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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, DOMINION FINCO INC. and DOMINION
DIAMOND MARKETING CORPORATION**

DOCUMENT **RESPONSE BENCH BRIEF OF THE APPLICANTS
(DDMI'S APPLICATION TO AMEND THE SARIO AND FOR
APPROVAL OF A SALE PROPOSAL)**

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1. OVERVIEW

1. This bench brief is submitted on behalf of Dominion Diamond Mines ULC (“**Dominion Diamond**”) and the other applicants in these proceedings (together, “**Dominion**” or the “**Applicants**”) in response to Diavik Diamond Mines (2012) Inc.’s (“**DDMI**”) application for:

- (a) an amendment to paragraph 16 of 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 diamonds currently held by DDMI (the “**Additional Diamond Collateral**”)) as further and unnecessary security for the “**Cover Payments**” made by DDMI pursuant to the SARIO; and
- (b) an order permitting DDMI to implement its proposed realization process (the “**DDMI Sale Proposal**”) for the sale of the Additional Diamond Collateral.¹

2. Dominion opposes both aspects of DDMI’s application. Dominion’s position on this application is supported by an affidavit of Kristal Kaye, Dominion Diamond’s CFO, sworn October 28, 2020 (the “**October Kaye Affidavit**”).

3. This Court has previously considered DDMI’s position that it ought to hold all of Dominion’s Diavik Mine production during the hearing held on June 19, 2020 (the “**June 19 Hearing**”). At the time, this Court dismissed DDMI’s argument, holding instead that DDMI should only be entitled to hold diamonds up to the DICAN value of the Cover Payments it makes. Nothing has changed since the June 19 Hearing that would warrant this issue being revisited or a different outcome. DDMI’s request for this Court to revisit this issue is simply an attempt by DDMI – once again – to ask for more concessions and more protections than it has already been granted by Dominion and this Court.

4. Contrary to the assertions made in the affidavit of Thomas Croese sworn October 19, 2020 (the “**October Croese Affidavit**”), DDMI is not under-secured by holding the Additional Diamond

¹ Capitalized terms not otherwise defined in this response bench brief have the meanings ascribed to them in October Kaye Affidavit, the Affidavit of Kristal Kaye sworn May 6, 2020 (the “**May Kaye Affidavit**”) or the Affidavit of Kristal Kaye sworn April 21, 2020 (the “**April Kaye Affidavit**”), as the case may be.

Collateral to secure its Cover Payment indebtedness – indeed, the evidence is that DDMI is over-secured.

5. In bringing its application, DDMI fails to acknowledge that, in addition to being over-secured on the diamonds it is holding, it has significant other security in Dominion's assets in addition to the Additional Diamond Collateral, including in Dominion's 40% interest in the Diavik Mine joint venture (the "**Diavik JV**").

6. In the Applicants' submission, on the basis of the actual evidence as to the value of the Additional Diamond Collateral that is before the Court today, and when due consideration is given to the need to balance the interests of all Dominion's stakeholders, there is no reason to disturb the *status quo* and allow DDMI to retain any more of Dominion's diamonds from the Diavik Mine.

7. With respect to DDMI's application for approval of the DDMI Sale Proposal, the DDMI Sale Proposal is neither necessary nor appropriate in the circumstances.

8. Dominion is willing, ready and able to sell the Additional Diamond Collateral (and remit the proceedings to DDMI in accordance with the terms of the Revised Monetization Process, as discussed and defined below) in the ordinary course consistent with the debtor-in-possession framework of the CCAA.

9. However, should DDMI be permitted to monetize the Additional Diamond Collateral, this Court must require that it do so pursuant to a fair and transparent process designed to maximize value and ensure all stakeholder interests are protected. The DDMI Sale Proposal that is currently before the Court does not meet this standard. It is not a fair, transparent, or commercially reasonable proposal.

2. DOMINION'S CONTINUED CONCERNS WITH THE OPERATION OF THE DIAVIK MINE

10. Dominion has long-standing concerns with the way in which DDMI discharges its duties as operator of the Diavik Mine, including concerns related to DDMI's repeated failure to meet the approved budget for the Diavik Mine (the "**Approved JV Budget**") (many of which failures preceded the COVID-19 pandemic and the operational and financial performance of the Diavik Mine generally).²

² October Kaye Affidavit at para. 13

11. Dominion has repeatedly asked DDMI to pursue appropriate cost reductions, including months before the onset of the COVID-19 pandemic.³ As a result of DDMI's failure to address these concerns, Dominion has commenced litigation against DDMI in the Supreme Court of British Columbia to protect its interests in the Diavik JV.⁴

12. Notwithstanding Dominion's commercial and legal rights to influence DDMI away from its current course of action, for unexplained reasons DDMI has continued down the same path.

