

NOVA SCOTIA COURT OF APPEAL
Citation: *D'eon Fisheries Ltd. (Re)*, 2016 NSCA 30

Date: 20160421
Docket: CA 440490
Registry: Halifax

Between:

Her Majesty the Queen in Right of Nova Scotia,
as representative by the Minister of Economic and Rural
Development and Tourism and Nova Scotia Business Incorporated
Appellants

v.

Deloitte Restructuring Inc., Trustee of the Estate of
D'Eon Fisheries Limited and Bank of Montreal and
Scotia Harvest Inc. and Marro Management Inc.
Respondents

Judges: Farrar, Oland and Scanlan, JJ.A.

Appeal Heard: January 26, 2016, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Scanlan, J.A.;
Farrar and Oland, JJ.A. concurring.

Counsel: Augustus M. Richardson, Q.C., for the appellants
Pamela J. Clarke, for the respondent Deloitte Restructuring
Inc.
Gavin D.F. MacDonald and Jack Townsend, for the
respondent Bank of Montreal

Reasons for judgment:

Introduction

[1] What is a “fishing licence” as issued pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14 (*Fisheries Act*)? Does it include quota? Is a reference to a “fishing licence”, in a financing statement registered pursuant to s.24(1)(a) of the *Personal Property Security Act*, S.N.S. 1995-96, c. 13, General Regulations OIC 1997-621 (*PPSA*), sufficient to capture both the licence and the quota? These questions are at the heart of this appeal.

[2] The appellants appeal a decision of Nova Scotia Supreme Court Justice Jeffrey Hunt (2015 NSSC 160) wherein he held that, for purposes of registration under the *PPSA*, a reference to licence in a financing statement was not sufficient to perfect a lien on the quota. For the reasons below, I am satisfied that the reference to “Fishing Licence #304715” in the financing statement filed pursuant to the *PPSA* was sufficient to perfect the lien on the quota.

[3] There was also a Notice of Contention filed by the Bank of Montreal (BMO). It asserts that there was no consideration provided to D’Eon Fisheries Limited (D’Eon) in return for the security which the Province seeks to enforce. BMO argued before the motions judge that the security should fail on that basis alone. The motions judge did not address that issue. For the reasons below, I would dismiss the Notice of Contention.

Background

[4] In 2002 D’Eon obtained access to, what was then an under-utilized species, silver hake, pursuant to groundfish licence No. 304715. This licence entitled D’Eon to an enterprise allocation of 25% of the total allowable catch of silver hake in a designated fishing zone. The licence included terms and conditions that governed the size and number of boats entitled to fish the enterprise allocation. It also specified the types of gear to be used and the area from which the fish were to be harvested.

[5] As of April, 2013, D’Eon had a groundfish licence, “Fishing licence No. 304715”, for the 2013-14 season. The license included certain conditions, including one regarding the species and catch limitations. That condition provided that D’Eon’s limitations were in accordance with an Enterprise Allocation

Schedule, which detailed the species and quantities that could be fished under the licence. D'Eon had an enterprise allocation or quota of 3750 tonnes of silver hake. In fact D'Eon had a historical enterprise allocation of 3750 tonnes, or 25% of the total Canadian quota, of silver hake per year. Although, pursuant to the *Regulations*, the Minister of Fisheries was entitled to alter terms and conditions of licences, D'Eon's quota for silver hake had not changed since the licence was first issued.

[6] Although D'Eon held the licence, over the years, it neither caught or processed the fish. D'Eon arranged for vessels to harvest the quota and the fish were delivered to an affiliated company, Blue Wave Seafoods (Blue Wave). D'Eon did not own any vessels or a processing plant.

[7] D'Eon borrowed money from time to time to support its operational needs. Pursuant to a fishing licence assignment agreement dated September 23, 2013, Her Majesty the Queen in Right of Nova Scotia, represented by the Minister of Economic and Rural Development and Tourism (the Province) loaned \$500,000 jointly to D'Eon and its affiliate, Blue Wave. That document provided that D'Eon would pledge all of its interest in the 'Licence Assets' which was defined as the fishing licences and all quota and enterprise allocation. However, the description of general collateral in the financing statement the Province registered against D'Eon referred only to "groundfishing license No. 304715". It did not use the word quota. The same wording was included in the Nova Scotia Business Inc. (NSBI) financing statement.

