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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** **June 19, 2020 Hearing - continuation of hearing commenced May 29, 2020** **SECOND AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BLAKE, CASSELS & GRAYDON LLP** Barristers and Solicitors 3500 Bankers Hall East 855 – 2nd 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 / peter.bychawski@blakes.com / claire.hildebrand@blakes.com / morgan.crilly@blakes.com Fax No.: 604.631.3309

PART I – INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants in support of the relief sought in the Applicants' amended application (the "**Amended Application**") served on the CCAA service list on June 12, 2020. The Amended Application is a continuation of the application served on May 21, 2020 (the "**Initial Application**") and set to be heard, and commenced, on May 29, 2020, which application was set over to continue on June 3, 2020 and then adjourned to June 19, 2020.

2. This Bench Brief is to be read in conjunction with the Bench Brief of the Applicants dated May 27, 2020, which was served in advance of the hearing of the Initial Application on May 29, 2020, and set out in detail the law and argument related to the requested approval of the SISP, Stalking Horse Term Sheet, Interim Financing Term Sheet, Financial Advisor Agreement and KERP.

3. This Bench Brief:

   (a) provides an update on the form of relief sought by the Applicants, including developments and amendments related to the amended form of Second ARIO, Stalking Horse asset purchase agreement (the "**Stalking Horse APA**") (which has replaced the Stalking Horse Term Sheet), the amended SISP (the "**Amended SISP**"), and the amended and restated Interim Financing Term Sheet (the "**Amended Interim Financing Term Sheet**") since the last hearing before this Court on June 3, 2020;

   (b) responds to the bench briefs filed prior to the hearing of the Initial Application on May 29th by the Ad Hoc Committee of Second Lien Noteholders (the "**2L Ad Hoc Group**"), the Indenture Trustee for the Second Lien Noteholders (the "**2L Trustee**"), and Diavik Dominion Diamond Mines (2012) Inc. ("**DDMI**"); and

   (c) responds to the submissions made by counsel for the above-noted parties during the hearing on May 29th (given there was insufficient time on May 29th for the Applicants to reply to the matters raised).

4. Capitalized terms not otherwise defined in this response Bench Brief have the meanings ascribed to them in the Applicants' Bench Brief dated May 27, 2020.

PART II – OVERVIEW

5. At its most basic level, the process that the Applicants are seeking to advance is not a complicated or an unusual one. Dominion Diamond seeks an interim financing ("**DIP**") loan, a sales and investment solicitation process, and approval of a stalking horse asset purchase agreement for the purposes of establishing it as the "stalking horse bid" in the SISP subject to overbids (in addition to approval of a financial advisor agreement and a key employee retention plan). CCAA courts approve such requests on a regular basis.

6. It is common ground that a DIP and a sales and investment solicitation process are needed by the Applicants. The Applicants need financing immediately and there is no longer an ability to delay matters any further.[1]

7. At the May 29th hearing, there was common ground with the 2L Ad Hoc Group and the 2L Trustee on the terms of the SISP after these parties, together with Dominion, the First Lien Lenders, and the Stalking Horse Bidder came to agreement on amendments to the form of SISP appended to the Initial Application filed May 22nd.

8. The DIP being offered to Dominion Diamond pursuant to the Amended Interim Financing Term Sheet, which is the result of a DIP solicitation process, is the best DIP available to Dominion Diamond and it is the least expensive. The DIP will serve to fund the Applicants through a SISP process that will provide a fair and transparent opportunity for any and all interested parties (including any existing creditors, such as the Second Lien Lenders) to bid against the Stalking Horse Bid.

9. The principal issue is the Stalking Horse APA (having replaced the Stalking Horse Term Sheet) and whether the court should approve it, understanding it is part and parcel of an integrated restructuring proposal that includes the Amended SISP and the Amended Interim Financing Term Sheet.

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[1] Affidavit of B. Bell dated June 12, 2020 ("**Bell Affidavit #2**") at para. 20.

10. As previously noted, the court is not being asked to approve an actual sale. Rather, the court is being asked to approve a sales process. There is an important distinction between the two.[2] The question is whether the sales process being advanced by the Applicants is reasonable.[3]

11. The Stalking Horse APA is what its name indicates – it is a "stalking horse" bid that is subject to market testing and being outbid by better offers. There is nothing in the Stalking Horse APA or the Amended SISP that limits the ability of the Second Lien Lenders or any other qualified bidder from advancing a superior bid. By their nature, one of the essential purposes of stalking horse bids is to set a baseline bid, provide some structure for other potential bidders, advance the sales process, and allow others to put forward superior bids.

12. While certain parties have taken issue with the Stalking Horse Bidder, being an affiliate of The Washington Companies ("**Washington**"), in hearings before the court, in the submission of the Applicants this is unwarranted. What has Washington done?

(a) They appear to have lost their US $500 million equity investment made in 2017;[4]

(b) Rather than walk away, they have offered a US $60M DIP at below market rates and have permitted the First Lien Lenders to participate in the DIP if they wish to do so;

(c) Rather than walk away from the Applicants' business, the northern community in which they operate, the northern suppliers, employees and pensioners who depend upon its continuing as a going concern, Washington has spent six weeks working with professional advisors and the Applicants negotiating a stalking horse bid – a bid that sets a floor and allows others to potentially outbid Washington;

(d) They have advanced a Stalking Horse APA providing for total consideration (cash and assumed liabilities) in the range of between Cdn $506 – $747 million;[5]

(e) When parties at the May 29, 2020 hearing criticized Dominion and Washington for having brought forward only a Stalking Horse Term Sheet, Washington rolled up its sleeves with no guarantee of payment of its fees and knowledge of opposition

[2] Bench Brief of the Applicants – May 29, 2020 Hearing at paras. 58-70.
[3] Bench Brief of the Applicants – May 29, 2020 Hearing at para. 71
[4] Affidavit of K. Kaye dated April 21, 2020 at para 25.
[5] Supplement to the Fourth Report of the Monitor at para. 21.

to its proposal and worked long hours to consider the complicated issues and prepare the Stalking Horse APA for this hearing; and

(f) As part of the assumption of liabilities, they have also agreed, subject to the terms and conditions of the Stalking Horse APA, to make available US $20 million with respect to the pre-filing trade suppliers (less the amount the Applicants are authorized to pay under the DIP Budget and orders of the CCAA court in respect of cure amounts, but have not yet paid).