13. Aside from the fact that DDMI is over-secured, as is discussed below, DDMI's application to retain all of Dominion's production from the Diavik Mine must be viewed in light of the historical and current concerns Dominion has raised with respect to DDMI's operation of the Diavik Mine.

a) DDMI's Cash Calls and Operations are Over Budget

14. Over the past 15 years, in excess of \$3 billion USD has been contributed to the Diavik JV by Dominion Diamond or its predecessors on account of their 40% participation in the Diavik JV.⁵ In the last three years alone, Dominion has paid approximated \$760 million USD with respect to Cash Calls made by DDMI.⁶

15. DDMI's Cash Calls have been and continue to be significantly over the amount provided for in the Approved JV Budget.

16. The quantum of Cash Calls made by DDMI was one of the factors that led to the deterioration of Dominion's financial situation leading up to the commencement of these CCAA proceedings.⁷

17. Since the Applicants filed for CCAA protection in April and up to September 30, 2020, in continuing to operate the Diavik Mine during the ongoing disruptions to the diamond industry sales channels caused by the COVID-19 pandemic, DDMI has made Cash Calls in a total amount of

³ October Kaye Affidavit at para. 14

⁴ October Kaye Affidavit at para. 13

⁵ May Kaye Affidavit at para. 9

⁶ May Kaye Affidavit at para. 9

⁷ October Kaye Affidavit at para. 8

approximately \$83.2 million USD.⁸ The Approved JV Budget for these Cash Calls was \$69.9 million USD.⁹

18. In other words, as set out in more detail at paragraphs 10 and 11 of the October Kaye Affidavit, in the period from April 22, 2020 (when the Applicants filed for CCAA protection) up to September 30, 2020, DDMI's Cash Calls have been approximately \$13.3 million USD (or 18.9%) over budget.¹⁰

19. Further Cash Calls have been made in the month of October to bring the total Cash Calls that DDMI has made in these CCAA proceedings to approximately \$94 million USD, which is \$14.7 million USD over budget.¹¹

i) The JV Cash Account

20. DDMI has been holding a significant amount of excess cash in the account it maintains to fund the operations of the Diavik Mine (the "**JV Cash Account**") (40% of which is funded by Dominion Diamond).¹²

21. Prior to the Applicants' filing for CCAA protection in April 2020, the average month-end balance in the JV Cash Account has been approximately \$5 million CAD. Since the onset of these CCAA proceedings, 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, the cash balance in the JV Cash Account was approximately \$17 million CAD.¹³

22. Despite holding an additional amount of approximately \$12 million CAD in the JV Cash Account as at September 30, in the month of October DDMI again made Cash Calls that exceeded the Approved JV Budget by approximately \$2 million CAD.¹⁴ This defies commercial logic. There is no valid reason for DDMI to maintain an increased balance in the JV Cash Account only to

⁸ October Kaye Affidavit at para. 10

⁹ October Kaye Affidavit at para. 10

¹⁰ October Kaye Affidavit at para. 10

¹¹ October Kaye Affidavit at para. 11

¹² October Kaye Affidavit at para. 15

¹³ October Kaye Affidavit at para. 15

¹⁴ October Kaye Affidavit at para. 15

make Cash Calls that lead to increased DDMI Cover Payments and the associated interest payable on these Cover Payments.¹⁵

ii) Canadian Emergency Wage Subsidy

23. There is also no commercial explanation for DDMI's apparent failure to apply 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.¹⁶

24. 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.¹⁷

25. 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, the CEWS could be a significant benefit to DDMI and provide it 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.¹⁸

3. DDMI'S APPLICATION TO AMEND THE SARIO SHOULD BE DISMISSED

26. DDMI seeks an amendment to paragraph 16 the SARIO to allow DDMI to retain all of the Dominion production from the Diavik Mine, as opposed to just the Additional Diamond Collateral. Paragraph 16 of the SARIO currently states that:

