

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

THIRD EYE CAPITAL CORPORATION

Applicant

and

RESSOURCES DIANOR INC. / DIANOR RESOURCES INC.

Respondent

**FACTUM OF THIRD EYE CAPITAL CORPORATION  
(ON MOTIONS OF RECEIVER AND LEADBETTER  
RETURNABLE SEPTEMBER 27, 2016)**

September 21, 2016

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## **PART I - INTRODUCTION**

1. Third Eye Capital Corporation (“Third Eye”) supports the relief sought by the Richter Advisory Group Inc., in its capacity as the Court-Appointed Receiver (the “Receiver”) for a vesting and approval order approving the sale of certain of the debtor’s assets to Third Eye
2. This sale of assets represents the best recovery for all creditors. It meets the *Soundair* principles and should be approved.
3. The only creditor who opposes this relief is John Joseph Leadbetter (“Leadbetter”), the original prospector of the properties. Leadbetter’s demands are prejudicial to the other creditors and there is no alternative prospect for recovery. In these circumstances, he is simply holding the other creditors to ransom and the sale should be approved over his objections.

## **PART II - THE FACTS**

4. The relevant facts are set out in the report of Receiver of Ressources Dianor Inc. / Dianor Resources Inc. (“Dianor”) dated August 8, 2016 (the “Second Receiver’s Report”).
5. By Order of this Court dated August 20, 2015, the Receiver was appointed over the assets, undertakings and properties of Dianor pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”) and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, C. C-43 (“*CJA*”).
6. As set out in the first report of the Receiver dated October 1, 2015 (the “First Receiver’s Report”) and Second Receiver’s Report, Dianor’s assets consist mainly of certain mining claims in Ontario and Quebec, both patented and unpatented.
7. Those mining claims are listed at Schedule “C” and Schedule “D” hereto.

## The Ontario Project Royalties

8. With respect to the Ontario mining claims, there are certain applicable royalties, being:

- (a) a 15.44% gross overriding royalty (“GOR”) for diamonds and 1.5% GOR for all other metals and minerals in favour of 2350614 Ontario Inc. (“235Co.”) (unpatented (Crown) and patented mining claims) (the “Leadbetter GORs”);
- (b) a 10% royalty for all minerals in favour of Algoma Steel Inc., which subsequently became Essar Algoma Steel Inc. (patented mining claims only) (the “Essar Royalty”),

(together, the “Ontario Project Royalties”).

**Reference**      Leadbetter Property Option Agreement [Crown Land] between Dianor Resources Inc., 3814793 Canada Inc. and Paulette A. Mousseau-Leadbettors dated August 25, 2008 (the “Crown Land Agreement”), Affidavit of Rebecca Giri sworn June 28, 2016 (“Giri Affidavit”), Exhibit D, Motion Record of Third Eye Capital Corporation (the “Third Eye Motion Record”), Tab 1D, pp. 23-26.

Leadbetter Property Option Agreement [Patented Land] between Dianor Resources Inc., 3814793 Canada Inc. and Paulette A. Mousseau-Leadbettors dated August 25, 2008 (the “Patented Land Agreement”), Giri Affidavit, Exhibit E, Third Eye Motion Record, Tab 1E, pp. 64-107.

9. The grant of the royalties proceeded by way of various agreements, which were amended over time. The Crown Land Agreement and the Patented Land Agreement, both dated August 25, 2008 govern.

10. The relevant terms of the Crown Land Agreement and the Patented Land Agreement as they relate to the Leadbetter GORs are virtually identical:

5. [...]

Once the Optionee becomes the owner of a one hundred percent (100%) undivided interest in the Mining Claims, the Optionors shall retain a twenty percent (20%) Gross Overriding Royalty ('GOR') for diamonds and a one and a half percent (1.5%) gross overriding royalty (GOR) for all other metals and minerals as calculated in accordance with Schedule 'A'. The Optionee shall have the right of first refusal to purchase the Optionors' GOR.

**Reference** Crown Land Agreement, section 5 (amending section 7 of the Leadbetter Option Agreement, attached as Schedule 1), Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 23-26.

11. Schedule A provides that the diamond GOR is to be calculated as follows:

2.1 The Optionors are entitled to a royalty ("Gross Overriding Royalty" or "GOR," equal to the Royalty Percentage of the Average Appraised Value of the Diamonds".

**Reference** Crown Land Agreement, Schedule A, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 23-26.

12. The various definitions applicable to the above provision are:

1.10 "Royalty Percentage" means twenty percent (20%) less the percentage interest in the Mining Claims, if any the Optionors have then acquired pursuant to the Ten Percent Purchase Agreement.

1.2 "Average Appraised Value" means the value in Canadian dollars of the Diamonds after they have been cleaned and sorted, determined as provided in section 2.2 and 2.3 hereof, with no deductions for costs or expenses of any nature or kind.

1.4 "Diamonds" means all diamonds that are recovered or produced from the Property after the date of this Agreement, excluding any by-products or tailings that remain after the extraction and processing process.

**Reference** Crown Land Agreement, Schedule A, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 23-26.

13. Schedule C provides that the metals and minerals GOR is to be calculated as follows:

2.1 The royalty interest which shall be payable to the Optionor by the Optionee pursuant to the Non-Diamond Mineral Rights Agreement shall

be 1.5% of the Gross Revenue, as defined in Section 1.1 of this Section "C".

**Reference** Crown Land Agreement, Schedule C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 23-26.

14. "Gross Revenue" is defined as:

1.1 "Gross Revenue" means the aggregate of the following amounts received in each quarter:

- (a) the revenue received by the Optionee or any of its Affiliates from arm's length purchases of all Product;
- (b) the fair market value of all Product sold by the Optionee or any of its Affiliates in such quarter to persons not dealing at arm's length with the Payor; and
- (c) any proceeds of insurance on Product.

