

COURT FILE NUMBER 2001-05630
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



APPLICANTS IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

JS
June 19, 2020
Justice Eidsvik

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

DOCUMENT **BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**

ADDRESS FOR SERVICE AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT
McCarthy Tétrault LLP
4000, 421 – 7th Avenue SW
Calgary, AB T2P 4K9
Attention: Sean Collins / Walker W. MacLeod / Sean Kelly /
Pantelis Kyriakakis
Tel: 403-260-3531 / 3710 / 3659 / 3536
Fax: 403-260-3501
Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca /
smkelley@mccarthy.ca / pkyriakakis@mccarthy.ca

BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.

**IN RESPONSE TO THE STAY EXTENSION, SISP APPROVAL, STALKING HORSE
APPROVAL, INTERIM FINANCING APPROVAL, AND RELATED APPLICATIONS
TO BE HEARD BY
THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK**

June 19, 2020 at 9:15 a.m.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	2
A. SARIO Amendments.....	2
B. Stalking Horse Proposal.....	5
C. Litigation.....	6
D. Stapled Interim Financing Term Sheet	7
E. DDMI Not a Purchaser	8
III. RELIEF REQUESTED	10

I. INTRODUCTION

1. This Brief of Argument is submitted by DDMI in response to the Bench Brief submitted by Dominion on June 12, 2020 (the “**Dominion Brief**”). Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Dominion Brief.

2. Dominion commenced the within proceedings with no intention of paying post-filing JVA obligations to DDMI. It did not seek interim financing to permit it to pay such obligations, which are now estimated to amount to \$105.5 million up to and including October 31, 2020. Although it was afforded a rather unusual mid-hearing adjournment of its own application, it did not use the additional time to address its post-filing financing issues. Rather, part of what it accomplished was to prepare and initiate an action in the British Columbia Supreme Court (notice of which was provided late in the day on June 16) against DDMI over alleged mismanagement of the Diavik Mine. Dominion must believe it has a very strong case to have sued despite its admitted administrative insolvency, yet its lengthy affidavit in support of these proceedings makes not the slightest mention of management concerns generally or this specific litigation “asset”.

3. DDMI’s position has been consistent since this case began. The failure of Dominion to pay its post-filing JVA obligations to DDMI is tantamount to DDMI being forced to supply post-filing goods and services without being paid for same. This Honourable Court has accepted DDMI’s construction that it is akin to an interim lender.

4. DDMI’s sole interest in the within proceedings is ensuring that it recovers the Cover Payment indebtedness and that it has a solvent counterparty that it is able to perform its obligations under the JVA, including the payment of costs required for the imminent closure of the mine. Dominion presumably knew the obligations it would have to perform under the JVA and the applicable environmental regulatory regime when it purchased the Diavik Mine. Dominion’s liquidity problems arise not because of its obligations under the JVA, but because it is over-leveraged.

5. Rather than seeking interim financing in an amount sufficient to pay its post-filing obligations to DDMI, Dominion obfuscates matters by alleging that DDMI’s statement that it will not purchase the Ekati Mine or the Diavik Mine are part of a plan to advance its own collateral purposes. Although it is currently indebted to DDMI in the amount of \$51.2 million (plus interest

costs and costs) and such debt is undisputed, it advances litigation against DDMI for the fashion by which it operates the Diavik Mine. DDMI is an involuntary creditor and is seeking to protect its position in relation to its insolvent counterparty.

6. DDMI's proposed amendments to the Second Amended and Restated Initial Order (the "**SARIO**") are attached as Schedule "**A**". The lengthy and detailed submissions of Dominion are disproportionate to the matters in issue. DDMI advised Dominion *prior* to Dominion filing its Brief that it had accepted all of the Monitor's proposed changes to the SISP, save a clarifying issue in paragraph 38.¹ DDMI seeks two modifications to the SARIO relating to (a) the holding of the Dominion Products and (b) the ranking of the Cover Payment security. DDMI's SARIO revisions are important to the myriad of stakeholders in this case who do not hold an equity position in Dominion. Those stakeholders include the 1124 employees and contractors of the Diavik Mine, the Diavik Mine trade creditors, local First Nations, the GNWT and the environment. The continued prudent and professional operation of the Diavik Mine, in accordance with the JVA, is of critical importance to these persons and is placed at risk in circumstances DDMI does not have adequate assurance that it will be able to recover the Cover Payments owing to it.

