DIGGING BELOW AND LOOKING BESIDE THE WALL OF MINISTERIAL DISCRETION: LICENCES AFTER *SAULNIER*

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Property law enthusiast, commercial debtor, and commercial creditor alike will find delight in the recent decision of the Nova Scotia Court of Appeal, given by Fichaud J. in *Saulnier (Receiver of) v. Saulnier*.[1] While the story is likely to set the property enthusiast's heart afire (unless such enthusiast is a proponent of a "functional" approach), the ending is more likely to soothe the commercial creditor and raise the hopes of the commercial debtor. The ending is this: A fishing licence issued under the *Fisheries Act*[2] is not the property of a bankrupt fisher; however, the *right to re-apply* for, and to *resist an arbitrary denial* of, such licence is the property of a bankrupt fisher and, as such, vests with the trustee. A fisher is not able to shed his or her liabilities while retaining an asset of significant commercial value. Further, such fishing licences are intangible personal property under the Nova Scotia *Personal Property Security Act*[3] and, as such, a fisher can grant a secured interest in them (and therefore likely pay a lower cost of capital).

Given that such licences are often worth more than $500,000, the *ending* will be of great interest to the parties involved and to other fishers and creditors; however, it is the *story* (composed of law in its most theoretical form) that promises to have the greatest practical impact given its precedential value in other areas of the law where "property" is at issue (such as matrimonial property, Aboriginal property, income tax, criminal property, fraudulent conveyances, and takings) and in regard to other statutory permissions (such as taxi licences, milk quotas, nursing home licences, and tobacco production quotas).

This comment attempts to recap part (but far from all) of the story. First, it looks at the definition of, and similarity between, "property" under the *Bankruptcy and Insolvency Act*[4] and the *PPSA*. Second, it discusses how the Court of Appeal in *Saulnier* gives shape to such definitions and finds that the holder of a fishing licence has property despite the Minister's "absolute discretion" in issuing/re-issuing such licence. Last, it discusses certain future implications of the *Saulnier* case.

I. THE BEGINNING

A. PROPERTY WITHIN THE *BANKRUPTCY AND INSOLVENCY ACT* AND THE *PERSONAL PROPERTY SECURITY ACT*

The definitions of "property" under both the *BIA* and the *PPSA* are largely circular. When stripped down to their core, subject to what is said below in Part II.D of this comment, they

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1 2006 NSCA 91, 22 C.B.R. (5th) 38 [*Saulnier*].

2 R.S.C. 1985, c. F-14.

3 S.N.S. 1995-96, c. 13 [*PPSA*].

4 R.S.C. 1985, c. B-3 [*BIA*].

reduce to "'property' ... includes ... property"[5] and "'personal property' means ... [personal property]."[6] In other words, they are tautologies that give little insight as to how to interpret "property" in the respective legislation.

One way of solving the tautologies would be to give "property" within the definitions the same meaning that a reasonable person (taking into account commercial realities) would.[7] Another would be to adopt a functional approach:

> A 'functional' approach, by contrast, looks first at the policy factors at play. It takes account of how property, as a tool of social life, should be used. This approach recognizes that property is not an acontextual entity that demands conceptual purity, but a purposive concept, to be used to meet social needs. Here one sees that property is inseparably tied to social values.[8]

The Court of Appeal, however, stayed away from common conceptions (for example, what does the reasonable person think is property?) or functional definitions (for example, what do we want to be property?) of property and instead adopted a modern version of the traditional "legal" approach to solve the tautologies: the bundle of rights archetype. The word "property" within the definition, according to the archetype, means a right or a bundle of rights enforceable against others:

> I find a helpful perspective in the following passage from Ziff's *Principles of Property Law*, 3rd Ed., Carswell (2000), p. 2:
>
> > Property is sometimes referred to as a bundle of rights. This simple metaphor provides one helpful way to understand the core concept. It reveals that property is not a thing, but a right, or better, a collection of rights (over things) enforceable against others. Explained another way, the term property signifies a set of relationships among people that concern claims to tangible and intangible items. The reference to 'rights' reveals that property, to a legal positivist, means entitlements created by law. In Jeremy Bentham's words, '[p]roperty and law are born and die together. Before laws were made there was no property; take away laws and property ceases'. Under this conception, property is a legal construct, born and bred under a legal regime. However, there is no complete catalogue of the objects that are regarded as property.[9]

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5 "Property" under the *BIA*, *ibid.*, s. 2 is defined as including: "money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property."

