Court file no: CV-15-11080-00CL

**ONTARIO SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

**B E T W E E N:**

**THIRD EYE CAPITAL CORPORATION**

Applicant

\- and –

**RESSOURCES DIANOR INC./DIANOR RESOURCES INC.**

Respondent

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# FACTUM OF 2350614 ONTARIO INC.

**(re: Sale Approval and Vesting Order)**

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September 22, 2016


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# FACTUM

## PART I - INTRODUCTION

1. This motion concerns the affect, if any, a Gross Overriding Royalty has on the ability of a court appointed receiver to sell the assets of a corporation in receivership. In this matter, Richter Advisory Group Inc. as receiver, (hereinafter referred to as the "Receiver") seeks to sell the assets of Dianor Resources Inc. (hereinafter referred to as "Dianor") free of all encumbrances. The largest asset of Dianor are the mineral rights to certain unpatented and patented mining claims.

2. 2350614 Ontario Inc. (hereinafter referred to as "235") holds a Gross Overriding Royalty over all of the mineral rights that the Receiver seeks to sell. 235, though not opposed to the sale, takes the position that any transfer of the mineral rights is subject to its royalties.

3. 235 also takes the position that it holds a valid lien under the *Repair and Storage Liens Act,* R.S.O. 1990, c. R.25 and asks for a declaration that the same ranks in priority to the charge held by Third Eye Capital Corporation (hereinafter referred to as "TEC").

## PART II - SUMMARY OF FACTS

### BACKGROUND

4. 235 is the registered owner, surface rights only, of the property identified in **Exhibit "A"** to the Affidavit Joseph Leadbetter sworn August 18, 2016 (the "Premises").

5. The Premises were originally owned by 1778778 Ontario Inc. (hereinafter referred to as "177") but were sold to Dianor on November 27, 2008 for the sum of

$1,000,000.00. TEC registered a mortgage on title to the mineral rights only on November 16, 2010.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 4 and Exhibit B.**

**Affidavit of J. Leadbetter, sworn August 18, 2016 at Exhibit V.**

6. Dianor failed to satisfy its mortgage obligations on its original purchase of the surface rights from 177. 235 acquired title to the Premises pursuant to a Power of Sale proceeding initiated by 177 for the sum of $800,000.00. The sale transaction closed November 30, 2012.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 4 and Exhibit C.**

7. Notwithstanding the fact that 235 Co acquired title to the surface rights on or about November 30, 2012, Dianor remained in possession of the Premises. Efforts were made to secure compensation for occupation of the Premises by Dianor but those efforts were unsuccessful.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at paras. 5 and 6.**

8. As a consequence, 235 registered a Repair and Storage Lien on August 27, 2014.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 7 and Exhibit D.**

9. On September 17, 2014, Notice of Sale under the *Repair and Storage Lien Act*, was issued to Dianor and TEC.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 8 and Exhibit E.**

10. A Response to that Notice of Sale was received through counsel for 235 in correspondence from the solicitor for TEC, secured Lender to Dianor, dated September 30, 2014. At that time counsel for TEC specifically objected to the Notice of Sale proceeding and requested confirmation that:

a) None of the articles subject of the Notice of Sale be removed from the compound;

b) Efforts have been taken to ensure they remain secure and

c) No steps be taken to sell, dispose or otherwise deal with the Articles.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at paras. 9, 10 and Exhibit F.**

11. 235 specifically requested vacant possession of the Premises by October 31, 2014, and failing vacant possession that TEC enter an agreement for monthly rental.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 11 and Exhibit G.**

12. TEC did not vacate the Premises or respond to counsel's correspondence of October 31, 2014. TEC and Dianor continued to use the Premises for storage of Dianor assets on and after October 31, 2014, through to this date.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 12.**

13. From time to time 235 Co would forward invoices to TEC in attempt to secure their attention to the situation and arrange compensation for storage of Dianor assets on the Premises. In response to an invoice 235 delivered August 18, 2014, 235 received correspondence from Mr. Bhalwani, managing director of TEC, stating:

