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COURT FILE NUMBER 2001-05630

COURT COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY 1202357 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, DOMINION FINCO INC. and DOMINION DIAMOND MARKETING CORPORATION**

DOCUMENT

**AFFIDAVIT**

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**AFFIDAVIT OF KRISTAL KAYE**

**Sworn on October 28, 2020**

I, Kristal Kaye of Calgary, Alberta, SWEAR AND SAY THAT:

1. I am the Chief Financial Officer of Dominion Diamond Mines ULC ("**Dominion Diamond**"), Dominion Diamond Canada ULC ("**Dominion Canada**"), and Dominion Diamond Delaware Company, LLC ("**Dominion Delaware**"), three of the applicants in these proceedings, a director of Dominion Canada and Dominion Diamond Marketing Corporation ("**Dominion Marketing**"), and I also hold other director and officer positions with certain other non-CCAA applicant entities affiliated with Dominion Diamond. As such, I have personal knowledge of the matters deposed to in this affidavit, except where stated to be based upon information provided to me, in which case I believe the same to be true.

2. I make this affidavit in response to the affidavit of Thomas Croese sworn October 19, 2020 (the "**Croese Affidavit**") and in opposition to DDMI's application for:

- (a) an amendment to the Second and Amended Restated Initial Order of this Court dated June 19, 2020 (the "**SARIO**") that would allow DDMI to retain all of Dominion's share of the Diavik Mine production (as opposed to only the Additional Diamond Collateral, as defined below); and
- (b) an order permitting DDMI to implement its proposed realization process (the "**DDMI Sale Proposal**") for the sale of the diamonds currently held by DDMI (the "**Additional Diamond Collateral**") as further security for the "**Cover Payments**" made by DDMI pursuant to the SARIO.

3. For the reasons set out below, the Applicants reject DDMI's assertion that DDMI requires further collateral to secure the Cover Payments and oppose DDMI's application to vary the SARIO to allow DDMI to hold any more of Dominion's production from the Diavik Mine beyond the Additional Diamond Collateral.

4. With respect to the DDMI Sale Proposal, the Applicants submit that any process that is implemented to sell the Additional Diamond Collateral must be fair, transparent, and provide for the best realization value available in the circumstances.

5. The Applicants should be permitted to, and are able and prepared to, sell the Additional Diamond Collateral themselves, but if DDMI is to be responsible for the sale, modifications to the DDMI Sale Proposal are required.

(1) **Background**

6. I have previously sworn several affidavits in these CCAA proceedings, including my affidavit of April 21, 2020 (the “**April Affidavit**”) and May 6, 2020 (the “**May Affidavit**”). Background facts relevant to DDMI’s application are set out in my April and May Affidavits.

7. If not defined in this affidavit, capitalized terms have the meaning given to them in my April and May Affidavits.

(2) **DDMI’s Cash Calls**

8. As is described in my April Affidavit, one of the significant financial burdens faced by Dominion prior to its filing for CCAA protection were the bi-monthly “**Cash Calls**” issued by DDMI with respect to Dominion’s forty percent share of the operating expenses of the Diavik Mine, which DDMI has been running notwithstanding the disruptions to the diamond industry sales channels caused by the COVID-19 pandemic.

9. As is described in both the Affidavit of Mr. Croese sworn April 30, 2020 and my May Affidavit, pursuant to the Joint Venture Agreement that governs Dominion and DDMI’s participation in the Diavik Mine joint venture, the operation of the Diavik Mine is conducted in accordance with an approved program and budget (the “**Approved JV Budget**”).