6 *PPSA*, *supra* note 3, s. 2(ad) provides that "'personal property' ... means goods, a document of title, chattel paper, a security, an instrument, money or an intangible" while an "intangible" is further defined in s. 2(w) to mean "personal property that is not goods, a document of title, chattel paper, a security, an instrument or money."

7 *Agricultural Credit Corp. of Saskatchewan v. Finesse Holsteins* (1992), 104 Sask. R. 154 (Q.B.) [*Finesse*]; R. Marcus Mercier, "Saskatoon Auction Mart: Milk Quotas and Finally Some Commercial Reality" (1993) 22 Can. Bus. L.J. 466.

8 Bruce Ziff, *Principles of Property Law*, 3d ed. (Toronto: Carswell, 2000) at 40 [footnote omitted]. See also Tom Johnson, "Security Interests in Discretionary Licenses under the Ontario *Personal Property Security Act*" (1993) 8 B.F.L.R. 123.

9 *Saulnier*, *supra* note 1 at para. 26, quoting Ziff, *ibid.* at 2 [footnotes omitted].

While an electronic search turns up over 300 references to "bundle of rights" as of the date of this comment, including over a dozen casual references by the Supreme Court of Canada (in cases from custody battles to Aboriginal interests), *Saulnier* is significant as it is one of the few cases relating to property to meaningfully adopt the archetype.

B. NECESSARY AND SUFFICIENT INDICIA OF PROPERTY

Once the bundle of rights archetype is adopted, the question turns to which rights must be included in the bundle, and what qualities such rights must have, for that bundle to constitute property.

Courts have been reluctant to definitively answer the question (for good reason according to some commentators).[10] For example, it appears that English courts have adopted a three-part test, laid down by Morritt L.J. in *Re Celtic Extraction Ltd.*,[11] as to whether a licence, quota, or other exemption from a statutory prohibition is "property." At first glance, the test promises to be definitive as the words "must" and "will have" make it clear that each feature is necessary. However, the word "likely" in the lead-up robs it of most of its power:

> It appears to me that these cases indicate the salient features which are *likely* to be found if there is to be conferred on an exemption from some wider statutory prohibition the status of property. First, there *must* be a statutory framework conferring an *entitlement* on one who satisfies certain conditions even though there is some element of discretion exercisable within that framework.... Second, the exemption *must* be *transferable*.... Third, the exemption or licence *will have value*.[12]

Against this backdrop, the Court of Appeal's simple and definitive test for "property" provides clarity as to the necessary and sufficient qualities/indicia of property (or at least intangible personal property):

> In summary, intangible personal property is the residue of "property" that is neither realty nor a chattel. *It is a right recognized by law. There is no other irreducible or prerequisite quality to denominate it as "intangible personal property"*.... One person's intangible right may affect another's "property".[13]

Essentially, the Court of Appeal denies the applicability of the latter two elements of the English test (transferability and value) as laid down in *Celtic*; instead, only the first is necessary. Further, and more importantly, the first, *by itself*, is sufficient provided that the "entitlement" qualifies as a right "recognized" by law. It is unclear as to whether "recognized" is broader than "enforceable," but it seems clear that minimally "recognized" includes enforceable rights. The Court of Appeal did not find that a *separate* "right of

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[10] See e.g. J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) where Penner suggests that the bundle of rights archetype is conceptually deficient because it does not meaningfully describe any sort of relation between people and things and allows its exponents to skirt around which rights are critical for the "bundle" to constitute property.

[11] [2001] 1 Ch. 475 (C.A.) [*Celtic*].

[12] *Ibid.* at para. 33 [emphasis added].

[13] *Supra* note 1 at para. 31 [emphasis added], referencing Ziff, *supra* note 8 at 5-6, 38.

exclusion"[14] must be necessarily included into every property bundle, nor did it find that there is any requirement that any of the rights be alienable[15] or valuable.[16] In regard to the latter, overruling the decision of Kennedy C.J. at the trial level in *Saulnier*, which was decided based on "commercial realities," the Court of Appeal stated:

> I respectfully disagree that "commercial reality", despite its appealing ring, is the basic reference point for legal analysis. Market value may be a determinant in the accounting or appraisal contexts. The question here is legal. Are the licenses "property" under the *BIA* and *PPSA*?[17]

The question, then, was whether Mr. Saulnier had any recognized "rights" in relation to the fishing licences. As such, the Court of Appeal pulled out its magnifying glass in search of recognized rights (and did not look for or discuss alienability or value).

