

IN THE COURT OF QUEEN'S BENCH OF SASKATCHEWAN  
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

KNC HOLDINGS LTD.

APPLICANT

- and -

FTI CONSULTING CANADA INC., NATIONAL BANK OF CANADA,  
BAKER HUGHES CANADA COMPANY, TRICAN PARTNERSHIP,  
ROUNDED ENERGY SERVICES LTD., CRU WELL SERVICING LTD.  
and CAL-GAS INC.

RESPONDENTS

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**BRIEF OF LAW  
ON BEHALF OF THE RESPONDENT,  
NATIONAL BANK OF CANADA**

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## I. INTRODUCTION

1. This Brief is submitted by the Respondent, National Bank of Canada (“**National Bank**” or the “**Bank**”), in response to the Application of KNC Holdings Ltd. (“**KNC**”) for an Order to determine the priorities amongst certain lien claimants and the Bank’s security.
2. National Bank submits that as the first priority secured lender and only major secured creditor, it is entitled to the Holdback Funds (as hereinafter defined) in priority to KNC and the other lien claimants.
3. The evidence before the Court presented by the Bank is contained in the Third Affidavit of Karen Koury dated September 8, 2015 and the materials filed in the receivership proceedings at the Alberta Court of Queen’s Bench, Action No. 1401-02489.

## II. FACTS

4. National Bank provided various loans to Coast Resources Ltd. (“**Coast Resources**”) since approximately 2004 through a series of loan agreements including an Offering Letter dated October 22, 2012, and an Amending Agreement dated June 19, 2013, as amended and restated from time to time (the “**Loan Agreements**”).

Third Affidavit of Karen Koury, sworn September 8, 2015, at para 4  
[Koury Third Affidavit]

5. As security for amounts advanced pursuant to the Loan Agreements, Coast Resources granted certain security to National Bank including by way of a fixed and floating charge demand debenture dated July 9, 2014, as amended and restated from time to time (the “**Coast Resources Security**”). In addition, 101033165 Saskatchewan Ltd. (“**1010**”), Viewfield Oil & Gas Ltd. (“**Viewfield**”) and Coast Services Inc. (“**Coast Services**”, and together with 1010 and Viewfield, the “**Guarantors**”), each jointly and severally guaranteed the performance of all of Coast Resources’ obligations and liabilities to National Bank and granted certain security to National Bank by way of a debenture (collectively with the Coast Resources Security, the “**Security**”).

Koury Third Affidavit at para 5

6. National Bank registered its Security against Coast Resources’ and the Guarantors’ (collectively, the “**Companies**”) personal property at the Saskatchewan Personal Property Registry (“**PPR**”) on the following dates: Coast Resources on July 6, 2004, 1010 on July 7, 2004, Viewfield on November 2, 2009, and Coast Services on March 25, 2011.

Koury Third Affidavit at para 6

7. National Bank registered its Security against certain of the Companies' oil and gas interests at the Saskatchewan Ministry of Economy ("**SME**") on February 14, 2014, and at the Information Services Corporation ("**ISC**") on February 19, 2014.

**Koury Third Affidavit at para 7**

8. National Bank's Security has been independently reviewed by Miller Thomson LLP who has opined that the Security creates a valid security interest in favour of National Bank in all of the right, title and interest of each of the Companies in its real property and personal property.

**First Report of the Receiver dated December 18, 2014, at para 77 [Tab 1]  
[Receiver First Report]**

9. As at February 26, 2014, the total indebtedness owing by Coast Resources to National Bank under the Loan Agreements was approximately \$5,462,702. Coast Resources failed to make punctual payments in accordance with the terms of the Loan Agreements and, accordingly, for this and for other reasons, National Bank sought the appointment of a receiver and manager over all of the assets, undertakings and property of the Companies. It is an express term of the Loan Agreements that the parties attorn to the jurisdiction of the courts of the Province of Alberta, and that the Loan Agreements be construed and governed in accordance with the laws of the Province of Alberta.

**Koury Third Affidavit at para 8**

10. On March 6, 2014, FTI Consulting Canada Inc. was appointed as receiver and manager (the "**Receiver**") over all of the assets, undertakings and property of the Companies, by Order of the Honourable Justice A.D. Macleod of the Alberta Court of Queen's Bench.

**Receiver First Report at para 1 [Tab 1]**

11. The Companies are incorporated pursuant to the laws of the Province of Saskatchewan and were established to invest in and operate oil and gas properties in Saskatchewan. The Companies held certain oil and gas leases in Saskatchewan, in the following areas: the Luseland Property, the Glen Ewen Property, and the Hoosier Property (collectively, the "**Properties**").

**Receiver First Report at para 12 [Tab 1]**

12. Fedirko Holdings Inc. ("**FHI**") is a corporation incorporated pursuant to the laws of the Province of Saskatchewan, which held various working interests in the lands granted by the Companies' petroleum and natural gas leases in the Luseland Property and the Hoosier Property (the "**FHI Working Interests**"). The FHI Working Interests were in existence at the time that the Security was granted to National Bank.

Receiver First Report at para 53 [Tab 1];  
Second Report of the Receiver dated May 27, 2015, at para 34 [Tab 2]  
[Receiver Second Report]

13. In the course of the Receiver's administration of the Companies' receivership estate, the Receiver became aware of several builders' liens that were registered against the interests of Coast Resources in the Luseland Property (the "**Liens**"). All lien claimants were given the opportunity to prove their lien(s) by filing a Claim of Lien pursuant to s. 50(3) of the Saskatchewan *Builders' Lien Act* ("**BLA**").