During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court, **provided however, that DDMI, in its capacity as manager under the Diavik JVA, be and is hereby authorized to hold an amount of Dominion Diamond's share of production from the Diavik Mine equal to the total value of the JVA Cover Payments made by DDMI (the "Dominion Products") at the Diavik Production Splitting Facility in Yellowknife, Northwest Territories**

¹⁵ October Kaye Affidavit at para. 15

¹⁶ October Kaye Affidavit at para. 15

¹⁷ October Kaye Affidavit at para. 15

¹⁸ October Kaye Affidavit in para. 15

(the "PSF") and the value of the Dominion Products shall be determined based on royalty valuations performed from time to time at the PSF by the Government of the Northwest Territories. [emphasis added]

27. Dominion's position is that there is no reason for the Court to grant DDMI's request to amend the SARIO. There is no factual or legal imperative for this Court to revisit its conclusion with respect to DDMI's security position from the June 19 Hearing, as reflected in the SARIO. Preserving the *status quo* is the soundest approach in these circumstances.

28. For clarity, the purpose of the sections that follow is only to demonstrate that the position taken by DDMI with respect to the valuation of the Additional Diamond Collateral is incorrect. Dominion is not asking this Court to revise the terms of the SARIO or change the method of valuation used to determine what amount of Dominion's Diavik Mine production DDMI should be permitted to retain to secure the Cover Payments.

a) DDMI is Over-Secured

29. DDMI's primary argument as to why it should be allowed to retain all of the Dominion production from the Diavik Mine is that the DICAN valuation, an independent third-party valuation used by both Dominion and DDMI, undervalues the Additional Diamond Collateral. In the October Croese Affidavit, DDMI claims that the DICAN valuation is not an accurate proxy for the true realizable value of the Additional Diamond Collateral, and DDMI is therefore under-secured.

30. There is only one reliable source of evidence before this Court as to whether the DICAN valuation is an accurate proxy for the value of the Additional Diamond Collateral – the evidence provided by Ms. Kaye in the October Kaye Affidavit. As is set out below, Ms. Kaye's evidence makes clear that DDMI is not under-secured. To the contrary, based on both the current DICAN valuations and pricing achieved by Dominion during recent diamond sales, DDMI is over-secured.

i) The DICAN Valuation

31. As stated in DDMI's own evidence, all diamonds produced by the Diavik Mine are evaluated by Diamonds International Canada Limited (DICAN), a Yellowknife-based company providing independent resource evaluation and diamond valuation services to the government of the Government of the Northwest Territories and the Government of Ontario.¹⁹

¹⁹ Affidavit of Thomas Croese sworn June 16, 2020 (the "June Croese Affidavit") at para. 20

32. DICAN is an incorporated joint venture between the Aboriginal Diamonds Group Ltd and WWW International Diamond Consultants Limited.²⁰ As such, DICAN is the body responsible for conducting the government royalty valuations.²¹ DICAN is independent from both DDMI and Dominion.²²

33. There is no evidence before this Court that DDMI (or any other party) has ever complained about the accuracy of the DICAN valuation. It is clear that the parties have been using DICAN for valuation purposes for many years. Indeed, as is described below, DDMI initially proposed that DICAN be used to value the portion of Dominion's diamonds it was entitled to retain.

ii) Recent Valuation Evidence

34. Dominion does not dispute the assertion in Mr. Croese's evidence that historically the DICAN valuations have been higher than the realized value of the diamonds from the Diavik Mine.²³

35. However, all of the diamonds that Dominion has sold in 2020 (beginning as early as January, prior to both the COVID-19 pandemic and Dominion's CCAA filing) have sold at a higher realized value than the DICAN valuation.²⁴ This includes with respect to DDMI - as noted by Mr. Croese himself in his affidavit, DDMI has also sold diamonds in September and early October of this year in excess of the DICAN valuation.²⁵

36. 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) is as follows:²⁶

²⁰ June Croese Affidavit at para. 20

²¹ June Croese Affidavit at para. 20

²² June Croese Affidavit at para. 20

²³ October Kaye Affidavit at para. 17

²⁴ October Kaye Affidavit at para. 17

²⁵ October Croese Affidavit at para. 13

²⁶ October Kaye Affidavit at para. 19

Production Date	DICAN value (USD\$/carat)	Sales Month	Sale value (USD\$/carat)	\$/carat Variance	Percentage Difference
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%

37. As is stated by Ms. Kaye in her October Affidavit, 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:²⁷ In other words, DDMI is over-secured by approximately \$8.9 million USD, based on the DICAN valuations.²⁸

Production Dates	Carats	DICAN USD\$/ct	Total DICAN Value (USD)
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
Production up to September 30	1,209,310.83	\$76.12	\$92,057,893.47

38. However, these DICAN valuations for 2020 referenced in the above tables undervalue the diamonds because of the point in time at which the valuations were done (at the height of the COVID-19 pandemic).