> *"the definition of insanity is doing the same thing over and over again and expecting a different result. As I told your lawyer this invoice is wholly inappropriate. In addition, you are not authorized to use, move, transfer, or otherwise deal with any Dianor assets on your property, all of which constitutes our collateral and which is situated on your property under contractual terms."*

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 13 and Exhibit H.**

14. Mr. Bhalwani, on behalf of TEC, specifically stated he would continue to occupy premises owned by 235 Co without compensation. It should be noted there was no

contract for terms of use at any point and time specifically including the date 235 Co acquired title to the Premises, and thereafter.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 14.**

15. That area of the Premises occupied by Dianor assets are referred to as the *"Compound"*. The Compound is described as follows:

a) a gated compound 213 x 213 square feet.

b) a mega dome structure 30 x 50 ft with concrete foundation

c) a utility building utilized as a core cutting room 10 x 20 ft with concrete foundation

d) a kitchen trailer

e) an office complex, double wide, with 6 offices, air conditioned, reception area and washroom facilities, 24 x 52 ft in size.

f) a generator building with concrete foundation (10 x 20 ft).

g) a pump house with a 150 ft drilled well (10 x 10 ft);

h) a complete certified septic system as well as a 1000 litre holding tank;

i) fuel tanks and pumps (tanks are double-walled and vaccum sealed).

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 15.**

16. The Dianor core boxes remain stored within the Compound area.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at paras. 15, 16 and Exhibits I, J,K and L.**

17. In addition two (2) vehicles remain stored in the compound.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 17 and Exhibit M.**

18. A container unit is also stored on the Premises.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 18 and Exhibit N.**

19. 235 has attempted to negotiate with Dianor, TEC and Richter respecting fair compensation for storage of the Dianor materials within the Compound located on the Premises for years, without success.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 20.**

20. The surface rights have a value of $555,000.00 on block inclusive of the Compound.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 21 and Exhibit P.**

21. Fair Market rent is the sum of $2,500.00 per month.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 22 and Exhibit Q.**

## GROSS OVERRIDING ROYALTY

22. Dianor currently holds as assets mineral rights on certain unpatented mining claims and mineral rights on certain patented mining claims (235 owns the surface rights to the patented claims which is referred to as the Premises above).

**Second Report of Richter Advisory Group Inc., Motion Record of Richter Advisor Group Inc., at page 25.**

23. 235 currently holds a Gross Overriding Royalty (hereinafter referred to as "GOR") with respect to the mineral rights on both the patented and unpatented mining claims.

**Second Report of Richter Advisory Group Inc., Motion Record of Richter Advisor Group Inc., at page 25.**

24. These GORs were created by two agreements between Dianor and 3814793 Ontario Inc. referred to as the Unpatented Option Agreement and the Patented Option Agreement.

**Second Report of Richter Advisory Group Inc., TAB F Motion Record of Richter Advisor Group Inc., at pages 131 and 146.**

25. These agreements were amended from time to time, with the final Amended Unpatented Option Agreement and final Amended Patented Option Agreement being dated August 25, 2008. Both Amended Agreements provide for a 20% GOR for diamonds.

**Second Report of Richter Advisory Group Inc., TAB F Motion Record of Richter Advisor Group Inc., at pages 162 and 201.**

26. Schedule A of each Amended Agreement specifically provides that the parties intended for the GORs to constitute an interest in land running with the property and mining claims.

**Second Report of Richter Advisory Group Inc., TAB F Motion Record of Richter Advisor Group Inc., at pages 172 and 211.**

27. The GORs of 3814793 Ontario Inc. were eventually assigned to 177 and then to 235.

**Second Report of Richter Advisory Group Inc., TAB F Motion Record of Richter Advisor Group Inc., at pages 244, 248 and 256.**

28. The GORs were registered on title to the patented lands and unpatented mining claims on May 15, 2009 in priority to the security of the Receiver is acting on.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at Exhibits U, V, and W.**

29. Dianor and 235 agreed that they could purchase the royalty back at a purchase price of $800,000.00 for each 1% (total value $16 million). Dianor in fact bought down the royalty to its current amount of 15.44%.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 27.**

30. Under the IBK Capital Corp. valuation, the 15.44% royalty owned by 235 Co has a value as high as $12,352,000.00 under similar market conditions as existed in 2006.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at paras. 26, 27 and Exhibit T.**

31. However, the diamond market at this particular point and time is distressed similar to most of the mining sector in Canada. The RBC Diamond Digest report dated June 2, 2016, identifies the significant decline in rough diamond prices from 2012 to date (page 7 of Report).