Koury Third Affidavit at para 10;  
*Builders' Lien Act*, SS 1984-85-86, c B-7.1 [Tab 3] [**BLA**]

14. The Receiver and its counsel reviewed the Claims of Liens and determined that the Liens complied with the requirements set out in the *BLA* and were valid.

Receiver Second Report at para 26 [Tab 2]

15. The Liens, which totalled \$632,691, have been registered as follows:

Legal Description	Title # / PN #	Lienholders	Amount	Date of Registration
SE Sec 21 Twp 35 Rge 25 W3	145290809	Trican Partnership	\$94,548	February 14, 2014 *
	145290809/ 113673887	Cru Well Servicing Ltd.	\$171,725	March 18, 2014
	113673887/ 145290809	Rounded Energy Services Ltd.	\$13,847	March 17-18, 2014
	145290809	Cal-Gas Inc.	\$14,160	April 1, 2014
	145290809	Cal-Gas Inc.	\$1,253	April 1, 2014
	145290809/ 113673887	Baker Hughes Canada Company	\$33,694	April 24, 2014
NE Sec 21 Twp 35 Rge 25 W3	145290764	Trican Partnership	\$31,581	February 14, 2014 *
	145290764/ 113673944	Cru Well Servicing Ltd.	\$20,866	March 18, 2014
	145290764	Cal-Gas Inc.	\$6,407	April 1, 2014
Sec 22 Twp 35 Rge 25 W3	PN53920	Trican Partnership	\$8,613	February 14, 2014
	113673821	Cru Well Servicing Ltd.	\$10,761	March 18, 2014
	PN53920	Cru Well Servicing Ltd.	\$10,761	April 17, 2014
	PN53920	Rounded Energy Services Ltd.	\$1,890	March 20, 2014
	PN53920	Cal-Gas Inc.	\$3,055	April 2, 2014
SW Sec 03 Twp 36 Rge 25 W3	145355205	Trican Partnership	\$16,173	February 14, 2014 *
	114394349	Cru Well Servicing Ltd.	\$21,866	March 18, 2014
	145355205	Cal-Gas Inc.	\$21,177	April 1, 2014
All Sections	145290809/ 145290764/ PN 53920 / 145355205	KNC Holdings Ltd.	\$161,074	May 8-9, 2014
		<b>Total</b>	<b>\$632,691</b>	

\* Registration prior to the Bank's Security

Receiver First Report at para 73 [Tab 1]

16. National Bank registered its Security against the Companies' assets at the PPR prior to any builders' lien being registered. National Bank registered its Security as against the Companies' oil and gas interests in each of the mineral properties where one or more builders' liens have been registered at the SME on February 14, 2014, and at the ISC on February 19, 2014.

**Koury Third Affidavit at para 11**

17. The Receiver and its counsel have determined that Trican Partnership had 3 builders liens totalling \$142,302.60 which had priority over the Bank's Security because the liens were registered before the Bank's Security at the ISC (Titles #145290809, #145290764, and #145355205). These funds have now been remitted to Trican Partnership. The Receiver and its counsel have determined that one of the liens registered by Trican Partnership (PN #53920) in the amount of \$8,613 was registered after the National Bank registration at the SME.

**Receiver First Report at para 77 [Tab 1]**

18. With the agreement of the lienholders, the Receiver reconciled and adjusted the remaining liens (the "**Remaining Liens**") with the records of the Companies. The Remaining Liens total \$488,867 and may be summarized as follows:

<b>Lienholders</b>	<b>Amount</b>
Trican Partnership	\$8,613
Cru Well Servicing Ltd.	\$224,715
Rounded Energy Services Ltd.	\$15,737
Cal-Gas Inc.	\$46,052
Baker Hughes Canada Company	\$33,694
KNC Holdings Ltd.	\$160,056
<b>Total</b>	<b>\$488,867</b>

**Receiver Second Report at paras 22-24 [Tab 2]**

19. To facilitate the sale of the Properties and to maximize the return for all stakeholders, the Receiver continued the oil and gas operations of the Companies from its appointment on March 6, 2014, until the Luseland Property and the Glen Ewen Property were sold. From the date of the appointment of the Receiver to May 12, 2015, the Receiver estimated the revenue collected from the sale of oil and gas at \$2,535,969.

**Receiver Second Report at para 17 [Tab 1]**

20. Pursuant to an Assignment Agreement, FHI agreed to assign the FHI Working Interests to the Receiver. The Liens attached to the FHI Working Interests before the FHI Working Interests were assigned to the Receiver.

**Receiver First Report at para 55 [Tab 1];  
Receiver Second Report at paras 32-40 [Tab 2]**

21. On January 8, 2015, the Receiver sought and was granted an Approval and Vesting Order, whereby the Honourable Justice D.B. Nixon of the Alberta Court of Queen's Bench ordered the sale of the Luseland Property to Northern Blizzard Resources Inc. for the sum of \$1,960,000. The purchase price was allocated in the following manner: \$1,568,000 for the Petroleum and Natural Gas Rights, \$391,990 for the Tangibles, and \$10.00 for Miscellaneous Interests (as defined in the Agreement of Purchase and Sale). The Order provided for the discharge of the Remaining Liens on the condition that the value of the Remaining Liens be held in trust pending the determination of priority between the Remaining Liens and the Bank's Security. Out of the proceeds of sale of the Luseland Property, the Receiver held back the amount of \$490,388 (the "**Holdback Funds**").

