

CLERK'S STAMP

COURT FILE NUMBER 2001-05630

COURT COURT OF QUEEN'S BENCH OF ALBERTA IN  
BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE CALGARY

APPLICANTS **IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF DOMINION DIAMOND MINES ULC,  
DOMINION DIAMOND DELAWARE COMPANY LLC,  
DOMINION DIAMOND CANADA ULC, WASHINGTON  
DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND  
HOLDINGS, LLC, and DOMINION FINCO INC.**

DOCUMENT **BENCH BRIEF OF THE APPLICANTS**  
**(SECOND AMENDED AND RESTATED INITIAL ORDER)**  
**BLAKE, CASSELS & GRAYDON LLP**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT  
Barristers and Solicitors  
3500 Bankers Hall East  
855 – 2<sup>nd</sup> Street SW  
Calgary, Alberta T2P 4J8

Attention: Peter L. Rubin / Peter Bychawski /  
Claire Hildebrand / Morgan Crilly  
Telephone No.: 604.631.3315 / 604.631.4218 /  
604.631.3331 / 403.260.9657  
Email: [peter.rubin@blakes.com](mailto:peter.rubin@blakes.com) /  
[peter.bychawski@blakes.com](mailto:peter.bychawski@blakes.com) /  
[claire.hildebrand@blakes.com](mailto:claire.hildebrand@blakes.com) /  
[morgan.crilly@blakes.com](mailto:morgan.crilly@blakes.com)

Fax No.: 604.631.3309

## TABLE OF CONTENTS

<b>PART I - INTRODUCTION</b> .....	<b>1</b>
<b>I. OVERVIEW</b> .....	<b>1</b>
<b>II. RELIEF SOUGHT</b> .....	<b>3</b>
<b>PART II - FACTS</b> .....	<b>4</b>
<b>I. BACKGROUND</b> .....	<b>4</b>
<b>II. SUMMARY OF THE RESTRUCTURING PROPOSAL</b> .....	<b>5</b>
A. THE LOI .....	5
B. THE STALKING HORSE TERM SHEET .....	6
C. THE SISP .....	10
D. INTERIM FINANCING .....	12
E. FINANCIAL ADVISOR AGREEMENT .....	17
F. THE KERP .....	19
<b>PART III - ISSUES</b> .....	<b>20</b>
<b>PART IV - LAW AND ARGUMENT</b> .....	<b>21</b>
<b>I. THE RELIEF SOUGHT FURTHERS THE PURPOSE OF THE CCAA</b> .....	<b>21</b>
<b>II. THE SISP AND STALKING HORSE BID</b> .....	<b>23</b>
A. FACTORS FOR APPROVING “STALKING HORSE” SALES PROCESSES .....	23
B. THE SISP AND STALKING HORSE BID SHOULD BE APPROVED .....	28
(i) The SISP and Stalking Horse Bid are warranted at this time .....	28
(ii) The SISP and Stalking Horse Bid benefit the Applicants’ economic community ..	29
(iii) There is currently no better alternative to the SISP and Stalking Horse Bid.....	30
(iv) The SISP and Stalking Horse Bid provide for a fair and transparent sales process	31
(v) The SISP and the Stalking Horse Bid are commercially efficacious in the	
Applicants’ circumstances .....	33
<b>III. INTERIM FINANCING</b> .....	<b>35</b>
A. FACTORS FOR APPROVING INTERIM FINANCING .....	35
B. THE INTERIM FINANCING SHOULD BE APPROVED .....	37
<b>IV. THE FINANCIAL ADVISOR AGREEMENT</b> .....	<b>40</b>
A. FACTORS TO BE CONSIDERED IN APPROVING THE FINANCIAL ADVISOR	
AGREEMENT.....	40
B. THE FINANCIAL ADVISOR AGREEMENT SHOULD BE APPROVED .....	42
<b>V. THE KERP</b> .....	<b>43</b>
A. FACTORS TO BE CONSIDERED IN APPROVING THE KERP .....	43
B. THE KERP SHOULD BE APPROVED .....	45
C. THE CONFIDENTIAL EXHIBIT SHOULD BE SEALED .....	46
<b>VI. STAY EXTENSION</b> .....	<b>46</b>
<b>PART V - CONCLUSION</b> .....	<b>47</b>

## PART I - INTRODUCTION

### I. OVERVIEW

1. The Applicants obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), on April 22, 2020 pursuant to an initial order of this Court (the "**Initial Order**"). The Initial Order was subsequently amended and restated by an Order (the "**ARIO**") of this Court granted on May 1, 2020. Among other things, the ARIO extended the Stay Period (as defined in the Initial Order) in respect of the Applicants from May 2, 2020 to June 1, 2020.

2. The Applicants' ability to conduct their business and generate revenue prior to seeking protection under the CCAA had been: (a) constrained by their highly leveraged capital structure; and (b) recently and seriously impaired by the sudden and rapidly spreading COVID-19 pandemic. The COVID-19 pandemic has severely limited the Applicants' ability to move their rough diamond inventory from the point of extraction to the Applicants' sorting facilities in India for further movement for eventual sale on the world market.

3. In their Application to this Court for the Initial Order, the Applicants advised that their restructuring plan while under CCAA protection would involve, among other things, efforts to:

- (a) undertake a sale and investment solicitation process to maximize the value of the Applicants' business and property for the benefit of stakeholders; and
- (b) obtain interim financing necessary to pursue the Applicants' restructuring efforts in the context of these CCAA proceedings, including the funding of operating disbursements, the costs associated with implementing their restructuring plans, and the costs of administering these CCAA proceedings.

4. Following several weeks of arm's-length and good faith discussions and negotiations with multiple parties, the Applicants' restructuring efforts have culminated in the Stalking Horse Bidder's (as defined below) integrated restructuring proposal (the "**Restructuring Proposal**"), which consists of the following three (3) key interconnected components (with defined terms in each case as defined below):

- (a) a Stalking Horse Term Sheet which forms the basis of a proposed Stalking Horse Bid, which would in turn set the "floor price" for the acquisition of substantially all the Dominion Vendors' business and assets;

- (b) a SISP that provides for a process to identify potentially higher and better offers than provided for by the Stalking Horse Bid; and
- (c) an Interim Financing Term Sheet which provides the Applicants with funding required to meet their operational and administrative expenses through to the completion of the SISP.

5. The approval of the integrated Restructuring Proposal is the primary issue before this Court on this Application.

6. The Applicants, after consultation with their financial advisor, Evercore Group LLC (“**Evercore**” or the “**Financial Advisor**”), and the Monitor, and after considering other potential restructuring options that would maximize value for the benefit of the Applicants’ stakeholders, submit that this Court’s approval of the Restructuring Proposal is in the best interests of the Applicants and their stakeholders and assists the Applicants’ efforts to maximize value through these CCAA proceedings.

7. The other relief sought by the Applicants on this application, including (a) the approval of the Applicants’ Financial Advisor Agreement (as defined below) with Evercore, (b) the approval of a key employee retention plan (“**KERP**”) for a limited number of the Applicants’ key employees (the “**Key Employees**”), and (c) the extension of the Stay Period, also furthers the Applicants’ restructuring efforts.

8. The Financial Advisor has had, and will continue to have, an important role in these CCAA proceedings. The Applicants simply do not possess the necessary skills to pursue and implement their restructuring efforts without the Financial Advisor’s continued engagement and expertise. The approval of the Financial Advisor Agreement is in the best interest of the Applicants and their stakeholders.

9. The KERP that is the subject of this Application is designed to facilitate and encourage the continued participation of Key Employees in the Applicants’ business and restructuring efforts, including through the SISP process and, where appropriate, will ensure a seamless transition to a successful bidder in the SISP process.

10. The extension of the Stay Period from June 1, 2020 to August 31, 2020 is required to maintain the stability of the Applicants’ business and provide required breathing room as the Applicants’ pursue their current restructuring efforts for the benefit of their stakeholders.

## II. RELIEF SOUGHT

11. In furtherance of their restructuring efforts, and to implement the Restructuring Proposal, the Applicants seek an amended and restated initial order (the “**Second ARIO**”), among other things:

- (a) subject to approval by the Monitor, authorizing and directing Dominion Diamond Mines ULC (“**Dominion Diamond**”), Washington Diamond Investments, LLC, and Dominion Diamond Holdings, ULC, as vendors (collectively, the “**Dominion Vendors**”), to negotiate and finalize a definitive “stalking horse” agreement of purchase and sale (such definitive agreement being the “**Stalking Horse Bid**”) with Washington Diamond Investments Holdings II, LLC, or its designated nominee, as purchaser (the “**Stalking Horse Bidder**”), substantially in accordance with the terms of the “stalking horse” term sheet (the “**Stalking Horse Term Sheet**”) negotiated among the Dominion Vendors and the Stalking Horse Bidder;
- (b) approving a sale and investment solicitation process (“**SISP**”) with respect to the Dominion Vendors’ business and assets which will, among other things, allow the Dominion Vendors to seek to identify any superior bid to the Stalking Horse Bid;
- (c) authorizing the Dominion Vendors to reimburse the Stalking Horse Bidder for certain fees incurred by it in connection with the negotiation of the Stalking Horse Term Sheet, the Stalking Horse Bid and the SISP, and approving certain bid protections in favour of the Stalking Horse Bidder should the Stalking Horse Bidder become entitled to such protections in accordance with the Stalking Horse Term Sheet;
- (d) approving the interim financing term sheet (the “**Interim Financing Term Sheet**”) between Dominion Diamond, as borrower, and an affiliate of the Stalking Horse Bidder, Washington Diamond Lending, LLC (“**Washington Lending**”), and the Existing Credit Facility Lenders (as defined in the Interim Financing Term Sheet and, collectively with Washington Lending, the “**Interim Lenders**”), as lenders, and Credit Suisse AG, Cayman Islands Branch, as the administrative agent and collateral agent of the Applicants’ revolving credit facility lenders (the “**First Lien Lenders**”), and granting the Interim Lenders’ Charge (as defined in the Second ARIO) on the terms and with the priority set out in the Second ARIO;

- (e) approving the Financial Advisor Agreement (as defined below) between the Applicants and Evercore and granting the Financial Advisor Charge (as defined in the Second ARIO) on the terms and with the priority set out in the proposed Second ARIO;
- (f) approving a KERP for a limited number of the Applicants' Key Employees, authorizing and directing the Applicants to enter into the KERP and to pay Incentive Bonuses (as defined in the Second ARIO) to each of the Key Employees, granting the KERP Charge (as defined in the Second ARIO) on the terms and with the priority set out in the proposed Second ARIO, and sealing the Confidential Exhibit (as defined below) setting out the names of the Key Employees and other confidential information relating to the KERP on the court file; and
- (g) extending the Stay Period (as defined in the Initial Order granted by this Court on April 22, 2020, as amended and restated by the Order of this Court granted on May 1, 2020) from June 1, 2020 to August 31, 2020.

12. The Applicants further request that this Court grant such relief as their counsel may advise at the hearing of this Application and this Court considers to be just.

## **PART II - FACTS**

### **I. BACKGROUND**

13. Background facts relating to the commencement of these CCAA proceedings are set out in the affidavit of Kristal Kaye, sworn April 21, 2020 (the "**Kaye Affidavit**").

14. The facts related to the relief sought on this Application are set out in detail in:

- (a) the affidavit of John Startin, sworn May 21, 2020 (the "**Startin Affidavit**"), which attached as Exhibits "A" – "E", respectively:

Exhibit A - LOI (as defined below) with respect to the Restructuring Proposal;

Exhibit B - the Stalking Horse Term Sheet;

Exhibit C - the SISP;

Exhibit D - the Interim Financing Term Sheet; and

Exhibit E - the Financial Advisor Agreement.

- (b) the affidavit of Brendan Bell, sworn May 21, 2020 (the “**Bell Affidavit**”); and
- (c) the affidavit of Patrick Merrin, sworn May 11, 2020 (the “**Merrin Affidavit**”), which attaches the KERP as Confidential Exhibit “A”.