13. Criticism of Washington advanced before this court is both misplaced and unfair.

14. Yes, Washington has prior involvement with Dominion Diamond and is the 100% equity holder of the company. But there is nothing improper with an "insider" offering to put up new money to buy a business to keep it operating. Nor is there anything wrong with an "insider" putting forward a stalking horse bid – other CCAA courts have approved this.[6] Similarly, the Second Lien Lenders have had an investment in Dominion Diamond since November 2017 and have had access to information since that time that other potential bidders have not had access to – but that does not mean that they should be prevented from advancing a stalking horse bid or prevented from bidding in the SISP.

15. DDMI is another logical purchaser for Dominion, not just because of DDMI being Dominion's 60% partner in the Diavik JV, but also because DDMI operates a mine in close proximity to the Ekati Mine and uses the same winter road and other local infrastructure which could presumably be utilized in the operation of the Ekati Mine. However, DDMI has announced that it will not be a bidder in the SISP. Knowing that DDMI has decided not to participate in the SISP, it makes no logical sense to now turn away the Stalking Horse APA advanced by another logical buyer, Washington, in the hope that Washington may come back and bid in the SISP after its Stalking Horse Bid is rejected.

16. The universe of potential purchases of Dominion's assets is not large. Within that universe, DDMI was a logical potential acquiror. If DDMI, with its unique position as joint venture partner and operator of the Diavik Mine and neighbour of the Ekati Mine will not bid, will anyone? Isn't that everyone's worst case scenario?

[6] Bench Brief of the Applicants – May 29, 2020 Hearing at para. 61.

17. It is also worthy of note that seven weeks have passed since the April 22, 2020 CCAA filing and the public announcement thereof three weeks have passed since the Initial Application materials enclosing the Stalking Horse Term Sheet were delivered to the service list on May 21, 2020. No other party has stepped forward and offered an alternative stalking horse bid - never mind a superior stalking horse bid or one with less conditionality than the Stalking Horse Term Sheet or Stalking Horse APA.

18. None of this is to minimize the investment of the Second Lien Lenders. Irrespective of the value at which their notes trade at in the open market, the Second Lien Lenders collectively hold US $550 million face value of notes.

19. In many respects, the Second Lien Lenders control their own fate. Collectively, they have US $550 million face value of notes which, presumably, they can credit bid in the SISP. They will decide if they wish to make a bid and they will decide if they want to own the assets. The SISP and the Stalking Horse APA do not change this. The Second Lien Lenders will not lose any of their rights if the SISP and Stalking Horse APA are approved. Indeed, as a result of the Stalking Horse Bid and the development of the Stalking Horse APA, the Second Lien Lenders will have the benefit of all work done to date by Washington in considering and formulating their own Second Lien Lender bid.

20. From the perspective of Dominion Diamond and its professional advisors, the Stalking Horse APA provides value and benefits to the Applicants and their stakeholders. Put another way, it is the judgment of both Mr. Bell (given his significant and direct experience) and Evercore that the better course of action is to go into a SISP with the Stalking Horse APA – rather than without it.

21. To be more specific, the Amended Application is:

(a) supported by Dominion Diamond, through its Independent Director, who has deep experience of the diamond industry including as a result of being a Minister with and member of the legislature of the GNWT and his experience with Dominion Diamond itself. In fact, Mr. Bell has previously been through four strategic review processes with this very asset including a sales process in 2017;[7]

[7] Affidavit of B. Bell, dated May 21, 2020 ("**Bell Affidavit #1**") at paras. 11 – 16 ; Bell Affidavit #2 at paras. 3, 9, 21.

(b) supported by Evercore, who is the expert financial advisor to the Applicants (and who the Monitor has said is deeply experienced and someone the Monitor has been impressed with) and has expertise in both the restructuring area and specifically the metals, minerals and mining practice area;[8] and

(c) supported by the First Lien Lenders.

22. The court has heard a great deal from DDMI (Dominion Diamond's 60% Diavik JV partner). As noted near the conclusion of the hearing on June 3, 2020, there are a variety of issues at play between DDMI and Dominion Diamond (and Dominion's stakeholders). The entirety of the submissions of DDMI, and their constant objections and requests, must be considered in light of this dynamic.

23. As noted on June 3rd:

(a) DDMI is a direct competitor to Dominion Diamond;

(b) By virtue of its 60% stake in the Diavik JV, DDMI is the controlling joint venture partner and the Manager of the Diavik JV;

(c) Dominion Diamond has raised serious and specific concerns and complaints related to the way DDMI has operated the Diavik JV including the assertion that DDMI is preferring its own interests over that of the joint venture;[9]

(d) DDMI sought a contractual release from Dominion Diamond in relation to the above-noted claims as part (and also a condition) of its alleged DIP financing offer – which, as discussed below, was not a DIP proposal in any real sense of that concept;

(e) DDMI, despite already owning 60% of the Diavik JV and being a logical buyer, has repeatedly told the court that it will not bid on Dominion Diamond's 40% interest in the Diavik JV; and

[8] Affidavit of J. Startin dated May 21, 2020 ("**Startin Affidavit #1**") at paras. 10, 18, 29, and 45; Affidavit of J. Startin dated June 12, 2020 ("**Startin Affidavit #2**").

[9] Affidavit of K. Kaye, dated May 6, 2020 ("**Kaye Affidavit**") at para 6.

(f) Only one party benefits from a failed SISP, a SISP that pre-judges issues and matters that should be judged at a sale approval hearing (not this sale process hearing); a SISP that interjects DDMI into the process or a process that leads to no buyers for Dominion Diamond's interest in the Diavik JV. That party is DDMI.

24. DDMI has been given the ability to make cover payments in circumstances where their manner of operating the Diavik Mine is disputed, and they have been given the ability to retain more security than they bargained for under the Diavik JV. There is no evidence they are prejudiced.