II. THE WALL: THE ABSOLUTE DISCRETION OF THE MINISTER

Courts before *Saulnier* held the magnifying glass directly at the licence to see they could see a "right to fish" or a "right to renewal." The problem was that the following cement wall was in the way: (1) licences to fish are issued in the *absolute discretion* of the Minister; (2) documents (including licences) are the *property of the Crown* and are *not transferable*; and (3) the issuance of a document *does not confer any future right or privilege of renewal.*[18] Cognizant of "commercial realities" — provided that licences, quotas, and other permissions to do what is otherwise prohibited are commercially valuable and are treated as property — courts have taken different approaches when dealing with this wall (and other walls under other regulatory regimes): they have walked straight into it, found doors in it, traversed

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[14] In *National Trust Co. v. Bouckhuyt* (1987), 61 O.R. (2d) 640 at 648 (C.A.) [*National Trust*], in the context of tobacco production quotas, Cory J. stated that "[t]he notion of 'property' imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right. This is distinct from a revocable licence, which simply enables a person to do lawfully what he could not otherwise do." While *Saulnier* does not expressly require a *separate* right of exclusion, it is consistent with the view that without "exclusion" there is no property. Under such view, for one person to have a "right" it must necessarily, by definition of the term "right," be the case that another (or everyone else) is under a corresponding duty not to, or is *excluded* from, interfering with such right (e.g., in *Saulnier*, the Minister is excluded from arbitrarily denying an application for a licence).

[15] Alienability was described as a necessary indicia of property in the following licence/quota cases: *Re Noël*, [1990] J.Q. No. 2401 (Sup. Ct.) (QL), aff'd [1994] J.Q. No. 978 (C.A.) (QL); *209991 Ont. Ltd. v. Cdn. Imperial Bank of Commerce* (1988), 39 B.L.R. 44 (Ont. H.C.J.). However, when push came to shove, in the face of contractual or statutory restrictions on assignment, it was held not to be a necessary indicia in these cases: *Herchuk v. Herchuk* (1983), 48 A.R. 169 (C.A.); *B.C. Packers Ltd. v. Sparrow* (1988), 22 B.C.L.R. (2d) 302 (S.C.) [*B.C. Packers*]; *Theriault v. Corkum* (1993), 121 N.S.R. (2d) 99 (C.A.) [*Theriault*]; *Re Bennett* (1988), 24 B.C.L.R. (2d) 346 (S.C.) [*Bennett*]; *Swift v. Dairywise Farms Ltd.*, [2000] 1 All E.R. 320 (Ch.D.); *Don King Productions Inc. v. Warren*, [1998] 2 All E.R. 608 at 634 (Ch.D.). In another case, the Court held that when a thing is rendered inalienable by choice or agreement (e.g., non-assignment clause) the court should look past such limitation and ask whether the thing under consideration is "intrinsically capable of transfer": *Brinkos v. Brinkos* (1989), 69 O.R. (2d) 225 at 230 (C.A.).

[16] The Court of Appeal is supported by *Re De Marni*, 2005 BCSC 685, 40 B.C.L.R. (4th) 341, where Goepel J. held that real property cannot lose it status as "property" under the *BIA* merely because charged against it was an amount greater than its unencumbered market value.

[17] *Supra* note 1 at para. 17.

[18] See *supra* note 2 and the *Fishery (General) Regulations*, S.O.R./93-53, ss. 7(1), 16.

through it (when the wall in question is soft), put on special goggles to see through it, dug below it and, most recently in *Saulnier*, looked right beside it.

A. WALK STRAIGHT INTO THE WALL (PRIVILEGES VS. RIGHTS)

Walking straight into the wall does not work (and may result in trauma for an unsuspecting creditor). The decision of Cory J. in *National Trust*,[19] in regard to tobacco production quotas, has been extremely influential over the last 15 years. Justice Cory made clear that the "transitory and ephemeral" privilege (the tobacco production quota) faintly seen through the impenetrable wall in question was not property:

> The [Basic Production Quota] 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 it cannot, in my view, be considered to be property.[20]

Justice Cory's characterization has been followed, albeit reluctantly, in a number of Ontario personal property cases and has influenced, or is at least consistent in result with, a number of cases dealing with whether fishing licences themselves are property of the holder.[21] Further, these cases are supported by decisions in cases under the *Fisheries Act*[22] that emphasize the Minister's discretion.[23] They make it clear that the concrete wall cannot be approached straight on: the holder of a licence does not have a "right to fish" or a "right to renewal."

