SUPREME COURT OF NOVA SCOTIA

Citation: *Business Development Bank of Canada v. D'Eon Fisheries Ltd.*, 2015 NSSC 160

Date: 20150527
Docket: Hfx. No. 426025
Registry: Halifax

Between:

Business Development Bank of Canada

Applicant

v.

D'Eon Fisheries Limited

Respondent

and

Estate No. 51-1810695/Court No. 37734

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY of
D'Eon Fisheries Limited
Of the Town of West Pubnico
In the Province of Nova Scotia

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: March 24, 2015, in Halifax, Nova Scotia

Written Decision: May 27, 2015

Counsel:
Paul E. Radford, Q.C., Solicitor for the Applicant
Andrew Nickerson, Q.C./Jason Cooke, Solicitors for the Respondent, Scotia Harvest Seafoods Inc.
Pamela Clarke/Brian Stilwell, Solicitors for the Respondent, Deloitte Restructuring Inc.
Gavin MacDonald, Solicitor for the Respondent, Bank of Montreal

By the Court:

Introduction

[1] This is an appeal by Nova Scotia Business Incorporated ("NSBI") and the Province of Nova Scotia ("Province") against a decision made by the Trustee in Bankruptcy for D'Eon Fisheries Limited ("D'Eon").

[2] The Trustee partially disallowed two Proofs of Claim filed by NSBI and the Province. The disallowance was based upon a finding by the Trustee that these two parties had failed to perfect their security against one substantial asset of D'Eon – the fishing quota assigned to the company.

[3] The effect of this decision by the Trustee was to eliminate the security priority that NSBI and the Province claimed over the quota.

Issue

1. As of the date of bankruptcy, were the security interests of NSBI and the Province perfected under the **Personal Property Security Act (**"**PPSA"),** SNS 1995-96, as amended, such that they had priority over D'Eon's Trustee in Bankruptcy?

Background

[4] D'Eon was a pioneer in the creation of a commercially viable Silver Hake Fishery in Nova Scotia. After years as a successful enterprise, it began to experience financial difficulty and ultimately became bankrupt on December 17, 2013. At the point of bankruptcy, D'Eon was the holder of Groundfish License 304715 ("License") issued by the federal Minister of Fisheries and Oceans ("Minister") under the Federal Fisheries Act and Regulations. D'Eon had also been assigned a certain quota within the total allowable catch of silver hake on the East Coast ("Quota").

[5] D'Eon had a subsidiary firm known as Blue Wave Seafoods Incorporated ("Bluewave"). In general, D'Eon was in the business of obtaining raw material for Bluewave to process through its plant. Over the years D'Eon and Bluewave entered into multiple borrowing agreements and security instruments with various lenders. It is not the wording of these loans and agreements that is at issue – rather the dispute arises out of the manner in which NSBI and the Province recorded their claims of security within the **PPSA** system.

[6] The Trustee and other creditors assert that NSBI and the Province failed to perfect their security against the Quota and thus, by operation of law, have lost

priority against the Trustee in Bankruptcy, and by extension, other creditors. In this case, the **PPSA** filings by NSBI and the Province fail to make any specific reference to the Quota. This fact is central to the present appeal.

[7] The history of the insolvency/receivership is as follows:

- On November 15, 2013 D'Eon filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the **Bankruptcy and Insolvency Act ("BIA**"). Deloitte Restructuring Inc. ("Deloitte") was appointed as Trustee under the Notice of Intention;

- On December 10, 2013 Business Development Bank of Canada ("BDC") appointed Price Waterhouse Cooper's Inc. as receiver over all the assets subject to BDC's security, including D'Eon's License, Quota and equipment. BDC was not caught by the Stay of Proceedings as they had issued a demand under s. 244 of the **BIA** prior to the filing of the Notice of Intention to Make a Proposal;

- Upon becoming aware of BDC's decision to appoint a Receiver, Deloitte filed a Material Adverse Change Report on December 12, 2013. D'Eon did not file a proposal nor a request for an extension of time to file a proposal; as a result, D'Eon was deemed bankrupt on December 17, 2013.

Deloitte was appointed Trustee of the bankrupt estate, as affirmed at the first meeting of creditors;

- The primary assets of D'Eon Fisheries were the License and Quota referred to above. The License and Quota were sold under the receivership proceedings initiated by BDC. There was no dispute with respect to the validity of the **PPSA** filing made by BDC.

- After payment of the first secured claim of BDC, the sale yielded surplus proceeds of $1,426,248.00. These surplus funds were paid into court in the BDC receivership proceeding. Subsequent to the payment into court, a Consent Order was issued on December 2, 2014 under which the surplus funds were transferred to the D'Eon Bankruptcy proceeding.

