo w/ these appliances; Camco trying to seize appliances
			* Issue: whether buyers bought in OCOB?
			* Camco argued that they didn’t b/c usually you go to the retail store to buy appliance
			* Held: sold in OCOB. Question of fact determined by all the circumstances
			* Liberal interpretation to 28(1) – it is a matter of commercial utility (purpose). People in ordinary commercial circumstances ought to assume that the sale of authorized (in those situation the risk ought to be by the seller, not the buyer)
		- *Fairlane Boats*
			* Normal terms that are consistent with general commercial practice
				+ In Ontario, you would not look at particular seller but rather seller’s industry
			* The perspective is that of the buyer
				+ The relevant circumstances that those that are known by the buyer or ought to be known by the buyer
			* Excludes private sales!
		- *Schauss*
			* sale does not need to be the most common type of sale that the seller’s – whether sale was a proper component of the seller’s business
			* Transaction was normal for someone in the business to engage in
				+ Even though it was only his second time selling corn; variety of factors supporting this is in the OCOB
	+ (4) buyer must not know of the breach of the security agreement
		- However, they can know about the security agreement, just not that the sale constitutes a breach
	+ (5) **There must be a sale 🡪 Must know when property passed** 🡪 usually go to *Sales of Goods Act* for this; EXCEPT: *Sale of Goods Act* is superseded by s 28!!
		- Pre-paid buyers are not covered (b/c not a sale under Sale of Goods Act)
			* recall s 17 (property cannot pass until goods are unascertained), s 18/19 intention, etc. (not for this!)
			* therefore amendments made – made it easier for buyers to fit into this exception
				+ However, this did not really change anything substantively – prepaid buyers still probably out of this (see RBC case below)
		- NEW: whether or not buyer gets title and switching the focus onto **identification**
		- 28(1.1) Subsection (1) applies whether or not,
			* (a) the buyer took possession of the goods;
			* (b) the seller was in possession of the goods at any time;
			* (c) title to the goods passed to the buyer; or
			* (d) the seller took a security interest in the goods.
		- 28(1.2) Despite subsection (1.1), subsection (1) does *not* apply if the goods were not identified to the contract of sale.
		- 28(1.3) For the purposes of subsection (1.2), goods are identified to the contract of sale when they are,
			* (a) identified and agreed upon by the parties at the time the contract is made; or
			* (b) marked or designated to the contract,
				+ (i) by the seller, or
				+ (ii) by the buyer, with the seller’s consent or authorization.
		- *RBC v 216200*
			* Facts: buyers prepaid for furniture (4 different classes)
			* Held:
				+ Class 1: Prepaid buyers in full and property not in possession of the debtor. NO

Unsecured creditors; no sale under SGA; could not identify goods b/c they were not even there

* + - * + Class 2: Prepaid buyers in part and property in the possession of the debtor. YES

Identification would probably not change anything – would pass under SGA too

* + - * + Class 3: Prepaid buyers in part and property not in possession of the debtor. NO

Unsecured creditors; no sale under SGA; could not identify goods b/c they were not even there

* + - * + Class 4: People entitled to refunds. NO

Unsecured creditors, no interest at all.

* + (6) “free from any SI therein given by the seller”
		- This is problematic in situations where there are multiple sales
		- It only says seller, meaning that is there is a SI down the line that is not cleared
		- Example
			* A sells boat to B on credit and takes SI & registers
			* B sells boat to C
			* C sells boat to D in OCOB of C
		- Does D have the boat free of any SI? Or can A seize boat from D?
			* It is dependent on whether B sold C the boat in OCOB – if not then NO!
			* Obviously could cause problems b/c D has no knowledge of that

**(3) does the buyer fall within the scope of 20(1)(c)?**

20(1) … until perfected, a security interest,

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest

* This deals with unperfected SI only
* it requires no knowledge of SI (under 28(1) you could have knowledge of the SI, only need not have knowledge of a *breach* of SA)
* But it deals with a wider scope (chattel paper, documents of title, instruments included too), while 28(1) only deals with goods
* Just another person that an unperfected SI is subordinate to – another reason to perfect your SI

If seller did not authorize collateral and buyer knew that the sale constituted a breach of the SA, the buyer still has *Sales of Goods Act* remedies – s 13 (goods free of encumbrances)

* But it’s not too useful b/c it’s a right of action against someone who is in default and it is a warranty

## (9) Proceeds

Concern: what happens to a SI when the debtor sells the collateral? Whether permitted or unpermitted

1 “proceeds” means identifiable or traceable personal property in any form *derived* directly or indirectly from any dealing with collateral or the proceeds therefrom, and includes

