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IN THE WAKE OF THE BINGO QUEEN: ARE LICENCES PROPERTY?

By

Anthony Duggan*

1. Introduction

In Saulnier v. Royal Bank of Canada, 1 the Supreme Court of Canada held that a fishing licence is property for the purposes of both the Bankruptcy and Insolvency Act 2 and the provincial personal property security statutes.3 The consequences were that: (1) subject to security interests, Saulnier’s interest in the licence passed to his trustee in bankruptcy and became part of the bankruptcy estate; 4 and (2) the bank, which had entered into a general security agreement with Saulnier relating to all his present and after-acquired personal property, was entitled to claim Saulnier’s interest in the licence as part of its collateral. The eponymous Bingo Queen was Saulnier’s boat and also a company of which he was the sole owner. 5

Although the focus of the case was on the bankruptcy and personal property security laws, the decision has implications for the meaning of property at large and the way in which courts and legal scholars approach the question. There is a tendency toward “doctrinal scholasticism” in the case law and mainstream literature which is at odds with

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1 2008 SCC 58.
2 RSC 1985, c.B-3 (“BIA”).
3 More specifically, the licence was personal property in the form of an intangible as defined in the personal property security legislation. The statute immediately in issue was the Nova Scotia Personal Property Security Act SNS 1995-1996, c.13, but the decision is relevant to the other provincial Personal Property Security Acts (“PPSAs”) as well, subject to the statutory interventions discussed in Part 4(c), below.
4 BIA, s.71.
5 For a fuller account of the facts, the decisions of the courts below and prior case law see Thomas G.W. Telfer, “Statutory Licences and the Search for Property: The End of the Imbroglio” (2007) 45 CBLJ 224.
the underlying policy considerations. In this paper, I aim to: (1) show how this tension between what I will call “formalism” and “functionalism” manifests itself in Saulnier; (2) critically analyze Saulnier from a functional perspective; and (3) explore the wider implications of the decision. In relation to (1), I will argue that Saulnier is open to both a formalist and a functionalist interpretation and that the significance of the decision varies depending on which of these interpretations the reader chooses to give it. In relation to (2), I will argue that: (a) from a functional perspective, the court was correct in concluding that a statutory licence is property for the purposes of both the bankruptcy laws and the personal property security statutes; and (b) the court was right in declining to hold that a licence is property for the purposes of the law at large. In relation to (3), I will explore the implications of the decision for contractual licences in the bankruptcy and secured transactions contexts and whether the inclusion of an anti-assignment provision in the licence agreement makes a difference. I will also discuss various law reform initiatives and critically analyze them from the same functional perspective that I apply to Saulnier.

Part 2, below describes the formal and functional approaches to the legal definition of property. Part 3 explores the tension between formalism and functionalism in Saulnier. Part 4 explains the decision’s wider implications from the functional perspective and canvasses the law reform options. Part 5 concludes.

2. Formalism and functionalism in the definition of property

(a) Introduction

The formal approach to the legal meaning of property is to construct a definition in the abstract, typically by a process of induction from earlier cases, and then to ask whether the entitlement in question falls within the definition. The exercise involves a search for the essential characteristics of a property right which distinguish it from a contractual or

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other simply personal right. By contrast, the functional approach focuses on the reason why the entitlement holder in a given case wants a property right and it compares the policy advantages and disadvantages of allowing the claim. In summary, the formal approach is precedent-driven, whereas the functional approach is policy driven.

(b) The formal approach

The formal approach of reasoning by induction from earlier cases has produced a number of competing tests for determining whether an entitlement qualifies as property. The following is a short critical account of the various attempts.

(i) Commercial reality. One approach is to ask whether the entitlement has market value or, in other words, whether there are buyers willing to pay for it. This is sometimes called the “commercial reality test” and it is the test the trial judge in Saulnier applied to support the conclusion that Saulnier’s fishing licence was property.\(^7\) The commercial reality test involves the following syllogism: (1) only proprietary entitlements are marketable; (2) the law should facilitate markets; (3) therefore, if there is proof of willing buyers for the entitlement in question, the court should say it is property. This is, of course, question-begging because a prospective buyer’s willingness to pay for the entitlement is likely to depend on whether transfers are legally valid but, \textit{ex hypothesi}, a transfer is not legally valid unless the entitlement is property. In other words, the commercial reality test defines property by reference to the reason for asking the question in the first place. Aside from this logical difficulty, there is also the empirical objection that not all entitlements which the law treats as property have market value,\(^8\) or, as Justice Binnie writing for the Supreme Court put it in \textit{Saulnier}, “many things that have commercial value do not constitute property, while the value of some property may be minimal”.\(^9\)
(ii) Exclusivity. A second approach is to ask whether the holder of the entitlement has the right to exclude third parties from enjoying the entitlement, in other words, whether the entitlement is good against all the world rather than being enforceable only against the grantor.\(^{10}\) “Property depends upon exclusion by law from interference”.\(^{11}\) The ability to exclude others goes to the marketability of the entitlement by making the entitlement more attractive to potential buyers or, in other words, by facilitating commodification of the entitlement.\(^{12}\) In this respect, the exclusivity test is related to both the commercial reality test discussed above and the alienability test, discussed below.