- The Order of December 2, 2014 also laid out a roadmap for determining the competing priorities and claims again the surplus funds. This hearing is one of these steps.

Positions of the Parties

[8] All parties agree that the central question is whether the security interest of NSBI and the Province were perfected under the **PPSA** prior to the date of bankruptcy.

[9] The Respondents seek to uphold the disallowance of the Proofs of Claim. They say the Trustee acted correctly and applied the appropriate test. They assert that the security interests of NSBI and the Province were unperfected for the following reasons:

1. They had descriptions that failed to adequately describe the Quota by item or kind;
2. The charge claimed was not a general charge against all personal property;
3. There was no evidence that value given by NSBI or the Province to D'Eon was sufficient to constitute consideration for the grant of the security interest in the Quota.

[10] NSBI and the Province seek to overturn the Trustee's disallowances pursuant to s.135 of the **BIA** saying that the License and Quota are in essence the same "item or kind" of security such that a reference in the **PPSA** financing statement to the License must be read to include the Quota.

[11] In response, the parties supporting the decision of the Trustee say the Quota and License are separate and distinct items of security. They argue as follows:

1. Quota can be pledged separately from a license;
2. A license can exist without any associated quota (indeed the License and Quota in this case were acquired separately);
3. Other lenders (including the senior security holder in this instance) who took security from D'Eon registered against the Quota and License separately and distinctly;

4. In its own security instrument, the Province describes and defines the Quota separately from the License. The two items each have their own distinct section within the Provincial security document;
5. The Department of Fisheries issues and tracks quota independently of the license. Within the internal systems of the department a different branch within the department is responsible for each item;
6. Quota can be transferred on an interim basis without any transfer of the license as long as the quota transfer is made to another license holder;
7. In this case, the Quota was found (in a valuation report by Trinav Consulting) to have a market value independent from that of the License.

Standard of Review

[12] There was common ground at the hearing that appeals of this nature proceed as a hearing *de novo.* All parties were free to bring forward evidence and argument regardless of whether these had been advanced before the Trustee.

[13] Since the Trustee's disallowance was based on a question of law, the appropriate standard for review is correctness: ***Re: Galaxy Sports***, 2004 B.C.C.A. 284 at para. 39.

Law

[14] Section 21(2) of the **PPSA** provides:

> **Subordination of unperfected interest**
>
> 21

…

(2) An unperfected security interest in collateral is not effective against

(a) a trustee in bankruptcy if the security interest is unperfected at the time of the bankruptcy;

(b) a liquidator appointed pursuant to the *Winding-up Act* (Canada) if the security interest is unperfected when the winding-up order is made; or

(c) a creditor, assignee or sheriff who has registered a notice of claim in the Registry pursuant to Section 2C of the *Creditors' Relief Act* for the purpose of any enforcement proceedings commenced pursuant to the enactments referred to in that Section if the security interest is unperfected at the time the notice of claim is registered.

[15] Section 135 of the **BIA** deals with the adjudication of proofs of claim by the trustee in bankruptcy, and the creditor's right of appeal:

135.(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The Trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or

> security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> **Determination or disallowance final and conclusive**
>
> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Analysis

Perfecting a Security Interest

[16] The elements required for the perfection of security interest are outlined in s.20 of the **PPSA**. It is unquestioned that a failure to comply with the express requirements of the **Act** will render the claimed security interest ineffective against a Trustee in Bankruptcy. This is made clear by s.21 of the **Act**. It will also render the interests of the secured holder subordinate to other secured creditors holding perfected security interests - **PPSA**, s.36 (1)b. It is well understood that a security instrument can be valid as between a debtor and creditor (as in this case) but if the claim is not perfected within the **PPSA** system it is ineffective against other creditors or a trustee in bankruptcy in a contest with respect to priority.

The Security Agreements

[17] NSBI's 1998 security agreement, which involved an assignment of D'Eon's enterprise allocation of silver hake, described the collateral as follows:

> … all of their right, title and interest in and to all enterprise allocations and quotas and all rights and privileges pertaining thereto and any other rights, whether in lieu thereof or otherwise, granted to any of the Assignors from time to time by the Minister of Fisheries or other governmental authority ("DFO") for harvesting and processing Silver Hake ("EA's") and all the inventory of Silver Hake harvested by any of them ("Inventory") and all of their right, title and interest in and to the proceeds receivable from the sale or other disposition of the Inventory (the "Receivables").

