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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
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AFFIDAVIT OF BRENDAN BELL

Sworn on October 4, 2020

I, Brendan Bell, of Kelowna, British Columbia, MAKE OATH AND SAY THAT:

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I. INTRODUCTION

1. I am a director of Dominion Diamond Mines ULC ("**Dominion Diamond**") and, together with the other entities listed as applicants in these proceedings, "**Dominion**"). 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. This affidavit supplements my prior affidavits sworn in these proceedings on May 21, 2020 (my "**May Affidavit**") and on June 12, 2020 (my "**June Affidavit**"). It is being sworn in support of Dominion's application for an order, among other things, approving the Asset Purchase Agreement (the "**APA**") by and among Dominion Diamond and Dominion Diamond Holdings LLC, as vendors, and Canadian Diamond Holdings L.P., CA Canadian Diamond Mines ULC, as purchasers, and Washington Diamond Investments, LLC, as parent to the Dominion vendors, as amended to include Dominion Diamond Marketing Corporation. Capitalized terms not otherwise defined in this affidavit have the meanings ascribed to them in my May Affidavit and my June Affidavit, as applicable.

II. BACKGROUND AND ROLE WITH DOMINION DIAMOND

3. I have a Bachelor of Commerce degree from the University of Calgary and a Master of Business Administration degree from Heriot-Watt University.

4. I have been actively engaged in government and private business in the Northwest Territories for more than twenty (20) years.

5. From October 1999 to October 2008, I served as an elected member of the Northwest Territories Legislative Assembly. In 2003, I was chosen to serve in Cabinet and held several Cabinet positions over the following four (4) years, including Minister Responsible for Energy and Mining, Minister Responsible for the Environment, and Minister of Justice and Attorney General. During this period, I was the lead Cabinet Minister responsible for dealing with economic and resource development issues for the Government of the Northwest Territories ("**GNWT**"). This included responsibility for the completion of several important socio-economic agreements with major international resource companies. I also oversaw the negotiation of an agreement with the Government of Canada to clean up the GIANT Mine in the Northwest Territories, which mine was the subject of a bankruptcy and significant environmental reclamation issues.

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6. Following my time with the GNWT, I was a founding partner of the Northern Strategy Group, advising clients on intergovernmental, socio-economic, and environmental matters. I also became actively involved in matters of energy policy affecting Northern and Western Canada and served as member of the Government of Alberta's Energy Strategy Panel and as Chairman of the Northwest Territories Power Corporation, the public electric utility for the Northwest Territories.

7. While at Northern Strategy Group, I began providing consulting services to the entity which is now Dominion Diamond (at the time named Harry Winston Diamond Corp.) beginning in 2007 and to the president of BHP Billiton Canada Inc. ("**BHP**"), which at the time owned the controlling interest in the Ekati Mine, beginning in 2008. Dominion Diamond went on to acquire the controlling interest in the Ekati Mine as well as associated sorting and sales facilities in the Northwest Territories and Antwerp, Belgium from BHP in 2013.

8. After Dominion Diamond acquired the controlling interest in the Ekati Mine from BHP in 2013, I joined Dominion Diamond as an executive with responsibility for External Affairs and Human Resources. In November 2014, I was appointed acting CEO and in July 2015 I was appointed permanent CEO and a director of Dominion Diamond. Accordingly, I have been involved with Dominion Diamond and its predecessors with an interest in the Ekati Mine for approximately twelve (12) years.

9. Since the acquisition of Dominion by The Washington Companies ("**Washington**") in November 2017, I have not been a member of management of Dominion Diamond, do not have a role with Washington, and do not have a relationship with Washington or Dominion Diamond that could reasonably interfere with the exercise of my independent judgement as a director in respect of a restructuring. I am independent.

10. In this context, and considering the possibility that any potential restructuring implemented by Dominion would likely both impact upon the interests of Washington in its capacity as Dominion's 100% equity holder, and may also potentially involve Washington in any restructuring exit strategy, prior to Dominion's CCAA filing, the Dominion Diamond board of directors delegated to me (the "**Independent Director**") powers to:

- (a) review the terms and conditions of any proposed restructuring options available to Dominion Diamond;

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- (b) assess whether any proposed restructuring options available to Dominion Diamond are in the best interest of the company;
- (c) negotiate or supervise the negotiation of the terms of any proposed restructuring options available to Dominion Diamond and any agreements necessary to give effect thereto;
- (d) determine whether or not to make a recommendation to the board of directors of Dominion Diamond with respect to restructuring options available to Dominion Diamond and, if a recommendation is to be made, to formulate the recommendation and report to the board of directors as to the Independent Director's recommendation and his reasons and conclusions in respect thereof;
- (e) engage such professional advisors, such as financial advisor(s), legal counsel, and restructuring advisor(s) as the Independent Director may determine are reasonably necessary or advisable to assist Dominion Diamond, the Independent Director, and the board of directors of Dominion Diamond, as the case may be; and
- (f) take such other actions as the Independent Director determines are necessary or advisable to permit him to formulate an appropriate recommendation to the board of directors of Dominion Diamond with respect to any proposed restructuring step.

11. In addition, in order to facilitate my decision making in my role as the Independent Director, prior to the CCAA filing, the Dominion Diamond board of directors reduced the quorum for meetings of the board of directors to one (1) director, so that I can make (and have made) decisions and provide instructions to Dominion Diamond's advisors on behalf of the company without the presence of Washington representatives serving on the board of directors of Dominion Diamond.