One objection to the exclusivity test is that it fails to distinguish between property and contract rights. Contract rights, too, are good against all the world, at least in the sense that a third party who intentionally interferes with a contract right may be liable in tort to the holder of the entitlement.\(^{13}\) A second difficulty is that the exclusivity test runs together two different scenarios, one involving tort and the other contract. For example, assume A, a property owner, gives B an exclusive licence to use the property. The exclusivity test suggests that the licence is property because B can sue in tort to prevent a third party (C) from exercising the same entitlement. Now assume that B purports to transfer the licence to C and A objects. In so far as the validity of the transfer depends on whether the licence is property, the exclusivity test is unhelpful because B’s right to prevent C from tortiously invading his entitlement has nothing immediately obvious to do with his contractual right to dispose of the entitlement to C.\(^{14}\) In other words, it is unclear what relevance B’s rights against C in the first scenario, above has to B’s rights against A in the second scenario.


\(^{12}\) Ibid.

\(^{13}\) Hansmann and Kraakman, op.cit. at p.410.

\(^{14}\) Ibid.
The exclusivity test presupposes one particular type of dispute to the exclusion of others. It focuses on B’s rights relative to C (can B prevent C from unilaterally exercising the entitlement?), but it overlooks B’s rights relative to A (can A prevent B from transferring the entitlement to C?). Perhaps more fundamentally, it also overlooks B’s rights relative to A’s successors in title. For example, assume that A transfers the property to X who claims not to be bound by B’s licence agreement with A. In so far as the dispute between B and X depends on whether the licence is property, the exclusivity test is unhelpful because it engages the wrong variable. It is hard to see what B’s ability to prevent C from using the property has to do with whether B can enforce the licence against X.15

(iii) Alienability. A third approach is to ask whether the entitlement holder has the right to transfer the entitlement to a third party. The alienability test is related to the commercial reality test, in the sense that the commercial reality test depends on the availability of willing buyers which, in turn, presupposes that the entitlement is transferable. It also relates to the exclusivity test in the sense that making the entitlement exclusive facilitates its commodification. The alienability test is not supported by the case law. There seems to be general agreement that “the ability to transfer is not necessarily an attribute of property”.16 More fundamentally, like the exclusivity test, the alienability test collapses the entitlement holder’s right to transfer the entitlement to a third party with the right to enforce the entitlement against the grantor’s successors in title and it is not clear what bearing the entitlement holder’s rights in one context have on her rights in the other.

(iv) Stability. Yet another approach is to ask whether the entitlement is sufficiently stable and permanent to qualify as property. For example, in National Trust Co. v. Bouckhuyt,17 the Ontario Court of Appeal held that a tobacco production quota was not property for PPSA purposes because, given the marketing board’s statutory discretion to allot, reduce and cancel quotas, the entitlement was too “transitory and ephemeral” to be property.18

15 Ibid.
16 Telfer, op. cit. at p.245 and see the cases and secondary literature Telfer cites at pp 244-245.
18 Ibid. at para. 23.
The decision suggests that if the licensing authority has some discretion to deny, cancel or refuse to renew a licence, the licence is not property, but later cases have added the gloss that the amount of discretion is relevant so that the question has become one of degree to be determined on a case-by-case basis.\(^{19}\)

As Justice Binnie pointed out in Saulnier, the stability test is inconsistent with the generally accepted view that the impermanence of an entitlement is not material: “a lease of land for one day or one hour is undeniably a property interest, as is a lease terminable at pleasure. A third party may be willing to pay ‘key money’ to take over a shop lease that is soon to expire in the expectation (reasonable or not) that a renewal will be forthcoming”\(^{20}\)

Moreover, because the stability test involves a question of degree, it is indeterminate so that parties cannot be sure at the time of their contract whether, in the event of a dispute, the court will uphold the entitlement or not. In the PPSA context, this uncertainty increases the risk of lending and is likely to affect the cost and availability of credit.\(^{21}\)

\((v)\) Specific enforceability. It is sometimes suggested that the availability of specific performance determines whether an entitlement is property. The main source of this suggestion is the maxim, “equity deems as done what ought to be done”, meaning in the present context that if the entitlement is specifically enforceable, equity anticipates the outcome of the litigation and treats the entitlement as property from its inception.\(^{22}\)

However, this is simply a technique for the legal recognition of property rights, not a definition. To say that a specifically enforceable entitlement is property presupposes that

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\(^{20}\) 2008 SCC 58 at para.[37].

\(^{21}\) Ibid. at para.[38].

\(^{22}\) See, e.g., Lysaght v. Edwards (1876) 2 Ch.D. 499 (CA). See also Guido Calabresi and Douglas Melamed, “Property Rules, Liability Rules and Inalienability: One View of the Cathedral” (1972) 85 Harvard Law Review 1089, arguing that specific performance is a “property rule” in the sense that it allows the parties to trade the entitlement for a mutually agreed price, in contrast to the damages remedy which allows the court to determine the price of any trade.
we know the meaning of property, but an inquiry into the meaning of property simply
takes us back to the other tests discussed above.