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 25 and Exhibit S.**

32. Mr. Bhalwani on behalf of TEC offered $5,000,000.00 for the entire royalty during discussions with 235 in or about the summer of 2012.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at para. 29.**

33. 235 is not prepared to have its interest terminated at the lowest end of the market simply to accommodate TEC consolidating a property interest, which it has the resources to hold and market into the future on the expectation of a rising diamond market. 235 is prepared to wait for better market conditions in order to achieve better value for its interest and declines to sell the G.O.R. interest at this time for the consideration currently offered.

**Affidavit of J. Leadbetter, sworn August 18, 2016 at paras. 30 and 31.**

## PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

34. 235 submits that there are four issues to determine in these motions:

a. Does the royalty of 235 create an interest in land?

b. If the royalty is an interest in land, can it be extinguished or vested out?

c. Does 235 have a valid lien under the *RSLA?*

d. If the lien is valid, does it rank in priority to the security of TEC

35. 235 takes the following positions:

a. The royalty does create an interest in land as the agreement specifically states the same;

b. This court has no jurisdiction to expunge, vest out or otherwise extinguish the royalty as it is an interest that runs with the land.

c. A valid lien was created by the *RSLA*.

d. The lien ranks in priority to the security of TEC.

*LAW – ROYALTY*

36. Whether or not a royalty agreement creates an interest in land will depend on the intent of the parties to the agreement. If the language used in creating the royalty is sufficiently precise to show that the parties intended for the royalty to be an interest in land, the royalty will be an interest in land.

> ***Bank of Montreal v. Dynex Petroleum Ltd.,*** **2002 SCC 7, [2001] 1 S.C.R. 146 at paras. 12, 16, 21 and 22, Book of Authorities of 235 at TAB 1.**
>
> ***Bank of Montreal v. Dynex Petroleum Ltd.,*** **1999 ABCA 363, [1999] A.J. No. 1463 at para. 68, Book of Authorities of 235 at TAB 2.**

37. For a royalty to be an interest in land it must be derived from a proper interest in land.

> ***Bank of Montreal v. Dynex Petroleum Ltd.,*** **2002 SCC 7, [2001] 1 S.C.R. 146 at para. 22, Book of Authorities of 235 at TAB 1.**

38. The above statement with respect to interests in land and royalties is applicable for all types of royalties. Royalties, whatever their origins, are subject to the same set of rules.

> ***Bank of Montreal v. Dynex Petroleum Ltd.,*** **1999 ABCA 363, [1999] A.J. No. 1463 at para. 50 Book of Authorities of 235 at TAB 2.**

39. Language that provides that an interest in "the mine" or "the land" is being created is sufficiently clear to create in interest in the land.

> ***Blue Note Caribou Mines Inc., Re,*** **2010 NBQB 91, 186 A.C.W.S. (3d) 594 at paras. 22 and 23 Book of Authorities of 235 at TAB 3.**

40. This Honourable Court cannot vest out or extinguish a royalty that is an interest in land.

> ***Blue Note Caribou Mines Inc., Re,*** **2010 NBQB 91, 186 A.C.W.S. (3d) 594 at paras. 41 and 63 Book of Authorities of 235 at TAB 3.**
>
> ***1565397 Ontario Inc., Re,*** **[2009] O.J. No. 2596, 178 A.C.W.S. (3d) 124 at paras. 60 and 64, Book of Authorities of 235 at TAB 4.**

41. Section 100 of the *Courts of Justice Act,* R.S.O. 1990 c. C.43 does provide this Honourable Court with the power to vest property. However, Section 100 only provides a mechanism to vest property to a person with a valid claim to ownership. Its does not provide this Honourable Court with the jurisdiction or authority to extinguish an interest in land.