B. OPENING THE DOOR IN THE WALL

1. DOORS CREATED THROUGH LEGISLATION (LEGISLATIVE CLARITY)

Governments are free to install a door in the wall, without sacrificing the stability of the wall (Ministerial discretion) itself, if they so chose. That is, similar to how a partnership is not a legal entity but is treated as such under different legislative provisions, it is open to governments to open the door and *treat* fishing licences as property of the holder under certain legislation (for example, the *BIA* and the *PPSA*) but not under others (such as, the *Fisheries Act*). Indeed, the Saskatchewan, British Columbia, and Northwest Territories governments have expressly included licences as personal property under their respective *PPSAs*.[24] However, even in these provinces there would not be a door in the wall in question,

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19 *Supra* note 14.

20 *Ibid.* at 648 [emphasis added].

21 The following cases are cited in *Saulnier*, *supra* note 1 at para. 43: *Joliffe v. The Queen*, [1986] 1 F.C. 511 (T.D.) [*Joliffe*]; *Bennett*, *supra* note 15; *Caisse populaire de Shippagan Ltée c. Ward* (2000), 21 C.B.R. (4th) 211 (N.B.Q.B.) [*Caisse populaire*]; L.W. Houlden & C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed. (Toronto: Carswell, 1989); *Re Noël*, *supra* note 15; *Re Jenkins* (1997), 32 C.B.R. (4th) 262 (N.S.S.C.); *Re Townsend*, (2002) 32 C.B.R. (4th) 318 (N.S.S.C.).

22 *Supra* note 2.

23 *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 [*Comeau's Sea Foods*]; *Joliffe*, *supra* note 21.

24 See *Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2, s. 2(w); *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 2; *Personal Property Security Act*, S.N.W.T. 1994, c. 8, s. 1.

as "licence" in the respective legislation is defined very narrowly and is arguably not broad enough to include fishing licences.[25]

2. JUDICIALLY DEFINED DOORS (FUNCTIONAL APPROACH)

By using the functional approach (as opposed to the bundle of rights approach), thereby asking whether the thing in question *should* be considered property for the *Act* in question, courts can determine whether or not there should be a door. Similarly, the door may be open under certain legislation and closed under others. However, with a couple exceptions, courts have stayed away from the functional approach and have dealt with the wall in other ways.

C. TRAVERSING THROUGH THE WALL: THE DISCRETIONARY THRESHOLD TEST

Despite what is said above, courts have found that it is possible to traverse through the wall in certain circumstances to see the rights on the other side. Somewhere between a concrete wall (where the Minister has "absolute discretion" in the issuance) and no wall at all (where the Minister has no discretion), is a messy middle marshmallow ground where the Minister is fettered just enough (the "discretionary threshold test" is passed) for the licence in question to be a right.[26] Unlike the concrete wall, a marshmallow wall will be penetrable, but it may take a little bit of dirty work, ignoring or placing little significance in the discretion that the Minister does have, to get through and see "rights" on the other side.

But which walls are concrete and which ones are made of marshmallow? Commercial participants need to be fairly certain in advance before they walk straight into the wall. Professor Tom Johnson categorizes the regulatory frameworks that govern producers, services, and marketing boards (walls) into three categories: (a) Buy-Back Models, such as the Ontario Egg Producers Marketing Board, where the board buys back the product; (b) Institutional Exchange Models, for example, the Ontario Milk Marketing Board, where quotas allotted to producers are traded on an exchange; and (c) "Unfettered" Discretionary Models, like that under the *Fisheries Act*. While, arguably, the first and, in some circumstances, the second type of wall may be made of marshmallow, quite clearly the "Unfettered" Discretionary Model wall is concrete. There is nothing soft and gooey about "absolute discretion."

D. SUPER POWER-INTEREST GOGGLES (INCHOATE RIGHTS, INTERESTS, AND POWERS)

If we change our magnifying glass (that sees only rights), and instead use our super power-interest goggles to look for things like "entitlements," we find that we no longer need to go through the wall looking for rights; instead, we can see previously unnoticed things (such as inchoate rights, interests, and powers) hovering all around us that are good enough to constitute property. While interests and powers, even contingent ones and the property that

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[25] Note that Matheson J. in *Finesse*, *supra* note 7, found that the express addition of licences to the definition only added "clarification." As such, Matheson J. found that agricultural marketing quotas were personal property under the Saskatchewan *Act*, *ibid.*, with or without the clarification.

[26] See *Re Foster* (1992), 8 O.R. (3d) 514 (Gen. Div.) [*Foster*] and Johnson, *supra* note 8.

can be acquired by the exercise of,[27] are *expressly* included in the definition of property of the bankrupt under the *BIA*,[28] they are not expressly included in the definition of property under other legislation (for example, the *PPSA*). As such, courts may be required to determine whether such goggles are *implicitly* available under other legislation (for instance, whether the general notion of property includes "interests" and "powers").[29] Note that to the extent that the general notion of property is consistent across legislation and includes "interests" and "powers," the express references to "interests" and "powers" in the definition of property in the *BIA* will arguably be redundant and only for the sake of clarity.