²⁷ October Kaye Affidavit at para. 20

²⁸ October Kaye Affidavit at para. 21

39. 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 by approximately \$17.5 million USD.²⁹

40. 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 USD. On this metric DDMI is over-secured by \$26.0 million USD.³⁰

41. The amounts listed above do not take into account either the approximately \$12 million CAD excess cash sitting in the JV Cash Account or the significant funds that DDMI could obtain if it applied for CEWS. When all of these factors are considered collectively, the Applicants submit that DDMI is over-secured in an amount that may exceed \$40 million USD.

42. It is critical to note that once again DDMI has not presented any of their own valuation evidence for the Additional Diamond Collateral. Aside from inaccurate and vague evidence about a percentage “discount” that should be applied to the gross value of the Additional Diamond Collateral and factually untenable assertions about the current DICAN values, there is no actual evidence before this Court as to the value of the Additional Diamond Collateral other than the evidence in the October Kaye Affidavit. In fact, Mr. Croese’s affidavit deliberately does not provide any evidence of how much DDMI has sold diamonds for in the past few months, saying only that it has been “in excess of the DICAN valuation.”³¹

43. To the extent DDMI attempts to rely on the stated “book value” of certain diamonds sold by Dominion in September, this is not relevant. The book value ascribed to diamonds is an accounting principle. Recent sale values and the current DICAN values are the most reliable and

²⁹ October Kaye Affidavit at para. 22

³⁰ October Kaye Affidavit at para. 23

³¹ October Croese Affidavit at para. 13

best evidence of what the Additional Diamond Collateral is worth today.³² On this evidence, DDMI is over-secured.

44. In this context, it is notable that DDMI acknowledged in its submissions to this Court at the June 19 Hearing that, as a matter of principle, it would be unfair to allow DDMI to hold all of the diamonds from the Diavik Mine in a situation where it could be demonstrated that DDMI was over-secured.³³ That is precisely the case here.

iii) Further Inaccuracies and Speculation in DDMI's Valuation of the Additional Diamond Collateral

45. 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.

46. This is incorrect. As is described in paragraphs 26-27 of the October Kaye Affidavit, the actual amount of these costs for Dominion's share of production from the Diavik Mine is 11%.³⁴ 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 suggests that the commercially reasonable decision is for Dominion to be the party responsible for selling the Additional Diamond Collateral.³⁵

47. DDMI also relies on certain secondary market reports to make projections as to the future of the diamond market and the impact of the COVID-19 pandemic.

48. Dominion does not disagree that there is uncertainty as to how diamond prices may fluctuate in the coming months and years.

49. 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,

³² October Kaye Affidavit at para. 24

³³ June 19 Hearing Transcript, page 90 at lines 22-27

³⁴ October Kaye Affidavit at para. 27

³⁵ October Kaye Affidavit at para. 28

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 October Croese Affidavit.³⁶ The Zimnisky Reports are attached as Confidential Exhibits to Ms. Kaye’s affidavit.

50. For example, 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.”³⁷

51. This more positive view of the future value of diamonds 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.³⁸ As noted in the October Croese Affidavit, DDMI’s recent diamond sales have yielded a similar result.³⁹

52. It would be unfair to the Applicants and their stakeholders to allow DDMI to rely on these self-selected secondary market projections as to the potential value of the Additional Diamond Collateral when there is much more reliable evidence before the Court on that point.

