

SUPREME COURT OF YUKON

Citation: *Hy's North Transportation Inc. v Finlayson Minerals Corporation dba Yukon Zinc Corporation*, 2016 YKSC 43

Date: 20160830
S.C. No.15-A0019
Registry: Whitehorse

Between:

HY'S NORTH TRANSPORTATION INC.

Petitioner

And

FINLAYSON MINERALS CORPORATION D.B.A. YUKON ZINC CORPORATION, YUKON ZINC CORPORATION, ATNA RESOURCES LTD., EQUITY EXPLORATION CONSULTANTS LTD., 8248567 CANADA LIMITED, ROYAL GOLD, INC., CATERPILLAR FINANCIAL SERVICES LIMITED/LES SERVICES FINANCIERS CATERPILLAR LIMITEE, DE LAGE LANDEEN FINANCIAL SERVICES CANADA INC. SERVICES FINANCIERS DE LAGE LANDEEN CANADA INC., SANDVIK CUSTOMER FINANCE LLC, FORD CREDIT CANADA LIMITED - CREDIT FORD DU CANADA LIMITEE, PROCON MINING & TUNNELLING LTD., PROCON MINING PARTNERSHIP, KASKA ALLIANCE/PROCON JOINT VENTURE, TRANSMINE TRADING S.A., JINDUICHENG CANADA RESOURCES CORPORATION LIMITED, MAYNARDS FINANCIAL LIMITED PARTNERSHIP, HONG KONG XIANGGUANG INTERNATIONAL HOLDINGS LIMITED AND FORD CREDIT CANADA LEASING

Respondents

Before Mr. Justice L. F. Gower

Appearances:

Alison M. Latimer and Lenore Morris

Counsel for the Petitioner

Kibben Jackson and Danielle Toigo
G. Bowman

Counsel for the Respondent Yukon Zinc.
Counsel for P.S. Sidhu Trucking Ltd.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for a declaration that the petitioner, Hy's North

Transportation Inc. ("Hy's North"), holds a valid and subsisting miners lien against the

Wolverine Mine (the “mine”) owned by the respondent, Yukon Zinc Corporation (“Yukon Zinc”). pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151 (the “*MLA*”). Hy’s North also seeks a declaration that its lien ranks equally with other valid miners liens against the mine. Finally, Hy’s North seeks a declaration that its lien attaches to:

- a) all estates or interests in the mine;
- b) all minerals severed and recovered from the mine while they are in the hands of the owner; and
- c) the interest of the owner in the fixtures, machinery, tools, appliances and other related property at the mine.

[2] The basis for the lien claim is that Hy’s North provided trucking services to Yukon Zinc by hauling processed ore concentrates from the mine to various destinations in British Columbia over the period from November 17, 2014, until on or about February 2, 2015.¹ The mine ceased operating on January 30, 2015. The current amount which Hy’s North claims as due from Yukon Zinc is \$485,869.70.

[3] The main issue in this application is whether this transportation of minerals from the mine is a service “in connection with the recovery of a mineral” as set out in s. 2(1)(b) of the *MLA*. There are however a number of secondary issues going to the validity of the claim of lien which are set out in greater detail below. There is no issue with respect to Hy’s North’s lien ranking equally with all other valid lien claimants against the mine, and no issue with respect to which of the mine’s property the lien would attach to, assuming it is valid.

¹ Hy’s North has actually submitted, in the alternative, that the exact date on which it last provided services to Yukon Zinc may have been February 28, 2015, or as late as June 5, 2015

[4] P.S. Sidhu Trucking Ltd. ("Sidhu") is also a trucking business asserting a lien claim against the mine in a separate petition against Yukon Zinc, S.C. No. 15-A0009. The parties originally agreed to have both petitions heard together on February 17, 2016, with Sidhu proceeding first. However, there was insufficient time to complete both matters on that day and Hy's North's application had to be adjourned to February 29, 2016.

[5] In the meantime, Yukon Zinc made an application to cross-examine the principal of Hy's North, Don Halliday, on his affidavits filed in support of the petition. That application was heard on February 25, 2016, and I allowed the cross-examination to proceed for separate reasons cited as 2016 YKSC 39.

[6] Further, on May 20, 2016, Sidhu applied to reopen its application heard on February 17, 2016, for the purpose of adducing additional evidence to respond to certain submissions made by Yukon Zinc's counsel at that hearing. I allowed that application in separate reasons cited as 2016 YKSC 40.

[7] At the hearings on February 29 and May 20, 2015, counsel for Hy's North essentially adopted the submissions of Sidhu's counsel on the main issue of whether the transportation of minerals from a mine is a service "in connection with the recovery of a mineral", which is required in order for the respective liens of the two companies to be valid. Counsel for Hy's North also made certain additional submissions of their own on this topic.

[8] The parties have also agreed that the evidence in each of the two petitions may be applied to each other. However, Yukon Zinc has specifically requested that I deliver separate reasons for the determination of the validity of each of the miners lien claims,

as the facts are somewhat different as between Hy's North and Sidhu. Therefore, my reasons regarding Sidhu are issued separately and are cited as 2016 YKSC 42.

ISSUES

- 1) Is the transportation of minerals, or concentrates, from a mine a service "in connection with the recovery of a mineral" as set out in s. 2 (1)(b) of the *MLA*?
- 2) Did Hy's North assign the debt due from Yukon Zinc for the trucking services before filing the claim of lien?
- 3) Did Hy's North file its claim of lien in time?

FACTS

[9] The parties are substantially in agreement on the facts.

[10] Hy's North is a Yukon company that provides trucking and hauling services.

Although its registered office is situated in Whitehorse, Hy's North also has a business office in Kamloops, British Columbia.

[11] Yukon Zinc is a British Columbia company that owns mineral claims in the Yukon. Its primary mining asset is the Wolverine Mine, which it owns and operates pursuant to Quartz Mining License QML-0006. (the "License"). It is located in the Watson Lake Mining District.