15. The facts set out in the Startin, Bell, and Merrin Affidavits are summarized below.

## II. SUMMARY OF THE RESTRUCTURING PROPOSAL

### A. THE LOI

16. As stated in the Kaye Affidavit, made in support of the Applicants’ application for an Initial Order, to address the highly-leveraged nature of the Applicants’ capital structure and associated liquidity challenges, the Applicants’ plans while under CCAA protection involved, among other things: (a) undertaking a sale and investment solicitation process to maximize value of the Applicants’ business and property for the benefit of stakeholders; and (b) obtaining interim financing to address operating needs pending the implementation of the Applicants’ restructuring efforts.<sup>1</sup>

17. On April 22, 2020, upon the granting of the Initial Order, Dominion Diamond issued a press release (the “**CCAA Press Release**”) advising the public of the commencement of these CCAA proceedings. In the CCAA Press Release, Dominion Diamond disclosed publicly to potentially interested parties that it intended to use these CCAA proceedings to engage in discussions with its lenders, creditors, equity sponsor, and other stakeholders, and to solicit and evaluate strategic alternatives to restructure financially and operationally.<sup>2</sup>

18. The CCAA Press Release also noted that Dominion Diamond had received and was considering a proposal from an affiliate of The Washington Companies (“**Washington**”), the Applicants’ 100% equity owner, to provide interim financing which would help provide sufficient liquidity through the CCAA process and be conditional upon Dominion Diamond agreeing to: (a) a Memorandum of Understanding (MOU) regarding a possible sale of Dominion Diamond’s assets to an affiliate of Washington, as a stalking horse bidder; and (b) bidding procedures for the

---

<sup>1</sup> Kaye Affidavit at para. 115.

<sup>2</sup> Bell Affidavit at para. 33 and Exhibit “A”.

solicitation of competing offers to such asset sale, including the potential purchase of Dominion Diamond's assets or an investment in the company.<sup>3</sup>

19. On May 21, 2020, following several weeks of discussions and negotiations among the Stalking Horse Bidder and its legal and financial advisors, and the Applicants and their legal and financial advisors, the Stalking Horse Bidder delivered a definitive letter of intent (the "LOI") to Dominion Diamond, via its Independent Director (as defined in the Bell Affidavit), Brendan Bell, in which the Stalking Horse Bidder set out the terms of the Restructuring Proposal on which it is prepared to support the Applicants in their restructuring efforts.<sup>4</sup>

20. The Restructuring Proposal, as more fully summarized in the Startin Affidavit, is structured in the manner consistent with the CCAA Press Release, other than the inclusion of the Applicants' First Lien Lenders as participants in the interim financing contemplated by the Interim Financing Term Sheet.<sup>5</sup>

#### **B. THE STALKING HORSE TERM SHEET**

21. The Stalking Horse Term Sheet provides that the Stalking Horse Bid will include the acquisition of substantially all of the assets of the Applicants' business, subject to certain terms and conditions, and will include the following material terms (with capitalized terms utilized in the table below that are not otherwise defined in this affidavit having the meanings ascribed to them in the Stalking Horse Term Sheet):<sup>6</sup>

<b>Term</b>	<b>Details</b>
Purchase Price	<p>In consideration for the Acquired Assets, the Stalking Horse Bidder will pay a Cash Purchase Price in an amount equal to US\$126,107,000, subject to the adjustments and conditions to be set out in the Stalking Horse Term Sheet, plus the assumption of the Core Liabilities (as defined below) and certain other assumed liabilities.</p> <p>The Stalking Horse Term Sheet provides that "the Cash Purchase Price is currently anticipated to be sufficient to (a) cash collateralize super priority charges approved pursuant to the Initial Order entered on April 22, 2020, as may be modified by subsequent order and subject to Buyer's prior written consent, not to be unreasonably withheld, (b) satisfy the Interim (DIP) Facility obligations, and (c) satisfy the first lien obligations of DDM under its revolving</p>

<sup>3</sup> Bell Affidavit at para. 33.

<sup>4</sup> Bell Affidavit at paras. 27-29; Startin Affidavit at para. 9.

<sup>5</sup> Bell Affidavit at para. 35; Startin Affidavit at para. 9 and Exhibit "A".

<sup>6</sup> Startin Affidavit at para. 14 and Exhibit "B".



Term	Details
	credit facility, based on the Company's Interim (DIP) Facility dated May 21, 2020 and an assumed closing date on or before October 31, 2020".
Transaction Structure	The transaction would be structured as a sale of assets (including equity in certain subsidiaries) by the Dominion Vendors and the assumption by the Stalking Horse Bidder of certain liabilities of the Dominion Vendors pursuant to the CCAA. However, the parties have the flexibility to elect a share sale should it be determined that such share sale is more advantageous.
Acquired and Excluded Assets	<p>The Stalking Horse Bidder will agree to acquire substantially all the assets used in connection with the Dominion Vendors' business. However, under certain circumstances (discussed below in connection with the "Ex-Rio Toggle") the transaction may exclude assets relating to the Diavik Mine.</p> <p>The Stalking Horse Bidder will not acquire the equity interests of (a) Dominion Holdings in Dominion Finco, Inc. and Dominion Diamond; or (b) Dominion Diamond in Dominion Diamond Delaware Company LLC (or any indirect interest in Dominion Diamond Canada ULC), Dominion Diamond (Cyprus) Limited and Dominion Diamond (Luxembourg) S.a.r.l. as they are not integral to the Dominion Vendors' business.</p>
Assumption of Liabilities	<p>The Stalking Horse Bidder will agree to assume substantially all operating liabilities of the Dominion Vendors, including all obligations of the Dominion Vendors under their operational contracts and JV agreements, to employees and unions, and First Nations and aboriginal groups and The Government of the Northwest Territories ("<b>GNWT</b>"), subject to certain modifications which are conditions to closing or an agreement between the Stalking Horse Bidder and the Dominion Vendors. The Stalking Horse Bidder and the Dominion Vendors will consider whether there are any contractual obligations in connection with the operations at the Ekati Mine that should not be assigned to the Stalking Horse Bidder.</p> <p>The additional liabilities the Stalking Horse Bidder agrees to assume include: (a) Dominion Diamond's obligation to collateralize or refinance outstanding letters of credit issued under Dominion Diamond's revolving credit facility to secure closure costs (including reclamation) pursuant to the Diavik Joint Venture Agreement and Closure Security Agreement as of closing; (b) Dominion Diamond's obligations under its pension plan, including with respect to the windup deficit; and (c) Dominion Diamond's obligations under the Diavik Joint Venture Agreement with respect to all accrued and unpaid capital calls, plus accrued interest, any pending (but not yet due) capital calls, each as of closing (the "<b>Core Liabilities</b>").</p>
Employees	Subject to certain terms specified in the Stalking Horse Term Sheet, the Stalking Horse Bidder anticipates that it will offer employment to all employees of the Dominion Vendors and assume all employee benefit plans, pension plans, union and collective bargaining arrangements, and other employee arrangements on their existing terms.

Term	Details
Conditions	Closing of the transaction contemplated by the Stalking Horse Term Sheet is subject to various conditions, including but not limited to (a) approval by this Court of the SISP and Interim Financing Term Sheet; (b) an agreement acceptable to the Stalking Horse Bidder with Diavik Diamond Mines (2012) Inc. (" <b>DDMI</b> ") (a subsidiary of Rio Tinto plc. and Dominion Diamond's joint venture partner with respect to the Diavik Mine) and GNWT in relation to the timing and quantum of capital calls and reclamation liabilities at Diavik Mine (the " <b>Rio Condition</b> "); and (c) the Stalking Horse Bidder obtaining third-party equity and debt commitments on terms acceptable to the Stalking Horse Bidder provided that the aggregate amount of third-party equity committed will be at least US\$140 million, less 50% of any debt raised (the " <b>Financing Condition</b> ").
" <b>Ex-Rio Toggle</b> " Transaction	<p>If the Rio Condition is not satisfied or waived by July 21, 2020, the parties will proceed with the transaction contemplated by the Stalking Horse Term Sheet but the Stalking Horse Bidder will not acquire or assume any rights or obligations with respect to the Diavik Mine Joint Venture (all of which would become excluded assets and excluded liabilities) (the "<b>Ex-Rio Toggle</b>") and Dominion may dispose of Dominion Diamond's participation interest to DDMI or another party.</p> <p>If the Ex-Rio Toggle occurs, then (a) the Cash Purchase Price would be as specified in the Stalking Horse Term Sheet, without reduction; (b) the Excluded Assets would include Dominion Diamond's interest in the Diavik Joint Venture and any diamonds distributed by the Diavik Joint Venture to Dominion Diamond after the date of the commencement of these CCAA proceedings and prior to closing; (c) the Stalking Horse Bidder would not assume Core Liabilities with respect to the Diavik Joint Venture, including obligations for collateralizing or refinancing outstanding letters of credit and obligations with respect to capital calls; and (d) the aggregate amount of equity required to be committed in order to satisfy the Financing Condition would be reduced to at least US\$70 million, less 50% of any debt raised.</p>
Closing and Outside Date	The parties will seek to close as soon as reasonably possible following court approval and the "target date" for closing is August 31, 2020. The "Outside Date" for the closing of the contemplated transaction is October 31, 2020.

22. In addition to the terms outlined above, the Stalking Horse Term Sheet provides that in certain circumstances fees or reimbursements of costs will be paid to the Stalking Horse Bidder, as follows:<sup>7</sup>

- (a) Reimbursement Payment on Signing of Stalking Horse Bid. All out-of-pocket expenses related to the Stalking Horse Term Sheet, Stalking Horse Bid and the

<sup>7</sup> Startin Affidavit at para. 16 and Exhibit "B".

SISP, up to the time of signing the Stalking Horse Bid, will become payable upon signing of the Stalking Horse Bid, subject to a US\$1.75 million cap;

- (b) Alternate Transaction. The Stalking Horse Term Sheet contemplates the Dominion Vendors' ability to terminate the Stalking Horse Bid and consummate an "**Alternate Transaction**" in certain circumstances. Such Alternate Transaction must be (A) a Successful Bid (as defined in the SISP and discussed below) or (B) any other sale of assets or plan in the CCAA proceeding that (i) results in a change in control and (ii) provides cash on closing to the Dominion Vendors or the Applicants equal to or greater than the Minimum Purchase Price (as defined in the SISP and discussed below).
- (c) Break-Up Fee and Expense Reimbursement. Pursuant to the terms of the Stalking Horse Term Sheet a "Break-Up Fee" of 2.0% of the Cash Purchase Price and a reimbursement of third party expenses up to a cap of US \$2.25 million (excluding prior reimbursements), is payable to the Stalking Horse Bidder from the proceeds of sale of the Alternate Transaction provided that (i) the Stalking Horse Bidder waives or satisfies the Financing Condition and waives or satisfies the Rio Condition on, or prior to, July 21, 2020; and (ii) the Stalking Horse Bid is not terminated because of a material breach by the Stalking Horse Bidder. Notably, the Dominion Vendors are entitled to terminate the Stalking Horse Bid on or before the first business day after the Phase 2 Bid Deadline (as defined in the SISP), without payment or penalty, in the event that the Stalking Horse Bidder does not waive or satisfy the Financing Condition (even if it has waived or satisfied the Rio Condition) by July 21, 2020. The consent of the Existing Credit Facility Agent is required for termination on this basis.
- (d) Tail Period. Further, if an Alternate Transaction is not concluded during the SISP, but a transaction is concluded following termination of the SISP that provides cash on closing to the Dominion Vendors or the Applicants equal to or greater than the Minimum Purchase Price and results in a change in control, the Break-Up Fee will also be payable to the Stalking Horse Bidder in those circumstances. The length of this "tail period" and other relevant terms and conditions relating to the tail period, will be agreed upon by the parties.

### C. THE SISP

23. The SISP, which was negotiated with the Stalking Horse Bidder in consultation with the Monitor, is a condition of the integrated Restructuring Proposal contemplated by the LOI, and sets out the parameters of the marketing process pursuant to which the Financial Advisor, on behalf of the Dominion Vendors, will solicit offers to purchase the assets of the Applicants, and the requirements for the submission of the offers by interested parties.<sup>8</sup>

24. The SISP is intended to solicit interest in, and opportunities for:<sup>9</sup>

- (a) a sale of (i) all or substantially all of the assets, property and undertakings of the Applicants and certain of their subsidiaries; (ii) the Diavik Interest (as defined in the SISP); (iii) the Non-Diavik Assets (as defined in the SISP); or (iv) some other portion of the assets, property and undertakings of the Applicants; or
- (b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of Dominion or its business.