53. DDMI, a subsidiary of Rio Tinto (which has operated a global diamond mining and marketing business for over 40 years)⁴⁰ cannot simply say “we don’t know how to value the Diavik diamonds so we should get to keep them all” but also that “we will not tell you what we sold diamonds for recently”. That is in effect what DDMI’s argument is on this application. That is a proposition that is both unsupported by the evidence before this Court and unduly prejudicial to the Applicants and their stakeholders.

b) The Additional Diamond Collateral is Just That – Additional Collateral

54. DDMI’s position on this application once again overlooks the fact that DDMI has already been granted significant collateral to secure Dominion’s obligations under the JVA, including the Cover Payments. DDMI is already adequately secured. DDMI has a first-ranking security interest

³⁶ October Kaye Affidavit at para. 30

³⁷ October Kaye Affidavit at para. 31

³⁸ October Kaye Affidavit at para. 34

³⁹ October Croese Affidavit at para. 13

⁴⁰ Affidavit of Thomas Croese dated April 30, 2020 at para. 30

in Dominion's 40% interest in the Diavik JV and its proportionate share of the assets of the Diavik Mine (including mining plants, equipment, etc).⁴¹

55. As stated above, Dominion (or its predecessor) has contributed in excess of \$3 billion to the operation of the Diavik JV.⁴² It stretches credulity for DDMI to now assert the fact that the SISF did not result in an offer to purchase Dominion's interest in the Diavik JV means that the security DDMI holds over Dominion's 40% interest in the Diavik JV has no value.

c) DDMI's "Security Position" has not Changed

56. DDMI hinges its most recent attempt to hold all of Dominion's Diavik Mine production as additional security on the recent developments with respect to the Washington Stalking Horse Bid and the break-down of negotiations between the Stalking Horse Purchasers and the Surety Bond Issuers (as defined in the Affidavit of Brendan Bell made October 23, 2020 (the "**Second October Bell Affidavit**")). These matters do not provide a basis for revisiting this Court's decision on the issues before it at the June 19 Hearing.

57. Since the impasse between the Stalking Horse Purchasers and the Surety Bond Issuers, Dominion has been working diligently with the assistance of its legal counsel and Evercore, and in consultation with the Monitor, to assess all of its available restructuring options.⁴³ As set out in the Second October Bell Affidavit, Dominion continues to engage with its stakeholders, including with the Ad Hoc Group, which had advised it is working towards a going concern solution and a restructuring transaction to effect that outcome.⁴⁴

58. While these recent events had a significant impact on these CCAA proceedings, contrary to the assertion made in DDMI's bench brief, there has not been any radical change in DDMI's security position since the June 19 Hearing. From DDMI's perspective, nothing material has changed:

- (a) it is still unclear whether there will be a purchaser for Dominion's business, including its 40% interest in the Diavik JV;

⁴¹ April Kaye Affidavit at para. 60, 76-77

⁴² May Kaye Affidavit at para. 9

⁴³ Second October Bell Affidavit at para. 10

⁴⁴ Second October Bell Affidavit at para. 24

- (b) contrary to the assertion made by DDMI in its bench brief, there is no basis to conclude that either:
 - i. “the value of Dominion Diamond’s participating interest in the Diavik Mine is less than the aggregate of the obligations in arrears and future obligations including closure and remediation costs” or that;
 - ii. “DDMI will necessarily have to recover the Cover Payment indebtedness from the [Additional Diamond Collateral]”; and
- (c) to the extent that DDMI now seeks to rely on either the royalties and expenses associated with monetizing the Additional Diamond Collateral or the existence of the CCAA Charges as a reason to be entitled to additional security – those are not new issues (and, with respect to the CCAA Charges, are costs borne by all secured creditors in these CCAA proceedings, not just DDMI).

59. What has changed between now and the June 19 Hearing is that both DDMI and Dominion have sold diamonds at amounts significantly higher than the DICAN valuation. We do not know what value was achieved by DDMI at the September and October sales referenced in Mr. Croese’s October Affidavit because DDMI has chosen not to provide that information to the Court. However, as is described above, we do know the values from Dominion’s recent sales and we know that DDMI is over-secured.

60. In this context, DDMI is once again trying to forestall possible outcomes and unfairly seek premature relief ahead of Dominion’s other secured creditors. At best, DDMI is asking for security for the Cover Payments months in advance without any reliable evidence that it is (or will be) under-secured for those Cover Payments. At worst, it is seeking to take an unwarranted and unnecessary benefit for itself at the expense of Dominion’s other stakeholders. As the Applicants’ evidence makes clear, DDMI is already over-secured. There is no reason for this Court to prioritize DDMI’s interests, to the detriment of Dominion and its other stakeholders.

d) This Issue Has Already Been Decided

61. DDMI’s application to hold further security for its Cover Payments is yet another example of DDMI asking for above and beyond what it has previously agreed to and what it has been given by this Court.