[12] The Wolverine Mine is a multi-metal underground mine that also has aboveground milling facilities. While in production, the mine produced primarily zinc, copper and lead, with silver and gold as by-products. The infrastructure of the mine is extensive and includes, among other things:

- an underground mine shaft;

- a crusher;
- a conveyor and mill facility;
- a concentrate load-out building;
- waste rock storage pads;
- tailings facilities;
- water treatment ponds;
- an assay laboratory;
- a shotcrete plant;
- a power generation facility;
- explosive and cap magazines;
- a fuel farm;
- a warehouse;
- a truck shop;
- a mining office and administration complex;
- a sewage treatment plant;
- a dry camp; and
- an air strip.

[13] The process of recovering and transporting minerals from the mine was as follows:

- a) the ore was extracted from the underground shaft and transferred to the on-site mill;

- b) at the on-site mill, the ore was processed to recover the mineral concentrates from the ore;
- c) once the minerals were recovered in their concentrate form they were stored at the mine pending pickup and transportation down south;
- d) Yukon Zinc retained various trucking companies to haul the concentrates away from the mine to designated ports in British Columbia, where the concentrates were unloaded and stored for transfer onto ships that would then transport them to smelters in Asia.

[14] In 2014, Yukon Zinc's principal trucking and hauling company, Maple Leaf Loading Ltd. ("MLL"), went into receivership. As a result, Yukon Zinc had to scramble to find an alternative trucking company. In the course of MLL's receivership proceedings, Yukon Zinc obtained an order from the Supreme Court of British Columbia, on July 31, 2014, authorizing the court-appointed receiver, Ernst & Young Inc., to sell certain trucking equipment formerly owned by MLL to Yukon Zinc (the "Sale Order"), which it then in turn sold to Sidhu. In making the Sale Order, Smith J. relied upon a document entitled "Second Report of the Receiver", dated July 28, 2014. Paragraph 25 of that Report states as follows:

The Receiver is seeking short leave to hear this application due to the urgency of completing the sale to [Yukon Zinc]. The Receiver understands that [Yukon Zinc] has not been able to replace the services provided by [MLL] prior to the Appointment Date and [Yukon Zinc] requires the [Yukon Zinc] Assets to resume hauling services at the [Yukon Zinc] mine site. [Yukon Zinc] further advises the Receiver that its storage facilities are at or near capacity and if they are unable to resume hauling services soon they will be forced to suspend production.

[15] At the same time, Yukon Zinc was experiencing severe financial difficulty because of a combination of a downturn in the global commodity market and restrictions in obtaining continuing financing from its parent company. It ceased operations at the mine on or about January 30, 2015.

[16] On March 13, 2015, the Supreme Court of British Columbia granted Yukon Zinc an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "CCA proceedings"), which included a stay of creditor's proceedings against Yukon Zinc. On October 28, 2015, Fitzpatrick J. of the Supreme Court of British Columbia ordered that the stay be lifted for the limited purpose of allowing Hy's North and Sidhu to apply to this Court to determine the validity of their respective miners liens.

[17] In the course of the debtor's relief proceedings in front of Fitzpatrick J., Yukon Zinc tendered an affidavit from its Chief Executive Officer, Mr. Jing Lu, detailing the financial difficulties experienced by the company. At para. 39, Mr. Lu deposed as follows:

Yukon Zinc experienced serious problems in its shipping and distribution when its key transporter - Maple Leaf Loading... was put into receivership in June 2014 and terminated its contracts with the Company. The Company was unprepared for this and the transport and sale of its inventory was delayed while the Company sought out and contracted with a new general transporter. This had a serious negative impact on the Company's cash flow in the latter half of 2014, the same time that metal prices were falling.

[18] Earlier in his affidavit, Mr. Lu attached as an exhibit a copy of a presentation prepared by Yukon Zinc in December 2014, providing a general overview of its operations and the company profile. Hy's North seeks to rely on the following statements in that presentation:

- Meeting concentrate trucking/shipping schedule is critical (p. 92)
- Zinc concentrate maxed out (14k tonnes) and delayed sales (p. 94)

ANALYSIS

- 1) ***Is the transportation of minerals, or concentrates, from a mine a service “in connection with the recovery of a mineral” as set out in s. 2 (1)(b) of the MLA?***

[19] Because the arguments on this issue were essentially the same in each of the two petitions brought by Hy's North and Sidhu, the following is a repetition of my reasons on the point in the Sidhu proceeding.

[20] Section 2 of the *MLA* sets out who is entitled to a lien under that *Act*:

2(1) A contractor or subcontractor who provides services or materials to a mine

(a) preparatory to the recovery of a mineral;

(b) in connection with the recovery of a mineral; or

(c) for an abandonment operation in connection with the recovery of a mineral,

is given a lien by this subsection and, notwithstanding that a person holding a particular estate or interest in the mine or mineral concerned has not requested the services or materials, the lien given by this subsection is a lien on

(d) all the estates or interests in the mine or mineral concerned;

(e) the mineral when severed and recovered from the land while it is in the hands of the owner;

(f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines or mining claim and the appurtenances thereto.

(2) In all other respects, this Act applies to the lien existing by virtue of subsection (1) notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.

(3) For the purposes of this section, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the mine site or in the immediate vicinity of the mine site, deemed to have performed a service and has a lien for just and reasonable rental of the equipment while it is being used or reasonably required to be available for the purpose of the mine. S.Y. 2008, c.17, s.5; S.Y. 2002, c.151, s.2

[21] The parties are agreed that in interpreting s. 2(1)(b), I am to apply the “modern principle” of statutory interpretation referred to by Ruth Sullivan in her text, *Sullivan on the Construction of Statutes*, (6th Ed), (Markham: Lexis Nexis, 2014), at 2.1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[22] In terms of the intention of the Legislature, it is important to note that s. 2 of the *MLA* was amended in 2002 to its present form. The predecessor section referred to work or service “in respect of” mining or a mine:

2.(1) Any person who performs any work or service in respect of or places or furnishes any material to be used in the mining or working of any placer or quartz mine or mining claim shall, by virtue thereof, have a lien for the price of such work, service or material upon the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or in respect of which such work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien. (my emphasis)

[23] The Supreme Court of Canada held in *Nowegijick v. The Queen*, [1983] 1 S.C.R.

29, that the words "in respect of" are to be given the widest possible interpretation:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. (my emphasis)

I pause here to observe that this statement arguably indicates that "in respect of" is broader in scope than "in connection with".