(c) The functional approach

The leading account of the functional approach to property rights is Hansmann and
Kraakman’s “Property, Contract and Verification”. Their analysis can be summarized
as follows. (1) The key distinguishing feature of a property right in an asset is that a
property right runs with the asset or, to continue the nomenclature from the examples
discussed above, it is enforceable by B against X. (2) The main benefit of a property right
is that it saves B transactions costs, first by avoiding the need for B to negotiate a new
agreement with X and secondly, by avoiding the risk that X might decline. (3) The main
cost of property rights are verification costs, in other words, the cost to X and parties
dealing with X of discovering B’s interest. (4) The law’s primary response to the
verification costs problem is to assume that all property rights in an asset are held by a
single owner, but the law allows partitioning of property rights provided there is adequate
notice to potentially affected third parties (is there a relatively low cost way for X and
parties dealing with X to discover B’s interest?) (5) The question whether to recognize a
new property right, that is to say, a different method of partitioning, requires a
comparison of the costs and benefits identified in (2) and (3), above.

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24 The law responds in various ways to the verification costs problem. For example, sometimes it insists on
B taking possession of the asset as a condition of obtaining a property right (see, e.g., Twyne’s Case 3
Co.Rep. 806, 76 Eng.Rep. 809 (Star Chamber, 1601)); sometimes it requires registration of B’s entitlement
(e.g., the PPSAs provide for registration of security interests); and sometimes it makes B’s entitlement
subject to X’s knowledge at the time of acquiring the asset from A (e.g., a bona fide purchaser of the legal
estate for value and without notice of a prior equitable claim obtains clear title). Accounts receivable are an
interesting example. An account receivable is a payment obligation owed by a customer to a supplier. As
between customer and supplier, the obligation is a purely personal one. However, it is clear that a supplier
can assign its accounts, or create a security interest in them, and that the assignment or security interest
runs with the accounts in the sense of being enforceable against a later assignee. The law solved the later
assignee’s verification costs problem, initially via the rule in Dearle v. Hall (1823) 3 Russ. 1 and,
subsequently, by registration; all the provincial PPSAs provide for registration of both security and non-
security assignments of accounts. These developments paved the way for treating an account as property, in
the sense described in the text.
25 For a competing account, see Merrill and Smith, op.cit. n. 10, above. According to Merrill and Smith,
(1) the defining characteristic of a property right is that property rights are good against all the world and
(2) the main costs of partitioning are information costs (too many different property rights may make it
difficult for potential purchasers to understand precisely what they are buying). Hansmann and Kraakman’s
From this perspective, alienability is neither a necessary nor a sufficient condition of property rights. In other words, the fact that an entitlement is transferable does not itself make the entitlement property (a transferable entitlement in an asset may not be enforceable against the grantor’s successors in title). Conversely, the fact that an entitlement is non-transferable does not prevent the conclusion that it is property (a non-transferable entitlement in an asset may still be enforceable against the grantor’s successors in title). The questions whether an entitlement is property and whether an entitlement is transferable turn on different policy variables. The relevant policy consideration for the transferability question is the value A places on B’s having a non-transferable entitlement relative to the value B places on having a transferable one. Where the entitlement in question is a statutory licence and A is the government, the corresponding relevant consideration is the social value of the policy behind the licensing statute relative to the value of facilitating markets for the sale of licensed business enterprises. Where what B wants to do is create a security interest in a statutory licence, the relevant consideration is the value of the policy behind the licensing statute relative to the value of facilitating the provision of business credit.

response to the first claim is discussed in text at nn 12-14, above. Their response to the second claim is that: (1) Merrill and Smith fail to explain why property law is more restrictive than contract law (“if there is an optimal finite number of standard forms for property rights, why is not the same true for contract rights?”: *ibid* at p.380). (2) The information costs problem is over-stated: (“so long as there are clear definitions and labels for the forms most needed, the ability of parties to transact in those forms will not be compromised by the availability of additional forms: *ibid* at p.381) (3) The claim lacks empirical support: “property law does not, in fact, offer a fixed set of well-defined forms from which parties must choose” (*ibid* at p.382).

26 It is true that alienability attracts verification costs. Assume B has contractual rights against A which she assigns to C. A needs some means of discovering that the obligation is now owed to C and both A and C need some means of verifying that they have a common understanding of the terms of the claim. However, “the original contract between A and B can generally serve as an adequate means of verification, since the contract itself can be transferred from B to C (and in turn others) as evidence of the nature of the claim, and possession of the document … can serve as evidence of the rightful claimholder.” This means that there is no need to invoke the apparatus of property law to solve the problem: *ibid* at pp 411-412.
3. Formalism and functionalism in Saulnier

(a) Introduction

In Saulnier, the court had to decide whether: (1) the fishing licence formed part of the debtor’s bankruptcy estate; and (2) a fishing licence is valid collateral for a security interest. From the functional perspective outlined above, these are both transferability questions, not property questions. The first question is a transferability one in the sense that it relates to the assignment by operation of law of the licence-holder’s entitlement to his trustee in bankruptcy. The second question is a transferability one in the sense that it relates to the licence-holder’s ability to partition his entitlement by creating a security interest in favour of a third party. Nevertheless both questions are forced by the governing legislation into the mould of a property question.