> ***Royal on Gordon Retirement residence Inc. v. Paterson,*** **2012 ONSC 2768, 20 R.P.R. (5th) 339 at para 15, Book of Authorities of 235 at TAB 5.**

42. Any royalty that is an interest in the land is an interest that is not the property of the bankrupt party. The receiver takes possession of the property of the debtor only and cannot sell the interests of the royalty holder. Extinguishing the royalty would

effectively be a transfer of the interest of the royalty holder to another party for consideration not agreed to by that party.

> ***1565397 Ontario Inc., Re,* [2009] O.J. No. 2596, 178 A.C.W.S. (3d) 124 at paras. 68 and 80 Book of Authorities of 235 at TAB 4.**

43. Unless the interest in land has no equity, this Honourable Court cannot vest out or extinguish the same, and any transfer of the property or asset is subject to the interest in land.

> ***1565397 Ontario Inc., Re,* [2009] O.J. No. 2596, 178 A.C.W.S. (3d) 124 at para 78 and 85 Book of Authorities of 235 at TAB 4.**

*<u>LAW - RSLA</u>*

44. With respect to the issue of a Repairer's Lien, a storer has a lien against an article that the storer has stored for the fair value of the storage and may retain the article until the same is paid.

> ***Repair and Storage Liens Act,* R.S.O. 1990, c. R.25, S. 4**

45. The lien created by Section 4 has priority over all other interests in the item.

> ***Repair and Storage Liens Act,* R.S.O. 1990, c. R.25, S. 6**
>
> ***General Electric Capital Canada Inc. v. Interlink Freight Systems Inc.* [1998] O.J. No. 4910 Book of Authorities of 235 at TAB 6.**

46. The person in possession of the item may retain or sell the same on notice to the owner of the item.

> ***Repair and Storage Liens Act,* R.S.O. 1990, c. R.25, S. 15 and S.17**

47. 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.

***Repair and Storage Liens Act*, R.S.O. 1990, c. R.25, S. 1**

48. At storage relationship can be inferred by the facts of a matter. There need not be an actual offer to store for payment and acceptance of the same. If the storee leaves items on property owned by the storer for the purpose of storing and using those assets, a storage relationship can be inferred.

***Eby v. Pitkin* (2006), 218 O.A.C. 234 at paras. 44 to 56 Book of Authorities of 235 at TAB 7.**

*ARGUMENT - ROYALTY*

49. It is clear from the language used in the agreements, that the parties intended for the GORs to be interests in land.

50. The GORs were initially created by two agreements, the Unpatented Option Agreement and the Patented Option Agreement. Section 7 of the Unpatented Option Agreement clearly provides that 381 retains a 20% GOR in the mining claims. Section 7 of the Patented Option Agreement clearly provides that 381 retains a 30% GOR in the Patented Lands.

51. This language is similar to that in *Blue Note Caribou Mines Inc.* above and clearly creates an interest in the land. The language of each Section 7 does not attempt to transfer a contractual interest but an interest in the "mining claim" and the "patented lands." This language clearly creates and interest in land.

52. Both the Patented Option Agreement and Unpatented Option Agreement were amended on August 25, 2008 by the Patented Amending Agreement and the Unpatented Amending Agreement. Both Amending Agreements amend the language of the GORs and clearly provide that the GORs are interests in land.

53. Section 16 of each Amending Agreement provides that the original Schedule A's with respect to the GORs are amended by the Schedule A attached to the Amending Agreements. Schedule A to the Amending Agreements includes the following at Section 4:

> *"4. Nature of Interest*
>
> *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 Mining Claims and all successors thereof or leases or other tenures which may replace them......."*

54. The Amending Agreements clearly provide that it is the intention of the parties to create and grant interests in land with respect to the GORs.

55. With respect to the GOR on the unpatented mining claims, the Supreme Court has stated in the *Bank of Montreal* case above, that a GOR will be an interest in land, if the interest it attaches to is an interest in land. It is clear that mineral rights in the unpatented mining claims are an interest land and therefore so is the GOR that attaches to them.

56. Therefore, it is clear from the language of the agreements that the parties intended for the GORs to be interests in land.

