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JS
Jan. 27, 2021
Justice Eidsvik

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

DOCUMENT **APPLICATION**
(ASSIGNMENT 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
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NOTICE TO RESPONDENTS:

This application is made against you. You are a respondent. You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: January 27, 2021
Time: 10:00 a.m. MST
Where: Calgary Courts Centre, 601 – 5th Street S.W., Calgary (Virtual Courtroom Via Webex)
Before: The Honourable Justice Eidsvik

Go to the end of this document to see what you can do and when you must do it.

REMEDY CLAIMED OR SOUGHT:

1. The Applicants seek an order substantially in the form attached hereto as **Schedule “A”** (the **“Assignment Order”**), among other things:
 - (a) abridging the time for service of this Application and supporting materials and deeming service to be good and sufficient;
 - (b) assigning the rights and obligations of the Dominion Vendors (as defined below) under the Restricted Assigned Contracts and any Additional Restricted Assigned Contracts (as defined below) that require counterparty consent for assignment to Arctic Canadian Diamond Company Ltd. (the **“Purchaser”**) pursuant to section 11.3 of the *Companies’ Creditors Arrangement Act* (as amended) (the **“CCAA”**), notwithstanding restrictions on assignment contained in such contracts, as part of the sale transaction under the Purchase Agreement (as defined below) which was approved by this Court pursuant to the Approval and Vesting Order granted in this proceeding on December 11, 2020 (the **“Approval and Vesting Order”**); and
 - (c) granting such further and other relief as counsel may request and this Court deems just.

GROUND FOR MAKING THIS APPLICATION:

2. On December 11, 2020, this Court granted the Approval and Vesting Order approving, among other things, (a) the sale transaction (the **“Transaction”**) contemplated by the Asset Purchase Agreement (the **“Purchase Agreement”**) dated

as of December 6, 2020, by and among, *inter alia*, Dominion Diamond Mines ULC, Dominion Diamond Holdings, LLC, Dominion Diamond Delaware Company ULC, Dominion Diamond Marketing Corporation, Dominion Diamond Canada ULC, and Dominion Finco Inc. (collectively, the “**Dominion Vendors**”) and DDJ Capital Management, LLC and Brigade Capital Management, LP (together, the “**Contracting Purchasers**”); and (b) vesting in one or more entities duly designated by the Contracting Purchasers (the “**Designated Purchaser**”) all of the Dominion Vendors’ right, title, and interest in and to the Acquired Assets (as defined in the Approval and Vesting Order), free and clear of all Encumbrances other than certain Permitted Encumbrances specified in the Approval and Vesting Order.

3. The Purchaser is the Contracting Purchasers’ Designated Purchaser for the purpose of the Purchase Agreement.
4. The Acquired Assets (as defined in the Purchase Agreement) to be acquired by the Purchaser as part of the Transaction include the Assigned Contracts (as defined in the Purchase Agreement) set forth on Schedule “A” to the Purchase Agreement and all rights thereunder. Certain of the Assigned Contracts require the applicable counterparty’s consent for the Assigned Contract to be assigned to the Purchaser (collectively, the “**Restricted Assigned Contracts**”).
5. The Dominion Vendors are required under the Purchase Agreement to use commercially reasonable efforts to obtain all consents required to assign the Assigned Contracts to the Purchaser. With respect to the transfer of the Dominion Vendors’ right, title, and interest in and to a Restricted Assigned Contract to the Purchaser, the Purchase Agreement provides that where the required counterparty consent has not been obtained prior to the Closing Date (January 29, 2021):
 - (a) the Dominion Vendors’ rights, benefits, and interests in, to and under such Restricted Assigned Contract may be conveyed to the Purchaser pursuant to an Assignment Order;
 - (b) the Dominion Vendors will use commercially reasonable efforts to obtain an Assignment Order in respect of such Restricted Assigned Contract on or prior to the Closing Date;