The first question is governed by BIA, s.71, which provides that, on bankruptcy, subject to the rights of secured creditors, the bankrupt’s property passes to and vests in the trustee. This language makes the transferability of the licence to the trustee a function of property. In other words, the only way the court can determine the transferability question within the scheme of the statute is to ask itself whether the licence is property. Nevertheless, this is no more than a statutory artifice and it should not be allowed to distract attention from the real question. More or less the same is true of the second question, which is governed by the PPSA. The PPSA implicitly invalidates a security

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27 Fishery (General) Regulations SOR/93-53, s.16 provides that a fishing licence is a document which is “the property of the Crown and is not transferrable”. The court treated this provision as referring only to the licence document itself, as opposed to the entitlement the licence conferred: [2008] SCC 58 ar para.[45].

28 There is a verification costs issue in this scenario, but the problem is a function of the security interest, not the licence. The verification costs problem arises at the point where B partitions his entitlement in the licence by creating the security interest in C’s favour. The risk is that third parties having later dealings with B in relation to the licence may not know about C’s security interest. Note that the problem would still arise even if the subject-matter of the transaction was not a licence but, say, a truck, an instrument or accounts receivable instead. The PPSAs address the problem by requiring registration of security interests in personal property of all kinds.

29 BIA, s.2 defines “property” expansively to mean “any type of property, whether situated in Canada or elsewhere, and includes 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”. 
interest unless the collateral is (personal) property. Once again, this formulation forces what is essentially a transferability question into the strait-jacket of a property question. However, as in the BIA context, the relevant policy considerations remain unchanged.

(b) The functional aspect of Saulnier

These points are reflected in the Saulnier judgment which, having noted that the court’s concern is not with the “concept of ‘property’ in the abstract”, the BIA and CCAA are “commercial statutes which should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes”; and “‘property’ is a term of some elasticity that takes its meaning from the context”, goes on to acknowledge, at least obliquely, that: (1) in the BIA and PPSA contexts, the issues before the court were transferability questions, not property questions; and (2) the resolution of transferability questions turns on a weighing of costs and benefits as discussed above. Justice Binnie identified the benefit of transferability in the PPSA context as follows:

A commercial fisher with a ramshackle boat and a licence to fish is much better off financially than a fisher with a great boat tied up at the wharf and no licence. Financial institutions looking for readily marketable loan collateral want to snap up licences issued under the federal Regulations, which in the case of the lobster fishery can have a dockside value that fluctuates up to a half million dollars or more. Fishers want to offer as much collateral as they can to obtain the loans needed to acquire the equipment to enable them to put to sea.

In other words, allowing security interests in a fishing licence facilitates the fisher’s access to credit. Though Justice Binnie did not make the point expressly, a parallel consideration applies to treating a fishing licence as part of the fisher’s bankruptcy estate:

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30 2008 SCC 58 at para.[16].
31 Ibid. para. [42].
32 Ibid. para.[16].
33 According to Justice Binnie, “it is extremely doubtful that a simple licence could itself be considered property at common law”: 2008 SCC 58 at para.[23] The functional explanation for why, despite this, a licence may be property in the BIA and PPSA contexts is that in these contexts, the question is really about transferability.
34 Ibid. at para.[13].
such a measure increases the pool of assets available to the debtor’s creditors in
bankruptcy and this additional level of comfort should encourage them to lend in the first
place.

Justice Binnie identified the costs of transferability as follows:

“Canada’s fisheries are a ‘common property resource’, belonging to all the people of
Canada. Under the *Fisheries Act*, it is the Minister’s duty to manage, conserve and
develop the fishery on behalf of Canadians in the public interest … Licensing is a tool
in the arsenal of powers available to the Minister under the *Fisheries Act* to manage
fisheries”.  

By implication, transferability is a cost if it compromises the statutory policy by fettering
the Minister’s discretion.

Justice Binnie goes on to point out that allowing a fishing licence to become part of the
bankrupt licence-holder’s estate does not in any way fetter the Minister’s discretion. The
reason is that the BIA gives the trustee in bankruptcy no greater rights than the debtor
himself had. The debtor holds the licence subject to the Minister’s discretion as provided
by the licensing statute and, likewise, the debtor’s right to transfer the licence is subject
to the Minister’s discretion. Accordingly, the trustee’s rights to hold and transfer the
licence are also at the Minister’s discretion:

It may well be that in the course of a bankruptcy the fishing licence will expire, or has
already expired. If so, the trustee will have the same right as the original holder of an
expired licence to go to the Minister to seek its replacement, and has the same recourse
(or the lack of it) if the request is rejected. The bankrupt can transfer no greater rights
than he possesses. The trustee simply steps into the shoes of the appellant Saulnier and
takes the licence “warts and all”.