12. I have had more than seventy (70) Independent Director meetings with various participants in attendance since the CCAA filing. These meetings have not always included the same participants, but have throughout this process included, at appropriate times, certain representatives of Evercore and certain members of management, and have always included Dominion Diamond's legal advisors. At no time have any of the other directors of Dominion Diamond participated in any of these meetings.

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III. DOMINION'S UNIQUE BUSINESS HAS VALUE AND DESERVES TO BE SAVED

13. As noted in my prior affidavits, the restructuring of Dominion must be considered in the context of the unique nature and value of Dominion's business.

14. The Ekati Mine is a complex asset that poses unique operational challenges for prospective owners for, among others, the following reasons:

- (a) the Ekati Mine operates in a sub-arctic climate, one of the most challenging physical environments in the world, and due to its Northern location is located far from supply chains, with nearly all supplies needing to be brought in on an ice road that can only operate for 8-10 weeks of the year;
- (b) diamonds are a niche resource and the mining of deposits and the extraction processes are atypical for the Canadian hard-rock mining environment;
- (c) the sale of diamonds is unlike most other mined resources, in that diamonds are not commodities and, as such, achieving fair market value for diamonds produced from the Ekati Mine requires specific knowledge and expertise; and
- (d) the development of additional viable diamond resources with the possibility of realizing long-term value requires sophisticated processes and is risky, complicated, and expensive.

15. The Ekati Mine is also unique in the sense that it has a strategic importance for its stakeholders in the Northwest Territories. In my view, as a significant taxpayer and the second largest non-governmental employer in the Northwest Territories (with over 40% of employees being Northern residents), the continuation of the Ekati Mine as a going concern is critical to, among others, the Northwest Territories, Dominion's Northern-based employees and contractors, and Northern communities generally. The importance of Dominion's business for these stakeholders cannot be overstated.

16. Due to its strategic importance and significant impact on Dominion's stakeholders, and Northern and Northern Indigenous stakeholders in particular, one of my primary considerations in exercising my functions as Independent Director has been to identify a restructuring path for Dominion that provides the best opportunity for the Ekati Mine to restart operations and continue as a going concern.

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17. To this end, as I discussed in my May and June Affidavits, the existence of the Stalking Horse Bid has, in my view, been important in demonstrating to Dominion's stakeholders, and Northern and Northern Indigenous stakeholders in particular, that they should have confidence in Dominion and its ability to survive as a viable business.

18. The fact that the Stalking Horse Bid contemplates that the Stalking Horse Bidder will assume substantially all of the go-forward operating liabilities of the Dominion Vendors (but not the Diavik Interest), including 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 GNWT, is in my view crucial to providing certainty about Dominion's future. This certainty has been, and continues to be, a significant benefit to those who depend on Dominion's business operations for their livelihoods and economic well being.

19. In considering the importance of a going concern outcome to these CCAA proceedings, I have been mindful of the financial and operational challenges posed to Dominion's business by its insolvency and the necessity of restructuring Dominion's financial affairs in the context of these CCAA proceedings.

20. The financial challenges faced by Dominion prior to the onset of the COVID-19 pandemic were substantial. As noted at the June 19, 2020 hearing before this Court and set out in the consolidated statement of loss found at Exhibit D to Ms. Kaye's April 21, 2020 affidavit, Dominion lost a combined \$332 million in 2018 and 2019.

21. As outlined in Ms. Kaye's affidavit sworn April 21, 2020, the ability of Dominion to conduct business and generate revenue and liquidity prior to the commencement of these CCAA proceedings had been constrained by the company's highly leveraged capital structure, which includes a US \$150 million first lien facility and US \$550 million in second lien notes.

22. As Ms. Kaye discusses in her affidavit, Dominion's financial woes were then exacerbated and materially impacted by COVID-19, cash calls by its joint venture partner at the Diavik Mine, increasing trade debt owing to suppliers, and finally the impending US \$20 million interest payment due May 1, 2020 to the second lien noteholders (which interest payments are due semi-annually and a further US \$20 million would have had to be paid November 1, 2020 but for the CCAA proceedings).

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23. The pre-COVID-19 circumstances, including the losses and constraints noted above, continue to exist, and will continue to exist when and if COVID-19 is no longer materially affecting Dominion's business.

24. It is clear to me that Dominion is facing several challenges that need to be addressed in a manner that would allow the company to continue operating as a going concern. I say this considering not only the best interests of Dominion but also taking into consideration the interests of various stakeholders, including but not limited to Northern communities, employees, contractors, the environment, and creditors. For the reasons set out in this affidavit, I am strongly of the view that approval and closing of the transaction contemplated by the APA before this Court is the best executable restructuring option available to Dominion and its stakeholders.

IV. IMPLEMENTATION OF THE SISP

A. Adjustments to the SISP Timelines and Requirements

i. Considerations for SISP Extensions

25. One of the issues that I was directly involved in during the SISP process concerned a request by members of the ad hoc group of second lien noteholders (the "**Ad Hoc Group**") for an extension of certain of the SISP timelines.

26. Following consultation with Dominion's professionals, and with the approval of the first-lien agent, the Stalking Horse Bidder, and the Interim Facility Lenders, I approved two (2) extensions to the SISP timelines to accommodate the Ad Hoc Group. I felt that these extensions and the terms thereof were in the best interests of Dominion. I note that, at the time these extensions were granted, more than four (4) months had passed since the initial CCAA filing and two and a half (2.5) months had passed since the Court approved the SISP.

27. I note that each of these two extensions were consented to by the Stalking Horse Bidder and the First Lien Lenders and neither had an obligation to do so under the SISP, the APA, or otherwise.

