

Court of Appeal approves decision concluding that water rights did not pass with a transfer of land

By Nigel Bankes

Cases Considered:

Canada Finance Corporation Limited v Hirsche Herefords, [2012 ABCA 315](#)

The Court of Appeal has dismissed the appeal from a decision of Justice Strekaf in which she had approved the sale by the receiver of a water right separate from the sale of lands to which the water right was appurtenant. In an earlier ABlawg post I commented on Justice Strekaf's decision ([here](#)).

In this appeal, the Canada Finance Corporation (which had purchased the land – not the water right - under the Court approved terms of sale) (CFC) argued that the sale of the land had to include the water rights since section 58 of the *Water Act*, RSA 2000, c W-5 mandates that water licences run with the land.

The Court rejected that approach concluding instead that, as matter of contract, it was clear that the parties agreed that the sale was subject to the approval of the Court. CFC did not have to complete on the approved terms (which clearly excluded the licence from the sale) but having done so it was bound by those terms. The Court concluded (at para 26) that “Since the water licence was not acquired by the appellant, the appellant is directed to provide the necessary written consent for the transfer to the third party as approved by the chambers judge. Whether the Director approves the transfer of the water licence is beyond the reach of this Court.” The last sentence is an acknowledgement of the transfer provisions of the *Water Act* (ss 81 – 83) which permit transfers (if approved in a relevant water management plan) but subject to the approval of the Director of Water Resources in each particular case. The Court described that process as follows (at paras 17 – 19):

[17] Water licences may be transferred from one parcel to another in accordance with Part 5, Division 2 of the *Water Act*. An application for such a transfer must be made to the Director of Water Resources in accordance with section 81 of the *Water Act*. In most cases, consent of the owner of the land to which the water licence is appurtenant must be obtained. The consent of the landowner to which the water licence is to be transferred must also be obtained. Proposed transfers must undergo public review. In other words, there is a statutorily-prescribed process for transferring water licences.

[18] Water licences are transferred, not by agreement, not by court order, but rather by approval of the Director of Water Resources. Without that approval, they remain with the land to which they are appurtenant. But there is nothing to prevent parties from agreeing to apply to the Director of Water Resources for transfers of water licences.

[19] Courts lack jurisdiction to approve transfers of water licences or to sever water licences from the lands to which they are appurtenant. The impugned condition in the order of the chambers judge (para 7) did not sever the water rights from the land. The effect of that condition was to afford the receiver the opportunity to market the water rights to a third party subject to the approvals mandated by the *Water Act*.

In my comment on Justice Strekaf's judgement I suggested that the Court approved sale had effected a "contingent severance" of the water right from the land; contingent that is upon the approval of the Director to a concrete transfer application. The Court of Appeal does not use that language but I think that the result is the same.

Perhaps the most important part of the judgement is the statement quoted above requiring CFC to provide its consent to the proposed transfer. This makes intuitive sense but it would be nice to know the precise source of this positive obligation. Does it rest on the terms of the 2010 Agricultural Real Estate Purchase Contract, or does the Court simply infer this obligation on the basis that CFC has no contractual interest in the water licence (which seems a bit of stretch)? Perhaps in these situations it would be best if the vendor obtains an express covenant to that effect as part of the terms of sale where the appurtenant water licence is reserved from the sale of the parcel.