II. ARGUMENT

A. SARIO Amendments

7. Dominion's approach to its own application is curious. The main issue for determination is whether the Stalking Horse Bid should be approved. The Stalking Horse Bid is intertwined with the SISP and the DIP. The application was initially commenced on May 29, 2020 and, in the midst of its continuation, adjourned at Dominion's own request. In addition to initiating litigation proceedings against DDMI, Dominion has utilized the intervening period to make "mid hearing" amendments to its own application. While it continues to pursue a transaction with Washington, the amendments include transitioning a highly conditional Stalking Horse Term Sheet to an equally conditional Stalking Horse APA.

¹ Further review of the SISP has disclosed an issue in paragraph 41(c) relating to access to Rio Tinto plc. DDMI will seek clarification from Dominion on the point (which provision was a belated add on to the SISP immediately prior to the May 29, 2020 application).

8. More curious is the fact that Dominion has directed significant focus at a party (DDMI) who does not oppose the application in the main. This Honourable Court has identified a number of serious issues with the Stalking Horse Term Sheet, including the lack of transaction certainty and the risk that the bid would operate to set a “ceiling” price. As the application moves to its third-day, Dominion continues to have the burden of addressing whether its fresh evidence is sufficient to satisfy the earlier concerns by this Honourable Court. It is (and remains) unclear how the fact that a dispute between Dominion and DDMI relating to the operation of the Diavik Mine is relevant to, by way of example, the nature of the financing conditions in the Stalking Horse APA. Those remain Dominion’s issues to address.

9. From the outset of this case DDMI’s concern has been, and continues to be, ensuring that it recovers the post-filing Cover Payments that it is being forced to make on account of Dominion’s default. Notwithstanding its significant process concerns, DDMI has engaged with Dominion and the Monitor on the SISP and the SARIO. Dominion’s suggestion that it supports the middle ground taken by the Monitor in relation to the SISP (made at paragraph 29 of its Bench Brief) is not supported by the evidentiary record. By way of example, the Monitor’s version of the SISP includes a provision (at paragraph 22(c)) that Phase 2 Qualified Bids that include the Diavik Interest include cash payment of Cover Payment indebtedness. Such a provision is required by the CCAA; the Cover Payment indebtedness is a monetary default under the JVA and the JVA cannot be assigned absent payment of the outstanding Cover Payments and other cure costs. Dominion has offered no explanation for deletion of a portion of the SISP that is required by operation of the statute. DDMI has accepted the comments of the Monitor on the SISP and, subject to clarification noted above, supports the version of the SISP as proposed by the Monitor.

10. In relation to the SARIO, and in an effort to advance the compromise advanced by the Monitor, DDMI has accepted the Monitor’s suggestion that DDMI will need to apply to court to seek leave to lift the stay to enforce its remedies. DDMI offers two changes to the SARIO. Both of the changes are driven by the fact that Dominion has made the decision not to pay post-filing obligations, DDMI has been forced to extend what amounts to (and has been recognized as) interim financing to Dominion, and Washington’s proposed Stalking Horse Bid purports to allow it to assume the Cover Payment obligations and not pay the same in cash on closing. DDMI’s total advances over the course of the case are projected to be \$105.5 million, much of which will be incurred whether or not the mine is producing diamonds. Do Dominion and the Washington Group

expect DDMI to continue to involuntarily finance them post-closing? To use Dominion's words, this must stop.

11. DDMI maintains its requests that the entirety of the Dominion Products be held at the PSF. At the outset, Dominion's continued assertion that this amounts to an amendment to the JVA is without merit. Dominion's submission disregards the actual language of the JVA. Article 9.4(c) of the JVA permits the non-defaulting Participant to assert common law and statutory remedies to recover Cover Payment indebtedness. Absent the intervention of the CCAA stay, DDMI would be able to assert common law and statutory lien rights against the Dominion Products that would entitle it to maintain possession of Dominion's share of production. The holding of a defaulting Participant's share of production is in fact contemplated by the JVA. DDMI would also be able to exercise additional exercise rights, including those specified in (but not limited to) Article 9.4(c) of the JVA. Far from seeking an amendment to the JVA or enhancement of its rights, DDMI seeks limited stay relief that is consistent with the JVA. The alternative would be for DDMI to seek a complete lifting of the stay.