[18] In September 2013 D'Eon and the Province concluded a Fishing License Assignment Agreement, describing the collateral as:

> …all quota and enterprise allocations allocated to the groundfish license number 304715 as security for obligations owing to the Province by D'Eon under a financing agreement dated September 20, 2013.
>
> AND WHEREAS the parties have agreed that the Secured Party's financing of the Debtor pursuant to the Financing Agreement shall be secured in part by the covenants in the within Agreement with respect to such licenses and all other fishing licenses now or hereafter held by the Debtor (the "Licenses") and all quota and enterprise allocations allocated to the Licenses (together the "License Assets").

[19] These two assignments form the debt foundation for the **PPSA** financing statements whose interpretation is at issue. However, for **PPSA** purposes, it is the wording of the financing statements with which we are concerned.

The Financing Statements

[20] On 27 September 2013, NSBI and the Province registered financing statements with the Nova Scotia Personal Property Registry, pursuant to the ***Personal Property Security Act***, SNS 1995-96, c 13. The financing statements described the collateral, in part, as:

> …all of the debtor's rights, title and interest of every kind which the debtor has in, to or under a fishing license, more particularly described as ground fish license number 304715 issued by the Minister of Fisheries and Oceans… and any books, records or documents related to such license…

[21] The financing statements registered by the other secured creditors used different language. BDC's collateral description specifically itemized groundfish license 304715 and the "allocation of 25% of the annual Total Allowable Catch ("TAC") for silver hake in respect of Groundfish License No. 304715…" BMO simply took a security interest in "all present and after-acquired personal property of the Debtors and all proceeds thereof."

The Appeal

[22] The Province and NSBI say the Trustee erred in finding that their security interests were unperfected. They say referencing the License but not the Quota in

the financing statements was sufficient to perfect a security interest in both. They rely on:

1. The law respecting description of collateral under the **PPSA**;

2. The legal relationship between the License and the Quota; and

3. Commercial practices.

[23] The Trustee and other secured creditors maintain that the financing statement "does not include a description of the Quota, by item or kind" and, therefore, the security interests were not perfected as against third parties, including the Trustee and the other secured creditors. They also deny that the License and the Quota are synonymous such that a description of collateral in the License necessarily includes the Quota.

D'Eon's Interest in the License and Quota

[24] Issuance of licenses and quotas is within the Minister's discretion as an aspect of the management of the fishery: *Comeau's Sea Foods v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12.[1] In a license-based fishery, possession of a license alone provides access to the resource. In a quota-based fishery, access

[1] *Comeau's Seafoods* at paras 36-37.

is based on a quota, which is only obtainable by a license-holder. DFO administers license and quotas separately. For instance, DFO can restrict transferability of a license or a quota that has been pledged as security. Similarly, there are separate commercial markets for licenses and quotas. A quota is transferable independently from the license to which it has been assigned.

[25] In *Saulnier v Royal Bank of Canada*, [2008] 3 SCR 166, 2008 SCC 58, the Supreme Court of Canada held that a fishing license is not a "mere license" to do something otherwise illegal, but rather a license coupled with a proprietary interest in the fish caught according to its terms.[2] *Saulnier* does not address the main question here - whether the license and quota are a single piece of collateral under the **PPSA**.

Are the License and Quota Inseparable?

[26] One of the claims of NSBI and the Province is that the License and the Quota are so intertwined as to be essentially one piece of security. They rely on affidavits of Clifford Hood, a lawyer with experience with fishing licensing issues, and Aaron Gillis, a DFO official responsible for licensing services in the Maritime

[2] *Saulnier* at paras 22, 34-35, 43, 47.

Region. The evidence indicates that the license includes a schedule of enterprise allocations, including that of D'Eon Fisheries. Such an allocation or quota is transferable to another license-holder. It remains the case, however, that a quota can be transferred independently of the license, including transfer on an interim basis. The Hood affidavit suggests that the quota is transferred along with the license in the event of an application for issuance of a replacement license (that is, in the event of a transfer of the license to another qualified fisherman). NSBI and the Province conclude from this that "the Quota cannot exist by itself, it must be attached to an applicable fishing license." Therefore, they argue, a financing statement describing collateral as "all rights, title and interest of every kind into and under a fishing license" should be interpreted to include a quota that "forms part of the conditions of that license and is automatically transferred when the license is transferred."

[27] NSBI and the Province argue that *Saulnier* supports their view that the Quota forms part of the License. *Saulnier* does not, in fact, consider the question of whether the license and the quota are the same asset. The Respondents point out that quotas and licenses can be pledged separately; as such, it is submitted, they "are not so inextricably linked that they constitute the same item or kind of collateral." Moreover, it is undisputed that they can be transferred separately and

are tracked separately by DFO for administrative purposes. A license holder can transfer quota without transferring the license, and in certain conditions can transfer a license without transferring quota. The evidence is, in this case, D'Eon acquired the License and Quota at different times.