[8] The loans NSBI and the Province made to D'Eon were subject to prior security interests granted in favour of Business Development Bank of Canada and NSBI.

[9] It is unfortunate that the wording in the financing statements registered pursuant to the *PPSA* did not track the wording of the assignment agreements and specifically reference "quota". I say it is unfortunate because, had that single word been inserted into the *PPSA* documents, it would have avoided the necessity of this litigation.

[10] On December 17, 2013 D'Eon became bankrupt. The Trustee in Bankruptcy took the position that NSBI and the Province had failed to perfect their security against the quota. That decision was appealed to the Supreme Court of Nova Scotia in Bankruptcy and Insolvency. The motions judge dismissed the appeal.

[11] The import of the motions judge's decision is that the appellants don't have a secured position in relation to the proceeds of sale of the silver hake quota.

[12] The licence was sold, together with the quota, to a single purchaser. A surplus of \$1,426,248.00 remains with the Court to be distributed. If the appellants are successful they will recover the amounts they advanced, in full. If not, they will fall within the group of unsecured creditors and recover only a portion of their loans on a pro-rated basis.

Issues

[13] I am satisfied that there were three issues on appeal:

- a. the standard of review;
- b. whether a security interest in a fishing licence attaches all of its conditions, including the type and quantity of fish that can be caught;
- c. as raised by the Notice of Contention as filed by BMO; was there adequate consideration to D'Eon coming from NSBI and the Province so as to perfect the security interest of the lenders under the *PPSA*?

Standard of Review

[14] The parties are not in agreement on the standard of review. The appellants argue that the issues raised on this appeal are purely legal issues involving interpretation and application of legislation. They suggest the applicable standard of review is correctness. The respondents' submissions on the standard of review suggest various standards. One suggesting that the issues on appeal are pure questions of fact and the standard is palpable and overriding error. Another suggests that this is a case involving mixed fact and law.

[15] I am satisfied the main issue on this appeal is: what is captured within the meaning of the term "licence" under the *Fisheries Act*? This is not a fact-infused issue. Whether the licence included the quota is a question of law for which the standard of review is correctness.

[16] I refer to *Housen v. Nikolaisen*, 2002 SCC 33, ¶36

... Matters of mixed fact and law lie along a spectrum. Where, for instance, an error... can be attributed to the application of an incorrect standard, a failure to

consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness... Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard. ...

[17] To the extent that the parties argue that the court here is dealing with a fact-infused issue, I am satisfied that even if it were, it falls on the legal side of the spectrum, and the applicable standard of review is correctness in any event.

[18] The Notice of Contention filed by BMO was not addressed by the motions judge. It must be considered as a fresh analysis.

The parties’ positions

[19] The appellants urge this Court to set aside the decision of the motions judge. They argue that the above-noted reference to the ‘licence’ in the financing statement is sufficient to perfect registration pursuant to the *PPSA*. They argue that the licence includes the enterprise allocation or what is colloquially referred to as the quota contained in its condition regarding the species and catch limitations.

[20] The Province and NSBI, in their submissions to the motions judge, argued that the reference to the “fishing licence” was an adequate “description by item or kind” pursuant to s. 24(1) of the *PPSA Regulations* to include the quota. They argued that licences and quotas in the fishing industry are so inextricably intertwined that a reference to a fishing licence includes a reference to any quota included as a condition to that licence. They also argued that if there was an error in the financing statement it was saved by s. 44(7) of the *PPSA*.

[21] Because of my determinations, as set out below, it is not necessary to rely upon the curative provisions of s. 44 (7).

[22] The respondents suggest the motions judge was correct in determining that the reference to the licence in the financing statement under the *PPSA* was not effective registration in relation to the quota. They argue that it captured the licence only. They argue that, in the fishing industry, quotas have been traded independent of the licences. They presented evidence to show that there was a commercial market and trade in groundfish quota. They pointed out that it is possible to hold a licence without having any quota attached to that licence.

[23] They argue that the motions judge was correct when he held that the financing statements do not refer to the word “quota” and, therefore, the appellants do not have a valid claim against the “quota”.

[24] I note that while one can hold a licence, it cannot be used to fish unless quota is associated with the licence.

Analysis

[25] As a preliminary point, I note that although Scotia Harvest Inc. and Marro Management Inc. are named as respondent parties in this appeal, they have withdrawn. Any reference below to the respondents, therefore, does not include Scotia Harvest Inc. or Marro Management Inc.