25. The SISP will be implemented by the Financial Advisor, with the oversight of the Monitor.<sup>10</sup>

26. The SISP is divided into two phases. Phase 1 requires interested parties to submit a non-binding letter of intent ("**Phase 1 Bids**") which contains critical information about the proposed bid. If no Phase 1 Bids are received, the SISP provides that the Dominion Vendors will seek court approval of the Stalking Horse Bid. Parties that submit Phase 1 Bids that satisfy certain enumerated criteria more particularly set out in the SISP will have the opportunity to submit a binding offer at a later date ("**Phase 2 Bids**").<sup>11</sup>

27. Binding Offers (as defined in the SISP), which can be in the form of acquisition bids or restructuring bids, must provide for cash on closing that is equal to or greater than the "**Minimum Cash Purchase Price**" required for Phase 1 Qualifying Bids being: (a) an amount equal to the cash payable on closing in the Stalking Horse Bid; plus (b) the amount of the Break-Up Fee and the amount of the Expense Reimbursement; plus (c) \$1 million. The Dominion Vendors do have the flexibility, however, to aggregate non-overlapping bids that collectively meet the Minimum

---

<sup>8</sup> Startin Affidavit at para. 20.

<sup>9</sup> Startin Affidavit at para. 21.

<sup>10</sup> Startin Affidavit at para. 22.

<sup>11</sup> Startin Affidavit at para. 22 and Exhibit "C".

Cash Purchase Price. If one or more binding offers are received in addition to the Stalking Horse Bid (provided that any financing condition contained in the Stalking Horse Bid has been waived or satisfied), the SISP provides that an auction will be held to determine the Successful Bid (as defined in the SISP). The SISP also contemplates a Back-Up Bid (as defined in the SISP) being the second-best offer received in the auction.<sup>12</sup>

28. The deadlines provided for in the SISP include the following (with capitalized terms utilized in the table below that are not otherwise defined in this affidavit having the meanings ascribed to them in the SISP):<sup>13</sup>

Event	Date
Financial Advisor to distribute Teaser Letter to Potential Bidders.	As soon as practical.
Financial Advisor to prepare and have available to Potential Bidders a confidential information memorandum (defined in the SISP as a “ <b>CIM</b> ”) and a confidential virtual data room (defined in the SISP as a “ <b>VDR</b> ”).	As soon as practical.
Phase 1 Bid Deadline for delivery of non-binding LOIs by Phase 1 Qualified Bidders in accordance with the requirement of paragraph 14 of the SISP.	By June 26, 2020.
Financial Advisor to notify each Phase 1 Qualified Bidder in writing as to whether its bid constituted a Phase 1 Successful Bid.	Within five (5) Business Days of the Phase 1 Bid Deadline, or at such later time as the Applicants, in consultation with the Financial Advisor, the Agent Advisors, and the Monitor, deem appropriate.
Sale Approval hearing in respect of the Stalking Horse Bid if no other Phase 1 Successful Bids are received.	By July 13, 2020.
Phase 2 Bid Deadline (for delivery of definitive offers by Phase 2 Qualified Bidders in accordance with the requirement of paragraph 22 of the SISP).	By August 7, 2020.
Auction Commencement Date (if needed).	August 10, 2020.
Deadline for selection of final Successful Bid.	August 14, 2020 or at such later date as the Applicants, in consultation with the Financial

<sup>12</sup> Startin Affidavit at para. 26 and Exhibit “C”.

<sup>13</sup> Startin Affidavit at para. 25 and Exhibit “C”.

Event	Date
	Advisor, the Agent Advisors, and the Monitor, deem appropriate.
Deadline for completion of definitive documentation in respect of Successful Bid.	August 18, 2020.
Deadline for filing of Approval Motion in respect of Successful Bid.	August 26, 2020.
Anticipated Deadline for closing of the Stalking Horse Bid in the event that no other Phase 1 Successful Bids are received.	August 31, 2020.
Anticipated Deadline for closing of Successful Bid, being the Target Closing Date.	September 9, 2020 or such earlier date as is achievable.
Outside Date by which the Successful Bid must close.	October 31, 2020.

29. Pursuant to its terms, any provision of the SISP which affords discretion to the Applicants, including without limitation in connection with the granting by the Applicants of any consent, waiver or approval, requires that the Applicants exercise such discretion in a commercially reasonable manner and with prior consultation with the Financial Advisor, the Agent Advisors (as defined in the SISP), on behalf of the First Lien Lenders, and the Monitor.

30. Notwithstanding the foregoing, (a) the Agent Advisors will only be consulted to the extent that the Existing Credit Facility Agent confirms that neither it nor any First Lien Lender intends to participate in the SISP as a bidder; and (b) nothing in the SISP will oblige or permit the Financial Advisor, the Monitor, or the Applicants to disclose to the Agent Advisors the identity of any bidder (other than the Stalking Horse Bidder) or any bid, prior to commencement of the Auction (all terms as defined in the SISP).<sup>14</sup>

#### **D. INTERIM FINANCING**

31. Since its engagement, the Financial Advisor, in consultation with the Monitor, has been actively soliciting proposals from and negotiating with key stakeholders across the Applicants' capital structure, including with the First Lien Lenders, second lien noteholders (the "**Second**

---

<sup>14</sup> Startin Affidavit at para. 27.

**Lien Lenders**”), and Washington, to ascertain interest in providing interim financing to the Applicants.<sup>15</sup>

32. The Financial Advisor, as more fully described in the Startin Affidavit, commenced the process of soliciting interim financing on behalf of the Applicants with a target potential interim financing requirement of between \$55 million to \$75 million. The target interim financing amount was sized to provide for operating disbursements over a five-month period, costs associated with the SISP and the Stalking Horse process, and CCAA costs.<sup>16</sup>

33. In soliciting potential interim financing, the Financial Advisor first reached out to the First Lien Lenders, Second Lien Lenders and Washington, and then also reached out to potential third-party lenders, consisting of both banks and alternative lenders.<sup>17</sup>

34. The Financial Advisor reviewed and considered each of the interim financing proposals received on behalf of the Applicants in consultation with the Monitor and, ultimately, the interim financing proposal submitted by the Interim Lenders, which include an affiliate of the Stalking Horse Bidder and the Existing Credit Facility Lenders, consisting of a senior secured, super priority, debtor-in-possession, interim, non-revolving credit facility up to a maximum principal amount of US\$60 million (the “**Interim Financing Facility**”), was selected by the Applicants as being more favourable.<sup>18</sup>

35. Material terms of the Interim Financing Facility, as set out in an Interim Financing Term Sheet dated as of May 21, 2020 (the “**Interim Financing Term Sheet**”) include but are not limited to the following (with capitalized terms utilized in the table below that are not otherwise defined in this affidavit having the meanings ascribed to them in the Interim Financing Term Sheet):<sup>19</sup>

<b>Term</b>	<b>Description</b>
Borrower	Dominion Diamond Mines ULC.
Interim Lenders	Washington Lending and the Existing Credit Facility Lenders as set out on Schedule “F” to the Interim Financing Term Sheet, provided that the

---

<sup>15</sup> Startin Affidavit at para. 30.

<sup>16</sup> Startin Affidavit at paras. 31-32.

<sup>17</sup> Startin Affidavit at para. 33.

<sup>18</sup> Startin Affidavit at paras. 36-37.

<sup>19</sup> Startin Affidavit at para. 38 and Exhibit “D”.

Term	Description
	aggregate Commitments of the Existing Credit Facility Lenders shall not exceed 34% of the Commitments.
Guarantors	Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, Dominion Finco Inc., Dominion Diamond Delaware Company LLC, Dominion Diamond Canada ULC (together with Dominion Diamond, the “ <b>Credit Parties</b> ”).
Facility Amount	Up to a maximum principal amount of US \$60 million (as such amount may be reduced from time to time pursuant to the terms of the Interim Financing Term Sheet).
Drawdowns	The Interim Financing Facility will be made available to the Borrower by way of up to six (6) advances (each an, “ <b>Advance</b> ”) which, in the aggregate, will not exceed the Facility Amount. The timing for each Advance will be determined based on the funding needs of the Borrower as set forth in the DIP Budget and as such draw amounts are agreed to by the Required Interim Lenders and the Credit Parties. Each Advance (other than the final Advance) will be in a principal amount of not less than US\$2,000,000.
Interest Rate	Interest will be payable on the aggregate outstanding amount of the Facility Amount that has been advanced to the Borrower from the date of the funding thereof at a rate equal to 5.25% <i>per annum</i> , compounded monthly and payable monthly in arrears in cash on the last Business Day of each month, with the first such payment being made on May 31, 2020. Upon the occurrence and during the continuation of an Event of Default, all overdue amounts will bear interest at the applicable interest rate plus 2% <i>per annum</i> payable on demand in arrears in cash.
Costs and Expenses	The Borrower will reimburse the Interim Lenders and the Existing Credit Facility Agent for all reasonable fees and expenses incurred (including reasonable and documented legal, financial advisory and professional fees and expenses on a full indemnity basis) (the “ <b>Interim Lenders’ Expenses</b> ”) by the Interim Lenders or any of their affiliates and the Existing Credit Facility Agent in connection with the negotiation, development, and implementation of the Interim Financing Facility (including the administration of the Interim Financing Facility). The Interim Lenders’ Expenses will form part of the Interim Financing Obligations secured by the Interim Lenders’ Charge (as defined in the Second ARIO).
Interim Facility Security and Priority	All Interim Financing Obligations will be secured by the Interim Lenders’ Charge which will be granted on the terms and with the priority set out in the Second ARIO. The Required Interim Lenders may, in their reasonable discretion (a) require the execution, filing or recording of any mortgages, security agreements, pledge agreements, control agreements, financing statements or other documents or instruments, or (b) take possession or control of any Collateral of the Credit Parties, to the extent it is necessary to



Term	Description
	<p>do so, to obtain and/or perfect its senior secured, super priority Lien on such Collateral.</p> <p>The Interim Lenders' Liens and the Interim Lenders' Charge shall have priority over all Liens on the Applicants' Collateral except that: (a) Permitted Priority Liens shall be senior to any Liens of the Interim Lenders or the Existing Credit Facility Agent in any of the Collateral (such Permitted Priority Liens include certain court-ordered priority charges, the Liens of the Existing Credit Facility Agent in respect of the Diavik Collateral, and, subject to the terms of the Interim Facility Term Sheet, any Diavik JV Priority Liens with respect to the Diavik Collateral); (b) the Liens of the Existing Credit Facility Agent in the Interim Facility Priority Collateral to secure the Funded First Lien Facility Obligations shall be senior to the Liens of the Interim Lenders in the Interim Facility Priority Collateral to secure any October Advances (and related interest); and (c) the Liens of the Interim Lenders in the Interim Facility Priority Collateral to secure any October Advances (and related interest), shall be senior to any Liens of the Existing Credit Facility Agent to secure the First Lien Facility LC Obligations.</p>
Repayment	<p>The Interim Financing Facility and the Interim Financing Obligations will be due and repayable in full (subject to the obligation to cash collateralize amounts secured by charges ranking in priority to the Interim Lenders' Charge) on the earlier of: (a) the occurrence of any Event of Default which is continuing and has not been cured; (b) the completion of a Restructuring Transaction; (c) the conversion of the CCAA Proceedings into a proceeding under the <i>Bankruptcy and Insolvency Act</i> (Canada); (d) the closing of a Successful Bid (as defined in the SISP); (e) the sale of all or substantially all of the CCAA Applicants' collateral; and (f) the Outside Date (i.e., October 31, 2020).</p>
Right of Repurchase	<p>In the event that the purchase agreement governing the Stalking Horse Transaction is terminated, the Existing Credit Facility Lenders shall have the right, but not the obligation, to purchase from the Interim Lenders, upon at least five (5) days prior written notice from the Existing Credit Facility Lenders to Washington Lending (which request may be made in the sole and absolute discretion of the Existing Credit Facility Lenders) either: (a) all outstanding Interim Facility Obligations (including, for the avoidance of doubt, any accrued and unpaid interest, expenses and fees as of the date of such purchase); or (b) a portion of the Advances made by the Interim Lenders, together with a ratable portion of accrued and unpaid interest, expenses and fees associated with such Advances.</p>

36. The Interim Financing Term Sheet provides that the purpose of the Interim Financing Facility is to fund certain obligations of the Credit Parties (as more fully described in the Interim Financing Term Sheet) in order for the Credit Parties to pursue and implement a “**Permitted**

**Restructuring Transaction**", pursuant to and in accordance with the SISP, which is defined as (with capitalized terms having the meanings ascribed to them in the Interim Financing Term Sheet):<sup>20</sup>

- (a) the Stalking Horse Transaction;
- (b) a transaction that (i) provides for the repayment in full in cash of all Interim Financing Obligations outstanding at the time of closing of such Restructuring Transaction and (ii) otherwise constitutes a "Successful Bid" as defined in and in accordance with the SISP; or
- (c) a transaction for the Non-Diavik Assets (as defined in the SISP) that (i) provides for repayment in full in cash of all Interim Financing Obligations; (ii) otherwise constitutes a "Successful Bid" as defined in and in accordance with the SISP; and (iii) maintains all liens and other rights held by the Existing Credit Facility Agent on behalf of the First Lien Lenders securing all obligations under the Existing Credit Facility, to the Diavik Interest (as defined in the SISP) including, but not limited to, all diamond production from the Diavik Interest (but excluding in all respects those diamonds (and/or proceeds thereof) delivered to any of the Applicants or their direct or indirect controlled affiliates prior to the commencement of the CCAA), including the proceeds thereof.