These three passages signify an at least implicit cost-benefit analysis: allowing the
licence to become part of the bankruptcy estate or to be used as collateral is important for
facilitating fishers’ access to credit; there are no costs in terms of potentially

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35 *Ibid.* at para.[14], quoting *Comeau’s Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)* [1997] 1 SCR 12 at para.37 *per* Major J.
36 2008 SCC 58 at para.[50].
compromising the policy of the licensing statute; therefore the court should rule in favour of the trustee and the bank, respectively.\textsuperscript{37}

c) The formal aspect of \textit{Saulnier}

Justice Binnie expressed doubts about whether “a simple licence could itself be considered property at common law”.\textsuperscript{38} By the same token, he recognized that “if not property in the common law sense, a fishing licence is a major commercial asset” and, by implication, that making the licence subject to the bankruptcy and secured transactions laws would facilitate the exploitation of its commercial possibilities.\textsuperscript{39} He could have reconciled these two propositions by pointing out that, in the BIA and PPSA contexts, the question whether licences are property is really a question about transferability and so it has no bearing on whether a licence is property at common law, which is a question about property in the strict sense. As it happens, there are points in the judgment where he comes close to making this move. For example, having noted that “property” is “a term of some elasticity that takes its meaning from the context”,\textsuperscript{40} he goes on to say that “because a fishing licence may not qualify as ‘property’ for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.”\textsuperscript{41}

It would have been better to have left matters there, but Justice Binnie opted for a belt and braces approach by advancing a formal argument to support his conclusion, in addition to the functional justification outlined above. The formal argument ran as follows. A fishing licence gives the licence-holder the right to fish, coupled with a right to the catch and the earnings from sale of the catch. “Accordingly, the fishing licence is

\textsuperscript{37}Compare the approach taken below by the Nova Scotia Court of Appeal. The Court of Appeal held that the bundle of rights comprising a licence included the right to apply for renewals and for permission to transfer the licence together with the right to a non-arbitrary determination of the application by the licensing authority and that these rights were property for the purposes of the BIA and PPSA: \textit{Royal Bank of Canada v. Saulnier} (2006) 271 DLR (4th) 34. From a functional perspective, this is not much different from Justice Binnie’s approach: it is just another way of stating the “warts and all” point.
\textsuperscript{38} \textit{Ibid.} at para. [23].
\textsuperscript{39} \textit{Ibid.}
\textsuperscript{40} \textit{Ibid.} at para.[16].
\textsuperscript{41} \textit{Ibid.} (emphasis added).
more than a ‘mere licence’ to do that which is otherwise illegal. It is a licence coupled with a proprietary interest in the harvest from the fishing effort”. As such, it bears some analogy to a *profit a prendre*, which is undeniably a property right at common law and this analogy is sufficiently close to justify treating a fishing licence as property for BIA and PPSA purposes.

The problem is that not all licences have this *profit a prendre*-type characteristic. For example, as Justice Binnie himself pointed out, there is a significant difference between, a quota, such as a tobacco quota or a milk quota, and a fishing licence. The same might be said of a taxicab licence, a nursing home licence and many other cases. His judgment is open to the interpretation that, while a licence in the nature of a *profit a prendre* is property for the purposes of the bankruptcy and secured transactions laws, other kinds of licence are not. This distinction makes no sense in terms of the policy considerations Justice Binnie himself identified, which are relevant regardless of the form the licence takes and it arbitrarily discriminates between different licence-holders. Furthermore, the distinction does not work even at the formal level. Recall that the objective is to provide a formal justification for treating a fishing licence as property for BIA and PPSA purposes, while at the same time avoiding the conclusion that all licences are property at common law. The distinction depends on the assumption that a licence in the nature of a *profit a prendre* is property at common law, but Justice Binnie undermines this assumption by emphasizing that a fishing licence is not *actually a profit a prendre* and so it would probably not be property at common law. In the end, he is stuck between a rock and a hard place: he cannot remain faithful to the prevailing view that a simple licence is not property at common law without doing violence to the accepted meaning of a *profit a prendre*, and he cannot run with the accepted meaning of a *profit a prendre* without also seeming to suggest that all licences are property at common law.

42 Ibid. at para.[22].
43 *National Trust Co. v. Bouckhuyt*, supra n.17.
45 *Foster (Re)*, supra n.19.
46 *Sugarman v. Duca Community Credit Union Ltd*, supra n.19.
47 2008 SCC 58 at paras [33] and [51].
In summary, *Saulnier* has both a formal and a functional aspect which are apparently in conflict with one another. From a functional perspective, the case can be read as deciding that: (1) all licences are property in the BIA and PPSA contexts; (2) this is really a transferability question, not a property question in the strict sense, and so it has no bearing on whether a licence is property at common law; and (3) treating a licence as property in the BIA and PPSA contexts facilitates the licence-holder’s access to credit without compromising the licensing authority’s discretion or the policy of the licensing statute. From a formal perspective, the case stands for the proposition that a licence in the nature of a *profit a prendre* is property in the BIA and PPSA contexts, but other kinds of licence are not. It remains to be seen which of these competing readings will prevail.