[26] I start my analysis by confirming that the motions judge correctly determined that, in the hearing before him, the matter proceeded as a hearing *de novo*. That allowed the parties to bring forward evidence and argument, without regard to whether it had been before the Trustee. As to the Trustee’s decision, the motions judge determined that the disallowance by the Trustee was a question of law to be reviewed on a standard of correctness.

[27] The question as to whether fishing licences can be effectively pledged as security is well settled since the decision of the Supreme Court of Canada in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 (*Saulnier*). There, Binnie J. stated:

[22] The fishery is a public resource. The fishing licence permits the holder to participate for a limited time in its exploitation. The fish, once caught, become the property of the holder. Accordingly, the fishing licence is more than a “mere licence” to do that which is otherwise illegal. It is a licence coupled with a proprietary interest in the harvest from the fishing effort contingent, of course, on first catching it.

Justice Binnie made it clear in *Saulnier* that a fishing licence could be pledged as property to secure a loan. In this case no party argues that a quota, whether it is a part of licence, or a separate asset, is any less a proprietary asset than a licence alone. The discrete issue in this case is whether the term “licence” included the “quota” for the purpose of registration under the *PPSA*.

[28] In a contest with respect to priority, a failure to comply with the express requirements of the *PPSA* will render the security ineffective as against the Trustee

in Bankruptcy and creditors of the bankrupt. The motions judge considered the financing statement that described the collateral security as:

...all of the debtor's right, title and interest of every kind which the debtor has in, to or under a fishing license, more particularly described as a ground fish license no. 304715...

He referred to s.24 of the *PPSA*, ¶33. It provides:

General description of collateral

24 (1) Where collateral is to be described other than by serial number, the registrant shall enter

(a) a description of the collateral by item or kind or by reference to one or more of the following: “goods”, “document of title”, “chattel paper”, “investment property”, “instrument”, “money” or “intangible”;

...

[29] The motions judge determined that the licence and quota were separable and the registration which referenced the “licence” only, did not capture the quota saying:

[56] I find there was no description of the Quota in the financing statements, whether by item or kind or by reference to “intangibles.” Accordingly, the security interests were not perfected and were subordinate to the interest of the Trustee. If the Quota cannot be regarded as an inseparable part of the License, there is nothing in the financing statement description that would alert a reasonable searcher to the existence of collateral in addition to the License. ...

[30] The motions judge said, to rule otherwise would place the burden on the searcher under the *PPSA* to find out whether the collateral description in the financing statement is accurate. He held that a searcher is not obliged to make a demand for information under s.19 of the *PPSA* in order to ascertain if there is additional collateral not referenced in the registration.

[31] The motions judge held that it was unreasonable and unrealistic to expect a party reviewing a financing statement, registered pursuant to the *PPSA*, to ignore the specific word “licence” and infer that there may be additional collateral, such as a fish quota, included in the security agreement. He held that the term “licence” was not an adequate description of the security to extend to, or include, any quota. He determined that if one wished to perfect a security interest in “quota” that term

should have been included in the financial statement as recorded pursuant to the *PPSA*.

[32] The motions judge appeared to have hung his hat on the fact that quota, in a commercial sense, could be bought and sold. He ignored the fact that even when it is bought and sold, it is at all times attached to a licence. I do not disagree that there is a commercial market and value for quota. That does not change the reality that, in law, the quota is part of the licence.

[33] The motions judge appeared to take comfort in saying that if a searcher saw the word “quota” that he/she need look no further to see what the security was. In saying this, he ignored the fact that a reference to the “quota” in a financing statement pursuant to the *PPSA* would still send a searcher to the Department of Fisheries and Oceans (DFO) to determine the extent of the “quota” attached to the licence. Only that Department could advise as to the conditions of the licence which sets out the amount of quota attached to a particular licence.