28. I discuss each of the two extensions in the subsequent sections of my affidavit. However, I feel that it is important to outline at the outset some of the important overarching considerations that informed my decisions to grant these accommodations on the terms I did. These considerations included:

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- (a) The need for any purchaser of Dominion's assets to apply to various governments and regulatory agencies for the transfer of licences, permits, mining leases, and other authorizations and the timing thereof;
- (b) The need for Dominion to purchase fuel and other supplies for shipment up the ice road and the timing thereof;
- (c) The benefits of restarting the Ekati Mine as soon as practicable and avoiding the negative consequences of delaying both the selection of a winning bidder and the closing of a transaction for the acquisition of the Ekati Mine; and
- (d) The importance of not giving the Stalking Horse Bidder the option to terminate the Stalking Horse Bid.

29. These considerations are complex and, to a significant extent, interrelated. For example, governmental and agency approvals cannot be sought until a purchaser is identified.

ii. Governmental Approvals

30. Both the Stalking Horse Bidder and the Ad Hoc Group proposed completing the acquisition of the Ekati Mine by way of an asset purchase. The transfer of substantially all the assets of an operating mining company the size of Dominion is not a small or easy undertaking. In particular, throughout the course of the SISP process it was clear that Dominion would be required to transfer each of its licences, permits, mining leases, and other authorizations to the successful bidder.

31. The key licenses pursuant to which Dominion operates its business are the Type A and Type B Water Permits, Dominion's obligations under which are secured by approximately \$260 million in surety bonds.

32. Pursuant to the *Waters Act* (Northwest Territories), an application for authorization to assign Type A and Type B Water Permits must be submitted to the Wek'eezhii Land and Water Board forty five (45) days before the date on which the applicant proposes to transfer the permits.

33. A second key authorization pursuant to which Dominion operates is the Environmental Agreement dated June 6, 1997 (the "**Environmental Agreement**"), as amended, made among GNWT, the Government of Canada, and Dominion. This agreement sets out additional

reclamation security requirements and creates an Independent Environmental Monitoring Agency to, among other things, oversee operations and reclamation at the Ekati Mine. The consent of the GNWT and the Government of Canada is required for the assignment of the Environmental Agreement. As there are no statutory or regulatory procedures for such approval, Dominion reached out to GNWT which brought in Crown-Indigenous Relations and Northern Affairs Canada to provide guidance on what would be required to obtain consent to the transfer of the Environmental Agreement. A copy of the letter received from GNWT in this regard is attached as Exhibit "L" to the affidavit of Jennifer Alambre sworn October 4, 2020 (the "**Alambre Affidavit**").

34. Among other things, GNWT advised that it will assess the following criteria as it relates to the successful bidder:

- (a) financial practices, systems, policies, and procedures;
- (b) ability to post required security;
- (c) the form of security provided;
- (d) the creditworthiness of the banks and/or insurance companies backing the securities;
- (e) the creditworthiness of the company providing the Ekati Environmental Agreement Guarantee;
- (f) ability to fund the Independent Environmental Monitoring Agency;
- (g) liquidity ratios, debt ratios, profitability ratios;
- (h) diamond market forecast;
- (i) ability to obtain the appropriate regulatory permits and licenses for the Ekati Mine to continue its operations;
- (j) management practices, systems, policies, and procedures;
- (k) personnel capacity;
- (l) Northern business experience, background of the company in diamond mining/resource extraction;

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- (m) life of mine plan;
- (n) past compliance record;
- (o) ISO certificates;
- (p) Industry certifications.

35. Accordingly, it was clear that preparing the application and obtaining the consent for the assignment of the Environmental Agreement was not a simple process.

36. In addition to the foregoing, there is a myriad of additional licences, permits and land leases that will have to be transferred to the successful bidder in the SISP process, as well as the Socio-Economic Agreement with the GNWT and Impact Benefit Agreements with four (4) Indigenous groups. As such, my evaluation of requests for extensions was informed in part by the understanding that any successful bidder (including either the Ad Hoc Group or the Stalking Horse Bidder) would require substantial time to complete this transfer process.

iii. Fuel Purchases and Transport

37. If Dominion does not arrange for the purchase of additional diesel fuel and the transportation thereof to the Ekati Mine during the 2021 ice road season, there will be no ability to restart the Ekati Mine until 2022.

38. The logistics for the purchase and transportation of diesel fuel for the Ekati Mine is complex and must be planned far in advance to avoid the risk of not securing such fuel. Dominion must arrange for the purchase of the fuel, the transportation of that fuel by truck or rail from areas in Western Canada to Dominion's tanking facilities in the Yellowknife area, the aggregation of that fuel, and the trucking of that fuel from the Yellowknife area to the Ekati Mine over an ice road.

39. Dominion has a seasonal window in which it must make certain commitments to purchase supplies, including in particular diesel fuel without which the Ekati Mine cannot operate. This is primarily due to the fact that the only practical or economical way to transport supplies to the area of the Ekati Mine is up an ice road that is only available during the winter period from approximately February 15 to March 31. This ice road is paid for and shared among three (3) mining companies and each is required to schedule its shipments.

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40. There are a limited number of drivers qualified to transport fuel on the remote and challenging conditions of the ice road. The limited number of qualified drivers is a particular concern in the current COVID-19 environment.

41. Because of the importance of securing fuel and arranging and scheduling its transportation up the ice road, Dominion has traditionally made these commitments in September to provide for adequate leadup time required to mitigate risks associated with the limited availability of the ice road and the need to retain in advance qualified drivers capable of delivering fuel to the mine site.