- (c) if an Assignment Order is obtained in respect of a Restricted Assigned Contract, the Purchaser shall accept the assignment of such Restricted Assigned Contract on such terms; and
 - (d) to the extent that any Cure Amount is payable with respect to any Restricted Assigned Contract, the Dominion Vendors shall (where such Restricted Assigned Contract is assigned pursuant to an Assignment Order) pay such Cure Amount in accordance with such Assignment Order.
- 6. The delivery of an Assignment Order (where applicable) by the Dominion Vendors to the Purchaser is a condition to the closing of the Transaction.
- 7. Since the granting of the Approval and Vesting Order, the Dominion Vendors have used, and continue to use, commercially reasonable efforts to obtain all consents and approvals required in respect of the Restricted Assigned Contracts. However, despite such efforts, as of the date of this Application there remain Restricted Assigned Contracts for which required consents have not been obtained.
- 8. To ensure that the Transaction closes by the anticipated Closing Date of January 29, 2021, the Dominion Vendors are seeking the Assignment Order pursuant to section 11.3 of the CCAA to order the assignment of the Restricted Assigned Contracts, as listed on Schedule "A" to the proposed Assignment Order, for which required counterparty consent has not been obtained.
- 9. To the extent that there are additional Restricted Assigned Contracts that are not listed on Schedule "A" to the Assignment Order that the Dominion Vendors, or one of them, are party to and in respect of which the required consent thereunder has not been obtained (the "**Additional Restricted Assigned Contracts**"), the proposed Assignment Order provides (a) a mechanism for the provision of notice of the assignment to the Purchaser of any such Additional Restricted Assigned Contracts to the counterparties thereto; (b) a right for such counterparties to object to such assignment; and (c) absent any objection, the assignment to the Purchaser of any such Additional Restricted Assigned Contracts subject to the satisfaction of any applicable Cure Amount.

10. Pursuant to the proposed Assignment Order, all monetary defaults in respect of the Restricted Assigned Contracts (and any Additional Restricted Assigned Contracts), other than those arising by reason only of the insolvency of the Applicants, the initiation of these CCAA proceedings, or the failure to perform a non-monetary obligation under the Restricted Assigned Contract (or Restricted Additional Assigned Contract), will be required to be satisfied by the Dominion Vendors consistent with the terms of the Purchase Agreement and the CCAA.
11. The assignment of the Restricted Assigned Contracts (and any Additional Restricted Assigned Contracts) to the Purchaser is required to facilitate the completion of the Transaction for the benefit of the Applicants and their stakeholders.
12. None of the Restricted Assigned Contracts that are the subject of the proposed Assignment Order are: (a) agreements that have been entered into after the commencement of these CCAA proceedings; (b) eligible financial contracts; or (c) collective agreements.
13. Any Restricted Assigned Contracts under the Purchase agreement that do not require the applicable counterparty's consent for assignment to the Purchaser, or for which required counterparty consents have been obtained, are not subject to the proposed Assignment Order.
14. The Contracting Purchasers will provide to the Purchaser new financing of US \$70 million to fund, among other things, the Purchaser's post-Closing operations at the Ekati Mine and general working capital and, as such, the Purchaser will have the financial ability to perform the obligations under the Restricted Assigned Contracts and any Additional Restricted Assigned Contracts following the closing of the Transaction.
15. Notwithstanding the assignment of the Restricted Assigned Contracts (and any Additional Restricted Assigned Contracts), or any other provisions of the proposed Assignment Order, the Applicants shall continue to be entitled to exercise all of their rights to set-off (or any other contractual, equitable, or statutory rights) and apply any and all post-filing amounts that the Dominion Vendors or any one of them owe or may come to owe to any party, as the case may be, as against any amounts that are owed by such party to the Applicants.

MATERIAL OR EVIDENCE TO BE RELIED ON:

16. The Applicants intend to rely upon the following materials:
 - (a) The pleadings and materials filed in the within proceedings;
 - (b) Affidavit of Kristal Kaye sworn January 20, 2021;
 - (c) Secretarial Affidavit of Leanna McInally sworn January 20, 2021;
 - (d) Eleventh Report of the Monitor, dated December 9, 2020; and
 - (e) Such further and other materials or evidence as counsel may advise and this Honourable Court may permit.

APPLICABLE RULES

17. The *Alberta Rules of Court*, Alta Reg 124/2010.

APPLICABLE ACTS AND REGULATIONS:

18. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended and this Honourable Court's equitable and statutory jurisdiction thereunder; and
19. Such further and other authority as counsel may advise and this Honourable Court may permit.