4. Some wider implications

(a) Introduction

The focus in *Saulnier* was on statutory licences, but the foregoing analysis has implications for contractual licences as well and in particular for intellectual property licences which are perhaps the most commercially significant variety. Part (b), below, addresses contractual licences. Prior to *Saulnier*, there had been calls for statutory amendments to make it clear that licences are property in the PPSA context. Unfortunately, for the reasons explained above, *Saulnier* has failed to clarify the position and so the need for a statutory solution persists. Part (c), below canvasses the statutory reform question.

(b) Contractual licences

In the case of a statutory licence, the grantor is the government and the licence entitles its holder to engage in activity that would be illegal without the licence. By contrast, in the case of a contractual licence, the grantor is typically a property owner and the licence entitles its holder to use the property. This difference matters because contractual licences engage the verification costs problem Hansmann and Kraakman identify, whereas
statutory licences do not. Recall that the verification costs problem manifests itself when A, the owner of an asset, gives B a licence to use the asset and later transfers the asset to X who denies being bound by the licence. The dispute between X and B turns on whether the licence is property and the property question, in turn, depends on whether the transactions costs savings to B from having a property right exceed the costs to X of discovering B’s entitlement before acquiring the asset from A.\(^{48}\)

In other words, contractual licences give rise to a property question in the strict sense, in addition to a transferability question, whereas statutory licences engage only the transferability question. How courts answer the property question may vary, depending on the kind of licence at issue because the relative costs and benefits may be different from case to case. This may explain the unsettled state of the cases on whether a contractual licence is property at common law.\(^{49}\) In any event, the property question is separate from the transferability question and, at least in cases where the debtor is the licence-holder, the question whether the licence is property for the purposes of the bankruptcy and secured transactions laws goes to transferability, not property in the strict sense.\(^{50}\) In the BIA context, the question for both statutory and contractual licences is not whether B’s entitlement is enforceable against X but, rather, whether the entitlement is transferable to B’s trustee in bankruptcy. Likewise, in the PPSA context, the question is whether B’s entitlement is transferable in the sense that B can partition it by creating a security interest in C’s favour. It is true that the partitioning of B’s licence raises a verification costs issue but this is due to the creation of the security interest, not the creation of the licence and the PPSAs address the problem by requiring registration of security interests.

In relation to statutory licences, the main concern in determining the transferability question is to facilitate access to credit while at the same time not fettering the licensing authority’s discretion or compromising the policy of the licensing statute. In relation to

\(^{48}\) See Part 2(c), above.

\(^{49}\) “It is extremely doubtful that a simple licence could itself be considered property at common law”: Saulnier 2008 SCC 58 at para.[23].

\(^{50}\) As to where the debtor is the licence grantor, see text following n.52, below.
contractual licences, the corresponding issue arises in cases where the licence incorporates an anti-assignment provision so that the lawmaker has to balance the value to B of increased access to credit against the value to A of restricting the licence to B. Recently enacted BIA amendments, not yet in force, explicitly acknowledge this trade-off in the bankruptcy context. New BIA, section 84.1 provides that, on application by a trustee and on notice to every party to an agreement, a court may make an order assigning the debtor’s rights and obligations under the agreement to a specified person. In deciding whether to make an order, the court must consider whether the proposed assignee is able to perform the obligations and whether the assignment is “appropriate”. The provision, which would apply to contractual licences, over-rides any anti-assignment provision in the contract.\(^{51}\) The clear implication is that a contractual licence constitutes property in the BIA context, regardless of any anti-assignment provision, and that, consequently, it passes to and vests in the trustee on the date of the bankruptcy.\(^{52}\) The requirement for court approval of the assignment accommodates, on a case-by-case basis, the need to balance the interests of the licence-holding debtor (B) against those of the licence grantor (A), as described above.

The foregoing analysis deals with the case where the debtor is the licence-holder, not the licence grantor. Consider the following case. A, the owner of an asset, gives B a licence to use the asset. A becomes bankrupt during the currency of the licence and A’s trustee in bankruptcy wants to terminate the licence, perhaps because he can obtain a higher fee from giving the licence to someone else, or perhaps because he can sell the underlying asset for a higher price without the licence. This scenario raises a property question in the strict sense because it involves asking whether B’s entitlement runs with the underlying asset so as to be enforceable against A’s trustee.