42. As the budget for the Interim Financing Term Sheet (the "DIP") does not contemplate the use of DIP proceeds to purchase such fuel, Dominion made each of the Ad Hoc Group and the Stalking Horse Bidder aware of the necessity of securing fuel and its transport to the Ekati Mine. I understand from Evercore that the timing and dollar value of Dominion's fuel requirements were included in, among other documents available to the Ad Hoc Group, Dominion's financial model that was made available to potential bidders by being uploaded to Dominion's virtual data room on April 22, 2020. The requirement to purchase fuel, the limited number of qualified drivers capable of delivering fuel to the mine site, and the limited window for staging fuel shipments to the Ekati Mine were also identified as key areas of focus in management presentations made to the Ad Hoc Group in August 2020.

43. On September 2, counsel to Dominion sent an email to counsel to both parties inviting (but not requiring) them to advise how they would propose to arrange for the purchase of sufficient fuel by Dominion prior to the closing of the transaction contemplated by the SISP in scenarios where the successful bidder intends to restart the Ekati Mine in either the fall of 2020 (or would like the option to be able to do so) or in the spring of 2021. The email from counsel to Dominion to counsel to the Ad Hoc Group dated September 2, 2020 in this regard is attached as Exhibit "O" to the Alambre Affidavit.

44. The Stalking Horse Bidder has not committed to the purchase of fuel pending closing of the transactions contemplated by the APA.

45. As a result, Dominion, together with Evercore, has worked diligently on alternatives for securing fuel and the transportation thereof. On approximately September 25, 2020, Dominion secured an agreement with a supplier on favourable terms for the purchase and transportation of 10 million litres of fuel, with the fuel beginning shipment by rail on or about October 23, 2020, the transportation being slotted into the schedule for the ice road, and the first payment required

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fifteen days after delivery. Dominion negotiated with the supplier that Dominion can increase the volume of fuel at a later date. Dominion can also cancel this purchase if necessary. The 10 million litres of fuel purchased, which is only a portion of the amount of fuel that will be required if a decision is made to restart the Ekati Mine in 2020 or 2021, was the maximum amount that the supplier would permit on these purchase terms. If Dominion did not secure these terms, it does not believe it would be able to restart the Ekati Mine until 2022. In the circumstances, it was determined that proceeding with this purchase was the prudent thing to do.

iv. Restart of Ekati Mine Operations and Avoiding Consequences of Delaying a Transaction

46. In my view, in addition to creating a termination right in favour of the Stalking Horse Bidder under the APA, there are further material negative consequences of delaying the closing of a transaction and significant advantages to positioning the successful bidder to be able to attempt to restart the Ekati Mine as soon as practicable. These include:

- (a) Ongoing Furlough of Employees. Unionized employees, and the majority of non-unionized employees, have been on furlough since April 4, 2020 and Dominion would like to see these employees brought back to work for their and the company's benefit;
- (b) Loss of Employees and Contractors. Dominion is concerned that it may lose employees and contractors to competitors or other regions if it does not resume operations at the Ekati Mine as soon as practicable. Dominion's highly skilled employees and contractors are vital to its business. These employees and contractors are not easily replaceable. The loss of these employees and contractors due to uncertainty as to whether or when the Ekati Mine will operate again would have a material negative effect on Dominion and the future viability of the Ekati Mine;
- (c) Loss of Trade Suppliers. The businesses of Dominion's contractors depend on Dominion's operations at the Ekati Mine. Dominion anticipates that many contractors will make alternate arrangements for their equipment and services if the Ekati Mine is not restarted or if there is uncertainty about its restart. If critical equipment currently at the mine site is taken from the mine site by these contractors, it may be difficult to replace in the near term given the remote location

of the mine and would impact the restart of the Ekati Mine. If significant equipment is removed from the mine site during the upcoming ice road season without notice, it would be difficult or even impossible, to replace it until the following ice road season in 2022.

- (d) Loss of Customers. Customers may be lost to other diamond companies if Dominion exhausts its current diamond inventory and is not able to backfill the inventory through resumed operations. The inability to sell diamonds, or delay in sales activity, could also result in a loss of Dominion's marketing and sorting staff. Like its skilled workforce at the Ekati Mine, Dominion's diamond sales/sorting staff is drawn from a limited talent pool and would be difficult and costly to replace;
- (e) Relationships with Northern Communities, Indigenous Groups, and the GNWT. In addition to providing employment to Northern and Indigenous residents of the Northwest Territories, Dominion supports numerous socially significant sustainable development projects, as identified by local Northern communities and Indigenous groups. Dominion's failure to restart operations at the Ekati Mine will necessarily have deleterious effects on the First Nations and local communities who depend on Dominion's business operations for their livelihoods and economic well being;
- (f) Cost of Care and Maintenance. The cost of care and maintenance is currently approximately \$5 million per month, with costs expected to increase as temperatures drop through the winter, and such costs are sunk costs which generate no revenue;
- (g) Risks Associated with Delayed Restart. Generally speaking, the longer a mine is on care and maintenance the more difficult and costly it is to restart; and
- (h) Geological Risks in Winter. Restarting the Ekati Mine as soon as possible avoids unknown geotechnical risks associated with continuing on care and maintenance through a winter in the North. The Ekati Mine has never been put through such a circumstance.

47. Dominion recognizes that a restart of the Ekati Mine will be at the discretion of the purchaser under the SISP process, and that there may be additional significant known and

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unknown challenges to such a restart. However, Dominion would like such purchaser to have the ability to attempt to restart the Ekati Mine as soon as practicable after the completion of its sale and hopes that the purchaser will do so.

v. Maintaining the Stalking Horse Bid

48. As noted above, the existence of the Stalking Horse Bid has been important in demonstrating to, among others, Dominion's employees, contractors, creditors, and to Northern communities and the GNWT, that they should have confidence in Dominion's ability to survive as a going concern. This confidence has been critical in ensuring Dominion's ability to handle both the COVID-19 environment and the restructuring process generally and to keep its business intact.