12. There are several reasons why the limited stay modification sought by DDMI is appropriate, the most notable of which is Dominion's own cash flow forecast. Dominion does not project, and has not projected at any time over the course of this case, to generate cash flow. It has absolutely no capacity to sell the Dominion Products. In a circumstance where DDMI has conceded that it will not move to sell the production without further Court approval, there is no justification for Dominion to take possession of the Dominion Products. It is noteworthy that Dominion, while outlining a litany of reasons as to why DDMI should not be able to maintain possession, has failed to offer an explanation as to why it needs to take possession in a circumstance where it has no capacity to monetize.

13. DDMI agrees with Dominion's submission at paragraph 94(a) of its Brief that there are some differences between DDMI and the Interim Lenders. One of these differences is, of course, the fact that the Interim Lenders have made the decision to voluntarily advance credit to Dominion whereas DDMI's Cover Payments are forced by Dominion's JVA defaults. Another important distinction is that Dominion is paying fees and interest to the Interim Lenders (and the first lien lender) but has made no such offer to DDMI. The most notable distinction is in relation to the different security rights of the Interim Lenders and DDMI: the Interim Lenders have recourse to

Dominion's Ekati assets and existing diamond inventory not otherwise subject to the DDMI security, whereas DDMI's rights are limited to the Diavik Mine. The Stalking Horse Agreement contemplated by Dominion, and supported by the Monitor, does not contemplate payment of DDMI Cover Payments. There is a very real risk that the Dominion Products are DDMI's only means of recovery in the instant case.

14. DDMI's other concern relates to its status of being an involuntary debtor in possession lender to Dominion. The Interim Lenders, who are voluntary creditors, are afforded various protections that DDMI is not. These include the benefit of section 11.2(3) of the CCAA, which provides that the DIP Lender Charge cannot be primed by a subsequent interim lender. DDMI has no such protection and faces the risk that Dominion will, at a later stage of this case, attempt to seek interim financing in priority to the Cover Payment security.

15. It is important for this Honourable Court to appreciate the significance of the two proposed SARIO amendments to the continued operation of the Diavik Mine. The SARIO amendments provide additional assurance to DDMI in respect of Cover Payment indebtedness. DDMI simply seeks reasonable assurances that it will not be required to fund 100% of production costs in return for only 60% of the Diavik Mine's production (a result that any operator would have difficulty justifying to its owners and stakeholders). That does not impact Dominion (who is not paying post-filing JVA obligations of any type). It does impact a multitude of other stakeholders all of whom, like DDMI, are involuntary participants in this process. It is appropriate for the Court, in determining the bases upon which it might be inclined to extend the stay of proceedings, to grant DDMI's suggested limited modification to the SARIO.

B. Stalking Horse Proposal

16. As previously indicated, DDMI did not oppose the Stalking Horse Proposal brought forward by the Washington Group. Rather, DDMI highlighted fundamental issues with the formulation of the Stalking Horse Term Sheet that was before this Honourable Court on May 29, 2020. In particular, DDMI noted that:

- (a) it is highly unusual for there to be unlimited and open-ended conditionality to the terms of a proposed stalking horse bid. That is to say, the prior iteration of the Stalking Horse Term Sheet contained a stipulation that the same was subject to

confirmatory due diligence and any other matter determined necessary by Washington;

- (b) the Stalking Horse proposal did not contain an ascertainable baseline price for the purchase of the Diavik Mine; and
- (c) the Stalking Term Sheet was conditional upon financing.

17. Dominion and Washington have moved beyond a non-binding term sheet to a conditional form of asset purchase agreement. While the Stalking Horse APA remains conditional upon financing and continues to contain the optionality of Washington purchasing the Diavik Mine, and now makes it explicit that Washington's expectation is that DDMI will continue to be forced to finance its joint venture partner post-closing for unpaid Cover Payments, DDMI will leave it to this Honourable Court's discretion as-to whether to approve the Stalking Horse APA.