PART III – THE AMENDMENTS

25. Attached to the Amended Application served on the service list for these proceedings on June 12, 2020 are revised and amended forms of:

(a) The Second ARIO (Schedule "A" to the Amended Application);

(b) Interim Financing Term Sheet (Schedule "A" to the Second ARIO);

(c) SISP (Schedule "B" to the Second ARIO); and

(d) Stalking Horse APA (Schedule "C" to the Second ARIO).

26. The amendments to the above-noted documents have resulted from the delay to approve the above matters, continued discussions with the Stalking Horse Bidder, and continued efforts to advance the Applicants' restructuring efforts, including the SISP and Stalking Horse Bid.

27. The amended form of Second ARIO and Amended SISP adopt the vast majority of changes to those documents as suggested by the Monitor in Appendix "M" to the June 2, 2020 Supplement to the Fourth Report of the Monitor, with limited amendments (as shown on the versions of these documents appended to the Amended Application).

28. That is to say, the form of Second ARIO and Amended SISP respect the views of the Monitor and its efforts to arrive at a "middle ground" on the various issues and positions that have been raised by the Applicants' stakeholders. As noted in the Monitor's Supplement to the Fourth Report, the Monitor had discussions with numerous parties including with Evercore so as to understand the impact on the SISP of the various revisions being sought by various

stakeholders.[10] The Applicants support the middle ground taken, and balance being sought, by the Monitor.

29. The form of Amended Interim Financing Term Sheet sought on this Amended Application also includes certain amendments to the form of Interim Financing Term Sheet sought on the Initial Application, including with respect to the updating of the Interim Financing Term Sheet submitted on account of changes to dates and similar matters and the inclusion of a provision that no fees, expenses, or disbursements are to be paid from the funds made available through the Interim Financing Facility to fund any challenges to objections to the Interim Financing Facility, the Stalking Horse APA, or the SISP, or to fund any litigation or pursuit of claims against the Interim Lenders. This change was proposed by the Stalking Horse Bidder on June 1, 2020 in response to the positions taken by counsel to the 2L Ad Hoc Group and the 2L Trustee at the May 29th hearing.[11]

30. At the May 29th hearing, the Applicants were seeking approval of the Stalking Horse Term Sheet. The Applicants and the Stalking Horse Bidder have worked very hard to advance that term sheet into an asset purchase agreement which is in a form that is substantially complete. While there is certainly more work to be done including with respect to the various schedules and the like, the parties continue to work hard at advancing a stalking horse bid and the form of document that will be available to all other bidders.

31. The complexity of implementing a transaction whereby any purchaser acquires the individual assets and liabilities of Dominion (whether the Stalking Horse Bidder or another party) is demonstrated in the Stalking Horse APA. The Stalking Horse APA sets out the terms and conditions that are summarized in the Stalking Horse Term Sheet and is consistent with that document.

32. The APA confirms that the Stalking Horse Bidder has agreed to assume:[12]

(a) all trade payables under assigned contracts arising on or after the filing date that are not yet due and payable as of closing;

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[10] Supplement to the Fourth Report of the Monitor at paras. 37-40.

[11] Fourth Supplement to the Monitor's Report at para. 33 and Appendix "G".

[12] Any and all summaries of the Stalking Horse APA contained herein are for reference purposes only and are qualified by their entirety to the Stalking Horse APA. In the event of any inconsistency between such summaries and the terms of the Stalking Horse APA, the terms of the APA shall govern.

(b) the liabilities with respect to employees transferred to the Stalking Horse Bidder under the existing benefit plans to be assumed by the Stalking Horse Bidder;

(c) all payroll liabilities with respect to employees transferred to the Stalking Horse Bidder following the payroll period which includes the Closing Date;

(d) liabilities relating to claims, actions, suits, arbitrations, litigation matters, proceedings, investigations or other actions involving, against, or affecting the acquired assets or the operation of the business from and after the closing, subject to exceptions described in the Stalking Horse APA;

(e) environmental liabilities and obligations relating to the Ekati Mine and, subject to the satisfaction of the Rio Condition, the Dominion Vendor's share of the Diavik Mine, subject to an agreement with respect to such matters with the GNWT, the issuers of certain surety bonds and DDMI; and

(f) liabilities under government authorizations (permits, licenses, mineral licenses) included in the acquired assets, in each case soley in respect of the period commencing at the Closing Date, subject to an agreement with respect to such matters with the GNWT and the issuers of certain surety bonds.

33. Consistent with standard commercial practice, the determination of which contracts will be assigned as part of the Stalking Horse APA will be done through a consultative process which will require discussion and negotiation with contractual counterparties in coordination with the Monitor.

PART IV – NON-DDMI CONCERNS

The Evidence

34. With respect to the approval of the each of the components of the integrated Restructuring Proposal, the evidence before this Court includes the following:

(a) The negotiations related to the Amended Interim Financing Term Sheet, Stalking Horse Term Sheet and Stalking Horse APA, and Amended SISP have been at lengthy and at arms' length;[13]

(b) The Amended Interim Financing Term Sheet is the best available DIP arising out of the interim financing proposal process (which was an extended process that produced multiple other DIP proposals);[14]

(c) Pursuing the Amended Interim Financing Term Sheet, Stalking Horse APA, and Amended SISP is warranted at this time, is appropriate, and will benefit the Applicants through value maximization;[15]

(d) The existence of the Stalking Horse Bid is important and is a positive aspect of the proposed path forward;[16]

(e) The process under, and timelines in, the Amended SISP are appropriate, will allow potential investors to participate and will allow the Applicants to maximize value.[17]

35. The process being advanced by Dominion is not only in the best interests of the Applicants but also benefits, and is in the best interests of, the Northwest Territories, northern communities, employees, retired employees, contractors, the environment and creditors.

36. The Monitor has had direct discussions with both Mr. Bell and with Evercore and the conclusions and support of the Monitor are set out in its Fourth Report and its Supplement to its Fourth Report.