Using the goggles on the interest setting (including interests in the net of "property"), however, arguably triggers a slippery slope problem as, when used, property is not (a right or) a bundle of rights but is instead (an interest or) a bundle of interests. Defining property as *only* enforceable rights is a relatively secure ledge to separate property from non-property; however, once the ledge is abandoned, finding another theoretically secure ledge is difficult. For example, while not impossible, it is not easy to draw the line between a taxpayer's "interest" in an eventual tax return, which is property,[30] and the interest that a person has in a spouse's will (while such spouse is living and competent), which is not property.[31] Both are future, contingent, and of unknown amount. The higher the setting that the goggles are turned up (thereby allowing more and more interests into the definition of property), the closer the bundle of rights approach, in effect, comes to the functional approach.

E. DIGGING BELOW THE WALL (BENEFICIAL INTERESTS)

Arguably by using the interest goggles to some extent, courts have dug below the provisions concerning legal rights and title in the *Fisheries Act* and its regulations, and have looked for beneficial interests that the holder of a licence enjoys. In *B.C. Packers*,[32] the British Columbia Court of Appeal upheld an agreement to transfer the beneficial interest of a fishing licence. The Court stated:

> 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

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27 The Court of Appeal in *Saulnier*, *supra* note 1 at para. 23, adopted the following words of Atkin, L.J. in *Re Mathieson*, [1927] 1 Ch. 283 at 297 (C.A.) to interpret s. 67(1)(d) of the *BIA*: "The section is awkwardly framed, *for it meant no doubt to vest in the trustee the powers over property, so that the property acquired by the exercise of the power might become the bankrupt's and so be divisible amongst the creditors*" [emphasis in *Saulnier*].

28 See *infra* notes 30 and 41.

29 In *Bennett*, *supra* note 15 at 349, also a case concerning the proprietary status of fishing licences, Ryan L.J. indicated that the reference to interests in the definition of property in the *BIA* "extend[ed] ... the general notion of property" in the *BIA*.

30 In *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765 at 783 [emphasis added], *Iacobucci J.* stated:
> Is there, then, a proprietary character to tax overpayments? Not surprisingly, the *Bankruptcy Act* defines the word "property" in very broad terms. In particular, I note that the definition includes "every description of property, whether ... legal or equitable", and it specifically mentions *"every description of ... interest ... present or future, vested or contingent, in, arising out of or incident to property"*: s. 2. Even if a taxpayer who makes overpayments has no right to compel a refund prior to filing a return, surely that taxpayer has at least a future and contingent interest in the ultimate tax refund.

31 *Re Schroeder* (1965), 8 C.B.R. (N.S.) 156 (Ont. H.C.J.).

32 *Supra* note 15, aff'd 35 B.C.L.R. (2d) 334 (C.A.).

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 restrictions apply only to dealing with the legal title.[33]

By digging in the mud, a number of cases have concluded, to varying degrees, that the holder of a fishing licence has a beneficial interest in the income resulting from the fishing licence.[34] Beneficial interests are clearly property under the *BIA* but, if possible, it is generally more comforting to find property grounded in statute or the common law as opposed to digging in the dirt and resorting to equity.

F. LOOKING BESIDE THE WALL (LIMITED RIGHTS)

The *National Trust*[35] line of cases stared directly at the concrete (absolute discretion) wall and could not see any rights, and therefore could not see any property. The first sighting of rights/property existing beside the wall using the "bundle of rights" approach was by Lederman J. in *Sugarman v. Duca Community Credit Union Ltd.*[36] However, the sighting was arguably undeveloped and preliminary as: (i) it was only upheld on appeal by the Ontario Court of Appeal as an "alternative" way to reach the same result; (ii) the nursing home licence in question was arguably behind a wall that was rather marshmallowy (the Minister's discretion was somewhat fettered); and (iii) Lederman J. was heavily influenced by "commercial realities" and arguably, in part, opened a door under the functional approach.

The Court of Appeal in *Saulnier*, however, confirmed the sighting.

III. THE WALL IN *SAULNIER*

The Court of Appeal saw a "right," and therefore property in the holder of the licence. However, the right sighted by the Court of Appeal was not like other rights. Other rights were enforceable for damages; whereas, the right sighted by the Court of Appeal could not be enforced for damages, but instead could only be enforced to *set aside a ministerial decision* (based on one of the standards of review, depending on the circumstances, under the pragmatic and functional approach): "A *legal right to damages* or *to set aside a ministerial decision* is, in my view, intangible personal property under the broad definition in s. 2 of the *BIA*."[37]

Such right held by the holder is, of course, subject to the Minister's discretion to deny a renewal on *good faith* considerations. The trustee takes no better interest: "The trustee's interest is [like the bankrupt's interest was] subject to the risk that the Minister of Fisheries,

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33 *Ibid.* at 340.