1.2 "Products" means any minerals recovered from the Mining Claims defined in the Leadbetter Option Agreement.

**Reference** Crown Land Agreement, Schedule C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 23-26.

15. The Crown Land Agreement goes on to provide that:

4.1 It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest. If any right, power or interest of any party under the Leadbetter Crown Land Property Option Agreement would violate the rule against perpetuities, then such right, power or interest shall terminate at the expiration of 20 years after the death of the last survivor of all the lineal descendants of Her Majesty, Queen Elizabeth II of England, living on the date of this Agreement..

**Reference** Crown Land Agreement, Schedules A and C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 23-26.

16. The Patented Land Agreement contains the same provisions.

17. The diamond GORs were reduced from 20% to 15.44% as reflected in Schedule 5.1(gg) of the TEC/Dianor Credit Agreement.

## The Surface Rights

18. Dianor also purchased certain surface rights from Leadbetter. That purchase is governed by an Agreement of Purchase and Sale between Dianor Resources Inc., 3814793 Canada Inc. and Paulette A. Mousseau-Leadbetter dated November 27, 2008 (the “Surface Rights Agreement”).

**Reference** Surface Rights Agreement, Giri Affidavit, Exhibit F, Third Eye Motion Record, Tab 1F, pp. 108-139.

19. Section 2 of the Surface Rights Agreement provides:

On the Closing Date, the Purchaser will grant the Vendor a first ranking mortgage in the principal amount not to exceed FIVE MILLION DOLLARS (\$5,000,000.00) in the form attached hereto as Schedules “B” and “B.1” which will provide security against the balance of the Purchase Price and other obligations under the hereinafter defined Suspension and Termination Agreement.

(the “Vendor Take-Back Mortgage”)

**Reference** Surface Rights Agreement, Giri Affidavit, Exhibit F, Third Eye Motion Record, Tab 1F, pp. 108-139.

20. The Vendor Take-Back Mortgage was registered on title on December 2, 2008, in favour of 3814793 Canada Inc. (20%), Paulette Leadbetter (10%) and 1584903 Ontario Ltd. (70%).

**Reference** Charge/Mortgage registered December 2, 2008 as AL47217, Giri Affidavit, Exhibit G, Third Eye Motion Record, Tab 1G, pp. 140-146.

21. On January 19, 2012, 1778778 Ontario Inc. (“177Co.”) wrote to Dianor, demanding payment under the Vendor Take-Back Mortgage (the “Demand Letter”).

**Reference** Demand Letter from Roderick Johansen to John Ryder, Giri Affidavit, Exhibit H, Third Eye Motion Record, Tab 1H, pp. 147-155.

22. The Demand Letter stated that Dianor owed \$2,475,000 under the mortgage as at December 31, 2011. Failing payment, the Demand Letter stated 177Co. would take legal action.

**Reference** Demand Letter from Roderick Johansen to John Ryder, Giri Affidavit, Exhibit H, Third Eye Motion Record, Tab 1H, pp. 147-155.

23. On October 2, 2012, 177Co. commenced power of sale proceedings.

**Reference** Notice of Sale Under Charge/Mortgage dated October 3, 2012 Giri Affidavit, Exhibit I, Third Eye Motion Record, Tab 1I, pp. 156-162.

24. It appears that pursuant to those power of sale proceedings 177Co. “sold” the surface rights to 235Co. (the holder of the GORs). Both of these companies are Leadbetter companies. Leadbetter’s affidavit sworn August 18, 2016 (the “Leadbetter Affidavit”) states that the “purchase price” was \$800,000. The Agreement of Purchase and Sale appended as Exhibit “C” to the Leadbetter Affidavit is executed both on behalf of the seller and the purchaser by Leadbetter.

**Reference** Notice of Transfer: Power of Sale registered on December 19, 2012 as AL112565, Giri Affidavit, Exhibit I, Third Eye Motion Record, Tab 1I, pp. 156-162.

Corporate search for 2350614 Ontario Inc., Giri Affidavit, Exhibit I, Third Eye Motion Record, Tab 1I, pp. 156-162.

Affidavit of John Leadbetter, sworn August 18, 2016 (the “Leadbetter Affidavit”), at para. 4, and Exhibit “C”, Motion Record of John Leadbetter dated August 19, 2016 (the “Leadbetter Motion Record”) Tab 2, p. 9 and Tab 2C, p. 58.

25. There is no evidence that 177Co. took any steps to maximize the purchase price or assess fair market value, including exposing the property to the market.



## The Bid Process

26. On October 7, 2015, the Court granted an order approving a bid process to be carried out by the Receiver and authorizing the Receiver to take steps in furtherance thereof (the “Bid Process Order”).

**Reference** Order dated October 7, 2015, Giri Affidavit, Exhibit L, Third Eye Motion Record, Tab 1L, pp. 156-162.

27. The Bid Process undertaken by the Receiver is detailed in the Second Receiver’s Report. Of note:

- (a) the Receiver canvassed 39 prospective interested parties;
- (b) all creditors were given notice of the bid process, including Leadbetter;
- (c) two offers to purchase the assets of Dianor were received prior to the bid deadline: one from Third Eye (discussed further below) and one from a third party; and
- (d) both offers to purchase contained a condition that the Ontario Project Royalties be terminated or significantly reduced.

**Reference** Second Report of Richter Advisory Group Inc., in its capacity as Court-Appointed Receiver of Ressources Dianor Inc. / Dianor Resources Inc. (“Second Receiver’s Report”) at paras. 14 and 19, Motion Record of the Receiver dated August 9, 2016, Tab 2, pp. 26-27 and 29.

28. Neither bidder was willing to purchase Dianor’s assets with the Ontario Project Royalties in place. Leadbetter was not a bidder.