10. In the period from April 22, 2020 when the Applicants filed for CCAA protection, until September 30, 2020, DDMI has made the following Cash Calls (which are compared in the table below to the amounts payable under the Approved JV Budget for Dominion’s 40% share):

Cash Call Period	\$ CAD			\$ USD		
	Approved JV Budget	Actual	Over/ (Under) Budget	Approved JV Budget	Actual	Over/ (Under) Budget
2nd April Cash Call	17,283,400	16,000,000	(1,283,400)	13,294,923	12,093,726	(1,201,197)
1st May Cash Call	11,283,400	17,600,000	6,316,600	8,679,538	13,303,099	4,623,561
2nd May Cash Call	11,283,400	12,000,000	716,600	8,679,538	9,070,295	390,757
1st June Cash Call	8,483,400	5,600,000	(2,883,400)	6,525,692	4,232,804	(2,292,888)

Cash Call Period	\$ CAD			\$ USD		
	Approved JV Budget	Actual	Over/ (Under) Budget	Approved JV Budget	Actual	Over/ (Under) Budget
2nd June Cash Call	8,483,400	10,000,000	1,516,600	6,525,692	7,558,579	1,032,887
1st July Cash Call	6,883,400	8,400,000	1,516,600	5,294,923	6,349,206	1,054,283
2nd July Cash Call	6,883,400	8,000,000	1,116,600	5,294,923	6,046,863	751,940
Exploration	-	1,977,282	1,977,282	-	1,494,544	1,494,544
1st Aug Cash Call	5,883,400	8,000,000	2,116,600	4,525,692	6,046,863	1,521,171
2nd Aug Cash Call	5,883,400	6,400,000	516,600	4,525,692	4,837,491	311,799
1st Sept Cash Call	4,283,400	8,800,000	4,516,600	3,294,923	6,651,550	3,356,627
Exploration	-	80,293	80,293	-	60,690	60,690
2nd Sept Cash Call	4,283,400	7,200,000	2,916,600	3,294,923	5,442,177	2,147,254
<b>TOTAL to September 30th</b>	<b>90,917,400</b>	<b>110,057,575</b>	<b>19,140,175</b>	<b>69,936,462</b>	<b>83,187,887</b>	<b>13,251,425</b>

11. Further Cash Calls in the month of October are as follows:

Cash Call Period	\$ CAD			\$ USD		
	Approved JV Budget	Actual	Over/ (Under) Budget	Approved JV Budget	Actual	Over/ (Under) Budget
1st Oct Cash Call	6,083,400	8,800,000	2,716,600	4,679,538	6,651,550	1,972,012
Exploration	-	664,634	664,634	-	502,369	502,369
2nd Oct Cash Call	6,083,400	4,800,000	(1,283,400)	4,679,538	3,628,118	(1,051,420)
<b>TOTAL</b>	<b>103,084,200</b>	<b>124,322,209</b>	<b>21,238,009</b>	<b>79,295,538</b>	<b>93,969,924</b>	<b>14,674,386</b>

12. As is contemplated by the SARIO, while the exercise of Dominion's creditors' rights and remedies are stayed, DDMI has the ability to make Cover Payments with respect to Dominion's

Cash Call obligations to DDMI. The amount of the above listed Cash Calls is equivalent to the amount that DDMI has paid as Cover Payments as of September 30, 2020. That is to say, as of September 30, DDMI has made Cover Payments in the amount of approximately \$83.2 USD million since the Applicants were granted CCAA protection. This amount is over the Approved JV Budget by approximately \$13.3 million USD or 18.9%.

13. As I described in my May Affidavit, Dominion Diamond has had for some time, and continues to have, concerns with the way in which DDMI has operated and continues to operate the joint venture and the Diavik Mine. The concerns that Dominion has raised are described in paragraph 6 of my May Affidavit, which include concerns related to the operational and financial performance of the Diavik Mine generally and DDMI's repeated failure to meet cost budgets, including a significant failure to meet the Approved JV Budget (many of which failures preceded the COVID-19 pandemic). Dominion has commenced litigation against DDMI with respect to its operation of the Diavik Mine in the British Columbia Supreme Court.