37. With respect to the Stalking Horse Term Sheet, which is the basis of the Stalking Horse APA, the Monitor analyzed numerous aspects of the Stalking Horse Term Sheet and reported to the Court as follows:

(a) The total purchase price depends to some extent on the exact amount outstanding at the closing date of the liabilities to be assumed by the Stalking Horse Bidder.

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[13] Bell Affidavit #1, para. 29 ; Bell Affidavit #2 at paras. 6, 8.
[14] Startin Affidavit #1 at paras. 33-37.
[15] Bell Affidavit #1 at para. 31; Startin Affidavit #1 at paras. 10, 45; Startin Affidavit #2.
[16] Bell Affidavit #1 at paras. 36-37, 39; Startin Affidavit #1 at paras. 10, 15.
[17] Bell Affidavit #1 at para. 34; Startin Affidavit #1 at paras. 18, 26, 28-29; Startin Affidavit #2.

However, the Monitor has prepared the following illustrative purchase price summary table based on information from the Applicants and Evercore, all of which will be available to all Phase 1 Bidders in the VDR:[18]

Illustrative Purchase Price Summary ($US millions)	Ekati + Corporate	Diavik JV Interest	Total
Cash Purchase Price	126 - 131	0	126 – 131
Reclamation, Letters of Credit and Guarantees	224	99	323
Unfunded Pension Balance	17	0	17
DDMI Cover Payments	9	55 - 70	55 - 70
Operating Liabilities	to be determined	to be determined	to be determined
Total Illustrative Purchase Price (excl. Operating Liabilities)	**$367 - $372**	**$154 - $169**	**$521 - $541**
Total Illustrative Purchase Price ($CAD millions)	**$506 - $513**	**$213 - $233**	**$719 - $747**

(b) While not in the earlier Monitor's reports, the Stalking Horse APA confirms US $20M will be allocated to pre-filing trade suppliers (less the amount the Applicants are authorized to pay under the DIP Budget and orders of the CCAA Court in respect of cure amounts, but have not yet been paid) resulting in the total consideration to be paid of approximately Cdn $530 million - $775 million, the range being primarily driven by the 40% Diavik JV interest;

(c) With respect to the upfront legal fees to be paid to the Stalking Horse Bidder for the work done to date, which matter was specifically raised at the May 29th hearing, the Monitor reported that: "the Stalking Horse Bidder spent considerable time, resources and legal costs in respect of the drafting and negotiation of the Stalking Horse Term Sheet and related transactions, and the payment of the Upfront SHB Expense Reimbursement is justified, in the circumstances";[19] and

(d) With respect to the conditions associated with (or the conditionality of) the Stalking Horse Term Sheet, the Monitor reported that: "while the Stalking Horse Bid is subject to significant conditions, the Monitor has concluded that these conditions are not unreasonable in the circumstances, and the presence of such conditions does not outweigh the beneficial aspects of the Stalking Horse Bid. Significantly, the majority of the fees, comprised of the Break Fee and the Break-up Expense

[18] Supplement to the Fourth Report of the Monitor at paras. 20-21.

[19] Fourth Report of the Monitor at para. 35(f).

> Reimbursement, that would be payable to the Stalking Horse Bidder [only] apply in the event that the Applicants pursue an Alternative Transaction [(e.g. a superior transaction)] and would only be payable in the event that the Stalking Horse Bidder has satisfied or waived the Financing Condition and Rio Condition in accordance with the Stalking Horse APA, which is appropriate".[20]

38. It should be noted that the Monitor and Evercore are highly sophisticated and deeply experienced financial advisory firms which are highly qualified to review, consider, and advise on the particular matters at hand. Their support for these matters, following a significant period of review and consideration of alternatives, is deserving of significant weight.

The 2L Trustee & 2L Ad Hoc Group

39. The 2L Trustee made the submission at the May 29th hearing that, should the Stalking Horse Bid be approved, it would represent a violation of the absolute priority rule in that it, for example, could provide value to unsecured trade creditors and employees, in advance of providing value to the secured second lien Notes. Assumption of unsecured liabilities has occurred in a great many CCAA cases where an asset sale has involved the *assumption* of employee and trade creditor obligations as part of a going concern transaction, and yet the purchase price has not been sufficient to repay certain financial securities of the debtors (such as notes).[21]

40. There is a clear distinction between the applicability of rules of insolvency law such as the equal treatment of creditors in cases of distributions, where they are applicable, and sale transactions where certain obligations may be *assumed* by a purchaser as part of going concern, where they are not applicable.

41. Similarly, the 2L Trustee also suggested in its bench brief that there is no "liquidation analysis" with respect to the Stalking Horse Term Sheet and made the bald assertion that such an analysis would be "customary in these circumstances."[22] There is no evidentiary support for

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[20] Fourth Report of the Monitor at para. 35(g).

[21] See, for example, the CCAA proceedings of Lightstream Resources Ltd. ABQB Court File No. 1601-12571.

[22] 2L Trustee Bench Brief at paras. 10 and 41.

that statement and no law cited for the proposition that a "liquidation analysis" is required or customary on an application to approve a sales *process.* That is not the law.

42. Under section 36(3)(c) of the CCAA, on a sale *approval* transaction, one of the factors to be considered is whether the monitor filed with the court a report stating that in their opinion a sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. However, as noted in the Applicants' bench brief,[23] the application before this Court is to approve the Stalking Horse APA for the purpose of the SISP sales process - this is not an application for a final sale approval under section 36 of the CCAA.

43. The evidence, and the applicable case law for approval of sales processes under the CCAA, supports the approval of the Stalking Horse APA as part of the SISP, and that its terms are appropriate and reasonable in these circumstances.

44. While the 2L Ad Hoc Group and the 2L Trustee have stated (or may wish) that the purchase price under the Stalking Horse Bid for the Dominion Vendors' assets should be higher, they have led no evidence at all to support that conclusion, other than to argue that a company that is now in insolvency proceedings was once worth more.

