

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



IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, RSC 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.

APPLICANTS AD HOC COMMITTEE OF NOTEHOLDERS (DDJ CAPITAL
MANAGEMENT, LLC, BARINGS LLC and BRIGADE CAPITAL
MANAGEMENT, LP)

PARTY FILING THIS DOCUMENT AD HOC COMMITTEE OF NOTEHOLDERS (DDJ CAPITAL
MANAGEMENT, LLC, BARINGS LLC and BRIGADE CAPITAL
MANAGEMENT, LP)

DOCUMENT **BENCH BRIEF OF THE NOTEHOLDER COMMITTEE**
June 19, 2019 Hearing

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PART I – OVERVIEW

1. The ad hoc committee (the “**Committee**”) comprised of DDJ Capital Management, LLC, Barings LLC, and Brigade Capital Management, LP, holds more than 50% of the 7.125% secured second lien notes (the “**Notes**”) of Dominion Diamond Mines ULC (“**Dominion Diamond**” or the “**Company**”) and is representing the interests of Noteholders collectively owed the equivalent of approximately C\$800,000,000.¹ The Noteholders are by far the largest creditor group in these *Companies’ Creditors Arrangement Act* (“**CCAA**”) proceedings.
2. This Bench Brief is to be read in conjunction with the Bench Brief of the Committee dated May 27, 2020, which was served in advance of the Application that was heard on May 29, 2020, and ultimately adjourned.
3. This Bench Brief provides the Committee’s further submissions and arguments in opposition to the Dominion Diamond application to approve an asset purchase agreement (the “**Shareholder Bid**”) pursuant to which the Shareholder would be a stalking horse bidder in the Company’s proposed Sale and Investment Solicitation Process (the “**SISP**”). The Shareholder Bid is tied to, and a conditional requirement of, proposed debtor-in-possession financing (the “**Shareholder DIP**”) put forward by the Company’s ownership group (the “**Shareholder**” or “**Washington**”).
4. The Committee counters the relief being sought by Dominion Diamond by seeking this Court’s authorization and direction to have Dominion Diamond and certain of its affiliates immediately enter into an Interim Financing Term Sheet (the “**Noteholder DIP**”) in the form attached as Exhibit “A” to the Affidavit of Eric Hoff sworn June 17, 2020.²
5. Capitalized terms used but not otherwise defined in this Bench Brief shall have the meaning given to such terms in the materials previously filed by the Committee, the Diamond Group and the Monitor in these proceedings.

¹ Affidavit of Eric Hoff sworn May 6, 2020 (“**Hoff Affidavit #1**”), at para 4.

² Affidavit of Eric Hoff sworn June 17, 2020 (“**Hoff Affidavit #2**”), at para 5.

PART II - FACTS

6. The Notes were issued in 2017 to largely fund the acquisition of Dominion Diamond by its current owner, Washington Diamond Investments LLC. The Notes are governed by a Trust Indenture dated as of October 23, 2017 among Dominion Diamond, as successor to Northwest Acquisition ULC, and Dominion Finco Inc., as co-issuers, and Wilmington Trust, National Association, as trustee.
7. The Notes constitute secured second lien obligations of Dominion Diamond and certain of its affiliates, enjoying rights and privileges typically associated with secured debt indebtedness and ranking senior to the rights of various unsecured trade, bond and other creditors.³
8. The Company has been impacted by highly adverse, but temporary, events. These relate to the unprecedented worldwide health measures which have shut down the international diamond sales market and the concurrent decision by the Company's joint venture partner to maintain full operations at the Diavik Mine while numerous other companies were shutting down mining operations.⁴
9. Most businesses across Canada have been detrimentally impacted by these extraordinary times. However, there is no evidence to support any argument that the true long-term value of the Company's assets has eroded substantially. The biggest threat to value could come from the pursuit of a "fire sale" in an unfair process that would favour the Shareholder and set the target purchase price at an extremely low level.⁵
10. Since the 2017 transaction, there have been no fundamental changes to the Company, its property and assets, and, other than the current short-term worldwide events, to the Company's industry. The Company is carrying a large and valuable current diamond inventory⁶ that alone very substantially exceeds the Shareholder Bid's purchase price even before consideration is given to the long-term value of the Company's interests in the Ekati and Diavik mines.

³ Hoff Affidavit #1, at paras 7-8.

⁴ Affidavit of Kristal Kaye sworn April 21, 2020 ("**Kaye Affidavit**"), at paras 12-16.

⁵ Hoff Affidavit #2, at para 7.

⁶ Kaye Affidavit, at para 125.

11. The Committee has raised red flags regarding the Company's process from the outset of its involvement in these proceedings. These are set out once again in the Affidavit of Eric Hoff sworn June 17, 2020.⁷ Notwithstanding the serious concerns raised by the Committee and other major stakeholders of the Company, representatives of the Company have steadfastly maintained their alignment with the Shareholder.
12. Following the adjournment of its own application on June 3, 2020, the Company has continued to forge down the same path and is now, in its application for the June 19, 2020 hearing, renewing its request for approval of the linked Shareholder Bid and Shareholder DIP. Leaving aside issues of patent deficiency in purchase price, which need not be determined now, the Shareholder Bid is a highly condition, vague and optional proposal that provides little or no value and considerable detriment to these proceedings and the collective interests of the Company's stakeholders.
13. In order to enable the Company to obtain interim financing without the need to accept the Shareholder Bid, the Noteholders are putting forward a matching interim financing term sheet that is not tied to acceptance of the Shareholder Bid or any other stalking horse bid. This will allow the Company to implement an open, fair and transparent sale and investment solicitation process in which all potential bidders could compete on a level playing field.