**Reference** Second Receiver’s Report at paras. 23 and 37, Motion Record of the Receiver, Tab 2, pp. 30 and 32.

### Third Eye's Offer to Purchase

29. Third Eye participated in the bid process, which culminated in Third Eye delivering a purchase and sale agreement dated November 23, 2015, which was accepted by the Receiver on December 11, 2015 (the "Asset Purchase Agreement"). An amending agreement was executed on August 4, 2016 (the "Amending Agreement", and together with the Asset Purchase Agreement, the "Third Eye Offer").

**Reference** Second Receiver's Report at subpara. 14(g), Motion Record of the Receiver, Tab 2, p. 27.

30. The salient terms of the Asset Purchase Agreement, as amended by the Amending Agreement are:

- (a) Third Eye has offered to purchase Dianor's interests in the sale assets, which constitute substantially all of the company's assets and business, other than the excluded assets;
- (b) the purchase price shall consist of \$2 million in Credit Bid Amount, Assumed Liabilities and the amount of \$400,000 payable in cash; and
- (c) the \$400,000 payable in cash is to be allocated and distributed, subject to and upon direction of the Court, to Essar in the amount of \$150,000 and to the holders of the 235Co GORs (i.e., Leadbetter entities) in the amount of \$250,000.

**Reference** Second Receiver's Report at paras. 15-17, Motion Record of the Receiver, Tab 2, pp. 27-28.

## Valuation of the Ontario Project Royalties

31. Third Eye commissioned a valuation of the Ontario mining claims. William E. Roscoe, Ph.D., P.Eng., Principal Geologist, co-founder and Chairman Emeritus of Roscoe Postle Associates produced a valuation report for the patented and unpatented mining claims, dated May 5, 2016 (the "Valuation Report").

**Reference** Valuation Report, Affidavit of William Roscoe sworn May 19, 2016 ("Roscoe Affidavit"), Exhibit B, Third Eye Motion Record, Tab 2B, pp. 199-208.

32. Dr. Roscoe is an expert in the area of mining valuations and has experience valuing diamond and other metals and minerals claims.

**Reference** Curriculum Vitae of William Roscoe, Roscoe Affidavit, Exhibit A, Third Eye Motion Record, Tab 2A, pp. 194-198.

33. Dr. Roscoe has executed an Acknowledgment of Expert's Duty.

**Reference** Acknowledgment of Expert's Duty, Roscoe Affidavit, Exhibit C, Third Eye Motion Record, Tab 2C, pp. 209-212.

34. The Valuation Report values the full value of the patented and unpatented mining claims, over which the Ontario Project Royalties apply. Dr. Roscoe concludes that the Dianor Mining Claims have a total value of \$1,000,000 to \$2,000,000, with the Leadbetter 15.44% GOR having a value of \$150,000 to \$300,000 and the Essar 10% GOR having a value of \$70,000 to \$140,000 (it being over only the patented mining claims).

**Reference** Roscoe Affidavit, para. 7, Valuation Report at p. 8, Roscoe Affidavit, Exhibit 2B, Third Eye Motion Record, Tabs 2 and 2B, pp. 199-208.

### **Agreement with Essar**

35. Based on the Valuation Report, Essar consented and agreed to forego its rights in the Ontario Project Royalties, for payment in the amount of \$150,000. The Court-appointed Monitor for Essar in its CCAA Proceeding agrees that this amount is fair and reasonable.

**Reference** Agreement between Third Eye Capital Corporation and Essar Steel Algoma Inc. dated April 21, 2016 (“Essar Agreement”), Giri Affidavit, Exhibit A, Third Eye Motion Record, Tab 1A, pp. 5-7.

Submissions of the Monitor of Essar Algoma Inc., dated August 16, 2016 at para. 8.

### **Offer to Leadbetter**

36. On May 12, 2016, counsel for Third Eye wrote to counsel for Leadbetter. The letter enclosed a copy of the Valuation Report. Third Eye offered, on “With Prejudice” basis, to purchase Leadbetter’s 15.44% diamond GOR and 1.5% mineral GOR for \$250,000 and the surface rights for \$100,000 (the “Third Eye/Leadbetter Offer”).

**Reference** Third Eye/Leadbetter Offer, Giri Affidavit, Exhibit B, Third Eye Motion Record, Tab 1B, pp. 8-20.

37. On May 24, 2016, Leadbetter responded directly to Third Eye with a “Without Prejudice” counter-offer, demanding:

- (a) In respect of the GORs:
  - (i) \$500,000 to reduce the GORs to 2%;
  - (ii) a right to purchase a further 1% GOR for \$2,000,000; and

- (iii) a 1% GOR to remain, but be capped at \$25,000; and
- (b) In respect of surface rights:
- (i) Payment of “back rent” of \$50,000, plus HST and property taxes;
  - (ii) Going forward “rent” of \$2,000/month, plus HST and property taxes; and
  - (iii) \$750,000 option to purchase for next two years,
- (the “Leadbetter Counter-Offer”).

**Reference** Agreement between Third Eye Capital Corporation and Essar Steel Algoma Inc. dated April 21, 2016 (“Essar Agreement”), Giri Affidavit, Exhibit A, Third Eye Motion Record, Tab 1A, pp. 5-7.

38. Third Eye relies on the Leadbetter Counter-Offer not to accept it or to hold Leadbetter to its terms, but to demonstrate how wildly disproportionate Leadbetter’s demands are to an independent third party valuation (and the Essar Agreement, determined to be fair and reasonable by the Court-appointed Monitor for Essar). Leadbetter purports to value the GORs (of 15.44%) at a total of \$2,525,000. That exceeds the upper end of the total value of the Mining Claims arrived at in the Roscoe Valuation Report by over half a million dollars. On this analysis, it appears that Leadbetter has arrived at a total value for the Mining Claims of almost \$17,000,000. That value is totally unsupported and outrageous. At this valuation, Leadbetter should jump at the chance to be a buyer. He is not. That is telling.