18. The First Lien lenders are being repaid in full on closing for their senior secured obligations. Washington is being paid in full on closing for its super senior secured interim financing obligations. Both the First Lien Lenders and the DIP Lenders are subordinate to DDMI's senior secured position with respect to the Cover Payments. DDMI has been consistent on this point – there cannot be an assignment of the Diavik JVA unless the outstanding Cover Payments are repaid in full in cash.

19. It is against this back-drop that DDMI notes its concerns, not as suggested by Dominion for ulterior motives designed to covertly benefit DDMI but, rather, to underscore the fact that DDMI continues to be exposed by the failure of Dominion to pay its post-filing JVA obligations and by the fact that the proposed Stalking Horse APA contemplates no incremental cash for the purchase of the Diavik interest.

C. Litigation

20. Dominion sued DDMI on June 16, 2020. DDMI denies the allegations made by Dominion and looks forward to the opportunity to respond to the claim in due course.

21. Dominion's allegations of mismanagement and misconduct should be viewed with extreme skepticism. Dominion defaulted on its obligations to make payments due and owing by

it under and pursuant to the JVA. If DDMI was in fact responsible for Dominion's misfortune, Dominion would have trumpeted that on its May 29, 2020 application. Dominion did not even whisper it. Instead, Dominion blamed its capital structure and the COVID-19 pandemic, never mentioning DDMI in this regard:

The Applicants' ability to conduct their business and generate revenues prior to seeking protection under the CCAA has been: (a) constrained by their highly leveraged capital structure; and (b) recently and seriously impaired by the sudden and rapidly spreading COVID-19 pandemic. The COVID-10 pandemic has severely limited the Applicants' ability to move their rough diamond inventory from the point of extraction to the Applicants' sorting facilities in India for further movement for eventual sale on the world market.²

22. Only after taking offense to DDMI's position with respect to various aspects of the flawed transactional documents did Dominion suddenly adopt the position that DDMI had wronged it.

D. Stapled Interim Financing Term Sheet

23. Dominion mischaracterizes and alleges ulterior motives on the part of DDMI and Rio Tinto in respect of tendering the Stapled Term Sheet. DDMI disagrees with the characterization and notes the following.

24. As is evident from the Monitor's summary of the DIP proposals received, the DIP solicitation process never included seeking sufficient liquidity through interim financing to allow Dominion to meet its post-filing joint venture obligations to DDMI. One would have thought that following this Court's comments on May 15, 2020 that DIP financing proposals would have at least solicited solutions to providing liquidity to make the post-filing Cash Calls.

25. Upon it becoming apparent that no such proposal was forthcoming, Rio Tinto developed the Stapled Interim Financing Proposal (the "**SIF Proposal**"). In the first instance, it is important to understand the importance of the nomenclature "stapled". The Rio Tinto interim financing in this case contemplated that the same would be "stapled", or, if you will, work hand-in-glove with interim financing provided in respect of Ekati offered to facilitate the acquisition. That is to say, the proposal was to facilitate an additional stream of interim advances that coexisted with the Ekati financing as opposed to conflicting with the Ekati interim financing.

² Bench Brief of the Applicants, filed on May 28, 2020, at para. 2.

26. The complaint by Dominion that the interim financing proposal contains a 2.5% sale and marketing fee is unfounded inasmuch as a 2.5% sale and marketing fee is eminently reasonable in the circumstances. In the Third Croese Affidavit, a recent transaction involving Mountain Province Diamonds Inc. (another NWT diamond producer) announced a \$50 million marketing program with a related-party shareholder wherein a sale and marketing fee of 10% will be paid together with 50% upside after costs. The Third Croese Affidavit further notes that the process of cleaning, separating, and preparing the diamonds for sale is a significant undertaking.

27. The contention that the proposed Stapled Interim Financing was designed to take the diamonds out of the jurisdiction of this Court is similarly without merit. By Dominion's own evidence, it sends its share of production from Ekati and Diavik to India and Belgium for processing and sale. Ultimately, a significant majority of the diamonds are sold through Antwerp. This is the commercial reality of the marketing of the diamonds and there is nothing untoward about such a process.

