

**COURT OF APPEAL OF ALBERTA**

COURT OF APPEAL FILE NUMBER **2001-0216AC**

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ESTATE NUMBERS 2001-05630

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APPLICANT DIAVIK DIAMOND MINES (2012) INC

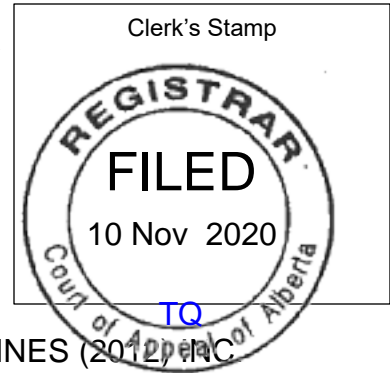
STATUS ON APPEAL PROPOSED APPELLANT  
STATUS ON APPLICATION APPLICANT

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CANADA ULC, WASHINGTON DIAMOND  
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**AND TO: BALANCE OF SERVICE LIST**

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## I. INTRODUCTION

1. In the ongoing CCAA proceedings involving Dominion Diamond Mines ULC (“**Dominion Diamond**”), Diavik Diamond Mines (2012) Inc. (“**DDMI**”) has paid all of Dominion Diamond’s post-filing obligations for joint venture billings under the Diavik Joint Venture Agreement, dated March 23, 1995 (the “**JVA**”)<sup>1</sup> and has thus acquired a senior security interest over Dominion Diamond’s share of production (the “**Diamonds**”) to secure repayment of all amounts paid by DDMI (collectively, “**Cover Payments**”); which as at October 19, 2020 amounted to \$120 million exclusive of interests, fees, expenses and costs.

2. The learned supervising CCAA judge, on application by DDMI, granted an order on November 4, 2020 that allows DDMI to realize upon the security it holds over the Diamonds. The learned judge, however, declined DDMI’s application to allow it to retain possession over the entirety of the Diamonds (the “**November 4<sup>th</sup> Order**”). Instead, the learned judge continued an order, granted in June of this year when circumstances were entirely different in terms of the proposed restructuring, that allowed DDMI to only withhold Diamonds in an amount equal up to the outstanding Cover Payments based on the “DICAN Gross Valuation”.<sup>2</sup> Such order was granted in connection with approving a sales process that was designed to solicit an offer to purchase Dominion Diamonds interest in the Diavik Mine which would see the purchaser of such interest repay the Cover

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<sup>1</sup> Affidavit of Katie Doran, sworn on November 10, 2020 [“**KD Affidavit**”] at para. 14 and Exhibit “**K**”, the Affidavit of Thomas Croese, sworn on April 30, 2020 [“**Croese Affidavit #1**”] at para. 2 and Confidential Exhibit “1” [“**JVA**”].

<sup>2</sup> As at the date of filing this memorandum, the precise terms of the Order have not been settled. A draft of the Order circulated by Dominion and Credit Suisse contains provisions that would allow Dominion to immediately sell Diamonds. See KD Affidavit, *supra* at paras. 7-8 and Exhibits “**D**” and “**E**”; KD Affidavit, *supra* at para. 4 and Exhibit “**A**”, the Second Amended and Restated Initial Order, granted by the Honourable Madam Justice K.M. Eidsvik on June 19, 2020 [“**SARIO**”] at para. 16.

Payments. That process failed to yield any executable offers.

3. The November 4 Order and a draft endorsement<sup>3</sup> (the “**Draft Endorsement**”) were based on errors of law, fact and principle. The Chambers Justice erred in law by allowing Dominion to take possession and control of a portion of the Diamonds prior to the full repayment of the Cover Payment Indebtedness, erred in fact by making findings without proper evidentiary foundation and erred in principle by not considering uncontroverted evidence in respect of DDMI’s alternative relief.