ANY IRREGULARITY COMPLAINED OF OR OBJECTION RELIED ON:

20. None.

HOW THE APPLICATION IS PROPOSED TO BE HEARD OR CONSIDERED:

21. Via WebEx before the Honourable Madam Justice K.M. Eidsvik.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes.

If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicants a reasonable time before the application is to be heard or considered.

SCHEDULE "A"

CLERK'S STAMP

COURT FILE NUMBER 2001-05630

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HOLDINGS, LLC DOMINION FINCO INC. AND DOMINION
DIAMOND MARKETING CORPORATION**

DOCUMENT

ASSIGNMENT ORDER

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BLAKE, CASSELS & GRAYDON LLP
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Fax No.: 604.631.3309

DATE ON WHICH ORDER WAS PRONOUNCED: January 27, 2021

LOCATION OF HEARING: Calgary

NAME OF JUDGE WHO MADE THIS ORDER: The Hon. Madam Justice K.M.
Eidsvik

UPON THE APPLICATION of Dominion Diamond Mines ULC, Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Dominion Diamond Holdings, LLC, Dominion Finco Inc., Dominion Diamond Marketing Corporation (collectively, the "**Dominion Vendors**") and Washington Diamond Investments, LLC (together with the Dominion Vendors, the "**Applicants**") under section 11.3 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") for an order (the "**Order**"), among other things, assigning the rights and obligations of the Dominion Vendors under and to the Assigned Contracts (as defined below) and any Additional Assigned Contracts (as defined below) to Arctic Canadian Diamond Company Ltd. (the "**Purchaser**"); **AND UPON** having read the Application and the Affidavit of Kristal Kaye, sworn January 20, 2021; **AND UPON** hearing counsel for the Applicants, counsel for the Purchaser, and those other counsel present:

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this Application and time for service of this Application is abridged to that actually given.

DEFINED TERMS

2. All capitalized terms not defined herein shall have the respective meanings ascribed to them in the Approval and Vesting Order granted by this Court in these proceedings on December 11, 2020 (the "**Approval and Vesting Order**").

ASSIGNMENT OF THE ASSIGNED CONTRACTS

3. Upon the delivery by the Monitor of the Monitor's Certificate (the "**Effective Date**") and notwithstanding any assignment, conveyance, transfer, change of control or similar provision restricting the assignment or requiring the consent of any person to an assignment, conveyance, transfer or a change of control contained therein (each, an "**Anti-Assignment Provision**"), all of the rights and obligations of the Dominion Vendors under and to the agreements listed in **Schedule "A"** to this Order (collectively, the "**Assigned Contracts**") shall be assigned, conveyed and transferred to, and assumed by, the Purchaser pursuant to section 11.3 of the CCAA.

4. The assignment of the Assigned Contracts is hereby declared valid and binding upon all of the counterparties to the Assigned Contracts notwithstanding any restriction, condition or prohibition contained in any such Assigned Contracts relating to the assignment thereof, including any provision requiring the consent of any party to the assignment.
5. The assignment of the Assigned Contracts shall be subject to the provisions of the Approval and Vesting Order directing that the Dominion Vendors' rights, title and interests in the Assigned Contracts shall vest absolutely in the Purchaser free and clear of all Encumbrances other than the Permitted Encumbrances in accordance with the provisions of the Approval and Vesting Order.
6. Following the assignment of any of the Assigned Contracts to the Purchaser, all such Assigned Contracts shall remain in full force and effect, and the Purchaser shall be entitled to all of the rights, benefits and entitlements of the Dominion Vendors under such Assigned Contracts. Following the Effective Date, no counterparty under any of the Assigned Contracts, nor any other person, upon the assignment, conveyance and transfer to, and assumption by, the Purchaser of any of the Assigned Contracts hereunder shall accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right, entitlement or remedy (including any right of set-off), make or pursue any demand, claim, action or suit or exercise any right or remedy under such Assigned Contracts against the Purchaser, by reason of:
 - (a) any circumstance that existed or event that occurred on or prior to the Effective Date that would have entitled such counterparty to the Assigned Contract to enforce those rights or remedies or caused an automatic termination to occur, including any monetary defaults or defaults or events of default arising as a result of the insolvency of any Dominion Vendor or the cessation of the Dominion Vendors' or their affiliates' normal course business operations;
 - (b) the Dominion Vendors having sought or obtained relief under the CCAA;
 - (c) releases, discharges, cancellations, transactions or other steps taken or effected pursuant to the Purchase Agreement and/or the Transaction that are the subject of the Approval and Vesting Order, the provisions of this Order or any other Order of the Court in these proceedings;