[28] NSBI and the Province argue that it is commercial practice to treat licenses and quotas as associated items. Such a general practice is described in the Hood affidavit and they assert is supported by the language used in advertising the receivership sale of the License and Quota in this case (describing the Quota as "associated with" and "attached to" the License).

[29] The Trustee argues that commercial practice is better reflected by the BDC financing statement, which treats the License and the Quota as separate entities, and by the fact that the two items can be transferred separately. More specifically, the Quota has a value independent of the License.

[30] Additionally, the security documents of NSBI and the Province treat and describe the License and Quota as separate and distinct assets. The Province's security agreement refers to the License and Quota in different recitals. The Trinav Consulting valuation report also appraises and values them as separate assets. The

language of the **PPSA** financing statement did not describe the same collateral as the security agreements.

[31] In my view, NSBI and the Province provide no convincing argument that the License and Quota are so inextricably linked as a matter of law or commercial practice that a reference to one (or the other) in a **PPSA** financing statement amounts to a collateral description of both. Clearly, the two items are subject to distinct administrative regimes, and are transferable separately. In addition, I do not find that commercial practice is supportive of the position urged by NSBI and the Province. One need look no further than the practice of the other creditors in this matter to see the opposite practice. The Respondents also presented additional evidence of commercial practice contrary to that urged by the Applicants.

Perfection by Registration

[32] Perfecting a security interest under s. 20 of the **PPSA** requires registration of a financing statement. As the Trustee points out, it is perfection of the security interest – attempted in this case by registration of the financing statements – that is relevant to priority as against other secured creditors and the Trustee. Prof. Bruce MacDougall notes, in *Canadian Personal Property Security Law* (2014), that

"ideally the description of the collateral in the financing statement should mirror the wording in the security agreement."[3] That was not the case here.

[33] The **PPSA** *General Regulations*, NS Reg 129/97, require collateral to be described in a financing agreement "by item or kind…": s. 24(1). Section 44 describes the registration process, including the effect of defects in financing statements:

> 44(7) Except as otherwise provided in this Section, the validity of the registration of a financing statement is not affected by any defect, irregularity, omission or error in the financing statement unless the defect, irregularity, omission or error is seriously misleading.
>
> …
>
> (9) In order to establish that a defect, irregularity, omission or error is seriously misleading, it is not necessary to prove that anyone was actually misled by it.

[34] NSBI and the Province argue that "description by item or kind" contemplates a "generic description" rather than an "itemized detailed description" of the collateral. They say this reasoning is reinforced by **PPSA** s. 19, which permits a person with an interest in personal property of the debtor to demand information about the collateral from a secured creditor. Subsection 19(3) itemizes the types of information that may be required by such a demand:

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[3] Bruce MacDougall, *Canadian Personal Property Security Law* (Markham, Ont: LexisNexis, 2014) at 253.

> (a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;
>
> (b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand;
>
> (c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;
>
> (d) a written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand;
>
> (e) sufficient information as to the location of the security agreement or a copy of it within the Province to enable a person entitled to receive a copy of the security agreement to inspect it within the Province.

The demand may be made "only with respect to a security agreement providing for a security interest in the personal property in which the person has an interest": **PPSA**, s 19(4).

[35] NSBI and the Province advocate a "low threshold" for detail in collateral descriptions by item or kind. They cite *Re Hickman Equipment (1985) Ltd*, 2003 NLSCTD 47, [2003] NJ No 86, where the word "vehicles" was held to be a sufficient description of an equipment dealer's entire inventory, including various loaders, excavators, bulldozers, earth-moving and paving equipment, as well as cars and trucks. The Court cited Professor Catherine Walsh's 1995 commentary on

the New Brunswick **PPSA** to the effect that the Court should embrace "a liberal approach to the level of detail required to satisfy a description by item or kind…".[4]

[36] The Court in *Re Hickman Equipment* also cited Cuming and Wood's **Alberta Personal Property Security Act** *Handbook* (1998), where the authors state that a collateral description need not be itemized. Rather, "generic descriptions of the collateral and the labels for collateral set out in the definition section of the Act" are sufficient.[5] For example, they observe:

> …a security agreement may describe the collateral as 'automobiles'. These broad descriptions do not inform a third party whether a particular automobile or item of tangible personal property of the debtor is encumbered by the security interest. Details of the collateral can be obtained through section 18 [s.19 in the **NS PPSA**].

