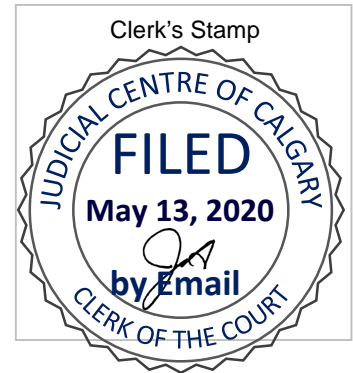


COURT FILE NUMBER 2001-05630
COURT COURT OF QUEEN'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE CALGARY
APPLICANTS IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c. C-36, AS AMENDED



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

\$50
JS
May 15, 2020
9:45 AM
Justice Eidsvik

DOCUMENT **APPLICATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto, ON M5K 0A1
Solicitors: John Salmas / Mark Freake
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File Number:

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: **May 15, 2020**
Time: **9:45 a.m.**
Where: **Calgary, Alberta (Virtual Courtroom Via Webex)**
Before Whom: **The Honourable Justice Eidsvik**

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

Remedy claimed or sought:

1. Wilmington Trust, National Association, in its capacity as Trustee, Notes Collateral Agent, Paying Agent, Transfer Agent and Registrar (collectively, the “**Trustee**”) under an indenture dated October 23, 2017 (as amended, supplemented or restated, the “**Trust Indenture**”), pursuant to which Northwest Acquisitions ULC (as predecessor-in-interest to Dominion Diamond Mines ULC), as Issuer (“**DDM**”), and Dominion Finco Inc., as Co-Issuer (“**Finco**”, and together with DDM, the “**Issuers**”), issued certain 7.125% Senior Secured Second Lien Notes Due 2022 (the “**Notes**”), seeks an Order:
 - a. if necessary, abridging the time for service and validating the service of this Application such that this Application is properly returnable on May 15, 2020; and
 - b. authorizing and directing DDM, Dominion Diamond Delaware Company, LLC, Dominion Diamond Canada ULC, Washington Diamond Investments, LLC, Dominion Diamond Holdings, LLC, and Finco (collectively, the “**Applicants**”) to pay and reimburse the reasonable post-filing fees and expenses of the Trustee and its counsel, Dentons Canada LLP and Dentons US LLP (together, “**Dentons**”), in connection with and from the date of commencement of these proceedings.
2. Such further and other relief as counsel may advise and this Honourable Court deems just.

Grounds for making this application:**Capitalized terms**

3. Capitalized terms used but not otherwise defined in this Application have the meanings given to them in the affidavit of Kristal Kaye sworn April 21, 2020 in these proceedings (the “**Kaye April 21 Affidavit**”), or in the Trust Indenture, as applicable.

Background

4. The Applicants sought and were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the order of this Honourable Court dated April 22, 2020.
5. On May 1, 2020, on the application of the Applicants, this Honourable Court granted the Amended and Restated Initial Order.
6. As set out in the Kaye April 21 Affidavit, filed in support of the Initial Order, the Applicants' two primary senior secured debt obligations are in respect of the (i) Revolving Facility, extended pursuant to the Credit Agreement dated November 1, 2017, and (ii) the Notes issued pursuant to the Trust Indenture.
7. As of April 20, 2020, the US\$150,000,000 available under the Revolving Facility was fully utilized and the accrued interest on the portion of the Revolving Facility drawn in cash is asserted to be approximately US\$178,651.64.
8. As of April 20, 2020, the amounts owing to the holders of Notes (the "**Noteholders**") pursuant to the Trust Indenture in respect of the Notes, with interest, was approximately US\$556,328,125.
9. To secure the obligations under the Credit Agreement, the Applicants granted the Credit Agreement Security. To secure the obligations under the Trust Indenture, the Applicants granted the Trust Indenture Security. The Trust Indenture Security is the same security package as the Credit Agreement Security, except that, pursuant to the Intercreditor Agreement, the Trust Indenture Security ranks in a second lien position behind the Credit Agreement Security.

The Trustee's Appointment, Roles and Duties

10. As noted above, the Trustee was appointed pursuant to the terms of the Trust Indenture to act in a number of capacities/potential capacities, namely as Trustee, Notes Collateral Agent, Paying Agent, Transfer Agent and Registrar under the Trust Indenture.

11. The Trustee acts as a fiduciary for, and in the best interests of, all Noteholders, including those not otherwise represented in the CCAA proceedings. The Trustee is contractually obligated to be involved in these CCAA proceedings.

