



Royalties are an Interest in Land (But can they be vested out? Stay tuned.)

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In a recent decision, the Ontario Court of Appeal determined that gross overriding royalties on certain Ontario mining claims constituted interests in land, finding that a right to enter and explore land is not a necessary incident of an interest in land. However, the court left for another day the question of whether an interest in land constituted by a royalty may be vested out by way of a vesting order under the [Courts of Justice Act](#) (Ontario).

Facts

At issue in [Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.](#), 2018 ONCA 253, were certain Ontario mining claims held by Dianor Resources Inc., subject to gross overriding royalties. Section 71 notices of the royalties were registered on title to the relevant surface rights and mining rights. Dianor became insolvent and the court appointed a receiver over Dianor's assets under section 243 of the [Bankruptcy and Insolvency Act](#) and section 101 of the [Courts of Justice Act](#). The receiver ran a bid process for the assets which yielded two bids for the mining claims, both of which included as a condition that the royalties be terminated or significantly reduced. Third Eye Capital Corporation, a creditor of Dianor, was the successful bidder for the mining claims, and the motion judge granted a vesting order that would extinguish the royalties. The royalty holder, although not opposing the transfer, asked that the mining claims be transferred subject to the royalties. The motion judge held:

- the royalties did not constitute an interest in land
- the court had jurisdiction under the [Courts of Justice Act](#) to transfer the mining claims free of the royalties
- \$250,000 (the value of the royalty rights as determined by an expert) of the proceeds of the sale should be paid to the royalty holder as a condition of the sale

The vesting order was registered on title. The royalty holder appealed to the Court of Appeal to set aside the order of the motion judge. Third Eye Capital argued, among other things, that the appeal was moot because the vesting order, which operated to extinguish the royalties, had already been registered on title.

Dual Nature of a Vesting Order

In response to Third Eye Capital's argument, the court referred to the decision of the Ontario Court of Appeal in [Regal Constellation Hotel Ltd., Re \(2004\)](#), 71 O.R. (3d) 355 (C.A.), where that court described a vesting order as having a dual nature, with characteristics of both a court order and a conveyance. In the immediate case, the court agreed that, when the vesting order was registered on title, it ceased to operate as a court order and therefore could not be appealed as such. However, the vesting order continued as a registered instrument of conveyance under the [Land Titles Act](#) (Ontario), and could be

subject to remedies available under the *Land Titles Act*, including rectification, if certain conditions were met. (The court indicated further submissions were required with respect to such conditions.) Therefore, the appeal was not moot.

Dynex and Royalties as Interests in Land; Distinguishing Anglo Pacific

The court indicated that “the central issue in this case is whether the [royalties] constitute interests in land within the meaning of the law outlined by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7”, holding that *Dynex* was the applicable law on the question of whether the royalty interests constituted interests in land. In *Dynex*, the Supreme Court of Canada considered the common law with respect to royalties and other similar types of arrangements in the context of the oil and gas industry, and determined that it was appropriate, given the nature of the oil and gas industry and the interests involved, that royalties should be recognized as being capable of being interests in land if that was the mutual intention of the parties to the royalty.

The Ontario Court of Appeal distinguished the decision of the Québec Court of Appeal in *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323. In that decision, the Québec court held that, to have a “real right” in land under the Civil Code of Québec, one must have ownership, and in order to have ownership, one must have the right to enter, enjoy, or dispose of the property. In *Dianor*, the court determined that these civil law concepts have no application in the common law provinces.

Applying *Dynex* to the mining royalties at issue in *Dianor*, the court in *Dianor* found that the parties clearly intended that the royalties constitute interests in land, citing an express statement to that effect contained in the royalty documents:

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.

The court also referred to the fact that notices of the royalties were registered on title to the lands and mining claims as further evidence of the parties’ intention.

The court found that the motion judge incorrectly determined that a right to enter the relevant property to explore and extract diamonds or other minerals was necessary to find that the *Dianor* royalty holder possessed an interest in land. The court explained (at para. 71) that:

The purpose of the Supreme Court and the Court of Appeal of Alberta in *Dynex* was to step away from the requirement that a royalty right had to have the incidents of a working interest or a *profit à prendre* in order to constitute an interest in land, so that royalty rights could play their useful role in financing the industry and spreading risk.

Applying the *Dynex* test to find that the royalties were interests in land, the court determined that further submissions were required to answer the question of whether the motion judge had jurisdiction to vest the royalties out of the mining claims.

The Next Phase

Holders of royalties on mining claims in the common law provinces will cheer the Ontario Court of Appeal’s recognition of mining royalties as interests in land and its interpretation of the *Dynex* test. However, the questions of whether interests in land may be vested out by vesting order under the *Courts*

of Justice Act and, if so, whether compensation is appropriate or necessary, remain outstanding pending the next phase of the appeal. If an interest in land can be vested out (without commensurate compensation, which may be problematic and contentious), then royalty holders' cheers may be short-lived.

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