28. Finally, Dominion indicates that the real reason behind the proposed SIF Proposal was the requirement of a release by Dominion of DDMI. There is nothing uncommon or improper in an interim lender seeking assurances from its borrower that the borrower will not commence claims against it. In the current iteration of the Washington DIP, there is broad indemnification sought by Washington against Dominion in connection with any claims brought against Washington. Such indemnification effectively functions as a release. Moreover, Washington has recently added a stipulation that the proceeds from its proposed DIP not be utilized for funding litigation against it (it is seemingly content to allow its subsidiary to pay litigation fees in commencing the action against DDMI instead of using the DIP to pay undisputed post-filing obligations).

E. DDMI Not a Purchaser

29. Dominion has also made various allegations concerning DDMI's motives in the within case, including suggesting that DDMI benefits from a failed process. DDMI's motivation, as articulated throughout the case, is as set forth above: it wishes to ensure that it is paid for Cover Payments that it has been forced to make over the course of these proceedings and that at the end of the piece, it has a solvent counterparty who is able to perform its obligations under the JVA.

30. Dominion contorts all logic and sense in insinuating ill motives exist in respect of DDMI declaring it is not a buyer. DDMI is the subsidiary of a company that mines for various types of materials in 36 different countries. It should not be forced to expand its arctic diamond extraction operations by purchasing Dominion's assets. It has no obligation to participate in Dominion's SISP; if Dominion commenced the within proceedings with a belief that DDMI was a "logical buyer" for the Diavik Interest it has made a strategic miscalculation and that error is of its own doing. Indeed, if the strategy was to have DDMI purchase Ekati and/or Diavik, then Dominion or anyone of its numerous advisors could have saved a great deal of time, trouble and apparent disappointment by simply inquiring of DDMI prior to the commencement of these proceedings as to whether DDMI would then have been inclined to make an offer for any of Dominion's assets.

31. A failed marketing process, which amounts to the continuation of the status quo because DDMI will continue to have an insolvent joint-venture partner that is incapable of meeting its obligations, does not benefit DDMI. The concerns expressed by DDMI in relation to the SISP are not on account of a desire to see the marketing process fail. Dominion has proposed a Stalking Horse APA that expressly contemplates a circumstance where the Diavik Mine will not be sold; DDMI has significant concern that there will not be a transaction and that the Dominion Products will be its only way for it to recover on the forecasted \$105.5 million of Cover Payment indebtedness. Additionally, DDMI is concerned about the ability of its counterparty to post the additional \$35 million in closure security in January next year. Recovery on obligations owed by Dominion to DDMI's has been DDMI's motivation throughout the case and, so long as Dominion fails to satisfy such obligations, will continue to be.

SCHEDULE "A"
PROPOSED AMENDMENTS TO THE SARIO

CLERK'S STAMP

COURT FILE NUMBER
COURT

2001-05630
COURT OF QUEEN'S BENCH OF ALBERTA IN
BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE

CALGARY

APPLICANTS

**IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS
AMENDED**

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

DOCUMENT
ORDER

SECOND AMENDED AND RESTATED INITIAL

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
3500 Bankers Hall East
855 – 2nd Street SW
Calgary, Alberta T2P 4J8

Attention: Peter L. Rubin / Peter Bychawski /
Claire Hildebrand / Morgan Crilly Telephone
No.: 604.631.3315 / 604.631.4218 /
604.631.3331 / 403.260.9657 Email:
peter.rubin@blakes.com /
peter.bychawski@blakes.com /
claire.hildebrand@blakes.com /
morgan.crilly@blakes.com

Fax No.: 604.631.3309

[File: 00180245/000013](#)

~~File: 00180245/000013~~ **DATE ON WHICH ORDER WAS PRONOUNCED:** June 3, 2020

LOCATION OF HEARING:

Calgary

NAME OF JUDGE WHO MADE THIS ORDER:

The Hon. Madam Justice K. Eidsvik

from providing any notice or taking or declining to take any action permitted by the Interim Financing Term Sheet.

