

**ENTERED**



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 **AFFIDAVIT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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**AFFIDAVIT OF KRISTAL KAYE**  
**Sworn on January 20, 2021**

I, Kristal Kaye of Calgary, Alberta, SWEAR AND SAY THAT:

1. I am the Chief Financial Officer of Dominion Diamond Mines ULC (“**Dominion Diamond**”), Dominion Diamond Canada ULC (“**Dominion Canada**”), and Dominion Diamond Delaware Company, LLC (“**Dominion Delaware**”), three of the applicants in these proceedings, a director of Dominion Canada and Dominion Diamond Marketing Corporation (“**Dominion Marketing**”), and I also hold other director and officer positions with certain other non-CCAA applicant entities affiliated with Dominion Diamond. As such, I have personal knowledge of the matters deposed to in this affidavit, except where stated to be based upon information provided to me, in which case I believe the same to be true.

2. I make this affidavit in support of the Applicants’ application for an order (the “**Assignment Order**”), among other things, assigning the rights and obligations of the Dominion Vendors (as defined below) under the Assigned Contracts and any Additional Assigned Contracts (as defined below) that require counterparty consent for assignment to Arctic Canadian Diamond Company Ltd. (the “**Purchaser**”), as contemplated by 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**”).

### ***Background***

3. 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, Dominion Diamond Holdings, LLC, Dominion Delaware, Dominion Marketing, Dominion Canada, and Dominion Finco Inc. (collectively, the “**Dominion Vendors**”) and DDJ Capital Management, LLC and Brigade Capital Management, LP (together, the “**Contracting Purchasers**”). Capitalized terms not otherwise defined in this affidavit have the meanings ascribed to them in the Purchase Agreement.

4. The material terms of the Transaction, and events leading up to this Court’s approval of the Transaction and Purchase Agreement on December 11, 2020, are discussed in detail in the affidavit of Brendan Bell sworn in these proceedings on December 7, 2020 (the “**December Bell Affidavit**”) and in the earlier affidavits referenced by Mr. Bell.

5. As Mr. Bell notes in the December Bell Affidavit, consistent with the Applicants’ restructuring objectives, the Purchase Agreement contemplates a going concern outcome for the Applicants’ business, providing that the Purchaser will assume (subject to the terms of the

Purchase Agreement) substantially all of the go-forward operating liabilities of the Dominion Vendors (but not the obligations related to Dominion Diamond's joint venture interest in the Diavik Mine), including substantially all obligations (a) of the Dominion Vendors under Dominion's go-forward operational contracts and joint venture agreements; (b) to employees and unions (including obligations under Dominion's collective bargaining agreements and pension plan); (c) to Indigenous groups; and (d) to the Government of the Northwest Territories.

6. It is the view of the Applicants that the Transaction, which was entered into following a thorough exploration and canvassing of the market through a sale and investment solicitation process approved by this Court and implemented over the course of more than five (5) months, is in the best interests of Dominion's stakeholders generally, including but not limited to the interests of Northern communities, Northern Indigenous groups, employees and contractors (and Northern-based employees and contractors in particular), the environment, and creditors.

7. Since this Court approved the Transaction and Purchase Agreement on December 11, 2020, the Applicants and the Contracting Purchasers have been diligently working to close the Transaction by the Closing Date of January 29, 2021 Outside Date for Closing.

### ***The Assignment Order***

8. Pursuant to the Approval and Vesting Order, upon Closing of the Transaction the Dominion Vendors' right, title, and interest in and to the Acquired Assets is to vest in the Purchaser (as the Contracting Purchasers' designee under the Purchase Agreement) in accordance with the Purchase Agreement free and clear of all Encumbrances other than certain Permitted Encumbrances specified in the Approval and Vesting Order.

9. The Acquired Assets to be vested in the Purchaser pursuant to the Transaction include certain Assigned Contracts set forth on Schedule A to the Purchase Agreement and all rights thereunder.

10. 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.

