

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

DOMINION DIAMOND MINES ULC

PLAINTIFF

AND

DIAVIK DIAMOND MINES (2012) INC.

DEFENDANT

NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim on the Plaintiff.

If you intend to make a Counterclaim, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim and Counterclaim on the Plaintiff and on any new parties named in the Counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.

Time for Response to Civil Claim

A Response to Civil Claim must be filed and served on the Plaintiff,

- (a) if you were served with the Notice of Civil Claim anywhere in Canada, within 21 days after that service,

- (b) if you were served with the Notice of Civil Claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Notice of Civil Claim anywhere else, within 49 days after that service, or
- (d) if the time for Response to Civil Claim has been set by order of the Court, within that time.

CLAIM OF PLAINTIFF

Part 1: STATEMENT OF FACTS

The Parties

1. Dominion Diamond Mines ULC ("**Dominion**") is an unlimited liability company incorporated under the laws of British Columbia. Dominion is Canada's largest independent producer of natural and responsibly mined premium rough diamonds.
2. Diavik Diamond Mines (2012) Inc. ("**DDMI**"), is a company incorporated under the laws of Canada and is a wholly-owned subsidiary of Rio Tinto plc ("**Rio**"). Rio is a global mining and metals company operating in approximately 36 countries with a current market capitalization of approximately USD\$65 Billion.

The Diavik Diamond Mine

3. Dominion supplies rough diamonds to the global market from its operation of the Ekati Diamond Mine, in which it has an approximate 90% interest, and the Diavik Diamond Mine (the "**Diavik Mine**"), in which it has a 40% interest. DDMI has a 60% interest in the Diavik Mine.
4. The Diavik Mine, consisting of the mine site and surrounding exploration properties, is located on a 20-kilometer island in Lac de Gras, approximately 300 kilometers northeast of Yellowknife, in the Northwest Territories. Commercial production commenced at the Diavik Mine in 2003.
5. The resources at the Diavik Mine were discovered by Dominion (then Aber Resources Limited ("**Aber**")) in the early 1990s. Due to the costs required to develop the mine, Dominion entered into a joint venture with Kennecott Canada ULC ("**Kennecott**") in 1995 and Kennecott became the Manager of the joint venture.
6. The Diavik Mine is currently operated by DDMI. All licenses and permits required to undertake operations at Diavik Mine are held by DDMI, as operator. All employees engaged at the Diavik Mine are the employees of DDMI.

The JV Agreement

7. Dominion and DDMI are successors in interest to a joint venture agreement dated as of March 23, 1995 between Aber and Kennecott. The JV Agreement was subsequently amended pursuant to:

- (a) Amending Agreement, dated as of December 1, 1995, between Kennecott and Aber;
- (b) Amending Agreement No.2, dated as of January 17, 2002, between Diavik Diamond Mines Inc. and Aber; and
- (c) Amending Agreement No.3, dated as of March 3, 2004, between Diavik Diamond Mines Inc. and Aber.

(collectively, the “**JV Agreement**”).

8. The fundamental purpose of the JV Agreement is the exploitation of mineral interests such that both DDMI and Dominion can benefit from the assets of the joint venture through a proportionate share of production. Dominion’s proportionate share of production under the JV Agreement is taken in kind in the form of rough diamonds. At all relevant times DDMI was aware that Dominion depended on the sale of its share of production to finance operation of the Diavik Mine.

9. DDMI acts as Manager under the JV Agreement and exercises an executive role over the operations of the joint venture, subject to direction by the Management Committee. Pursuant to the JV Agreement Dominion’s and DDMI’s votes on the Management Committee are equal to their participating interests, and nearly all decisions of the Management Committee are decided by a simple majority vote of the participating interests.

10. As the majority participant, DDMI effectively controls the Management Committee. Together with DDMI’s position as Manager under the JV Agreement, DDMI exercises all discretionary authority under the JV Agreement, including overall joint venture property and funds supplied by Dominion pursuant to cash calls.