[24] In any event, the words "in respect of" were dropped when s. 2 of the *MLA* was amended in 2008. The pertinent words in s. 2(1) now are:

A contractor or subcontractor who provides services or materials to a mine

...

in connection with the recovery of a mineral

...

is given a lien by this subsection...

In addition, s. 2(3), quoted above, provides that persons who rented equipment to an owner, contractor or subcontractor that is used as part of a mining operation are also deemed to have provided services to a mine, and are entitled to a claim of lien for rental fees while the equipment is at or near the mine site.

[25] The words "in connection with", while perhaps narrower in scope than "in respect of", have nevertheless been held to have a "very broad meaning": *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505. An earlier case from the British Columbia Supreme

Court, *Re Nanaimo Community Hotel Ltd.*, [1944] 4 D.L.R. 638, at para. 5, similarly

held:

[5] ...One of the very generally accepted meanings of "connection" is "relation between things one of which is bound up with or involved in another"; or again "having to do with." The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase "having to do with" perhaps gives as good a suggestion of the meaning as could be had.

[26] The Yukon Government *Hansard* of November 26, 2008, quotes the then Minister of Community Services, the Honourable Archie Lang, as stating the following with respect to the amendments to the *MLA*:

... The purpose of this amendment to the *Miners Lien Act* legislation is threefold: One, by modernizing the *Miners Lien Act*, which was first introduced in 1902 and amended in 1958, the Yukon government will continue to encourage investment in Yukon's mining sector; two, changes to the miners lien legislation will make the act easier to interpret and more in line with the newer legislation in other Canadian jurisdictions; three, these changes will assist mining companies, legal and financial firms, developers, contractors and suppliers that service the mining sector. Potential lien claimants, some of whom may be small Yukon businesses, should not need sophisticated legal aid to understand their rights.

...

... The change also provides necessary clarity to encourage investment in the territory.

...

As many of the developing mines will require debt financing, it is important to ensure that lenders and others can quantify their risks through the amendments to this act while at the same time ensuring suppliers of goods and services clearly understand the extent of the protection provided. It is the

commitment of this government to keep Yukon competitive and attractive for the mineral investment by amending outdated legislation and providing a more attractive investment climate...

[27] Notwithstanding the very broad meaning given to “in connection with” in other contexts, it might be concluded from the Minister’s comments above that the intention of the Legislature was to clarify, and perhaps even narrow, the types of workers who can validly claim a miners lien from the broad range of workers who might fall within the “widest possible scope” of those performing work or a service “in respect of” mining or a mine. I say this because the obvious intention of the legislature was to increase the clarity of the legislation and decrease the need for contractors to seek legal advice to understand their rights. The Legislature chose to focus on workers providing services or materials to a mine in relation to “the recovery of the mineral”. For reasons which I will get to later, this presumably excludes, by implication, services provided post-recovery. If this is correct, then the scope of potential lien claimants is arguably narrower than it was under the former legislation. Having said that, I also recognize that the Legislature specifically added, as potential lien claimants, persons who rent equipment to owners, contractors or subcontractors, providing the equipment is being used or is available for use at the mine site.

[28] This latter point may have been what Veale J. had in mind when he made the following obiter comment in *Ross v. Ross Mining Ltd.*, 2011 YKSC 91 (“*Ross 2011*”):

47 The 2008 amendments to the *MLA* definition of a lien claimant are intended to clarify and expand the persons entitled to a lien claim but limit the lien to 60 days of work, services or materials in priority over mortgages and encumbrances. Thus, the amendments give some assurance to financiers of mining claims that their security

will not be subject to priority of unlimited amounts of lien claims.

[29] In any event, the interpretation of lien legislation is subject to a rather different scrutiny than other legislation. This is because liens, including miners liens, are considered to be an abrogation of the common law in that they create a security right for one class of creditors which did not exist before the statute was enacted and give that class preference over other creditors. Therefore, when determining whether a claimant falls within the preferred class, the statute must be given a strict interpretation. Then, once the claimant has met the burden of establishing that it has the right to claim a lien, the legislation should be liberally interpreted. This approach is further elaborated in the following cases.

[30] In *Re Anvil Range Mining Corp.*, [1999] Y.J. No. 129, Hudson J. of this Court was interpreting s. 2(1) of the previous *MLA* and commented:

63 As will be seen, it is my view that where a statute such as this creates a right which did not previously exist, then the provisions of the statute must be strictly interpreted. Where any party claims the right to a lien on an interpretation of the statute claimed to support such a right, when in fact the statute is silent on the point, the burden on the proponent is increased. (my emphasis)

[31] Further, in another case before this Court, *Access Mining Consultants Ltd. v. United Keno Hill Mines Ltd.*, 2000 YTSC 541, Veale J. was again interpreting s. 2(1) of the old *MLA* and stated:

5 It is a long established rule of interpretation that while the *Miners Lien Act* may merit a liberal interpretation generally, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it. (See *L. Di Cecco Co. v. Ace Lumber Ltd.*,

[1963] S.C.R. 110 and *Anvil Range Mining Corp. (Re)*,
[1999] Y.J. No. 129.) (my emphasis)

[32] More recently, the Nunavut Court of Appeal was dealing with the miners lien legislation in that territory in *Diavik Diamond Mines Inc. v. Tahera Diamond Corp.*, 2009 NUCA 3. There, the Court of Appeal had this to say:

11 Miners' liens such as those created by the *Act* and the analogous builders' and mechanics' liens created by similar legislation are purely statutory rights; such liens were unknown to English common law. ..

12 The Supreme Court of Canada has termed such liens "an abrogation of the common law", that grants to one class of creditors a security or preference not enjoyed by all. Accordingly, lien statutes must be interpreted strictly in determining whether a claimant has brought itself within the terms of the statute so as to claim entitlement to a lien. When the claimant's right to a lien has been established, however, the statute should be "liberally interpreted toward accomplishing the purpose of its enactment": *Clarkson Co. Ltd. v. Ace Lumber Ltd.*, [1963] S.C.R. 110 at 114 ("Clarkson").

13 The Supreme Court was interpreting the Ontario *Mechanics' Lien Act* in *Clarkson*. However, the same rule of statutory interpretation has been applied, properly in our view, to the Yukon Miners Lien Act: Access Mining Consultants Ltd. v. United Keno Hill Mines Ltd., 2000 YTSC 541, 17 C.L.R. (3d) 126 at para. 5. It is equally applicable to the *Act* at issue here.

