

**Court of Queen's Bench of Alberta**

**Citation: Dominion Diamond Mines ULC (Re), 2021 ABQB 47**



**Date:**  
**Docket:** 2001 05630  
**Registry:** Calgary

**In the Matter of The *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

**And In The Matter 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.**

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**Endorsement  
of the  
Honourable Madam Justice K.M. Eidsvik**

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[1] Dominion Diamond seeks an interpretation of paragraph 16 of the Second SARIO granted on June 19, 2020. In short, this paragraph authorizes DDMI, in its capacity as manager under the Diavik JVA, to hold an amount of Dominion Diamond's share of production from the Diavik Mine equal to the total value of the Cover Payments made by DDMI based on the DICAN valuation ("Dominion Products").

[2] Dominion and DDMI dispute four different areas of interpretation:

1. When the value of the Dominion Products should be assessed against the quantum of outstanding Cover Payments,
2. Whether certain larger diamonds ("Section 4 Diamonds") should be included in the value of Dominion Products held back by DDMI,
3. Whether the Cover Payments should include interest, and
4. What foreign exchange rate should be used to convert the value of the Dominion Products (valued in US \$) in comparison to the Cover Payments (which are made in Can \$).

## Discussion

[3] The point of paragraph 16 of the Second SARIO was to allow DDMI some security over the Cover Payments it was making on Dominion's behalf, to operate the Diavik Mine during the pandemic and in face of Dominion's efforts to restructure. In other words, the principle behind the paragraph was to allow DDMI to hold back diamonds equal to the Cover Payments as collateral. Note that this relief was opposed by Dominion on the basis that none of its portion of the Diavik diamonds should be held back, but it was ordered in order to balance DDMI and Dominion's rights. Importantly, the security ordered in paragraph 16 was not a monetization process – this has since been dealt with in a separate Order. Further, it was not supposed to entail any final assessments of amounts owing between the parties. That too will be for another day.

[4] Keeping these principles in mind, I make the following comments which will hopefully help the parties interpret and implement paragraph 16.

### 1. Timing

[5] The Cover Payments and the production and delivery cycle of the mined diamonds do not operate in sync: the Cover Payments are payable mainly bi-weekly whereas the diamond production cycle includes production starts and cut offs, valuation and shipment dates.

[6] The general arrangement set out in the Splitting Protocol is that the diamonds are mined and produced, sent over to the PSF, reviewed and triaged there into sizes and given a DICAN value. Most of the diamonds are then split between the parties (40% to Dominion and 60% to DDMI). Some larger diamonds are dealt with separately as I will come to. Throughout the process the mined diamonds are held in trust by DDMI as manager of the mine. Once split, Dominion's portion would normally then be shipped to them and title would pass.

[7] Dominion attempts in its calculations to sync the amount of the Cover Payments with the value of the diamonds by pro-rating the monthly value of diamonds produced in the mine as assessed by their DICAN value (when the DICAN value subsequently becomes available – which may be a few weeks later), and compares that with the amount of that same month's Cover Payments. Accordingly, the analysis it provided to the Monitor was up to November 15, 2020 since the last production cycle for which they had received a DICAN valuation ended November 19, 2020.

[8] DDMI however, calculates the Cover Payments made in any particular month, and compares those payments to the value of the diamonds when they are given their DICAN value and are split and ready to ship – that is – a few weeks later. Accordingly, the assessment it provided to the Monitor included Cover Payments up to December 31, 2020 but *excluded* diamonds in its possession that had not yet been split and assigned a DICAN value. In other words, it does not pro-rate the diamond value back to coordinate with the Cover Payments made the same month the diamonds were mined – but rather includes their value later.

## Analysis

[9] I have reviewed the history of the production of diamonds since the commencement of these CCAA proceedings to help ascertain what was being contemplated in the June 19, 2020 Order. Firstly, I note that the Cover Payment of \$16 M was not made by Dominion on April 22, 2020, and it was one of the liabilities that was highlighted in the receivership in the first place. The diamonds that were produced between April 1 and April 15, 2020, due to be delivered on April 22 coincidentally, were ordered to be delivered to Dominion since the Cover Payments were up to date. This Order was granted on May 8, 2020.

[10] On May 15, 2020, I allowed DDMI to hold the whole of the next May 20, 2020 delivery in trust. According to Ms. Kaye's Confidential Exhibit #5 in her May 6, 2020 Affidavit, this shipment was for diamonds produced between April 16 and May 6, 2020. Subsequently, on June 19, 2020 I made the Order, including the paragraph we are discussing, allowing DDMI to only hold back those diamonds that equaled the Cover Payments.

[11] In DDMI's table as set out at para 24 of the Monitor's Twelfth Report, DDMI has set out the whole of the Cover Payments made in April and May, but only a small value for diamonds for May, and none for April. Dominion has set out the Cover Payments made in April and May and a much larger value of diamonds since they include the diamonds produced and in DDMI's possession in April and May. (Note that I am not using the exact numbers for confidentiality reasons).

[12] Considering that DDMI had authority to hold back diamonds from April 16, the fact that they assess no value to these diamonds in April and little in May, i.e. some value is deferred into June since that would have been the next delivery date, does not align with what was trying to be achieved in paragraph 16 in terms of *collateral* for DDMI.

