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The severance of a water right from a purchase and sale of land

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Cases commented on:

Royal Bank of Canada v Hirsche Herefords, 2012 ABQB 32

This decision concludes that a provincial water licence can be contingently severed from the land or undertaking to which it is appurtenant by way of an agreement of sale and the subsequent registered transfer. The contingency is the Director's approval of the transfer of the water licence to another party under the terms of sections 81 – 82 of the *Water Act*, RSA 2000, c W-5. The decision also confirms the emergence of a water rights market in southern Alberta.

The facts

Hirsche Herefords (HH) was put into receivership. At the time of the receivership HH owned a quarter section of land to which there was an appurtenant interim water licence on the Highwood River with a 1968 priority. A licence must be appurtenant to land or an undertaking (s 58) and typically "runs with the land" (s 58(2)). The receiver, PWC, and its realtor, marketed the land and the water licence as separate lots. PWC and CFC entered into an agreement of sale for the lands in April 2011. The schedule to the agreement contained a clause referring to water rights/irrigation schedule which was struck out and initialed by the parties. At the hearing before the Court to approve the sale, express reference was made to the reservation of water rights and paragraph 7 of the Order approving the sale (the "April Order") stated that:

> 7. The Purchaser is not purchasing or acquiring as part of the Purchase Agreement any title or right in respect of the Water License, Priority No. 1968-01-31-001, File No. 11409 registered in the name of Grant Arthur Hirsche and Annette Hirsche;

The transfer of the land was registered July 22, 2011. PWC subsequently entered into an agreement to sell the water right to XCo for $378,000. CFC opposed court approval of the sale the water rights contending (at para 18) that:

> … the Water License was appurtenant to and ran with the Hirsche Lands, that the Receiver had no jurisdiction to sever the Water License from the Hirsche Lands other than in accordance with the *Water Act*, R.S.A. 2000 c. W-5, as amended, which had not occurred, that the parties had not agreed to exclude the Water License in the Purchase Contract and that the Court lacked the jurisdiction to sever the Water License from the Hirsche Lands.

The Decision

Justice Strekaf approved the sale. She gave two main reasons for concluding that CFC was not in a position to oppose the sale. The first was the doctrine of collateral attack. CFC could have appealed the April Order which clearly approved severing the water right from the sale of the land. CFC failed to do so and accordingly should not be permitted to attack the severance by objecting to the subsequent sale of the water right. Second, the doctrine of estoppel by approbation and reprobation meant that CFC could not at one and the same time both rely on the April Order for its title to the land and yet attack the validity of clause 7. Thus, since it was clear that CFC had not purchased the water licence as part of the agreement of sale it remained only to approve the sale of the licence on terms that respected the transfer approval provisions of the *Water Act* (at para 34):

> The Water License is an asset of the receivership. Water licenses in Alberta are governed by the *Water Act*. Applications to transfer an allocation of water under a water license are to be made to the Director appointed under the *Water Act* (ss 81 - 82). It is for the Director to determine whether a transfer of a water license should be approved. The sale of the Water License 1552277 is approved, subject to obtaining any required approvals from the Director appointed under the *Water Act*.

Comment

The new *Water Act* contemplated a market in water when it entered into force in 1999. The need for a market became a reality when the South Saskatchewan basin was closed to new water licences: see "The Environmental Appeal Board confirms Alberta Environment's decision to reject the application of municipality to obtain additional water from a well." But the market has been slow to emerge and potential buyers such as the Town of Okotoks have had a hard time securing additional water rights. What this decision reveals is a growing understanding of the potential value of water rights severed from the lands to which they were originally appurtenant. The receiver clearly appreciated this and appreciated as well that its obligation to secure value for the creditors might be best achieved by selling the land and water right separately.

The decision is not the end of the story as Justice Strekaf recognizes. The purchaser will still need the Director's approval and the Director will need a concrete application from the purchaser - and in the end may approve or reject the application. And even if the Director approves, s\he may still insist on the 10% conservation holdback (*Water Act*, s 83).

Since Justice Strekaf dealt with the application principally on the basis of the doctrine of collateral attack she must have found it unnecessary to consider the effect of section 58(2) (c) of the *Water Act* which seems to make approval of the Governor in Council a condition precedent to severing (even contingently – the reference to Part 5, Division 2 is a reference to the transfer provisions):

> 58(1) When issuing a licence, including licences issued under Part 5, Division 2, the Director must specify in the licence the land or undertaking to which the licence is appurtenant.
> (2) Subject to Part 5, Division 2, a licence and all works operated under the licence
> (a) are appurtenant to the land or undertaking specified in the licence,

(b) are inseparable from the land or undertaking specified in the licence, and
(c) run with the land or undertaking on any disposition of the land or undertaking unless the Lieutenant Governor in Council orders otherwise.

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