49. Accordingly, I am of the view that it is not in the best interests of Dominion and its stakeholders generally to take any action that will give the Stalking Horse Bidder the right to terminate the APA or result in a breach of the Outside Date milestone under the DIP. Such an outcome would create the type of uncertainty regarding Dominion's ability to continue to operate the Ekati Mine that the Stalking Horse Bid was intended to avoid. This outcome could trigger cascading negative consequences of the sort referenced above for Dominion and its stakeholders and create a meaningful risk that Dominion may never be able to restart the Ekati Mine.

50. Taking any action that could result in the loss of the Stalking Horse Bid on the mere hope that a better opportunity may materialize in the future is in my view not reasonable or prudent.

B. First Extension of the SISP Timelines to Accommodate the Ad Hoc Group

51. On August 20, 2020, the Ad Hoc Group requested a thirty (30) day extension to the August 31, 2020 SISP deadline for binding Phase 2 Bids and stated in their correspondence that even an extension of less than thirty (30) days might prove pivotal in enabling the Ad Hoc Group to put forward a superior offer in the SISP. The email from counsel to the Ad Hoc Group to counsel to Dominion dated August 20, 2020 regarding this extension request is attached as **Exhibit "G"** to the Alambre Affidavit.

52. As outlined in writing by Dominion's counsel on August 28, 2020, it was suggested by the Ad Hoc Group that Dominion should be prepared to take actions to extend the dates set out in the SISP regardless of whether Dominion had the consent of the Stalking Horse Bidder or the First Lien Lenders. In making this request, the Ad Hoc Group advised Dominion that it expected

in the near future to be able to arrange debt and equity financing required to make a binding bid that would be superior to the Stalking Horse Bid. The email from counsel to Dominion to counsel to the Ad Hoc Group dated August 28, 2020 regarding this extension request is attached as Exhibit "K" to the Alambre Affidavit.

53. The dates set out in the Court approved SISP were also dates and deadlines in the DIP and the Stalking Horse Bid approved by the Court on June 19, 2020. As a result, a unilateral decision by Dominion to amend the SISP and extend the process as suggested by the Ad Hoc Group would have resulted in a default under the DIP as well as a breach of certain covenants and obligations of Dominion under the Stalking Horse Bid. This would give the Stalking Horse Bidder the right to terminate the APA with Dominion having no alternative transaction proposal.

54. After careful consideration, I determined that it was not in Dominion's interest or in the interest of its stakeholders generally to take the approach suggested by the Ad Hoc Group outlined above. I was not prepared to take the risk of putting in jeopardy the benefits provided by the Stalking Horse Bid in the hope that the Ad Hoc Group would come through on its statement that it may make a superior bid at some future time. Such an outcome could lead to a liquidation of Dominion, the loss of hundreds of jobs and supply contracts and, in general, would be a devastating result for the North.

55. At the same point, I did want to provide what accommodations could be reasonably provided in the circumstances to the Ad Hoc Group. To this end, Dominion sought and obtained from the Stalking Horse Bidder, the Interim Facility Lenders, and the First Lien Lenders an extension to certain of the SISP deadlines to allow the Ad Hoc Group additional time to: (a) arrange its financing; (b) come to an arrangement with Dominion's sureties; and (c) determine if the Ad Hoc Group would purchase Dominion's 40% interest in the Diavik Mine.

56. By requesting the Stalking Horse Bidder and the First Lien Lenders' consent Dominion was able to keep the Stalking Horse Bid alive while providing an extension to the Ad Hoc Group.

57. The proposal that was consented to by the Stalking Horse Bidder, as an accommodation to the Ad Hoc Group, and by the Interim Facility Lenders and the First Lien Agent, attached as **Exhibit "K"** to the Alambre Affidavit, was set out in an email from counsel for Dominion to counsel for the Ad Hoc Group dated August 28, 2020, as follows:

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- (a) the Ad Hoc Group would be required to submit its Phase 2 Bid by August 31, 2020 in accordance with the terms of the SISP;
- (b) Dominion and the Monitor would waive (i) the requirement that the Ad Hoc Group's bid identify whether the Ad Hoc Group would be purchasing the Diavik Interest and (ii) the requirement that the bid not contain financing conditionality (the "**Limited Waiver**");
- (c) the Limited Waiver would expire at 3 pm EST on September 8, 2020 (the "**First Extended Phase 2 Bid Deadline**"), meaning that the Ad Hoc Group had to confirm whether it would be purchasing the Diavik Interest and remove its financing condition by this time;
- (d) the Ad Hoc Group would receive the required SISP deposit back if it withdrew its bid by the First Extended Phase 2 Bid Deadline;
- (e) the Auction would commence on September 9 (rather than September 3) and would be concluded by September 11 (rather than September 7);
- (f) transfer documents related to all leases and licenses and other matters that require governmental approval would be worked on by the Ad Hoc Group with Dominion during the period from September 1 through to September 8 (i.e. before it was determined who would be the winning bidder) so that these documents would be finalized and in a form able to be submitted to the applicable governments and governmental agencies by no later than September 14 (which would enable the transaction to possibly still close by October 31); and
- (g) the Outside Date for the purposes of the SISP and APA would be moved to November 7 to provide a buffer for closing.