37. The Interim Financing Term Sheet grants the Interim Lenders certain consent and consultation rights as described in the Interim Financing Term Sheet. In most instances the requisite consents and consultation rights are to be exercised by the "**Required Interim Lenders**", which are those Interim Lenders holding a majority of the Commitments and any outstanding Advances provided that the Required Interim Lenders must in all cases include Washington Lending. Washington Lending will hold at least 66% of the Commitments, as participation by the First Lien Lenders is limited to 34% of the Commitments. Certain matters are subject to the consent of the "**Supermajority Interim Lenders**", which are those Interim Lenders holding at least 68% of the Commitments and outstanding Advances held by all Interim Lenders provided that the Supermajority Interim Lenders must in all cases include Washington Lending.

---

<sup>20</sup> Startin Affidavit at para. 39 and Exhibit "D".

In other instances, consent and consultation rights are also granted to the Existing Credit Facility Agent.

#### **E. FINANCIAL ADVISOR AGREEMENT**

38. As noted in the Kaye Affidavit, Dominion Diamond engaged Evercore as a financial advisor to the company prior to the commencement of these CCAA proceedings pursuant to an engagement letter dated April 8, 2020 between Dominion Diamond and Evercore (as amended on April 22, 2020, the “**Financial Advisor Agreement**”).<sup>21</sup>

39. As outlined in the Kaye Affidavit, and more fully described in the Startin Affidavit, Evercore’s role with Dominion includes, but is not limited to, reviewing and analyzing the Applicants’ business, operations, and financial projections, communicating with lenders, other stakeholders, and their advisors, and advising and assisting the Applicants in negotiating the terms of a comprehensive restructuring framework. In furtherance of this role, Evercore has evaluated several strategic alternatives for Dominion, has been directly involved in and has led the search for potential interim financing, and has played a critical role in the negotiation and development of the Restructuring Proposal.<sup>22</sup>

40. The terms of the Financial Advisor Agreement include but are not limited to the following (capitalized terms as defined in the Financial Advisor Agreement):<sup>23</sup>

- (a) a Monthly Fee of US \$200,000 is payable to Evercore for its services, with the first Monthly Fee payable on the execution of the Financial Advisor Agreement and subsequent Monthly Fees payable on the first day of each month; provided, however, that 50% of all Monthly Fees paid in June 2020 and thereafter will be credited against any Restructuring Fee or Financing Fee that becomes payable or are negotiated;
- (b) a Restructuring Fee is payable to Evercore upon the consummation of any Restructuring or Sale of US \$6,500,000; provided, however, that 50% of any incremental amount above the Minimum Financing Fee paid pursuant to paragraph

---

<sup>21</sup> Startin Affidavit at para. 4.

<sup>22</sup> Startin Affidavit at paras. 4, 7-8.

<sup>23</sup> Startin Affidavit at para. 43 and Exhibit “E”.

2.d. of the Financial Advisor Agreement will be credited against the Restructuring Fee;

- (c) a Liability Management Transaction Fee is payable to Evercore upon the closing of any Liability Management Transaction equal to 1.125% of the aggregate principal amount of Dominion's debt exchanged in connection with any such Transaction;
- (d) a Financing Fee is payable to Evercore upon consummation of any financing, with fees varying according to the form of the financing, but subject to a Minimum Financing Fee set at US \$2,500,000, on the first such financing. Notwithstanding the foregoing, the Financing Fee on account of the Interim Financing Facility that is before this Court for approval is capped at US \$2,000,000 and that amount will be fully credited against any Restructuring or Liability Management Transaction Fee;
- (e) Evercore is to have the benefit of a first-ranking super-priority charge (which charge will form part of the Administration Charge) to secure the Monthly Fee and all Evercore's disbursements and expenses incurred under the terms of the Financial Advisor Agreement; and
- (f) Evercore is to have the benefit of a super-priority CCAA charge on all Dominion's property to secure the Restructuring Fee, Liability Management Transaction Fee, Liability Management Incentive Fee, Financing Fee, and Minimum Financing Fee that is to rank *pari passu* with the Interim Lenders' Charge.

41. Pursuant to the Financial Advisor Agreement, Evercore has agreed to provide the following services to the Applicants in the context of these CCAA proceedings, among others:

- (a) reviewing and analyzing the Applicants' business, operations, and financial projections, including by assisting with the refinement and analysis of Dominion's long-term modelling as it relates to the operation of the Ekati Mine;<sup>24</sup>

---

<sup>24</sup> Startin Affidavit at para. 7(a).

- (b) advising and assisting Dominion in evaluating proposed transactions and transaction implementation steps;<sup>25</sup>
- (c) providing financial advice in developing and implementing a restructuring plan in the context of these CCAA proceedings, including by, among other things, engaging in discussions with and providing information to the advisors of the First Lien Lenders, the Second Lien Lenders, and Washington;<sup>26</sup> and
- (d) assisting Dominion with soliciting, assessing and negotiating an interim lending facility;<sup>27</sup> and
- (e) considering and providing advice related to potential sales transactions, including by (i) considering, structuring, and evaluating the Stalking Horse Term Sheet and the SISP; (ii) identifying interested parties and/or potential acquirors and, at Dominion's request, contacting such interested parties and/or potential acquirors; (iii) assessing the structure of a potential sale transaction with a view to maximizing value for Dominion's stakeholders; and (iv) advising and assisting Dominion in connection with negotiations with potential interested parties and/or acquirors.<sup>28</sup>

42. In furtherance of this role, Evercore has evaluated several strategic alternatives for the Applicants, has been directly involved in and has led the search for potential interim financing, and has played a critical role in the negotiation and development of the Restructuring Proposal.<sup>29</sup>

## **F. THE KERP**

43. The Applicants seek this Court's approval of a KERP which has been developed by the Applicants, in consultation with the Monitor, to incentivize a small number of Key Employees to continue their employment with the Applicants as they continue to restructure their affairs.<sup>30</sup>

44. A list of the Key Employees, their salaries, their respective Incentive Bonuses and a short summary of their importance to the Applicants' business and restructuring efforts is attached as

---

<sup>25</sup> Startin Affidavit at para. 7(b).

<sup>26</sup> Startin Affidavit at para. 7(d).

<sup>27</sup> Startin Affidavit at para. 7(e).

<sup>28</sup> Startin Affidavit at para. 7(f).

<sup>29</sup> Bell Affidavit at para. 50.

<sup>30</sup> Merrin Affidavit at paras. 7, 15.

a confidential exhibit to the Merrin Affidavit (the “**Confidential Exhibit**”). This information is confidential and commercially sensitive, and as discussed below, the Applicants are also seeking an order sealing the Confidential Exhibit.<sup>31</sup>

45. Under the terms of the KERP, each Key Employee will be offered a lump sum Incentive Bonus (as defined in the Second ARIO).<sup>32</sup>

46. Each Incentive Bonus will be paid as follows:

- (a) the first one-third of the incentive Bonus shall be paid to each Key Employee on the earlier of June 6, 2020 and their last day of employment (if the Key Employee is terminated without cause); and
- (b) the remaining two-thirds of the Incentive Bonus shall be paid to each Key Employee on the earlier of November 6, 2020, their last day of employment (if the Key Employee is terminated without cause) and the closing of any restructuring, transaction.<sup>33</sup>

47. Payments to Key Employees under the KERP will only be made if, at the date the relevant payment of the Incentive Bonus is due, the Key Employee has fulfilled his or her employment obligations and has not voluntarily resigned or been terminated for cause.<sup>34</sup>

48. The Applicants also seek approval of the KERP Charge in the amount of no more than \$580,000 in order to provide the Key Employees with a reasonable level of assurance that the Incentive Bonuses will be paid.<sup>35</sup>

### **PART III - ISSUES**

49. The issues before this Court on this application are whether this Court should approve:

- (a) the SISP, including the provision for the Stalking Horse Bid and the Break-Up Fee and Expense Charge (as defined in the Second ARIO);

---

<sup>31</sup> Merrin Affidavit at para. 16.

<sup>32</sup> Merrin Affidavit at para. 10.

<sup>33</sup> Merrin Affidavit at para. 11.

<sup>34</sup> Merrin Affidavit at para. 12.

<sup>35</sup> Merrin Affidavit at para. 18.

- (b) the Interim Financing Term Sheet and the Interim Lenders' Charge;
- (c) the Financial Advisor Agreement and the Financial Advisor Charge;
- (d) the KERP, the KERP Charge, and the sealing of the Confidential Exhibit related thereto; and
- (e) an extension of the Stay Period.

50. The Applicants submit that such relief should be approved as being necessary and appropriate in the circumstances.

#### **PART IV - LAW AND ARGUMENT**

##### **I. THE RELIEF SOUGHT FURTHERS THE PURPOSE OF THE CCAA**

51. Restructuring proceedings under the CCAA are intended to provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.<sup>36</sup>

52. In furtherance of the purpose of the CCAA, Canadian courts have regularly approved sales and sale processes, recognizing that such processes are consistent with the remedial nature of the CCAA, which confers broad powers to approve sales in relation to a CCAA debtor's business and assets either prior to or in the absence of a plan of compromise and arrangement.<sup>37</sup>

53. In *Sanjel Corporation (Re)*, this Court specifically recognized that the CCAA can be a vehicle for implementing integrated restructuring proposals involving the sale of assets:

[...] Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the

---

<sup>36</sup> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para. 59 [Tab 1], citing *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (O.N.C.A.) at para. 57.

<sup>37</sup> *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 4467 (S.C.J.) at paras. 47-48 [*Nortel*] [Tab 2].

sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. [...]

As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. [...]<sup>38</sup>

54. The Restructuring Proposal that is the subject of this Application and the other relief sought by the Applicants furthers the purpose of the CCAA by, among other things:

- (a) providing for a Stalking Horse Bid that will give the Applicants' stakeholders certainty that the Applicants' business will continue as a going concern to the benefit of the employees and social and economic communities that rely upon the Applicants' business for their well being;
- (b) enhancing the fairness of the SISP through the Stalking Horse Bid including by allowing the Dominion Vendors to seek to identify any superior bid to the Stalking Horse Bid through the SISP;
- (c) providing for interim financing in an amount required by the Applicants to provide for operating disbursements over the five-month sales process contemplated by the SISP, costs associated with the SISP and the Stalking Horse process, and CCAA costs, which will enhance the prospects of a viable restructuring of the Applicants' business and financial affairs, including by allowing for the effective execution of the SISP; and
- (d) implementing a KERP designed to facilitate and encourage the continued participation of Key Employees in the Applicants' business and restructuring efforts, including through the SISP process.

55. For these reasons, and the further reasons set out set out below, the Applicants, in consultation with the Financial Advisor and the Monitor, submit that this Court's granting of the relief sought by the Applicants will further the purpose of the CCAA, is in the best interests of the

---

<sup>38</sup> *Sanjel Corporation (Re)* 2016 ABQB 257 at paras. 64-66 [*Sanjel*] [Tab 3].



Applicants and their stakeholders, and assists the Applicants' efforts to maximize value through these CCAA proceedings.

