

Submissions to

GRAHAM WHITMARSH

Deputy Minister
Ministry of Finance
Po Box 9417 STN PROV GOVT
Victoria, BC, V8W 9V3
Telephone: 250 387-3184
Fax: 250 387-1655
Email: Graham.Whitmarsh@gov.bc.ca

On Proposed Amendments to the

Personal Property Security Act, R.S.B.C., 1996 c. 359

Issued by:

Canadian Bar Association
British Columbia Branch
Maritime Law Section
PPSA/Saulnier Subcommittee
June 2009

CC: **LORI WANAMAKER**
Deputy Minister
Ministry of Labour and Citizens' Services
PO Box 9440 STN PROV GOVT
Victoria, BC V8W 9V3
Telephone: 250 387-8852
Fax: 250 387-8561
No email available

LARRY PEDERSEN
Deputy Minister
Ministry of Agriculture and Lands
PO BOX 9120, STN PROV GOVT
Victoria, BC, V8W 9V3
Telephone: 250 356-1800
Fax: 250 356-8392
Email: Larry.Pedersen@gov.bc.ca

PREFACE

The Canadian Bar Association nationally represents over 4236 members and the British Columbia Branch (“**CBABC**”) itself has 6,209 members who practice law in many different areas. The CBABC has established 89 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education research and law reform. It also establishes special committees from time to time to deal with issues of interest. The comments expressed in this submission reflect the views of the CBABC Maritime Section only and are not necessarily the views of the CBABC as a whole.

The Maritime Law Section of the CBABC (the “**Maritime Section**”) formed a subcommittee when the draft *Personal Property Security Act* legislation was released in April of 1988. This subcommittee studied the draft legislation and provided extensive submissions to the Attorney General of B.C. respecting the application of the draft legislation to maritime security.

In response to the decision of the Supreme Court of Canada in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 (“*Saulnier*”)¹, the Maritime Section has formed a *Saulnier/PPSA* subcommittee to consider the implications of *Saulnier* to the *Personal Property Security Act*, R.S.B.C., 1996, c. 359 (“**B.C. PPSA**”)². The *Saulnier/PPSA* subcommittee consists of Brad M. Caldwell (Chair) and Jack D. Buchan, both of whom were members of the original subcommittee that studied the proposed *PPSA* legislation in 1988. Jack Buchan is also the author the textbook, “Mortgages of Ships: Marine Security in Canada.”

¹ <http://scc.lexum.umontreal.ca/en/2008/2008scc58/2008scc58.html>

² <http://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-359/latest/rsbc-1996-c-359.html#section5>

The Maritime Section proposes changes to the definition of “licence” in s. 1 of the B.C. *PPSA* in light of changes to the law enunciated by the Supreme Court of Canada in *Saulnier*.

EXECUTIVE SUMMARY

In the case of *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, the Supreme Court of Canada held that the definition of “intangible” in the Nova Scotia *Personal Property Security Act* includes a fishing licence coupled with a proprietary interest in the fish caught pursuant to its terms. Since this interpretation will assist Nova Scotia fish harvesters to provide fishing licences as collateral for loans, it is recommended that the B.C. *PPSA* be amended to allow British Columbia fish harvesters to similarly provide fishing licences as collateral for loans.

SUBMISSION

The *Saulnier* case involved a fish boat owner with four fishing licences having a combined value in excess of \$600,000 that borrowed money from the Royal Bank of Canada and granted it a general security agreement under the Nova Scotia *Personal Property Security Act* (“**Nova Scotia PPSA**”). 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 *PPSA*. This would allow the bank to sell the licences and give it priority to the proceeds of sale over the Trustee in Bankruptcy. Despite the existence of a 1987 decision of a five member panel of the Ontario Court of Appeal suggesting that in most cases a licence is not property³, the Royal Bank was successful with its initial application and at all levels of appeal.

³ *National Trust Co. v. Bouckhuys* (1987), 61 O.R. (2d) 640 (referred to at para. 27 of *Saulnier*).

At the Supreme Court of Canada level, the court commenced its analysis of the case by describing the need for PPSA type security over fishing licences as follows:

A commercial fisher with a ramshackle boat and a licence to fish is much better off financially than a fisher with a great boat tied up at the wharf with no licence. Financial institutions looking for readily marketable loan collateral want to snap up licences issued under the federal Regulations, which in the case of the lobster fishery can have a dockside value that fluctuates up to a half a million dollars or more. Fishers want to offer as much collateral as they can to obtain the loans needed to acquire the equipment to enable them to put to sea. [para. 13].

. . .

[T]he stability of the fishing industry depends on the Minister's predictable renewal of such licences year after year. Few fishers expect to see their loans paid off with the proceeds of a single year's catch. In an industry where holding one of a very restricted number of licences is a condition precedent to participation, the licence unlocks the value in the fishers' other marine assets. [para. 14].

. . .

The PPSA, on the other hand, is designed to facilitate the creation of a security interest to enable holders of personal property to use it as collateral, and to enable lenders to predict accurately the priority of their claims against the assets in question. [para. 19]

As part of its analysis, the Supreme Court of Canada reviewed the definitions of both “intangible” and “personal property” contained in the Nova Scotia PPSA,⁴ which are very similar to the definitions contained in s. 1 of the British Columbia PPSA, except for the fact that the definition of “intangible” in the B.C. PPSA includes the term “means . . . a licence” and defines a licence to “mean . . . a right to harvest timber, or

⁴ See para. 50 of Saulnier:

[51] I repeat, for convenience, the relevant PPSA definitions:

(w) “intangible” means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money;

. . .