**Receiver First Report at para 79 and Appendix "A" [Tab 1]**

22. The Receiver has estimated the value of the FHI Working Interests to be between \$90,000 and \$113,000. The Receiver held back the lower estimate of \$90,000 based on the Proved Developed Producing reserves ("**PDP**"). The Receiver was of the opinion that the PDP allocation was the most accurate indication of the underlying value of the FHI Working Interests (the "**FHI Working Interests Holdback**").

**Receiver Second Report at paras 32-40 [Tab 2]**

23. KNC brought this Application to determine the priority between the Bank's Security and the Remaining Liens with respect to the Holdback Funds and the FHI Working Interests Holdback.
24. The Receiver determined that the priority between National Bank and the Remaining Liens was a matter governed by the laws of the Province of Saskatchewan, and the Saskatchewan Court of Queen's Bench was the proper jurisdiction to hear the matter.

**Order Respecting Retention of Funds, Additional Distribution and Holdbacks,  
dated July 10, 2015 [Tab 4]**

### **III. ISSUE**

25. The issue for determination at this Application is whether National Bank's Security takes priority over the Remaining Liens, such that National Bank is entitled to the Holdback Funds and the FHI Working Interest Holdback.

#### IV. LAW AND ANALYSIS

##### The Priorities Pursuant to s. 71 of the BLA

26. The various lien claims are brought pursuant to s. 22 of the *BLA* which provides:

###### **Lien on land and materials and extension re minerals**

**22(1)** A person who provides services or materials on or in respect of an improvement for an owner, contractor or subcontractor, has, except as otherwise provided in this Act, a lien on the estate or interest of the owner in the land occupied by the improvement, or enjoyed therewith, and on the materials provided to the improvement for as much of the price of the services or materials as remains owing to him.

(2) Where services or materials are provided:

- (a) preparatory to;
- (b) in connection with; or
- (c) for an abandonment operation in connection with;

the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the services or materials, the lien given by subsection (1) is also a lien on:

- (d) all the estates or interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding that fee simple has expressly requested the services or materials (the “**Estates or Interests**”);
- (e) the mineral when severed and recovered from the land while it is in the hands of the owner, and to the proceeds of the mineral and to the amounts to be paid in lieu of the proceeds of the mineral to the owner by a person that operates the mine, oil well or gas well (the “**Oil Inventory**”);
- (f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines, mining claim or land, oil or gas well and the appurtenances thereto (the “**Machinery**”);

but, in all other respects, this Act applies to the lien existing by virtue of this subsection notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.

***BLA at s. 22 [Tab 3]***

27. More specifically, s. 22(2) of the *BLA* provides that when services or materials are provided preparatory to or in connection with the recovery of a mineral, the lien attaches to (a) the Estates of Interests (s. 22(2)(d)), (b) the Oil Inventory (s. 22(2)(e)), and (c) the Machinery (s. 22(2)(f)).

28. National Bank’s position is that liens arising pursuant to s. 22 are subject to the priorities set out under s. 71 of the *BLA*. Section 71 provides that a registered mortgage has priority for all monies advanced prior to the registration of a lien or a notice of the lien having been given to the mortgagee:

**Priorities between mortgages, etc., and liens**

71(1) The liens arising from an improvement have priority over all mortgages, conveyances or other agreements registered after a claim of lien is registered.

(2) In the case of an agreement for sale of land where the purchase money or part of the purchase money is unpaid and no transfer of title for the parcel of land has been made to the purchaser, for the purposes of this Act the purchaser shall be deemed to be a mortgagor and the seller a mortgagee whose mortgage was registered on the date of the agreement for sale.

(3) Subject to Part II:

(a) a lien has priority in respect of all payments or advances made on account of any conveyance or mortgage after written notice of a lien has been given to the person making the payments or advances or after a claim of lien is registered; and

(b) if no written notice of a lien is given or if no claim of lien is registered, all of the payments or advances have priority over the lien.

[Emphasis Added]

**BLA at s. 71 [Tab 3]**

29. National Bank registered its Security against Coast Resources' personal property at the PPR and against Coast Resources' oil and gas interests in the Luseland Property at the SME and the ISC in priority to the Remaining Liens. Furthermore, the Bank made no advances of funds to Coast Resources after the Remaining Liens have been registered. National Bank's Security attached to Coast Resources' Estates or Interests, Oil Inventory, and Machinery in priority to the Remaining Liens.

**Koury Third Affidavit at paras 11 and 13**

30. KNC's position is that the Remaining Liens attach to the Estates or Interests, the Oil Inventory and the Machinery of Coast Resources and take priority over National Bank's Security. KNC relies on the decision of the Saskatchewan Court of Queen's Bench in *Boomer Transport Ltd. v Prevail Energy Canada Ltd.* ("**Boomer Transport**") and a line of cases, beginning with the decision of the Saskatchewan Court of Appeal in *Canada Trust Co. v Cenex Ltd.* ("**Cenex**"), for the proposition that liens arising pursuant to s. 22(2) of the *BLA* are special types of liens to which s. 71 does not apply.

***Boomer Transport Ltd. v Prevail Energy Canada Ltd.*,  
2014 SKQB 368 [Tab 5] [*Boomer Transport*]  
*Canada Trust Co. v Cenex Ltd.*,  
[1982] 2 WWR 361, 13 Sask R 435 (CA) [Tab 6] [*Cenex*]**

31. National Bank respectfully submits that *Cenex* was incorrectly decided. *Cenex* was decided in 1982 pursuant to s. 12(2) of the *Mechanics' Lien Act* ("**MLA**") (now s. 22 of the *BLA*). Section 12 of the *MLA* reads as follows:



**12** (1) Any person who does or causes any work to be done or services rendered upon or in respect of an improvement or furnishes any material to be used or on an improvement for an owner, contractor or subcontractor has, except as otherwise provided in this Act, a lien upon the estate or interest of the owner in the land occupied by the improvement or enjoyed therewith for so much of the price of the work, services or material as remains owing to him.