## II. FACTS

### The JVA

4. The outstanding amount of any Cover Payment is secured, pursuant to the JVA, by a mortgage, charge, and security interest (collectively, the “**Security**”) over the defaulting Participant’s right, title and interest in, to, and under, its Participating Interest in the Diavik Mine and the Assets (all as defined in the JVA).<sup>4</sup>

5. Pursuant to the terms of the JVA and the inter-creditor agreements entered into between DDMI and the agent for Dominion’s first lien lenders and the trustee under Dominion’s second-lien note indenture (collectively, the “**Inter-Creditor Agreements**”), the Security constitutes a first ranking secured position and interest on the defaulting Participant’s Participating Interest and Assets which includes the Diamonds.<sup>5</sup>

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<sup>3</sup> KD Affidavit, *supra* at para. 13 and Exhibit “J”, the draft endorsement supporting the oral decision of the Honourable Madam Justice K.M. Eidsvik on November 4, 2020.

<sup>4</sup> Croese Affidavit #1, *supra* at para. 19; JVA at s. 9.4(c).

<sup>5</sup> Croese Affidavit #1, *supra* at paras. 20-24; KD Affidavit, *supra* at para. 15 and Exhibit “L”, Supplemental Affidavit of Thomas Croese, sworn on May 7, 2020 [“**Supplemental Croese Affidavit**”] at para. 13, Exhibit “A” and Exhibit “B”.

## **Dominion's CCAA Proceedings, Post-Filing Defaults, and Failed SISF Procedures**

6. It is common cause, and Dominion's CCAA cash flow statements indicate, that Dominion never intended to meet any of its Cash Call obligations, and it has failed or otherwise refused to do so.

7. As a result, DDMI sought and obtained an exception from the stay of proceedings to permit DDMI to make the Cover Payments, on Dominion's behalf. Such relief was necessary for DDMI to continue to operate the Diavik Mine, to the benefit of Dominion, DDMI, and their creditors and stakeholders.<sup>6</sup>

8. DDMI has made Cover Payments that, as of October 19, 2020, amount to \$119.52 million, plus interest (presently estimated to be in the amount of \$2.37 million) and legal fees, costs and expenses (collectively, the "**CP Indebtedness**") on account of post-filing obligations.<sup>7</sup>

9. Pursuant to the Second Amended and Restated Initial Order, granted by the Honourable Madam Justice K.M. Eidsvik on June 19, 2020 (the "**SARIO**"),<sup>8</sup> DDMI was authorized to hold a portion of the Diamonds, equal in value to the CP Indebtedness; such value being determined based on notional royalty valuations performed by the Government of the Northwest Territories (the "**DICAN Valuation**"), not actual realizations.<sup>9</sup>

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<sup>6</sup> KD Affidavit, *supra* at para. 16 and Exhibit "**M**", the Affidavit #4 of Thomas Croese, dated October 19, 2020 at para. 6 ["**Croese Affidavit #4**"].

<sup>7</sup> Croese Affidavit #4, *supra* at para. 5.

<sup>8</sup> SARIO, *supra* at para. 16.

<sup>9</sup> Croese Affidavit #4, *supra* at paras. 15-16.

10. On September 25, 2020, the Court issued an order temporarily suspending the requirement for DDMI to deliver any Diamonds to Dominion.<sup>10</sup>

11. As part of these CCAA proceedings, Dominion undertook the SISP Procedures (as defined in the SARIO), to solicit interest and opportunities for, a transaction involving all assets, properties, and undertakings of Dominion. The SISP Procedures, despite contemplating a related party stalking horse bid by a subsidiary of Dominion's sole equity holders,<sup>11</sup> concluded with no successful purchasers for Dominion's interest in the Diavik Mine. As a result, section 16 of the SARIO, which permitted DDMI to apply to realize against the Diamonds, was triggered.

### III. ISSUES

12. Should this Court grant: (i) leave to appeal the portions of the November 4<sup>th</sup> Order requiring DDMI to release Diamonds prior to the payment of the CP Indebtedness; and (ii) a stay of the November 4<sup>th</sup> Order pending the determination of such proposed appeal. In the event DDMI's leave to appeal application cannot be heard on an expedited basis, should an interim stay of the November 4<sup>th</sup> Order be granted, pending such application.

### IV. ARGUMENT

13. In issuing the November 4<sup>th</sup> Order, the Chambers Justice made:

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<sup>10</sup> KD Affidavit, *supra* at para. 6 and Exhibit "C", the Order approved by the Honourable Madam Justice K.M. Eidsvik on September 25, 2020, not yet signed.