14 Lien legislation is remedial, its purpose being to secure the parties entitled to its benefits for the value of work done and materials supplied to an improvement: *Curtis v. Richardson* (1909), 18 Man.R. 519 (K.B.). The primary purpose of lien legislation is to better enable the suppliers of work and materials to recover the amounts owing to them and to secure those amounts against the land which has been improved by their work: see, eg, *Wyo-Ben, Inc. v. Wilson Mud Canada Ltd.*, [1985] A.J. No. 1114, 23 D.L.R. (4th) 760 (Alta. C.A.); *Town-N-Country Plumbing & Heating (1985) Ltd. v. Schmidt* (1991), 86 D.L.R. (4th) 716, 93 Sask.

R. 278 (C.A.). That is also the object of miners lien legislation generally, and of the Act in particular.(my emphasis)

[33] This last paragraph in *Diavik* says that the purpose of lien legislation generally, and miners lien legislation in particular, is that it seeks to protect those workers who improve an owner's property, or mine, by creating a preferential security interest for them. This theme was picked up by Veale J. in the *Ross 2011* decision, cited above :

40 In my view, it is evident that the *MLA* was created for the purpose of allowing persons who perform work, services or furnish materials to the owner of a mine to recover the price of the work, service or materials from the mining claim or property. The theory behind the *MLA* is that an owner should not receive the benefit of an improvement to the detriment of a lien claimant who has not been paid.... (my emphasis)

[34] In *Ross 2011*, Veale J. also reiterated the need for a strict interpretation of a lien statute in determining who can claim a lien, but this time in the context of the amended *MLA*:

41 The leading case on the interpretation of a lien statute is *Clarkson Company Limited v. Ace Lumber Limited*, [1963] S.C.R. 110. That case decided that a company that rented equipment to a subcontractor but used on the land of the owners, could not have a lien for rental services. The Court gave a liberal interpretation to the rights that the lien statute conferred, but a strict interpretation in determining who can claim a lien, as the statute represented an abrogation of the common law about giving a charge on an owner's land. ...the provisions creating a lien should be narrowly interpreted. In my view, the same narrow interpretation applies to s. 2(1) of the *MLA*. (my emphasis)

[35] It is interesting to note that, although Hudson J. in *Anvil Range*, cited above, was interpreting s. 2(1) of the old *MLA*, he nevertheless commented that the legislature did

not intend to expand the class of persons claiming a lien beyond those providing goods or services "directly to the property":

71 It is not sufficient simply to take a word (person) [in the former s. 2(1)], examine it and say that, "I am a person therefore I am included and I am entitled to the rights of the statute." It is necessary to look at the whole scheme of the statute and look at the issue from the point of view of whether or not the purpose of the statute is satisfied or whether or not the purpose of the statute is obliterated or avoided by the interpretations sought to be made. An examination of the whole of the statute persuades me that it was not the intention of the legislature to expand the rights of persons claiming a lien to include those who do not provide goods or service **directly to the property**, but provide them to intermediaries such as contractors. (my emphasis)

[36] I agree with Yukon Zinc's counsel that the objective of miners lien legislation generally, including the *MLA*, is to protect those that enhance or improve the mine by providing services or materials which contribute to the actual extraction of minerals from the mine.

[37] In the case at bar, we are talking only about services. Although Hy's North did transport certain materials to the mine on four occasions between November 25, 2014 and January 11, 2015, this fact has no bearing on the validity of the miners lien because, as I will discuss later, Hy's North did not file its lien until April 1, 2015, which was more than 45 days after the last day that particular work was done.²

[38] I also agree with the submission of Yukon Zinc's counsel that one needs to distinguish between services benefiting, improving or enhancing the physical mine site, as opposed to the business or other operations of a mining company generally. This is because "mine" is defined in s. 1 of the *MLA* in terms of the land and physical plant

² Contrary to s. 6 of the *MLA*.

located in whole or in part within the boundaries of the subject mining claim or claims,
as opposed to the mining business operated by the owner.

“mine” means an opening or excavation in the ground which is located in whole or in part within the boundaries of a recorded claim, or a recorded claim which is subject to a lease, or which is located in whole or in part within the boundaries of a group of contiguous claims, and that is established or maintained for the purpose of mining and includes

(a) machinery, plant, buildings, premises, stockpiles, storage facilities, waste dumps or tailings, whether below or above ground, that are used for, or in connection with, mining,

(b) a crusher, mill, concentrator, furnace, refinery, processing plant or place that is used for, or in connection with, washing, crushing, sifting, drying, oxidizing, reducing, leaching, roasting, smelting, refining, treating or conducting research on mineral bearing substances, and

(c) an abandoned mine and abandoned mine tailings...

[39] In *Byer's Transport Ltd. et al v. Terra Mining & Exploration Ltd.*, (1972), 24 D.L.R.

(3d) 447 (NWTSC), a trucking company which transported freight supplies, equipment and mining materials to a mine in the Northwest Territories was held to be a legitimate

lien claimant. Section 3(1) of the *Miners Lien Ordinance* was at issue in that case:

(1) Any person who performs any work or service upon or in respect of or places or furnishes any material to be used in the mining or working of any placer or quartz mine or mining claim shall, by virtue thereof, have a lien for the price of such work, service or material upon the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or upon or in respect of which such work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien.

Counsel for the defendant in *Byers* referred to several cases in support of his argument that s. 3(1) was to be strictly construed since it was in derogation of the common law.

However, Morrow J. found in favour of the lien claimant, as follows:

24 Section 3(1) above must be examined carefully in the light of such decisions as the above. The section refers to performance of "any work or service upon or in respect of or places or furnishes any material". Such material is to be used in the mining. The lien is to affix to the minerals or ore produced as well as to the estate of the owner of the mine or mining claim "in or upon or in respect of which such work or service is performed or material furnished". As I read the above it seems to me that I do not have to stretch or exaggerate the meaning of "service in respect of or places ... material to be used ..." in order to find it includes the carrying or freighting of "necessary supplies, equipment" and so on. In this respect I am not unmindful of the general situation to be found in the Northwest Territories where ventures such as the one under consideration here cannot be serviced by roads or railways in the ordinary sense but only by a combination of winter road and air. (my emphasis)

[40] In the case at bar, Hy's North cannot be said to have enhanced the physical mine site by hauling concentrate away from that site. While Yukon Zinc concedes that Hy's North benefited the business operations of Yukon Zinc by doing so, that does not result in a direct enhancement to the mine itself. Rather, I conclude that s. 2(1)(b) the *MLA* is concerned with protecting those whose services and materials contribute to the ultimate recovery of minerals from the ground, from which the concentrate is extracted.