57. The Receiver cites the cases of *Vandercraft v. Coseka Resources Ltd.* and *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd.* as standing for the proposition that if a royalty references "recovered" and "produced" the parties intended that the royalty not be an interest in land. However, those cases are distinguishable from this matter as the royalty agreements in these cases do not state the specific intentions of the parties. In

this matter, the Agreements specifically state the intention of the parties: that the GORs are interests in land.

58. As the GORs are clearly interests in land, this Honourable Court cannot extinguish or vest out the GORs.

59. The Receiver argues that Section 100 of the *Courts of Justice Act,* R.S.O. 1990 c. C43 allows this Honourable Court to vest property in TEC. However, the Court of Appeal in *Royal On Gordon Retirement Residence Inc. v. Paterson* has held that Section 100 is only the mechanism by which this Court can vest title to property if there is a valid claim to the same. It is submitted that Section 100 does not provide this Honourable Court with the ability to vest property free of interests in land because it suits certain parties.

60. The Receiver also cites the case of *Royal Bank of Canada v. Soundair Corp* as the authority which sets out the principles to which this Court looks in determining whether or not to approve a receiver's sale of assets. However, this case does not provide that an interest in land can be extinguished. It is submitted that no authority cited by the Receiver provides for the extinguishment of an interest in land.

61. As stated in the *1565297 Ontario Inc.* case above, there is no law that allows this Honourable Court to vest out an interest in the land in which the holder of the same has equity. It is clear from the various reports, the GORs have value and will continue to have value into the future. The IBK valuation and RPA valuation confirm that the value of the residual royalty held by 235 on the mineral rights is a function of the dynamics in the diamond market and is subject to variation over time. Dianor valued

the GORs at $16 million in offering buy down the same at the rate of $800,000.00 for every 1%.

62. Furthermore, the GORs were registered on title on May 15, 2009, prior to the TEC debenture. TEC took their debenture subject to the GORs.

63. Though TEC argues in its Factum that the GORs are only valued at $150,000.00 to $300,000.00, this valuation is only valid if current market conditions hold. It is clear from the IBK Valuation, RPA valuation, the buy down by Dianor and the RBC Report that the market conditions fluctuate over time. This matter is distinguishable from the *Regal Constellation Hotel Ltd., Re* case cited by the Receiver in that here there is evidence that the value of the GORs can fetch a different price in different market conditions.

64. Extinguishing the GORs is akin to transferring 235's interest in the land to TEC without consideration. As held in *1565297 Ontario Inc.* above, the receiver does not that the authority to deal with an interest in land owned by a party other than Dianor. Therefore, if the assets are transferred, they re transferred subject to the GORs.

65. Unlike a mortgage, there is no ascertainable amount that can be used to satisfy the GORs. This Honourable Court does not have the jurisdiction to create such an amount and the GORs must remain on title. 235 cannot be forced to sell its interest at the bottom of the market.

*ARGUMENT - RSLA*

66. With respect to the lien under the *RSLA,* 235 submits that it has a valid possessory lien under the *RSLA* as it meets the definition of a storer under the same. It is agreed that the *Mining Act* can govern a situation where a surface rights holder is

seeking damages for lost value to their surface rights. However, in this matter 235 is seeking rent for the occupation of certain structures built on the surface. It is distinguishable from the common entitlement of surface rights holders.

67. Dianor acquired the surface rights upon which it stores its assets on November 27, 2008. From that date to November 30, 2012, Dianor stored its assets on land owned by it. Subsequent to November 30, 2012 the surface rights upon which the assets were stored was sold to 235 via a power of sale.

68. Therefore, subsequent to November 30, 2012, Dianor stored its assets on land it did not own for no consideration. Dianor remained in possession of the compound.

69. A storage relationship can be inferred from this set of facts. Like in *Eby* above, the parties did not expressly agree on a storage relationship but did enter into one notwithstanding the lack of agreement. The lands owned by Dianor were sold to 235 under a power of sale. Subsequent to the sale, Dianor did not remove its assets nor did it pay rent for the storage of the assets.

70. Instead, Dianor left the assets in their place for future use. Dianor, in effect, stored the assets on the land now owned by 235. Commercial reality dictates that some payment is owed for this storage. Dianor cannot assert that it had any right to store or leave its assets on lands owned by 235 free of any form of charge or fee. The Lien covers the period from August 1, 2014 (which is the date Dianor/TEC were aware of 235's position) to date of vacating the Premises.