45. The evidence of Evercore, the Applicants' financial advisor, and the Court-appointed Monitor is that the purchase price is an acceptable starting point for offers on the Dominion Vendors' assets, which is, again, a stalking horse bid. Moreover, both the 2L Ad Hoc Group and the 2LTrustee still have all the following options under the proposed SISP:

(a) They can participate fully in the proposed SISP;

(b) If they believe that Dominion is worth more than the purchase price provided for by the Stalking Horse Bid, they can credit bid the full amount of their second lien debt;

(c) If they believe that the company is worth more, the SISP procedures give them the full ability to introduce other parties to the sales process and to make a bid; and

[23] Applicants' Bench Brief at paras. 58 – 71.

(d) If they wish to stand in the way of a closing of a successful going concern transaction at the close of the sales process contemplated by the SISP, including by arguing that the company should not be sold at the purchase price provided for by the Stalking Horse Bid, or any higher bid generated through the SISP, they can make those arguments at that time, and provide such further financing to the Applicants as may be required to continue these CCAA proceedings.

46. At the May 29th hearing, the 2L Trustee also suggested in its brief that the plan put forward in the Restructuring Proposal is "audacious" in that the Applicants' 100% equity holder might retain ownership of the Applicants' business without the Second Lien Lenders being paid in full.[24] This line of argument is misguided.

47. While it is true that the Stalking Horse Bidder is a related party, it is offering a significant amount of new money to complete its proposed purchase (and offering to assume a significant amount of go-forward operational liabilities). This does not violate any laws or norms. Specifically, there is nothing wrong with an equity holder placing a bid for the assets of an insolvent company – just as the Second Lien Lenders and other interested parties are permitted to do. Section 36(4) of the CCAA expressly contemplates sales of an insolvent debtor's assets to "related persons".[25] In the CCAA case of *Brainhunter* the court similarly found nothing objectionable in approving a sales process involving a stalking horse bid from an "insider and a related party".[26]

PART V – OBJECTIONS OF DDMI

48. With respect to DDMI, in its written submissions delivered to the Service List on May 28th, DDMI sought

(a) certain changes to the form of the Second ARIO that are in fact a continuation of matters from the May 15, 2020 hearing concerning the way "cover payments" made in connection with the Diavik Mine should be treated; and

(b) certain changes to the form of the SISP.

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[24] 2L Trustee Bench Brief at para. 12.
[25] Applicants' Bench Brief at para. 68.
[26] Applicants' Bench Brief at para. 61.

49. The changes to the Second ARIO and the SISP sought by DDMI were appended to DDMI's bench brief.[27]

50. This Bench Brief addresses seven matters related to DDMI's objections:

(a) The current relationship and longstanding conflicts between Dominion and DDMI;

(b) DDMI's so called "DIP Proposal" and DDMI's possible motivations in putting it forward;

(c) DDMI's wish to sell diamonds;

(d) The Rio Condition;

(e) Ascribing a value to the Stalking Horse Bid for the Diavik Interest;

(f) DDMI's position as a non-bidder; and

(g) DDMI's position on the SISP and Second ARIO generally.

The Dispute

51. It is abundantly clear that the Applicants and DDMI do not see eye-to-eye and have not done so for some period of time. While not only direct competitors – litigation appears inevitable as noted at the June 3rd hearing.

52. DDMI is a competitor of Dominion as the parties compete both for the purchase of high value diamonds from the Diavik JV and they compete for sales of their respective diamonds on the global diamond market.[28] They are also competitors for labour and contracting services.

53. The affidavit of Mr. Croese dated April 30th (para 28) refers to a letter sent from Dominion to DDMI on April 27th, some seven weeks ago. Mr. Croese elected not to attach that letter to his affidavit, presumably because it makes reference to a number of cash cost overruns and mining and production failures.

[27] DDMI Bench Brief at para. 71.

[28] Supplement to the Fourth Report of the Monitor at para. 27(d).

54. Paragraph 6 of the affidavit of Ms. Kaye dated May 6, 2020, submitted in connection with a prior hearing in this proceeding, provides a lengthy and detailed list of written complaints and objections made by Dominion and conveyed to DDMI in respect of the manner in which DDMI has conducted itself under its joint venture agreement with Dominion Diamond and the way DDMI has operated the Diavik Mine.

55. Below are four of the eight complaints cited in Ms. Kaye's affidavit and further detailed in the April 27th letter: [29]

(a) The Diavik Mine's repeated failure to meet costs budgets, production (ore processed) plans and diamond recovery budgets, including a significant failure to meet these in the January to March period of this year as against the approved budget (which budget is noted at paragraph 35 of the Croese Affidavit), many of which failures preceded the COVID-19 pandemic;

(b) The operation of the Diavik Mine in a manner inconsistent with the annual planned program and that appears to be a result of DDMI adopting a high-grade approach, which makes little economic sense and is destructive of value for the Diavik JV and its participants;

(c) The operational and financial performance of DDMI in relation to the Diavik Mine including the amount of the bi-weekly cash calls; and

(d) Dominion's serious and direct allegation that DDMI, as manger of the Diavik JV, has breached its obligations to Dominion Diamond and has been operating in the interests of itself and Rio, rather than in the interests of the joint venture partner.[30]

56. It is in this charged atmosphere that the submissions of DDMI, and the amendments they seek to the form of Second ARIO and SISP, must be considered.

57. Notwithstanding their disputes with DDMI, the Applicants have made concessions in favour of DDMI in the context of their restructuring efforts, including consenting to an order that DDMI can make cover payments if it wishes to, and consenting to an order that diamond production can be held by DDMI. That is, the Applicants have conceded that DDMI maintain its

[29] Kaye Affidavit at para. 6.
[30] Kaye Affidavit at para. 6.

security position under the Diavik JV. However, DDMI wants more and continually asks this court for more.

58. It is also worth recalling that DDMI's evidence is that the Diavik Mine will generate $100 million or more of free cash flow[31] and that the Diavik JV agreement has an entire section devoted to how and when cover payments are to be made by one partner, when the other cannot make its cash calls. In other words, this very situation has been contemplated by the parties in their definitive agreement. Yet DDMI continually asks this Court – and these debtors – for more, at every hearing. This must stop.