<sup>11</sup> The stalking horse bid assigned no value to Dominion's interest in the Diavik Mine. The bid provided that the transaction contemplated thereunder was subject to reaching an agreement, acceptable to the bidder, with DDMI and the Government of the Northwest Territories in relation to timing and quantum of cash calls and reclamation liabilities (the "Rio Condition"). The bid also contained a clause whereby, if the Rio Condition was not satisfied: (i) the Diavik Mine would be excluded from the transaction; and, (ii) the cash purchase price under the bid would not be reduced.

(a) an **error of law**, reviewable on a standard of correctness, by requiring DDMI to return Diamonds, prior to the satisfaction of its senior secured claim. The law is that senior secured creditors are entitled to be paid from the proceeds of the sale of their collateral in full and prior to the release of such collateral, or resulting proceeds, to subordinate secured creditors, unsecured creditors and the debtor. That did not occur in this case.. The order jeopardizes the rights of DDMI as the first secured creditor and is contrary to the law.;

(b) an **error of fact**, reviewable on a standard of palpable and overriding error, by making findings of fact that are entirely contrary to the uncontroverted evidentiary record. The Chambers Justice stated that "...the DICAN evaluation [sic] was proposed by DDMI" and that this was "...likely because it is the method that has been used for years between the parties to divide the diamond production." The learned judge was then unconvinced that a change was required "...since the parties both agreed to this method a few months back." All of these facts are patently incorrect. DDMI never proposed that its right to hold Diamonds be based on the DICAN Gross Valuation; this method was determined and ordered by the Chambers Justice's Order as part of DDMI responding to Dominion's stay extension application in June.<sup>12</sup> The division of production from the Diavik Mine is based on an agreement between the parties<sup>13</sup> that is entirely independent from, and does not involve, the DICAN Gross Valuation. Finally, there has never been

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<sup>12</sup> DDMI referred to the DICAN Gross Valuation only to demonstrate it was under-secured. KD Affidavit, *supra* at para. 19 and Exhibit "P", Affidavit #3 of Thomas Croese, sworn on June 16, 2020 at paras. 7, 20-22; KD Affidavit, *supra* at para. 5 and Exhibit "B", Transcript of proceedings in Court of Queen's Bench Action No. 2001-05630, dated June 19, 2020, at 85:4-8, 88:34-89:24; 90:13-91:33.

<sup>13</sup> Supplemental Croese Affidavit, *supra* at paras. 5-6, Confidential Exhibit 1.



an agreement on the usage of the DICAN Gross Valuation as previously ordered by the Chambers Justice; and,

14. an **error in principle**, in connection with the alternative relief sought by DDMI in the event the Court was not inclined to permit it to retain all of the Diamonds by failing to address the fact that the DICAN Valuation is a gross valuation. The DICAN Valuation does not account for sale, marketing, royalty, or other fees (the “**Realization Costs**”); and, does not reflect actual net revenues or realized values.<sup>14</sup> The undisputed evidence is that there will be Realization Costs. The only dispute is as to the percentage: Dominion’s evidence is that Realization Costs will be “approximately” 11%; DDMI has highlighted they could be as high as 20%.<sup>15</sup> It is submitted that the failure to take the evidence into account is a separate error of law.

**A. Leave to Appeal Should be Granted**

15. DDMI should be granted leave to appeal. Leave to appeal in CCAA proceedings will be granted where there are serious and arguable grounds that are of real and significant interest to the parties, taking the following into account, whether: (i) the point on appeal is of significance to the practice; (ii) the point raised is of significance to the action itself; (iii) the appeal is *prima facie* meritorious or frivolous; and, (iv) the appeal will unduly hinder the progress of the action.<sup>16</sup>

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<sup>14</sup> Croese Affidavit #4, *supra* at paras. 15-16; KD Affidavit, *supra* at para. 17 and Exhibit “N”, the Affidavit #5 of Thomas Croese, sworn on October 29, 2020 at paras. 15-16 [“**Croese Affidavit #5**”].