34 The following cases are cited in *Saulnier* at para. 37 in support of this proposition: *Bennett*, *supra* note 15; *Re Rogers*, 2001 ABQB 551, 42 C.B.R. (4th) 310; *Caisse populaire*, *supra* note 21; *Re Dugas*, 2003 NBQB 220, 263 N.B.R. (2d) 216; *Joliffe*, *supra* note 21; Houlden & Morawetz, *supra* note 21. See also *Theriault*, *supra* note 15; *Foster*, *supra* note 26; *Comeau's Sea Foods*, *supra* note 23 at 33 (referring to *Joliffe*), 49. Note, however, arguably conflicting with the Court of Appeal in *Saulnier* (discussed below), the Court in *Bennett* held that the holder does not have a beneficial interest to re-apply for a licence, even when wearing the super power-interest goggles.

35 *Supra* note 14.

36 (1998), 38 O.R. (3d) 429 (Gen. Div.), aff'd (1999), 44 O.R. (3d) 257 (C.A.).

37 *Supra* note 1 at para. 52 [emphasis added].

in the exercise of his discretion as intended by Parliament, will deny the request to renew or reissue the license."[38]

How was the Court of Appeal able to see this "right," in the context of an "absolute discretion" wall, where other courts could not? The following is clear: unlike the *National Trust* line of cases, it did not walk straight into the wall, nor did it deny the concreteness of the wall (the Minister's absolute discretion) or open up a functional approach "commercial reality" door. Instead, it saw property in the following three ways.

A. DIGGING AND LOOKING BESIDE THE WALL (POSSIBLY WHILE WEARING GOGGLES)

The Court of Appeal found that the first two ways "converge" with each other. That is, the Court of Appeal saw the same right (in substance, if not in form) whether it dug in the ground for beneficial interests or looked beside the wall for limited legal rights (to set aside ministerial decisions):

> In my view, the principles espoused by the three Courts of Appeal in *British Columbia 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 British Columbia 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 the *National Trust* line of cases.[39]

It is not clear whether the super power-interest goggles (in "interest" seeking mode) were required to be turned on, under either approach, to see this "right." To the extent that they were, given that the Court of Appeal found that the holder of a licence also has property as defined in the *PPSA*,[40] it seems that the Court of Appeal confirmed that at least certain interests constitute property under the *PPSA* (the goggles can also be used under the *PPSA*). Assuming that goggles were utilized by the Court, it seems to me that the Court of Appeal was able to find a tenable ledge (by adding rights that can be enforced to set aside decisions) and avoid the slippery slope of stepping too far away from the safe position where property is defined to include only those rights where damages can be obtained.

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38 *Ibid.* at para. 56.

39 *Ibid.* at para. 49 [emphasis added].

40 *Supra* note 3.

B. WEARING GOGGLES IN THE "POWER" SETTING

Further, arguably unconsidered in other cases, the Court also found property by using the super power-interest goggles in the "power" setting under s. 67(1)(d) of the *BIA*:[41]

> Respecting s. 67(1)(d) of the *BIA*, my conclusions are these:
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> (a) Mr. Saulnier had the power to apply for a renewal of his fishing license or reissuance to his designate. He had the legal right to resist an arbitrary denial of that application, either under *Comeau's* formulation or by the appropriate standard of review under the pragmatic and functional approach.
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> (b) These rights related to Mr. Saulnier's power to apply for a renewal of the fishing license. The fishing license, though not itself "property", would give to the license holder a "property" right (i.e. the beneficial interest) to the earnings during the term of the license, discussed above.
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> (c) Mr. Saulnier's entitlement to apply, coupled with his legal right to resist arbitrary denial, is a "power" that would assist him to obtain property, within the meaning of s. 67(1)(d) and *Mathieson* quoted earlier.[42]

IV. THE WALL IN *RE RAE*

It is interesting to note that Warner J. in *Re Rae*,[43] an English case based on extremely similar facts as *Saulnier*,[44] came to a similar conclusion as the Court of Appeal in *Saulnier*. Justice Warner adopted the word "entitlement" to refer to what was held by the bankrupt:

> I do not of course intend to suggest, by the use of that phrase, that the entitlement is a legal right, any more than I take the ministry to have so intended by the use of the word 'entitlement' in its letters of 29 April and of 6 May. It is clear and, I think, common ground between counsel that the grant or refusal by the minister of a licence is a matter entirely within her discretion, *subject to the possibility in an appropriate case of an exercise of her discretion being the subject of proceedings for judicial review*.[45]

Justice Warner, like the Court of Appeal in *Saulnier*, found that the right to judicial review is sufficient to constitute property; however, it is interesting that Warner J. expressly required the super power-interest goggles in the "interest" setting to be able to see the right (property). Justice Warner states:

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41 *Supra* note 4. Section 67(1)(d) of the *BIA* provides that : "[the property of the bankrupt shall comprise] such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit."