## II. THE SISP AND STALKING HORSE BID

### A. FACTORS FOR APPROVING "STALKING HORSE" SALES PROCESSES

56. A "stalking horse" sales process like that contemplated by the SISP and Stalking Horse Bid is a recognized type of sales process frequently utilized in insolvency proceedings to attempt to obtain the best price for the business or assets being sold.<sup>39</sup> Stalking horse agreements are a popular approach in CCAA proceedings. Stalking Horse agreements, including ones with conditionality, have been approved concurrently with sales processes in numerous CCAA proceedings.<sup>40</sup>

57. The purpose behind using stalking horse agreements in sales processes is to establish a baseline or "floor" price and deal structure in an effort to generate superior bids to the stalking horse bid from interested parties, thereby maximizing the value of a business for the benefit of stakeholders while enhancing the fairness of the sale process.<sup>41</sup>

58. In *Nortel Networks Corp. (Re)*, the Ontario Superior Court of Justice (Commercial List) approved a stalking horse sale process and set out four factors (the "**Nortel Criteria**") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:<sup>42</sup>

- (a) is a sale transaction warranted at this time?

---

<sup>39</sup> *CCM Master Qualified Fund Ltd v. blutip Power Technologies Ltd*, 2012 ONSC 1750 [*CCM Master*] at para. 7 [Tab 4]; *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.) [*Brainhunter*] at para. 13 [Tab 5]; *Danier Leather Inc. (Re)*, 2016 ONSC 1044 [*Danier Leather*] at para. 20 [Tab 6].

<sup>40</sup> See, for example, *CloverLeaf Holdings Company (Re)* (December 20, 2019) Toronto, CV-19-631523-00CL at para. 6 [Tab 8]; *Aralez Pharmaceuticals Inc. (Re)* (October 10, 2018) Toronto, CV-18-603054-00CL at para. 6 and related extracts (Order Re Bidding Procedures Approval) [*Aralez Bidding Procedures Order*] [Tab 7]; (Bidding Procedures, Stalking Horse Approval and Stay Extension Order) (stalking horse bid for certain assets entirely conditional on closing of an acquisition by an unrelated buyer of other assets); *White Birch Paper Company* (April 29, 2010) Montreal, 500-11-038474-108 at para. 2 and related extracts (Order Approving the Sale and Investor Solicitation Process) [Tab 9] (stalking horse bid conditional on achieving new labour agreements with the unions); *James E. Wagner Cultivations Corporation Re* (April 9, 2020) CV-2—00639000-00CL Toronto at para. 5 and related extracts (Bidding Procedures and Stalking Horse APA Approval) [*Wagner Bidding Procedures Order*] at para. 5 [Tab 10] (assignment of Health Canada licenses to purchaser).

<sup>41</sup> *Danier Leather* at para. 20 [Tab 6], citing *CCM Master* at para. 7 [Tab 4].

<sup>42</sup> *Nortel* at para. 49 [Tab 2]; *Brainhunter* at para. 13 [Tab 5].

- (b) will the sale benefit the whole “economic community”?
- (c) do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

59. The court in *Nortel* also indicated with respect to the sales process approval in that case that the proposed process would see the debtors returning to court for approval “of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Soundair*.”<sup>43</sup>

60. The Nortel Criteria predate the 2009 CCAA amendments which introduced section 36 of the CCAA. Section 36 of the CCAA expressly permits the sale of substantially all the debtors’ assets in the context of its restructuring efforts. It also sets out certain factors to be considered on such a sale. Section 36 does not, however, directly assess the factors a court should consider when deciding to approve a sale process aimed at soliciting bids for a debtor’s assets.

61. In the 2009 decision of *Brainhunter Inc. (Re)*, a proceeding commenced after the 2009 amendments, the court considered the applicability of the newly introduced section 36 of the CCAA on a motion for approval of a sales process that included a stalking horse agreement by a proposed purchaser acknowledged to be “an insider and a related party”. In approving the process at issue, the court commented on the relationship between the Nortel Criteria and section 36 of the CCAA:<sup>44</sup>

Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court

---

<sup>43</sup> *Nortel* at para. 53 [Tab 2].

<sup>44</sup> *Brainhunter* at paras. 16-17 [Tab 5].

can consider whether there has been any unfairness in the working out of the sales process.

62. In *Clothing for Modern Times Ltd. (Re)*,<sup>45</sup> the Nortel Criteria were held to represent “the factors a court should consider when reviewing a proposed sale process under the CCAA in the absence of a plan.”

63. The distinction between the approval of a sales process and the approval of an actual sale was more recently confirmed in *Danier Leather*.<sup>46</sup> In that case, which concerned the approval of a sales process in proposal proceedings under the *Bankruptcy and Insolvency Act* (the “BIA”), the court applied the Nortel Criteria to the approval of the sales process, confirming that section 65.13 of the BIA “is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.”<sup>47</sup>

64. The distinction between the approval of a sales process and the approval of a sale transaction is important to the present case.

65. Approval of the Stalking Horse Bid is only being sought at this stage of these CCAA proceedings for the purpose of establishing a baseline transaction for the SISP. The Stalking Horse Bid may, or may not, ultimately be the final or best bid at the end of the SISP. If the Stalking Horse Bid is ultimately selected as the “Successful Bid”, an application to this Court will be required and assessed considering the factors set out in section 36 of the CCAA.

66. The jurisprudence on the approval of sales and investment solicitation processes in the insolvency context, including those containing stalking horse bids, has elsewhere been summarized as also including the following additional considerations:

Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a

---

<sup>45</sup> *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 at para. 19 [Tab 11].

<sup>46</sup> *Danier Leather* at para 22 [Tab 6]; See also *Mustang GP Ltd. (Re)*, 2015 ONSC 6562 at paras. 36-38 [Tab 12] where the *Nortel* criteria was applied in respect of a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA.

<sup>47</sup> *Danier Leather* at para. 22 [Tab 6]. While *Danier Leather* was decided under the BIA and not the CCAA, the Supreme Court of Canada has recognized that the CCAA and BIA are parallel restructuring schemes (see *Century Services* at para 24 [Tab 1]; *Indalex Ltd. (Re)*, 2013 SCC 6 [*Indalex*] at paras. 50-51 [Tab 13]) and sections 65.13 of the BIA and 36 of the CCAA are substantially identical.

proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

- i) the fairness, transparency and integrity of the proposed process;
- ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.<sup>48</sup>

67. While the summary of the law set out above considers a process proposed by a receiver, it has been adopted as being equally applicable when assessing the reasonableness of a proposed sales process in a CCAA proceeding.<sup>49</sup>

68. While not technically applicable at the sale process stage, the factors set out in subsections 36(3) – (4) of the CCAA have also been considered when deciding whether to approve a sale process.<sup>50</sup> These subsections provide as follows:

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

---

<sup>48</sup> *CCM Master* at paras. 6-7 [Tab 4].

<sup>49</sup> *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 [PCAS] at paras. 17-19 [Tab 14]; *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 [Walter Energy] at paras. 19-20 [Tab 15].

<sup>50</sup> *Nortel* at para. 49 [Tab 2].

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that:

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

69. The factors set out in section 36(3) of the CCAA do not constitute a rigid code. In considering section 36 the court will look at a transaction as a whole and approve it for reasons other than those mentioned in section 36 or refuse to grant it for reasons which are not mentioned in the CCAA.<sup>51</sup>

70. In addition to the factors set out above, courts will give due consideration to the “business judgment” rule and give weight to the recommendations of the Monitor when considering whether to approve a sales process.<sup>52</sup>

71. The caselaw is clear that the question to be asked is not whether a sales process is perfect, only whether it is reasonable.<sup>53</sup>

---

<sup>51</sup> *White Birch Paper Holding Co. (Re)*, 2010 QCCS 4915 [*White Birch*] at para. 49 [Tab 16].

<sup>52</sup> *9286594 Canada Inc. v Advance Engineering Products Ltd.*, 2015 SKQB 196 at para. 35 [Tab 17]; *Bloom Lake, g.p.l. (Re)* 2015 QCCS 1920 [*Bloom Lake*] at para. 28 [Tab 18], citing *AbitibiBowater Inc. (Re)*, 2009 QCCS 6460 [*AbitibiBowater*] at para. 59 [Tab 19]. Although the court in *AbitibiBowater* did not specifically reference the business judgment rule by name, the Court did observe: “Absent some compelling, exceptional factor to the contrary, the Court should accept an applicant’s proposed sales process where it was recommended by the Monitor and supported by the stakeholders” (para 59).

<sup>53</sup> *Sanjel* at para. 80 [Tab 3]; *Bloom Lake* at para. 36 [Tab 18].

**B. THE SISP AND STALKING HORSE BID SHOULD BE APPROVED**

**(i) The SISP and Stalking Horse Bid are warranted at this time**

72. The SISP and Stalking Horse Bid are warranted at this time for several reasons.

73. First, the undertaking of a sale and investment solicitation process was one of the Applicants' restructuring plans in commencing these CCAA proceedings.<sup>54</sup> It is also the view of the Applicants' Independent Director that a sales and investment solicitation process needs to be run in the context of these CCAA proceedings for the benefit of the Applicants' stakeholders.<sup>55</sup>

74. Second, the diamond industry and pool of parties interested in and capable of acquiring the Dominion Vendors' assets is limited. Any potential buyer or investor likely had knowledge of the Applicants' CCAA filing and their plans to undertake a solicitation and investment process substantially on the terms of the SISP since April 22, 2020. Potential investors or purchasers interested in the Dominion Vendors' assets will in the view of the Financial Advisor be able to participate in the SISP on the timelines set out therein.<sup>56</sup> The Monitor further notes that the Dominion Vendors' assets have been subject to a strategic sales process as recently as 2017.<sup>57</sup>

75. Third, the SISP and Stalking Horse Bid are the result of a process for assessing the viability and availability of a potential sale of the Applicants' assets in the context of these CCAA proceedings that included, among other things, the Financial Advisor:<sup>58</sup>

- (a) reviewing proposed operations and projected operating costs and cash flows of the Applicants, particularly with respect to the Ekati Mine and the Diavik Mine (in which Dominion Diamond holds a minority interest and is operated by Dominion Diamond's joint venture partner);
- (b) identifying interested parties and/or potential acquirors of the Applicants' business and assets based on the Financial Advisor's understanding of such potential acquirors' interest in diamond operations, their level of mining expertise, and their ability to adequately finance an acquisition of this nature; and

---

<sup>54</sup> Kaye Affidavit at para. 115.

<sup>55</sup> Bell Affidavit at para. 26.

<sup>56</sup> Bell Affidavit at paras. 34-43; Startin Affidavit at para. 26.

<sup>57</sup> Fourth Report of the Monitor at para. 20(e). Also see Bell Affidavit at paras. 15-16.

<sup>58</sup> Startin Affidavit at para. 12.

- (c) developing a plan to contact potentially interested parties during the SISP that may have an interest in the Applicants' business or assets.

76. Fourth, it is the judgment of the Applicants' Financial Advisor that a sale transaction with respect to the Applicants' business and assets is warranted at this time and that the integrated, comprehensive nature of the Restructuring Proposal provides material value to the Applicants and is the best currently available executable restructuring option available to the Applicants in the context of these CCAA proceedings.

77. Fifth, in the absence of the US \$60 million in funding to be made available through the Interim Financing Facility, the Applicants lack the liquidity to fund their operating costs, the costs of the SISP, and the administrative costs of these CCAA proceedings through to the completion of the SISP and the closing of any resulting restructuring transaction.<sup>59</sup> If the SISP is not implemented at this time, the Applicants will be required to incur additional borrowings to fund the costs of these CCAA proceedings through an extended period of time, thereby decreasing recoveries for their stakeholders.

78. The Applicants' Independent Director and the Monitor concur with the Financial Advisor's judgment that the implementation of the SISP including the Stalking Horse Bid is warranted at this time. The Monitor is of the view that the SISP is a fair and transparent marketing process designed to identify the highest and best offers for the Dominion Vendors' assets and to maximize recoveries, by seeking offers superior to the Stalking Horse Bid.<sup>60</sup>

**(ii) The SISP and Stalking Horse Bid benefit the Applicants' economic community**

79. While the Stalking Horse Bid may, or may not, be the final or best bid at the end of the SISP, it provides for stakeholder value maximization by, among other things, generating interest in the Dominion Vendors' assets, setting a "floor price" that will potentially be bested by any bids received under the SISP, and enhancing the fairness of the sale process.<sup>61</sup>

80. The existence of the Stalking Horse Bid, and the support of the First Lien Lenders and Washington (as the 100% equity owner), also provides value by demonstrating to, among others, the Applicants' employees, contractors, creditors and to Northern communities and the GNWT

---

<sup>59</sup> Startin Affidavit at paras. 9, 32, 37 and 41.