(a) any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom,

(b) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and

(c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property

* Identifiable = when they continue to exist in their original form (question of fact). Only need to prove the dealing with the car resulting in the boat.
	+ E.g. exchange car for a boat; boat is identifiable (exists in its original form)
* The issue becomes when you comingle it with other money (where traceable comes in)
	+ E.g. you have $10k in your bank account, you put another $1k in. The $1k isn’t identifiable – which of the $11k is yours? That’s where “traceable” comes in.
		- The real issue is if you have e.g. $10k in the account, then put in the other person’s $1k, but then only have $8k left – is it traceable?
* Traceable
	+ Many rules of equity developed that are inconsistent
		- Rule in Clayton’s Case
			* First in – first out
			* $50 + **$100** (money trying to trace) - $75 = $75
			* $75 can be traced
		- Rule in Hallet’s case
			* Where Clayton’s case inappropriate
			* Last in (debtor’s funds) – first out
			* **$100** (money trying to trace) + $50 (debtor) - $75 = $75
			* $75 can be traced
		- Rule in Oatway
			* Debtor invests money
			* **$100** (money trying to trace) - $75 (money invested) - $25 = $0
			* $75 invested can be traced
		- Lowest Intermediate Balance Rule
			* funds spent, then replenished
			* $**100** (money trying to trace) - $25 + $50 = $125 (balance)
			* $75 (LIB) can be traced
	+ *Pettyjohn* – important case for identification/tracing in the context of PPSA
		- The rules of tracing in common law and equity are applied but not strictly; certain changes are required in the context of the PPSA
			* There must be a “close and substantial connection” between the original collateral and the replacement property
			* Must look at the transaction with substance as a whole
				+ Court rejects form – substance consistent with PPSA
			* Tracing is concerned with fairness as b/w creditors (not debtor-creditor fairness)
			* Held: Watusi cattle were able to be traced from original cattle; thus proceeds
				+ Original cattle sold; deposited into bank account and used to pay overdraft; then overdraft was used to purchase Watusi cattle among other things
		- Rule in specific context: 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 from the first were used to acquire the second, whatever the formalities of the transactions in question
	+ *Flexi-coil* – endorsed Pettyjohn
		- this court has not simply adopted the common law or equitable rules of tracing but rather have developed rules based on the PPSA designed to achieve flexibility and certainty required by the PPSA

25(1) Where collateral gives rise to proceeds, the SI therein,

* (a) *continues* as to the collateral, ***unless*** the SP expressly or impliedly authorized the dealing with the collateral free of the SI; and
	+ This is implied for inventory
* (b) **extends to the proceeds**. (always!!!)

*E.g.* Sellers sells car for $10k and buys boat using $10k. The proceeds are the boat. Can go after collateral (car) if SP didn’t authorize sale and buyer of car cannot fit themselves into 28(1) or 20(1)(c).

25(2), (3) where SI in collateral is perfected by registration, perfected SI extends to proceeds (continuously perfected)

25(4) if SI perfected by means other than registration, then SI in proceeds becomes unperfected 10 days after the proceeds arose unless they perfect (practically speaking by registration b/c they probably wouldn’t be able to get possession if it’s contentious)

## (10) Enforcement

### Preamble

When you talk about enforcement, you are talking about *realizing on collateral* 🡪 seizing the collateral and keeping it in satisfaction of the debt; and selling it to realize on the collateral owed

Property interest that the secured creditor has is the most important part (other interests that unsecured creditors are still available but will not be spoken about here)

### Enforcement Measures

Part V sets out the rights and obligations of the secured party (and the debtor)

**Framework:**

(1) Is the SI a SI by virtue of 2(a)? (SI secures payment or performance of obligation). If not, Part 5 does not apply.

(2) Is the collateral exempt collateral by virtue of s 62(2) 🡪 any property exempt by *Execution Act* deemed exempt from taking possession 🡪 e.g. motor vehicle up to a certain sum, tools/equipment up to a certain sum, etc.

(3) Is the debtor in default? If so, can take enforcement measures under Part 5, otherwise cannot.

(4) If in default, Rights and remedies under SA and under Part 5 available

(5) When SP takes possession, Duties of SP (s 17, 17.1)

57.1 Unless otherwise provided in this Part, this Part applies to a security interest only if it secures payment or performance of an obligation.

* Must be in substance a SI – in the Act by virtue of 2(a) not (b) or (c) – because those are deemed
* This is especially relevant for true leases (part 5 remedies unavailable) vs financing leases (part 5 remedies available)

“default” means the failure to pay or otherwise perform the obligation secured when due ***or*** the occurrence of any event whereupon under the *terms of the security agreement* the security becomes enforceable.