(2) Where work is done, services are rendered or materials are furnished:

(a) preparatory to;

(b) in connection with; or

(c) for an abandonment operation in connection with;

the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done, the services to be rendered or the material to be furnished, the lien given by subsection (1) attaches to all the estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding the fee simple estate in the mines and minerals has expressly requested the work or services or the furnishing of materials in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to the person's estate or interest, if any, in the remainder of the land,

(3) A lien attaching to an estate or interest in mines and minerals attaches also to the minerals when severed and recovered from the land while they are in the hands of the owner, and to the proceeds thereof and to the amounts to be paid in lieu thereof to the owner by a person that operates the mine, oil well or gas well in accordance with an order or regulation made under the *Mineral Resources Act*.

(4) A person who has a lien under subsection (1) in respect of any mine, mining claim, mining land, oil well or gas well shall also have a lien upon the interest of the owner in the fixtures, machinery, tools, appliances, equipment and other property in or on the mine, mining claim, mining land, oil well or gas well, and the appurtenances thereto.

*Mechanics' Lien Act, RSS 1978, c M-7 at s. 12 [Tab 7] [MLA]*

32. *Cenex* involved a priority contest between lienholders and a secured bank. The bank was granted a debenture which contained specific charges on mineral claims and mineral leases. Several mechanics' liens on the minerals subsequently arose and the lienholders claimed priority. Justice Halvorson for the Saskatchewan Court of Queen's Bench considered s. 12 of the *MLA* and found that a lien on minerals did not attach to the interest of an encumbrancer. Halvorson J found that clearer language would be necessary to deprive a third party of pre-existing property rights by creating a mechanics' lien on the security interest of a mortgage. Halvorson J concluded that s. 12 was intended to prescribe the circumstances in which a lien arose and that s. 25 of the *MLA* (now s. 71 of the *BLA*) was intended to establish priorities.

*Canada Trust Co. v Cenex Ltd., [1981] 2 WWR 296, 116 DLR (3d) 731 [Tab 8];  
Cenex at paras 1-9 [Tab 6]*

33. The Saskatchewan Court of Appeal disagreed with the interpretation of s. 12 by the Trial Court. Hall JA, for the Court of Appeal, found that s. 12(1) created a general lien and general liens were subject to the priority ranking provided for by s. 25 of the *MLA* (now s. 71 of the *BLA*). Liens arising pursuant to s. 12(2) of the *MLA*, however, were considered by Hall JA to be a special type of lien. Hall JA held that in the case of a lien for work done, services rendered or materials supplied preparatory to or in connection with recovery of a mineral, the lien attached to all of the estates and interests in the mineral recovered and the lien had priority over all other estates and interests in the mineral, including secured interests.

**Cenex at paras 11-13 [Tab 6]**

34. In *Cenex*, the Court found that the phrase “*all the estates and interests in the mineral concerned*” was sufficiently broad to include secured interests. To support this conclusion, Hall JA stated that the intention behind s. 12(2) was that those who provided work and material to sever and extract ore from a mine were to have a first claim upon the ore. Hall JA created this super-priority, however, only with respect to the severed or extracted ore. Hall JA stated that no priority was given by s. 12(2) to the lienholders over the other assets of the mining company.

**Cenex at paras 17-24 [Tab 6]**

35. National Bank respectfully submits that Hall JA’s interpretation of “*all the estates and interests in the mineral concerned*” in *Cenex* is incorrect. National Bank submits that the scope of the phrase “*all the estates and interests in the mineral concerned*” is limited to ownership type of interests and does not extend to security interests.

36. Section 22(2) extends the category of affected interests to include all parties with an ownership interest in minerals. The purpose and the effect of s. 22(2) is to eliminate the requirement that each of the parties with ownership interests in the land request the work to be performed. The phrase “*all the estates and interests in the mineral concerned*” accommodates the multiple ownership structures utilized in the oil and gas industry. For instance, these might consist of conventional ownership interests, royalty interests and working interests. Section 22(2) is not sufficiently broad such that it encompasses security interests.

37. National Bank’s position is reinforced by a historical review of the builders’ lien legislation in the Province of Saskatchewan. The phrase “*all the estates and interests in the mineral concerned*” made its first appearance under s. 12 of the *Mechanics’ Lien Act*, SS 1973, c 62. The 1973 *Mechanics’ Lien Act* implemented the findings and recommendations of a Royal Commission tasked to review the Saskatchewan lien legislation. The following excerpt from the Royal Commission Report demonstrates that the legislature intended that “*all the estates and interests in the mineral concerned*” be restricted to ownership type of interests:

“There is a good deal of difference between the petroleum industry and the construction industry and the *Mechanics’ Lien Act* of this province was originally designed to take care of the construction industry and comparatively little attention has been paid to the petroleum industry... Under certain pooling-arrangement or schemes for the sharing of expenses several persons may end up with an interest in the minerals in the same parcel of land. That can create complications.

If instructions for the drilling of the test well are given by one of the group it may well be that some one or more of the group have never made any direct request for work to be done or materials to be furnished for the drilling of the well but the well is nevertheless drilled for the direct benefit of all of those who have an interest in the minerals and will benefit if the well turns out to be a producer. The liens of those who do the work or furnish the materials for the drilling of the well should therefore be a charge upon all of the estates or interests in the minerals concerned other than the estate in fee simple in the mines and minerals unless the owner of that estate is one of the group and has expressly requested the work to be done or the materials to be furnished.