<sup>60</sup> Fourth Report of the Monitor, at para. 32(i).

<sup>61</sup> Startin Affidavit at paras. 9, 15, and 18; Bell Affidavit at para. 36.

that they should have confidence in the Applicants and that the Applicants' business will survive as an ongoing business.<sup>62</sup>

81. Stakeholder confidence in the ability of the Applicants' business to continue as a going concern is critical to ensuring the Applicants can navigate the COVID-19 environment, restructure, and survive as a viable business. Specifically, the Applicants' highly skilled employees and contractors are vital to its business. The loss of these employees and contractors to competitors or other regions of Canada due to uncertainty as to whether the Ekati Mine will operate again as a going concern would have a material negative effect on Dominion and the future viability of the Ekati Mine.<sup>63</sup>

82. The Stalking Horse Bid further contemplates that the Stalking Horse Bidder will assume substantially all of the operating liabilities of the Dominion Vendors, including all obligations of the Dominion Vendors under their operational contracts and joint venture agreements, to employees and unions (including obligations under its collective bargaining agreements and pension plan), to First Nations groups, and to the GNWT.<sup>64</sup> In this regard, the value of the Stalking Horse Bid goes beyond the cash purchase price it provides. The Stalking Horse Bid gives real additional value to the Applicants' trade, employment, pension, reclamation, environmental, and other stakeholders.

83. The fact that the Stalking Horse Bid continues the employment of nearly all of Dominion's employees and maintains a business partner to the significant number of companies, First Nations, and local communities who conduct business with Dominion is a significant benefit to those who depend on Dominion's business operations for their livelihoods and economic wellbeing.<sup>65</sup>

**(iii) There is currently no better alternative to the SISP and Stalking Horse Bid**

84. The Financial Advisor, as outlined in detail in the Startin Affidavit, was engaged by the Applicants prior to the commencement of these CCAA proceedings to, among other things, evaluate several strategic alternatives for the Applicants.<sup>66</sup>

---

<sup>62</sup> Bell Affidavit at para. 37.

<sup>63</sup> Bell Affidavit at para. 37.

<sup>64</sup> Bell Affidavit at para. 38.

<sup>65</sup> Bell Affidavit at para. 39.

<sup>66</sup> Startin Affidavit at para. 4.



85. The Financial Advisor has worked closely with the Applicants, in consultation with the Monitor, to identify potential restructuring options that maximize value for the benefit of the Applicants' stakeholders. The Financial Advisor does not believe that the Applicants have better viable alternatives to the transactions that are the subject of this Application.<sup>67</sup>

86. The Independent Director, based on knowledge of the Applicants' business, and experience in the Northwest Territories, including in the diamond industry, and after considering professional advice from the Financial Advisor and others, is similarly of the view that pursuit of the SISP and Stalking Horse Bid is warranted at this time, is the appropriate course of action, and will benefit the Applicants and their stakeholders through value maximization.<sup>68</sup>

87. The Monitor concurs with the views of the Financial Advisor and Independent Director that execution of the Restructuring Proposal is appropriate in the circumstances.

**(iv) The SISP and Stalking Horse Bid provide for a fair and transparent sales process**

88. The proposed SISP is consistent with similar sales processes approved in other Canadian insolvency proceedings.

89. The SISP affords flexibility to potential bidders who may submit bids with respect to one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Applicants as a going concern or a sale (or partial sales) of all, substantially all, or certain of the Applicants' property, or a combination thereof.<sup>69</sup>

90. The Applicants similarly have flexibility to accept not only the bid that provides the most cash, but to also consider other factors as well, such as levels of conditionality and overall impact on stakeholders.<sup>70</sup>

91. The timelines for the SISP, developed by the Financial Advisor in consultation with the Monitor and the Applicants, are based on considerations of a number of factors, including that (a) the pool of potential purchasers with sufficient resources and expertise to acquire and operate a diamond mine in the Northwest Territories is limited; (b) viable potential purchasers of the

---

<sup>67</sup> Startin Affidavit at para. 45.

<sup>68</sup> Bell Affidavit at para. 31.

<sup>69</sup> Startin Affidavit at paras. 21 and 24.

<sup>70</sup> Startin Affidavit at para. 24.

Applicants' assets would have known of a potential transaction opportunity since at least the commencement of these CCAA proceedings on April 22, 2020; (c) discussions with potentially interested parties have already taken place; and (d) the *prima facie* need to advance the SISP as soon as possible given the Applicants' current liquidity position.

92. Further, as discussed above, the SISP will allow the Dominion Vendors to maximize value for their business and assets by seeking offers superior to the Stalking Horse Bid. Only if a superior bid is not identified in the SISP will the Dominion Vendors seek approval of the Court to consummate the Stalking Horse Bid. For the reasons set forth herein, the Applicants believe that the Stalking Horse Bid provides substantial and immediate benefits to the Applicants and their stakeholders.

93. In the circumstances:

- (a) the marketing and advertisement contemplated in the SISP will ensure the Applicants' assets are adequately exposed to the market;
- (b) the SISP will allow for the assessment of the legitimacy of the bidders and their ability to ultimately close on a transaction;
- (c) the due diligence period and information available through the CIM, the VDR, and the ability to meet with management of the Applicants provide potential purchasers with the time and information required to make an informed offer;
- (d) the timelines set out in the SISP provide a reasonable opportunity for all interested parties to submit competing offers and the auction provisions allow for a fair and transparent process to solicit the best offer for the Applicants and their stakeholders; and
- (e) the consultation rights granted to the Existing Credit Facility Agent and the Agent Advisors under the SISP are reasonable and appropriate.

94. As noted by the Monitor, the timeframe to solicit a purchaser or investor in the Applicants' business is also reasonable and appropriate in light of the Applicants' circumstances and the significant costs being incurred during these CCAA proceedings. The Interim Lenders have expressed that they are not willing to finance the Applicants if a lengthier sales process were

pursued.<sup>71</sup> Advancing the SISP on the timelines proposed is necessary to preserve the Applicants' financial resources with a view to maximizing value for all stakeholders.

95. Notwithstanding the need to quickly advance the SISP, the proposed SISP does not tie the hands of the Applicants to the milestones contained therein. The Dominion Vendors may extend the Phase 1 Bid Deadline, with the consent of the Monitor, the Stalking Horse Bidder, and the Agent Advisors, if they deem it advisable to do so. The Dominion Vendors, with the consent of the Monitor, may also waive compliance with the requirements specified in the SISP and deem a non-compliant bid to be compliant. The Dominion Vendors may further schedule the auction for another time and place other than as defined in the SISP. The process in the SISP expressly gives the company flexibility to respond to any unforeseen circumstances to ensure that the process is responsive and designed to maximize value.

96. For these reasons, it is the judgment of the Financial Advisor, shared by the Applicants and the Independent Director, that the SISP will provide an appropriate test for whether the Stalking Horse Bid delivers the best possible result for all stakeholders and will result in a fair and reasonable process that will adequately canvass the market in order to maximize value for the Applicants' assets for the benefit of the Applicants' stakeholders.<sup>72</sup>

97. The Monitor is also of the view that the SISP terms and timeframe are reasonable in the circumstances and afford the Applicants with an opportunity to achieve a successful restructuring transaction within the circumstances facing the Applicants and the constraints of the available interim financing.<sup>73</sup>

**(v) The SISP and the Stalking Horse Bid are commercially efficacious in the Applicants' circumstances**

98. The Restructuring Proposal, as an integrated package, is the best currently available executable restructuring option available to the Applicants in the context of these CCAA proceedings.

---

<sup>71</sup> Fourth Report of the Monitor at para. 32(c).

<sup>72</sup> Startin Affidavit at para. 29; Bell Affidavit at para. 42.

<sup>73</sup> Fourth Report of the Monitor, para. 33.

99. The Break-Up Fee and expense reimbursement provisions in favour of the Stalking Horse Bidder are frequently approved in insolvency proceedings.<sup>74</sup> Such “break fees” do not merely reflect the cost to the purchaser of putting together the stalking horse bid. They may include the price of stability, and thus some premium over simply providing for out of pocket expenses is appropriate.<sup>75</sup>

100. It is the Financial Advisor’s judgment that, when considered as part of an overall package, together with the SISP and the Interim Financing Term Sheet, including the fact that the Interim Financing Facility is on a no fee basis, with a below market interest rate, the Break-Up Fee and expense reimbursement provisions of the Stalking Horse Term Sheet are in line with market terms and are commercially reasonable in the circumstances.

101. The Break-Up Fee and expense reimbursement provisions in the Stalking Horse Term Sheet fall well within the range of reasonableness, have been approved by the Applicants in the exercise of their business judgment and in consultation with the Financial Advisor and Monitor, and as such should be approved in the circumstances.<sup>76</sup>

102. The Monitor concurs with the Applicants’ view that reimbursing the Stalking Horse Bidder for certain fees and offering bid protections should a superior bid be selected in accordance with the SISP is reasonable in the circumstances.<sup>77</sup> The Monitor has considered the Break-Up Fee and expenses reimbursement provisions and is of the view that they are in line with market comparable transactions and are commercially reasonable in the circumstances.<sup>78</sup>

---

<sup>74</sup> *CCM Master* at para. 13 [Tab 4]; See also *Parlay Entertainment Inc. (Re)*, 2011 ONSC 3492 at para. 12 [Tab 20]; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4293 (S.C.J.) at paras. 12 and 26 [Tab 21]; *W.C. Wood Corp. (Re)*, [2009] O.J. No. 4808 (S.C.J.) at para. 3 [Tab 22].

<sup>75</sup> *Danier Leather* at para. 41 [Tab 6], citing Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4 [Tab 23]; *CCM Master* at para. 13 [Tab 4].

<sup>76</sup> *Danier Leather* at para. 44 [Tab 6]; *Brainhunter* at para. 20 [Tab 5].

<sup>77</sup> Fourth Report of the Monitor, para. 35(j).

<sup>78</sup> Fourth Report of the Monitor, para. 35(h).

### III. INTERIM FINANCING

#### A. FACTORS FOR APPROVING INTERIM FINANCING

103. Section 11.2 of the CCAA codified much of the pre-2009 jurisprudence regarding the granting of interim financing and corresponding super-priority interim lenders' charge pending the development of a plan of arrangement or compromise.

104. Sections 11.2(1) – (3) provide that:

- (a) on application by a debtor company and on notice to secured who are likely to be affected, the court may make an order declaring the debtor's property subject to a charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend the company an amount approved by the court as required by the company, having regard to its cash-flow statement;<sup>79</sup>
- (b) the charge may not secure an obligation that exists before the order is made;<sup>80</sup>
- (c) the court may order that the charge rank in priority over the claim of any secured creditor of the company;<sup>81</sup> and
- (d) the court may order that the charge rank in priority over any security or charge arising from a previous order made pursuant to s. 11 only with the consent in whose favour the previous order was made.<sup>82</sup>

105. The Supreme Court of Canada recently commented on the importance of the relief available under section 11.2, including the provision of an interim lenders' charge, in its reasons in *9354-9186 Québec inc. v. Callidus Capital Corp.*, as follows:

89 Such charges, also known as “priming liens”, reduce lenders' risks, thereby incentivizing them to assist insolvent companies. As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under CCAA protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors. Although super-priority charges do subordinate secured

---

<sup>79</sup> CCAA, s. 11.2(1) [Tab 24].

<sup>80</sup> CCAA s. 11.2(1) [Tab 24].

<sup>81</sup> CCAA s. 11.2(2) [Tab 24].

<sup>82</sup> CCAA s. 11.3 [Tab 24].

creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].<sup>83</sup>

106. Section 11.2 does not mandate any standard form or terms. A CCAA court has a broad discretion to approve interim financing if the statutory prerequisites are met.<sup>84</sup>

107. Section 11.2(4) sets out a list of non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:<sup>85</sup>

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its majority creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or the charge; and
- (g) the monitor's report.

108. There is no one factor that should govern the Court's application of section 11.2(4) — determining whether to grant a super-priority charge is a balancing analysis and each factor is to be considered in equal measure.<sup>86</sup>

---

<sup>83</sup> 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Bluberi*] at para. 89 [Tab 25].

<sup>84</sup> *Bluberi* at para. 87 [Tab 25].

<sup>85</sup> *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 [*Canwest Publishing*] at para. 42 [Tab 26].

<sup>86</sup> *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49 [Tab 27]; *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176 at para. 33 [Tab 28].

