

A Vesting Order Cannot Create Title

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Case Commented On: *Quicksilver Resources Canada Inc (Re)*, [2018 ABQB 653](#)

Quicksilver Resources (QRCI) owned oil and gas assets and associated infrastructure in the Horn River basin. In 2011, QRCI joined the Fortune Creek Partnership (FCP) and agreed, by way of a Contribution Agreement, to contribute certain infrastructure assets to the FCP. Those assets were described as follows:

The “Assets” are set forth on Exhibit 1 (Maxhamish Pipeline), Exhibit 2 (Compression Assets) and shall include the following:

- (a) all permits, licenses, authorizations, surface rights (including easements, licenses of occupation and rights-of-way), and buildings, structures, appurtenances and tangible depreciable property situate thereon *that are used or useful in connection with the operation of the Maxhamish Pipeline;* but
- (b) specifically exclude any rights or interests in or relating to petroleum or natural gas or the production thereof, or in wells or wellsite facilities, or in the operation of the foregoing. [The emphasis is supplied by Justice Jones.]

The FCP became insolvent in 2016 and MNP was appointed as Trustee in Bankruptcy. QRCI and its subsidiaries followed FCP into insolvency and obtained protection under the *Companies Creditors Arrangement Act*, [R.S.C. 1985, c C-36](#) (“CCAA”) and a stay of proceedings. FTI Consulting was appointed as the Monitor of QRCI.

In March 2016 QRCI entered into an Asset Purchase Agreement (APA) with Rockyview Resources Inc (RRI). Under the CCAA, the APA required the approval of the Court and that approval was granted in the ordinary course in April 2016 in the form of an Approval and Vesting Order.

A dispute then arose as to whether certain infrastructure assets were included in the APA. These “disputed assets” are described as follows:

1. a metering station and building (the “Metering Station”) located at the downstream or outlet end of the Maxhamish Pipeline, the location being legally described as a-59-A/094-O-14 in the Province of British Columbia;
2. a pig receiving station (the “Pig Receiver”) at the same location; and,
3. a BC Oil and Gas Commission (“OGC”) Facility License for the Metering Station (the “Metering Station License”).

QRCI sought a declaration to the effect that RRI had no interest in the disputed assets.

There were three issues to resolve: (1) were the disputed assets covered by the partnership Contribution Agreement such that QRCI could not have sold them to RRI; (2) were the disputed assets included in the APA, and (3) did the Approval and Vesting Order give title of the disputed assets to RRI notwithstanding the conclusions to the first two questions.

Were the disputed assets covered by the partnership Contribution Agreement such that QRCI could not have sold them to RRI?

This question required the court to interpret the Contribution Agreement (focussing on the italicized text above) in light of a related Gathering Agreement and (relying on *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 ([CanLII](#)) at paras 56 ff.) (at para 14) “the context of natural gas transport.”

As for the Metering Station, the court concluded that it was used or useful in connection with the pipeline. Even if it did not itself move gas, it was itself directly connected to the use of the pipeline (at para 21):

Since the purpose of moving natural gas through a pipeline is to bring it to market and since natural gas is sold by volumetric measure, I find that a facility to measure volumetric flow through a pipeline would be useful to the operation of that pipeline. Indeed, the evidence satisfied me that not only was the Metering Station used in connection with the operation of the Maxhamish pipeline, its *only* use was in connection with the operation of that pipeline.

Presumably the same conclusion would follow in relation to the Pig Receiver since that must also be intimately connected with the operation of the pipeline.

Were the disputed assets included in the APA?

The APA provided for the transfer of the “Oil and Gas Assets” from QRCI to RRI. “Oil and Gas Assets” were defined to include QRCI’s “right, title and interest” in and to defined asset types: “Petroleum and Natural Gas Rights”, “Tangible Property” and “Miscellaneous Interests”. Tangible Property was defined as the “Seller’s Interest” in the “Tangibles” which means “the Facilities, and any and all tangible depreciable equipment and facilities that are located within, upon, or *in the immediate vicinity of the Lands*, or that are used or *intended to be used* in producing, gathering, processing, treating, dehydrating, *measuring*, transporting, making marketable or storing Petroleum Substances, excluding the Excluded Assets but including...” various subcategories of equipment including meters (the emphasis is that of Justice Jones at para 31). The Excluded Assets included certain contracts including the Contribution Agreement. “Facilities” were identified in Schedule A. Schedule A did not refer to either a metering station or a pig receiver. The “Lands” were also set out in Schedule A and established that the metering station was some 30 Km away from the lands. This allowed Justice Jones to conclude (at para 35) that “a metering station some 30 km away and decoupled from the wells and other facilities cannot reasonably be said to relate directly to the operation of the Lands. Rather, the Metering Station was used in the operation of the Maxhamish Pipeline.”