...

Saskatchewan has always been a strong supporter of the Torrens system of land registration, under which priority is given as of the date of registration. The system has so many advantages that I see no reason to depart therefrom. There is one exception I would make in regard to that however. As a rule a mortgage is good only for the amount advanced thereunder. If a mortgage company advances money under its mortgage after it has received notice in writing of a lien, the advance should rank after the lien because the mortgage, upon receipt of the notice, could have protected itself by not making the advance...”

[Emphasis Added]

***Report of the Thomson Royal Commission study on Mechanics’ Liens, 1966 at 32 and 40 [Tab 9];  
Mechanics’ Lien Act, SS 1973, c 62 [MLA 1973] [Tab 10]***

38. Before 1973, the builders’ lien legislation was not designed to accommodate the multiple ownership structures utilized in the oil and gas industry. The 1973 *Mechanics’ Lien Act* introduced the phrase “*all the estates and interests in the mineral concerned*” to correct this mischief.

***MLA 1973 [Tab 10]***

39. A decade later, in 1983, a Special Advisory Committee was appointed by the Minister of Justice to review the *MLA* and to make recommendations for its improvement. The Special Advisory Committee was asked to consider whether there should be special rules for liens arising when services or materials are provided preparatory to or in connection with recovery of a mineral. The Committee considered *Cenex* and concluded:

“Saskatchewan’s subsection 12(2) was recently the subject of interpretation by our Court of Appeal. The resulting decision shows the ambiguity of these subsections. His Lordship Hall, JA in *Canada Trust Company v Cenex Limited*, [1982] 2 WWR 361 held that subsection 12(2) charged not only the estates or interests of the minerals in the ground but they are severed the lien also attaches the mines and minerals. His Lordship interpreted “estate or interests” to include the interest of a debenture financier and a bank holding a section 88 Bank Act interest and granted priority to the lien claimants over the secured parties even though the interests of the secured

parties were prior in time. The Court went on to reconcile subsection 12(2) with 12(3) by extending the lien to the mines and minerals, when severed in the hands of the owner of the fee simple estate...

Turning subsection 12(2) into a section establishing a priority rule creates serious consequences for financiers of mining and oil and gas interests...

The priority rule selected by the Court of Appeal is also unfortunate in that it places prior financiers at risk and, it would appear, their liability extends beyond the owner's liability for deficiencies in the holdback to the full lien claim to the extent of the value of the mineral claim. In other parts of the Act only real property security interests or advances subsequent in time to a mechanics' lien interest take subject to the lien and, it can be argued, that these do so subject to deficiencies in the holdback and not for the full amount of the lien.

The Committee felt that there was a justification for extending the lien on land and materials to severed minerals and to the equipment of the owner. When there is default in the oil and gas industry, there is little for the lien claimants to attach in the way of an improvement and resort must be had to the personal property of the owner. However, this lien should only be an extension and not a different lien from the lien currently created by subsection 12(1) as found by the *Cenex* case. The priority rules for all liens would then continue to apply. The only priority a lien claimant would have in relation to severed minerals or equipment would be priority over unsecured creditors. To attempt to give priority over secured creditors would seem to be an expensive intrusion into the priority structure relating to personal property. It would be unfair to confer priority without requiring registration of the lien in the Personal Property Registry and providing for the giving of and the effect of notice to secured parties..."

[Emphasis Added]

**Report prepared for the Honourable J. Gary Lane, Q.C., Minister of Justice by the Special Advisory Committee to the Minister of Justice on Builders' Lien, August 1984 at 111-114 [Special Advisory Committee] [Tab 11]**

40. The *MLA* was subsequently amended by way of s. 22 of the *BLA* to overrule the ratio in *Cenex* and "to make it clear that the lien is imposed upon real property interests and is not intended to affect any pre-existing financing on the mineral or proceeds derived from the mineral".

**Special Advisory Committee,  
Committee's Draft Proposal for a Builders' Lien Act at 24 [Tab 11]**

41. Based on the foregoing, it is clear that the intention of the legislature in enacting s. 12 of the *MLA* and s. 22 of the *BLA* was to restrict the interests in "*all the estates and interests in the mineral concerned*" to ownership interests. The legislative evolution of s. 22 of the *BLA* may be relied on by courts to assist interpretation.

***Sullivan on the Construction of Statutes*, Sixth Edition,  
(LexisNexis Canada Inc.: Markham, 2014) at 660-666 [Sullivan] [Tab 12]**

42. Alberta Courts have refused to follow the ratio in *Cenex*. After an extensive and detailed review of the Alberta and Saskatchewan lien legislation, Justice LoVecchio of the Alberta Court of Queen's Bench refused to follow *Cenex* and the proposition that "*all the estates and interests in the mineral*

*concerned*’ encompassed secured interests. At para 46 of the *Smoky River* decision, LoVecchio J stated:

[46] There is another reason for not linking security interests and ownership interests under the umbrella of all interests. The taking of a mortgage as security for a debt is not of the same nature as becoming the owner of a property. In a mortgage, the creditor has provided funds to the owner and now simply wants to be repaid. The creditor has taken a security interest to secure that repayment. The nature of their security interest in the property and their relationship to the owners is similar to that of the lienholders. The lienholders are also creditors who have done something for the owners and want to be paid by the owners. As they are both creditors, the issue, as between the Petitioners and the lienholders, should be one exclusively of priorities except for the situations in which the mortgagee has, by direct dealing, involvement or by the nature of the financing arrangement, incurred a direct liability to the lienholder...