NO INTERFERENCE WITH RIGHTS

16. 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~~the entirety of the 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 (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. DDMI shall hold the Dominion Products~~Yellowknife Facility) in trust, and subject to the following conditions:
- (a) DDMI shall segregate the Dominion Products from DDMI's share of production from the Diavik Mine pursuant to and in accordance with the Agreement to establish a Protocol for Diamond ~~Splitting Production~~Splitting Production, dated January 7, 2003, as amended, modified, supplemented or restated from time to time;
 - (b) DDMI shall provide adequate safeguarding of, and insurance coverage for, the Dominion Products;
 - (c) DDMI shall provide each of Dominion Diamond and the Monitor with reporting and records on the Dominion Products as may be requested by Dominion Diamond or the Monitor;
 - (d) DDMI shall permit reasonable access to Dominion Diamond and the Monitor to attend at the PSF and audit or inspect the Dominion Products;

(e) ~~on the happening of any of the following dates, events or occurrences,~~
DDMI shall be ~~entitled~~entitled to apply to this Honourable Court to seek
an Order allowing it to exercise rights and remedies as against the
Dominion Products including in connection with the following events:

(i) the date that the within CCAA proceedings are terminated;

- 17 -

37. This Order is subject to provisional execution and, if any of the provisions of this Order in connection with the Definitive Documents or the Interim Lenders' Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (each, a "**Variation**") whether by subsequent order of this Court or any other court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the Interim Lenders under this Order (as made prior to the Variation) or the Definitive Documents, with respect to any advances made prior to the Interim Lenders being given written notice of the Variation and the Interim Lenders shall be entitled to rely on this Order as issued (including, without limitation, the Interim Lenders' Charge) for all advances so made.

SISP PROCEDURES, STALKING HORSE TERM SHEET, AND BREAK-UP FEE AND EXPENSE CHARGE

38. Capitalized terms utilized in paragraphs 38 to 45 of this Order that are not otherwise defined in this Order shall have the meanings ascribed to them in the Procedures for the Sale and Investment Solicitation Process (the "**SISP Procedures**") in the form attached as **Schedule "B"** hereto.
39. The SISP Procedures (subject to any amendments thereto that may be made in accordance therewith) are hereby approved.
40. The Applicants, the Monitor and their respective advisors (including the SISP Advisor) are hereby authorized and directed to carry out the SISP Procedures and to take such steps and execute such documentation as may be necessary or incidental to the SISP Procedures.
41. ~~Each~~ Subject to paragraph 45, each of the Applicants, the SISP Advisor and the Monitor and their respective affiliates, partners, directors, employees, advisors (including the SISP Advisor), agents, shareholders and controlling persons shall have no liability with respect to any losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of the SISP Procedures or the conduct thereof, except to the extent of such losses, claims,

- 22 -

57. Each of the Charges shall constitute a charge on the Property (other than, solely in the case of the Interim Lenders' Charge, the Excluded Assets) and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person; provided, however, that:
- (a) the KERP Charge, the Break-Up Fee and Expense Charge, the Interim Lenders' Charge and the Financial Advisor Charge shall rank subordinate to any Encumbrances under Article 9 of the Diavik JVA ~~in respect of the assets owned by the Diavik Joint Venture and the Borrower's interest in the Diavik Joint Venture;~~
 - (b) the Encumbrances of the Existing Credit Facility Agent (as defined in the Interim Financing Term Sheet) in respect of the Diavik Collateral (as defined in the Interim Financing Term Sheet) shall rank senior to the Interim Lenders' Charge in respect of the Diavik Collateral;
 - (c) the Encumbrances of the Existing Credit Facility Agent in respect of the Interim Financing Priority Collateral (as defined in the Interim Financing Term Sheet) shall be senior to the Interim Lenders' Charge in respect of the Interim Financing Priority Collateral securing any October Advances (as defined in the Interim Financing Term Sheet) and related interest; and
 - (d) the Interim Lenders' Charge in respect of the Interim Facility Priority Collateral securing any October Advances and related interest shall be senior to any Encumbrances of the Existing Credit Facility Agent securing the First Lien Facility LC Obligations (as defined in the Interim Financing Term Sheet).
58. Except as otherwise expressly provided for herein, or as may be approved by this Court:
- (a) the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the

Applicants also obtain the prior written consent of the Monitor and the chargees entitled to the benefit of the Charges (collectively, the “Chargees”), or further order of this Court; and

(b) no Encumbrances other than the Administrative Charge and the D&O Charge will be granted priority over the Diavik Collateral (as defined in the Interim Financing Term Sheet) unless consented to in writing by DDMI.

59. The Charges, the Interim Financing Term Sheet and the other Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees