



Regulatory Licences – Enhanced Collateral Security for Lenders to Borrowers in Regulated Industries

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Background

Historically, lenders have not viewed a licence as marginable collateral security. The collateral value of a licence has long been uncertain due to the fact that a licence does not have all of the characteristics of 'property' at common law. Moreover, because a licence is not deemed property at common law it has been unclear whether a licence is subject to the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") or to provincial personal property security statutes (the "PPSA"), since these statutes relate specifically to property. Accordingly, lenders have been uncertain whether they could realize on a licence either through bankruptcy proceedings under the BIA or, where a security interest was granted over the licence, through remedy provisions of the PPSA. The corollary was that a borrower was not able to effectively pledge security over a licence to a lender in order to obtain secured financing.

On October 24, 2008, the Supreme Court of Canada (the "SCC") released the decision of *Saulnier v. Royal Bank of Canada* ("Saulnier").¹ In *Saulnier*, the SCC concluded that certain government issued licences could be realized by creditors during bankruptcy proceedings and, perhaps more importantly, that such licences could be realized by creditors when pledged as collateral security. The decision appears to expand the category of assets that can be effectively pledged as collateral security and is of particular importance to borrowers in regulated industries where a regulatory licence may be the most valuable asset of a business.

The Facts

Mr. Saulnier, a fisherman and principal of Bingo Queen Fisheries Limited ("Bingo"), held four fishing licences which together accounted for a significant portion of the value of his business. Saulnier financed his business through both personal and corporate loans extended by the Royal Bank of Canada (the "Bank"). Saulnier provided the Bank with a personal

guarantee of the debts of Bingo and, as collateral security for Saulnier's obligations under the guarantee and personal loans, as well as for Bingo's obligations under the corporate loans, both Saulnier and Bingo provided separate general security agreements ("GSAs"). The Bank subsequently registered its security interests under the PPSA. Saulnier made an assignment into bankruptcy, but refused to transfer the licences as directed by the receiver and trustee in bankruptcy. The Bank sued, claiming that the licences should be subject to bankruptcy proceedings and that the licences were covered by the GSA that was registered against Saulnier under the PPSA.

Saulnier's Arguments

Saulnier argued that the fishing licences did not fit within the statutory definition of 'property' under s. 2 of the BIA or within the definition of 'personal property' under the PPSA and were therefore not subject to bankruptcy proceedings under the BIA or to the remedy provisions of the PPSA.

Saulnier further argued that the nature of the regulatory regime surrounding the fishing licences precluded the Court from ruling that the licences were property. Saulnier pointed out that, under the *Fisheries Act*, the legislation clearly provided that the fishing licences were the property of the Crown and not transferable by the holder. Saulnier also pointed out that the granting, withdrawal and renewal of the fishing licences were subject to the discretion of the Minister of Fisheries and Oceans and argued that because the licences were not freely held or transferable, they were merely a transitory right and not the property of the holder.

The 'Preferred Approach' of the Supreme Court of Canada

The SCC disagreed with Saulnier's arguments and chose instead to emphasize the commercial purpose of both the BIA and PPSA. The Court rejected the notion that the definition of 'property' and 'personal property' in the BIA and PPSA, respectively, was limited to the common law concept of 'property' and determined that 'property' should be interpreted broadly in order to achieve the commercial objectives of the legislation.

The SCC then noted that not all licences are equivalent. The SCC distinguished between a simple

¹ *Saulnier v. Royal Bank of Canada*, 2008 SCC 58.

licence² and the much more potent fishing licences, which allowed Saulnier to participate in an exclusive fishery and granted Saulnier a proprietary interest in any fish caught as well as in any profits derived from their sale. The SCC concluded that the proprietary interest granted by the fishing licences was sufficient to bring the licences within the statutory definition of 'property' and 'personal property' and, accordingly, the fishing licences were held to be intangible personal property subject to a PPSA security interest and also property of the bankrupt for the purposes of recovery under the BIA.

Finally, the SCC dismissed Saulnier's arguments relating to the regulatory regime surrounding fishing licences. The SCC confirmed the role of the Minister in regulating the fishing industry, but found that the existence of a regulatory regime did not impact the proprietary interest of the holder in the licence. The SCC cautioned, however, that the Minister retains the same level of discretion with respect to regulating the fishing industry both prior to and during insolvency proceedings, such that a lender seeking to realize on a regulatory licence has no greater rights vis-à-vis the regulatory regime simply because they are acting through the BIA or PPSA. The lender simply steps into the borrower's shoes, and any attempted transfer or liquidation of the licence would be, as always, subject to the discretion of the Minister.

Comments

i. Proprietary Interest

Saulnier was decided in the context of fishing licences, but the application of the SCC's decision could extend beyond this limited industry. The key to the decision was the determination by the Court that a fishing licence that grants a right to extract and sell could be considered a licence with an associated proprietary interest. This same reasoning with respect to proprietary interest could be extended to the mining industry, for example, where a mining licence grants the right to extract and sell minerals.

ii. Regulatory Risk

In *Saulnier*, the SCC confirmed that a lender, when stepping into the shoes of a borrower, will become subject to the regulatory regime surrounding the regulatory licence. In effect, the SCC has identified that a lender seeking to realize on a regulatory licence will take on any regulatory risks associated with the regulatory regime. The nature of the regime and level of associated risk become important considerations for lenders when determining the

collateral value of a regulatory licence prior to providing the borrower with financing.

Conclusion

Saulnier has expanded the universe of securitizable assets. This may allow borrowers to leverage certain regulatory licences for the purposes of obtaining secured financing. Although the full range of licences that fall within the test established in *Saulnier* is still uncertain, the decision by the SCC provides a framework in which other leveragable licences can be identified. In addition, *Saulnier* highlights the fact that regulatory risk may effect the valuation of this new type of collateral security, and ultimately the level of financing a borrower may obtain.

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation.

If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact us.

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² A common definition of a licence is "a right to do what would otherwise be unlawful"