62. It is important to remember how the parties have arrived at the current *status quo*. At the hearing before this Court on May 8 (the “**May 8 Hearing**”), DDMI asked this Court for:

- (a) a modification of the stay of proceedings granted in favour of the Applicants to allow DDMI to make Cover Payments; and
- (b) authorization to allow DDMI to “securely store a portion of Dominion’s share of production from the Diavik Mine”.⁴⁵

63. The draft order attached to DDMI’s Bench Brief for the May 8 Hearing directly spoke to how DDMI proposed to value the portion of diamonds it sought to retain. DDMI specifically asked for an order amending the Applicant’s Initial Order (now the SARIO) to state that “the value of the Dominion Diamond’s share of production to held [*sic*] at the Diavik Production Splitting Facility in Yellowknife, Northwest Territories (the “**PSF**”) and the value of the Dominion Diamond’s share of production to be held at the PSF shall be determined based on the royalty valuations performed from time to time at the PSF by the GNWT”.⁴⁶

64. This underlined language is also the language that now appears in paragraph 16 of the SARIO. Irrespective of what DDMI now says, DDMI’s prior position was that the DICAN valuation was a proper way to value the production from the Diavik Mine.

65. However, by the time Dominion was before this Court seeking approval of the Stalking Horse Bid and associated relief at the June 19 Hearing, DDMI’s position had changed.

66. Having previously sought an order that it be entitled to hold diamonds in the amount of the owing Cover Payments (on the basis of the DICAN valuation), at the June 19 Hearing DDMI sought an order allowing it to hold all of Dominion’s share of production from the Diavik Mine. Despite having filed evidence from Mr. Croese speaking to the independence of the DICAN

⁴⁵ Bench Brief of DDMI dated May 6, 2020 at para. 2

⁴⁶ DDMI Bench Brief dated May 6, 2020, Tab 1. It is also of note that DDMI subsequently filed an affidavit from Mr. Croese (dated June 16, 2020) that states as follows at paragraph 20: “All diamonds produced by the Diavik Mine are evaluated...by Diamonds International Canada Limited (DICAN), a Yellowknife-based company providing independent resource evaluation and diamond valuation services to the Government of the Northwest Territories in addition to the government of Ontario...As such, DICAN is the body responsible for conducting the government royalty valuations that have been referred to by parties to these proceedings. DICAN is independent from DDMI.” [Emphasis Added]

valuation, at the June 19 Hearing DDMI reversed its position on this point as well and questioned whether DICAN was a sufficient proxy for the value of the Additional Diamond Collateral.

67. This relief was contested by Dominion. The Monitor also did not support DDMI's request to hold diamonds greater than the amount of the Cover Payments.

68. This Court considered DDMI's request to hold all of the diamonds and refused to grant it, finding instead that the more appropriate and fair path forward was that DDMI was entitled to retain diamonds equal to the amount of its Cover Payments on the basis of the DICAN valuation. As the evidence above makes clear, there is no reason for this Court to now reverse that decision.

4. DOMINION IS ENTITLED TO ALL DIAMONDS FROM THE APRIL 1-15 PRODUCTION CYCLE

69. DDMI continues to hold diamonds owing to Dominion resulting from DDMI's first Cash Call for the month of April (the "**First April Cash Call**"). Dominion paid this First April Cash Call, in an amount of \$17,200,000 USD, prior to filing for CCAA protection.⁴⁷

70. As this Court may recall, at the May 8 Hearing, DDMI disputed 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 its order on the May 8 Hearing, this Court required DDMI to provide those diamonds to Dominion, stating that "DDMI "shall forthwith make available for delivery" to Dominion Diamond the diamonds referenced in a confidential exhibit to the May Kaye Affidavit "for the period with the Production Start of April 1, 2020 and the Cut-Off of April 15, 2020."⁴⁸

71. 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 (the "**Missing April Diamonds**"). Dominion is entitled to receive all diamonds owing to it from the April 1 – April 15 production cycle, including the Missing April Diamonds and not only these smaller stones.⁴⁹ Dominion has paid for the diamonds as these larger stones relate to the April 1 – April 15 production cycle (for which Dominion has paid its Cash Calls). This was the very basis for the Court's May 8 Order.