[41] I find support for this conclusion in the three principles of statutory interpretation raised by counsel for Yukon Zinc.

[42] The first is the implied exclusion principle which arises from the maxim: to express one thing is to exclude another. This is referred to by Ruth Sullivan in her text, cited above, at 8.90:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failed to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied...

Thus, the fact that the *MLA* does not provide for post-recovery services and materials must be seen as the deliberate exclusion of such services and materials by the legislature. I conclude that Sidhu's services were post-recovery.

[43] The second principle of statutory interpretation applicable here is the presumption against tautology. This is referred to by Ruth Sullivan in her text at 8.23:

It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and have a specific role to play in advancing the legislative purpose....

...

... For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[44] In the amended *MLA*, the Legislature made specific provision for services and materials that are "preparatory" to the recovery of a mineral [s. 2(1)(a)] and included a deeming provision extending lien rights to persons renting equipment to an owner, contractor or subcontractor [s. 2(3)]. This supports a narrower reading of the phrase "in connection with the recovery of a mineral" in s. 2(1)(b) because, if this provision was intended to apply broadly to all those persons providing a service or furnishing materials to an owner of a mine in connection with a mining operation, the additional provisions of ss. 2(1)(a) and 2(3) would be rendered meaningless and redundant.

[45] The third principle of statutory interpretation which applies to this argument is that the Legislature can be presumed not to have intended to create absurd results. The broad interpretation of s. 2(1)(b) urged by Hy's North would result in lien rights being extended to anyone that provided services in connection with a mining operation, irrespective of whether such service had anything to do with the actual recovery of a mineral or the improvement of the mine. The resulting absurdity, in my view, is that this would extend lien rights to any contractor that provided services to Yukon Zinc, including warehouse operators, shipping companies, insurers, or even lawyers and financiers. In other words, virtually every creditor could assert a claim of lien against a mining company's primary assets. This would increase uncertainty for lenders and detract from the "attractive investment climate" which the Legislature was trying to create through the amendments to the *MLA*.

[46] Hy's North argued that, if it had not provided trucking services to Yukon Zinc, the Yukon Government would have shut down the mine because Yukon Zinc would have been in breach of its Licence for stockpiling concentrate in excess of the limits stipulated by the License and the related Mill Operating Plan (the "Plan"). Thus, as I understood it, the point is that Hy's North's trucking services were integral to the operation of the mine and therefore ought to be considered a lienable service.

[47] The evidence here begins with affidavit #5 of Mr. P. Sidhu. In paras. 7 and 8 of the affidavit, Mr. Sidhu deposed as follows:

7. In our discussions, Mr. Lu, Floyd, and Nancy Yuan each told me that Yukon Zinc had too much concentrate stored at the mine and needed to reduce the stockpiles quickly or the Yukon government might order Yukon Zinc to stop production.

8. We finalized our discussions for trucking services and it appeared to me that we would reach an agreement. Ms. Yuan told me that she was worried the mine would have to shut down production if too much zinc concentrate remained on the mine site and the trucking had to start right away. I told her that I would talk to YTG to ensure this wouldn't happen. Ms. Yuan said that when I contact YTG I should tell them that, "I [P.S. Sidhu Trucking Ltd.] would start hauling the concentrate out right away." I contacted the Minister, Wade Istchenko and informed him that I would be hauling the Zinc concentrate from the Wolverine Mine within a few days. He said that that was fine.

[48] Mr. Lu is the Chief Executive Officer of Yukon Zinc and Ms. Yuan is the General Manager, Marketing and Sales of the company. As I noted in my reasons on the application to reopen, the truth of these statements attributed to Mr. Lu and Ms. Nancy Yuan were disputed by counsel for Yukon Zinc at the hearing on February 17, 2016. However, no application for an adjournment or cross-examination on the affidavit was made. Rather, counsel made a number of responsive submissions based on instructions received from Ms. Yuan. Because that information was never reduced to the form of an affidavit, it cannot be considered as evidence. Nevertheless, both Hy's North and Sidhu felt it was necessary to adduce additional evidence in response to shore up their argument that the Yukon Government would have intervened to stop production at the mine, in the event that Yukon Zinc exceeded its storage capacity limits under the Licence and the Plan.

[49] I allowed the application to reopen and permitted Hy's North and Sidhu to rely upon three additional pieces of evidence found as exhibits in the affidavit of Julie Hutchinson filed March 20, 2016:

- 1) A Second Report of the receiver, Ernst and Young Inc., dated July 28, 2014, filed in the British Columbia CCAA proceedings;
- 2) A Sale Order made July 31, 2014, in the British Columbia CCAA proceedings; and
- 3) The affidavit of Mr. Lu, sworn March 13, 2015, and also filed in the British Columbia CCAA proceedings.

[50] In his affidavit, Mr. Lu detailed the financial difficulties experienced by Yukon Zinc which ultimately led to the stay of proceedings against all creditors ordered by Fitzpatrick J. At para. 39, Mr. Lu deposed as follows:

Yukon Zinc experienced serious problems in its shipping and distribution when its key transporter - Maple Leaf Loading... was put into receivership in June 2014 and terminated its contracts with the Company. The Company was unprepared for this and the transport and sale of its inventory was delayed while the Company sought out and contracted with a new general transporter. This had a serious negative impact on the Company's cash flow in the latter half of 2014, the same time that metal prices were falling.

[51] Earlier in his affidavit, Mr. Lu attached as an exhibit a copy of a presentation prepared by Yukon Zinc in December 2014, providing a general overview of its operations and the company profile. Hy's North seeks to rely on the following statements in that presentation:

- Meeting concentrate trucking/shipping schedule is critical (p. 92)
- Zinc concentrate maxed out (14k tonnes) and delayed sales (p. 94)

[52] Although I risk repeating much of what I said in my reasons on the application to reopen, I feel it is necessary to do so in order to more fully explore Hy's North's argument here.

