The Property Status of Fishing Licences

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Introduction

The property status of a fishing licence has for a long time been undecided. The judicial decisions have varied significantly on whether a fishing licence is property at common law or pursuant to various statutory definitions. The significance of the issue lies primarily in the financial arena. It is most often the case that the preponderance of the value in a fishing enterprise lies with the fishing licence rather than in the vessel. It is not uncommon for a lobster licence to approach one million dollars in value.\(^1\) When quota is allocated to groundfish licences, the value of the package can easily grow to many millions. On the other hand, the fishing vessel may be worth a fraction of the licence.

For the purposes of financing a fishing enterprise the lender typically wishes to secure its financing by taking security over available assets, the foremost of which are the vessel and the licence. Security over a vessel is easily achieved, typically through a statutory marine mortgage pursuant to the Canada Shipping Act.\(^2\) Where the financing is provided to purchase a vessel and acquire a licence, however, the question is how to secure that portion of the funding provided for the licence, which is often the majority of the funding. The uncertain property status of a fishing licence has made it unclear whether a security interest can be taken in a fishing licence. It has also been unclear whether a trustee in bankruptcy will have the ability to deal with fishing licences.

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\(^1\) Such is the case with a District 35 lobster fishing licence, though there is a wide variance in value between districts. Groundfish licences can reach multi-million dollar values depending upon the quota assigned to them.

Lenders have found ways around this through the use of guarantees and pledges over other non-marine security such as the borrower’s real property. This approach, however, restricts dealing in the borrower’s available collateral, presuming it even exists, and generally adds costs to the financing. A recent case heard in the Supreme Court of Nova Scotia and appealed to the Nova Scotia Court of Appeal, *Royal Bank of Canada v. Saulnier*, bears directly on the issue and adds significant clarity. This paper will canvass the law regarding the property status of a fishing licence leading up to the *Saulnier* decision. After a review of the general nature of a fishing licence, both as defined by legislation and common law, the primary issues addressed in *Saulnier* will be examined. These are (1) whether a fishing licence is personal property under personal property security legislation such that a security interest can be taken in it and (2) whether a fishing licence is property under the *Bankruptcy and Insolvency Act*, such that a trustee in bankruptcy gains control of it once the licence holder becomes a bankrupt.

I. The nature of a fishing licence

The most appropriate place to begin to understand the status of a fishing licence is the *Fisheries (General) Regulations*. The following provisions are relevant:

> “document” means a licence, fisher’s registration card or vessel registration card that grants a legal privilege to engage in fishing or any other activity related to fishing and fisheries;

10. Unless otherwise specified in a document, a document expires

(a) where it is issued for a calendar year, on December 31 of the year for which it is issued; or

(b) where it is issued for a fiscal year, on March 31 of the year for which it is issued.

16. (1) A document is the property of the Crown and is not transferable.

(2) The issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type.\(^6\)

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3. 2006 NSCA 91, rev’g in part 2006 NSSC 34 [*Saulnier*].
There is no question as to the intent of the legislation. The definition of "document," which includes licences, specifically contemplates that it is a privilege, though section 16(1) suggests that there is a property interest. To the extent that property exists in a fishing licence, however, it is and will remain the property of the Crown. The statement that a document is not transferable has been the focus of many of the decisions, as will become evident below. It is noteworthy that the provisions do not contemplate any distinction between legal and beneficial interests.

The Federal Court of Appeal addressed the status of a licence in the split decision of *Joys v. Minister of National Revenue* which was an appeal from the trial decision that a commercial fishing licence was an integral part of the plaintiff's boat. The vessel was seized by Customs authorities under their ability to seize "conveyances" after it was used to import marijuana into Canada. The licence was issued to the vessel and the Minister directed that it be included in the seizure. The Trial Judge held that the licence became an "integral part" of the vessel and was properly included in the seizure and forfeiture. On appeal, Justice Décary held that the licence did not form an integral part of a "conveyance" under the Customs Act. His comments on licences accord with the general common law view that a licence is not in itself property. He also gives little credence to the fact that the licence is issued to the vessel not to a person, a point which is significant in some of the bankruptcy decisions. Ultimately, Justice Décary concluded that "...it is clear law that a fishing licence is a privilege granted by the Minister and in the renewal of which the licence holder has no vested right." Justice Robertson concurred in the result adding:

As I view it, the answer to the above question hinges on the legal nature of a commercial fishing licence as issued under the Fisheries Act, R.S.C., 1985, c. F-14 and the Pacific Fishery Regulations, 1984, SOR/84-337 as amended. As a general observation, it is fair to say that the law surrounding the legal nature of a commercial fishing licence is not fully developed, nor was it fully argued before us on appeal. Nonetheless, there are a few propositions which seem to be well accepted. The reasons of the Trial Judge below offer a convenient summary (at page 252):

Both parties are essentially in agreement regarding the nature of a licence, namely that it is a privilege to do something that would otherwise be illegal, but for the licence. *It is also clear that the grant of a fishing licence or privilege vests no interest or property in the grantee.* The jurisprudence is also clear that a fishing licence is an annual licence which does not carry with

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As noted by Justice Robertson in Joys, the law on the status of a licence is not fully developed. Her unequivocal statement that a fishing licence grants no interest cannot be entirely accurate. Clearly, the holder has some interest. The failure of Parliament to clarify the nature of the interest has led to a great deal of confusion in commercial financing. Arguably, the Fisheries Act contemplates that a licence is property in the provision that it is "the property of the Crown." Parliamentary intention, as divined from the wording of the legislation, can be significant. See for example Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd. in which the Court of Appeal found that mineral licences were not property concluding that there was nothing in the legislation which indicated an intention to confer proprietary right in the lands or minerals covered by the licence.

Notwithstanding the legislative provisions, the Department of Fisheries and Oceans (DFO) has adopted policies which are more pragmatic. While policies do not actually have the force of law and do not fetter the Minister’s discretion in granting licences, they are intended to provide guidance to the industry on how in the normal course of events the DFO will exercise its discretion on the Minister’s behalf. Section 5 of the Commercial Fisheries Licensing Policy for Eastern Canada (1996) provides the following description of the character of a licence:

5 (a) General

A “licence” grants permission to do something which, without such permission, would be prohibited. As such, a licence confers no property or other rights which can be legally sold, bartered or bequeathed. Essentially, it is a privilege to do something, subject to the terms and conditions of the licence.

(b) Fishing Licence

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9. Ibid. at para. 48. The reliance on Joliffe v. Canada, [1986] 1 F.C. 511 (T.D.) is expected. In Joliffe, the Court did not expressly deal with the property issue but it is worth noting the comments of Justice Strayer that the interest vested in a licence-holder is subject to modification by validly enacted laws, a point that is particularly relevant when considering whether a fishing licence is property in the context of statutory law, such as personal property security legislation or the Bankruptcy and Insolvency Act.