109. In addition to the statutory factors set out above, courts have determined that several additional factors are relevant to an application under section 11.2. These include whether:

- (a) the petitioner would be forced to stop operating without interim financing and whether bankruptcy would be in the interest of the petitioner's stakeholders;<sup>87</sup>
- (b) the proposed interim financing will support the Applicants' restructuring plans, including implementation of a sales process;<sup>88</sup>
- (c) the balancing of prejudice weighs in favour of approval of the interim loan facility;<sup>89</sup> and
- (d) the proposed facility has been approved by the Applicants' management.<sup>90</sup>

## **B. THE INTERIM FINANCING SHOULD BE APPROVED**

110. The Applicants require interim financing for working capital and general corporate purposes to pursue their restructuring efforts in the context of these CCAA proceedings and to allow payment of their post-filing financial obligations, including the Applicants' ordinary course of business obligations and the essential administrative expenses associated with these CCAA proceedings.

111. The Applicants and Evercore began engaging in strategic discussions with the Applicants' secured creditors and other parties with respect to their interim financing needs prior to the commencement of these CCAA proceedings.<sup>91</sup> The Financial Advisor has been actively soliciting proposals from and negotiating with key stakeholders across the Applicants' capital structure, including with the First Lien Lenders, Second Lien Lenders, and Washington, to ascertain interest in providing interim financing to the Applicants.<sup>92</sup>

112. Of the sixteen (16) potential third-party lenders identified and contacted by the Financial Advisor, seven (7) executed non-disclosure agreements and subsequently received access to

---

<sup>87</sup> *North American Tungsten Corp. (Re)*, 2015 BCSC 1376 [*North American Tungsten*] at para. 33 [Tab 29], citing *Timminco Ltd. (Re)*, 2012 ONCA 552 at para. 6 (affirming 2012 ONSC 948) [Tab 30].

<sup>88</sup> *North American Tungsten* at para. 35 [Tab 29].

<sup>89</sup> *North American Tungsten* at para. 34 [Tab 29], citing *Indalex* at paras. 58-59 [Tab 13].

<sup>90</sup> *8440522 Canada Inc. (Re)*, 2013 ONSC 6167 [Tab 31].

<sup>91</sup> Affidavit of Kristal Kaye sworn May 13, 2020 at paras. 10-11; Startin Affidavit at para. 30.

<sup>92</sup> Startin Affidavit at para. 30.

interim financing marketing materials prepared by the Applicants with Evercore's assistance. Evercore received four (4) non-binding interim financing proposals from third-party lenders and three (3) non-binding interim financing proposals from the Applicants' existing stakeholders, including proposals from the First Lien Lenders, the Second Lien Lenders, and the proposal of the Interim Lenders that is part of the integrated Stalking Horse Term Sheet, SISP, and Interim Financing Term Sheet proposal.<sup>93</sup>

113. Each of the interim financing proposals received by Evercore included a term that the interim financing to be provided have the benefit of a super-priority CCAA charge to rank in priority to all secured claims other than those subject to certain CCAA charges granted by this Court. Similarly, all interim financing proposals received by Evercore included expense reimbursement provisions and all of the proposals other than the proposal received from Washington (the Interim Financing Term Sheet) included additional fees in the nature of commitment fees, original issuance discounts, standby fees, and similar fees.<sup>94</sup>

114. As noted above, the Applicants, in consultation with the Financial Advisor and the Monitor, believe that the terms of the Interim Financing Term Sheet, including the Interim Lenders' Charge contemplated thereunder, the approval of which is a condition of the integrated Restructuring Proposal, are fair and preferable to the other proposals considered by the Financial Advisor on behalf of the Applicants.<sup>95</sup>

115. The Interim Financing Term Sheet is reasonable and appropriate for, among others, the following reasons:

- (a) the Interim Financing Facility is part of a comprehensive, integrated proposal comprised of the Stalking Horse Term Sheet, SISP, and the Interim Financing Term Sheet;
- (b) the Interim Financing Term Sheet is less expensive than the other proposals submitted to the Financial Advisor, with not only (i) an interest rate that is below comparable market rates, but also (ii) no fees or prepayment penalties that were present in the other proposals received;

---

<sup>93</sup> Startin Affidavit at para. 34.

<sup>94</sup> Startin Affidavit at para. 35.

<sup>95</sup> Startin Affidavit at paras. 35-37 and 41; Bell Affidavit at para 46.



- (c) the Interim Financing Term Sheet is less expensive than the other proposals submitted to the Financial Advisor even if the out of pocket expenses related to the Stalking Horse Term Sheet, Stalking Horse Bid, and the SISP referenced above are included in the interim financing cost calculation;
- (d) the Interim Financing Term Sheet, unlike the third-party proposals, is not subject to due diligence conditions;
- (e) unlike certain other proposals, the commitment amount and maturity date of the Interim Financing Term Sheet extended for a long enough period to allow the Applicants to complete the SISP given the present trade and travel disruptions associated with the COVID-19 pandemic that may have an impact upon the due diligence stage of the sale process contemplated by the SISP; and
- (f) unlike certain other proposals, the draw schedule under the Interim Financing Term Sheet is subject to very limited conditionality.<sup>96</sup>

116. For the reasons set out above, the Applicants believe that the Interim Financing Term Sheet and the Interim Lenders' Charge, the approval of which is a condition of the Stalking Horse Term Sheet, are fair and reasonable in the circumstances, are necessary, and are in the best interest of the Applicants and their stakeholders having regard to, among other things, (a) the period during which the Applicants are expected to be subject to these CCAA proceedings; (b) how the Applicants' business and financial affairs are to be managed during these CCAA proceedings; and (c) the nature and value of the Applicants' business and assets.<sup>97</sup>

117. The Applicants have consulted the Monitor with respect to their need for interim financing and the Interim Financing Term Sheet. It is the Monitor's view that the financing contemplated by the Interim Financing Facility is necessary for the funding of the Applicants' operations and restructuring costs in the near term and will enhance the Applicants' prospects of achieving one or more successful restructuring transactions. The Monitor concurs with the Applicants view that the Interim Financing Facility, including its associated costs and the corresponding Stalking Horse Bid, make it the most favourable option available to the Applicants in the circumstances.<sup>98</sup>

---

<sup>96</sup> Startin Affidavit at para. 37.

<sup>97</sup> Startin Affidavit at para. 40; Bell Affidavit at para. 46.

<sup>98</sup> Fourth Report of the Monitor, para. 28.

118. The First Lien Lenders consent to and have agreed to participate in the Interim Financing Facility on the terms set out in the Interim Financing Term Sheet including the granting of the Interim Lenders' Charge.

119. Credit Suisse AG, Cayman Islands Branch, as the administrative agent and collateral agent First Lien Lenders, Wilmington Trust, National, in its capacity as trustee for the Second Lien Lenders, and Dominion Diamond (as successor to Northwest Acquisition ULC), Dominion Diamond Delaware Company LLC, are party to an Intercreditor Agreement dated November 1, 2017 (the "**Intercreditor Agreement**").<sup>99</sup>

120. Pursuant to the terms of the Intercreditor Agreement, the Second Lien Lenders have, in the context of an interim financing to which the First Lien Lenders consent and participate in, among other things, agreed (a) that they would not raise objections to the approval of the interim financing or the use of the Senior Collateral (as defined in the Intercreditor Agreement) to secure such financing; (b) to remain subordinate and be deemed subordinate to the First Lien Lenders if the First Lien Lenders agree to be subordinate to the interim financing security; and (c) to not object to, or contest, Dominion Diamond's payment of the fees and expenses of the First Lien Lenders. Notwithstanding the foregoing, the Second Lien Lenders are expressly authorized by the Intercreditor Agreement to participate in the SISP and to submit a bid which complies with the requirements of the SISP and provides greater value to the company than that provided by the Stalking Horse Bid.<sup>100</sup>

#### **IV. THE FINANCIAL ADVISOR AGREEMENT**

##### **A. FACTORS TO BE CONSIDERED IN APPROVING THE FINANCIAL ADVISOR AGREEMENT**

121. The Applicants are seeking approval of the Financial Advisor Agreement and the Financial Advisor's Charge to rank *pari passu* with the Interim Lenders' Charge.

122. Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA.<sup>101</sup>

---

<sup>99</sup> Intercreditor Agreement, Exhibit B to Affidavit of Mark Freake (the "**Freake Affidavit**"), sworn May 12, 2020, pages 171 to 226.

<sup>100</sup> Intercreditor Agreement, section 6.01, Exhibit B to the Freake Affidavit, pages 194-195.

<sup>101</sup> *Danier Leather* at para. 47 [Tab 6]; *Canwest Publishing* at para. 55 [Tab 26]; *Walter Energy* at paras. 25-48 [Tab 15]; *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 [*Colossus*] at paras. 28-36 [Tab 32].

123. The statutory jurisdiction for granting a charge to secure the fees of a debtor company's advisors is found in section 11.52 of the CCAA, which provides as follows:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

...

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act;

124. A non-exhaustive list of factors to be considered on an application to approve a charge under s. 11.52, including one in favour of a financial advisor such as Evercore, include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.<sup>102</sup>

125. In considering the above factors on an application to approve a charge in favour of a financial advisor, the court in *Canwest Publishing* noted that such relief acts as an incentive to advisors providing “essential” services such as generating interest in a solicitation process.<sup>103</sup> As noted by Justice Morawetz in *Re Timmino Limited*, it is unreasonable to expect professionals who

---

<sup>102</sup> *Canwest Publishing* at para. 54 [Tab 26]. In refusing leave to appeal of a decision of this Court approving a charge in favour of a CCAA financial advisor, in *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217, the Court of Appeal stated that the consideration of these factors does not require the judge to expressly consider each one – the decision of whether to approve a charge in favour of a financial advisor is “a discretionary decision requiring a balancing of interests of competing stakeholders.” (para. 13) [Tab 33].

<sup>103</sup> *Canwest Publishing* at para. 52 [Tab 26].

are essential to a debtor company's restructuring to take the risk of not being paid for their services.<sup>104</sup>

126. In addition to the general factors applicable to s. 11.52, in considering whether to specifically approve agreements with financial advisors and the fees payable thereunder, courts have considered the following factors:

- (a) whether the debtor and the court office overseeing the proceedings believe the quantum and the nature of remuneration are fair and reasonable;
- (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and
- (c) whether the success fee is necessary to incentivize the financial advisor.<sup>105</sup>

## **B. THE FINANCIAL ADVISOR AGREEMENT SHOULD BE APPROVED**

127. Evercore has significant relevant industry experience and knowledge of the Applicants' business and the industry in which it operates and has played a critical role in the negotiation and development of the Restructuring Proposal.<sup>106</sup> Evercore will continue to have an important role in these CCAA proceedings in connection with the SISP, which specifically contemplates Evercore's involvement, and the implementation of a potential transaction thereunder.

128. It is impractical for a company of the Applicants' size, with its debt structure and with the restructuring complexities at issue, to try to restructure without retaining a financial advisor. The Applicants do not have the expertise or management resources to do this on their own.<sup>107</sup>

129. The terms of the Financial Advisor's engagement, as set out in the Financial Advisor Agreement, were negotiated among the Applicants and Evercore, in consultation with the Monitor, and are within the range of comparable market arrangements. The Applicants, in exercising their business judgment, believe that the quantum and nature of the remuneration to be provided to

---

<sup>104</sup> *Timminco Limited (Re)*, 2012 ONSC 506 at para. 66 [Tab 34].

<sup>105</sup> *Danier Leather* at para. 47 [Tab 6]; *Colossus* at paras. 28-36 [Tab 32]; *Sino-Forest Corp. (Re)*, 2012 ONSC 2063 at para. 47 [Tab 35].

<sup>106</sup> *Startin Affidavit* at para. 5.

<sup>107</sup> *Bell Affidavit* at para. 52.

the Financial Advisor is reasonable in the circumstances and in line with financial advisor agreements approved in other comparable CCAA proceedings.<sup>108</sup>

130. Evercore is prepared to continue to provide services to the Applicants, including those contemplated by the SISP with a view to maximizing value for the Applicants' stakeholders in these CCAA proceedings, only if it is protected by the CCAA charges contemplated by the Financial Advisor Agreement.