11. To the extent that any Assigned Contract is not assignable without the consent of the counterparty and such consent has not been obtained prior to the Transaction's Closing Date (i.e., January 29, 2021), the Purchase Agreement provides that:

- (a) the Dominion Vendors' rights, benefits, and interests in, to and under such 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 Assigned Contract on or prior to the Closing Date;
- (c) if an Assignment Order is obtained in respect of such Assigned Contract, the Purchaser shall accept the assignment of such Assigned Contract on such terms; and
- (d) to the extent that any Cure Amount is payable with respect to any Assigned Contract, the Dominion Vendors shall (where such Assigned Contract is assigned pursuant to an Assignment Order) pay such Cure Amount in accordance with such Assignment Order.

12. The delivery of an Assignment Order (where applicable) by the Dominion Vendors to the Purchaser is a condition to the closing of the Transaction.

13. 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 Assigned Contracts. The Dominion Vendors do not, however, control whether counterparties to the Assigned Contracts will consent to their assignment to the Purchaser or the timing of when such consent may be provided by each counterparty.

14. As of the date of this affidavit, despite the Dominion Vendors' efforts, there remain approximately eight (8) Assigned Contracts which are not assignable without the consent of the counterparty for which the required consents have not been provided (collectively, the **"Restricted Assigned Contracts"**).

15. To ensure that the Transaction can close by the Closing Date of January 29, 2021, the Applicants are seeking the Assignment Order to order the assignment of the Restricted Assigned Contracts that have been identified by the Applicants and Contracting Purchasers and included on Schedule "A" to the proposed Assignment Order. To my knowledge, none of the Restricted Assigned Contracts are (a) agreements which have been entered into after the commencement

of these CCAA proceedings on April 22, 2020; (b) eligible financial contracts; or (c) collective agreements.

16. Any 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 relief being requested by the Applicants and therefore do not appear on Schedule "A" to the Assignment Order.

17. Pursuant to the terms of the proposed Assignment Order, to the extent there are additional Restricted Assigned Contracts that are not listed on Schedule "A" to the Assignment Order that the Dominion Vendors 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.

18. As noted above, the Purchase Agreement approved by this Court provides that, to the extent that any Cure Amount is payable with respect to any Restricted Assigned Contract, the Dominion Vendors are required (where such Restricted Assigned Contract is assigned pursuant to an Assignment Order) to pay such Cure Amount in accordance with any assignment order granted by this Court (or as may be agreed between the Dominion Vendors and an affected counterparty). Accordingly, pursuant to the proposed Assignment, all monetary defaults in respect of the Restricted Assigned Contracts (and any Additional Restricted Assigned Contracts), other than those arising by reason of the insolvency of the Dominion Vendors, the initiation of these CCAA proceedings, or the failure to perform a non-monetary obligation under the Restricted Assigned Contracts (or the Additional Restricted Assigned Contracts), will be satisfied.

19. The Restricted Assigned Contracts that are subject to the proposed Assignment Order are as follows:

<b>Agreement Counterparty</b>	<b>Agreement Description</b>	<b>Agreement Date</b>	<b>Cure Amount</b>
1012986 B.C. Ltd	Core Zone Joint Venture Agreement	17 April 1997	\$0

<b>Agreement Counterparty</b>	<b>Agreement Description</b>	<b>Agreement Date</b>	<b>Cure Amount</b>
<b>1012986 B.C. Ltd</b>	Reclamation Liability Agreement	28 October 2019	\$0
<b>1012986 B.C. Ltd</b>	Sales Representation Agreement	21 December 2002	\$0
<b>NorthwesTel</b>	Tariffed Services Agreement – Enterprise Performance	31 May 2017	\$0
<b>Livingston International Inc.</b>	Corporate Brokerage Agreement	1 January 2019	\$0
<b>Bradley Air Services Limited (D/B/A/ First Air)</b>	Agreement for the Supply of Aircraft Services	13 July 2015	\$0
<b>Caterpillar Financial Services</b>	Financing Lease Agreement	19 January 2018	\$0
<b>Somerset Equipment Finance Ltd</b>	Capital Lease Agreement	18 June 2018	\$0