A “fishing licence” is an instrument by which the Minister of Fisheries and Oceans, pursuant to his discretionary authority under the Fisheries Act, grants permission to a person including an Aboriginal organization to harvest certain species of fish or marine plants subject to the conditions attached to the licence. This is in no sense a permanent permission; it terminates upon expiry of the licence. The licencee is essentially given a limited fishing privilege rather than any kind of absolute or permanent “right or property”.

(c) Future Commitment

As provided under the Fishery (General) Regulations, the issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type upon expiry of the document.12

As noted above, section 16 of the Fishery (General) Regulations expressly provides that a “document,” which is defined to include a licence, is the property of the Crown, that the document is not transferable, and that its issuance to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type. According to the regulations and policies, a fishing licence consists legally of nothing more than permission to fish, in accordance with certain terms and conditions, during the period of the licence validity. In the inshore fishery particularly, licences are typically issued for only one year at a time. As provided in section 11(2) of the Policy:

11. General Policy Guidelines

(2) Except where a fishery is closed for conservation purposes, licence renewal and payment of fees is mandatory on a yearly basis in order to retain the privilege to be issued the licence.13

How then can a security interest be taken in something which is definitively stated as being only a “permission” or “privilege”? How can a licence acquire value and be sold if it conveys no property interest?14 Notwithstanding the fact that the licences are technically not transferable and a licence holder has no right to licence renewal, DFO practice has been to reissue to a given licence holder each year the licence he held in

12. Commercial Fisheries Licensing Policy for Eastern Canada (1996), Department of Fisheries and Oceans, Canada, as found on DFO website at http://www.dfo-mpo.gc.ca/communic/lic_pol/ch1_e.htm [the “Policy”].
13. Ibid. at s. 11(2).
14. The question of how this affects the estates of fishers is best left to another paper though these issues bear directly upon the issue. The licence is often the main source of retirement income for a fisher. A fisher builds equity in the fishing enterprise over time and needs a degree of certainty that in later years it will be capable of transfer or sale to finance retirement.
the previous year, or to issue a “replacement” licence to another eligible person upon the previous licence holder’s request. This practice is described in the first two subsections of section 16 of the Policy:

16. Change of Licence Holder

(1) Current legislation provides that licences are not transferable. However, the Minister in “his absolute discretion” may for administrative efficiency prescribe in policy those conditions or requirements under which he will issue a licence to a new licence holder as a “replacement” for an existing licence being relinquished. These prescribed conditions or requirements are specified in this document.

(2) Subject to subsection (5), a replacement licence may be issued upon request by the current licence holder to an eligible fisher recommended by the current licence holder. Accordingly, while DFO is not obliged to do so, in practice it will comply with a licence holder’s request to have a licence issued to another person as a replacement for his own. This is the manner in which what is commonly referred to as licence “transfer” is effected. Technically, it does not represent a transfer of a licence but rather a cancellation of the licence and the issuance of a replacement licence to another person.

A common means to obtain “security” (although not a security interest in the conventional sense) over a licence is by obtaining a covenant from the licence holder to apply to DFO for issuance of a replacement licence to the lender’s nominee, in the case of an event of default under the financing agreements. Whether a transfer will be effected as requested is always subject to the absolute discretion of the Minister of Fisheries and Oceans. DFO has in practice respected such requests, but it is not obliged to do so. Under the present Act and Regulations DFO may at any time opt to change its policies in respect of such licence transfers.

The issue of whether courts will enforce the contractual obligation to effect the transfer of a licence has arisen in the context of trust agreements. The leading case in Nova Scotia on the legality and enforceability of such arrangements is the decision of the Court of Appeal in *Theriault v. Corkum*. In *Theriault*, a company owned by Theriault sold its vessel to a company owned by Corkum, on condition of the issuance to Corkum of a fishing licence as a replacement for that which had been held by Theriault. Because of a DFO policy that a licence will be reissued only once in a twelve month period, and because the licence had recently been reissued, the parties entered into an agreement whereby Theriault would continue

15. *Supra* note 12 at s. 16.
16. (1993), 121 N.S.R. (2d) 99 (C.A.) [*Theriault*].
to hold the licence for the benefit of Corkum until it was possible for Theriault to request transfer of the licence to Corkum or his nominee. One of the principal issues in the case was whether this trust arrangement was illegal as contrary to the *Fisheries Act* and its regulations. The decision of first instance was by an arbitrator who held that the trust arrangement between the parties was legal and enforceable. This decision was upheld by both the trial and appeal courts on the basis that the agreement did not contravene any express prohibitions within the Act.

The Court in *Theriault* relied upon the leading case of *British Columbia Packers Ltd. v. Sparrow*. That case involved a trust agreement regarding a herring sein licence, which was a category of licence upon which DFO had imposed transfer restrictions. Because of these restrictions, on the sale of Sparrow’s fishing vessel to B.C. Packers, the parties entered into an agreement whereby the licence would remain in Sparrow’s name and the beneficial interest in the licence would be transferred to B.C. Packers until such time as it was possible for Sparrow to request reissuance. The British Columbia Court of Appeal rejected Sparrow’s argument that the agreement was illegal and unenforceable, holding that it did not contravene any express provisions of the *Fisheries Act*. The decision of Justice MacDonald is noteworthy because he found that the statute did not prohibit the transfer of the beneficial interest, as opposed to the legal interest, in the licence:

I reach now my opinion upon the issue. I think the judge found for the respondent for valid reasons. He concluded [p. 307] “that the contract was not illegal due to breach of express statutory provisions.” That met para. 7 of the appellant’s statement of defence which says:

In answer to the whole of the statement of claim, the Defendant says that the Agreement, in so far as it relates to the “H” Licence, is unenforceable as being illegal and contrary to the Fisheries Act Regulations referred to above and public policy.

There is the same result if one ascertains the object of the agreement and inquires whether what was to be done thereunder was an illegal act. The object of the agreement was the transfer of all beneficial interest in the herring licence to the respondent, Sparrow, who was to remain a bare trustee holding the legal title. It would be unprofitable elaboration to do more than say that one can search the statute and regulations and find no prohibition of transfer of beneficial interest in a herring licence. The

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17. (1989), 35 B.C.L.R. (2d) 334 (B.C.C.A.) [Sparrow].
restrictions apply only to dealing with the legal title.\textsuperscript{18}

The distinction between a legal and beneficial interest is one which is significant. The courts have recognized that there is more than simply a title interest in a licence. A beneficial interest is essentially some further benefit or right beyond legal title.\textsuperscript{19} In the trial decision of \textit{Saulnier}, as discussed below, Chief Justice Kennedy acknowledged that there is a "bundle of rights" in a licence and implicitly not all of those rights are restricted by the statutory provisions.\textsuperscript{20} Can those rights which are relevant to particular issues then be considered property in the hands of the licenceholder for certain statutes?