[53] Hy's North relies upon the evidence of Ms. Yuan, in her affidavit #1, at para. 6, that "Yukon Zinc must operate the Wolverine Mine in compliance with the Plans pursuant to the terms of the License." Further, Hy's North relies upon the following provisions in the License which it says required Yukon Zinc to abide by subsequent provisions in the Plans:

6.1 Where the License calls for the submission of a plan, the plan must be approved by the [Yukon Government] before the Licensee is authorized to carry out any of the activities described in the plan.

...

6.5 The Licensee is authorized to undertake only those activities that are authorized by this License and where these activities are described in an approved plan, the Licensee must undertake them in accordance with the plan.

...

13.2 The Licensee must submit to the [Yukon Government] for approval a Mill Operating Plan which must include:

...

g) a description of concentrate storage, handling and transportation...

[54] Hy's North then points to the following provisions in the Plan:

3.5 - which states that zinc concentrate thickeners will produce at the rate of 12.3 tonnes per hour;

Table 4-2 - which states that the production of zinc concentrate would be 270.8 tonnes per day;

Figure 3-8 - which indicates that the zinc concentrate stockpile would have a capacity of 3792 tonnes; and

5 - "Concentrate Storage and Haulage"

...

Hy's North
Concentrates will be trucked via the Robert Campbell Highway southward through Watson Lake to the existing Stewart Bulk Terminal in Stewart, BC. Concentrate will then be transported via ocean freighters to smelters in Asia.

[55] Sidhu submits that, reading these Plan provisions together should allow this Court to conclude that, if Yukon Zinc exceeded its stated storage capacity for zinc concentrate, the Yukon Government would have been authorized to stop production at the mine. Accordingly, the trucking services provided by Hy's North were essential to the operation of the mine and therefore should be considered a lienable service.

[56] Yukon Zinc submits that the License and the Plan do not include specific provisions regarding the volume of concentrate that could be stored at the mine. I disagree. Figure 3-8 does describe the volume of zinc concentrate stockpile at the mine.

[57] In any event, Yukon Zinc submits that despite the stated stockpile capacity for the storage of zinc concentrate, it is apparent from the manner in which it departed from the provision in the Plan stating that it would truck concentrate to Stewart, British Columbia, that the Yukon Government was not strictly enforcing all of the provisions of the Plan. In this regard, counsel points to affidavit #2 of Don Halliday, which indicates that Hy's North was hauling concentrates to terminals in Richmond, British Columbia (para. 9).

[58] Yukon Zinc further submits that neither the License nor the Plan include specific provisions mandating Yukon Zinc to haul concentrate away from the mine. I agree with his submission and would add that there are no provisions in the License or the Plan which specifically indicate that Yukon Zinc would be in breach if it exceeded the capacity of the zinc concentrate stockpile. Nor are there any provisions indicating the Yukon Government would intervene to cease operations at the mine for breach of conditions of the License or the Plan.

[59] Thus, I am not persuaded that the evidence shows, on a balance of probabilities that the mine was in danger of being shut down, but for the trucking services provided by Hy's North.

[60] However, even if I am wrong in this conclusion, and even if I accept for the moment that Hy's North's trucking services were integral to the operation of the mine, that is not the test for whether it is entitled to a miners lien. The test, in my view, is whether Hy's North provided a service in connection with the recovery of a mineral from the mine and, as I indicated above, I do not find that Hy's North has met this test. It also must be kept in mind that other service providers, contractors, agencies or institutions could also be described as integral to the operation of the mine, in the sense that the mine might not have been able to operate absent the provision of the service. Two examples of such services referred to above were insurance companies and lending institutions or entities. Obviously, Yukon Zinc would not have been able to operate the mine without adequate insurance or financing. However, that does not make those services lienable under the *MLA*.

[61] In the result, I conclude that Hy's North did not provide the service in connection with the recovery of a mineral and therefore it does not have a valid miners lien against Yukon Zinc's Wolverine Mine.

2) ***Did Hy's North assign the debt due from Yukon Zinc for the trucking services before filing the claim of lien?***

[62] In my view, the answer to this question is unequivocally "yes".

[63] On February 26, 2015, pursuant to my oral ruling the previous day, the principal of Hy's North, Donald Halliday, was cross-examined on three affidavits sworn by him on April 1, April 30, and February 3, 2016, as well as related documentation which I ordered Hy's North to produce in relation to an alleged assignment between it and Accutrack Capital ITC Inc. ("Accutrack").

[64] In late November 2014, Hy's North began issuing invoices for its trucking services to Yukon Zinc stating:

Please be advised that we have assigned, made over and sold to ACCUTRAC CAPITAL ITC INC. all of our rights and interests in and to the account receivable arising from this invoice and that all payments should be made to:
ACCUTRAC...

[65] On December 10, 2014, Hy's North issued the first of many subsequent invoices containing the following notice:

NOTICE OF ASSIGNMENT

Please be advised that we have assigned, made over and sold to ACCUTRAC CAPITAL INC. all of our rights and interest in and to the account receivable arising from this invoice and that all payments should be made payable to:
Accutrac...

[66] On December 11, 2014, Hy's North advised Yukon Zinc that it was going to "start factoring" its invoices with Accutrac, and that all future invoices were to be paid directly to Accutrac.

[67] On February 10, 2015, Mr. Halliday sent an email to Yukon Zinc instructing it to pay past due invoices to the "finance company". Again, it appears to be undisputed that this was a reference to Accutrac.

[68] The assignment came about when Hy's North entered into a "Factoring Agreement" with Accutrack in December 2014³. This agreement includes the following statements:

We agree to purchase and you agree to sell all of your accounts receivable (the "Receivables") under the following terms:

...

11. You irrevocably appoint us...your lawful attorney for all collection matters relating to the Receivables, and, without limiting the scope of this appointment, we have the right... to sue for, recover and receive all monies due, owing and payable under each Receivable...

There is no dispute that the Receivables referred to in this Agreement are the invoices which Hy's North relied upon in support of, and identified in, its claim of lien (the "liened invoices").