39. Further, Leadbetter claims in respect of the value of the surface rights and demands that he be compensated for Dianor’s use of the land, pursuant to the *Repair and Storage Lien Act*. As Leadbetter rightly points out in his affidavit, aside from the Crown Land Agreement and the

Patented Land Agreement, there is no agreement with respect to the use of the surface rights.

Those Agreements govern or in their absence, the *Mining Act*.

**Reference**            Leadbetter Affidavit at para. 14, Leadbetter Motion Record, Tab 2, p.11.

*Repair and Storage Lien Act*, R.S.C. 1990, c. R-25.

*Mining Act*, R.S.O. 1990, c. M-14.

## **PART III - THE LAW**

### **Legal Framework**

40.            The Receiver was appointed pursuant to section 243 of the *Bankruptcy Insolvency Act* (“*BIA*”) and section 101 of the *Courts of Justice Act* (“*CJA*”).

41.            Section 243 of the *BIA* provides:

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or

(c) take any other action that the court considers advisable.

42.            Section 101 of the *CJA* provides:

101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

43. Section 100 of the *CJA* grants the Court broad powers with respect to vesting orders:

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

44. An ability to vest property is a power created in the Court by statute, but its origins and application are equitable:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, *Snell's Equity*, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.

**Reference**      *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No 4804 at para 281, 51 OR (3d) 641, (Ont CA), Third Eye Brief of Authorities, Tab 1.

45. *Royal Bank of Canada v. Soundair Corp.* contains the familiar principles to which the Court will look to approve a Receiver's sale of assets:

- (a) whether the Receiver has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

**Reference**      *Royal Bank of Canada v Soundair Corp.*, [1991] OJ No 1137 at para 16, 4 OR (3d) 1, (Ont CA), Third Eye Brief of Authorities, Tab 2.

46. The Receiver has satisfied the *Soundair* principles. As set out in the Second Receiver's Report, the Receiver:

- (a) provided notice of its motion to approve a bid process to Dianor's creditors, including Third Eye, Essar and Leadbetter;
- (b) received Court approval for the bid process on October 7, 2015;
- (c) established a data room;
- (d) canvassed 39 prospective interested parties;
- (e) received and reviewed two offers to purchase;
- (f) considered but elected not to hold an auction process; and
- (g) reviewed the offers its received and concluded that the Third Eye Offer was the superior offer. The Third Eye Offer has now been enriched by the Amending Agreement, which provides it will pay \$400,000 to the Receiver for distribution to the other known creditors, being Essar and Leadbetter.

**Reference** Second Receiver's Report at para. 14, Motion Record of the Receiver, Tab 2, pp. 26-27.

### **Third Eye's Offer Maximizes Value for all Affected Creditors**

47. The Receiver has concluded that the Third Eye Offer is the superior offer and maximizes value for all creditors of Dianor.

48. The Third Eye Offer provides not only a non-cash component of the Credit Bid Amount (being \$2,000,000) plus Assumed Liabilities, but also a cash component amount, payable



to the other known creditors of Dianor, consistent with an independent third party valuation of those assets.

49. The Court-appointed Monitor of Essar has accepted the valuation and that the amount to be paid to it under the Third Eye Offer is fair and reasonable.

### **Leadbetter's Bad Faith**

50. Leadbetter's refusal to accept the Third Eye Offer and his counter-offer wildly overvalues the assets. While Dr. Roscoe valued the aggregate Ontario Mining Claims at \$1,000,000-\$2,000,000, Leadbetter appears to value them at almost \$17,000,000. That valuation is so high and disproportionate, one can only conclude that Leadbetter is holding Third Eye, and Dianor's other creditors, to ransom.

51. If Leadbetter's valuation had any basis in reality, he would jump at the chance to acquire a \$17,000,000 asset for \$2,400,000. Leadbetter did not submit a bid in to the process. That is revealing.

52. Leadbetter has a history of not acting in good faith in respect of these properties, as set out below.

53. In respect of the surface rights, he issued a Notice of Sale to Dianor. While he could have foreclosed on the property, instead he purported to "sell" the property. That sale has been revealed to be to a related company. There is a general prohibition against a mortgagee selling to himself under power of sale. That prohibition may be overcome with proper indicia of fair market value (an appraisal, a listing on MLS, exposure to the market, an offer of purchase and sale from an arm's length buyer). None of that exists here. Leadbetter's actions have the ring of bad faith in

dealing with the surface rights of these same properties. That bad faith carries over to his actions in respect of the GORs now.

**Reference** Walter M Traub, *Falconbridge on Mortgages*, 5<sup>th</sup> ed (Toronto: Canada Law Book, 2015) 35:130, Third Eye Brief of Authorities, Tab 3.

*Practice in Mortgage Remedies in Ontario*, Remedies, at 33-30.4, Third Eye Brief of Authorities, Tab 4

*Ostrander v Niagara Helicopters Ltd et al* (1973), 1 OR (2d) 281 at para 9, 40 DLR (3d) 161, citing *Farrar v Farrars, Ltd* (1889), 40 Ch D 395, Third Eye Brief of Authorities, Tab 5.

54. A practical approach is necessary in order to conclude this Receivership and maximize value for Dianor's creditors. These facts are similar to *Regal Constellation Hotel Ltd., Re* where the Court upheld the sale of an asset over a debtor's opposition on the grounds that the asset had been beneficially sold to a party with whom it was engaged in a protracted legal battle. The Court held that a practical approach was required:

The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional \$25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were no other offers available apart from the \$24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J. [...]

There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. [...] **This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives** extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted \$45 million share purchase transaction.

In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal. [Emphasis added].

