



Taking Security Over Vessels and Fishing Licences

In an ideal world, federal legislation and provincial legislation would be harmonized. Someone wishing to take security over assets governed by federal legislation (in this article, the *Canada Shipping Act* and the *Fisheries Act*) ought to have a clear course for doing so. Alas, in the real world, there are overlaps and gaps between jurisdictions, meaning a creditor who needs to take security over sea-going, rather than land-based, assets must take great care to steer clear of the shoals.

Vessels

If it is a vessel alone that is the subject of the security, there are two courses available, depending on the vessel. The first step is to determine whether the vessel is registered

under the *Canada Shipping Act* or licensed by the Department of Transport.

If it is the former (and a vessel over 15 tons **must** be registered), a creditor would take a marine mortgage and register the mortgage in the Ship's Registry against the title to the vessel, in much the same way as one would register a land mortgage in the provincial Land Title Office. The marine mortgage is very short, much like the Form C portion of a land mortgage, but it is accompanied by a collateral marine agreement that sets out the details of the indebtedness for which the security has been granted.

Vessels under 15 tons are not required to be registered under the *Canada Shipping Act*, but they are required to be licensed by the Department of Transport. Accordingly, the Ship's Registry system described above is not available to a creditor wanting security over such a vessel. Instead, a creditor would use the provincial *Personal Property Security Act* to file a security interest over the licensed vessel, identifying it by serial number, much like taking a charge over a motor vehicle.

Fishing Licences

For vessels involved in the commercial fishing industry, a substantial part of the

value of such a vessel derives from its ability to earn revenue from fishing. This depends upon what the vessel (or its operator) is entitled, by its fishing licence or licences, to catch—and when. Accordingly, whether the vessel is registered under the *Canada Shipping Act* or licensed by the Department of Transport, a creditor needs to have security not only over the vessel, but over the licences, as well, insofar as it is possible to do so. This is where things get interesting.

There are at least 17 different categories (literally, from “A” to “Z”) of commercial fishing licences issued by the Department of Fisheries, but for the purposes of this article, they fall into two broad types: those issued to an individual and those issued to a vessel.

First, however, it is necessary to consider: what kind of an asset, in law, is a licence? A licence is simply an authority to do something and, according to the case law, it is **not** property. A fishing licence is considered to be a privilege granted to a person or a vessel; it allows the harvesting of a particular species of fish for a specified period of time and subject to certain other conditions.

The Department of Fisheries and Oceans, the body that grants fishing licences, defines them as follows.

“Commercial fishing licence” means a document issued:

- (i) to a person authorizing that person to engage in a fishery for a named species of fish, using a specified vessel and specified gear, and other conditions that may be needed for proper management; or
- (ii) to a commercial fishing vessel, specifying the category of commercial fishing in which that vessel is authorized to engage, the species of fish that may be caught, and the gear to be used in accordance with the terms of that document.

A licence is issued and renewed at the discretion of the Minister of Fisheries and generally expires on December 31 of the year in which it is issued, although there are some non-calendar-year fisheries.

A creditor wishing to secure both a vessel and the licences that give that vessel its revenue-producing potential has, at a minimum, these four possible combinations to consider.

1. A registered vessel coupled with one or more licences issued to the vessel

In this case, the creditor can rely upon the registration provisions of the *Canada Shipping Act* for both the vessel and the licence, provided that care is taken to ensure that included with the usual marine mortgage and collateral marine agreement are an appropriate hypothecation and assignment of the vessel-based licence.

2. A registered vessel together with a licence issued to an individual

Here the vessel would be secured by a registered marine mortgage as with example 1, but in the case of the licence, there is a problem because it is neither part of the vessel, nor according to the case law, is it personal property. The best a creditor can do here is to file a notice of its interest in the licence in the provincial Personal Property Registry (PPR). This acts as notice only and not a true security interest. Most purchasers of such a licence would routinely search the Personal Property Registry.

3. A licensed vessel coupled with a vessel-based licence

Here the creditor would register the vessel and the licence (as part of the vessel) together in the PPR, describing under General Collateral both the vessel, by serial number, and the licence as attached to the vessel.

4. A licensed vessel together with a licence to an individual

Again, the creditor would take a security interest over the vessel and register it under the *Personal Property Security Act (PPSA)* and, as in example 2, file a notice of its interest in the Personal Property Registry.

Any lawyer or Notary retained to arrange for security of this kind would need to qualify any opinion by making it clear that a licence *per se* cannot be secured as property.

The four combinations I have set out above are only a simplified summary of what might be involved and describe the bare minimum of security to be “taken.” Bear in mind that in some cases, vessel-based licences are transferred or encumbered separate from the vessels to which they are issued.

The Department of Fisheries and Oceans does not recognize the transfer of a vessel-based licence without a vessel but these transactions occur, leaving the beneficial ownership in the licence in someone else’s name, not the vessel owner’s name. In these cases, a number of sophisticated techniques are available to improve the creditor’s or owner’s security, but these should not be undertaken without the advice and assistance of a practitioner particularly qualified and experienced in this specialized area.

I want to acknowledge the expert assistance of one of my senior law partners Joanne Lentsch, a large portion of whose practice is devoted to all aspects of the west coast commercial fishery, including the security issues covered in this article. ▲

Anthony DuMoulin is a senior partner in the law firm DuMoulin & Boskovich, Barristers & Solicitors.

Voice: 604 669-5500
Fax: 604 688-8491
tony@dubo.com

BC Decision-Makers Read *The Scrivener!*

This magazine reaches the following spheres of influence, quarterly.

- BC Notaries
- Land Appraisers: R.I.(B.C.) designates
- Land Surveyors of BC
- Lawyers
- Real Estate Professionals
- Real Estate Boards and Associations
- Provincial/Federal Court Judges
- Registrars
- MLAs and MPs
- Life Insurance Brokers and Agents
- Accountants
- Managers of Financial Institutions
- Mayors
- Government Ministries
- Libraries: Public and Private, including Law Society, Legal Services, Educational Facilities
- Investment Management Agencies
- Chambers of Commerce
- BC Housing
- BC Assessment
- BC Buildings Corporation

**Advertising Deadline for
Summer Issue: May 15, 2004**

**Promote your
services to our
prequalified
audience of allied
professionals!**

Call: 604 985-9250
Fax: 604 985-0900
scrivener@notaries.bc.ca