II. \textit{Personal Property Security Act (PPSA)}\textsuperscript{21}

There is no doubt that if a fishing licence is property, it must be personal property. A fishing licence has no connection to real property. The treatment of licences under the provincial personal property security legislation is significant because the definitions within this legislation rely largely upon the common law interpretation of personal property. In order for the \textit{PPSA} to apply, a licence would need to be personal property within the meaning of the Act:

"personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

This definition of personal property does not clearly encompass a licence. It is possible that a licence is an intangible, which is defined as:

\begin{itemize}
  \item \textsuperscript{18} \textit{Ibid}. at paras. 14-15. For similar comments on the enforceability of such agreements see also \textit{Smith v. Humchitt Estate} (1990), 48 B.C.L.R. (2d) 361 (B.C.S.C.), \textit{Cabinet v. Hicks} (1999), 176 Nfld. & P.E.I.R. 48 (N.L.S.C.), \textit{R. Baker Fisheries Ltd. v. Widrig}, [1998] N.S.J. No. 158 (N.S. S.C.) and \textit{Goulden v Smith}, 2003 NSSC 215. In the latter two cases the Court actually ordered that the defendant take the necessary steps to transfer the licence in question. There are, however, occasional contrary decisions. In a recent case from the Newfoundland and Labrador Supreme Court, \textit{Loder v. Citifinancial Canada Inc.}, 2006 NLTD 8, Justice Orsborn declined to give effect to a trust agreement transferring the beneficial interest in a fishing licence, though the decision appears to be founded upon Loder's lack of qualification to hold the licence. The Court makes a particular distinction between circumventing the regulations for the purposes of avoiding qualification and the usual process of circumventing section 16(1) of the \textit{Fishery (General) Regulations} which holds that "a document is the property of the Crown and is not transferrable." This case is clearly fact specific but does raise the spectre that a Court may choose not to enforce a trust agreement in certain circumstances.
  \item \textsuperscript{19} The fisheries cases typically make the distinction from legal title without defining the relationship. See for example \textit{Re Bennett}, infra note 50 or \textit{Sparrow}, supra note 17. A useful definition of "beneficial owner" can be found in Black's. "One who does not have title to property but has rights in the property which are normal incident of owning the property"; \textit{Black's Law Dictionary}, 6th ed., s. v. "beneficial owner."
  \item \textsuperscript{20} \textit{Saulnier}, supra note 3 at para. 54.
  \item \textsuperscript{21} For the purposes of this paper the references shall be to the \textit{Personal Property Security Act}, S.N.S. 1995-96, c.13, though the relevant aspects of personal property security legislation are consistent across Canada.
\end{itemize}
"intangible" means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money.

As is evident, the definitions are somewhat circular. The Ontario courts have directly addressed the issue of whether a licence is personal property for the purposes of the PPSA in the context of a nursing home licence in Sugarman v. Duca Community Credit Union Ltd. In Sugarman, the applicant credit union had a security agreement in which it was given a security interest in the respondent’s nursing home licence. An application was brought to determine whether one could gain a security interest in the licence. It should first be noted that the decision of the Court was heavily influenced by the fact that the Nursing Homes Act specifically recognized that one may acquire a security interest in a nursing home licence. Justice Lederman stated:

> Ontario Courts have generally regarded licenses issued under a regulatory regime as being either a privilege or a right depending on the extent of discretionary control over transferability maintained by the overseeing regulatory authority. If the discretion was considered broad, then the licence would be characterized as a privilege, whereas if the discretion was of a limited nature, then the license would be viewed as a property right in the licence holder.

He then went on to review previous cases where a licence had been considered not to be property.

It is important to note the relevant components of the regulatory system in Sugarman. The scheme provided for the licencsee to transfer his or her interest in a licence to another by conditional surrender and replacement under section 7 of the Act. The licencing body’s ability to refuse to renew or to revoke the licence was not unfettered and was confined to certain specific grounds. There was an appeal procedure which entitled a licencee to a hearing if the licence was not going to be renewed. Despite significant differences from the fisheries regime, the Court’s comments on commercial issues and transferability are useful. Justice Lederman acknowledged the commercial realities, which are of singular importance in the context of fishing licences:

> While the jurisprudence has, for the most part, emphasized the concept

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23. Ibid. at para. 32.
24. National Trust Co. v. Bouckhuyt (1987), 7 P.P.S.A.C. 273 (Ont. C.A.) [Bouckhuyt] dealing with a tobacco quota; and 209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce (1988), 8 P.P.S.A.C. 135 (Ont. H.C.) [209991 Ontario Ltd.] for a nursing home licence. The security interests in these cases both arose (or sought to arise) by way of a chattel mortgage whereas the security interest in Sugarman arose from a general security agreement which specifies the nursing home licence as collateral.
and degree of transferability, when assessing the nature and extent of a security interest, this focus, while perhaps relevant to a consideration of a chattel mortgage, is inappropriate in respect of other security interests. Transferability per se is not required for the creation of security interests in intangibles under a general security agreement. With a chattel mortgage, there is an express transfer, or legal assignment by the mortgagor. In contrast, a security interest in an intangible does not involve an express transfer but rather is an acknowledgment that the holder has a bundle of rights which may be exercised in respect of some specified collateral. To the extent that there may be limitations on the security holder's exercise of those rights because of regulatory controls, that is a risk that the security holder is prepared to and must take.\(^5\)

He went on to conclude:

In the instant case, the Nursing Homes Act specifically recognizes that one may acquire a security interest in a nursing home licence. It would be fundamentally wrong to deprive such a secured party of priority rights under the PPSA on the basis that a nursing home licence does not constitute “personal property” under traditional notions of property, rather than recognizing the commercial reality that a nursing home licence does qualify as “collateral”.

Clearly, the legislature contemplated that the interest of a nursing home licence could be subject to a security interest. That alone should suffice to conclude that the licence constitutes “collateral” and “personal property” within the meaning of the PPSA.

For these reasons, I find that the nursing home licence in question constitutes personal property and is capable of supporting a security interest under the PPSA.\(^6\)

The Court of Appeal affirmed the decision.\(^7\) In his brief decision Justice Finlayson states:

I find it difficult to accept that the Legislature would expressly recognize a security interest in a nursing home licence without being aware that the case law has taken a restrictive view of what constitutes personal property in the context of various financing arrangements. The definition of “security interest” in the Nursing Home Act has no significance except in connection with the P.P.S.A. In my opinion, the references to “security interest” in the Nursing Homes Act are a recognition of the realities of the market and are intended to clarify that the interest of a licensee in a nursing home licence can constitute collateral under the P.P.S.A. and that the enforcement of such security interest is subject to the approval of the Director.