[37] Professor Walsh however goes on to add the following comments, which immediately follow her endorsement of a "liberal approach" to detail in descriptions by item or kind:

> … A more controversial issue is whether a broad generic description can be used even where the collateral in fact consists of only one item or kind of property within that broader genre, e.g. "motor vehicles" where the debtor has two motor vehicles and the security interest only covers one of them or "all present and after-acquired goods" when the security interest is only intended to cover present and after-acquired motor vehicles. Some commentators [Walsh cites Cuming and

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[4] *Hickman Equipment* at para 14, citing Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act* (University of New Brunswick Faculty of Law, 1995; rep 1996) at 78.
[5] *Hickman Equipment* at para 15, citing Ronald Cuming and Roderick Wood, *Alberta Personal Property Act Handbook*, 4th edn (Carswell, 1998) at 136-137.

> Wood] suggest that these kinds of overly broad descriptions are acceptable. This interpretation, it is suggested, goes too far. One might as well say that the parties can describe the collateral as "all present and after acquired personal property" when in fact the parties have orally agreed to a security interest only as against present and after acquired goods. If the writing requirement is to retain any evidentiary meaning, kind descriptions should not be permitted to substitute for item descriptions nor all-inclusive descriptions for kind descriptions.[6] [Emphasis added.]

[38] Professor Walsh's comments suggest that s. 19 is not a license for descriptions that lack all meaning. As she puts it, the purpose of the provision is to allow "the business and financial community to comply with its requirements in as simple and certain a manner as can be achieved consistently with the intention underlying the requirement."[7] A more recent text by Walsh, Cuming, and Wood – *Personal Property Security Law* (2012) – echoes Professor Walsh's 1995 remarks, suggesting that *Re Hickman Equipment:*

> "…goes too far. The interpretive issue at stake is not the true intention of the parties. Rather, the purpose of requiring a written collateral description is to enable third parties to identify which assets of the debtor are encumbered by security. To allow extrinsic evidence of the parties' subjective intention to vary the ordinary meaning of the descriptive words used in their written agreement defeats the purpose of the requirement.
>
> The Act provides creditors and other third parties with an interest in the collateral with the means to confirm which particular items are in fact collateral under a security agreement. In addition to requiring the secured party to supply a copy of the security agreement, third parties are also entitled to demand that the secured party verify which items on an itemized list of possible collateral accompanying the demand are actually collateral as of the date of the demand. The availability of this procedure is seen by some as intended to set the threshold of identification of the [collateral] at a relatively low level.

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[6] Walsh on the NBPPSA at 78.
[7] Walsh on the NBPPSA at 78.

> While the authors agree that a technical or overly demanding reading of collateral descriptions is to be resisted, they do not regard the availability of the verification procedure as validating the use of ambiguous collateral descriptions that make ascertainment of the collateral impossible without extrinsic evidence as to the subjective intent of the parties. If descriptions that depended on extrinsic evidence of subjective intent for interpretation were adequate, the policy underlying the requirement for a written collateral description would be undermined."[8]

[39] As the authors point out, a written description of the collateral enables "third parties dealing with assets in a debtor's hands to determine which of those assets are encumbered" as well as deterring secured parties from claiming a security interest "in a greater range of collateral than that to which the debtor actually agreed."[9]

[40] These comments, it should be noted, relate specifically to collateral descriptions in security agreements, not financing statements. However, as Walsh, Cuming, and Wood note, the same approach applies to determining the effectiveness of collateral descriptions in security agreements as to those in registrations of financing statements.[10]

[41] While courts have acknowledged that adequacy of description may require "a relatively low level"[11] of detail, this characterization must be considered in the

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[8] Ronald C. C. Cuming, Catherine Walsh and Roderick Wood, *Personal Property Security Law*, 2d edn (Toronto: Irwin Law, 2012) at 274-275.
[9] *Personal Property Security Law* at 271.
[10] *Personal Property Security Law* at 369
[11] *GE Capital Canada Acquisitions Inc. v Dix Performance (Trustee of)*(1994), 99 BCLR (2d) 21, [1994] BCJ No 2590 (SC) at para 8.

context of the descriptions those courts were actually confronted with. As noted above, *Re Hickman Equipment* appears to represent a generous reading of the description requirements. In any event, it seems tenuous to argue that the reasoning in *Hickman* in respect of such a broad and non-specific term leads to the conclusion that the collateral description of a specific fishing license should be read to include a fishing quota, even one that is held by the license-holder. The items in question in *Hickman* could be defined as "vehicles", even if this required some pointed analysis.