59. DDMI is party to a contract and these debtors and this court cannot continually be asked to amend and supplement this contract because DDMI does not the like the terms it negotiated for, even though those terms expressly relate to the very situation at hand. DDMI has the right to make cover payments under its contract, and its contract provides a complete code as to how those cover payments are to be treated and secured under the contract. The concessions of the Applicants and the orders of this Court made to date grant DDMI all the additional protections that can reasonably be requested in these circumstances.

The DDMI DIP Proposal

60. During his submissions on May 29th, counsel to DDMI referenced that DDMI offered interim financing to Dominion on May 18th. The court expressed surprise at not having seen DDMI's interim financing referenced in the interim financing summary set out in the Monitor's report. The absence of such reference can be explained by the fact that there was no DDMI interim financing proposal in any real sense of that concept.

61. A few facts in respect of the DDMI proposed "interim financing", which document DDMI did not take the court to, bear review:

(a) The proposal was delivered after this Court's decision on May 15th in which this Court ordered the May 20th diamond delivery to be held back and ordered other protective terms to ensure the parties' respective rights were protected;

[31] Affidavit of Thomas Croese, sworn April 30, 2020 at para. 42(a).

(b) It was not an interim financing proposal made in response to the Evercore request for DIP proposals to help fund the CCAA and the restructuring;

(c) It was not an offer to provide financing to the Applicants to finance the CCAA restructuring. Instead, it related solely to the funding of the Diavik cover payments that may be made by DDMI (security for which was already ordered by this court on May 15th and the full terms for which are already set out in the applicable contract). In other words, the so-called "DDMI DIP" was nothing more than yet another request for "more" than DDMI's governing contract provides for under the very circumstances at hand - the making of cover payments);[32] and

(d) The terms of the DDMI "DIP proposal" in respect of DDMI's cover payments included other terms of note:

i. Payment of all expenses of DDMI (something not contemplated or permitted by this Court's May 15th order);

ii. DDMI to be permitted to take Dominion Diamond's share of the diamonds produced from the Diavik Mine outside of Canada (something not contemplated or permitted by this Court's May 15th order);

iii. DDMI to be permitted to immediately sell Dominion Diamond's share of diamonds produced from the Diavik Mine through its own channels (something not contemplated or permitted by this Court's May 15th order);

iv. DDMI to be paid a 2.5% fee on all sales (on top of the payment of all the expenses of DDMI); and

v. Notably, DDMI sought a release from Dominion Diamond for all claims Dominion Diamond has against DDMI under or in connection with the Diavik Joint Venture Agreement.

62. Not surprisingly, this one-sided proposal was of no interest to the Applicants.

63. In addition to the above, and as noted by the Monitor in its Supplement to the Fourth Report of the Monitor:

[32] See section 9.4 of the Diavik Joint Venture Agreement entitled "Default in Contributions" which lays out in detail how "Cover Payments", as defined therein, which arise when one partner must cover a capital call that another has failed to make, will be handled and secured.

(a) The concept of DDMI loaning money to Dominion to allow Dominion to make cash call payments was essentially the opposite of the remedy requested by DDMI and awarded by the Court;[33] and

(b) When counsel to DDMI sent the proposal to the Applicants, counsel to DDMI stated: "[t]he benefit to Dominion is that, rather than facing opposition from DDMI for any attempt by Dominion to seek a priming charge over Diavik, Dominion and its stakeholders will enjoy the consent of DDMI to DIP financing."[34] At that time, DDMI was not aware of the proposed terms of the DIP. In fact, Dominion was not, and is not, seeking to prime the security interest of DDMI on the Diavik assets. DDMI got what it wanted. So what did DDMI do, it set its sights on other ways to frustrate the restructuring (all to the benefit of DDMI).

64. As an aside, the Applicants note that "marketing rights" have a significant value in the diamond world. What DDMI is attempting to do through asking for the right to sell diamonds, whether in its application or in its purported DIP Proposal, is to attempt further opportunistically extract value from Dominion and its stakeholders.

65. When all stakeholders listened to the submissions of DDMI on May 29th only partial information and partial truths were being proffered. Counsel to DDMI expressed incredible surprise that their DIP was not part of the DIP comparison the court saw – yet they never took the court to its terms or explained the critical issues noted above.

66. Their DIP was not a real DIP, was inconsistent with the relief they sought before this Court, and in fact was an indirect way for DDMI to try to insulate themselves from the detailed allegations of mis-management and the very real and detailed allegations set out in the letter sent by Dominion to DDMI seven weeks ago as referenced by both Mr. Croese and Ms. Kaye in their affidavits of early May.

The DDMI Request to Sell Diamonds

67. With respect to DDMI's ability to sell diamonds, which also relates to the proposed amendments that DDMI seeks to the Applicants' proposed Second ARIO on this application, this Court will recall the evidence of Ms. Kaye on behalf of the Applicants and the Applicants'

[33] Supplement to the Fourth Report of the Monitor at para. 24(h).
[34] Supplement to the Fourth Report of the Monitor at para. 24(i).

submission at the May 8th hearing, that DDMI's evidence with respect to its ability to sell is vague and lacks any specificity whatsoever. As noted by Ms. Kaye at paragraph 12 of her May 6, 2020 affidavit:

> "It is also worthy of note that the Croese Affidavit makes very general statement about DDMI's sales saying that an affiliate of DDMI has achieved "material sales during March and April 2020." There is no evidence or details in the Croese Affidavit of what "material" means, how the volume of such sales compares to sales in the preceding several months and years and what level of discount (or reduced sale price) these sales occurred at as compared to sales in the preceding several months and years. It is unknown if the discounts were "material", what discounts were offered, and which sales were offered and rejected."

68. Despite the passage of more than a month since Ms. Kaye's affidavit, DDMI has not provided any details of its ability to sell diamonds, at what volumes, at what discounts, or at what prices. DDMI should not be given any ability to sell Dominion Diamond's diamonds whether today or in the future, absent agreement or a court order granted at the relevant period of time.