[69] Mr. Halliday further admitted in cross-examination that, with the sole exception of a storage fee invoice, which I will return to later, prior to filing its claim of lien on April 1, 2015, Hy's North had assigned all the liened invoices to Accutrack⁴. Mr. Halliday also

³ Affidavit #2 of Fergus McDonnell, Ex A4.

⁴ Affidavit #2 of Fergus McDonnell, Ex A, p. 57.

admitted that Accutrack paid Hy's North to acquire the liened invoices⁵, and that as of April 1, 2015, all amounts owing under the invoices were owed to Accutrack and not to Hy's North⁶. Although Mr. Halliday previously swore an affidavit on April 1, 2015, verifying the truth of Hy's North's claim of lien, he conceded in cross-examination that he did not actually review the claim of lien before swearing the affidavit.

[70] Counsel for Hy's North submitted at the hearing on February 29, 2015, that the assignment was "unwound" at some unspecified time after the Factoring Agreement was made. However, there is absolutely no evidence of this.

[71] Yukon Zinc says that the assignment is determinative of the validity of the miners lien. This is because, when Hy's North filed its claim of lien, it no longer had any interest in the debt owed to it by Yukon Zinc and, therefore, there was no basis for the lien. As authority for this proposition, counsel relies upon *DiGuilo v. Boland*, [1958] O.R. 384. There, the Ontario Court of Appeal commented upon a provision in the *Conveyancing and Law of Property Act* of Ontario, having a purpose somewhat similar to that of s. 1(1) of the Yukon's *Choses in Actions Act*, R.S.Y. 2002, c. 33, which allows for the assignment of every debt and chose in action (essentially a form of debt) arising out of contract.⁷ The Court of Appeal in *DiGuilo* stated:

... A legal assignment is not effective or complete until the debtor is given notice... After it becomes effective, the

⁵ Ibid, p. 23.

⁶ Ibid, p. 143-145.

⁷ s. 1(1) *Choses in Action Act*. Every debt and every chose in action arising out of contract is assignable at law by any form of writing containing appropriate words to that effect, but subject to those conditions and restrictions with respect to the right of transfer as may relate to the original debt or as may be connected with or be contained in the original contract and subject to the *Personal Property Security Act*, and the assignee thereof may bring an action thereon in their own name as the party might to whom the debt was originally owing or to whom the right of action originally accrued, or may proceed in respect of the debt as though this *Act* had not been passed.

assignor ceases, *vis-à-vis* the debtor, to have any interest in the chose [debt]...

In the case at bar, there is no question that Hy's North provided notice to Yukon Zinc that the liened invoices had been assigned to Accutrack.

[72] As for the relationship between the debt and the claim of lien, Yukon Zinc's counsel referred to *Esquire Heating & Air Conditioning Ltd. v. Hoffman* (1984), 56 A.R. 184 (Q.B.), where Master Funduk addressed a provision in the Alberta *Builders' Lien Act*. At paras. 18 and 19, he stated:

18 There can be no doubt that a lien claimant can accept something other than full payment, or even payment, in satisfaction of a lien. Properly, it is more correct to talk about satisfaction of the claim secured by the lien rather than satisfaction of the lien, because the lien does not stand on its own. The foundation for the lien is a debt owed to the lien claimant, which debt arises from a set of circumstances that fit into s. 4(1), (2) or (4).

19 The lien given by the *Act* is, at the risk of appearing redundant, a statutory lien. It makes the lien claimant a secured creditor. As indicated in *Wortman*, supra, the lien claimant has a charge on the land. The charge is merely security for the payment of the claim. The distinction between the *in personam* claim (the debt) and the lien must be kept in mind. The debt is not dependent on the lien. It is the other way round. The lien is dependent on there being a debt. If there is no debt owed to the lien claimant, for whatever reason, there is no lien. (my emphasis)

[73] Yukon Zinc also relied upon *Henfrey & Co. Ltd. v. Poplar Properties Ltd. et al* (1986), 24 D.L.R. (4th) 313, where the British Columbia Court of Appeal dealt with the issue of the validity of an assignment of an inchoate claim of builders lien under the British Columbia *Builders Lien Act*. While much of the Court's discussion around that issue is irrelevant to the case at bar, the following comment, at para. 12, about the

relationship between the debt and the lien claim echoes the words of Master Funduk in

Esquire Heating:

... The lien claim and the debt are inseparable. The lien claim is not a separate chose in action. The lien claim is a collateral right attaching to the debt and cannot stand and be pursued independently of the debt...

[74] I conclude from all this that the assignment was absolute and that Hy's North retained no rights against Yukon Zinc at the time that it filed its claim of lien on April 1, 2015. Accordingly, the claim of lien was a nullity. Further, even if there were evidence of a subsequent change of status in the relationship between Hy's North and Accutrack vis-à-vis the Receivables, that could not revive or validate the previously invalid lien.

3) ***Did Hy's North file its claim of lien in time?***

[75] Counsel for Hy's North has made a number of alternative arguments on this point. For the reasons which follow, all of them must fail.

The period of credit argument

[76] The first argument is that Hy's North issued its final invoice for trucking services on February 2, 2015, and that its arrangement with Yukon Zinc was that each invoice was to be paid within 30 days. Thus, relying upon *Access Mining*, cited above, at para. 12, the 45-day period for filing a claim of lien specified s. 6 of the *MLA* did not begin to run until 30 days after February 2, i.e. March 4, 2015. Obviously, this would mean that when the lien was filed on April 1, 2015, it was within the statutory period of 45 days.

[77] This argument must fail because *Access Mining* was dealing with the former s. 6 of the *MLA* (R.S.Y. 2002, c. 151) which provided:

The claim may be registered at any time before the expiration of six months from the last day upon which the work or service or material which is the subject matter of the claim, was performed or furnished or where credit has been given from the time fixed for payment. (my emphasis)

This provision was amended in 2008 and now reads as follows:

The claim may be registered at any time before the expiration of 45 days from the last day on which the work or service or material which is the subject matter of the claim, was performed.

Further, s. 7 of the *MLA* states:

Every lien that has not been duly deposited under this Act shall cease to exist on the expiration of the time previously limited for the registration thereof.

[78] Obviously, the provision regarding the period of credit has been dropped in the new legislation. Therefore, *Access Mining* is of no assistance to Hy's North. There is currently no basis in law to support a claim of lien filed outside the 45-day timeline: *Golden Hill v. Ross Mining Ltd.*, 2009 YKSC 80 ("*Ross 2009*"), at paras. 6 and 15.