<sup>15</sup> KD Affidavit, *supra* at para. 20 and Exhibit “Q”, the Affidavit of Frederick Vescio, sworn on October 7, 2020 at Exhibit “B”; KD Affidavit, *supra* at para. 21 and Exhibit “R”, Bench Brief of DDMI, filed on October 21, 2020, at para. 39 [“**DDMI Brief**”].

<sup>16</sup> *Bellatrix Exploration Ltd v BP Canada Group ULC*, [2020 ABCA 178](#) [Bellatrix] at para. 16; *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, [1999 ABCA 255](#) at paras. 2-5.

(i) The Proposed Appeal is of Significance to the Practice

16. The proposed appeal is of significance to the practice. The significance of the proposed appeal is gauged by whether the issue subject to the appeal only has relevance to the parties involved or whether it deals more broadly with an issue of significant interest to the industry.<sup>17</sup>

17. The proposed appeal is significant to the insolvency practice and secured creditors as it considers whether a CCAA judge may require a secured creditor to return its collateral to the debtor, prior to the satisfaction of its senior secured claim.

(ii) The Proposed Appeal is of Significance to the Action

18. The proposed appeal is significant to the within proceedings<sup>18</sup> as, it will: (i) affect DDMI's priority position; (ii) potentially enrich subordinate creditors to DDMI's corresponding deprivation; and, (iii) potentially impact the sole operating business within Dominion's CCAA proceedings, the Diavik Mine.<sup>19</sup>

(iii) The Proposed Appeal Has *Prima Facie* Merit

19. To establish *prima facie* merit, it is not necessary for a party seeking leave to show that it is guaranteed to win on appeal; it only needs to show that it has an arguable case,<sup>20</sup>

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<sup>17</sup> *West Edmonton Mall Property Inc v Duncan & Craig*, [2001 ABCA 40](#) at para. 10; *Liberty Oil & Gas Ltd (Companies Creditors Arrangement Act)*, [2003 ABCA 158](#) at para. 17.

<sup>18</sup> For the test see *Bellatrix*, *supra* at para. 25, citing *Gauntlet Energy Corporation (Re)*, [2004 ABCA 20](#), 49 CBR (4<sup>th</sup>) 225 at para. 11.

<sup>19</sup> Croese Affidavit #4, *supra* at para. 6.

<sup>20</sup> *Kenroc Building Materials Co Ltd v Kerr Interior Systems Ltd*, [2008 ABCA 291](#) at para. 11.

as “[t]he standard is not onerous; the appeal must be arguable and not frivolous.”<sup>21</sup>

20. The prospective appeal is *prima facie* meritorious, arguable, and is not frivolous, as: (i) the proposed appeal, in part, concerns errors of law; (ii) the decision of the lower Court is contrary to trite principles pertaining to the rights of secured creditors during an enforcement process concerning their collateral, which the corresponding Draft Endorsement and reasoning of the lower Court failed to mention or account for; and, (iii) the proposed appeal involves the lower Court failing to: (a) determine the appropriate Realization Costs; and, (b) mention or take into account the significance of certain relevant and material facts in exercising its discretion with respect to other issues, such as the value of the Diavik Mine, or the use of the DICAN Valuation.

21. The November 4<sup>th</sup> Order fails to respect the tenets of secured transactions law include that a secured creditor is entitled to maintain possession of its collateral after default; to sell such collateral; and to account to the debtor and subordinate creditors for the excess proceeds, if any.<sup>22</sup> The debtor or another creditor may redeem the collateral by paying the indebtedness in full.<sup>23</sup>

22. A liquidation necessarily contemplates payment in accordance with priority:

“... Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic.

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<sup>21</sup> *Bellatrix*, *supra* at para. 28.

<sup>22</sup> See KD Affidavit, *supra* at para. 22 and Exhibit “S”, Reply Bench Brief of DDMI, dated October 29, 2020, at paras. 13-19; DDMI Brief, *supra* at paras. 27-33.

<sup>23</sup> DDMI Brief, *supra* at paras. 34-36.

Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. ..."<sup>24</sup>

23. Section 11 of the CCAA does not alter that principle:

"There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors."<sup>25</sup>

(iv) No Hindrance to the Progress of the Action

24. The proposed appeal will not unduly hinder the progress of Dominion's CCAA proceedings as it involves a discrete issue regarding the Diamonds currently being liquidated pursuant to the Monetization Process.