58. As part of this extension, Dominion did not extend the deadline by which the Ad Hoc Group (and any other Phase 2 Qualified Bidder aside from the Stalking Horse Bidder) was required to fund a refundable deposit equal to 10% of the cash purchase price component of its bid. The deadline for such a deposit remained August 31, 2020, and, in the case of the Ad Hoc Group, would have required a refundable deposit of approximately US\$13 million. Dominion and its advisors believed that continuing to require such a deposit by the original Phase 2 Bid Deadline would demonstrate the *bona fides* of the Ad Hoc Group's offer while not proving unduly onerous

for the Ad Hoc Group because (a) of the months of notice given to the Ad Hoc Group; and (b) the deposit was fully refundable.

59. The intent and effect of this proposal was to provide the Ad Hoc Group with an additional eight (8) days beyond the SISP deadline to advance its bid while preserving the ability of the parties to still close by October 31, 2020, but if not then by no later than the new November 7, 2020 Outside Date.

60. The dates as extended were not arbitrary, but rather were selected with purpose after considering the potential implications of both granting and declining to grant an extension.

61. With respect to the Outside Date, I selected this date as Dominion determined at the time that it could last approximately another week until the new Outside Date of November 7, 2020 without additional financing under the DIP. Further, Dominion felt that if a transaction could not close by October 31, the new Outside Date of November 7 would still ensure that the successful bidder could make timely and important decisions regarding the business including, among other things, potentially restarting the Ekati Mine in 2020.

62. With respect to the First Extended Phase 2 Bid Deadline of September 8, 2020, I selected this date so that there would be sufficient time to complete all documentation necessary to submit the applications for the transfer of the Type A and B Water Licenses and the assignment of the Environmental Agreement as described above.

63. On August 31, 2020, the Ad Hoc Group submitted its Phase 2 Bid which:¹

- (a) contained a financing condition (as was permitted by the Limited Waiver). However, the financing condition that was added to the Ad Hoc Group's bid extended the financing condition to closing and provided a closing condition that the Ad Hoc Group shall have entered into such arrangement, commitments and agreements as may be satisfactory to them, in their sole discretion, with respect to "debt and equity financing" (section 9.16);

¹ All section references in this paragraph are references to sections in the draft asset purchase agreement submitted by the Ad Hoc Group.

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- (b) did not require the Ad Hoc Group to purchase the Diavik Interest; *i.e.*, it contained a Diavik Interest condition (as was permitted by the Limited Waiver) (section 3.1(b)); and
- (c) was in a form very similar to the Stalking Horse Bidder's asset purchase agreement and, specifically:
 - (i) included a surety condition (section 9.9);
 - (ii) permitted the Ad Hoc Group to remove contracts from the Acquired Assets prior to Closing (section 3.2(e));
 - (iii) stated that the intention was to offer employment to substantially all employees but permitted the purchaser to not make offers to all employees (section 8.1(a)); and
 - (iv) included a material adverse effect condition precedent in favour of the Ad Hoc Group (section 9.6).

64. Notwithstanding that there was no extension or waiver of the deposit deadline, the bid submitted by the Ad Hoc Group on August 31, 2020 was not accompanied by any deposit. This deficiency was raised with the Ad Hoc Group. During the week following August 31, a partial deposit of only approximately US\$7.9 towards the required deposit of US\$13.2 million was provided to counsel to the Monitor (provided by approximately twenty-five (25) different parties). The remaining US\$5.3 million was never provided.

65. On September 8, 2020, just prior to the First Extended Phase 2 Bid Deadline, the Ad Hoc Group wrote to counsel for Dominion to advise that the Ad Hoc Group was withdrawing their offer and requesting the prompt reimbursement of the partial deposit paid by the Ad Hoc Group. An email from counsel to the Ad Hoc Group to counsel to Dominion dated September 8, 2020 regarding the withdrawal of the Ad Hoc Group bid is attached as Exhibit "Q" to the Alambre Affidavit.

C. *Second Extension of the SISP Timelines to Accommodate the Ad Hoc Group*

66. While I believed that further moving the Outside Date was problematic, I was prepared to find ways to provide an additional extension to the First Extended Phase 2 Bid Deadline to further

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accommodate the Ad Hoc Group's continued participation in the SISP and foster a potential higher or better bid for Dominion's assets.

67. On September 8, 2020, Dominion advised counsel for the Ad Hoc Group that Dominion was prepared to ask the Stalking Horse Bidder and the Interim Facility Lenders for an additional extension to the First Extended Phase 2 Bid Deadline, which such parties ultimately granted as a further accommodation to the Ad Hoc Group to assist it in making its bid.

68. Later in the day on September 8, 2020, counsel to the Ad Hoc Group advised Dominion that the Ad Hoc Group would be interested in a further SISP deadline extension.

69. On September 9, 2020, Dominion, with the applicable consents, granted a second extension to certain of the SISP timelines that required that any new bid by the Ad Hoc Group be submitted by September 15, 2020 (the "**Second Extended Phase 2 Bid Deadline**").

70. As part of the Second Extended Phase 2 Bid Deadline, certain key dates would be pushed back (with adjustments to other dates as required), including the extension of the Auction start date from September 3 to September 16, the extension of the deadline for selection of a winning bidder from September 7 to September 18. The deadline for the Outside Date had already been extended one week and remained November 7. An email from counsel to Dominion to counsel to the Ad Hoc Group dated September 9, 2020 setting out the terms for the Second Extended Phase 2 Bid Deadline is attached as Exhibit "Q" to the Alambre Affidavit.