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25. Sugarman, supra note 22 at para. 56.
26. Ibid. at paras. 58-60.
27. (1999), 14 P.P.S.A.C. (2d) 264
Additionally and alternatively, I accept the analysis of the case law set out in the reasons of Lederman J. in which he concludes that a nursing home licence is in the nature of a property right and can be the subject of a security interest under the P.P.S.A. His reasons accept that such a licence is embraced by a regulatory framework that, while restricting its transfer, protects it from arbitrary revocation and/or non-renewal such that the licence is neither transitory nor ephemeral.  

Clearly the presence of the definition of security interest in the Nursing Homes Act played a significant part in the Court's conclusions in Sugarman, a fact which must be borne in mind when considering fishing licences. The decisions in Bouckhuyt and 209991 Ontario Ltd. dealing with matters other than the PPSA were considered by Justice Lederman.  

The decision in Bouckhuyt, dealing with tobacco quota, focused on the degree of discretion exercised by the regulatory authority, noting that:

The regulations do indeed control each and every aspect of the production, sale and marketing of tobacco in Ontario. For example, the regulations provide for the licensing of all persons who are engaged in the producing or marketing of tobacco. As well, no one can produce or market tobacco without such a licence. The regulations provide for the fixing and allotting by the Tobacco Board of quotas for the marketing of tobacco. The Tobacco Board can refuse to fix or allot to any person such a quota and may cancel or reduce or refuse to increase a quota. No one can market tobacco in excess of the quota which has been allotted. The board regulations go so far as to provide for the seizure, removal or destruction of tobacco which has been produced in violation of the regulations to the BPQ. In sum, the control exercised by the Tobacco Board is absolute and complete.

It is true that the BPQ may be leased and, in a rather peculiar form, it may be transferred and pledged. This is accomplished by the board first cancelling the BPQ and then reissuing it to the purchaser. This same formula is utilized for the leasing from year to year of a quota. However, what is of paramount significance is that all transactions pertaining to the BPQ are made subject to the approval of the board and are subject to the unfettered discretion of the board.  

Justice Cory then went on to conclude that the quota did not constitute property:

... The BPQ is thus no more than the manifestation of permission to do that which is otherwise prohibited by statute and regulation; the BPQ represents the granting of a privilege. It is by its nature subject to such discretionary control and is so transitory and ephemeral in its nature that

28. Ibid. at paras. 21-22.
30. Ibid. at paras. 21-22.
it cannot, in my view, be considered to be property.\textsuperscript{31}

\textit{209991 Ontario Ltd.} was decided prior to amendments applicable in \textit{Sugarman} and significant emphasis was placed on provisions which stated that a nursing home licence is not transferable. This provision is directly relevant to interpretation of the effects of the \textit{Fisheries Act} which also provides that fishing licences are not transferable.\textsuperscript{32} Justice Anderson held that because the licence was not transferable it was not property which could be mortgaged:

In my view, the plaintiff's claim under the chattel mortgage must fail for one simple, fundamental reason. The nursing home licence, whatever the nature of the interest, rights or privileges which it comprises or represents, is not property which can be mortgaged.

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...I entertain some doubt that the licence in question can appropriately be called property of any kind. No authority directly on point was provided. In any event, I have decided that it is not necessary for my purposes to decide that question. Whatever the legal nature and incidents of the creature may be, one thing is clear from the statute which calls it into existence: it is not transferable. That, in my view, is fatal to the claim under the chattel mortgage.\textsuperscript{33}

Until \textit{Saulnier}, the view of the court in \textit{Sugarman} had to be balanced against the opposing views in \textit{Bouckhuyt} and \textit{209991 Ontario Ltd.} \textit{Bouckhuyt} and \textit{209991 Ontario Ltd.} placed great emphasis on the degree of control and discretion of the regulatory body. It is noteworthy that section 7 of the \textit{Fisheries Act} accords the Minister "absolute discretion" regarding the issuance of licences for fisheries or fishing. Further, as indicated above, the \textit{Fisheries (General) Regulations} specifically provide that licences are the property of the Crown and are not transferable. On the other hand, though there is some scope to argue that the discretion is not in practice exercised in an absolute manner. The practice of DFO, pursuant to its policies, to effect requested transfers, lends weight to the commercial reality arguments in \textit{Sugarman}.

The Court in \textit{Sugarman} also relied upon a decision of the Ontario Bankruptcy Court dealing with a taxi licence and whether it constituted personal property which could be the subject of a security interest under the \textit{PPSA}.\textsuperscript{34} In \textit{Re Foster}, Justice Lane canvassed the above cases focusing

\begin{itemize}
\item \textsuperscript{31} \textit{Ibid.} at para. 23.
\item \textsuperscript{32} \textit{Fisheries (General) Regulations}, \textit{supra} note 4 at s.16(1).
\item \textsuperscript{33} \textit{209991 Ontario Ltd.}, \textit{supra} note 24 at paras. 11-12.
\item \textsuperscript{34} \textit{Re Foster} (1992), 3 P.P.S.A.C. (2d) 6 (Ont. Bkcy.).
\end{itemize}
on the degree of discretion. He concluded that the characteristics of the

taxi licence in its regulatory setting were those of property and that the
circumstances were vastly different than those in Bouckhuyt and 209991
Ontario Ltd. He described the differences in his comments:

A number of aspects of this by-law are of importance. First, it specifically
contemplates transfer including leases and sub-leases, and after the first
three years imposes no restrictions on transfer other than the personal
suitability of the proposed transferee and the satisfactory inspection of
vehicles [ss. 17, 61, 67]. Second, it creates a prima facie entitlement to
renewal (s.18). Third, Council’s discretion in revoking or suspending a
licence is not unfettered, but is, by s. 22, confined to the grounds specified
in s. 18. Fourth, there is an appeal procedure entitling the licensee to a
hearing by the Appeal Committee of Council under the rules laid down
in the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, ss. 5-15,
21-24 if it is proposed not to renew the licence [s.28]. Fifth, the licence
is expressly recognized as an asset of the estate of a deceased owner
[s.68]. These are not the characteristics of a “transitory and ephemeral
privilege.”

Until recently, the status of a fishing licence under personal property
legislation fell to be determined by analogy to these cases as there were
no decisions which dealt with fishing licences in the context of personal
property legislation. Thus, there was a great deal of uncertainty on how
a fishing licence would be viewed. It was likely that the tests articulated
above by the Ontario courts would carry significant weight in any future
determination. Recall that Justice Lederman’s analysis turned on the
extent of discretionary control over transferability maintained by the
regulatory authority. His view was that Ontario Courts have held that “if the
discretion was considered broad, then the licence would be characterized
as a privilege, whereas if the discretion was of a limited nature, then the
licence would be viewed as a property right in the licence holder.” Given
the emphasis on discretion and non-transferability in the provisions of the
Fisheries Act and its regulations, there was a reasonable prospect, if the
Ontario jurisprudence were to be applied, that a fishing licence would be
considered not to be personal property for the purposes of the PPSA or
more generally for the purposes of taking a security interest. That said,
it is always difficult to predict how a Court will consider the commercial
realities of a situation.