**Reference** *Regal Constellation Hotel Ltd, Re*, [2004] OJ No 2744 at paras 59, 61-62, 71 OR (3d) 355 (Ont CA), Third Eye Brief of Authorities, Tab 6.

55. This Court should grant the relief sought to prevent the abuse or misuse by a single creditor of its rights to extort what is in substance a hostage premium. It is well established that the Court has inherent jurisdiction to prevent one party to a complex restructuring from exercising its rights in bad faith for the purposes of holding hostage the other stakeholders in the restructuring. As noted by C. Campbell, J. in the decision of this Court in the Asset Backed Commercial Paper (ABCP) litigation in the context of an application to approve third party misrepresentation releases:

It would defeat the purpose of the statute if a single creditor could hold a restructuring plan hostage by insisting on the ability to sue another creditor whose participation in and contribution to the restructuring was essential to its success. Tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA.

**Reference** *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, [2008] OJ No 2265 at para 138, 168 ACWS (3d) 244, aff'd 2008 ONCA 587, Third Eye Brief of Authorities, Tab 7.

56. Further, as noted by this Court in *Fiber Connections Inc v SVCM Capital Ltd*:

“For the purposes of this case, it is not in my view an extension of the concept of inherent jurisdiction, but rather the prevention of one shareholder, with no economic value of his equity, holding all the stakeholders hostages. In this respect, I think that the considerations expressed for the exercise of the court’s inherent jurisdiction under the CCAA are applicable under the BIA to the facts of this case...”.

**Reference** *Fiber Connections Inc v SVCM Capital Ltd*, [2005] OJ No 3899 at para 39, 5 BLR (4<sup>th</sup>) 271, leave to appeal to the CA granted, 198 OAC 27, Third Eye Brief of Authorities, Tab 8.

57. Here, the only other offer to purchase Dianor’s assets similarly calls for a reduction or elimination of the GORs. Leadbetter’s position is not principled and contrary to the assessment of two officers of the Court (the Receiver and the Essar Monitor) as well as an independent valuation

expert. Moreover, Leadbetter's position is contrary to the purpose of the statute and of this proceeding. This Court ought to exercise its inherent jurisdiction to grant the relief sought and prevent the abuse of the position of one stakeholder to the detriment of all others.

**Reference**            Leadbetter Affidavit at paras. 21-23, 29 and 32, Exhibits P, Q, R, Leadbetter Motion Record, Tabs 2, 2P, 2Q, 2R, pp. 12, 14, 109-123

Affidavit of Arif N. Bhalwani, sworn September 19, 2016 ("Bhalwani Affidavit") at paras. 4-6, Supplementary and Responding Motion Record of Third Eye ("Third Eye Supplemental Motion Record"), p. 2.

58.            To reject the Receiver's recommendation that the Third Eye Offer be accepted would be to prejudice all of Dianor's creditors, without any known prospect that any other sale could be achieved, let alone be superior in value for creditors.

### **Leadbetter GORs Do Not Run with the Land**

59.            In the alternative, the Leadbetter GORs do not run with the land and can and should be compromised as contractual rights.

60.            In determining whether rights run with the land in the case of GORs for mining, oil and gas prospects, the Courts take a practical and substantive approach, focused on the rights granted to a party holding the GOR.

**Reference**            *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7 at para 17, SCJ No 70 [*Dynex Petroleum*], Third Eye Brief of Authorities, Tab 9.

61.            A GOR may be found to be an interest in land if:

1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2) the interest, out of which the royalty is carved, is itself an interest in land.

**Reference** *Dynex Petroleum, supra* para 59 at para 22, citing *Vandergrift v Coseka Resources Ltd*, [1989] AWLD 528, Third Eye Brief of Authorities, Tab 9.

62. The words of the contract do not necessarily end the inquiry. The contract must contain the essential characteristics of a right running with the land, including the benefits of ownership – the right to use, enjoy and freely dispose of the land.

**Reference** *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323 at para 77, 237 AVWS (3d) 28, Third Eye Brief of Authorities, Tab 10.

63. The Crown Land Agreement and the Patented Land Agreement state that the parties intend the GORs to run with the land:

4.1 It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest. If any right, power or interest of any party under the Leadbetter Crown Land Property Option Agreement would violate the rule against perpetuities, then such right, power or interest shall terminate at the expiration of 20 years after the death of the last survivor of all the lineal descendants of Her Majesty, Queen Elizabeth II of England, living on the date of this Agreement.

**Reference** Crown Land Agreement, Schedules A and C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 24-63.

64. However, the grant of rights themselves evidence that those rights are rights to the diamonds, metals and minerals once extracted, not in the land:

1.4 “Diamonds” means all **diamonds that are recovered or produced from the Property** after the date of this Agreement, excluding any by-products or tailings that remain after the extraction and processing process.

1.2 “Products” means **any minerals recovered from** the Mining Claims defined in the Leadbetter Option Agreement.

**Reference** Crown Land Agreement, Schedules A and C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 24-63.

65. A series of cases have parsed the words used in similar agreements, and concluded that the words “recovered” and “produced” evidence a contractual right. In *Vandergrift v Coseka Resources Ltd*, the Court underscored the significance of the word “recovered” in denoting a contractual right to the payment of a royalty by juxtaposing the expression “royalty on all petroleum substances recovered from the lands”, with the expression “petroleum within, upon and under the lands”.

**Reference** *Vandergrift v Coseka Resources Ltd*, [1989] AWLD 528 at para 40, 15 ACWS (3d) 36 (Alta QB), Third Eye Brief of Authorities, Tab 11.

66. Similarly, the Court in *St. Andrew Goldfields Ltd v Newmont Canada Ltd* placed significant weight on the use of the word “produced”, observing that:

The use of the words “covenants and agrees to pay” and “produced” in the description of the Barrick royalty is the first indication that the parties intended to create only contractual rights to the payment of a royalty and not an interest in land.