* You are able to customize the terms of default
* Typical events of default
	+ non-payment
	+ failure to observe covenants
	+ failure to maintain or insure collateral
	+ reps or warrants untrue
	+ insolvency or bankruptcy
	+ enforcement proceedings or receiver

59(1) Where the debtor is *in default* under a security agreement, the secured party has the rights and remedies provided in the security agreement ***and*** the rights and remedies provided in this Part [5] **and**, when in possession or control of the collateral, the rights, remedies and *duties* provided in section 17 or 17.1, as the case may be.

* Debtor in default = precondition
	+ Default is where the rights change from a contract to property rights
		- Until default, SP only have contractual remedies (cannot look to SP for property remedies)

### Part V remedies (SP)

* 62(1)(a) right to **seize** collateral
	+ 62(1) Upon default under a security agreement, (a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law
	+ You can drive to the debtor’s premises and take the collateral
	+ Can you use force?
		- A little but not a lot 🡪 so long as you don’t “breach the peace”
		- R v Duccett
			* SP can lawfully recover goods as long as they don’t “breach the peace”
			* If you enter a premises lawfully but then if you use force, your actions are likely illegal
			* *If the debtor refuses to give you possession, you should abandon the attempt and seek an order under s 67*
* 63 right to **dispose** of collateral
	+ 63(1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to,
	+ (a) the reasonable expenses of the secured party, including the cost of insurance and payment of taxes and other charges incurred in retaking, holding, repairing, processing and preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement, any other reasonable expenses incurred by the secured party; and
	+ (b) the satisfaction of the obligation secured by the security interest of the party making the disposition,
	+ and the surplus, if any, shall be dealt with in accordance with section 64
	+ 63(2) Collateral may be disposed of in whole or in part, and any such disposition may be by public sale, private sale, lease or otherwise and, subject to subsection (4), may be made at any time and place and on any terms so long as every aspect of the disposition is *commercially reasonable*
		- If public sale, then easier to argue that it is commercially reasonable
		- If private sale, then getting 2-3 appraisals are good practice to prove that it is commercially reasonable
		- Must think about a lot: interest in collateral? Perishable? Diminishing in value? Likely that debtor will redeem collateral? Etc.
		- If there is a deficiency after the sale, you are an unsecured creditor for the deficiency
		- If there is a surplus, the money must go to the debtor (or to any other secured parties waiting). If you don’t know who is entitled to the money, pay it into court
	+ 63(3) SP’s right to delay disposition of collateral, so long as it is commercially reasonable (e.g. perishable product may not be commercially reasonable)
	+ 63(4) Must give 15 days written notice of the sale
		- (a) the debtor who owes payment or performance of the obligation secured;
		- (b) every person who is known by the secured party, before the date that the notice is served on the debtor, to be an owner of the collateral or an obligor who may owe payment or performance of the obligation secured, including any person who is contingently liable as a guarantor or otherwise of the obligation secured;
		- (c) every person who has a security interest in the collateral and whose interest,
			* (i) was perfected by possession, the continuance of which was prevented by the secured party who has taken possession of the collateral, or
			* (ii) is perfected by registration before the date the notice is served on the debtor;
		- (d) every person with an interest in the collateral who has delivered a written notice to the secured party of the interest in the collateral before the date that the notice is served on the debtor.
	+ 63(5) notice shall set out … see section
		- description of collateral
		- amount owing
		- total expenses incurred (or estimate)
		- statement that debtor may redeem
		- statement that collateral will be sold
		- date, time and place of sale
	+ 63(7) circumstances where notice **not** required where … collateral is perishable … see all of these exceptions!
* Right to appoint receiver or receiver and manager
	+ S 60 see this if need details
* right to collect accounts collateral
* right to foreclosure (keep collateral)
	+ 65(2)-(7) – see these sections
	+ If collateral is worth more than debt, then expect the debtor to object (allowed to)
* right to sue for damages

### part V remedies (debtor)

* 66 **right to redeem collateral**
	+ debtor can pay debt owed and get the collateral back
* right to sue SP for acting unlawfully
* additional rights for consumer debtors

### Duties of SP

17(1) A secured party shall use **reasonable care** in the *custody and preservation* of collateral in the secured party’s possession

* (2) SP able to charge reasonable fees associated with this (e.g. repossession, security guard, etc.)
* Typically risk of loss will remain on the debtor, unless SP was negligent
* You can get a SI on the asset (so long as it does not impair debtor’s right of redemption)