14. In light of its concerns with respect to the operation of the Diavik Mine, as is also described in my May Affidavit, Dominion has repeatedly asked DDMI to pursue appropriate cost reductions, including months before the onset of the COVID-19 pandemic. Despite these requests, as is clear from the above, DDMI's Cash Calls have continued to be in an amount well in excess of the Approved JV Budget.

15. The Applicants' concerns with respect to DDMI's operation of the Diavik Mine have continued to manifest since filing for CCAA protection. Among others, the Applicants' concerns include the following two issues:

- (a) **Cash Account:** DDMI maintains a cash account to fund the operations of the Diavik Mine (the "**JV Cash Account**"), 40% of which is funded by the Applicants in respect of their proportional share of the Diavik Mine obligations. Prior to the Applicants' filing for CCAA protection (with a starting point of January 2017), the average month-end balance in the JV Cash Account has been approximately \$5 million CAD. Since the Applicants' filing for CCAA protection in April, the average month-end balance in the JV Cash Account has been approximately \$15 million CAD. As of the last financial reporting at September 30, 2020 I understand that the cash balance in the JV Cash Account was approximately \$17 million CAD. Yet, in October, DDMI has again made Cash Calls in excess of the Approved JV Budget by approximately \$2 million CAD. I am not aware of any reason for DDMI

to maintain such an increased balance in the JV Cash Account, which in effect increases the amount of Dominion's Cash Calls (and therefore the DDMI Cover Payments and the associated interest payable on these Cover Payments).

- (b) **CEWS Benefit:** To the best of my knowledge, DDMI has not applied for the Canadian Emergency Wage Subsidy ("**CEWS**") benefit that has been made available to Canadian employers who have seen a drop in revenue due to COVID-19 to cover part of employee wages. A general discussion on CEWS eligibility occurred between Dominion and DDMI at a meeting held on April 20, 2020. At a third-quarter joint venture meeting held on October 21, 2020, Dominion confirmed that DDMI had not applied for the CEWS benefit. Subsequent to that meeting Dominion requested further details from DDMI in order to calculate the potential benefit available to DDMI pursuant to the CEWS. This information has not been provided to Dominion as of the date of this affidavit. If DDMI's operations have been impacted in a similar way as Dominion's by the pandemic, particularly with respect to the ability to conduct significant sales, this could be a significant benefit to DDMI and provide them with additional funds in the tens of millions of dollars, which would again reduce the amount of the Dominion Cash Calls and corresponding Cover Payments. DDMI has advised that it may apply for this subsidy in the coming months but the Dominion Cash Calls should have already been reduced.

(3) **DDMI is Over-Secured (not Under-Secured)**

16. DDMI's claim that the Cover Payment indebtedness of the Applicants to DDMI exceeds the gross value of the Additional Diamond Collateral is incorrect. If anything, as is set out below, DDMI is over-secured with respect to the Cover Payments on the basis of the most recent pricing information available.

*Valuation of the Additional Diamond Collateral*

17. Mr. Croese is correct that historically the DICAN (as defined in the Croese Affidavit) valuations have been higher than the realized value of diamonds from the Diavik Mine. However, all of the diamonds that Dominion has sold in 2020 (beginning as early as January, prior to both the COVID-19 pandemic and the Applicants' CCAA filing) have sold at a higher realized value than the DICAN valuation.

18. As noted by Mr. Croese himself at paragraph 13 of his affidavit, DDMI has also sold diamonds in September and early October of this year in excess of the DICAN valuation.