The case law that the parties have submitted makes a valid distinction between the “granting” of royalties attached to or “in” the land or the minerals themselves, thus creating an interest in the land, and the payment of royalties attached to the minerals or revenues “produced” or “removed” from the land, resulting in the creation of contractual rights to the payment of a share of the revenue from the minerals after they have been extracted.

**Reference** *St. Andrew Goldfields Ltd v Newmont Canada Limited*, [2009] OJ No 3266 at paras 101-102, 179 ACWS (3d) 826, aff’d 2011 ONCA 377 [*St. Andrew*], Third Eye Brief of Authorities, Tab 12.

67. Other factors are relevant to the intention of the parties:

Other relevant factors to determine the parties' intention to create contractual rights or an interest in land are: whether the royalty holder retains a right to enter upon the lands to explore for and extract the minerals: *Vandergrift v. Coseka Resources Limited* ... and whether the owner of the lands is in complete control of its interest in the lands acquired with the only right in the royalty holder being to share in the revenues produced from the minerals extracted from the lands: *St. Lawrence Petroleum Limited v. Bailey Selburn Oil & Gas Ltd.*

**Reference** *St. Andrew, supra* para 66 at para 103, Third Eye Brief of Authorities, Tab 12.

68. In circumstances “where the royalty relates to a share after the [resource] had been removed from the land, this is not an interest in land but it to be treated personally.”

**Reference** *Vanguard Petroleums Ltd v Vermont Oil & Gas Ltd*, [1977] 1 ACWS 172 at para 19, 72 DLR (3d) 734 (Alta SC), citing *Emerald Resources Ltd v Sterling Oil Properties Mgmt Ltd* (1969), 3 DLR (3d) 630 (Alta CA), aff'd 15 DLR (3d) 256, Third Eye Brief of Authorities, Tab 13.

69. Here, it is clear that the GOR rights are with respect to a share of revenue:

(a) With respect to Diamonds, the Leadbetter entitlement is to amount determined based upon the Average Appraised Value:

1.2 “Average Appraised Value” means the value in Canadian dollars of the Diamonds after they have been cleaned and sorted, determined as provided in section 2.2 and 2.3 hereof, with no deductions for costs or expenses of any nature or kind.

**Reference** Crown Land Agreement, Schedules A and C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 24-63.

(b) With respect to other metals and minerals, it is with respect to Gross Revenue:

1.1 “Gross Revenue” means the aggregate of the following amounts received in each quarter:

(d) the revenue received by the Optionee or any of its Affiliates from arm's length purchases of all Product;

- (e) the fair market value of all Product sold by the Optionee or any of its Affiliates in such quarter to persons not dealing at arm's length with the Payor; and
- (f) any proceeds of insurance on Product.

**Reference** Crown Land Agreement, Schedules A and C, Giri Affidavit, Exhibit D, Third Eye Motion Record, Tab 1D, pp. 24-63.

70. Any ambiguity in respect of the GOR rights created by the insertion of section 4.1 is subject to the principle of *contra proferentem* and should be resolved against Leadbetter.

71. In these circumstances, the GOR interests are contractual rights, not running with the land and Third Eye is not and should not be subject to them.

### **Leadbetter Seeks to Frustrate the Mining Rights**

72. Leadbetter seeks relief to which he is not entitled:

- (a) An order pursuant to the *Repair and Storage Liens Act* for \$67,800.00 plus a per diem charge of \$92.88 (or almost \$3,000 per month). The *Mining Act* governs;
- (b) An order that Dianor/Third Eye/Receiver vacate the premises (surface rights) owned by Leadbetter, despite their mining interests and contrary to the *Mining Act*; and/or
- (c) An order that the assets of Dianor be forfeited and vest in Leadbetter.

73. The *Mining Act* (Ontario) grants claimholders broad statutory rights to access the surface lands overlying their unpatented or patented mining claims without needing to obtain consent from, or provide notice to, the landowner:

The holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right, subject to the requirements



of this Act, to enter upon, use and occupy such part or parts thereof as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein. [Emphasis added]

**Reference**      *Mining Act* at ss. 50(2).

74.      Similarly, in respect of unpatented claims, the *Mining Act* provides:

[T]he holder of an unpatented mining claim has the right prior to any subsequent right to the user of the surface rights, except the right to sand, peat and gravel, for prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights. [Emphasis added]

**Reference**      *Mining Act* at ss. 51(1).

75.      Landowners are not permitted under the *Mining Act* to hinder or prevent a claimholder from accessing their lands for mineral exploration or mining purposes and are not entitled to demand compensation from the claimholder as a condition of entry on to the land. A landowner is entitled to be compensated by a claimholder only for “damages sustained to the surface rights” of the landowner that are caused by the claimholder’s exploration, development, or mining operations. For example, a claimholder must compensate the landowner for trees that it cuts or uses on the accessed property.

**Reference**      *Mining Act* at ss. 79(2) and 92(8).

76.      At this point in time, there is no exploration work in respect of the mining rights. If exploration work were to continue, it would comprise small sampling at targeted sites.

**Reference**      Bhalwani Affidavit at para 7, Third Eye Supplemental Motion Record, p. 2.

77.      There is a mechanism under the *Mining Act* for disputes over the quantum of damages. In particular, disputes regarding the quantum of damages are to be determined by the Mining and

Lands Commissioner for claims up to \$1,000 and by the Divisional Court for larger amounts. This Court does not have jurisdiction to decide the damages assessable, if any.

**Reference**      *Mining Act* at ss. 79(4).

78.            The rights of the claimholder, and the subjugation of surface rights thereto, have a long history in the jurisprudence.

**Reference**      *Coniagas Mines Ltd v Cobalt (Town)* (1910), 20 O.L.R. 622 at 632, Third Eye Brief of Authorities, Tab 16.