- (d) any change of control of the Dominion Vendors or their affiliates arising from the implementation of the Transaction, or any Anti-Assignment Provision in an Assigned Contract and, for greater certainty, the Transaction and its implementation shall be deemed not to constitute a change in ownership or change in control under any Assigned Contract; or
- (e) any failure by the Dominion Vendors to perform a non-monetary obligation under any of the Assigned Contracts;

and all such counterparties and persons shall be forever barred and estopped from taking such action. For greater certainty:

- (a) nothing herein shall limit or exempt the Purchaser in respect of obligations accruing, arising or continuing after the Closing of the Transaction under the Assigned Contracts other than in respects of items (a) to (e) above; and
 - (b) any Permitted Encumbrances shall continue to have the priority and entitlement attaching thereto notwithstanding this Order.
7. All monetary defaults in relation to the Assigned Contracts existing prior to the Closing of the Transaction, if any, other than those arising by reason only of the insolvency of the Dominion Vendors, the commencement of these CCAA proceedings, or the failure to perform a non-monetary obligation under any of the Assigned Contracts, shall be paid by the Dominion Vendors to the applicable counterparty in such amount as is set forth in Schedule A to this Order under the heading "*Cure Amount*" and any such Cure Amount shall be paid within 30 days from the delivery by the Monitor of the Monitor's Certificate and for certainty the payment of the Cure Amount shall not be the responsibility of the Purchaser.
8. On the Effective Date of the assignment, all counterparties to the Assigned Contracts shall be deemed to have waived any and all defaults then existing or previously committed by the Dominion Vendors or caused by the Dominion Vendors, directly or indirectly, or non-compliance with any covenant, positive or negative pledge, warranty, representation, term, provision, condition or obligation, express or implied, in any Assigned Contract arising from the commencement or existence of these CCAA proceedings (including any deferral or interruption of payments and any incurrence of or creation of charges arising from or

relating to any such proceeding), the insolvency of the Dominion Vendors or the entering into the Purchase Agreement or any other agreement or document in connection with the Transaction, and the completion of the Transaction, and any and all notices of default or termination and demands for payment under or in connection with any of the Assigned Contracts shall be deemed to have been rescinded and of no further force nor effect.

9. Immediately following the assignment and transfer of the Assigned Contracts, no counterparty under any of the Assigned Contracts shall have any claim whatsoever against the Dominion Vendors or the Monitor other than with respect to the Cure Amount.
10. Notwithstanding any other provision of this Order, if the Cure Amount payable with respect to a Restricted Assigned Contract is not paid as required by this Order then such Assigned Contract shall not be assigned, conveyed or transferred to the Purchaser pursuant to this Order.
11. The Dominion Vendors shall serve a copy of this Order on the counterparties to the Assigned Contracts.

ADDITIONAL ASSIGNED CONTRACTS

12. Following the date of this Order, including, for greater certainty, following the Closing of the Transaction, the Dominion Vendors are authorized to provide to the counterparties to any additional Assigned Contracts not listed on Schedule "A" to this Order that are to be assigned to the Purchaser pursuant to the Purchase Agreement and in respect of which the counterparty's consent is required thereunder but not obtained (each an "**Additional Assigned Contract**") a notice of the assignment to and assumption by the Purchaser of such Additional Assigned Contract and the applicable Cure Amount with respect to such Additional Assigned Contract (each an "**Assignment Notice**").
13. Any counterparty to an Additional Assigned Contract who receives an Assignment Notice shall have seven (7) days from the date of such Assignment Notice (the "**Objection Deadline**") to provide notice in writing to the Monitor, the Dominion Vendors, and the Purchaser of any objection it has to such assignment to and assumption by the Purchaser of the applicable Additional Assigned Contract.

