Fishing Licences as Security for Loans – An Incremental Step Forward by the Nova Scotia Supreme Court *Mariner Life* April 2006

One of the many problems currently facing the Canadian fishing industry is the fact that although fishing licences are required in order to participate in virtually all fisheries and often costs hundreds of thousands of dollars to acquire, those same licences cannot be used use as collateral to finance loans for their purchase. This problem was identified recently by the Pearse/McRae Report (April 2004 - *Treaties and Transition*), which recommended that the British Columbia provincial and federal governments work together to create a formal licence registry to provide a "mechanism for establishing claims against borrowers' assets" (p. 44).

Although neither level of government has acted on these recommendations, a recent decision of the Nova Scotia Supreme Court has taken an incremental step towards helping licence holders borrow money on the value of their fishing licences. In the case of *Royal Bank of Canada v. Saulnier* [2006] N.S.J. No. 38, a fish boat owner with four fishing licences having a combined value in excess of $600,000 borrowed money from the Royal Bank of Canada and granted it a general security agreement under the Nova Scotia *Personal Property Security Act.* This security agreement encumbered all of the boat owner's personal property including "intangibles." After the licence holder got into financial difficulties and made an assignment into bankruptcy, the Royal Bank commenced a legal action and applied to the Nova Scotia Supreme Court for a declaration that the four fishing licences were intangibles as defined by the Nova Scotia *Personal Property Security Act.* This would allow the bank to sell the licences and give it priority to the proceeds of sale over the Trustee in Bankruptcy.

In arguing that licences were property that could be encumbered under the *Personal Property Security Act*, the Royal Bank had an uphill battle because it was faced with a contrary decision of the highly respected Ontario Court of Appeal in *National Trust Co. v. Bouckhuyt* (1987), 7 P.P.S.A.C. 273. The *Bouckhuyt* case involved a security agreement attempting to encumber a quota for the production of tobacco that allowed a great deal of discretionary control to the government authority that regulated tobacco

farmers, but also allowed the quota holder to sell or lease out the quota. Upon holding that the tobacco quota could not be considered intangible property for the purpose of the Ontario *Personal Property Security Act*, the court said that although the tobacco quota "might be sold in a limited market, the mere fact that it could be exchanged, sold, pledged or leased does not in itself make it property." In arguing its case, the Royal Bank referred the Nova Scotia court to a series of more recent court decisions that have been reluctant to follow the *Bouckhuyt* decision. These included cases that have upheld *Personal Property Security Act* security interests over a taxicab licence, a milk quota, and a nursing home licence. In addition, the Royal Bank referred the court to the British Columbia case of *F.A.S. Seafood Producers Ltd. v. Her Majesty the Queen* 98 DTC 2034, where the Tax Court of Canada characterize fishing licences as capital property for the purpose of the *Income Tax Act.* While all of these cases were supportive of the Royal Bank's argument, they were not determinative because all of these cases, except the case involving the nursing home licence, are trial level decisions that do not have the same level of authority as the contrary decision of the Ontario Court of Appeal in *National Trust Co. v. Bouckhuyt.* Although the Ontario Court of Appeal affirmed the nursing home licence case, that case could be distinguished by the licence holder because the legislation setting up the nursing home licence structure specifically recognized the right to grant a security interest.

Despite the absence of a high level judicial authority in favour of the Royal Bank, the trial court in *R.B.C. v. Saulnier* accepted the Bank's arguments and relied upon these more recent cases to declare that the four fishing licences were intangible property for the purposes of the Nova Scotia *Personal Property Security Act.* The court also ruled that the licences were property for the purpose of the *Bankruptcy and Insolvency Act* with the result that any surplus sale proceeds left over after the bank has been paid would go to the Trustee in Bankruptcy to pay off the other creditors of the licence holder. Judgement on this case was granted on January 31, 2006 and it is currently under appeal (The outcome of this appeal will be posted on the Fisheries Law page of Admiraltylaw.com).

While this case would be viewed as a loss from the perspective of the individual licence holder who apparently wished to avoid paying his creditors, from the perspective of fish harvesters in general, it should be viewed as an incremental step forward in improving the ability of licence holders to obtain credit based upon the value of their fishing licences. Unfortunately, from the perspective of licence holders in British Columbia this case may be of no immediate assistance because: (1) it is only a trial level decision; and (2) unlike the Nova Scotia *Act*, there is some uncertainty in the British Columbia *Personal Property Security Act* as to whether or not the term "intangibles" as defined by the *Act* includes fishing licences. It could be argued that by incorporating the term "licence" into the definition of intangibles, which is defined by the *Act* to mean only a timber or Christmas tree licence, this definition by necessary implication excludes other types of licences, including fishing licences. With respect to this uncertainty, perhaps the British Columbia Minister of Agriculture, who jointly commissioned the McCrae/Pearse Report with the Federal Minister of Fisheries, could be persuaded to sponsor a small amendment to the *Personal Property Security Act* to specifically include a fishing licence in the definition. In addition, if the recommendation to create a federal licence registry is ever implemented by the federal Minister of Fisheries, the creation of security interests in licences could be further facilitated by specifically including the right to encumber licences in the federal enacting legislation as was done in the case described above regarding nursing home licences. If the *Saulnier* decision is successfully defended by the Royal Bank upon appeal, this appeal decision, coupled with one or more of the legislative changes described above, would put the British Columbia courts in a relatively strong position to categorize fishing licences as intangibles for the purpose of enforcing PPSA security agreements over them.

Given the many conflicting user groups within the Canadian fishing industry, problems facing the Canadian fishing industry are usually easy to recognize but very difficult to solve. In this case, we have a problem faced by almost all user groups and a clear solution to the problem. With a little assistance from both the British Columbia provincial government and the federal government, this problem could be solved.

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