*Alberta Gold Well Servicing Corp. v Snow Hawk Energy Inc.*,  
(1987), 53 Alta LR (2d) 333 (Alta Master) at para 14 [Tab 13] [*Alberta Gold*];  
*Smoky River Coal Ltd., Re*, 1999 ABQB 204 at paras 23-26, 32 and 46 [Tab 14] [*Smoky River*]

#### Interpretation of s. 22(2) of the BLA

43. Additionally, National Bank submits that based on the rules of statutory interpretation, the phrase “*all the estates and interests in the mineral concerned*” under s. 22 of the *BLA* must be interpreted in context and in line with the purpose of the legislation and the intention of the legislature.

*Rizzo & Rizzo Shoes Ltd., Re*,  
[1998] 1 SCR 27 at para 21 [Tab 15]

44. Section 22(2) should not be read in isolation to the other provisions of the *BLA*. For instance, s. 78 of the *BLA* specifically provides that where an estate or interest in land is sold pursuant to an order of the court, the proceeds received as a result of that disposition are to be distributed in accordance with the priorities set out under s. 71 of the *BLA*. Section 78 makes no distinction between a lien arising under s. 22(1) and a lien arising under s. 22(2). Section 78 provides:

#### **Distribution of proceeds of sale**

**78** Where an estate or interest in land is sold or leased pursuant to an order of the court or by a trustee appointed under this Part, the proceeds received as a result of that disposition, together with any amount paid into court under subsection 96(5), shall be distributed in accordance with the priorities set out in Part VI.

45. The interpretation of s. 22(2) as supported by KNC leads to an inexplicable inconsistency in the legislation. Section 71 of the *BLA* gives mortgagees priority and s. 22(2), as argued by KNC, takes it away. Sections 22(1) and 22(2) cannot be given different meanings. If the legislation had intended to create two types of liens and that one of them would encompass secured interests, the legislation would have made that explicit.
46. Furthermore, courts are guided by the presumption that the legislature does not intend to interfere with established rights unless the intention to do so is clearly expressed. In other words, in the

absence of specific statutory provision to that effect, s. 22(2) should not be construed in a manner which would deprive third parties of their pre-existing property rights. National Bank submits that clearer language is needed to deprive a mortgagee of its pre-existing rights.

**Sullivan at 497-503 [Tab 12]**

47. Based on the foregoing, National Bank submits that s. 71 on priorities applies to both s. 22(1) and s. 22(2) of the *BLA* and that National Bank's Security ranks in priority to the Remaining Liens.

*Boomer Transport Ltd. v Prevail Energy Canada Ltd. ought not to be followed*

48. Alternatively, if this Honourable Court was to decide that *Cenex* has not been overruled by the present wording of s. 22 of the *BLA*, then National Bank submits that *Cenex* created a common law exception with respect to the Oil Inventory but that exception does not extend to the Estates or Interests and the Machinery.
49. For the reasons that follow, National Bank submits that the Remaining Liens may only defeat the Bank's Security with respect to the Oil Inventory produced in connection to the Luseland Property. Although the Receiver collected Oil Inventory since its appointment on March 6, 2014, the Receiver has estimated that the net value of the Oil Inventory to be nominal and likely negative after considering the operating expenses, royalties, administrative and other general and associated receivership costs paid by the Receiver.

**Receiver Second Report at para 30 [Tab 2]**

50. The Applicant, KNC, asserts that the *Boomer Transport* decision stands for the proposition that a lien may defeat the interest of a secured creditor with respect to the Estates or Interests, the Oil Inventory and the Machinery. National Bank respectfully submits that KNC is wrong to argue that the Remaining Liens attach to the Estates or Interest and the Machinery of Coast Resources. National Bank submits that *Boomer Transport* was decided on the particular facts of its case.
51. In *Boomer Transport*, the Honourable Justice Rothery ordered the remaining funds in a receivership estate to be distributed amongst the lienholders. In this case, the receiver had failed to address the lien claims and to create a form of allocation of assets that were subject to s. 22 of the *BLA* and it became impossible to trace and identify the Oil Inventory. Rothery J held that the secured creditor was not to benefit from the receiver's oversight and it was for this reason that Rothery J ordered the remaining funds of the receivership estate to be distributed amongst the lienholders.
52. If *Cenex* created a common law exception to the application of the priorities as set out under s. 71 of the *BLA* to the Oil Inventory, National Bank submits that the exception does not include the

Estates or Interests and the Machinery. It was made clear in *Cenex*, that the exception only applies to the Oil Inventory. At paras 18-23 the Court stated:

[18] ...The language used in s. 12(2) [MLA] is clear and unambiguous. It was intended that those who provide the work and materials to sever and extract the ore from a mine should have a first claim upon it. The provision is limited in its scope to property which is defined and identified, that is, the ore so severed or extracted.

[19] This legislation does not, in the ordinary way, deprive the debenture holders of pre-existing rights. Before the ore was extracted, their security covered the mine and minerals *in situ*. The work and materials supplied by the lienholders have transformed the mineral *in situ* into readily marketable ore and have greatly enhanced its value. The legislature has recognized that this entitles the lienholders to first claim upon the severed ore.

...

[23] While registration of the debentures might be relevant to determine priority of claims to the remaining assets, the question is really academic under the circumstances. The security of the bank under s. 88 was duly registered and takes priority over the mechanics' liens to the remaining assets. It is agreed that the bank's debenture will take priority over the others. The remaining assets were sold for approximately \$130,000. The bank would take all that in any event.