12. The Trustee derives its rights and powers from the Trust Indenture. Section 7.1 of the Trust Indenture provides that, upon the occurrence of an Event of Default, “the Trustee shall exercise such rights and powers vested in it by [the Trust Indenture] and, in the exercise of its power, use the degree of care and skill of a prudent man in the conduct of his own affairs.” Such rights and powers include, among others:

- a. Section 6.2: declaring all due and outstanding notes payable immediately;
- b. Section 6.3: proceeding in its own name to protect and enforce its rights and the rights of Noteholders “by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce such rights”;
- c. Section 6.5: taking directions from the Noteholders “of a majority in the aggregate amount of the then outstanding Notes” regarding the remedies available to the Trustee, “*provided* that:
 - i. the Trustee may refuse to follow any direction that conflicts with law, its fiduciary duties, [the Trust Indenture] or that the Trustee determines in good faith may be unduly prejudicial to the rights of [Noteholders] not joining in the giving of such direction;
 - ii. the Trustee may refuse to follow any direction that the Trustee determines is unduly prejudicial to the rights of other [Noteholders] or would involve the Trustee in personal liability; and
 - iii. the Trustee may take any other action deemed proper by the Trustee that is not inconsistent with such direction”;

- d. Section 6.8: receiving payment, for the benefit of the Noteholders, from the Issuers in respect of payments of amounts due under the Notes; and
- e. Section 6.9: filing “proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the compensation, expenses, disbursements and advances of the Trustee, its agents and counsel...) and the [Noteholders] allowed in any judicial proceedings relative to the Issuers or any Guarantor, their creditors or their property...”.

The AHG Application

- 13. On May 6, 2020, a group of Ad Hoc Group of Bondholders (“**AHG**”) served and filed an application seeking payment of the fees of the advisors to the AHG (the “**AHG Application**”). The AHG had sought for the AHG Application to be heard on May 8, 2020. The AHG Application is currently returnable on May 15, 2020.

Payment of the Trustee’s reasonable fees

- 14. In accordance with the provisions of the Trust Indenture and the Intercreditor Agreement, the Trustee seeks to have its reasonable post-filing fees and expenses, including those of Dentons, in connection with these CCAA proceedings paid by the Applicants pursuant to its contractual rights under the Trust Indenture and the Intercreditor Agreement.
- 15. Section 7.2(a) and (c) of the Trust Indenture expressly provide that the Trustee has a right to consult with legal counsel or other professional advisors of its choosing as to any matter relating to the Trust Indenture and the Trust Indenture Security. Section 7.2(c) expressly provides that such consultation shall be “at the expense of the Issuers, *provided* all fees and expenses are reasonable and documented”.
- 16. Section 7.6 of the Trust Indenture provides as follows in respect of the Trustee’s compensation and indemnity in connection with the Trust Indenture and the Trust Indenture Security:

7.6 Compensation and Indemnity

(a) The Issuers shall pay to the Trustee and each Agent from time to time such fees, expenses and compensation as shall be agreed in writing for its services hereunder. The Trustee's compensation shall not be limited by any law on compensation of a trustee of an express trust. The Issuers shall reimburse the Trustee and each Agent upon request for all reasonable expenses incurred or made by it, including costs of collection, in addition to the compensation for its services. Such expenses shall include the compensation and reasonable expenses of the Trustee's and each Agent's agents and counsel.

[...]

(c) To secure the Issuers' and the Guarantors' payment obligations in this Section 7.6, the Trustee shall have a lien prior to the Notes on all money or property held or collected by the Trustee, in its capacity as Trustee, except money or property held in trust to pay principal of, premium, if any, and interest on particular Notes.

(d) When the Trustee or any Agent incurs expenses after the occurrence of a Default specified in Section 6.1(a)(ix) or (x) with respect to any Issuer, any Guarantor, or any Restricted Subsidiary, the expenses are intended to constitute expenses of administration under Bankruptcy Law and in any Insolvency or Liquidation Proceeding. [Emphasis added.]