69. Further, and as noted below, the proposed Interim Lenders are not given rights in advance to sell the collateral that would secure their Interim Financing Facility. Granting parties the ability to enforce absent court order granted at the relevant period of time is a dangerous precedent and forces this Court to not only pre-judge issues but to do so in the absence of relevant information and evidence at the applicable time.

The Rio Condition

70. DDMI's counsel submitted that the Stalking Horse Bidder "wants to re-write the JV agreement" through the Rio Condition. That is simply not the case. The Rio Condition simply provides that the Stalking Horse Bidder shall have reached an agreement with DDMI and GNWT in relation to the timing and quantum of capital calls and reclamation liabilities with respect to the Diavik Joint Venture.

71. This is nothing complicated about the Stalking Horse Bidder wanting to come to an agreement with DDMI and the GNWT on cash calls and reclamation in order to give it certainty. This is no different than a condition that a union contract be renegotiated. Further, this is the heart of a longstanding complaint between Dominion and DDMI. That issue is not going to go

away because Dominion is in CCAA. The Applicants expect that other bidders will need to do the same.

72. Furthermore, DDMI (not the Stalking Horse Bidder) is in control of whether it will provide any accommodations (or even speak) to the Stalking Horse Bidder or any other bidder for that matter. DDMI is not compelled to do anything. Why is DDMI concerned with this condition when this Court is not being asked as part of this SISP or Stalking Horse Bid to force DDMI to do anything?

73. DDMI's counsel made much of the fact that the RIO Condition removal or satisfaction date was July 31st – after the June deadline for bids. However, what was not mentioned by DDMI during it submissions was that the June deadline for bids was the non-binding deadline for expressions of interest. Binding bids were not proposed by the Applicants to be due until August 7th (and now moved to a later date) – more than a month after the Rio Condition removal or satisfaction date.

Ascribing a value to the Stalking Horse Bid for the Diavik Interest

74. DDMI made submissions that the Stalking Horse Term Sheet has no dollar figure or price set out therein with respect to the Diavik Interest, which DDMI says is needed so others can bid. In considering this point, the structure of the proposed Stalking Horse Bid is important. The Stalking Horse Term Sheet and, now the Stalking Horse APA, contemplate the assumption of the Applicants' obligations pursuant to the Diavik Joint Venture Agreement and the Closure Security Agreement (the agreement between Dominion Diamond and DDMI), including all accrued and unpaid capital calls, plus accrued interest, any pending (but not yet due) capital calls, provided that the Purchasers and DDMI can come to an agreement with respect to the timing and quantum of capital calls and reclamation liabilities.

75. A definitive dollar amount cannot be placed on these obligations as the cash calls and reclamation liabilities are only projected future amounts but will be known at closing. That said, Mr. Croese himself has given evidence in his May 28 affidavit of precisely what those amounts are today and projections into later this year. Mr. Croese states that (a) DDMI has paid Cdn $33.6M in cover payments for Dominion Diamond; (b) a further Cdn $69.7 million in Dominion Diamond cash calls are expected until October 31, 2020 (the outside date in the SISP); and (c) Cdn $105 million in letters of credit have been issued on behalf of Dominion Diamond for its share of reclamation obligations.

76. Two points arise. First, while the exact numbers of assumed Diavik Mine obligations are not capable of absolute definition in that they relate to future events, any prospective bidder under the SISP will have the information referenced above in respect of the liabilities so the amounts being assumed have a level of precision. Second, the DDMI suggestion that the Stalking Horse Bidder does not ascribe any value to Dominion Diamond's 40% stake in the Diavik Joint Venture Agreement is not accurate. The above assumed liabilities add up to an order of magnitude in excess of $200 million. That is real value.

DDMI Will Not Be a Bidder

77. The statements made repeatedly by DDMI's counsel DDMI and/or RIO will not be a bidder are interesting. This is a curious comment at this stage of the process.

78. DDMI is Dominion Diamond's majority (60%) partner in the Diavik Mine. DDMI is also the "Manager" of the Diavik Mine under the Diavik Joint Venture Agreement. Nobody knows more about the Diavik Mine than DDMI – no one is more informed than they are.

79. Rio/DDMI is a potential and logical buyer for Dominion's 40% interest in the Diavik Mine. But they have said they will not bid. Why?

80. Is it because they believe there is no value in the Diavik Interest? That does not seem to be the case given Mr. Croese's affidavit evidence, including that the Diavik Mine will generate $100 million or more of free cash flow,[35] and given DDMI continues to operate the Diavik Mine.

81. There is another possible motive when one asks the following question: Who benefits from a failed SISP in respect of Dominion's 40% interest in Diavik? The answer is DDMI.

82. Any provisions in the Second ARIO or SISP that interfere with the SISP or make it more difficult for the SISP to work as intended, that pre-judge issues today (at a sale process hearing) that should be dealt with at a sale approval hearing, or provide information to DDMI (particularly in the context of live litigious disputes with Dominion Diamond) give DDMI a leg up and are detrimental to the sales process. If there are no bidders for Dominion's 40% share in the Diavik Mine – presumably DDMI will seek to foreclose on that interest.

[35] Affidavit of Thomas Croese, sworn April 30, 2020 at para. 42(a).

83. Undoubtedly, DDMI will say none of this is true. However, when one steps back to consider this process, and where DDMI sits with respect to it, DDMI currently has the ability to hold Dominion Diamond's diamonds from the Diavik Mine and also has all of the security it bargained for under the Diavik Joint Venture Agreement. This Court's order of May 15th, as extended on May 29th and on June 3rd, protects all parties' rights (including DDMI) and, as submitted at the May 29th hearing, should simply be maintained until stakeholders and this Court obtain more information through the SISP process.

84. DDMI does not need, and should not have, additional rights that are not needed; rights that are prejudicial to the Applicants; or rights which could negatively impact the SISP, impair the ability of other stakeholders to recover value, and interfere with the Applicants' ability to seek the highest and best bids.

85. Like the overreaching efforts of DDMI in their purported "DIP Proposal", DDMI now seeks court orders related to enforcement rights that no other party (including the proposed Interim Lenders or First Lien Lenders) has.

86. DDMI also seeks to interject themselves into the SISP when (a) it is not a bidder; (b) it does not need any information from Dominion Diamond as DDMI has all information related to the Diavik Joint Venture Agreement (where their security lies); and (c) it is both a competitor to Dominion Diamond and is on notice of significant legal claims having been asserted by Dominion Diamond against DDMI.

DDMI's Proposed SISP Changes

87. The DDMI amendments are designed to influence the SISP in a manner that is clearly to its benefit and detrimental to the SISP process and, accordingly, Dominion's other stakeholders. For instance:

(a) DDMI seeks consent and consultation rights – thereby interjecting itself into the SISP that is already been professionally run by Evercore in consultation with the Monitor and where the Monitor has significant consent rights. Consultation rights at every turn being given to DDMI makes the process unworkable;

(b) DDMI seeks disclosure of the name of bidders when such information is not provided to any other party – disclosure of such information, as confirmed by the

Monitor in discussions with Evercore, could have a chilling effect on the process and dissuade potential bidders from even participating in the SISP;[36]

(c) DDMI sees a provision that it be provided with the CIM and access to the virtual data room – without DDMI executing an NDA.[37] It does not need such information in any event as its security is limited to the Diavik Mine of which it is the Manager.

(d) DDMI seeks a variety of provisions to be added to the SISP that require, including at the non-binding Phase I stage, that any bidders state how they intend on complying with the Diavik Joint Venture Agreement, that they "must" assume certain obligations, etc. Provisions such as this "pre-judge" matters that are appropriately dealt with at the sale approval transaction and are not for this hearing.[38] These provisions remove the discretion of the Court at the Sale Approval hearing.

88. All of this is unwarranted, unnecessary and negatively impacts on the restructuring process. The SISP does not "take away" any of DDMI's rights and DDMI is not running the process.

89. Some of these issues may be issues upon a sale hearing but that is not an issue for today.

DDMI's Proposed Amendments to the Second ARIO

90. There is no issue, as previously stated, with DDMI making cover payments if they choose to do so and the company takes no issue with this Court's order of May 15th (as extended on consent of Dominion on May 29th and June 3rd) continuing in that regard or in respect of future diamond deliveries (subject to, as previously mentioned in court on May 29th, to the outstanding issue of the delivery of the April 2020 diamonds).

91. However, the form of amended Second ARIO sought by DDMI seeks to greatly expand DDMI's rights and to make significant changes to this Court's May 15th, May 29th and June 3rd orders that are prejudicial to the Applicants and to the SISP.

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[36] Paras. 9, 35 of DDMI's proposed SISP amendments and Supplement to the Fourth Report of the Monitor at Appendix K.

[37] Paras. 11-12 of DDMI's proposed SISP amendments.

[38] Paras. 14, 18 , 22 & 35 of DDMI's proposed SISP amendments.

92. Specifically, DDMI seeks in its amendments to the form of Second ARIO proposed by the Applicants:

(a) To allow DDMI to move diamonds outside of Canada and beyond the jurisdiction of this court (para. 16 of DDMI's proposed Second ARIO);

(b) To allow DDMI to enforce as against Dominion Diamond's share of diamonds as early as July 2020 and to sell such diamonds after providing notice – all without further court order (para. 16 of DDMI's proposed Second ARIO). The proposed amendments give enforcement rights to DDMI that are not given to the proposed Interim lender who has to come back to court to enforce;

(c) The addition of language that impacts the SISP and purports to pre-judge issues that are properly dealt with at any sale approval motion (para. 45 of DDMI's proposed Second ARIO). The references in DDMI's submissions to issues that properly fall within the scope of sections 11.3 and 36 of the CCAA are issues for a sale approval motion and not for this hearing;

(d) DDMI seeks greater information and document delivery rights (paras. 24, 26 & 45 of DDMI's proposed Second ARIO) in circumstances where (i) the standard CCAA model order provisions should apply; (ii) DDMI is the Manager of the Diavik Mine and already has greater information than Dominion Diamond does; and (iii) DDMI has security is in respect of the Diavik Mine and not the rest of the Applicants' assets; and

(e) DDMI seeks to adjust and amend the security to which the additional CCAA Charges attach – notwithstanding the fact that those charges already rank after the security interest of DDMI (para. 57 of DDMI's proposed Second ARIO). There is no reason that the applicable CCAA Charges should not attach to Dominion's interest in the Diavik Mine after the interest of DDMI as is proposed by the Applicants.

93. With respect to its request to be able to sell diamonds on pre-determined dates:

(a) It in not necessary or appropriate to make an order now that may apply in July or August 2020;

(b) DDMI's request for orders related to "enforcement" rights today is not necessary or appropriate and is in fact troublesome in circumstances where the SISP is at its earliest stages;

(c) Neither the parties nor this Court have the necessary facts today to determine if the relief DDMI seeks will be appropriate months down the road. This SISP needs to run its course;

(d) Neither the parties nor this Court know where the SISP will lead and also do not know the SISP outcomes;

(e) There is no need to make the orders sought by DDMI today and no need to pre-judge the potential enforcement issues today;

(f) The enforcement rights DDMI seeks are not rights that the Interim Lenders currently have; i.e., event the Interim Lenders must come back to court prior to taking enforcement steps as is standard in CCAA proceedings; and

(g) These are all matters that will have to considered if and when the time comes to consider any potential enforcement – but that day is not today.

94. With respect to the assertion that DDMI should get rights analogous to, and with respect to enforcement greater than, those provided to the Applicants' Interim Lenders:

(a) There are a number of very important differences between the Applicants' Interim Lenders and DDMI – two of which are that (i) unlike the Interim Lenders, DDMI is actually holding Dominion Diamond's property; and (ii) DDMI has all the available information related to the Diavik Mine (where their security lies) as they are the Manager of that asset.

(b) The rights DDMI seeks are not needed and are inappropriate given the clear disputes between the parties which have been memorialized in letters and the likelihood of litigation.

95. For the reasons set out above, the Applicants submit that the relief sought in the Amended Application be granted in the form of the proposed Second ARIO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF JUNE, 2020

BLAKE, CASSELS & GRAYDON LLP

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