71. The intent and effect of this proposal was to: (i) provide the Ad Hoc Group with a further seven (7) days to advance its bid; (ii) retain the previously extended Outside Date at November 7, 2020; and (iii) provide for only one (1) business day (an three calendar days) from September 18, 2020 (the new outside date for the conclusion of the Auction) for the winning bidder and Dominion to prepare the necessary materials to apply for the transfer of the Type A and B Water Licenses and the assignment of the Environmental Agreement by no later than September 21, 2020 (which was the date required to give 45 clear days before the November 7 Outside Date).

72. With respect to the Outside Date, I did not believe that it was in the best interests of Dominion and its stakeholders to further extend this date due to the need to ensure that the successful bidder could make timely and important decisions regarding the business including, among other things, potentially restarting the Ekati Mine in 2020.

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73. With respect to the Second Extended Phase 2 Bid Deadline, I determined that Dominion could move this date one (1) week without moving the Outside Date, but only if the Ad Hoc Group was prepared to work with Dominion over the coming weeks to prepare required transfer documentation in advance of the Auction process so that if the Ad Hoc Group was selected as the winning bidder that the applicable documentation could be submitted to the government and applicable regulatory bodies by, September 21 (which was the date required to give 45 clear days before the November 7 Outside Date). While I perceived there to be risk that there would not be enough time to complete the documentation in this time period, I felt it was an acceptable risk if it provided an additional week for the Ad Hoc Group to organize its bid.

V. AD HOC GROUP'S FAILURE TO BID AND SEPTEMBER 15, 2020 LETTER

74. To the best of my knowledge, there was no substantive engagement between the Ad Hoc Group and Dominion from September 8 through the Second Extended Bid Deadline of September 15. Among other things, the Ad Hoc Group did not engage with Dominion to advance the applicable transfer documentation for submission to the government and regulatory bodies.

75. The Ad Hoc Group did not submit a bid by the Second Extended Phase 2 Bid Deadline. With the Ad Hoc Group's withdrawal of, and subsequent failure to resubmit, their bid, the Stalking Horse Bid was the only qualified bid submitted in accordance with the SISF by the Second Extended Phase 2 Bid Deadline.

76. I have reviewed the letter sent by counsel to the Ad Hoc Group to counsel to Dominion on the Second Extended Phase 2 Bid Deadline.

77. In the September 15 letter the Ad Hoc Group, among other things, requests that Dominion reject the Stalking Horse Bid and instead engage in discussions with the Ad Hoc Group on an alternate transaction path. The Ad Hoc Group's letter does not specify what the alternate transaction path it suggests Dominion pursue is and what it would necessarily entail. The September 15 letter does state that there should be a deferral of any definitive transaction up to "at least November 16, 2020" and also comments that "we do not need to now pre-determine deadlines."

78. For all of the reasons set out in this affidavit, my May Affidavit, and my June Affidavit, including the considerations that informed my views on the appropriateness of implementing the SISF, the value of the Stalking Horse Bid, and the granting of the First and Second Extended

Phase 2 Bid Deadlines, I determined that it is in the best interest of Dominion and its stakeholders generally that Dominion continue to move forward with the transaction contemplated by the APA.

VI. CLOSING WORKSTREAMS

79. The transaction contemplated by the APA, which involves transferring all of the assets of a large operating mine site, is complex and involves multiple concurrent and interrelated work streams that require the Stalking Horse Bidder's active and ongoing participation and engagement.

80. Since the determination that the Stalking Horse Bid was the successful bid under the SISP, Dominion and the Stalking Horse Bidder have been diligently working towards the closing of the transaction contemplated by the APA by the Outside Date of November 7, 2020.

81. In particular, the major workstreams presently underway as the parties work towards closing include:

- (a) Surety Negotiations. The Stalking Horse Bidder and Dominion are actively engaged in ongoing negotiations with Dominion's sureties to satisfy the closing condition that the Stalking Horse Bidder come to satisfactory arrangements with respect reclamation security obligations for the Ekati Mine. Dominion and the Stalking Horse Bidder, and their respective advisors, and all three of the sureties continue to devote substantial time, effort, and resources to reach an agreement regarding this important matter. Assuming an agreement with the sureties is reached, the Stalking Horse Bidder and Dominion will immediately engage with the GNWT.
- (b) Identification of Assigned Contracts and Related Negotiations. The Stalking Horse Bidder and Dominion, and their respective advisors, are actively involved in reviewing Dominion's contracts and engaging in discussions with contractual counterparties to ensure that required and appropriate contracts are assumed by the Stalking Horse Bidder on a go-forward basis as contemplated by the APA.
- (c) Transfer of Authorizations. The transfer of Dominion's material licenses, mining claims, permits and other authorizations, including key applications such as the transfer of Dominion's Type A and B water license, land use permits, and Environmental Agreement, requires significant ongoing coordination between the Stalking Horse Bidder, Dominion, their respective advisors, and various regulators and governmental bodies to ensure that

these material licenses are in place following closing to allow the Stalking Horse Bidder to operate the Ekati Mine.

- (d) Restart. The Stalking Horse Bidder and Dominion, and their respective advisors, are working on scenarios for the possible restart of the Ekati Mine.
- (e) Fuel. As described above, Dominion and its advisors have been working on alternatives for the purchase and transportation of fuel.
- (f) Systems. The Stalking Horse Bidder and Dominion are preparing for the implementation of an entirely new enterprise resource planning system (SAP) covering operations, financial, human capital management and corporate services.
- (g) Community Engagement. Dominion is actively engaged with its community stakeholders, including beneficiaries under the Socio-Economic Agreement with the GNWT and Impact Benefit Agreements with Indigenous groups, regarding the status of Dominion's operations and the effect of the transaction contemplated by the APA on these stakeholders.

