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Liens Against Minerals Do Not Have Super Priority: Saskatchewan Court of Appeal Overrules *Cenex*

By: Nigel Bankes

Case Commented On: *National Bank of Canada v KNC Holdings Ltd*., 2017 SKCA 57 (CanLII)

A unanimous five person panel of the Saskatchewan Court of Appeal has overruled the Court's earlier decision in *Canada Trust Co. v Cenex Ltd.* (1982), 1982 CanLII 2651 (SK CA), 131 DLR (3d) 479 (Sask CA). Decided in 1982, *Cenex* concluded that s 12 of *The Mechanics' Lien Act*, RSS 1978, c M-7, (then the relevant statute) created a super priority for mechanics' liens filed against mineral interests and severed minerals on the basis that the lien was to attach to "all the estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals …" (at para 11). Justice Hall writing for the Court in *Cenex* concluded that this language bound even the equity of the Royal Bank which held prior security under s 88 of the *Bank Act*, RSC 1970, c B-1 and debenture security. The effect of Justice Hall's conclusion was to afford the lien holders a super priority.

The Mechanics' Lien Act of Saskatchewan has since been replaced by *The Builders' Lien Act*, SS 1984-85-86, c B-7.1, (*BLA*) and the relevant section is now s 22. It was however (at para 25) "common ground that the variations between the two provisions are not material to the issues at stake in this appeal."

Chief Justice Richards writing for the Court in this case concluded that Justice Hall had fundamentally misinterpreted the old s 12 by transforming an attachment provision into a priority provision. Chief Justice Richards suggested that the available record made it clear that the expansive language of the section was intended (at para 38) to ensure "that arrangements such as farm-ins and joint ownerships, common in the oil and gas industry in particular, do not frustrate the builders' lien regime". Chief Justice Richards explained this point further by referencing Justice LoVecchio's decision in *Smoky River Coal Ltd., Re*, 1999 ABQB 204 (CanLII) at para 32, dealing with the similar provision in Alberta's *Builders' Lien Act*, RSA 1980, c B-12:

> We are then only concerned with the Court's conclusion that the interest of the debenture holders was "attached" by the liens which were registered later. The purpose and the effect of subsection (2) is, in my view, only to eliminate the requirement for a request by each of the parties with ownership interests in the assets which benefit from the work in order for their interests to be attached by the lien. This conclusion accommodates the multiple ownership structures utilized in the oil and gas industry. These might consist of conventional ownership interests, royalty interests, working interests and even the contingent interest of a farmee where the farmee has yet to earn its interest. If only one of these

> stakeholders dealt with a contractor they would be the only one to fit the definition of owner in section 1(g) and the contractor would only have a lien against that stakeholder's interest, an interest which might be negligible. Accordingly subsection (2) was created to encumber the other interests without a direct request from them. (emphasis added by Richards CJS)

Chief Justice Richards found further support for his conclusion by noting (at para 33) that there was nothing in the language of the section that was "in any way concerned with the priority of builders' liens *vis-à-vis* other kinds of security interests." The structure of the Act also supported the conclusion since the current s 22 was in part of the Act dealing with the nature and scope of liens whereas priorities were addressed in a different part of the Act. Chief Justice Richards was unmoved by the argument that the Legislature must be taken to have endorsed the *Cenex* interpretation when it adopted the *BLA* without significantly amending this provision. The short answer (at para 47) was that the common law rule had been modified by s 36(2) of *The Interpretation Act, 1995*, SS 1995, c I-11.2 which provides that:

> (2) The re-enactment, revision, consolidation or amendment of a provision in an enactment does not imply an adoption of any judicial or other interpretation of the language used in the provision or of similar language.

With this decision the law in Saskatchewan is now the same as that of Alberta as articulated by Justice LoVecchio in *Smoky River Coal* where he distinguished *Cenex*.

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