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\(^{52}\) By further implication, the trustee may affirm the licence and take it over himself for the benefit of the estate and, by virtue of new BIA, s.84.2, the trustee’s rights in this regard over-ride any *ipso facto* provision in the agreement. The reforms make parallel changes to the *Companies’ Creditors Arrangement Act* RSC 1985, c.C-36 (“CCAA”): new CCAA, ss.11.3 and 34 correspond with BIA, ss 84.1 and 84.2, respectively.
In principle, the answer depends on whether the transactions cost savings to B from having a property right in this sense exceed the costs to the trustee of discovering B’s entitlement. B’s transactions costs savings are likely to be substantial because, typically, B’s business will depend on the licence. If the law gave A or A’s trustee a unilateral right of termination, the likely *ex post* result would be to harm B’s business, perhaps to the extent of forcing B herself into bankruptcy, while the likely *ex ante* consequence would be to increase the risk of engaging in licensed business activities, thus increasing the cost and reducing the availability of the goods or services such businesses provide. On the other hand, the trustee’s verification costs should be relatively low because it is simply a matter of questioning A about outstanding interests in the asset, assisted if necessary by the trustee’s investigative powers under the bankruptcy laws. These considerations suggest that the trustee should have no right to terminate the licence and this conclusion, in turn, implies that the licence is property in the sense that it runs with the underlying asset and is enforceable against the trustee in bankruptcy.

By and large, the law seems to reflect this analysis. The trustee in bankruptcy has a power at common law to disclaim contracts, but the trustee cannot use the power to dispossess a tenant or disenfranchise a licensee. This implies that a debtor-granted contractual licence is property in the debtor’s bankruptcy, in the sense that it runs with the underlying asset so as to be enforceable against the trustee. It should be stressed that this conclusion is context-specific and it does not follow that the licence is property at large. Assume A’s trustee transfers the underlying asset to X, a willing buyer. Can B enforce the licence against X? Since A’s trustee stands in A’s shoes, having no larger rights than A himself

53 See *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting* (2005) 251 DLR (4th) 328 (BCCA) and cases there cited.

54 *Pearce v. Bastable’s Trustee in Bankruptcy*, [1901] 2 Ch. 122; *Re Bastable, ex parte Trustee*, [1901] 2 K.B. 518 (C.A.); *Re Triangle Lumber & Supply Co.*, (1978), 21 O.R. (2d) 221 (S.C.); *Re Erin Features #1 Ltd.* (1992), 8 C.B.R. (3d) 205 (B.C.S.C.); *Armadale Properties Ltd. v. 700 King St (1997)* Ltd. (2001), 25 C.B.R. (4th) 198 (Ont. Sup. Ct. J.). Recently enacted BIA, s.65.11 and CCAA, s.32 not yet in force, provide for the disclaimer of contracts in BIA proposal proceedings and CCAA restructurings, but both provisions make exceptions for specified kinds of contracts, including an intellectual property licence where the licence grantor is the debtor. There is no express exception for other kinds of contractual licence, but both sections allow the court, on application by the licence-holder, to disallow the disclaimer if, among other things, it would be likely to cause the licence-holder significant financial hardship. There is no corresponding statutory power of disclaimer for straight bankruptcies.
to deal with A’s assets, this question is the same as if, outside bankruptcy, A had transferred the underlying asset to X.\textsuperscript{55} In other words, the issue is not, strictly speaking a bankruptcy one. Since X’s verification costs may be higher than A’s trustee’s, it does not follow that because the licence is enforceable against the trustee it should also be enforceable against X.\textsuperscript{56}

(c) PPSA reforms

To date, Saskatchewan and the Northwest Territories are the only jurisdictions which make specific provision in their PPSAs for licences at large.\textsuperscript{57} The Saskatchewan PPSA defines “intangible” to include a licence and it defines “licence” to mean:

\begin{itemize}
  \item[(i)] a right, whether or not exclusive:
    \begin{itemize}
      \item to manufacture, produce, sell, transport, or otherwise deal with personal property; or
      \item to provide services;
    \end{itemize}
  \item[(ii)] that is transferrable by the grantee with or without restriction or the consent of the grantor.\textsuperscript{58}
\end{itemize}

The definition is clearly wide enough to cover both statutory and contractual licences, but it is limited to transferable licences. In the case of a statutory licence, the definition means that if the governing legislation absolutely prohibits transfers, the PPSA will not apply, but the fact that transfers are subject to the licensing authority’s discretion does not take the licence outside the PPSA definition. In the case of a contractual licence, the definition means that if there is an anti-assignment provision, the PPSA will not apply,

\begin{footnotes}
\textsuperscript{55} See Part 2(c) and text at n.48, above.
\textsuperscript{56} Where the underlying asset is intellectual property, a comprehensive register of intellectual property interests, including licences, would solve the verification costs problem: see generally, Howard P. Knopf (ed), \textit{Security Interests in Intellectual Property} (Thomson Carswell, Toronto, 2002). Assume A, the licence grantor, borrows from X, giving X a security interest in the underlying asset. Is B’s licence enforceable against X in this scenario? In principle, this case should be subject to the same analysis as the bankruptcy scenario discussed in the text. Note Revised Article 9, Uniform Commercial Code, s.9-321 which provides, in effect, that a licensee under a non-exclusive licence takes subject to a security interest unless the secured party authorizes the licence free of the security interest.
\textsuperscript{57} The British Columbia PPSA provides that forestry licences qualify as personal property: RSBC 1996, c.359, s.1.
\textsuperscript{58} S.S. 1993, c.P-6.2, s.2(1)(w) and (z), respectively.
\end{footnotes}
but the fact that transfers are subject to the grantor’s consent does not take the licence outside the PPSA definition. Enforcement of a security interest in a licence will typically involve sale of the licence to a willing buyer, along with the business to which the licence relates. In this connection, the Saskatchewan PPSA provides that the secured party may seize the licence upon giving notice to the debtor and also to the grantor of the licence or the grantor’s successor in title and that the licence may be disposed of only in accordance with the terms and conditions under which the licence was granted. This provision is relevant to the case of a statutory licence where transfers are at the licensing authority’s discretion and also to a contractual licence where transfers require the grantor’s consent.