[13] DDMI is concerned that the way Dominion has pro-rated the value of the diamonds in a monthly fashion is not right because "Until the diamonds have been cleaned, sorted and valued, there is no reliable means of predicting the value of the work-in progress at any specific point in time." (para 32 of DDMI's brief of Jan 12, 2021) However, that is not the way I interpret Dominion's way of approaching the pro-rata split. Instead, it is properly using *actual* DICAN valuations for the diamonds produced in any particular month, even if assessed later, and applying this value on a pro-rata basis to the month when the diamonds were produced (see para 41 of Dominion's Jan 13, 2021 brief for an example).

[14] DDMI submits that only diamonds where Dominion has title should be included – which means of course a lag in timing because title is only obtained once the whole of the splitting protocol is complete. In Dominion's methodology, it is *possession* of produced (i.e. mined diamonds) that is emphasized, not title. I agree that this latter way is the appropriate one to view the value of the collateral allowed in paragraph 16 – especially since DDMI, as manager, has complete control and possession of these diamonds throughout the process and holds them in trust.

[15] In sum, I accept that Dominion's methodology to compare the value of diamonds in DDMI's manager's possession in any particular month to the Cover Payments made in that same

month, aligns best with what paragraph 16 was attempting to achieve; that is, *collateral* for DDMI equal to the amount of Cover Payments. Using a deferred method as suggested by DDMI is not a what was contemplated.

## **2. Section 4 diamonds**

[16] DDMI has excluded the value of the larger diamonds that go through a special process to split the value between the parties. Unlike other diamonds that are under 6 carats, the Splitting Protocol provides that these diamonds are valued using DICAN for royalty purposes and then sent to Antwerp to undergo a possible auction process and the value that the diamonds achieve from their sale is then split. (I note that DDMI indicated in para 28 of its brief that the Government of the NWT has allowed for a different protocol wherein the manager now values these diamonds at year end).

[17] Since, as I have already discussed, the point of paragraph 16 is to deal with *collateral*, it is only appropriate to attribute some value to the Section 4 diamonds that are in DDMI, in its capacity as manager's possession, when comparing diamond value to the Cover Payments. I understand that in terms of *delivery* of these diamonds, a different protocol will have to apply compared to the rest of the excess diamonds. In that regard, the Spitting Protocol agreed between the parties should be implemented. Accordingly, the value of the Dominion Product should include the value of the Section 4 diamonds, since they are in DDMI's possession, but the *delivery* of the amount of excess diamonds beyond the Dominion Product will have to exclude them. The difference can be accounted for when they are sold pursuant to the Protocol

## **3. Interest**

[18] The Cover Payment amount referred to in paragraph 16 does not include interest. It was not requested to be included in the calculation of the amount of Cover Payments at the time and it is a separate calculation to that of "Cover Payments" *per se*. I note that Mr. Croese in his Conf Exhibit 1 to his October 19, 2020 Affidavit calculated the Dominion collateral without including interest in his reference to "Cover Payments". There is no dispute that interest is owing, but it can be accounted for during the monetization process. Indeed, that Order refers to interest, legal and other costs to be dealt with at that time.

## **4. Foreign Exchange**

[19] As I mentioned at the outset, paragraph 16 was a way to allow DDMI some security for the payment of Dominion's Cover Payments. Ultimately there will have to be a reconciliation of expenses and this will occur, in part, when the Dominion Product is monetized. The prevailing exchange rate will apply, if necessary, at that time.

[20] In the interim, I have accepted that the manner in which Dominion has set out the way to compare the amount of interim Cover Payments to the value of the Dominion diamonds and this includes a calculation of the exchange rate at the same intervals. This appears to be a fair and a proper way of interpreting paragraph 16 of the Second SARIO.

**Conclusion**

[21] In summary, I accept the methodology that Dominion has set out to calculate the value of the Dominion Product equaling the Cover Payments made, including the timing of the foreign exchange, and not including interest for now. The value of the Dominion Product should include the Section 4 diamonds held by DDMI, as manager, although the way that they are dealt with in terms of delivery can vary from the other smaller diamonds held.

[22] This concludes my remarks about how to interpret paragraph 16 of the June 19, 2020 Order. DDMI should proceed to deliver the excess diamonds, as discussed, for the period up to November 15, 2020. Thereafter, it should continue to calculate the appropriate set off on a periodic monthly basis using the same methodology.

Heard on the 15<sup>th</sup> day of January, 2021

**Dated** at the City of Calgary, Alberta this 18<sup>th</sup> day of January, 2021.



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**K.M. Eidsvik**

**J.C.Q.B.A.**

**Appearances:**

Peter Rubin  
for the Respondent Dominion Diamond Mines ULC

Sean Collins  
for the Applicant Diavik Diamond Mines (2012) Inc

Chris Simard and Kelsey Meyer  
for the Monitor

Marc Wasserman and Emily Paplawski  
for Credit Suisse AG, Cayman Islands Branch, as Administrative Agent  
Under the First Lien Credit Agreement

Kyle Kashuba  
for Ad Hoc Group of Bondholders