⁴⁷ October Kaye Affidavit at para. 36

⁴⁸ October Kaye Affidavit at para. 37; Order (Delivery of Diamonds) granted May 8, 2020 at para. 2

⁴⁹ October Kaye Affidavit at para. 38

72. While this is a further example of DDMI seeking to retain more of Dominion's Diavik diamonds than it is entitled to, the fact that DDMI has not produced the Missing April Diamonds to Dominion is a distinct issue from whether DDMI is currently over-secured with respect to the Cover Payments. Dominion has paid for the Missing April Diamonds and DDMI must give them to Dominion immediately.

5. THE DDMI SALE PROPOSAL SHOULD NOT BE APPROVED

73. The other application before this Court by DDMI is for approval of the DDMI Sale Proposal, which was circulated by counsel to DDMI on Friday October 23.

74. At the outset, the Applicants' primary position is that they should be permitted to, and are able and prepared to, sell the Additional Diamond Collateral themselves, including pursuant to the same terms as the proposed process that is being developed by the Applicants and the First Lien Lenders, which is discussed in further detail below. Dominion has all of the infrastructure required to effectively realize value for the Additional Diamond Collateral, including an excellent, secure facility, sorting abilities, and quick and secure collection of cash.⁵⁰ There is no reason for this Court to deprive Dominion of its right to sell its own diamonds in a manner consistent with the debtor-in-possession framework of the CCAA. The Court-appointed Monitor will of course oversee Dominion's actions in this regard as well as the priority distribution of the cash proceeds to DDMI to reimburse it for the Cover Payments and associated expenses.

75. 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 Dominion and its stakeholders are protected. The DDMI Sale Proposal does not contain these safeguards and therefore ought not to be approved by this Court.

a) The DDMI Sale Proposal is Not Commercially Reasonable

76. The DDMI Sale Proposal is markedly different from previous proposals circulated by DDMI prior to the delivery of their court materials. In fact, it 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.⁵¹

⁵⁰ October Kaye Affidavit at para. 44

⁵¹ October Kaye Affidavit at para. 39

77. The DDMI Sale Proposal is a process that effectively gives DDMI free reign to sell Dominion's assets, in any manner DDMI wishes and without any significant details as to the process DDMI will utilize to sell diamonds or the results of the sales being provided to Dominion or their stakeholders. It is a proposal that lacks transparency, clarity, and detail, where DDMI seeks a Court order effectively absolving it from any substantial obligation to act in a commercially reasonable manner.

78. 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.⁵²

79. Critically, 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.⁵³ This lack of transparency is a significant concern to Dominion and the First Lien Lenders. It should also be a significant concern for this Court.

80. Should this Court allow DDMI to sell any of the Additional Diamond Collateral, it must be pursuant to a fair, transparent process that maximizes value and protects the interests of all Dominion's stakeholders – rather than the interests of DDMI. In other words, it must align with the core concepts of the CCAA, including a desire to balance the competing interests of creditors and while ensuring that the realization process is both transparent and fair.

⁵² October Kaye Affidavit at para. 39

⁵³ October Kaye Affidavit at para. 40

81. To that end, Dominion has been working with the First Lien Lenders to prepare an alternative process (the “**Revised Monetization Process**”) to the DDMI Sale Proposal.⁵⁴

82. 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.

83. 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.⁵⁵ This is a critical element and will avoid reporting disputes at a later date.

84. Dominion is prepared to sell the Additional Diamond Collateral and will be prepared to do so on the terms of the proposed Revised Monetization Process, including providing to DDMI the monthly reporting provided for in the Revised Monetization Process.⁵⁶

85. However, should DDMI be permitted to sell the Additional Diamond Collateral, the Applicants submit that the Court must require that DDMI do so pursuant to a fair and transparent process.

i) More Transparency is Required

86. 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.⁵⁷

87. In the circumstances, 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, is transparent, and gives Dominion the information it needs to participate effectively.⁵⁸