*Minister of Natural Resources v. Malouf* (2010) (“Malouf”), MLC File No. MAA 022-09, pp. 3 and 6, Third Eye Brief of Authorities, Tab 17.

79.            Leadbetter’s demand that Dianor/Third Eye/Receiver vacate the land is in direct contravention of a claimholders statutory and common law rights. Similar to *Malouf*, some mechanism must be in place to ensure Dianor/Third Eye/Receiver’s right to access the mining interests and ensure Leadbetter not frustrate them.

**Reference**      *Malouf*, pp. 3 and 6, Third Eye Brief of Authorities, Tab 17.

80.            Similarly, Leadbetter looks to legislation which is not applicable to seek compensation to which he is not entitled and which in event is grossly overvalued. Leadbetter’s seeks relief under the *Repair and Storage Liens Act*. The *Repair and Storage Liens Act* defines “storer” as:

a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be.

**Reference**      *Repair and Storage Liens Act* at s 1(1).

81. A storer's lien exists:

[A]gainst an article that the storer has stored or stored and repaired for an amount equal to one of the following, and the storer may retain possession of the article until the amount is paid:

1. The amount agreed upon for the storage or storage and repair of the article.
2. Where no such amount has been agreed upon, the fair value of the storage or storage and repair, determined in accordance with any applicable regulations.
3. Where only part of a repair is completed, the fair value of the storage and the part of the repair completed, determined in accordance with any applicable regulations.

**Reference**      *Repair and Storage Liens Act* at s 4(1).

82. Ontario courts have interpreted the statutory definition of “storer” strictly, failing to find that a party is a storer absent evidence of an understanding that it would be paid for its storage services.

**Reference**      *Ally Credit Canada Ltd v All-Ontario Towing and Storage Inc*, 2011 CarswellOnt 18837 at para 5, Third Eye Brief of Authorities at Tab 14.

*1258917 Ontario Inc v Daimler Truck Financial*, 2012 ONSC 2522 at paras 62-63, Third Eye Brief of Authorities at Tab 15.

83. There is no evidence to suggest that the Dianor assets were placed on the premises on the express or implied understanding that Leadbetter would receive any compensation for storage services.

84. In fact, those assets are on the land pursuant to the Crown Land Agreement and the Patented Land Agreement and Dianor's rights as a holder of the mining rights. The Agreements and the *Mining Act* govern.

85. Leadbetter's claim is also belied by the facts. Even if Leadbetter were entitled to some recompense, which he is not, there is no evidence that the Dianor assets have in any way impeded Leadbetter's use and enjoyment of the 1,600 acre property or that they have affected the purported valuation of the property.

**Reference** Leadbetter Affidavit, Exhibit P, Leadbetter Motion Record, p. 110-115

86. What is evident is that Leadbetter has consistently overvalued any interest he has in the property. Leadbetter purported to register a storage lien against the Dianor assets in the amount of \$4000/month, in the total amount of \$148,595.00.

**Reference** Bhalwani Affidavit at paras. 4-6, Third Eye Supplemental Motion Record, Tab 1, p. 2.

**Reference** Leadbetter Affidavit, Exhibit E, Leadbetter Motion Record, p. 72.

87. Leadbetter now seeks recompense of \$67,800.00 plus a 92.88 per diem amount (or almost \$3000/month). No explanation for this changed amount is provided.

**Reference** Leadbetter Notice of Motion, Leadbetter Motion Record, Tab 1, pp.1-7.

88. In fact, Leadbetter relies on a valuation for sale of the entire property for \$555,000 (despite the property inexplicably being listed for sale for \$975,000) and a letter in respect of what he says is a similar property offering it for sale for \$250,000 or for rent for \$2,500/month. Neither of those valuations is supported by the affidavit or acknowledgment of an expert.

**Reference** Leadbetter Affidavit at paras. 21 and 22, Exhibits P and Q, Leadbetter Motion Record, Tabs 2, 2P and 2Q, pp. 12 and 109-119.

89. But even against the unsupported valuations upon which Leadbetter purports to rely, his demands for restitution for use of a small part of the 1,600 acre property, without any evidence of harm whatsoever, reveal themselves for what they are: extortionary and in bad faith.

90. If Leadbetter is entitled to any amounts, which is denied, they should be dealt with pursuant to the mechanism provided for in the *Mining Act*. The balance of Leadbetter's relief should be denied.

91. Third Eye is prepared to compensate Leadbetter for the GORs in accordance with the objective third party valuation of William Roscoe, the sufficiency of which is supported by the acceptance of a buyout on the same valuation by the Monitor for Essar, and any further amounts owing to Leadbetter under the *Mining Act*. Absent elimination of the GORs, there is no purchaser for Dianor's assets and no recovery for any creditor of Dianor. Leadbetter cannot be permitted to frustrate the interests of the other creditors in pursuit of an ephemeral golden ring.

**PART IV - ORDER REQUESTED**

92. Third Eye requests that this Court issue the Vesting and Approval Order requested by the Receiver and deny the relief sought by Leadbetter.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21st day of September, 2016.