[Emphasis Added]

***Cenex* at paras 18-23 [Tab 6]**

53. The decisions of the Saskatchewan Court of Queen's Bench that have followed *Cenex* demonstrate that that the exception created by *Cenex* applies solely to the Oil Inventory. In *Doug Johnston Construction Co. v Avonlea Mineral Industries Ltd.*, the Applicant creditor sought an interim distribution of funds realized from the sale of minerals by an appointed trustee. The minerals had undergone some processing but the minerals' essential character had not changed. The Respondent creditor, which had a registered debenture, resisted the Application on the basis that its interest had priority over the Applicant's lien claim. Justice Kyle for the Saskatchewan Court of Queen's Bench held that s. 22(2)(e) of the *BLA* provided that those who provide work and material to sever and extract a mineral had a first claim upon it and that the interests of a lien claimant could not be defeated simply because the subject of the lien was sold, particularly when the subject was readily identifiable.

***Doug Johnston Construction Co. v Avonlea Mineral Industries Ltd.*,  
[1990] 6 WWR 417, 22 ACWS (3r) 616 [Tab 16]**

54. Furthermore, in *Cambrian Blasting Co. v Trican Well Services Ltd.* ("***Cambrian Blasting***"), counsel for the lienholder argued that s. 22(2) of the *BLA* provided the lienholder with a priority position over the two secured creditors and this priority extended to the severed ore as well as the mineral *in situ* under certain quarry leases. Justice Rothery for the Court of Queen's Bench rejected this proposition and held that the lienholder was not entitled to the assets in priority to the secured creditors. Rothery J said:

[21] ... *Cenex* made it clear that the lien holder has a priority claim over the interests of the secured party in the ore extracted from the mine and taken over by the receiver. Such priority does not extend to ore to be extracted in the future by a purchaser of the quarry lease. It is only the debtor's assets that become the pool of assets available for distribution amongst the competing parties.

...

[23] The affidavit material filed included the receiver-manager's listing of Hanson's seized assets. No severed or extracted ore was listed. It follows that Cambrian is not entitled to any of Hanson's seized assets in priority to Trican or SOCO.

[Emphasis Added]

***Cambrian Blasting Co. v Trican Well Services Ltd.,*  
2003 SKQB 355 at paras 21-23 [Tab 17]**

55. In *Boomer Transport*, Rothery J expended the scope of what he had said in *Cambrian Blasting* solely to accommodate the particular facts before him. Rothery J stated that:

[39] Counsel for Macquarie submits that the proceeds of sale by the Receiver include far more than merely the oil or proceeds at the time of the Receiver's court appointment. The Receiver operated Prevail's oil drilling for a period of time after, and the Receiver's receipts included that oil extracted. It is impossible to now trace what, if any oil, was in Prevail's hands at the time of the receivership appointment. Counsel argues that the Lien Claimants' priority to any of the proceeds in court has not been proven and should not be allowed.

[40] Counsel for the Lien Claimants confirmed that no claims process was ever initiated by the Receiver. The Lien Claimants ought not to lose their priority to the assets as set out in s. 22(2) of the *BLA* simply because the Receiver has not allocated certain proceeds that would be directly traceable to those assets. This was a functioning corporation at the time of the receivership appointment and oil was being extracted at the time. Thus, oil or proceeds existed at that time. The Receiver has been fully compensated for operating the business until the assets were sold. Counsel argue that the remaining funds ought to be paid to the Lien Claimants.

...

[43] ... Why the Receiver did not resolve the priority dispute in a timely manner when an evidentiary base could have been set before the court to determine the extent of that priority under s. 22(2) of the *BLA* need not be answered here. What can be answered is Macquarie is not entitled to benefit from the Receiver handling the receivership in this manner.

***Boomer Transport Ltd. at paras 39-40 and 43 [Tab 5]***

56. In the present circumstances, the Receiver notified all potential lienholders of the receivership proceedings and the lienholders were invited to prove their lien(s) by filing a Claim of Lien. Further, the Receiver kept a detailed record of the Oil Inventory of the receivership estate and concluded that the estimated net value of the Oil Inventory was nominal and likely negative. In its Second Report, the Receiver advised that there was no distribution to be made with respect to the Remaining Liens relating to the Oil Inventory.



57. Based on the foregoing, National Bank submits that *Boomer Transport* was decided on the particular facts of the case and this Honourable Court ought not to follow *Boomer Transport* in the present instance.

The FHI Working Interests Holdback

58. Finally, with respect to the FHI Working Interests, National Bank is of the opinion that certain of the Remaining Liens attach to the FHI Working Interests and are entitled to the FHI Working Interests Holdback in proportion to the amounts of their respective liens.
59. Section 22(2) of the *BLA* provides that when services or materials are provided preparatory to or in connection with the recovery of a mineral, the lien attaches to the estates and interests of a person, “notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the services or materials”. If a lien claimant is unable to recover the amounts of its lien against the entity who requested the work to be performed (Coast Resources), because the lien claimant does not have priority as a result of a prior registered mortgage or because the value of the interests of the entity who requested the work is not sufficient, the lien claimant can look to the other estates or interests in the minerals for the full amount of the lien claim. It is to accommodate these types of situations that the phrase “*all the estates and interests in the mineral concerned*” was incorporated into the lien legislation.