42 *Supra* note 1 at para. 54.

43 [1995] B.C.C. 102 (Ch.D.).

44 The regulatory regimes involved, while substantially similar, are of course different. Further, likely irrelevant, the Crown in *Re Rae* was an instigator in the proceedings as it was of the opinion, and communicated to the parties involved, that the fishing licence in question became vested in the trustee for bankruptcy; in *Saulnier*, the Crown took no position.

45 *Supra* note 43 at 105-106 [emphasis added].

> I have, however, after considerable hesitation, come to the conclusion that Mr Davies is entitled to succeed on one of his alternative submissions, which was that Mr Rae's recognised entitlement came within the words in s. 436 '*and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to property*', namely his vessels. I think that the recognised entitlement is a present interest incidental to the vessels. The word 'interest' is notoriously one of wide import, the meaning of which varies according to the context in which it is used. Here it is not limited to an interest in property. It extends to an interest 'arising out of, or incidental to, property'. *The difficult question is whether the phrase 'every description of interest' includes an interest which is not enforceable in a court of law but which is nonetheless marketable and so capable of being turned into money.* The passage that I read earlier from the judgment of Sir Nicolas Browne-Wilkinson in *Bristol Airport plc v Powdrill* provides to my mind authoritative guidance in answering that question. The words 'every description of interest' are fairly capable of bearing more than one meaning. *They could be construed as meaning only interests capable of being asserted or defended in legal proceedings (other than proceedings for judicial review). But there is nothing in the words themselves to confine them to that meaning.* Nor do the words that follow, 'whether present or future or vested or contingent', have any obvious limiting effect. That being so it is right to adopt the meaning that gives effect to, rather than frustrates, the statutory purpose.[46]

In the end, Warner J. came to the same conclusion — the licence is not property of the holder but the entitlement to *apply* for the licence is property — as the Court of Appeal in *Saulnier*:

> Second, I will make a declaration (which of course will not bind the minister) that *any entitlement of Mr Rae* to be considered by the Minister of Agriculture, Fisheries and Food for the grant of new fishing licences consequent upon the invalidation of the licences issued to Mr Rae in respect of the four vessels now vested in Mr Hobson as Mr Rae's trustee in bankruptcy (those vessels being named in a schedule to the order) *and any power to waive or surrender such entitlement are property* within the meaning of the *Insolvency Act* 1986 and are accordingly vested in Mr Hobson as Mr Rae's trustee in bankruptcy.[47]

V. IMPLICATIONS OF *SAULNIER*

Whether by looking around, by digging, or by using goggles, the Court of Appeal in *Saulnier* casts the net of property far. This is especially so since the Court of Appeal dropped "value" and "alienability" as necessary requirements of property, thereby prohibiting their use as potential property filters. The right to, and the right to do, pretty much anything, including the *right to apply for* (and not be denied arbitrarily, in bad faith, or based on irrelevant considerations) a professional licence, driver's licence, or other "privilege," falls squarely in the balloon of property unless such right is otherwise excluded. Further, to the extent that a court's discretion is fettered, perhaps the Court of Appeal decision could even be extended to have a significant impact on the right to matrimonial property.[48]

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[46] *Ibid.* at 113 [emphasis added].

[47] *Ibid.* at 114 [emphasis added].

[48] See e.g. *Deloitte, Haskins & Sells Ltd. v. Graham* (1983), 42 A.R. 76 (Q.B.) where the trustee claimed the bankrupt's interest in property from a prior marriage where McDonald J. states at para. 7: "The spouse making the application has no 'right' to matrimonial property. All he (in this case Mr. Graham) has is a right to ask the court for an order in its discretion, applying principles of justice and equity."