PART III - ARGUMENT

A. The Shareholder Bid

14. The Committee has repeatedly advised this Court and other stakeholders of serious concerns regarding the Shareholder's involvement in these proceedings. These concerns are again validated in the Company's application materials for the June 19, 2020 hearing.
15. In these unprecedented economic times, amidst the backdrop of the COVID-19 pandemic, Dominion Diamond is putting forward an expedited SISP that seems orchestrated to facilitate the surgical eradication of the Noteholders' debt investment. The Shareholder DIP sets up the Shareholder Bid.
16. Even though weeks have passed since the first vague and non-definitive Shareholder stalking horse bid term sheet was disclosed by the Company, nothing has changed in

⁷ Hoff Affidavit #2, at paras 6-10.

substance. Although the Shareholder Bid is contained in a more detailed template asset purchase agreement, it remains highly conditional, vague and optional. In short, it does not serve the constructive purpose it purports to serve.

17. The Shareholder Bid remains subject to a broad financing condition that effectively gives the Shareholder a free option to acquire the Company's business and assets until at least July 31, 2020. Even if the Shareholder fails to satisfy the financing condition by July 31, 2020, the Shareholder Bid does not automatically terminate. Instead, the Company would simply have the right, and not the obligation, to terminate the Shareholder Bid, and that right can be exercised only with the consent of the Company's first lien lenders (the "**1st Lien Lenders**"). This provides no protection to the Noteholders and other stakeholders, and it concentrates critical decision-making and control of the process in only a few hands.
18. The Shareholder also retains the power of optionality as to whether the Company's interests in the Diavik mine are or are not included in the Shareholder Bid transaction. Granting the Shareholder a free option to include or exclude the Diavik interests creates great uncertainty that relates not only to the Company's ownership interests in the Diavik mine, but also the associated reclamation liabilities for which the Company's 1st Lien Lenders have issued letters of credit that might impact recovery on all of the Company's assets.
19. There continues to be little clarity in the Shareholder Bid as to what obligations of the Company the Shareholder would or would not assume. The Shareholder retains the option until very late in the process to designate which contracts it chooses, in its discretion, to assume or strand. Although the Company's materials suggest that improvement has been achieved because the Shareholder has committed to assuming up to \$20 million of "cure cost" liabilities, that commitment relates only to contracts it chooses to assume. If the Shareholder elects not to assume any contracts, the value of that commitment is nil.
20. The Shareholder Bid is also unclear as to which employees will retain a job with the Company. Despite a general statement that the Shareholder will take on substantially all employees in the repurchased business, the Shareholder has a clear option to leave behind whomever the Shareholder designates.
21. There are also very extensive conditions in the Shareholder Bid that include a requirement that the Shareholder enter into new agreements acceptable to it with respect to reclamation

liabilities, including with governmental authorities and bonding companies. A myriad of other material conditions relate to regulatory approvals and other matters.

22. As if those conditions don't provide enough uncertainty, the Shareholder has also qualified all of its commitment by a broadly worded material change clause that permits the Shareholder to back out with impunity if conditions worsen.
23. And there remains the patently low purchase price. At US\$126-US\$131 million, the purchase price remains far lower than the value that the Company and the Shareholder had attributed to the Company's business and assets at any time before these proceedings, including but not limited to when the Noteholders were induced to invest in the Company. Efforts in the Company's materials to fluff up the total purchase price are misleading. For example, the proposed conditional bonding arrangements for reclamation liabilities contemplate a continuation or amendment of existing arrangements. They do not constitute payment of value from the Shareholder to or for the benefit of the Company's stakeholders.

B. Unfairness and Detrimental Impact of the Shareholder Bid

24. As was suggested and has been submitted on a number of occasions by the Committee in these proceedings, there are real and patent conflicts inherent in the proposed process. The integrity of these CCAA proceedings could be seriously undermined by not recognizing them. Close scrutiny and judicial oversight is a necessity in this situation, and limited deference should be shown to the Company and its controlling Shareholder.
25. It is a fundamental, reasonable, and well-justified hallmark of fair and balanced sales processes that all bidders are allowed the opportunity to compete on a level playing field. The Committee is seeking that objective. The Shareholder Bid would give the Shareholder an array of preferential advantages from the moment the Court approves it.
26. The Shareholder's benefits and advantages, relative to any other potential bidder, would be considerable. To begin with, the Shareholder would stand to earn a large break-up fee of US\$2,522,140 and expense reimbursements of US\$2,250,000 if the Company selected a different transaction. These provisions create a potential windfall for an otherwise out-of-the-money equity holder and a steeper hill for other bidders. Other bidders would also be required to overbid by yet another US\$1,000,000 under the terms of the proposed SISF.