The recent decisions of the Nova Scotia Supreme Court and the Nova
Scotia Court of Appeal in Saulnier bring clarity to this issue. In Saulnier

35. Sugarman, supra note 22 at para. 50.
36. Ibid. at para. 32.
37. Saulnier, supra note 3.
the applicant receiver sought a declaration that a fishing licence was a form of personal property which can be charged under a general security agreement made pursuant to the *Personal Property Security Act* of Nova Scotia. After a review of the Ontario decisions, Chief Justice Kennedy, at the trial level, found the reasoning in *Sugarman* to be compelling. He specifically approached the issues by first characterizing “the federal fishing licences based on the reality of the commercial arena.” In his decision, Chief Justice Kennedy confirmed what those involved in the fishing industry in Nova Scotia have known for years:

That evidence confirms my understanding, that on the east coast of Canada fishing licenses, particularly for lobster, are commonly exchanged between fishermen for a great deal of money.

Fishing vessels of questionable value are traded for small fortunes because of the licenses that are anticipated to come with them.

To accept the argument of the respondent that there can be no property in these licenses in the hands of the holder, because of ministerial control would, I conclude, foster an unrealistic legal condition based on an historic definition of property that ignores what is actually happening in the commercial world that the law must serve.

It is important that the law address and reflect the obvious, that although those licenses do not give exclusive control to the holder, they do in fact provide a bundle of rights which constitute marketable property capable of providing security.

There are lending institutions apparently prepared to accept the holder’s interest in these licenses as intangible personal property with potential as security.

The Minister may not agree to the strategy for realizing such security upon default, however that is a risk that the lender accepts.

Using the same logic I find that such licenses are also property for purposes of the BIA.

To ignore commercial reality would be to deny creditors access to something of significant value in the hands of the bankrupt. That would be both artificial and potentially inequitable.

Formally I find that the interest of a holder in a fishing license issued by the Department of Fisheries and Oceans is intangible personal property which can be charged under a security agreement made pursuant to the P.P.S.A.

I further find that such licenses are property pursuant to the BIA which, in

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appropriate circumstances, a trustee can require a bankrupt to transfer.\textsuperscript{39}

The Chief Justice canvassed jurisprudence which suggests movement away from \textit{Bouckhuyt}, noting commentary in \textit{The Ontario Personal Property Security Act: Commentary and Analysis}.\textsuperscript{40} This jurisprudence is based firmly on commercial reality concerns. He also noted the Tax Court decision of \textit{F.A.S. Seafood Producers Ltd. v. The Queen}.\textsuperscript{41} In this case, which addressed whether a licence was an expense or capital, Chief Justice Bowie acknowledged that the evidence indicated that licence renewals were almost always granted and that:

\begin{quote}
... the commercial reality is that the Appellant entered into the transactions ... not simply to be able to fish the licenses in the short run, but with a view to acquiring the expectation of a long series of renewals in the future. It is the prospect of this series of renewals that constitutes 'an asset of an enduring nature', and which prompted the Appellant to pay $150,000 for the two licenses...\textsuperscript{42}
\end{quote}

Many cases dealing with fishing licence issues focus upon the absolute discretion conferred upon the Minister by section 7 of the Act. Chief Justice Kennedy agreed with the suggestion that, if commercial reality is to dictate the outcome, the "absolute discretion" of the Minister was of little relevance to the true nature of a licence holder's interest.\textsuperscript{43} It was further argued that a decision that fishing licences were not personal property would allow the bankrupt to "successfully 'blow off his creditors' and then sell his licences for a substantial sum in the commercial market place."\textsuperscript{44} Given the value attributed to most fishing licences this must have played a factor in the approach adopted by the Court.

The Chief Justice recognized an important attribute of the security interest in a fishing licence when he stated "the Minister may not agree to the strategy for realizing such security upon default." The present statutory regime is not conducive to a commercial market in fishing licences. However, DFO has adopted policies which tolerate, if not outright accept, the commercial realities of a market for fishing licences. Since this market is dependant upon such policies, lenders and the industry as a whole run the risk that the Minister may alter the policy at some time after funds are

\textsuperscript{39} Ib\textit{id.} at paras. 51-60.
\textsuperscript{40} Ziegel and Denomme, \textit{The Ontario Personal Property Security Act: Commentary and Analysis}, 2\textsuperscript{nd} ed. (Markum: Butterworths, 2000). See para. 23 of the \textit{Saulnier} decision.
\textsuperscript{41} (1995), 98 D.T.C. 2034.
\textsuperscript{42} \textit{Ibid.} at para. 15.
\textsuperscript{43} \textit{Saulnier, supra} note 3 at para. 42.
\textsuperscript{44} \textit{Ibid.} at para. 36.
Presumably lenders receive appropriate advice in this regard and value their security accordingly.

The Court of Appeal took a different approach to the question. In the appeal decision Justice Fichaud undertook the analysis absent in the trial decision of the statutory definitions, finding that a fishing license fell within both the definition of “property” under the Bankruptcy and Insolvency Act and “personal property” under the PPSA. He placed substantial emphasis on the provision of section 16(10) of the Fisheries (General) Regulations which provides that a licence is the property of the Crown and is not transferable, concluding on the basis of this clear statement that whatever property there is in a fishing licence itself cannot be the property of licence holder. The Court of Appeal took the position that the “commercial reality” approach adopted by Chief Justice Kennedy did not have any bearing on the property status of a fishing license. It chose instead to rely upon the statutory definitions.

Nonetheless while Justice Fichaud for the Court concluded that a fishing licence is the property of the Crown, he acknowledged that the licence holder may have intangible personal property rights in it, noting that recent jurisprudence had taken a “bundle of rights” view of the legal status of statutory licences.

III. Bankruptcy

The next question is whether a licence is property such that a trustee in bankruptcy gains control of the licence once the licence holder becomes bankrupt. In Saulnier the question of whether a fishing licence was property within the definition of the Bankruptcy and Insolvency Act was also addressed. As noted above in Joliffe, the interest in a fishing licence is subject to validly enacted laws. While a fishing licence may be determined to be property under personal property security legislation, it is not necessarily the case that it will be considered so under other legislation, though many of the arguments are equally compelling. In the context of other legislation, it is possible that the definition of property can be broader than either the common law definition or the approach within the Fisheries Act. It is this issue which arises with respect to the Bankruptcy and Insolvency Act. Within this Act:

“Property” means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every

45. Such policy reviews are not uncommon. The Atlantic Fisheries Policy Review has been underway for some time, with extensive industry consultation.
46. Saulnier, supra note 3 at paras. 17 and 18.
47. Ibid. at paragraphs 27 and 28.
48. Supra note 4.
The relevance of this definition is apparent from the effect of an assignment in bankruptcy. All of the property of the bankrupt will vest in the trustee and will be subject to eventual distribution among creditors. The interaction with personal property matters remains important as the position of a secured creditor is substantially better in bankruptcy.