⁵⁴ October Kaye Affidavit at para. 41

⁵⁵ October Kaye Affidavit at para. 41

⁵⁶ October Kaye Affidavit at para. 43

⁵⁷ October Kaye Affidavit at para. 47

⁵⁸ October Kaye Affidavit at para. 47

88. Exhibit “A” to the October Croese Affidavit contains DDMI’s Proposed Monthly Reporting Form should it be allowed to monetize Dominion’s diamonds. This proposed form does not provide sufficient information to the Applicants or 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 October 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.⁵⁹

89. There is no valid commercial 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.⁶⁰

⁵⁹ October Kaye Affidavit at para. 49

⁶⁰ October Kaye Affidavit at para. 48

ii) An Auction Process Should be Required

90. There are a number of different ways that diamond producers market and sell their diamonds, including through supply contracts, auctions, tenders, and negotiated spot sales. DDMI's Sale Proposal proposes to use new supply agreements (term contracts) and spot auctions to sell the diamonds.⁶¹

91. In the Applicants' view, an auction process (with a minimum floor price) is the most transparent and effective way to realize value for diamonds.⁶² Dominion's auction process is set out in paragraph 53 of the October Kaye Affidavit.

92. However, Dominion understands that Rio Tinto (DDMI's parent company) sells a large portion of its diamonds from the Diavik Mine through long-term supply contracts, as opposed to an auction process. 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 value 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.⁶³

93. The fact that DDMI's parent company (Rio Tinto) 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 is also a factor weighing against approval of the DDMI Sale Proposal.

⁶¹ October Kaye Affidavit at paras. 51-52; October Croese Affidavit at para. 9(d)

⁶² October Kaye Affidavit at para. 57

⁶³ October Kaye Affidavit at para. 54

94. 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.⁶⁴ This would clearly be of significant detriment to the Applicants and their stakeholders.

95. 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.⁶⁵

96. On the other hand, 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.⁶⁶

97. For the reasons above, selling Additional Diamond Collateral through an auction at reasonable intervals is the only way to ensure value is maximized,⁶⁷ through a fair and transparent process.

iii) DDMI's Proposed Fee is Unreasonable

98. If DDMI is allowed to monetize the Additional Diamond Collateral, it says it will deduct 2.5% from the net sale proceeds as a handling, sorting, sales and cash collecting fee.⁶⁸

⁶⁴ October Kaye Affidavit at para. 55

⁶⁵ October Kaye Affidavit at para. 56

⁶⁶ October Kaye Affidavit at para. 58

⁶⁷ October Kaye Affidavit at para. 58

⁶⁸ October Croese Affidavit at para. 9(f)

99. The Applicants' evidence is that this fee is too high, and the Applicants would expect an appropriate fee for these same services to be not more than 1%. As Ms. Kaye states in her October Affidavit, many of the costs associated with the sale of diamonds are fixed.⁶⁹

100. If Dominion is permitted to sell the Additional Diamond Collateral, it will be able to do so for a 1% fee.⁷⁰ The availability of the additional proceeds from this reduced fee will obviously benefit Dominion's stakeholders. If DDMI is unprepared or unable to monetize the Additional Diamond Collateral for the same fee as Dominion is able to, this is yet another reason why Dominion should be allowed to monetize the diamonds itself.

iv) Other Protections Required to Ensure a Fair Process

101. 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.⁷¹

102. Similarly, as described in the April Kaye 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.⁷²

6. SEALING ORDER

103. The Applicants also seek an order sealing the Confidential Exhibits to the October Kaye Affidavit, which include third-party analysis and information regarding the diamond market that is proprietary, confidential, and commercially sensitive.⁷³ The information contained in the Confidential Exhibits is not publicly available and was provided with the express consent of Zimnisky Analytics on the basis that it would not be disclosed.⁷⁴

⁶⁹ October Kaye Affidavit at para. 60

⁷⁰ October Kaye Affidavit at para. 61

⁷¹ October Kaye Affidavit at para. 62

⁷² October Kaye Affidavit at para. 63

⁷³ October Kaye Affidavit at para. 64

⁷⁴ October Kaye Affidavit at para. 33

104. The salutary effects outweigh any deleterious effects that may arise from granting the proposed sealing order and no stakeholder will be prejudiced by the relief.⁷⁵

7. CONCLUSION

105. On the basis of the evidence and the argument set out above, Dominion respectfully request that this Court dismiss DDMI's application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF OCTOBER, 2020

BLAKE, CASSELS & GRAYDON LLP



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⁷⁵ October Kaye Affidavit at para. 64