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Peter J. Osborne



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Shara N. Roy

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Lawyers for Third Eye Capital Corporation

## SCHEDULE "A"

### LIST OF AUTHORITIES

#### CASE-LAW

1. *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No 4804, 51 OR (3d) 641, (Ont CA).
2. *Royal Bank of Canada v Soundair Corp*, [1991] OJ No 1137, 4 OR (3d) 1, (Ont CA).
3. *Ostrander v Niagara Helicopters Ltd et al* (1973), 1 OR (2d) 281, 40 DLR (3d) 161.
4. *Regal Constellation Hotel Ltd, Re*, [2004] OJ No 2744, 71 OR (3d) 355 (Ont CA).
5. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, [2008] OJ No 2265, 168 ACWS (3d) 244, aff'd 2008 ONCA 587.
6. *Fiber Connections Inc v SVCM Capital Ltd*, [2005] OJ No 3899, 5 BLR (4<sup>th</sup>) 271, leave to appeal to the CA granted, 198 OAC 27.
7. *Bank of Montreal v Dynex Petroleum Ltd*, 2002 SCC 7, SCJ No 70.
8. *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, 237 AVWS (3d) 28.
9. *Vandergrift v Coseka Resources Ltd*, [1989] AWLD 528, 15 ACWS (3d) 36 (Alta QB).
10. *St. Andrew Goldfields Ltd v Newmont Canada Limited*, [2009] OJ No 3266, 179 ACWS (3d) 826, aff'd 2011 ONCA 377.
11. *Vanguard Petroleum Ltd v Vermont Oil & Gas Ltd*, [1977] 1 ACWS 172, 72 DLR (3d) 734 (Alta SC).
12. *Ally Credit Canada Ltd v All-Ontario Towing and Storage Inc*, 2011 CarswellOnt 18837.
13. *1258917 Ontario Inc v Daimler Truck Financial*, 2012 ONSC 2522.
14. *Coniagas Mines Ltd v Cobalt (Town)*, 15 OWR 761, 20 OLR 622.
15. *Fuller v. Howell*, [1942] 1 D.L.R. 462.
16. *Minister of Natural Resources v. Malouf* (2010), MLC File No. MAA 022-09
17. *Nova Scotia Business Capital Corp. v. Coxhealth Gold Holdings Ltd.* (1994), 119 D.L.R. (4<sup>th</sup>) 518.

SECONDARY SOURCES

18. Dunn, G. William, Wayne Scarisbrick Gray & Alfred S. Marriot. *Marriott and Dun Practice in Mortgage Remedies in Ontario, Vol. V* (Toronto: Thompson Professional Publishing Canada, 1991).
19. Walter M Traub, *Falconbridge on Mortgages*, 5<sup>th</sup> ed (Toronto: Canada Law Book, 2015) 35:130.
21. Canadian Encyclopedic Digest, Mines and Minerals (Ontario), X. 3 Mining and Operations Agreements, Royalties.



## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

2. *Courts of Justice Act*, R.S.O. 1990, C. C-43

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

3. *Repair and Storage Liens Act*, R.S.O. 1990, CHAPTER R.25

1. (1) In this Act, "storer" means a person who receives an article for storage or storage and repair on the understanding that the person will be paid for the storage or storage and repair, as the case may be. ("entrepreneur") R.S.O. 1990, c. R.25, s. 1 (1); 2014, c. 9, Sched. 4, s. 1.

4. (1) Subject to subsection (2), a storer has a lien against an article that the storer has stored or stored and repaired for an amount equal to one of the following, and the storer may retain possession of the article until the amount is paid:

1. The amount agreed upon for the storage or storage and repair of the article.
2. Where no such amount has been agreed upon, the fair value of the storage or storage and repair, determined in accordance with any applicable regulations.
3. Where only part of a repair is completed, the fair value of the storage and the part of the repair completed, determined in accordance with any applicable regulations. 2014, c. 9, Sched. 4, s. 3 (1).

4. *Mining Act*, R.S.O. 1990, c. M.14

79.(2) Where there is a surface rights holder of land or where land is occupied by a person who has made improvements thereon that, in the opinion of the Minister, entitles that person to compensation, a person who,

- (a) prospects, stakes or causes to be staked a mining claim or an area of land for a boring permit;
- (b) formerly held a mining claim or an area of land for a boring permit that has been cancelled, abandoned or forfeited;
- (c) is the holder of a mining claim or an area of land for a boring permit and who performs assessment work; or
- (d) is the lessee or owner of mining lands and who carries on mining operations,

on such land, shall compensate the surface rights holder or the occupant of the lands, as the case may be, for damages sustained to the surface rights by such prospecting, staking, assessment work or operations. R.S.O. 1990, c. M.14, s. 79 (2); 2009, c. 21, ss. 41 (3), 101 (2-4).

**Schedule "C"**

Crown Land mining claims (the "Unpatented Claims") situated in Chabanel Township in the District of Algoma, more particularly described as:

1243318, 1243319, 1243325, 1243332, 1243335, 1243336, 1243363, 1243365, 1243369, 1243373, 1243377, 1243509, 1243510, 1235746, 1235747, 1235754, 1235757, 1235758, 1235759.

**Schedule "D"**

Surface and mining rights in respect of patented mining claims (the "Patented Claims") situated in Chabanel Township in the District of Algoma, more particularly described as:

SSM 17358, SSM 17359, SSM 17360, SSM 21168, SSM 17334, SSM 17335, SSM 17362, SSM 17361, SSM 17337, SSM 17341, SSM 17342, SSM 17343, SSM 17340, SSM 17339, SSM 17338, SSM 18637, SSM 23011, SSM 18638, SSM 23012, SSM 18639, SSM 18640, SSM 18641, SSM 18642, SSM 18644, SSM 18645, SSM 23544, SSM 23543, SSM 21166, SSM 21167, SSM 22722, SSM 22721, SSM 18643, SSM 22718, SSM 22874, SSM 13687, SSM 22719, SSM 13686, SSM 22945, SSM 13683, SSM 22946, SSM 22714, SSM 17336, SSM 17650, SSM 17333, SSM 17363, SSM 21169, SSM 22726, SSM 15445 AND SSM 21171.

THIRD EYE CAPITAL CORPORATION  
Applicant

-and-  
Respondent

RESSOURCES DIANOR INC. / DIANOR RESOURCES INC.

Court File No. CV-15-11080-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THIRD EYE CAPITAL CORPORATION  
(ON MOTION OF RECEIVER RETURNABLE  
SEPTEMBER 27, 2016)**

**LENCZNER SLAGHT ROYCE  
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