There is a surprising amount of case law dealing with fishing licences in the context of bankruptcy. What is surprising is that the results are so divergent and contradictory. Perhaps the most frequently cited case is Re Bennett. In Re Bennett, the holder of a herring gill net licence made an assignment in bankruptcy. The case revolved around a dispute between the trustee and the Inspector as to the disposition of the fishing licence. The Court acknowledged that there existed a practice in the industry of selling or leasing the beneficial interest in licences and that DFO tacitly accepted this practice. In Re Bennett, the bankrupt agreed to pay $9,000 to the trustee for the licence but the Inspector rejected this approach. The decision focused on whether the licence can be said to be property within the meaning of the Bankruptcy and Insolvency Act. The Court acknowledged that it may be correct that the licence does not create an interest in property at common law but noted the definition of property in the Act, particularly the latter portion of the definition: "... and includes obligations, easements and every description of the state, interest and profit, present or future, vested or contingent, in, arising out of, or incidental to property." Justice Ryan found that this aspect of the definition included "interests which extend beyond the general notion of property and can include such interests as the licence possessed by Mr. Bennett."

Justice Ryan did, however, go on to find that the licence was only property for the year in which it was issued, noting that the licence holder had only a "right to reapply" for the licence for future years. He concluded that this was "in reality nearly an ability to acquire property, but is not a property interest in itself." He stated:

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49. See section 71 of the BIA: "On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer."


51. Ibid. at para. 9.
What counsel characterized as a “right to reapply” for the licence is in reality merely an ability to acquire property, but is not a property interest in itself. It might be suggested that if the licence is property in the sense that it is an “interest or profit incidental to property”, then the right to reapply must be a contingent interest in the same thing. The answer lies in the nature of the asserted interest. The licence holder has no right of renewal. The granting of the licence is purely discretionary. Although it has been different in the past, my reading of the regulations indicates that anyone may apply for a roe herring licence. For purely historical reasons Mr. Bennett belongs to a group which is more likely to find success in obtaining a licence than other groups or individuals. Mr. Bennett, in the result, has no higher legal right to obtain the licence than any other applicant. His interest is illusory.  

This issue was addressed more recently in Re Dugas. The bankrupt was a crab fisherman who sold his licences to a creditor without first obtaining the approval of the DFO. The DFO declined to give approval and the creditor ultimately sued for breach of contract, obtaining judgment. After making an assignment in bankruptcy, the bankrupt continued to use the fishing licence and later brought an application for discharge from bankruptcy. The Court addressed whether the licence was property which ought to be distributed to the creditors.

Registrar Bray placed particular emphasis in the earning potential of the licence. While recognizing the provisions of the Fisheries Act and regulations were clear, noting the divergence of the case law, he took a broader approach in order to give effect to the objectives of the bankruptcy legislation. While he recognized the different approaches, the Registrar stated that “there is obviously a beneficial interest on the part of the Bankrupt in a licence regardless of where the formal ownership lies.” He went on to find:

Although ultimate control of the license rests with the Federal Government such that it cannot be assigned and resold at will, it would be frivolous to suggest that the Bankrupt has no legal or equitable right to the benefits conferred by this permit, as long as he is exploiting it in accordance with DFO policies. The parliament has granted a right that is not exclusive to an individual but to a group of persons, fishers in the administrative zone, who are entitled to have that right assigned. The possibility of assignment results in competition and consequent commercial value that could be realized as income by the holder upon its devise. To hold that such income should be withheld from the estate and not inure to the benefit of creditors would be contrary to the principles of the bankruptcy legislation.

52. Ibid. at para. 14.
54. Ibid. at para. 23.
Public interest in the proper administration of the Act would be offended were the Bankrupt to receive a discharge and be able to immediately thereafter resume business as successfully as before or alienate a right in consideration of a substantial profit while making no provisions for creditors.\textsuperscript{55}

Taking a very practical view, the Registrar focused on the exploitation of the licence, rather than its inherent nature. Ultimately the discharge was granted, but its operation was suspended for a period of time during which surplus income was to be paid to the trustee.\textsuperscript{56}

There are a number of contrary cases. In \textit{Waryk v. Bank of Montreal}\textsuperscript{57} the Bank financed the purchase of a commercial fishing licence and a boat. Eventually the company ran into financial difficulties and the Bank petitioned it into bankruptcy. The Bank seized the boat, selling it and the fishing licence to a third party who then resold them. The original owners asked the trustee to sue the Bank for the difference between the price paid by the third party and the price which he subsequently sold the boat for. The trustee refused, but assigned the right of action to the plaintiffs. The plaintiffs sued the bank claiming that the bank wrongfully petitioned the company into bankruptcy. Ultimately, the action was dismissed.\textsuperscript{58}

The Court found that the licence remained the property of the Crown and "that it never was and never became an individual and independent article of commerce in which either the company or Waryk had a disposable title which by the bankruptcy of the company either was deprived."\textsuperscript{59} The Court stated:

Even if I am wrong in so holding and that the company/Waryk did have in the licence a property interest which passed to the trustee (as was held in \textit{Re Bennett} (1988), 24 B.C.L.R. (2d) 346, 67 C.B.R. (N.S.) 314 (S.C.), a case of a personal fishing licence), there is nothing to prevent a secured creditor availing itself of the provisions of the \textit{Bankruptcy Act} in order to enhance its position: \textit{Re Black Bros.} (1978) Ltd. (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.).\textsuperscript{60}

\textsuperscript{55} \textit{Ibid.} at paras. 26-27.
\textsuperscript{56} In an earlier decision in the history of this bankrupt, which was referred to in the above decision, Justice Leger made a brief statement that, in his view, "the Bankrupt’s 2003 crab licence is property under the Act. In the least, the right to fish for crab is an interest or profit arising out of property or incidental to property." (para. 17) The decision was appealed at [2004] N.B.J. No. 69 (C.A.) but the Court of Appeal did not comment on this issue.
\textsuperscript{57} (1990), 80 C.B.R. (N.S.) 44 (B.C.S.C.) [\textit{Waryk}].
\textsuperscript{58} The specific licence in this case was a “T” licence for groundfish, issued pursuant to the \textit{Pacific Fishery Registration and Licensing Regulations}, S.O.R./83-102. These regulations included a similar statement that commercial fishing licences are the property of the Crown. This licence was, however, issued in respect of a commercial fishing vessel and was not issued to a company or person.
\textsuperscript{59} \textit{Waryk}, supra note 57 at para. 108.
\textsuperscript{60} \textit{Ibid.} at para. 118.
The ratio of the decision is somewhat convoluted. The essence appears to be based on the fact that the licence was issued to the vessel. It seems that the Court concluded that since there was no property in the licence, it did not pass to the trustee. The secured creditor could therefore take possession of the licence as incidental to its secured position over the vessel. At the Court of Appeal, the Court affirmed the decision taking particular notice of the fact that the licence was specific to a particular vessel.\textsuperscript{61}

In \textit{Re Jenkins}, a bankrupt lobster fisherman brought an application for discharge from bankruptcy.\textsuperscript{62} One of the issues involved was whether the trustee had the ability to deal with the lobster licence. The Court acknowledged that the Minister had the discretion whether or not to issue licences in succeeding years and that the licence remained the property of the Crown. After a review of \textit{Re Bennett}, Registrar Hill stated:

A different result as to whether or not a fishing licence constitutes a "property" as such is defined in the Bankruptcy and Insolvency Act was reached in the case of \textit{Noel v. Savard} (1990), an unreported decision of the Quebec Superior Court. In that case the Court found that a fishing licence was only a permit to do something. It did not confer any property or contractual rights which could be lawfully sold, traded or devised by will. In essence, the Court concluded it was a privilege to do something, subject to its terms. The Court found that a fishing licence was not "property" as defined in the Bankruptcy and Insolvency Act.