71. The lien under the *RSLA* also clearly ranks in priority to any charge registered by TEC. The TEC charge only attached to the mining rights related to the property owned by 235. It does not form security over the assets of Dianor that exist on the surface.

72. The *Mining Act* defines mineral rights as the rights to minerals on, in or under any land. The TEC mortgage only encumbers the minerals on, in or under the land owned by TEC. By nature of the definition of mineral rights, the TEC mortgage cannot and does not encumber the assets of Dianor on the surface of the property which includes those assets in the affidavit of J. Leadbetter.

73. Therefore, there is no issue of priority between TEC and 235 as the 235 lien is the only security affecting the surface assets.

*ARGUMENT – BAD FAITH*

74. The Receiver alleges that 177co. did not takes steps to maximize the purchase price for the surface rights. There is no evidence to support that position. The power of sale procedure was followed and was supported by an opinion on value.

75. The Receiver suggests that Mr. Leadbetter is overvaluing the Mining Claims, and as a result, the value of his GORs. 235 submits that the current value of $2,525,000.00 is reasonable when compared to both the RPA Valuation and the IBK Valuation. It is clear that the value of this interest fluctuates with market conditions. 235 is entitled to wait for better market conditions before it elects to sell.

76. 235 submits that there is no evidence of bad faith on the part of Mr. Leadbetter and no evidence that he or 235 is holding the transaction hostage. 245 is entitled to retain its GORs.

**ORDER REQUESTED**

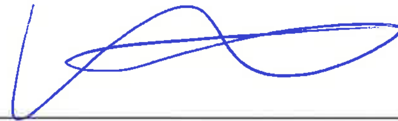
77. 235 requests:

a. An Order dismissing the Motion of the Receiver;

b. An Order that the GORs are interests in land and that any sale of the assets of Dianor are subject to the GORs.

c. An Order that 235 has a valid lien in the sum of $67,800.00 to August 31, 2016 with per diem charges accruing at the rate of $92.88 thereafter that ranks in priority to the security held by TEC.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 22rd day of September, 2016.



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# A

**SCHEDULE "A"**

**LIST OF AUTHORITIES**


1. *Bank of Montreal v. Dynex Petroleum Ltd.,* 2002 SCC 7, [2001] 1 S.C.R. 146

2. *Bank of Montreal v. Dynex Petroleum Ltd.,* 1999 ABCA 363, [1999] A.J. No. 1463

3. *Blue Note Caribou Mines Inc., Re,* 2010 NBQB 91, 186 A.C.W.S. (3d) 594

4. *1565397 Ontario Inc., Re,* [2009] O.J. No. 2596, 178 A.C.W.S. (3d) 124

5. *Royal on Gordon Retirement residence Inc. v. Paterson,* 2012 ONSC 2768, 20 R.P.R. (5th) 339

6. *Eby v. Pitkin* (2006), 218 O.A.C. 234

7. *General Electric Capital Canada Inc. v. Interlink Freight Systems Inc.* [1998] O.J. No. 4910.

B

# SCHEDULE "B"

# TEXT OF STATUTES, REGULATIONS & BY – LAWS

## Repair and Storage Liens Act

R.S.O. 1990, CHAPTER R.25

*Definitions and interpretation*

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. ("entreposeur") R.S.O. 1990, c. R.25, s. 1 (1); 2014, c. 9, Sched. 4, s. 1.

*Storer's lien*

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).

*Limit on storer's lien*

(2) A storer is not entitled to a lien for a repair made to an article unless the repair is made by the storer on the understanding that the storer would be paid for the repair or unless subsection 28 (2) applies. R.S.O. 1990, c. R.25, s. 4 (2).

*When lien arises*

(3) A storer's lien arises and takes effect when the storer receives possession of the article for storage or storage and repair, except that no storer's lien arises with respect to repair if the storer was required to comply with sections 56 and 57, subsection 58 (1) and section 59 of the *Consumer Protection Act, 2002*, if applicable, and the storer has not done so. 2006, c. 19, Sched. G, s. 10 (2).