Furthermore, while the Metering Station was not listed in the Excluded Assets, it would be unwise to draw any particular conclusions from that (at para 37):

Failure expressly to exclude an asset does not necessarily imply its inclusion. Typically, a seller identifies what it is selling with somewhat general language and then excludes specific items. It is not surprising that QRCI would not have expressly excluded the Metering Station and the Pig Receiver, given that it was of the view that it no longer owned those assets.

Accordingly, “neither the Metering Station nor the Pig Receiver was conveyed by the APA” (at para 38).

That left the Metering Station Licence. While this Licence was included in the schedule of assets there was also an argument that it was part of the Excluded Assets insofar as the Contribution Agreement was an Excluded Asset (see above) and the Metering Station Licence was a licence related to an Excluded Asset. QRCI’s alternative argument was that if the Licence were subject to the APA all that QRCI was conveying was its bare title to the Licence since any underlying or beneficial interest had already been conveyed to the FCP by the Contribution Agreement. Justice Jones accepted both of these arguments. He had little sympathy for RRI’s understanding (at para 47) that “it intended to purchase all of QRCI’s assets in British Columbia and asks how it could have been expected to know what assets QRCI might have conveyed to the Fortune Creek Partnership.” He noted that (at para 47):

The APA does not state that QRCI purports to sell all of its remaining assets in British Columbia, nor does it provide that it is RRI’s intention to acquire all such assets. Even if QRCI stated that it was selling all of its remaining British Columbia assets to RRI, it would be necessary to determine what assets remained to be sold. In my view, RRI should have conducted sufficient due diligence to allow it to make that determination.

Justice Jones further noted that under the APA the seller was not making any warranties as to title and that the buyer was purchasing the assets on an “as is where is” basis (at para 48). QRCI had no duty to alert RRI to issues relating to ownership of assets and the APA was covered by an “entire agreement” clause thus precluding “RRI from relying on any other alleged representations by QRCI” (at paras 49 and 50).

Did the Approval and Vesting Order give title of the disputed assets to RRI notwithstanding the conclusions to the first two questions?

The Approval and Vesting Order provided that, upon delivery of a necessary certificate, “all of [QRCI’s] right, title and interest in and to the Purchased Assets shall vest absolutely, exclusively, entirely and forever in [RRI], free and clear of and from any and all rights, claims, titles, interests” and other claims (at para 53). This led RRI to argue that the Order operated to vest in it title to the Disputed Assets regardless of any prior conveyances under the Contribution Agreement.

It is hard to see how this argument could possibly succeed given that Justice Jones had already interpreted the APA not to have transferred the Disputed Assets. Nevertheless, Justice Jones took the opportunity to reject any argument that the Vesting Order could have an effect broader than that of the APA. Such an approach he said (at paras 56 and 57) would:

- (a) reward inadequate due diligence on the part of persons responsible for preparing accurate descriptions of assets conveyed;
- (b) undermine certainty and security by vesting with the Court far-reaching powers to restructure economic relationships and expectations in ways never contemplated by parties to commercial arrangements;
- (c) render a provision such as section 5.12 of the APA meaningless by relieving the buyer of the risk it expressly agreed to assume; and
- (d) be inconsistent with the fairness intended by the CCAA because a non-party to proceedings may find its property summarily expropriated.

Perhaps most troubling from the Court's perspective is the inference that the Court is somehow engaged in the due diligence process of confirming title to assets purported to be sold. I would suggest that it would be an abuse of CCAA orders to interpret them as the Court's confirmation that title the seller does not possess may be vested in the buyer free of claims to ownership by the true owner. The better interpretation is that a CCAA order may vest off certain claims against title, but does not create title.

For all of these reasons Justice Jones agreed (at para 60) to grant a declaration that RRI had no interest in the Metering Station and the Pig Receiver. To the extent that the Metering Station Licence was included in the APA then all that RRI had received was the bare legal title to the licence and, on general principles, RRI could be compelled to transfer it FCP's trustee in bankruptcy of its nominee (at para 68).

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