(ad) “personal property” means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

to grow and harvest Christmas trees, under an agreement referred to in section 12 of the Forest Act”. Based upon its conclusion that a fishing licence was similar, but not identical to a *profit à prendre*, the court concluded that “intangible” as defined by the Nova Scotia *PPSA* “would include an interest created by statute having the characteristics of a licence coupled with an interest at common law as in the case of a *profit à prendre*”.⁵ The end result was the court held that although the fishing licences would not constitute property at common law, they would qualify as property for the purposes of both the Nova Scotia *PPSA* and the Federal *Bankruptcy and Insolvency Act*.

For the reasons enunciated by the Supreme Court of Canada as quoted above, the Maritime Section is of the view that it would be beneficial to allow fish harvesters to offer fishing licences as collateral to obtain loans from financial institutions. This position is supported by the Pearse/McRae Report, *Treaties and Transition: Towards a Sustainable Fishery on Canada's Pacific Coast* (April 2004),⁶ which was jointly commissioned by the B.C. Minister of Agriculture and the Federal Government. This report recommended that the British Columbia Provincial and the Federal Government work together to create a formal licence registry to provide a “mechanism for establishing claims against borrowers’ assets”⁷.

Although the Maritime Section has restricted its analysis to fishing licences, it is suspected that holders of other types of licences in British Columbia would also benefit from being able to offer their licences as collateral for loans.

The Maritime Section is of the view that as a consequence of the use of the word “means” in the definition of both “intangibles” and “licence”, a court would likely limit the application of the B.C. *PPSA* to licences to harvest timber or grow and harvest Christmas trees.⁸

⁵ Para. 51. See also paragraphs 22 and 30-34.

⁶ <http://www.env.gov.bc.ca/omfd/reports/pearse-mcrae-report.pdf>

⁷ P. 44.

⁸ See Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th) (Markham Ont.: Lexis Nexus, 2008) at page 62: “Statutory definitions may be exhaustive or non-exhaustive. Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might

CONCLUSION

Since the B.C. *PPSA* was drafted shortly after the Ontario Court of Appeal decision referred to above⁹, it is likely that it did not attempt to expand the scope of the B.C. legislation beyond that of the Ontario legislation as interpreted by the courts, other than with respect to the inclusion of timber licences and Christmas tree licences. Now that all provincial legislation will presumably be interpreted in light of the decision of the Supreme Court of Canada in *Saulnier*, the Maritime Section is of the view that any terms in the B.C. *PPSA* that would impede an interpretation allowing fishing licences to be treated as intangibles should be removed.

RECOMMENDATION

The Maritime Law Section recommends that in section 1 of the B.C. *PPSA*, the definition of “licence” be amended by substituting these words, “includes, without limiting the generality thereof,” for the word, “means”. The updated definition would be:

"licence" includes, without limiting the generality thereof, a right to harvest timber, or to grow and harvest Christmas trees, under an agreement referred to in section 12 of the *Forest Act*; (**“Option One”**)

Alternatively, the Maritime Law Section recommends that in section 1 of the B.C. *PPSA*, the word “licence” be removed from the definition of “intangible” and the definition of “licence” be removed. The updated definition would be:

"intangible" means personal property, but does not include goods, chattel paper, a document of title, an instrument, money or investment property; (**“Option Two”**)

otherwise bear in ordinary or technical usage. An exhaustive definition is normally introduced by the verb ‘means.’”

⁹ *National Trust Co. v. Bouckhuyt*, see footnote 3.

The complete removal of the word “licence” pursuant to Option Two would make the wording of the B.C. *PPSA* very similar to the wordings of the personal property security legislation of Nova Scotia, Alberta and Ontario.¹⁰

Some consequential amendments may also be required to other sections of the B.C. *PPSA*, including the following:

- S. 4 (f) (interest in Land arising under licence not excluded)¹¹;
- S. 7 (8) (choice of law rules for collateral without stable *situs*, including licences)¹²;
- S. 10 (1) (written requirements for security agreements encumbering licences)¹³;
- S. 58(2) (e) (seizure of a licence)¹⁴; and
- S. 61(4) (consent of Ministry of Forests required for voluntary foreclosure of licence)¹⁵.

If you have any questions, kindly direct them to Brad M. Caldwell, the Chair of the *Saulnier/PPSA* subcommittee. He can be contacted at 604 689 8894 and bcaldwell@admiraltylaw.com.

Yours truly,


Brad M. Caldwell
Chair, Maritime Section

¹⁰ The Committee has not reviewed any other Canadian *PPSA* legislation.

¹¹ Although interests in land do not arise under fishing licences, since the BC *PPSA* will continue to apply to timber type licences this provision can remain.

¹² Since the holder of a fishing licence to fish in waters in or adjacent to British Columbia would normally reside in British Columbia, there is no need to modify Section 7 (8) if Option One is utilized. If Option Two is adopted the reference to licence should be deleted.

¹³ A requirement for written description of a licence within the security agreement should apply to all types of licences, including fishing licences. Accordingly amendment of this provision is not required unless Option Two is adopted.

¹⁴ If Option One is adopted, this subsection should be amended to make specific reference to a licence to harvest timber. If Option Two is adopted the reference to licence should be deleted.

¹⁵ If Option One is adopted, this subsection should be amended to make specific reference to a licence to harvest timber. If Option Two is adopted the reference to licence should be deleted.