60. FHI did not request the work performed by the lienholders. As a working interest holder under certain oil and gas leases owned by Coast Resources in the Luseland Property, it is likely, however, that FHI benefited from the work performed by the lienholders. Since there is no competing mortgage registration with respect to the FHI Working Interests, certain of the Remaining Liens have attached to the FHI Working Interests in priority.
61. Consequently, it is National Bank’s position that certain of the Remaining Liens are entitled to the value of the FHI Working Interests Holdback in proportion to the amounts of their respective liens. The Receiver has estimated the value of the FHI Working Interests to be approximately \$90,000.
62. The FHI Working Interests relate to, among other things, SE Sec 21 Twp 35 Rge 25 W3, NE Sec 21 Twp 35 Rge 25 W3 and SW Sec 03 Twp 36 Rge 25 W3. However, Coast Resources does not have an interest in the minerals with respect of SW Sec 03 Twp 36 Rge 25 W3, as the mineral lease has expired. The following builders’ liens have been registered against the remaining quarter sections:

Legal Description	Title # / PN #	Lienholders	Amount	Date of Registration
SE Sec 21 Twp 35 Rge 25 W3	145290809/ 113673887	Cru Well Servicing Ltd.	\$171,725	March 18, 2014
	113673887/ 145290809	Rounded Energy Services Ltd.	\$13,847	March 17-18, 2014
	145290809	Cal-Gas Inc.	\$14,160	April 1, 2014
	145290809	Cal-Gas Inc.	\$1,253	April 1, 2014
	145290809/ 113673887	Baker Hughes Canada Company	\$33,694	April 24, 2014
NE Sec 21 Twp 35 Rge 25 W3	145290764/ 113673944	Cru Well Servicing Ltd.	\$20,866	March 18, 2014
	145290764	Cal-Gas Inc.	\$6,407	April 1, 2014
All Sections	145290809/ 145290764/	KNC Holdings Ltd.	\$161,074	May 8-9, 2014
		<b>Total</b>	<b>\$488,867</b>	

Koury Third Affidavit at para 14;  
Receiver First Report at 76 [Tab 1]

63. Based on a *pro rata* calculation, National Bank propose to have the FHI Working Interests Holdback distributed as follows:

Lienholders	Amount	Adjustment	Distribution
Cru Well Servicing Ltd.	\$192,591	\$192,087	\$41,014.63
Rounded Energy Services Ltd.	\$13,847	\$13,847	\$2,956.67
Cal-Gas Inc.	\$21,820	\$21,820	\$4,659.03
Baker Hughes Canada Company	\$33,694	\$33,694	\$7,194.38
KNC Holdings Ltd.	\$161,074	\$160,056	\$34,175.38
<b>Total</b>			<b>\$90,000.00</b>

BLA at s. 73 [Tab 3]

### Conclusion

64. National Bank submits that as the first priority secured creditor, it is entitled to the Holdback Funds in priority to KNC and the other lien claimants.
65. National Bank further submits that certain of the Remaining Liens are entitled to the FHI Working Interests Holdback on a *pro rata* basis.

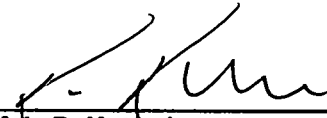
**V. RELIEF SOUGHT**

66. For the reasons set out above, National Bank requests the following relief:

- (a) an Order that the Holdback Funds be remitted to National Bank, as the first priority secured lender to Coast Resources;
- (b) an Order that the FHI Working Interests Holdback be distributed amongst certain of the Remaining Liens on a *pro rata* basis;
- (c) an Order for such further and other relief, as this Honourable Court may deem just and appropriate; and
- (d) costs on a solicitor-client basis or such other basis as may be ordered by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18<sup>th</sup> DAY OF SEPTEMBER, 2015.

**NORTON ROSE FULBRIGHT CANADA LLP**

Per:   
\_\_\_\_\_  
**Kyle D. Kashuba**  
Counsel for the Respondent,  
National Bank of Canada

## INDEX OF AUTHORITIES

1. First Report of the Receiver dated December 18, 2014
2. Second Report of the Receiver dated May 27, 2015
3. *Builders' Lien Act*, SS 1984-85-86, c B-7.1
4. Order Respecting Retention of Funds, Additional Distribution and Holdbacks, dated July 10, 2015
5. *Boomer Transport Ltd. v Prevail Energy Canada Ltd.*, 2014 SKQB 368
6. *Canada Trust Co. v Cenex Ltd.*, [1982] 2 WWR 361, 13 Sask R 435 (CA)
7. *Mechanics' Lien Act*, RSS 1978, c M-7
8. *Canada Trust Co. v Cenex Ltd.*, [1981] 2 WWR 296, 116 DLR (3d) 731
9. *Report of the Thomson Royal Commission study on Mechanics' Liens*, 1966
10. *Mechanics' Lien Act*, SS 1973, c 62
11. *Report prepared for the Honourable J. Gary Lane, Q.C., Minister of Justice by the Special Advisory Committee to the Minister of Justice on Builders' Lien*, August 1984
12. *Sullivan on the Construction of Statutes*, Sixth Edition, (LexisNexis Canada Inc.: Markham, 2014)
13. *Alberta Gold Well Servicing Corp. v Snow Hawk Energy Inc.*, (1987), 53 Alta LR (2d) 333 (Alta Master)
14. *Smoky River Coal Ltd., Re*, 1999 ABQB 204
15. *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27
16. *Doug Johnston Construction Co. v Avonlea Mineral Industries Ltd.*, [1990] 6 WWR 417, 22 ACWS (3r) 616
17. *Cambrian Blasting Co. v Trican Well Services Ltd.*, 2003 SKQB 355

This *Brief of Law* is delivered by:

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