64 **distribution of surplus**

* 64(1) Where the secured party has dealt with the collateral under section 61 or has disposed of it, the secured party shall account for and, subject to subsection (4), pay over any surplus consecutively to,
	+ (a) any person who has a security interest in the collateral that is subordinate to that of the secured party and whose interest,
		- (i) was perfected by possession, the continuance of which was prevented by the secured party who took possession of the collateral, or
		- (ii) was, immediately before the dealing or disposition, perfected by registration;
	+ (b) any other person with an interest in the surplus who has delivered a written notice to the secured party of the interest before the distribution of the proceeds; and
	+ (c) the debtor or any other person who is known by the secured party to be an owner of the collateral,
	+ but the priority of the claim of any person referred to in clauses (a), (b) and (c) against the recipient of the surplus shall not be prejudiced thereby.
* (2) SP may require other SP to furnish evidence of SI
* (4) SP may pay into court if question about who is entitled to receive payment until (1)

### Contracting out

59(4) subject to (5), SA can set out the standards by which the rights/duties are to be measured, as long as they are not manifestly unreasonable

59(5) Despite subsection (1), the provisions of sections 17, 17.1 and 63 to 66, to the extent that they give rights to the debtor and impose duties upon the secured party, shall not be waived or varied except as provided by this Act.

Essentially: You can make rights of debtor more onerous via contract, but not less

### Reasonable Notice

**(1) Reasonable Notice as a matter of common law**

* not in the PPSA explicitly but there is a reasonable notice requirement in the common law
* **creditor must give reasonable notice of its intention to enforce its security interest** (*Lister*, *Waldron*)
	+ gives the debtor a chance to pay off their debt and redeem their collateral (*Lister*)
	+ *Waldron*: *Lister* applies every time the SP wants to enforce its collateral, regardless of SA (even if it says hat a creditor is entitled to repayment of loan “on demand”; debtor must be given reasonable notice)
		- Cannot waive or modify reasonable notice
	+ Typically we are talking a matter of days (but can be shortened to a few hours)
* Factors to assess reasonableness: (*Mister Broadloom*)
	+ Amount of loan
		- A greater loan balance weighs in favour of a longer notice period as it would be more difficult to raise large sums of money in a short period of time.
	+ Risk to the creditor of losing his money or the security
		- If the security is at risk, this weighs in favour of a shorter notice period.
			* If collateral is in imminent risk, weighs heavily in favour of virtually no notice period being acceptance (e.g. *Cal Grass* 🡪 30 mins acceptable)
	+ Relationship between the parties (incl. length)
		- A longer relationship weighs in favour of a longer notice period, unless the length of that relationship reveals a history of defaults;
	+ Character and reputation of the debtor
		- A debtor with a good reputation is entitled to a longer notice period. Conversely, in cases of dishonest conduct on the part of the debtor, virtually no notice period may be acceptable.
	+ Ability of debtor to refinance the debt
		- This can involve an assessment of a number factors including the state of the debtor’s assets, inventory, operations, market conditions, etc. 🡪 If the debtor will have difficulty raising the money, then this weighs in favour of a shorter notice period
	+ any other relevant factors

**(2) Notice as a matter of *BIA***

* statutory notice required under BIA in certain circumstances – 10 day notice
* s 244(1) *BIA*: A secured creditor who intends to enforce a security **on all or substantially all** of
	+ (a) the inventory,
	+ (b) the accounts receivable, or
	+ (c) the other property
* of an *insolvent* person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.
	+ Not bankrupt but insolvent 🡪 question of fact
* (2) the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of **ten days** after sending that notice, *unless* the insolvent person consents to an earlier enforcement of the security
	+ (2.1) Not able to waive it in advance, but able to be waived after notice is given (rare)

### BIA and CCAA

* Secured creditors are generally outside the scope of the BIA (can realize on secured assets – but note requirements such as s 244)
* Secured creditors are subject to CCAA though – e.g. order that secured creditors stayed during bankruptcy proceedings

### Consumer goods

S 65 Where collateral is consumer goods and 60% has been paid off, *must dispose of it within 90 days*

* Recall the *CPA* rules too (s 24/25) – 2/3 paid off means they cannot seize collateral w/o leave

S 66 debtor has the right to redeem collateral

### Exempt Collateral

* S 62(2) any property, other than those that have a purchase-money security interest or a possessory security interest, exempt by *Execution Act* deemed exempt from taking possession 🡪 e.g. motor vehicle up to a certain sum, tools/equipment up to a certain sum, etc.

### Court Orders

S 67 broad provision that allows party to go to court and seek an order in terms of compliance w/ Part 5 or s 17

*Rapid Transit*: s 67 is only procedural (not substantive – does not alter the rights of parties)