[34] I am satisfied that the issue of what is included in the reference to “groundfish licence # 304715” in the financing statement is answered by reference to the applicable *Fisheries Regulations*, not to the existence, or non-existence, of a commercial market for quota. The *Fishery (General) Regulations*, SOR 93/53 and the *Atlantic Fisheries Regulations*, 1985 SOR/86-21, do not use the word “quota”. There can be no participation in the fishery without a licence. Section 2 of the *Fisheries Regulations* defines “licence” as “any type, kind or category of licence issued under any of the Regulations listed in s.3(4) or under these Regulations.” Section 22(1) of the *Fisheries (General) Regulations*, under the sub-heading “Conditions of Licences” provides, in part, as follows:

22.(1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may **specify in a licence** any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify **conditions respecting any of the following matters:**

- (a) **the species of fish and quantities** thereof that are permitted to be taken or transported;
- (b) the age, sex, stage of development or size of fish that are permitted to be taken or transported;
- (c) the waters in which fishing is permitted to be carried out;

(Emphasis added)

[35] Section 2(1) of the *Atlantic Fishery Regulations* contains the following definition:

“groundfish” means any species of fish set out in Part II of Schedule I;

“licence” means authorizing a person to fish for the species of fish specified in the licence, to harvest the species of marine plants specified in the licence or to transport fish as specified in the licence.

[36] Part II of the *Atlantic Regulations* deals with the “Registration of Persons and Vessels and Licensing of Persons” and sets out the following in ss. 13-14:

13(1) Subject to section 15 and subsection 51.1(2), no person shall use a vessel, and no owner of a vessel shall permit another person to use the vessel, in fishing for any species of fish referred to in these Regulations unless

- (a) a vessel registration card has been issued in respect of the vessel;
- (b) the use of the vessel to fish for that species of fish is authorized by a licence; and
- (c) subject to subsection (2), the person who is using the vessel is named in the licence referred to in paragraph (b).

14.(1) Subject to subsection (4) and section 15, no person shall fish for any species of fish set out in Schedule 1 unless

- (a) he holds a fisher’s registration card; and
- (b) he is authorized, pursuant to subsection (2), to fish for that species.

14(2) Subject to subsection (3), a person is authorized to fish for a species of fish if that person is

- (a) the holder of a licence for that species;
- (b) on board a vessel and is named as the operator of that vessel in a licence that authorizes the use of that vessel to fish for that species;
- (c) accompanying a person referred to in paragraph (a) or (b); or
- (d) on board a vessel the owner of which is the holder of a licence that authorizes the use of that vessel in fishing for that species and an operator is not named in the licence.

[37] A licence may be altered from time to time upon acceptance by the DFO. However, absent any alterations, the conditions of licence, as it exists from time to time, determines the amount of fish that can be fished under that licence, together with the size and number of vessels, and the type of gear to be used.

[38] In this case, the Trustee in Bankruptcy arranged for the sale of the licence to a third party. DFO simply executed a transfer of the licence. Mr. Gillis, an official with DFO, testified that, upon acceptance of the transfer application form by DFO, the licence including D'Eon's quota was transferred into the name of a third party. No document in addition to the transfer application form was required to transfer D'Eon's licence, including quota, to a new purchaser because D'Eon's quota is a part of the terms and conditions of the licence.

[39] DFO operates on a single document; that is the licence. There was no separate concept of quota. A condition of the licence can be altered by adding or decreasing the allowable catch attributed to a particular licence. While that facilitated a commercial value and trade in quota, it did not change the fact that the licence, as it existed from time to time, included the quota.

[40] Because the quota is attached as a condition of D'Eon's licence, I am satisfied that reference to the licence in the financing statement as registered was sufficient to include the quota as it existed at the time the security was given. It remained as a condition to the licence when it was sold by the Trustee.

[41] The description of collateral in the financing statements filed by NSBI and the Province describe the assets as the rights, title and interest of every kind which D'Eon had in, to or under its groundfish licence. That wording satisfied the requirement in s. 22(1) of the *PPSA* for a description "by item or kind or by reference to intangibles". This being the case, it is not necessary to refer to s. 44(7) of the *PPSA*.

Notice of Contention

[42] On the issue of whether there was consideration, it is clear that D'Eon and Blue Wave were affiliated. Fish caught under the D'Eon licence was necessary for Blue Wave to continue in its processing operations. D'Eon was not in the business of fishing or processing silver hake. The evidence of money being advanced jointly to the affiliated companies is sufficient to show there was consideration to both companies. For that reason I would dismiss the BMO Notice of Contention.

Conclusion

[43] I am satisfied that the appeal should be allowed. The appellants have a valid security against the licence which includes the quota.

Costs

[44] The parties agreed that there would be no costs payable on this appeal.

Scanlan, J.A.

Concurring:

Oland, J.A.

Farrar, J.A.