[42] In *GE Capital Canada Acquisitions Inc. v Dix Performance (Trustee of)*(1994), 99 BCLR (2d) 21, [1994] BCJ No 2590 (SC), the question was whether the word "shelving" adequately described the collateral. The Respondent argued that the description was inadequate "because that description is not sufficient to allow someone to identify the piece or pieces of equipment in question. The term fails to identify whether the shelving is metal or wooden, its colour, type or nature, its identity by manufacturer part, model or serial number."[12] The court rejected this, in large part due to the identification procedure available under s. 18 of the British Columbia **PPSA** (equivalent to Nova Scotia's s. 19). Brenner, J added:

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[12] *Dix Performance* at para 6.

> I am also of the view that when interpreting commercial legislation of this nature and where it is consistent with the wording of the statute, the Court should try to achieve the objectives of simplicity and certainty. The Court ought to strive for interpretations that, where possible, recognize the importance to the business and financial community of being able to achieve compliance with regulatory requirements in as simple and in as certain a manner as is consistent with the intention of the Legislature as expressed in the language of the statute. In striving for simplicity, judicial interpretation should minimize to the extent possible the cost of regulatory compliance; achieving the equally important goal of certainty will similarly minimize the generation of post filing litigation challenging such compliance. To require the identification of collateral by more than item or kind, subject to the ban on the words "equipment" or "consumer goods", would defeat the objective of simplicity of compliance. Similarly, for s. 10 compliance, to require particulars sufficient for identification or to impose some other criteria such as make, model, manufacturer serial or part number, would be to also defeat not only the goal of compliance simplicity, but would also tend to generate post-filing litigation as parties seek to further challenge the adequacy of the selected descriptions.[13]

[43] These comments must be read with the fact that the collateral – namely, a quantity of shelving – was in fact described as "shelving." There does not appear to have been any suggestion that any of the collateral was not, in fact, shelving, but some other type of furniture (for instance).

[44] In *Re Alda Wholesale Ltd*, 2001 BCSC 921, [2001] BCJ No 1336, the financing statement described the collateral as follows:

> MOTOR VEHICLES (INCLUDING, WITHOUT LIMITATION, TRUCKS, TRACTORS, TRUCK TRAILERS, TRUCK CHASSIS OR TRUCK BODIES), AUTOMOTIVE EQUIPMENT (INCLUDING WITHOUT LIMITATION, TRAILERS, BOXES AND REFRIGERATION UNITS) AND MATERIALS-HANDLING EQUIPMENT LEASED BY THE DEBTOR FROM THE SECURED PARTY TOGETHER WITH ALL ATTACHMENTS, ACCESSIONS, APPURTENANCES

[13] *Dix Performance* at para 14.

> ACCESSORIES OR REPLACEMENT PARTS. PROCEEDS, GOODS, SECURITIES, INSTRUMENTS, DOCUMENTS OF TITLE, CHATTEL PAPER, INTANGIBLES AND MONEY.[14]

[45] The Province of British Columbia, one of the creditors, claimed that the description was defective, in that it was not clear whether the collateral included all motor vehicles, or only leased ones. Burnyeat, J. discussed the objective approach to determining whether a description is "seriously misleading." The question was "whether the defect, irregularity, omission or error would be seriously misleading to any reasonable person within the class of persons for whose benefit registration and other methods of perfection are required."[15] He added:

> For parties contemplating providing financing to Alda, the primary purpose of their search of the Registry would be to ascertain what security interest had been registered against all or some of the inventory and/or some of the equipment of Alda. It is in this context that a reasonable person searching the Registry would have been seriously misled by the general collateral description used by AFC.[16]

[46] Burnyeat, J. gave the following reasons for finding the collateral description to be seriously misleading:

> I am satisfied that there are a number of reasons why a reasonable person would find the AFC general collateral description seriously misleading. First, it is not clear whether all three categories of goods must be leased. Second, it is not clear whether "all attachments, accessions", etc. refer to all three categories or only to "materials-handling equipment leased by the debtor from the secured party."

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[14] *Alda Wholesale* at para 8.
[15] *Alda Wholesale* at para 32.
[16] *Alda Wholesale* at para 34.

> Third, while it is clear that the collateral is "inventory", it is also clear that the goods are described in two places as "equipment" and never as "inventory." Fourth, there was no attempt to indicate that the security interest was being taken in all of Alda's present and after-acquired personal property in order that the general collateral description could comply with either s. 13(1)(b) or (c) of the Regulation.[17]

[47] Burnyeat, J. did not accept that the use of the word "goods" could save the collateral description, saying:

> "…to suggest that the interested party would have to ignore all of what precedes the word 'goods' in order to ascertain what collateral was charged by the AFC security is both unreasonable and unrealistic. AFC must be bound by the specific descriptions which would override the general description 'goods.'[18]

Similarly, it is arguably "unreasonable and unrealistic" to expect an interested party to ignore the specific word "license" and to infer that there may be additional collateral – such as a fish quota – subject to the security agreement.