14. If the Monitor, the Dominion Vendors, and the Purchaser do not receive any notice of objection to the assignment to and assumption by the Purchaser of an Additional Assigned Contract by the Objection Deadline, the Dominion Vendors shall be authorized to assign, convey and transfer such Additional Assigned Contract to the Purchaser subject to paragraphs 3 to 11, inclusive, of this Order, which shall apply *mutatis mutandis* to the assignment and assumption of any Additional Assigned Contracts without any further Court order; provided that the "*Cure Amount*" applicable to such Additional Assigned Contracts shall be the amount, if any, required to be paid to remedy all of the Dominion Vendors' monetary defaults under such Additional Assigned Contracts existing prior to the Closing of the Transaction, if any, other than those defaults arising by reason only of the insolvency of the Dominion Vendors, the commencement of these CCAA proceedings, or the failure to perform a non-monetary obligation under any of the Additional Assigned Contracts (or such other amounts as may be agreed by the Purchaser and the counterparty to such Additional Assigned Contracts).
15. The applicable date of assignment and assumption of any Additional Assigned Contracts shall be the later of the Objection Deadline or delivery of the Monitor's Certificate.
16. If notice of an objection to the assignment to and assumption by the Purchaser of an Additional Assigned Contract is received by the Monitor, the Dominion Vendors, and the Purchaser from the counterparty to such Additional Assigned Contracts by the Objection Deadline, the Dominion Vendors are authorized to bring an application before this Court for the resolution of such objection.

MISCELLANEOUS MATTERS

17. Notwithstanding:
 - (a) the pendency of these proceedings and any declaration of insolvency made herein;
 - (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), in respect of the Applicants, and any bankruptcy order issued pursuant to any such applications;
 - (c) any assignment in bankruptcy made in respect of the Applicants; and

(d) the provision of any federal or provincial statute;

the assignment of the Assigned Contracts and any Additional Assigned Contracts to the Purchaser in accordance with this Order and the Purchase Agreement shall be binding on any trustees in bankruptcy that may be appointed in respect of the Applicants and shall not be void or voidable by creditors of the Applicants, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. Notwithstanding any other provision of this Order, the Applicants shall continue to be entitled to exercise all of their rights to set-off (or any other contractual, equitable, or statutory rights) and apply any and all post-filing amounts which the Applicant owes or may come to owe to any party, as the case may be, as against any amounts that are owed by such party to the Applicant.
19. The Applicants, the Monitor and the Purchaser shall be at liberty to apply for further advice, assistance and direction as may be necessary or desirable in order to give full force and effect to the terms of this Order, including without limitation, as necessary, to effect the assignment and transfer of the Assigned Contracts and any Additional Assigned Contracts (including any transfer of title registrations in respect of such Assigned Contracts and any Additional Assigned Contracts), the interpretation of this Order or the implementation thereof, and for any further order that may be required, on notice to any party likely to be affected by the order sought or on such notice as this Court requires.
20. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to

assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

21. Service of this Order shall be deemed good and sufficient by serving the same in accordance with the procedures in the CaseLines Service Order granted May 29, 2020 in these proceedings.

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"
(ASSIGNED CONTRACTS)

#	Agreement Counterparty	Agreement Description	Agreement Date	Cure Amount
1.	1012986 B.C. Ltd	Core Zone Joint Venture Agreement	17 April 1997	\$0
2.	1012986 B.C. Ltd	Reclamation Liability Agreement	28 October 2019	\$0
3.	1012986 B.C. Ltd	Sales Representation Agreement	21 December 2002	\$0
4.	NorthwesTel	Tariffed Services Agreement – Enterprise Performance	31 May 2017	\$0
5.	Livingston International Inc.	Corporate Brokerage Agreement	1 January 2019	\$0
6.	Bradley Air Services Limited (D/B/A/ First Air)	Agreement for the Supply of Aircraft Services	13 July 2015	\$0
7.	Caterpillar Financial Services	Financing Lease Agreement	19 January 2018	\$0
8.	Somerset Equipment Finance Ltd	Capital Lease Agreement	18 June 2018	\$0