I prefer the reasoning of the Quebec Superior Court. It seems to me that the ability to engage in the fishery is a privilege controlled by the governing authority, that is the Government of Canada. The Act and the Regulations make it clear that licences such as that held by Mr. Jenkins are issued for the period of only one year, and that the Minister has an absolute discretion as to whether or not to renew the licences. While there may be an "underground" trade in these licences, the Regulations also make it clear that the licence is and remains the property of the Crown. I question whether a licence, which is the property of the Crown, can simultaneously be the property of some other party. If there were a joint property interest in the licence surely the Regulation would indicate that to be the case. It does not. That being so I cannot make any order compelling Mr. Jenkins to hand over his licence to the Trustee for the purpose of resale so as to benefit the estate.

If I am wrong in this finding as to whether or not a fishing licence constitutes "property" as such is defined in the \textit{Bankruptcy and Insolvency Act}, then I would point out that the licence in question was the licence for 1994, the year in which Mr. Jenkins became a bankrupt. Clearly that

licence has long since expired.63

The New Brunswick Court of Queen’s Bench addressed the same issue in Caisse Populaire de Shippagan Ltée v. Ward.64 In this case, the fishermen applied for an absolute discharge. The Credit Union, creditor of the bankrupt, objected and asked that the bankrupt’s fishing licence be sold and the proceeds distributed. The Court ultimately concluded that the fishing licence was not property within the definition of the Bankruptcy and Insolvency Act, canvassing both Re Bennett and the Noel v. Savard decision referred to by Registrar Hill in Re Jenkins. The comments on the Noel v. Savard decisions are particularly interesting:

On the other hand, in Noël v. Savard et al., a Quebec Superior Court decision, No. 650-11-000004-9092 (July 1990), the bankrupt Noël refused to hand over his commercial fishing licence to the trustee. Paul Corriveau, J. decided as follows:

Contrary to Bennett, cited by counsel for the trustee, no financial interest is incidental to the licence held by the debtor. The Court can’t do anything about the fact that, in practice, commercial fishing licence-holders “find ways” to cash in on their licence. The administrative authorities know about this practice and do nothing to stop it. The Court cannot find anything in the law to forbid it.

We must therefore find that a bankrupt’s fishing licence is not property within the meaning of the Bankruptcy Act.

The Quebec Court of Appeal dismissed the trustee’s appeal in these terms:

The appellant trustee asks that the bankrupt, a commercial fisherman whose right to fish is based solely on a licence issued by the Department of Fisheries and Oceans of Canada, hand over his licence so that it may be dealt with as an asset of the estate.

For reasons given by the trial judge, to the effect that a commercial fishing licence is not assignable nor transferrable, that it is the property of the Crown, and that it is exempt from seizure because it is merely a privilege of a personal nature conferred on the respondent at the discretion of the Federal Crown, - reasons which we adopt.65

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63. Ibid. at paras. 25-27.
65. Ibid. at para. 6. The Noël v. Savard decision is unavailable in English and is therefore cited from within the Caisse Populaire decision.
Ultimately, the Court concluded, on the basis of *Noel v. Savard*, that the fishing licence was not property within the meaning of the *Bankruptcy and Insolvency Act*. Justice McIntyre noted that if he was wrong in so deciding, he adopted Justice Ryan's words in *Re Bennett* that as of the date of the application for discharge, the bankrupt was no longer in the possession of the licence because it had not been renewed.66

In another decision by Registrar Hill, *Re Townsend*67, the Court also concluded that quota was not property under the *Bankruptcy and Insolvency Act*. The issue in that case was whether the fishing quota was property and thus assigned to the trustee by virtue of the Act. Registrar Hill cited to his own decision in *Re Jenkins* wherein he concluded that since the licence was the property of the Crown, it could not simultaneously be the property of some other party. With respect to the quota, he stated:

I would not differentiate between quota and a licence and therefore find that the assignment in bankruptcy did not have the effect of assigning any property interest in the quota to the trustee.68

As is evident, there is a disparity within the case law over whether a fishing licence constitutes property for the purposes of the *Bankruptcy and Insolvency Act*. Chief Justice Kennedy in the trial decision of *Saulnier* made a clear finding the fishing licences are "property pursuant to the *Bankruptcy and Insolvency Act* which, in appropriate circumstances, a trustee can require a bankrupt to transfer."69 This statement is unequivocal. However, while Chief Justice Kennedy addressed in detail the law relevant to the personal property issue he did not consider any cases dealing with bankruptcy. Though he cited the definition of property in the *Bankruptcy and Insolvency Act*, there was no consideration of the underlying issues, other than those common to the personal property issue. The absence of any substantive analysis detracted from the weight of authority to be assigned to the decision on this particular point though many of the arguments with respect to personal property have equal force in bankruptcy. While it seems apparent that the definition of property in the *Bankruptcy and Insolvency Act* is broadly stated, it cannot be ignored that both the Quebec and British Columbia Courts of Appeal have ruled that, in the particular case...

66. In the decision, Justice McIntyre referred to an unreported decision of the Quebec Superior Court, *Chicoin v. Corporation Immobilière du Nouveau-Québec Limitée et al.* (11 February 2000), 650-11-00/05-980 (Que. S.C.) In this decision, Justice Corriveau ordered the sale of the licence by tender with 85% of the proceeds distributed to unsecured creditors. There is no indication of the ratio but Justice McIntyre expressly declined to follow *Chicoin*.


68. Ibid. at para. 12.

69. *Saulnier* trial decision, supra note 3 at para. 60. Presumably the "appropriate circumstances" relate to finding a purchaser who is eligible to take the licence in his or her name.
The Property Status of Fishing Licences

circumstances, a fishing licence was not property for the purposes of the Bankruptcy and Insolvency Act. This left uncertainty over the outcome. The Court of Appeal of Nova Scotia has added necessary clarity on this point.