If this expanded scope is undesired, one solution would be to carve out certain things from the sphere of property on an *ad hoc* basis. The Court in *Saulnier* acknowledges the power to do so.[49] English decisions in the context of bankruptcy recognize a carve-out of rights of the bankrupt with reference to his body, mind, or character:

> Thus in successive statutes dealing with bankruptcy and insolvency the definition of 'property' has been progressively extended (*Morris v Morgan* [1998] CA Transcript *524*); though, however wide the definition, it is *subject to the implied exclusion of rights of the bankrupt with reference to his body, mind or character*: *Heath v Tang, Stevens v Peacock [1993] 4 All* ER *694, [1993] 1* WLR *1421*.[50]

Indeed, such reasoning has been applied in regard to a driver's licence[51] and also in the context of division of matrimonial property where Killeen L.J. concluded in *Linton v. Linton*:

> It is clear that the right to work, whether in a profession or otherwise, is a right entirely *personal* to the individual and is not capable of transfer to another nor can it be considered as a subject of "ownership" in the ordinary meaning of that term. A professional licence, a tradesman's licence, a university degree and a job or, more broadly, a right to work, all lack the basic hallmarks for personal property and cannot be considered personal property within the [*Family Law Act*].[52]

A person's right to liberty is obviously a right that must be carved out from the concept of property. In *Marr v. Marr Estate*, O'Leary J. states:

> The concept of property, even in its widest sense, is limited to things which are capable of ownership and which are transferable or assignable. *It does not include purely personal rights such as the right to personal safety, the right to a good name, the right to privacy or the right to be free from physical restraint.*[53]

Clearly in the future the courts will be faced with the issue of how far to extend the carve-out of rights of a personal nature, especially if such rights are commercially valuable. The line between a right to apply for a fishing licence (a necessary asset for a fishing business) and a right to apply for a driver's licence (a necessary asset for a self-employed truck driver but also a personal privilege) is clearly tenuous.

This point of course takes us full circle back to the first section of this comment (the traditional definitions of property versus the functional approach). The determinations that will be required to be made in regard to a carve-out are likely to be the same required under the functional approach. As such, in result, there may be little difference between such property models *when the condition precedent of finding a recognized right, thus taking the analysis to the carve-out stage, has been satisfied.* Note, however, that the more that a court

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49 *Supra* note 1 at para. 28.

50 *Re Celtic Extraction Ltd. (in liquidation)*, [1999] 4 All E.R. 684 at 692 (C.A. (Civ. Div.)). See also *Shields v. Boan*, 2005 SKQB 45, 10 C.B.R. (5th) 90 in the context of "'personal injuries."

51 *Pizzey v. Derrough* (1985), 58 C.B.R. (N.S.) 129 (Sask. Q.B.). See also *Allstate Insurance Co. v. Batt*, [1993] O.J. No. 2602 (Gen. Div.) (QL).

52 (1988), 64 O.R. (2d) 18 at 30 (Ont. S.C.) [emphasis in original], aff'd [1990] O.J. No. 2267 at para. 37 (C.A.) (QL).

53 (1989), 101 A.R. 47 at para. 31 (Q.B.) [emphasis added].

is willing to look around, dig, or turn up the setting on its goggles, the easier it becomes to satisfy the condition precedent.

VI. CONCLUDING REMARKS

The Court of Appeal in *Saulnier* wrote an ending to the story that will likely be welcomed by the business community, which is whom, in the words of Kennedy J. in the trial decision, "the law must serve."[54] Before *Saulnier*, likely calculated into the cost of capital that fishers must pay was a risk premium associated with the legal uncertainty of whether fishers could grant a secured interest in their licence (or the beneficial or limited legal rights relating to the licence that they enjoyed). By reducing such uncertainty, fishers will reduce costs. Of course, however, if such fisher should fall into financial distress, he or she will quickly realize that clarity in the law can be double-sided.

It is the story-telling that makes the *Saulnier* decision notable. While coming to a destination that is consistent with business need, the Court chose its own path. It *equated* a "recognized" right with property. While such right may be valuable and the holder of such right may also have a right to alienate, such factual circumstances are irrelevant. They are dead weight considerations that cloud the legal concept of property. Further, the Court saw property in the hands of the holder of a licence or quota even when the Minister has "absolute discretion," provided that the Minister is fettered and restricted from acting arbitrarily.

Going forward, it will be interesting to see how the principles laid out in *Saulnier* will be applied to other types of licences, quotas, and other types of intangible property, and how much will be carved-out of the definition of property pursuant to something akin to a body, mind, or character exemption. The story is not over (especially if the Supreme Court of Canada grants leave to Mr. Saulnier's appeal of the Court of Appeal's decision in *Saulnier*).

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[54] *Saulnier (Receiver of) v. Saulnier*, 2006 NSSC 34, 17 C.B.R. (5th) 182.