[48] Burnyeat, J. also rejected the suggestion that the third-party search provisions of the **PPSA** would render the description acceptable:

> … While it might be the case that a searching party could have ascertained the specific assets charged by the AFC security, I am satisfied that there is no obligation on a searching party to do so. In this regard, I adopt the statement of Bayda C.J.S. in [*Kellan (Trustee of) v Strasbourg Credit Union* (1992), 3 PPSAC (2d) 44 (Sask CA)]:

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[17] *Alda Wholesale* at para 36.
[18] *Alda Wholesale* at para 37.

> ... it does not follow that reason and logic therefore impose upon a person using the system a positive obligation (as for example an obligation to conduct a second search, that is, a search using the debtor's name) to mitigate or attempt to prevent any loss that may flow from that foreseeable omission. A reasonable person is entitled to rely on the assumption that the onus to prevent any such loss should in law rest not on him or her but upon the person responsible for the omission. This stance in reason and logic is supported by certain legal principles that the legislators likely intended should come into play when they enacted the Act. Because the Act is concerned with the status of titles (broadly speaking) to property and a system of registration which in large measure determines that status, the principles of certainty and predictability must predominate if the integrity of the system and efficacy of commercial transactions are not to be undermined. (at p. 61)

This interpretation is consistent with one of the primary purposes of the P.P.S.A. which is to give notice of the nature of prior security to a prospective creditor or a creditor so that the searcher will know whether the collateral is the same as the collateral over which it is also seeking security. Although they came to a different actual result, the same principle about attempting to balance the relative interests of those who register and those who search is contained in the judgment of Doherty J.A. on behalf of the court in [*Re Lambert* (1994) 7 PPSAC (2d) 240 (Ont CA)]:

> The section is designed to preserve the integrity of the registration system provided by the P.P.S.A. That system has two constituencies: those who register financing statements; and those who search the system for prior registrations. The integrity of the overall system must address the interests of both groups. Section 46(4) seeks to maintain the system's integrity by distributing the impact of errors, no matter how unavoidable, made in financing statements between the two groups. An interpretation of s. 46(4) which is too forgiving of such errors places too much of the burden on prospective creditors and purchasers (searchers). An interpretation which is too unforgiving of those errors places too much of the burden on creditors (registrants). In either event, the integrity of the registration system suffers. Section 46(4) should be interpreted, to the extent that its language permits, so as to assign the burden of the error in a manner which best promotes the overall integrity of the system. (at p. 253)

[49] The Court observed that the burden of the error in a financing statement should be on the party filing, commenting as follows:

> … The overall integrity of the registration system is best promoted if those filing financing statements are accurate in their descriptions so that prospective creditors and purchasers are able to obtain concise accurate descriptions of the collateral charged when they search either by name or by serial number. The defects and errors in the AFC financing statement were not ones that could have been ascertained on any other search of the Registry that could have been undertaken. The principles of certainty and predictability must predominate. In the case at bar, the description is so seriously misleading that it should not be valid against

> subsequent parties who have taken the care to provide appropriate and accurate descriptions of the collateral charged.[19] (emphasis added)

[50] Burnyeat, J. went on to consider a second financing statement, in respect of which, counsel for the registering party admitted that the use of the word "equipment" in the statement was "confusing and ambiguous", but argued that a reasonable person, encountering the confusion, would demand to see the security agreement. The Court rejected this position:

> … While a review of that Agreement would clarify the security interest claimed by VCSCU, I have concluded that it is not necessary for a searching party to have reference to a security agreement in order to clarify seriously misleading registration errors and where there is complete failure to provide any collateral description other than "equipment." VCSCU must take the responsibility for the seriously misleading description they provided. It was not intended by the legislation that prospective creditors or other searching parties would be obligated to clear up such abandonments of mandatory registration requirements by having to obtain a copy of the security agreement.
>
> While eligible parties using s. 18 to obtain a copy of the security agreement would then see details such as the particular items of collateral secured, the amount of the indebtedness, the terms of repayment and the term of the loan all of which are not in the public record, the mandatory requirements for collateral descriptions set out in the P.P.S.A. and the Regulation must be given some meaning in order to impose a level of accuracy in the description which can be relied upon by prospective purchasers or creditors. By describing the collateral as "all equipment ... and all proceeds thereof" VCSCU provided a seriously misleading description.[20] (emphasis added)

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[19] *Alda Wholesale* at para 40.

[20] *Alda Wholesale* at paras 48-49.