In his decision Justice Fichaud acknowledged that the definition of property within the Bankruptcy and Insolvency Act included beneficial interests even though the property was legally owned by another. He said:

In my view, during the term of a license, a licensee has a beneficial interest in the earnings from use of the license. That interest, and the right to those earnings, pass to the trustee in bankruptcy of the license holder. This is not a “right to fish”, and does not prejudice DFO’s powers to cancel a license or regulate its use as authorized by the Fisheries Act and regulations. Justice Fichaud correctly recognized that the real issue was whether Mr. Saulnier had rights relating to renewal or reissuance of the licence. For there to be any value to the trustee in enforcing against the licence, the trustee needed to be able to enforce contractual provisions requiring Mr. Saulnier to seek reissuance of the licence to the designate of the trustee. Noting the “undulating” line of authority, Justice Fichaud analyzed many of the cases discussed above in a thorough canvass of the jurisprudence. After reviewing the cases which held that the privilege of renewal of licences is “transitory and ephemeral,” Justice Fichaud examined the opposing line of authorities, and he concluded:

In my view, the principles espoused by the three Courts of Appeal in B.C. Packers, Theriault and Careen converge at the destination reached by the Ontario Court of Appeal in Sugarman. If the law entitles the license holder to resist an arbitrary non-renewal of the license, then the license holder’s rights are not “transitory or ephemeral”. The license holder has a legally recognized right - limited though it may be - that constitutes intangible personal property. Depending on the paradigm, that limited right either rests somewhere in the “bundle of rights” from Sugarman, or is a “beneficial interest” under B.C. Packers, Theriault and Careen. The security holder or trustee in bankruptcy takes the license holder’s limited legal right or beneficial interest. The security holder or trustee takes subject to all the risks of non-renewal that applied to the license holder - ie. non-renewal on grounds that are not arbitrary. This ensures that the interest of the security holder or trustee in bankruptcy does not degrade the regulatory scheme of the legislation, the concern underlying

70. Saulnier, supra note 3 at para. 30.
71. Ibid. at para. 38.
72. Ibid. at para. 39.
the National Trust line of cases.\textsuperscript{73}

Citing cases dealing specifically with fishing licences, Justice Fichaud found that the rights of the licence holder are not "transitory and ephemeral" and are intangible personal property falling within the definition of "property" in the \textit{Bankruptcy and Insolvency Act}. Of particular importance, he held that Mr. Saulnier's rights to apply for a renewal or reissuance of the licence passed to the trustee, subject to the same risks and equities that affect the bankrupt.\textsuperscript{74}

\textbf{Conclusion}

Until \textit{Saulnier}, there remained substantial uncertainty as to how a fishing licence would be treated for the purposes of personal property security legislation. Prior to \textit{Saulnier}, the question had not been addressed by the Courts in respect of a fishing license, although the courts in Ontario had dealt with other types of licences. Specifically, the Ontario courts held that "if the discretion was considered broad, then the licence would be characterized as a privilege, whereas if the discretion was of a limited nature, then the licence would be viewed as a property right in the licence holder."\textsuperscript{75} Given the emphasis on discretion and non-transferability in the provisions of the \textit{Fisheries Act} and its regulations, it is likely that a court using the Ontario test would not find a fishing license to be personal property for the purposes of the \textit{PPSA} or more generally for the purposes of taking a security interest. While this accords with the apparent intent of the legislation, there are obvious commercial realities at play. DFO has long condoned a system which results in transfers of fishing licences for value. There are a number of decisions that recognize the importance of commercial realities in determining the property status within a statutory regime. This approach had not been applied to fishing licenses before \textit{Saulnier}.

While previous decisions have considered whether a licence is property at common law, in \textit{Saulnier} the focus at the trial level was upon whether a fishing licence was property in the context of two statutory regimes, the \textit{PPSA} and the \textit{Bankruptcy and Insolvency Act}. In that regard the statutory wording and legislative intent are important. Chief Justice Kennedy's determination that "the interest of a holder in a fishing licence issued by the Department of Fisheries and Oceans is intangible personal property which can be charged under a security agreement made pursuant to the

\textsuperscript{73} Ibid. at para. 49.

\textsuperscript{74} Ibid. at para. 56. The Court also held that the trustee was entitled to direct Mr. Saulnier to execute the documentation to effect reissuance to the designee of the trustee.

\textsuperscript{75} Sugarman, supra note 22 at para. 32.
"PPSA"\textsuperscript{76} is clear and unequivocal. On this issue he canvassed the relevant case law and came to what appears to be both the practical and appropriate decision.

The Chief Justice placed significant emphasis on "commercial reality" in his decision, an argument which the Court of Appeal wholly discounted. However, the Court of Appeal still made an unequivocal finding that a fishing license is intangible personal property. While recognizing that the regulations are clear that a fishing license is the property of the Crown, Justice Fichaud acknowledged jurisprudence which has held that such licenses are composed of a "bundle of rights". The result is that the Crown holds only a portion of those rights while the license holder has certain intangible personal property rights which can be the subject of a security agreement.

Chief Justice Kennedy also found that that fishing licences are property pursuant to the \textit{Bankruptcy and Insolvency Act} and that the trustee could, in appropriate circumstances, require a bankrupt to transfer licences. However, while Chief Justice Kennedy addressed the law relevant to the personal property question he did not consider any cases dealing with bankruptcy. Though he cited the definition of property in the \textit{Bankruptcy and Insolvency Act} there was no consideration of the underlying issues, other than those common to the personal property issue. The absence of substantive analysis detracted from the weight of the trial decision on this particular point.

An analysis of the jurisprudence favours the view that a licence is property for the purposes of the \textit{Bankruptcy and Insolvency Act}. However, both the Quebec and British Columbia Courts of Appeal have ruled that, in the particular circumstances, a fishing licence is not property for the purposes of the \textit{Bankruptcy and Insolvency Act}. This left some uncertainty which the Nova Scotia Court of Appeal in \textit{Saulnier} clarified by conducting a review of areas not addressed in the trial decision. The Court held that a fishing licence itself is not property of the licence holder but the licensee has a beneficial interest in the earnings from the use of the license which can be passed on to the trustee in bankruptcy.

In the absence of any policy changes on the part of DFO, lenders will continue to advance funds taking security, at least in part, on fishing licences. The value of this security is directly affected by the ability to take a secured position with the resulting priorities and enforcement options. A legislative amendment to the \textit{Fisheries Act} or the personal property security legislation (or other relevant legislation) could achieve this end, as

\textsuperscript{76} \textit{Saulnier, supra} note 3 at para. 59.
in the Ontario *Nursing Homes Act* discussed in *Sugarman*. In the absence of an amendment, the decisions of the Nova Scotia Supreme Court and Nova Scotia Court of Appeal in *Saulnier* add a great deal of certainty. The combined effect of the trial and appeal decisions is a well-considered analysis of the law to date.