19. Below is a table showing the average price per carat that Dominion has obtained in its sales in 2020 as compared to the DICAN valuation for those same diamonds (being the DICAN valuation conducted several months prior):

<b>Production Date</b>	<b>DICAN value (USD\$/carat)</b>	<b>Sales Month</b>	<b>Sale value (USD\$/carat)</b>	<b>\$/carat Variance</b>	<b>Percentage Difference</b>
November 2019	\$90.82	January 2020	\$97.56	\$6.74	7%
December 2019- January 2020	\$80.41/\$87.85	February 2020	\$93.94	\$9.65	11%
February 2020	\$86.13	September 2020	\$90.52	\$4.39	5%

20. If the DICAN values applied at the time the valuation was performed are applied to the Dominion diamonds currently held by DDMI, the total value of these diamonds is approximately \$92.1 million USD:

<b>Production Dates</b>	<b>Carats</b>	<b>DICAN USD\$/ct</b>	<b>Total DICAN Value (USD)</b>
April 16-May 6	51,578.47	\$102.63	\$5,293,436.87
May 7 - May 27	242,242.17	\$73.13	\$17,716,298.61
May 28 - June 17	171,587.14	\$71.61	\$12,286,998.25
June 18 - July 22	251,599.75	\$71.87	\$18,081,391.17
July 23 - 26 August	262,052.28	\$74.28	\$19,465,839.98
27 August-30 September	230,251.02	\$83.45	\$19,213,928.58
<b>Production up to September 30</b>	<b>1,209,310.83</b>	<b>\$76.12</b>	<b>\$92,057,893.47</b>

21. As set out above, as of September 30, 2020, the Cover Payments made by DDMI are approximately \$83.2 million USD. The value of the Dominion diamonds being held by DDMI for this same period of time using the DICAN pricing is approximately \$92.1 million USD. In other words, DDMI is over-secured by approximately \$8.9 million USD, based on the DICAN valuations.

22. However, these DICAN valuations for 2020 undervalue the diamonds because of the point in time at which the valuations were done (at the height of the pandemic). If all of the diamonds currently held by DDMI for the production dates up to September 30 are valued using the most recent DICAN valuation number, \$83.45 per carat, the total value of the inventory held by DDMI to secure its Cover Payments (both current to September 30) is approximately \$100.7 million USD. This results in DDMI being over-secured in an amount of approximately \$17.5 million USD.

23. An even more accurate way to value the Additional Diamond Collateral is to use the actual pricing obtained by Dominion in its most recent diamond sales in September of this year. If the Additional Diamond Collateral is valued at the average sales price obtained by Dominion during its September sale, being \$90.52 per carat, the total value of the Additional Diamond Collateral (to September 30) is approximately \$109.2 million US. DDMI is therefore over-secured by \$26.0 million US.

24. In my view, Dominion's recent sales data, or in the alternative the current DICAN valuation, is the best and most accurate way to value the Additional Diamond Collateral. For clarity, Dominion is not asking this Court to revise the terms of SARIO or change the method of valuation used – it is only providing this evidence to illustrate that the position taken by DDMI with respect to the valuation of the Additional Diamond Collateral is incorrect.

Further Inaccuracies in DDMI's valuation

25. In paragraph 16(a) of the Croese Affidavit, Mr. Croese claims that an amount of 13-20% must be deduced from the gross value of the Additional Diamond Collateral to account for sale, marketing, royalty and other fees and expenses associated with selling these diamonds. According to Mr. Croese, the basis of this information is data from a recent sale of diamonds by Dominion that is found in in the Monitor's Sixth Report.

26. Mr. Croese's claim that these expenses will amount to 13-20% of the gross value of the Additional Diamond Collateral is incorrect. An estimation of 20% is too conservative (given, among other things, the fixed cost of sales that does not fluctuate materially with increased volume, except for per-stone sorting costs).

27. The actual amount of these costs for Dominion's share of production from the Diavik Mine is 11%. This accounts for Belgian taxes, GNWT royalties, private royalties and sorting and shipping costs. The estimated 13% expense value derived from the information on diamond



sales from the Monitor's Sixth Report, dated September 22, 2020, was arrived at using diamond sale figures reported on a consolidated basis and included costs associated with both the Ekati and Diavik Mines. Dominion does not own 100% of the Ekati Mine and has to pay the proportionate share of Ekati's net revenues to its JV partner, Mr. Stu Blusson. There are no other deductions or expenses that I am aware of to justify an ask of 13-20%.