**B. A Stay Pending Appeal is Appropriate In the Circumstances**

25. A stay pending appeal is appropriate in the circumstances. DDMI applies for a stay under Rule 14.48(b).<sup>26</sup>

26. **Arguable Issue:** DDMI's proposed appeal raises arguable issues and is not frivolous or vexatious, for the same reasons as set out above.

27. **Irreparable Harm:** Absent a stay, DDMI will suffer irreparable harm if required to return Diamonds, prior to: (i) repayment, in full, of the CP Indebtedness; (ii) completion of the court-approved Monetization Process; and (iii) all within the context of Dominion's

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<sup>24</sup> *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#) at para. 12.

<sup>25</sup> *U.S. Steel Canada Inc. (Re)*, [2016 ONCA 662](#) at para. 82.

<sup>26</sup> *Alberta Rules of Court*, AR 124/2010 vol. 1, at r. 14.48(b). A stay is appropriate where: (i) there is an arguable issue to be determined on appeal; (ii) the applicant will suffer irreparable harm if the stay is not granted; and, (iii) the balance of convenience favours granting the stay. See e.g. *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA*, [2013 ABCA 357](#) at para. 6 [CNRL], citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1994 CanLII 117](#) (SCC); *Siri Guru Nanak Sikh Gurdwara of Alberta v Sandhu*, [2014 ABQB 169](#) at para. 11, Marceau J [*Sandhu ABQB*], aff'd [2014 ABCA 181](#).

ongoing CCAA proceedings and failed SISP Procedures. If the portion of the Diamonds DDMI is allowed to retain and realize upon is insufficient to repay the CP Indebtedness, DDMI may not be able to subsequently recover such loss from Dominion and will be irrevocably prejudiced; to the corresponding benefit of subordinate creditors.

28. **Balance of Convenience.** The balance of convenience favours DDMI. Unless a stay is granted, DDMI will suffer significant and irreparable harm and prejudice, as set out above. In contrast, Dominion will suffer no prejudice as a result of any stay, as: (i) DDMI is required to account to Dominion and its creditors for any residual proceeds; (ii) Dominion has no sale or plan which will be affected by the proposed appeal and the discrete issues raised therein; and, (iii) DDMI's retention of the Diamonds will not cause a liquidity crisis, as Dominion has \$53.8 million of cash on hand.

29. To the extent this Honourable Court is unable to hear DDMI's leave to appeal application on an expedited basis, an interim stay of the November 4<sup>th</sup> Order should be granted pending such hearing.

## **V. RELIEF SOUGHT**

30. DDMI respectfully requests: (i) leave to appeal the portions of the November 4<sup>th</sup> Order requiring DDMI to release any of its Diamonds prior to the satisfaction of DDMI's claims and the completion of the Monetization Process; (ii) a stay, pending such proposed appeal; and, (iii) if DDMI's application seeking leave to appeal cannot be heard on an expedited basis, an interim stay of the November 4<sup>th</sup> Order pending the hearing of same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of November, 2020.



**Table of Authorities**

1. *Bellatrix Exploration Ltd v BP Canada Group ULC*, [2020 ABCA 178](#);
2. *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, [1999 ABCA 255](#);
3. *West Edmonton Mall Property Inc v Duncan & Craig*, [2001 ABCA 40](#);
4. *Liberty Oil & Gas Ltd (Companies Creditors Arrangement Act)*, [2003 ABCA 158](#);
5. *Gauntlet Energy Corporation (Re)*, [2004 ABCA 20](#);
6. *Kenroc Building Materials Co Ltd v Kerr Interior Systems Ltd*, [2008 ABCA 291](#);
7. *U.S. Steel Canada Inc. (Re)*, [2016 ONCA 662](#);
8. *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#).
9. *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA*, [2013 ABCA 357](#);
10. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994 CanLII 117](#) (SCC);
11. *Siri Guru Nanak Sikh Gurdwara of Alberta v Sandhu*, [2014 ABQB 169](#);
12. *Siri Guru Nanak Sikh Gurdwara of Alberta v Sandhu*, [2014 ABCA 181](#).