20. As indicated in the above table, there are no Cure Amounts payable with respect to the Restricted Assigned Contracts subject to the proposed Assignment Order. The Cure Amounts (if any) payable with respect to any potential Additional Restricted Assigned Contracts are not currently known. However, as noted above, the proposed Assignment Order provides that, to the extent that any Cure Amount is payable with respect to any Additional Restricted Assigned Contract, the Dominion Vendors are required to pay such Cure Amount in accordance with the Assignment Order (or as may be agreed with an affected counterparty).

21. As noted in the December Bell Affidavit, concurrently with Closing, the Contracting Purchasers will provide to the Purchaser new financing of US \$70 million to fund the Purchaser's post-Closing satisfaction of Assumed Liabilities, which amount includes payment of the Cure Amount, operations at the Ekati Mine, and general working capital, all on and subject to the terms and conditions set out in the Support Agreement between the Contracting Purchasers and the Applicants' First Lien Lenders and the definitive documents to be delivered pursuant thereto.

***Restricted Assigned Contracts of 1012986 B.C. Ltd***

22. 1012986 B.C. Ltd., (“**101 Corp.**”) an entity controlled by Mr. Steward Blusson, who was involved in the original discovery of diamondiferous kimberlite at the site of the Ekati Mine, is the counterparty to three of the Restricted Assigned Contracts.

23. As described in my affidavit sworn in these proceedings on April 21, 2020, 101 Corp. holds an 11.1% participating interest in the “Core Zone” of the Ekati Mine’s operations, which is the primary focus of mining operations.

24. The three Restricted Assigned Contracts to which 101 Corp. is a counterparty are:

- (a) a Joint Venture Agreement – Core Zone Property dated April 17, 1997 (the “**Core Zone JVA**”);
- (b) an Amended and Restated Reclamation Liability Agreement dated October 28, 2019 (the “**Reclamation Agreement**”), with respect to the parties’ respective responsibilities for the Core Zone joint venture’s liabilities, including reclamation liabilities, in proportion to each parties’ participating interest; and
- (c) a Sales Representation Agreement dated December 21, 2002 (the “**Sales Agreement**”), pursuant to which Dominion Diamond Mines ULC acts as the Core Zone joint venture participants’ exclusive sale agent for marketing diamonds produced from the Ekati Mine.

25. Copies of the Core Zone JVA, the Sales Agreement, and the Reclamation Agreement are attached as **Exhibits “A”, “B”, and “C”**, respectively, to the affidavit of Leanna McNally sworn on January 20, 2021.

26. Collectively the Core Zone JVA, the Reclamation Agreement, and the Sales Agreement govern all aspects of the relationship between the Applicants and 101 Corp. with respect to the Ekati Mine.

27. I understand that 101 Corp. is prepared to consent to the assignment of the Core Zone JVA and the Reclamation Agreement to the Purchaser but objects to the assignment of the Sales Agreement.

28. The Sales Agreement, like the related Core Zone JVA and the Reclamation Agreement, has been designated as an Essential Contract under the Purchase Agreement. The Purchase Agreement defines an Essential Contract as, among other things, a Material Contract.

**Conclusion**

29. The assignment of the Restricted Assigned Contracts (and any Additional Restricted Assigned Contracts) to the Purchaser is required for the closing of the Transaction. The Applicants are requesting the proposed Assignment Order to facilitate completion of the Transaction for the benefit of the Applicants and their stakeholders generally.

SWORN BEFORE ME )  
at Calgary, Alberta on January 20, 2021. )  
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\_\_\_\_\_)  
A Commissioner for Oaths in and for the )  
Province of Alberta )  
)

Morgan Crilly  
Barrister & Solicitor

  
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**KRISTAL KAYE**