The storage argument

[79] Hy's North argued in the alternative that if this Court does not apply the interpretation from *Access Mining*, then the last day that services were provided should be February 28, 2015. On that date, Hy's North issued invoice 7416, which was included in the claim of lien, and was submitted to Yukon Zinc for the "storage" of 225 tonnes of "ore" [should have stated "concentrate"] from February 14-28, 2015, in the amount of \$1,575.

[80] This argument must fail because there was never any agreement that Hy's North would provide storage services for Yukon Zinc. Yukon Zinc and Hy's North did not have

a single agreement specifying the terms upon which Hy's North would provide its trucking services. Rather, on each occasion that Hy's North did so, Yukon Zinc would issue a purchase order to Hy's North. The purchase orders involved in this application included, among other things, a description of the work to be carried out in the terms of payment. However, the purchase orders did not include any provision for storage costs and at no time did Yukon Zinc engage Hy's North to provide storage services.

[81] The storage issue only arose because, from early February 2015 onwards, Hy's North refused to deliver certain copper concentrate and refused to relinquish possession of it to Yukon Zinc. Rather, it sought to force Yukon Zinc to pay some of the outstanding invoices as a condition of releasing the concentrate.

[82] Mr. Halliday admitted in his cross-examination that Hy's North never contracted with Yukon Zinc for storage and further testified that Hy's North should not have charged Yukon Zinc for this service⁸. Rather, Mr. Halliday testified that he issued the invoice to get a "reaction" from Yukon Zinc, as he was becoming frustrated over his bills not being paid⁹.

[83] Thus, Hy's North failed to comply with its obligation to deliver the concentrate and now seeks to benefit from that breach of agreement. Such action cannot be countenanced: *Webster v. Thompson*, 2008 ONCA 730, at para. 19; and *McNaughton v. Stewart*, [1993] B.C.J. No. 1180, at para. 13.

[84] Finally, and in any event, the storage of recovered mineral concentrate away from the mine site in British Columbia is simply another type of service performed

⁸ Affidavit #2 of Fergus McDonnell, Ex A, pp. 62-64.

⁹ *Ibid*, p. 64.

subsequent to the mineral being recovered. Thus, pursuant to my reasons above on the transportation of minerals away from the mine, I similarly conclude that this particular storage was not “in connection with the recovery of a mineral” and therefore is not a lienable service under s. 2 (1)(b) of the *MLA*.

[85] Hy's North made a related alternative argument that it had stored materials at its yard in Kamloops, British Columbia, up to and until June 5, 2015, before completing the delivery of a particular load of concentrate to a terminal in Richmond, British Columbia¹⁰. Accordingly, Hy's North submitted that June 5, 2015, is to be taken as the last day that provided services to Yukon Zinc. This argument must fail for the same reasons just given above.

The argument regarding s. 11(1) of the MLA

[86] Section 11(1) of the *MLA* provides:

Any number of lien holders may join in one application and any proceedings brought by a lien holder shall be taken to be brought on behalf of all the lien holders who have duly registered their liens before or within 60 days after the commencement of the proceedings or who, within a period of 60 days, file with the clerk of the Supreme Court a statement of their respective claims intituled [as written] in or referring to those proceedings.

[87] Hy's North submitted that, even if the final day it provided service to Yukon Zinc was February 2, 2015, its claim of lien is nevertheless valid under s.11(1). This is because there was another miners lien filed by Procon Mining and Tunnelling Ltd. (“Procon”), which Procon subsequently perfected by filing a petition in this Court on March 12, 2015, and obtaining a certificate of pending litigation. Hy's North filed its

¹⁰ Affidavit #2 of Dan Halliday, paras. 5-9.

petition with this Court on May 15, 2015, within 60 days of the commencement of the Procon proceedings.

[88] Counsel for Hy's North submitted that s.11(1) of the *MLA* should be read as providing for "a suspension of the timeliness requirements in ss.6 and 7 for any person entitled to a lien under s. 2(1), so long as they give notice of their claim within 60 days of the filing of a claim by another lien holder". Counsel further submitted that any lien holder who has duly registered their lien before or within 60 days after the commencement of the proceeding by the other lien holder is deemed to be part of those proceedings. Thus, s. 11(1) must apply to the lien holders who have not duly registered their liens.

[89] Once again, I confess that I do not understand this argument.

[90] I conclude that the last day of work provided by Hy's North to Yukon Zinc was February 2, 2015. Hy's North then filed its claim of lien on April 1, 2015, which was 58 days after the last day of work. Section 6 of the *MLA* requires that the claim of lien registered within 45 days from the last day of work. Further, the effect of s. 7 of the *MLA* is that every lien which has not been duly registered within 45 days shall "cease to exist" at the expiration of that time period.

[91] The flaw in Hy's North's argument is that s. 11(1) of the *MLA* only applies to "lien holders". Therefore, in order to come within the sub-section Hy's North first has to establish that it holds a valid lien, which it has failed to do. Accordingly, s. 11(1) has no bearing on this matter.

[92] I also agree with the submission by Yukon Zinc's counsel that s. 11(1) cannot be relied upon to revive an expired lien claim, because if the argument of Hy's North was

accepted, it would render the 45-day limitation period meaningless, so long as one valid lien claimant had commenced proceedings in respect of its claim.

CONCLUSION

[93] I conclude that Hy's North does not hold a valid and subsisting miners lien against Yukon Zinc's Wolverine Mine.

[94] In the event that I am subsequently found to be wrong in the above conclusion, I note that Yukon Zinc takes no issue with that portion of the application in which Hy's North seeks a declaration that its lien ranks equally with other valid miners liens against the mine. Further, Yukon Zinc takes no issue with the declaration sought that the lien, if it exists, attaches to:

- a) all estates or interests in the mine;
- b) all minerals severed and recovered from the mine while they are in the hands of the owner; and
- c) the interest of the owner in the fixtures, machinery, tools, appliances and other related property at the mine.

[95] Accordingly, the notice of application filed by Hy's North on February 8, 2016, is dismissed. Yukon Zinc shall have its costs for succeeding on the application.

GOWER J.