*Priority of lien*

6. A lien under this Part has priority over the interests of all other persons in the article. R.S.O. 1990, c. R.25, s. 6.

*Sale of article*

15. (1) A lien claimant who has a right, under this Act, to sell an article shall not exercise that right unless the lien claimant has given notice of intention to sell the article.

*Idem*

(2) A notice of intention to sell an article shall be in writing and shall be given at least fifteen days before the sale to,

(a) the person from whom the article was received for repair, storage or storage and repair;

(b) where the article was received for repair, storage or storage and repair from a person other than the owner,

(i) the person who is the registered owner of the article, if the article is a motor vehicle, or

(ii) the person the lien claimant knows or has reason to believe is the owner, if the article is not a motor vehicle;

(c) every person who has a security interest in the article under the *Personal Property Security Act* that is perfected by registration against,

(i) the name of the owner, if the owner is a person entitled to notice under clause (a) or (b),

(ii) the vehicle identification number, if the article is a motor vehicle; and

(d) every person who has registered a claim for lien under Part II (Non-possessory Liens) against,

(i) the name of the owner, if the owner is a person entitled to notice under clause (a) or (b),

(ii) the vehicle identification number, if the article is a motor vehicle.

*Contents of notice*

(3) The notice required by subsection (2) shall contain,

(a) a description of the article sufficient to enable it to be identified;

(b) a statement of the amount required to satisfy the lien, as of the time when the notice is given, and any costs of seizure;

(c) a statement of the method of calculating, on a daily basis, any further costs for storage or preservation of the article that may be incurred between the time when the notice is given and the time when the sale is to take place;

(d) a statement that the article may be redeemed by any person entitled to receive notice by payment of the amount determined under clauses (b) and (c) plus any other reasonable costs incurred in preparing the article for sale;

(e) a statement of,

(i) the name of the person to whom payment may be made,

(ii) the address where the article may be redeemed,

(iii) the times during which redemption may be made,

(iv) the telephone number, if any, of the person giving notice;

(f) a statement of the date, time and place of any public sale at which the article is to be sold, or the date after which any private sale of the article is to be made; and

(g) a statement that the article may be sold unless it is redeemed on or before the day required to be specified in the notice by clause (f).

*Method of sale*

(4) The article may be sold in whole or in part, by public or private sale, at any time and place, on any terms, so long as every aspect of the sale is commercially reasonable.

*Purchase by lien claimant*

(5) The lien claimant may purchase the article only at a public sale. R.S.O. 1990, c. R.25, s. 15.

17. (1) A lien claimant who has a right to sell an article may propose, in lieu of selling it, to retain the article in satisfaction of the amount of the lien claimed by giving written notice of the proposal to the persons entitled to notice under subsection 15 (2). R.S.O. 1990, c. R.25, s. 17 (1).

*Objection*

(2) Where a person entitled to notice under subsection (1) gives the lien claimant a written objection to the proposal within thirty days of the receipt of the proposal, the lien claimant, subject to subsections (3) and (4), shall sell the article in accordance with section 15. R.S.O. 1990, c. R.25, s. 17 (2).

*Application to court*

(3) Upon application to the Superior Court of Justice and upon notice to every person who has given a written objection to the proposal, the court may order that the objection is ineffective because,

(a) the objection was made for a purpose other than the protection of the interest in the article of the person who made the objection; or

(b) the fair market value of the article is less than the amount of the lien of the lien claimant and the estimated expenses to which the lien claimant is entitled under this Act. R.S.O. 1990, c. R.25, s. 17 (3); 2000, c. 26, Sched. B, s. 18 (1).

*Foreclosure*

(4) If no effective objection is made, the lien claimant, at the expiration of the thirty-day period mentioned in subsection (2), shall be deemed to have irrevocably elected to retain the article and thereafter is entitled to hold or dispose of the article free from the rights and interests of every person to whom the written notice of the proposal was given. R.S.O. 1990, c. R.25, s. 17 (4).

THIRD EYE CAPITAL CORPORATION
Applicant

-and-

DIANOR RESOURCES INC.
Respondent

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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM**


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RCP-E 4C (July 1, 2007)