131. The Monitor shares the Applicants' views that the Applicants do not have the capability of conducting the SISP without the assistance of the Financial Advisor.<sup>109</sup>

132. The Monitor has reviewed the fees paid to financial advisors in comparable formal restructuring proceedings of similar scale and is of the view that (a) the fees and terms provided for the Financial Advisor Agreement are reasonable in the circumstances; and (b) that the Financial Advisors' Charge, including the relative priority thereof, is reasonable in the circumstances and necessary to ensure the Financial Advisors' ongoing assistance in the CCAA proceedings.<sup>110</sup>

## **V. THE KERP**

### **A. FACTORS TO BE CONSIDERED IN APPROVING THE KERP**

133. The Applicants have developed a KERP that applies to a limited number of employees, all of whom have been determined for a variety of reasons to be critical both in the context of the Applicants current restructuring efforts and the successful continuation of the business. The Applicants are seeking approval of the KERP and a charge for up to \$580,000 to secure the amounts thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing Administration Charge and the Directors' Charge.

---

<sup>108</sup> Financial advisor charges have been approved in, among others, the following cases: *Canwest Publishing* at paras. 40, 52-55 (\$10 million) [Tab 26]; *Sanjel Corporation (Re)*, (April 4, 2016) Calgary Court File No. 1601-03143 (CCAA Initial Order) [*Sanjel Initial Order*] at para. 6 (US\$6.1 million) [Tab 36]. See also: *Essar Algoma Steel Inc. (Re)*, (January 29, 2016) Toronto CV-15-000011169-00CL (Order Re Approval of Evercore Fees and Expenses and Financial Advisor's Charge) and related extracts (US \$8 million) [Tab 37]; *Lightstream Resources Ltd (Re)*, (September 26, 2016) Calgary Court File No: 1601-12571 (CCAA Initial Order) [*Lightstream Initial Order*] at para. 7 (\$19.4 million) [Tab 38]; *Performance Sports Group Ltd. (Re)*, (December 14, 2016) Toronto CV-16-11582-00CL (Order Re Centerview Engagement and Fee Approval) at paras. 1 and 3 and related extracts (\$8 million) [Tab 39].

<sup>109</sup> Fourth Report of the Monitor, para. 13.

<sup>110</sup> Fourth Report of the Monitor, paras. 17-18.

134. Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts.<sup>111</sup>

135. A non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan includes the following:<sup>112</sup>

- (a) whether the court appointed monitor supports the key employee incentive plan and related charge;
- (b) whether the beneficiaries of the key employee retention plan are likely to consider other employment opportunities if the plan is not approved;
- (c) whether the continued employment of the employees to which the key employee retention plan applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- (d) the employees' history with and knowledge of the debtor;
- (e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the key employee retention plan applies;
- (f) whether the key employee retention plan agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (g) whether the key employee retention plan agreement and charge are supported or consented to by the secured creditors of the debtor; and
- (h) whether the key employee retention plan payments are payable upon the completion of the restructuring process.

---

<sup>111</sup> *Danier Leather* at para. 75 [Tab 6]; *Grant Forest Products Inc. (Re)*, (2009), 57 C.B.R. (5th) 128 [*Grant Forest*] at para. 8 (Ont. S.C.J.) [Tab 40]; *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (Ont. S.C.J.) [*Canwest Global*] at paras. 49-50 [Tab 41]; *Cinram International Inc. (Re)*, 2012 ONSC 3767 [*Cinram*] at paras. 91-93 [Tab 42]. See also the following orders granted by this Court: *Sanjel Initial Order* at para. 47 (\$2.85 million) [Tab 36]; *Lightstream Initial Order* at para. 34 (\$4.1 million) [Tab 38].

<sup>112</sup> *Cinram* at para. 91 [Tab 42].

## **B. THE KERP SHOULD BE APPROVED**

136. The proposed KERP is justified and reasonable based on the following factors:

- (a) the Key Employees possess knowledge, experience and skills that are vital to a successful restructuring of the Applicants as they have legacy operational knowledge, extensive diamond industry experience and key market relationships required to operate the business as a going concern and maintain the stability of those operations;<sup>113</sup>
- (b) in the event of a departure of the Key Employees, it will be difficult for the Applicants to find suitable replacements in light of the Applicants' current financial circumstances, the cost of potentially recruiting new employees, the particular skill set of the employees and the challenges posed by recruiting and relocating new employees during the ongoing COVID-19 global pandemic;<sup>114</sup>
- (c) without the KERP and the security provided by the KERP Charge, there is concern that the Key Employees may depart and seek employment elsewhere;<sup>115</sup>
- (d) a significant amount of the KERP payments are to be deferred until the closing of a restructuring transaction;<sup>116</sup>
- (e) the amount of the KERP and the KERP Charge is reasonable in the circumstances;
- (f) the KERP was designed in consultation with the Monitor and the Monitor supports the approval of the KERP and the KERP Charge.<sup>117</sup>

137. The Monitor has considered the terms of the KERP and KERP Charge and is of the opinion that the KERP is reasonable in the circumstances and will be beneficial to the Applicants and their stakeholders.<sup>118</sup>

---

<sup>113</sup> Merrin Affidavit at para. 8.

<sup>114</sup> Merrin Affidavit at para. 9.

<sup>115</sup> Merrin Affidavit at para. 14.

<sup>116</sup> Merrin Affidavit at para. 11.

<sup>117</sup> Merrin Affidavit at para. 15.

<sup>118</sup> Fourth Report of the Monitor, at para. 42.

### **C. THE CONFIDENTIAL EXHIBIT SHOULD BE SEALED**

138. The Applicants are seeking an order sealing the Confidential Exhibit, which includes commercially sensitive information on the Key Employees and the KERP.

139. In *Sierra Club of Canada v. Canada (Minister of Finance)*,<sup>119</sup> the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

- (a) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

140. In the insolvency context, courts have applied the *Sierra Club* test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.<sup>120</sup>

141. It would be detrimental to the operations of the Applicants to disclose the identity of the individuals who will be receiving the KERP payments as this may result in, among other things, other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

142. In the circumstances, a sealing order is necessary to protect the important commercial interests of the Applicants. This salutary effect greatly outweighs the deleterious effects of not sealing the KERP.

### **VI. STAY EXTENSION**

143. The current stay of proceedings under the ARIO granted by this Court on May 1, 2020 expires on June 1, 2020. The Applicants are seeking an extension of the Stay Period up to and including August 31, 2020.

---

<sup>119</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [Tab 43].

<sup>120</sup> *Stelco Inc. (Re)*, [2006] O.J. No. 275 (S.C.J.) at paras. 2-5 [Tab 44]; *Nortel* at para. 57 [Tab 2].



144. Pursuant to section 11.02 of the CCAA, the Court may grant an extension of a stay of proceedings where: (a) the applicant satisfies the Court that an extension of the stay of proceedings is appropriate; and (b) the Court is satisfied that the applicant has acted, and is acting, in good faith and with due diligence during the CCAA proceedings.<sup>121</sup>

145. Since the granting of the Initial Order, the Applicants have acted, and are continuing to act, in good faith and with due diligence to maintain the stability of their business and financial affairs as the Applicants pursue restructuring efforts for the benefit of their stakeholders.

146. The length of the stay extension sought by the Applicants is reasonable having regard to the current state of the Applicants' restructuring plans and the timelines set out in the SISP.

147. With the benefit of the interim financing to be provided pursuant to the Interim Financing Term Sheet, the Applicants will have sufficient funds to continue their operations and fund these CCAA proceedings through the proposed extension of the Stay Period to August 31, 2020.

148. The Monitor supports the proposed extension of the Stay Period.<sup>122</sup>

#### **PART V - CONCLUSION**

149. The Applicants respectfully submit that the relief requested in the Second ARIO is reasonable and necessary and ask that the Second ARIO be granted by this Court.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27<sup>th</sup> DAY OF MAY, 2020**

**BLAKE, CASSELS & GRAYDON LLP**



---

Peter Rubin / Peter Bychawski /  
Claire Hildebrand / Morgan Crilly  
Counsel of the Applicants

---

<sup>121</sup> CCAA s. 11.02 [Tab 24].

<sup>122</sup> Fourth Report of the Monitor, at para. 51.

## LIST OF AUTHORITIES

TAB	Description
1	<i>Century Services Inc. v. Canada (Attorney General)</i> , 2010 SCC 60
2	<i>Nortel Networks Corp. (Re)</i> , 2009 CarswellOnt 4467 at paras. 47-48
3	<i>Sanjel Corporation (Re)</i> , 2016 ABQB 257 at paras. 64-66
4	<i>CCM Master Qualified Fund Ltd v. blutip Power Technologies Ltd</i> , 2012 ONSC 1750
5	<i>Brainhunter Inc. (Re)</i> , (2009) 62 C.B.R. (5th) 41 (Ont. S.C.J.)
6	<i>Danier Leather Inc. (Re)</i> , 2016 ONSC 1044
7	<i>Aralez Pharmaceuticals Inc. (Re)</i> (October 10, 2018) Toronto CV-18-603054-00CL (Order Re Bidding Procedures Approval) and related extracts
8	<i>CloverLeaf Holdings Company (Re)</i> (December 20, 2019) Toronto, CV-19-631523-00CL (Bidding Procedures, Stalking Horse Approval and Stay Extension Order)
9	<i>White Birch Paper Company (Re)</i> (April 29, 2010) Montreal, 500-11-038474-108 (Order Approving the Sale and Investor Solicitation Process) and related extracts
10	<i>James E. Wagner Cultivations Corporation (Re)</i> (April 9, 2020) CV-2—00639000-00CL Toronto (Bidding Procedures and Stalking Horse APA Approval) and related extracts
11	<i>Clothing for Modern Times Ltd. (Re)</i> , 2011 ONSC 7522
12	<i>Mustang GP Ltd. (Re)</i> , 2015 ONSC 6562
13	<i>Indalex Ltd. (Re)</i> , 2013 SCC 6
14	<i>PCAS Patient Care Automation Services Inc. (Re)</i> , 2012 ONSC 2840
15	<i>Walter Energy Canada Holdings, Inc. (Re)</i> , 2016 BCSC 107
16	<i>White Birch Paper Holding Co. (Re)</i> , 2010 QCCS 4915
17	<i>9286594 Canada Inc. v Advance Engineering Products Ltd.</i> , 2015 SKQB 196
18	<i>Bloom Lake, g.p.l. (Re)</i> , 2015 QCCS 1920
19	<i>Re AbitibiBowater Inc. (Re)</i> , 2009 QCCS 6460
20	<i>Parlay Entertainment Inc. (Re)</i> , 2011 ONSC 3492
21	<i>Nortel Networks Corp. (Re)</i> , [2009] O.J. No. 4293 (S.C.J.)
22	<i>W.C. Wood Corp. (Re)</i> , [2009] O.J. No. 4808 (S.C.J.)

- 23 Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1
- 24 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
- 25 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
- 26 *Canwest Publishing Inc. (Re)*, 2010 ONSC 222
- 27 *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775
- 28 *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176 at para. 33
- 29 *North American Tungsten Corp. (Re)*, 2015 BCSC 1376
- 30 *Timminco Ltd. (Re)*, 2012 ONCA 552
- 31 8440522 *Canada Inc. (Re)*, 2013 ONSC 6167
- 32 *Colossus Minerals Inc. (Re)*, 2014 ONSC 514
- 33 *Canadian Imperial Bank of Commerce v. Endurance Energy Ltd.*, 2016 ABCA 217
- 34 *Timminco Limited (Re)*, 2012 ONSC 506
- 35 *Sino-Forest Corp. (Re)*, 2012 ONSC 2063
- 36 *Sanjel Corporation (Re)*, (April 4, 2016) Calgary Court File No. 1601-03143 (CCAA Initial Order)
- 37 *Essar Algoma Steel Inc. (Re)*, (January 29, 2016) Toronto CV-15-000011169-00CL (Order Re Approval of Evercore Fees and Expenses and Financial Advisor's Charge) and related extracts
- 38 *Lightstream Resources Ltd (Re)*, (September 26, 2016) Calgary Court File No: 1601-12571 (CCAA Initial Order)
- 39 *Performance Sports Group Ltd. (Re)* (December 14, 2016) Toronto CV-16-11582-00CL (Order Re Centerview Engagement and Fee Approval) and related extracts
- 40 *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128
- 41 *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (Ont. S.C.J.)
- 42 *Cinram International Inc. (Re)*, 2012 ONSC 3767
- 43 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
- 44 *Re Stelco Inc. (Re)*, [2006] O.J. No. 275 (S.C.J.)