[51] Such comments clarify the obligation on the party registering a financing statement to provide a reliable and accurate description. It is not the intent of the **PPSA** to oblige third parties to guess at what collateral might be secured by a financing statement. As the Court said in *Re Hoskins*, 2014 NLTD(G) 12, [2014] NJ No 21:

> The personal property security regime promotes clarity and certainty and moves away from concepts such as constructive notice and unfairness. The rules are precise. Accuracy is expected. Those relying on the registration system to search for prior security interests are entitled to expect that those filing financing statements will respect the prescribed rules.[21]

[52] In *Re Noriega*, 2003 ABQB 265, [2003] AJ No 367, the lender relied on a passage in Cuming and Wood's comment that a "registration will not be considered to be seriously misleading so long as a hypothetical searching party has sufficient information to direct any demand for information to the correct secured party."[22] The court rejected the suggestion that this meant that "a significant error in describing the collateral, or not describing it at all, is immaterial if a searcher can go to the creditor to get the information."[23] This Court stated that this would render the comments:

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[21] *Re Hoskins* at para 32.
[22] *Alberta PPSA Handbook* at 415.
[23] *Re Noriega* at para 13.

> …out of context and would entirely read out the requirements for describing the collateral. Later comments by the authors show that the sentence relied on by [counsel for the lender] does not mean what she thinks it to mean.[24]

The Court noted Cuming and Wood's view that cases granting secured parties:

> …a surprising latitude in making significant errors describing the collateral appeared to be "premised on the assumption that the error may be cured so long as an actual person was not misled by the error" and were therefore of no persuasive value under Alberta law.[25]

Like the Alberta Act, the Nova Scotia **PPSA** does not require any party to have actually been misled.

[53] The Alberta legislation did not require the searcher to go to the secured party in order to find out what the collateral was, but rather required the secured creditor to "provide an adequate description of the collateral … by item or kind…"[26] The failure to do so amounted to a "complete failure to provide any collateral description…"[27]

[54] The Respondents submit that determining the sufficiency of a **PPSA** financing statement containing identification of collateral by item or kind should follow an analysis that asks:

1. Whether there is a description by item or kind;

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[24] *Re Noriega* at para 13.
[25] *Re Noriega* at para 21, citing *Alberta PPSA Handbook* at 417.
[26] *Re Noriega* at paras 23-24.
[27] *Re Noriega* at para 25, citing *Alberta PPSA Handbook* at 417.

2. If so, whether it is ambiguous; and

3. If so, whether it is "seriously misleading", as per ss 44(7) and (9).

They further submit that these provisions should be interpreted in accordance with the objective test in the manner described in *Alda Wholesale*. Walsh, Cuming, and Wood support this approach in their text, *Personal Property Security Law*:

> In determining what constitutes a seriously (or materially) misleading error, it is not necessary to show that anyone was actually misled, or, indeed whether a search was ever conducted by the party challenging the effectiveness of the registration. Rather, the test is an objective one. Is the error seriously misleading from the viewpoint of a hypothetical searcher of the system?
>
> … an objective standard avoids case-by-case litigation on the question of actual prejudice and promotes the integrity and reliability of the registration system…[28]

[55] It is clear that a "significantly misleading error in the general collateral description in a registration, or a failure to describe the collateral altogether, means that the security interest will not be considered perfected with respect to that item or kind of collateral."[29] Such an error or omission is not excused by a provision in the nature of s.19 of the Nova Scotia **PPSA**, since the result of that would be to

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[28] *Personal Property Security Law* at 363-364.
[29] *Personal Property Security Law* at 364.

"rob the collateral description requirement for an effective registration of any meaning."[30]

[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. The financing statement simply omits any mention of the Quota, while making specific reference to the collateral in the License.

[57] A searcher who was to review all the relevant Financing Statements would first locate the BDC filing which correctly identified the existence of, and BDC security in, both elements (Quota and License). They would next see the NSBI/Province filings which reference only the License. This would tend to reinforce the misleading nature of the filings by NSBI and the Province.

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[30] *Personal Property Security Law* at 364.

[58] I conclude that this particular description was seriously misleading, in that it would give no reason for a reasonable searcher to conclude that a quota was included.

[59] The theory advanced by NSBI and the Province would effectively place the burden on the searcher to find out whether the collateral description in the financing statement is accurate. In my view it is clear from the authorities that the registering party is responsible for the accuracy of the description. A searcher is not obligated 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.

Conclusion

[60] I find the decision of the Trustee ought to be upheld and, accordingly, the Application is dismissed. I will hear the parties on costs in the event these cannot be agreed.

Justice Jeffrey R. Hunt