In 1998, the Canadian Bar Association – Ontario recommended amendments to the Ontario PPSA along the lines of the Saskatchewan model. As Justice Binnie was later to do in *Saulnier*, the submission stressed that the proposal constituted no threat to the grantor’s interests because the secured party takes its security interest “warts and all”:

> Whatever restrictions exist in the terms of the license or in the relevant legislation imposing regulatory requirements will continue to apply. The explicit inclusion of licenses simply means that the OPPSA applies to a security interest in a license. It leaves it up to the secured party, as a matter of commercial judgment, to decide whether the license is suitable collateral having regard to the contractual or statutory restrictions in the license.

The Bar Association proposal was not adopted, apparently because some government stakeholders, including the Ministry of Agriculture, Food and Rural Affairs, opposed it on the ground that Ministries responsible for the issue of government licences and quotas should have exclusive responsibility for the transfer, assignment and creation of interests in them. This concern apparently overlooks the warts and all qualification. In any event,

59 Sections 57(3) and 59(18), respectively.
60 The Northwest Territories legislation is to the same effect. Compare Revised Article 9, Uniform Commercial Code, s.9-408.
the same proposal was put to the government again in 2006 and, again, it was rejected. It appears that, at the political level, the warts and all idea is a hard one to get across.

The Ontario Bar Association Business Law Section’s Personal Property Security Law Subcommittee is currently working on a new draft proposal. As previously noted, the proposed amendment would specify that the statute applies subject to any prohibition in the statute or the licence agreement on transfers or the creation of security interests. However, in contrast to the Saskatchewan model, the effect of such a prohibition on transfers would be simply to prevent the secured party from enforcing its security interest by selling the licence and not to prevent the creation of the security interest at all. The thinking is that the licence itself may be viable collateral even if it is non-transferable because, for example, it may allow the secured party’s receiver to operate the business. On the other hand, the proposed reform would allow the licence grantor to prevent the creation of security interests altogether by expressly prohibiting them in the licensing statute or the licence agreement, as the case may be. The chances of this proposal being adopted are uncertain but the fate of the earlier proposals does not provide much ground for optimism. Given the political challenges of selling the case for statutory reform, Saulnier’s failure to unambiguously resolve the matter assumes added significance.

5. Conclusion

The immediate issue in Saulnier was whether a fishing licence is property for the purposes of the bankruptcy and secured transactions laws. The court held that it was, adopting both a functional and a formal line of argument in support of its conclusion. The functional argument was, basically, that treating a licence as property in the BIA and PPSA contexts facilitates access to credit and that any concerns about the potential for compromising the policy of the licensing statute are misplaced because the trustee in bankruptcy and the secured party, respectively, acquire no greater rights than those held

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63 Letter to the Minister of Government Services dated April 28, 2006 from John R. Cameron on behalf of the Personal Property Security Law Subcommittee, Business Law Section, Ontario Bar Association
by the debtor himself. They take the licence “warts and all”, the warts including any restrictions in the governing statute on the duration of the licence and its transferability. The formal argument was that a fishing licence is property in the BIA and PPSA senses because it is analogous to a profit a prendre.

The functional argument is unexceptionable, but the formal argument is open to criticism because it discriminates arbitrarily between different kinds of licence and it overlooks the policy considerations the court identified in the functional aspect of its judgment. Furthermore, the running together of the formal and functional arguments obscures the significance of the case: on the formal, or narrow, reading the case stands for the proposition that only licences in the nature of a profit a prendre are property in the BIA and PPSA senses, but on the functional, or wider, reading, all statutory licences qualify. It remains to be seen how lower courts will deal with this ambiguity. Prior to Saulnier, there had been calls for PPSA amendments to deal with use of licences as collateral for secured loans. Saulnier should have obviated the need for legislation,64 but instead it seems to have made the need more pressing.

At first glance, the issue in Saulnier seems a fairly narrow one but, on closer study it becomes clear that, at least on its wider reading, the significance of the case extends beyond fishing licences and even beyond licences in general, to the meaning of property at large. The wider lesson to be drawn from the case is that in addressing the question, “what is property?” courts and commentators tend to collapse two distinct sets of concerns, the first relating to the running of the entitlement in question with the asset to which it relates, and the second to the transferability of the entitlement. Keeping the lines separate is an indispensable step for the avoidance of confusion.

64 Telfer, op.cit. at p.252.