17. These CCAA proceedings constitute an Event of Default (as such term is defined in the Trust Indenture) pursuant to the Trust Indenture. The Trustee's expenses incurred in these CCAA proceedings are expenses incurred after the occurrence of an Event of Default, as specified in Section 6.1(a)(x) of the Trust Indenture.
18. The Trustee has engaged Dentons to act as its counsel in the within CCAA proceedings.
19. To date, the Applicants have not agreed to pay the fees of the Trustee and its counsel.
20. The Trustee does not have access to independent funding to fund its participation in these CCAA proceedings. The Trust Indenture does not establish any sort of escrow funds from the bond issuance to be available for use by the Trustee. The AHG is seeking its own fee and expense application and, as such, the Noteholders will not be funding the Trustee.
21. The Trust Indenture further includes the following provisions which are relevant to this Application:

- a. Section 6.6: a Noteholder “may not use this Indenture to prejudice the rights of another [Noteholder] or to obtain a preference or priority over another [Noteholder]”:
 - b. Section 6:10: subject to the Intercreditor Agreement, any money or property collected pursuant Article 6 of the Trust Indenture, or from the enforcement of the Trust Indenture Security, shall be paid “**First** to the Trustee, the Notes Collateral Agent and their agents... and attorneys for amounts due under Section 7.6, including payment of all compensation, expenses and liabilities incurred, and all advances made, by the Trustee, the Agents and the Notes Collateral Agent and the costs and expenses of collection”;
 - c. Section 7.11: “[t]he rights, privileges, protections, immunities and benefits given to the Trustee in this Indenture, including, without limitation, its right to be indemnified and/or secured, are extended to, and shall be enforceable by the Paying Agent(s) (other than the Issuer, the Co-Issuer or any Affiliate of the Issuers acting as Paying Agent), the Transfer Agent(s), any Authenticating Agent, the Notes Collateral Agent and the Registrar as if the Paying Agents(s), the Transfer Agent(s), the Authenticating Agent, the Notes Collateral Agent and the Registrar were named as the Trustee herein.”
22. Payment of the Trustee’s reasonable fees and expenses is therefore lawful, fair and appropriate as it:
- a. is in accordance with and not otherwise in violation of the express terms of the Trust Indenture and Intercreditor Agreement; and
 - b. would ensure the necessary participation of the Trustee and all Noteholders not otherwise represented in these CCAA proceedings.
23. Moreover, with respect to the treatment of the Noteholders under the Trust Indenture Security in relation to that of the senior lenders under the Credit Agreement Security (the “**Senior Lenders**”), the Section 6.03 of the Intercreditor Agreement states:

“... to the extent that the [Senior Lenders] are granted adequate protection in the form of payments in the amount of current post-petition fees and expenses, and/or other cash payments [in relation to an insolvency proceeding, which would include these CCAA proceedings], then the [Trustee], for themselves and on behalf of the [Noteholders] under [the Trust Indenture], shall not be prohibited from seeking adequate protection in the form of payments in the amount of current post-petition incurred fees and expenses, and/or other cash payments (as applicable), subject to the right of the [Senior Lenders] to object to the reasonableness of the amounts of fees and expenses or other cash payments so sought by the [Noteholders].”

24. The Applicants’ disclosure to its stakeholders reveals sufficient available cash in order to fund the Trustee’s fees and expenses and those of its counsel. As far as the Trustee is aware, no liquidation analysis of the Applicants has been undertaken. As such, there is no evidence anywhere in the Court record that the Notes are to be considered “out of the money”.

The AHG Application

25. On May 6, 2020, AHG filed the AHG Application which seeks payment of fees and costs. The Trustee understands that the AHG Application does not seek to obviate the Trustee’s request for fees and costs sought by this Application.

26. The Trust Indenture grants the Trustee’s fees and expenses contractual priority on amounts recovered prior to distributions to Noteholders.

27. The funding of the Trustee will promote the fairness and integrity of this process.

28. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

29. All pleadings and proceedings filed in the within action.

30. The Affidavit of Mark Freake sworn May 12, 2020.

31. The Affidavit of Kristal Kaye sworn April 21, 2020.

32. The Affidavit(s) of Service, if any, to be filed.

33. The inherent jurisdiction of this Honourable Court to control its own process.

34. Such further and other material as counsel may advise and this Honourable Court may permit, or as soon thereafter as counsel may be heard.

Applicable rules:

35. The *Alberta Rules of Court*, AR 124/2010.

36. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

37. The CCAA.

38. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

39. None.

How the application is proposed to be heard or considered:

40. Oral submission by counsel at an application to be heard via Webex before the Honourable Madam Justice K.M. Eidsvik at 9:45 a.m. on May 15, 2020.

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 applicant(s) a reasonable time before the application is to be heard or considered.