82. Each of the above workstreams requires regular engagement by senior leadership of the Stalking Horse Bidder and Dominion and their respective advisors. Concurrently with the major workstreams identified above, Dominion's and the Stalking Horse Bidder's representatives and advisors are actively preparing the substantial amount of legal documentation required to transfer Dominion's assets in the context of the company's unique, complex, and integrated business structure by the Outside Date. At present, I understand that the closing agenda being advanced by the parties is twenty (20) pages long and includes eight-six (86) active action items.

VII. CONCLUSION

83. In my capacity as Independent Director, I reviewed and considered the Stalking Horse Bid, both prior to its approval by this Court and throughout the SISP process. Deliberations on the Stalking Horse Bid considered many factors including, among others, the consideration offered, transaction structure, timing, conditions and certainty of closing, and impact on stakeholders. Consideration was also given to the detailed canvassing of the market through the SISP, as well as the current circumstances facing Dominion and the diamond market.

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84. With respect to market exposure, prior to these CCAA proceedings I was involved in three (3) strategic review processes to, among other things, solicit the sale of Dominion's assets to a third-party. As discussed in my May Affidavit, the first two (2) of these strategic processes were undertaken with the assistance of a bank-owned financial advisor in each of 2015 and 2016 and did not produce a buyer. The third strategic process was undertaken in 2017 and resulted in one (1) formal offer to acquire the company, being the offer made by Washington.

85. Notwithstanding the public nature of these CCAA proceedings, no third-parties came forward with their own competing stalking horse offer in the approximately two (2) months between the commencement of these CCAA proceedings in April and the formal start of the SISP process in June. Nor did the SISP result in a qualified bid other than that of the Stalking Horse Bidder.

86. Dominion has made substantial and continuous good faith efforts in the context of these CCAA proceedings to sell its assets to parties willing to provide bids superior to the Stalking Horse Bid. However, notwithstanding a thorough exploration and canvassing of the market over the course of approximately five (5) months, superior bids, including any superior bid from the Ad Hoc Group, did not materialize. I do not believe that expending more time, costs, and resources pursuing the hope of a different outcome would change this situation.

87. In contrast to the uncertainty associated with now pursuing options other than the APA with the Stalking Horse Bidder, further delay to the SISP process would expose Dominion to known risks impacting its ability to potentially restart the Ekati Mine, including risks associated with the ability to purchase fuel, rehire employees, preserve relationships with, and the business of, contractors and suppliers, maintain a competitive market presence with customers, and create certainty for community stakeholders including Indigenous groups, the GNWT, unions and regulators and other interested parties.

88. For the reasons set out above, it is my judgment that the prudent course of action is for Dominion to spend its time and resources on advancing the closing of the transaction contemplated by the APA for the benefit of its stakeholders and not on pursuing alternative options that may or may not materialize at some future time.

89. Based on my knowledge of Dominion's business, experience in the Northwest Territories, including in the diamond mining industry, participation in three (3) prior strategic processes for the sale of Dominion's assets, it remains my strongly held view that the transaction contemplated

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by the APA is the best executable alternative for Dominion in the circumstances and is in the best interest of Dominion and its stakeholders.

VIII. PROCESS FOR COMMISSIONING OF THIS AFFIDAVIT

90. I am not physically present before the Commissioner for Oaths (the "**Commissioner**") taking this affidavit, but I am linked with the Commissioner by video technology. The following steps have been or will be taken by me and the Commissioner:

- (a) I have shown the Commissioner the front and back of my current government-issued photo identification ("ID") and the Commissioner has compared my video image to the information on my ID;
- (b) the Commissioner has taken a screenshot of the front and back of my ID to retain it;
- (c) the Commissioner and I have a paper copy of this affidavit, including all Exhibits, before us;
- (d) the Commissioner and I have reviewed each page of this affidavit and Exhibits to verify that the pages are identical and have initialed each page in the lower right corner;
- (e) at the conclusion of our review of the affidavit and Exhibits, the Commissioner administered the oath to me, and the Commissioner watched me sign my name to this affidavit; and
- (f) I will send this signed affidavit, including Exhibits, electronically to the Commissioner.

SWORN BEFORE ME by two-way video)
conference on October 4, 2020.)
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A Commissioner for Oaths in and for the
Province of Alberta)
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BRENDAN BELL

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SWORN BEFORE ME by two-way video)
conference on October 4, 2020.)

A Commissioner for Oaths in and for the
Province of Alberta

Morgan E. Crilly
Barrister & Solicitor

BRENDAN BELL



APPENDIX A

Certificate of Commissioning by Videoconference

I, Morgan Crilly, Commissioner of Oaths in and for Alberta, took the Affidavit of Brendon Bell via videoconference on October 4, 2020 (the "**Affidavit**").

The affiant and I followed the process outlined by the Alberta Court of Queen's Bench in Notice to the Profession and Public #2020-02 dated March 25, 2020. In addition to the steps described in the Affidavit, I compared each page of the copy I received from the affiant with the initialed copy that was before me while I was linked by videoconference with the affiant. Upon being satisfied that the two copies were identical, I affixed my name to the jurat.

On March 17, 2020, the Government of Alberta declared a state of public health emergency pursuant to the Alberta *Public Health Act* in response to the COVID-19 pandemic. The Government of Alberta also strongly recommends that all individuals stay home and avoid contact with others whenever possible. Therefore, I am satisfied that this process was necessary because it was unsafe for the deponent and I to be physically present together.



Commissioner of Oaths in and for Alberta
Morgan E. Crilly
Barrister & Solicitor