

AMENDMENTS TO PERSONAL PROPERTY SECURITY ACT ALLOWING BANKS TO TAKE SECURITY
OVER FISHING LICENCES COMES INTO EFFECT 1 SEPTEMBER 2012: *Banks Permitted to Take
Security over Fishing Licences*

By Brad Caldwell

As noted in the *Mariner's News* section of the January issue of *Western Mariner*, although the Legislature of British Columbia passed the *Personal Property Security Amendment Act, 2011* in November of 2011, it delayed implementation of the new amendments in order to give the public an opportunity familiarize themselves with the changes. It has now been announced that the new law will likely take effect on **1 September 2012**.

Limitations of the new legislation include the following:

- 1) The legislation is only applicable to the parties to a loan agreement and their respective receivers and/or trustees in bankruptcy, it does not bind the Federal Department of Fisheries and Oceans;
- 2) There is a rebuttable presumption that legislation only has prospective effect, so loan agreements signed before 1 September 2012 that purport to encumber fishing licences would likely not be enforceable.

Given the fact that the *Personal Property Security Act* ("PPSA") does not bind the Department of Fisheries and Oceans ("DFO"), it is helpful that DFO has created its new Notice and Acknowledgement System. The positive aspects of this system include the following:

- 1) A notice of the loan agreement involving a fish licence will be filed at DFO with the fish harvester's licence information;
- 2) The fish harvester must consent to DFO notifying the lender if the fish harvester does not pay his or her licence fees or fails to renew the licence;
- 3) Prior to transferring quota for more than one season or transferring a licence, the fish harvester must file an acknowledgement signed by the lender;
- 4) DFO has indicated a desire to develop "procedures for working with trustees in bankruptcy and secured creditors and their receivers" to "address the concerns of the financial sector about the security of loans against fishing licences"; and
- 5) DFO has indicated that it will accept requests respecting licences from secured creditors and receivers.

The limitations of the Notice and Acknowledgement System include the following:

- 1) Its use is limited to “Recognized Financial Institutions” granting loans where there is no third party, such as a fish processor involved that controls or influences decisions regarding licence transfers; and
- 2) DFO explicitly retains its discretion with respect to approvals of licence transfers and simply states that a Notice of a Recognized Financial Institution is a consideration that will be taken into account by DFO in determining whether to approve a request submitted by a secured creditor along with any court decisions or legal opinions.

With respect to prohibition on third parties, this effectively prevents fish processors from guaranteeing loans and co-owning fishing vessels and licences. This is a response to concerns, mainly on the east coast, regarding corporate concentration in the fishing industry. Given the large number of fish harvesters approaching retirement age, the Canadian Maritime Law Association recently made a submission to DFO suggesting that the benefits of the Notice and Acknowledgement System be extended to vendors offering vendor financing to purchasers. To date no response has been received.

With respect to DFO retaining its discretion regarding approval of licence transfers by banks, in the past DFO has recognized the rights of banks exercising their power of sale under marine mortgages to transfer fishing vessels and vessel based fishing licences attached to those vessels. Accordingly, it is likely that it will do so once again under the more formalized Notice and Acknowledgement System as supplemented by Personal Property Security legislation. It is also likely that they will now do so for non-vessel based licences. However, until a test case has demonstrated DFO’s continued commitment to enforcing loan agreements, financial institutions will likely charge a premium for such loans.

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