In short, competing bids would have to be superior to the Shareholder Bid by at least US\$5,772,140.

27. The Shareholder would also get a huge head start in conducting due diligence and in further developing, negotiating and advancing its bid. It could gain immediate access to critical business partners which other bidders may or may not have until much later in the SISP process. The Shareholder's big head start would allow it to satisfy conditionality long before other bidders, and competing bids that tried to play catch-up would face the risk of being disqualified or ranked inferior in the SISP process if they retained more conditions because they had not been afforded the same time and access.
28. Aside from the inherent unfairness of the preferential benefits given to the Shareholder, the Shareholder Bid would also have numerous detrimental effects on these proceedings and the proposed SISP process. The involvement of the Shareholder as an insider stalking horse bidder would serve to chill the bidding process. Other potential bidders looking from the outside in could easily form the impression that this was a stacked process in favour of insiders. It would be a deterrent to other bidder's expenditure of time, resources and money when insiders with no interest in achieving any higher and better bids are seen as the ones driving the process.
29. Competing bids would be further deterred by the fact that the Shareholder Bid would raise the price of entry, through the requirement that competing bids be superior to the Shareholder Bid by at least US\$5,772,140. If superior bids did clear this higher bar, US\$4,772,140 that would otherwise have gone to the Company's stakeholders would be diverted to the Shareholder.
30. The Shareholder Bid also makes for fertile ground for Shareholder manipulation in this process. With the Shareholder wearing so many hats – current owner, controller of the purse strings as DIP lender, and stalking horse bidder - any semblance of a level playing field and transparent process could be lost. This is exacerbated by the weak governance protocols and lack of conflicts avoidance measures currently in place.
31. In any case, the Shareholder Bid is not a firm and unconditional purchase commitment. It remains weak, vague and highly conditional. It creates only the illusion of a "floor price", and it lends itself to the risks of bait pricing and re-trading.

32. The Shareholder has fostered an acrimonious environment in these proceedings, and with key stakeholders and business partners. Perpetuating the Shareholder's prominence as a central figure in these proceedings will almost certainly worsen the process and lead to further instability and higher risk.
33. Contrary to any argument that the Shareholder Bid creates a "floor price", it in fact is much more likely to create "ceiling price". The Company's true long-term value need not be argued and determined at this point and can be left to a fair market process. But approval of the Shareholder Bid with a price that is vastly below the price at which the Noteholders were induced to invest in the Company three years ago risks being seen by potential bidders as tacit approval of its reasonableness. In effect, the Shareholder Bid price would create a new target price for competing bidders.
34. Approval of the Shareholder Bid would create a dangerous precedent in support of an extraordinarily unusual insider-driven process that would result in the enrichment of subordinate ranking equity holders and selective unsecured creditors while wiping out a massive secured debt investment by Noteholders of the Company.
35. The diamond inventory market is beginning to re-open, and this could dramatically change the complexion of these proceedings, including with respect to the need or appropriateness of a stalking horse bid or, for that matter, any sale transaction.

PART IV – INTERIM FINANCING ALTERNATIVE

36. Given that the Shareholder DIP is linked to the Shareholder Bid, the Committee is offering alternative financing that would allow the Company to instead conduct a fair, level and transparent process without the need to accede to the Shareholder's wishes regarding the Shareholder Bid.
37. The Noteholder DIP is modeled very closely on the Shareholder DIP and accordingly contains substantively the same terms and conditions. Like the Shareholder DIP, it contemplates the implementation of a SISF on terms to be approved by the Court. The Noteholder DIP's terms are equally or more beneficial to the Company and the Company's collective stakeholders.
38. The Noteholder DIP also treats the 1st Lien Lenders and other charge holders in the same manner as the Shareholder DIP. The ranking of the charges in the Noteholder DIP, relative

to 1st Lien Lenders and other charges, is identical to the ranking of the charges in the Shareholder DIP.

39. An open, level and transparent process that does not involve a Shareholder stalking horse bid will far better serve the objectives of these proceedings and the collective interests of the Company's stakeholders and, accordingly, the Noteholder DIP is superior to the Shareholder DIP.

PART V - CONCLUSION

40. The Committee submits that the relief sought is necessary for the effective conducting of the SISP and the integrity of these proceedings, particularly in light of the patent potential for conflicts, manipulation and abuses. The relief being proposed by the Committee will promote the fairness and integrity of this restructuring process and reflect the intentions underlying the CCAA. Particularly given the uniquely sensitive issues being raised in these proceedings, it would enhance both the fact and appearance of fairness in the eyes of involved parties and potential bidders. This will be of benefit to all stakeholders.

PART V – RELIEF SOUGHT

41. For all the foregoing reasons, the Committee is seeking that the Shareholder Bid be rejected and, given the Shareholder Bid's linkage to the Shareholder DIP, that this Court instead direct and authorize the Company to enter into the Noteholder DIP in the form attached as Exhibit "A" to the Hoff Affidavit #2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on June 17, 2020 at Calgary, Alberta.

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