28. If DDMI truly estimates that it will have to deduct an amount of 13-20% from the gross value of the Additional Diamond Collateral to account for sale, marketing, royalty and other fees and expenses associated with selling these diamonds, whereas Dominion estimates these costs to be approximately 11%, that is only further evidence that Dominion should be the party responsible for selling the Additional Diamond Collateral.

29. For the sake of accuracy, I also note that in his affidavit Mr. Croese indicates that the diamonds owed to Dominion for May 20, 2020 are in an amount of 49,832.78 carats, but the DICAN report provided to Dominion by GNWT indicates that the correct weight is 50,316.99 carats.

#### Projections as to Future Diamond Sales

30. I do not disagree with Mr. Croese that there is uncertainty as to how diamond prices may fluctuate in the coming months and year. Even absent the COVID-19 pandemic, diamond pricing is dynamic. However, it is important to recognize that diamond experts hold differing views with respect to what the future holds for the diamond market. For example, Paul Zimnisky Diamond Analytics ("**Zimnisky Analytics**"), a monthly subscription service that is used by financial institutions, management consulting firms, private and public corporations, governments, intergovernmental organizations and universities, takes a more optimistic view in its monthly reports for September (the "**September Zimnisky Report**") and October (the "**October Zimnisky Report**", together the "**Zimnisky Reports**") than the views contained in the secondary market sources relied on in the Croese Affidavit.

31. In the September Zimnisky Report, Zimnisky Analytics stated that:

"While the impact of the pandemic has led to a continuation of a multi-year down-trend in diamond prices, the situation has also acted as a catalyst to expediate pre-existing supply trends that should be fundamentally supportive of prices going forward."

32. Further, the Zimnisky October Report notes that “in the weeks spanning late-August through early-September, both De Beers and ALROSA held sales in which rough was sold at levels not seen since before the pandemic”.

33. Similar to the WWW Forecasts relied on by Mr. Croese in his affidavit, the Zimnisky Reports are not publicly available and have been attached to this Affidavit with the express consent of Zimnisky Analytics on the basis that they will not be disclosed due to the commercially sensitive and proprietary information contained in them. The September Zimnisky Report is attached to this affidavit as “Confidential Exhibit 1” and the October Zimnisky Report is “Confidential Exhibit 2”.

34. This more positive view of the future value of diamonds contained in the Zimnisky Reports, for example, aligns with Dominion’s recent sales experience. Dominion sold 99.6% of the diamonds it put to market in September at a price per carat that is significantly higher than the DICAN valuation. As noted in the Croese Affidavit, DDMI’s recent diamond sales have yielded a similar result.

35. There is no reasonable basis for DDMI to assert that applying the DICAN valuation to the Additional Diamond Collateral results in DDMI being under-secured for the amounts owing to it with respect to the Cover Payments. As is set out above, the evidence demonstrates the opposite - DDMI is over-secured.

**(4) DDMI Continues to Hold Diamonds Owing to Dominion**

36. As is stated in my May Affidavit, prior to filing for CCAA protection on April 22, Dominion paid DDMI’s first Cash Call for the month of April (the “**First April Cash Call**”). The First April Cash Call was in amount of \$17,200,000.

37. Following a dispute between DDMI and Dominion as to Dominion’s entitlement to the diamonds owing to Dominion by virtue of its payment of the First April Cash Call, being the diamonds with a production start of April 1, 2020 and up to April 15, 2020, in an order of May 8, 2020, this Court required DDMI to provide those diamonds to Dominion. In that order the Court stated that DDMI “shall forthwith make available for delivery” to Dominion Diamond the diamonds referenced in a confidential exhibit to my May Affidavit “for the period with the Production Start of April 1, 2020 and the Cut-Off of April 15, 2020.”

38. However, DDMI has only provided Dominion with the smaller stones from that April 1 – April 15 production cycle (8 gr and below). The larger stones (10 gr to +6), approximately 7,275 carats, have not been provided to Dominion. Dominion is entitled to receive all diamonds owing to it from the April 1 – April 15 production cycle, not only these smaller stones.

**(5) DDMI's Proposed Process to Monetize the Additional Diamond Collateral**

39. I have reviewed the draft DDMI Sale Proposal that was circulated by counsel to DDMI on Friday October 23. This proposal is markedly different from previous proposals circulated by DDMI prior to the delivery of their court materials. The DDMI Sale Proposal eliminates the parameters previously being negotiated between the parties to ensure Dominion and its stakeholders had some assurance that DDMI would maximize the Additional Diamond Collateral. Specifically, the DDMI Sale Proposal is deficient in that:

- (a) it does not identify the scope of the Additional Diamond Collateral to be sold by DDMI;
- (b) it does not speak to maximizing the value of the Additional Diamond Collateral or establish a procedure which would require it to do so;
- (c) it purports to “empower and authorize” DDMI to sell the Additional Diamond Collateral on any terms and conditions as it may deem or consider appropriate;
- (d) it does not properly establish the basis on which DDMI would act as Dominion’s agent for the purpose of selling the Additional Diamond Collateral; and
- (e) it purports to distribute proceeds to Dominion’s creditors without a proper adjudication of priorities.

40. In addition, the DDMI Sale Proposal does not provide for sufficient reporting to Dominion to allow it and its stakeholders to review, consider and assess the results of any sales undertaken by DDMI of the Additional Diamond Collateral.

41. Dominion has been working with the First Lien Lenders to prepare an alternative process (the “**Revised Monetization Process**”) to the DDMI Sale Proposal served Friday, October 23. The Revised Monetization Process will be a fair and transparent sales process designed to maximize the value received for the Additional Diamond Collateral and provide the appropriate and necessary information to Dominion, the First Lien Lenders and the Monitor, to allow for the

appropriate degree of insight into the monetization process and exchange of information. This Revised Monetization Process will include details as to the monthly reporting that should be provided to Dominion, the Monitor, and the First Lien Lenders.

42. Both Dominion and the First Lien Lenders have provided initial comments on revised sales proposals to DDMI. Dominion is continuing to work with the First Lien Lenders on the Revised Monetization Process.

43. Dominion is prepared to sell the Additional Diamond Collateral and will be prepared to do so on the terms of the Revised Monetization Process, including providing to DDMI the monthly reporting provided for in the Revised Monetization Process.

44. Dominion has all of the infrastructure required to effectively realize value for these assets, including an excellent, secure facility, sorting abilities, quick and secure collection of cash, and the ability for the Court-appointed Monitor to oversee and ensure priority distribution of the cash proceeds to DDMI to reimburse the Cover Payments and associated expenses.

45. However, should this Court conclude that DDMI ought to be permitted to sell the Additional Diamond Collateral, certain safeguards are required to ensure that the sales process is fair and transparent and that the interests of both the Applicants and their other stakeholders are protected.

*More Transparency is Required*

46. If DDMI is permitted to sell the Additional Diamond Collateral, the process must be transparent. DDMI must provide monthly reporting with sufficient information to allow Dominion and its stakeholders, including the First Lien Lenders, to evaluate the pricing, marketing, and results of the sale of the Additional Diamond Collateral by DDMI. The DDMI Sale Proposal provides none of this.

47. As is set out in my May Affidavit, DDMI's lack of consultation with Dominion and failure to properly take into consideration the interests and views of Dominion was a concern to Dominion prior to the commencement of these CCAA proceedings. As Dominion and other CCAA stakeholders' interests will be directly impacted by any sale of the Additional Diamond Collateral, any realization process approved by this Court must ensure that adequate consultation occurs, including by requiring that the process is structured to maximize value, transparent and designed to give Dominion the information it needs to participate effectively.

48. There is no valid reason for DDMI to resist providing the necessary information to the Applicants and their stakeholders, particularly if sufficient safeguards are put in place to ensure protection of any confidential or commercially sensitive details.

49. The information I reviewed with respect to DDMI's proposed realization process, including Exhibit "A" to the Croese Affidavit (DDMI's Proposed Monthly Reporting Form) indicates that more information must be made available to the Applicants and their stakeholders. A transparent process must, among other things:

- (a) require a prescribed level of reporting from DDMI that meets a number of criteria with respect pricing and sorting of diamonds, beyond the level of detail provided for in Exhibit "A" to the Croese Affidavit, in conjunction with copies of all detailed DICAN valuation reports so that the Applicants have some evidence as to a third-party's valuation and can confirm carat recoveries;
- (b) prior to each sales cycle, Dominion should receive a report showing each category of diamond parcels and each individual "special" stone, the most recent achieved price per carat in such category and the proposed average reserve price for such category;
- (c) following each sales cycle, Dominion should receive a report showing the results of the sale for each category of diamond parcels and each individual special stones, the performance versus the reserve pricing and the amount of goods which remain unsold;
- (d) a right to inspect and value the sorted diamond inventory (on notice to DDMI);
- (e) a month-end snapshot of current inventory, carats and estimate value (by production cycle if possible); and
- (f) an ability to audit information provided by DDMI with respect to the sale of diamonds.

50. In addition to these general transparency requirements, there are further points discussed below that the Applicants view as critical to ensuring a fair process. Given that there are ongoing discussions occurring between DDMI and the Applicants at this stage, I have only provided high level comments on certain aspects of what is required of any potential realization process.

*An Auction Process Should be Required*

51. As a general statement, diamond evaluation and pricing is a complicated, dynamic, and often confidential process. There are a number of different ways that diamond producers market and sell their diamonds. As is set out in the Croese Affidavit, this can include through supply contracts, auctions, tenders, and negotiated spot sales.

52. As is also set out in the Croese Affidavit, DDMI's Sale Proposal proposes to use new supply agreements (term contracts) and spot auctions to sell the diamonds.

53. Dominion's auction process involves inviting clients to view the diamonds, holding viewing appointments over 6-8 working days (with approximately 50 appointments), using a reserve price to ensure sufficient value is realized for the diamonds, even if a temporary drop in demand occurs, and using an ascending clock auction process where participating clients bid until there is a winner. In the Applicants' view, this process maximizes realization for Dominion's diamonds.

54. It is my understanding that Rio Tinto sells a large portion of its diamonds from the Diavik Mine through long-term supply contracts, as opposed to an auction process similar to the one described above. The Applicants are concerned that DDMI will continue to use its existing long-term contracts (or similar long-term supply contracts) in its sale of the Additional Diamond Collateral. In Dominion's view, there are two primary issues with the use of long-term supply contracts to sell diamonds:

- (a) In general, long-term supply contracts may result in a lower price (1 to 5%) being paid for diamonds than auction sales due to the commitment to take future volumes without knowing market demand.
- (b) Due to the nature of the ongoing business relationship created by a long-term supply contract, the purchasing counter-parties are often granted certain accommodations that in this case could result in a lower valuing being paid for the Additional Diamond Collateral, including for example cross-subsidizing diamonds from different sources which may be of differing values. This results in a higher price being paid for lower quality diamonds and a lower price being paid for higher quality diamonds.

55. Rio Tinto (DDMI's parent company) is a significant player in the rough diamond market and has access to and sells rough diamonds from its other diamond mines to its customers. Rio Tinto's global marketing and sales strategy may not involve maximizing value for Dominion's share of production from the Diavik Mine. DDMI could sell the Additional Diamond Collateral pursuant to long term supply contracts or through spot sales with existing customers at a discount to then prevailing market rates. DDMI may also be motivated to sell the Additional Diamond Collateral without considering market factors relating to current supply and demand which would achieve the highest pricing for its goods.

56. Dominion has previously requested that DDMI consider profitability when determining its operating costs budgets. However, DDMI will not provide its average diamond pricing information to Dominion or anyone else. As such, there is no way for Dominion to assess the price paid by DDMI's purchasers with respect to its long-term contract sales.

57. In the Applicants' view, an auction process (with a minimum floor price) is the most transparent and effective way to realize value for diamonds. Dominion is prepared to permit DDMI to sell the Additional Diamond Collateral on its behalf through ascending bid auctions with reserve pricing established by DDMI.

58. Selling the Additional Diamond Collateral through an auction at reasonable intervals is the only way to ensure value is maximized. An auction process, which opens the sale up to hundreds of potential buyers (as opposed to a limited number of contract customers), could expose the Additional Diamond Collateral to a higher number of potential purchasers than existing Rio Tinto contract customers. This increased customer exposure creates market tension and can yield a higher price, giving comfort to the Applicants' stakeholders that the best possible price is being achieved for the Additional Diamond Collateral. It is ultimately a fairer and more transparent process.

#### *DDMI's Proposed Fee Is Unreasonable*

59. At paragraph 9(f) of the Croese Affidavit, Mr. Croese states that pursuant to DDMI's proposed DDMI Sale Proposal, DDMI will deduct 2.5% from the net sale proceeds of the Additional Diamond Collateral as a handling, sorting, sales and cash collecting fee. Mr. Croese states that this fee is consistent with fees charged by affiliates of Rio (DDMI's parent company) to arm's length third parties for similar services in their commercial profit making arrangements.

60. In my view, this fee is too high. Many of the costs associated with selling diamonds are fixed and should not change in any material way if DDMI sells the Additional Diamond Collateral. Indeed, as Mr. Croese notes in his affidavit, DDMI already has “existing secure and well-established infrastructure” in place to sell DDMI’s share of the diamonds from the Diavik Mine, and DDMI’s diamond team will handle the Additional Diamond Collateral in the same way it handles its own share of production.

61. If Dominion were to sell the Additional Diamond Collateral, I would expect the fee charged as a handling, sorting, sales and cash collecting fee would be not more than 1%. As stated above, an appropriate alternative solution is to allow Dominion to sell the Additional Diamond Collateral and pay the net proceeds to DDMI on account of the amounts owing for the Cover Payments, particularly given that Dominion anticipates charging a significantly lower fee for these services than DDMI does. As stated earlier, Dominion will be prepared to sell the Additional Diamond Collateral on the terms set out in the Revised Monetization Process and will be able to do so for a 1% fee.

*Other Protections Required to Ensure a Fair Process*

62. The tax issues that arise in various jurisdictions with respect to the sale of diamonds are complex. Any sales process implemented by DDMI will have to give due consideration to the tax requirements of all relevant jurisdictions, including allocation of tax liability and subsequent reassessment, and ensure that the chain of title to the Additional Diamond Collateral is one that effectively maximizes sale proceeds.


63. Similarly, as is set out in my April Affidavit, there are certain royalties payable on Dominion’s share of diamonds from the Diavik Mine. Any sales process implemented by DDMI will have to ensure that liability for these royalties are properly allocated.



**(6) Sealing Order**

64. In light of the commercially sensitive, proprietary and confidential information contained in Confidential Exhibits 1 and 2, the Applicants ask that these exhibits be sealed on the court record. I do not believe that any stakeholder will be prejudiced by this relief.

SWORN BEFORE ME at Calgary, Alberta,  
this 28<sup>th</sup> day of October, 2020.

  
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A Commissioner for Oaths in and for the  
Province of Alberta

Morgan E. Crilly  
Barrister & Solicitor

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KRISTAL KAYE

CONFIDENTIAL EXHIBIT "1"

REDACTED – SUBJECT TO REQUESTED SEALING ORDER

CONFIDENTIAL EXHIBIT "2"

REDACTED – SUBJECT TO REQUESTED SEALING ORDER