11. Section 7.3 of the JV Agreement provides that the Manager must conduct all operations in an efficient manner and in accordance with sound mining and other applicable standards and practices. As a minority joint venture participant, Dominion is further entitled to expect that DDMI’s efforts – and the funds supplied by Dominion – will be devoted to maximizing the profitable production of diamonds from the Diavik Mine.

COVID-19 Impact

12. COVID-19 has had an acute negative impact on all segments of the global diamond industry. Dominion’s ability to move its rough diamond inventory from the point of extraction in the Northwest Territories to sorting facilities in India for further movement and eventual sale on the world market has been effectively frozen.

13. Dominion’s inability to generate revenues from its share of production at the Diavik Mine, among other factors, created a liquidity crisis for Dominion that rendered it insolvent and in urgent need of protection under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”).

14. On April 22, 2020, upon the application of Dominion and certain of its affiliates (together, the “**CCAA Applicants**”), the Alberta Court of Queen’s Bench in Bankruptcy and Insolvency (the “**CCAA Court**”) granted an initial order with respect to the CCAA Applicants.

DDMI's Cash Calls

14. DDMI's operation of the Diavik Mine is significantly over budget, and production has failed to meet targets. DDMI's poor performance preceded the impact of COVID-19 and has continued to deteriorate. In 2019, costs rose approximately 7% above the stretch plan, while total carats recovered were 8.5% below plan. In November 2019, DDMI committed to achieving its stretch plan and embarking on a program that would focus on cost reduction, among other initiatives. However, in the first quarter of 2020, cash costs were more than 19% above DDMI's stretch plan, while at the same time carats recovered were 13.6% below plan. Dominion has repeatedly objected to DDMI's failure to reduce cash consumption, particularly considering its record of poor production.

15. Despite DDMI's failure to meet production and grade plans, DDMI has taken no effective steps to mitigate, and instead has continually demanded that Dominion satisfy increasingly large cash calls. In the first three months of 2020 alone, those cash calls totaled \$68.9 million. In April 2020, DDMI issued further cash calls to Dominion totaling approximately \$33 million.

16. Despite repeated requests for information, DDMI has refused or neglected to provide all relevant current information to Dominion, including resource and reserve reconciliation reports and information regarding an ongoing reclamation feasibility study being conducted, all of which has been funded by joint venture funds.

17. At the direction of Rio, DDMI has been and continues to prioritize the interests of DDMI and Rio in its management of the Diavik Mine to the detriment of Dominion and the joint venture as a whole.

18. DDMI has continued to maintain full operations at the Diavik Mine without taking into account the disruptions to the diamond industry caused by the COVID-19 and, in particular, without taking into account Dominion's circumstances. DDMI has done so knowing that Dominion has no ability to pay for such cash calls because it cannot materially monetize diamond inventories to pay for them.

19. Without Dominion being able to generate revenues due to COVID-19 related impacts on the diamond market and Dominion's business operations, the DDMI cash call payments have drained Dominion's cash reserves and contributed to Dominion's liquidity crisis. The continued cash calls will also negatively impact Dominion's restructuring efforts.

DDMI's Breaches

20. Despite express knowledge that Dominion is particularly harmed by DDMI's conduct, DDMI has and continues to breach its obligations under the JV Agreement, including by, without limitation:

- (a) failing to meet cost budgets, production plans and diamond recovery budgets, including failures in the period preceding the COVID-19 pandemic;
- (b) failing to achieve agreed-upon and appropriate cost reductions;
- (c) deliberately attempting to extract as much capital as possible from Dominion with knowledge of its liquidity crisis;

- (d) utilizing funds supplied by Dominion pursuant to recent bi-weekly cash calls to operate the mine in a manner that is not economically efficient and does not maximize profitability;
- (e) failing to develop adequate modelling to support economic development of resources;
- (f) failing or refusing to base operational and management decisions on sound engineering, mining and economic principles;
- (g) mining the deposits in a manner inconsistent with the planned program;
- (h) failing to disclose all relevant information to Dominion;
- (i) failing to adequately consult with Dominion; and
- (j) placing DDMI's and Rio's interests ahead of the joint venture with the result of depriving Dominion of the benefit of the JV Agreement.

(together, DDMI's "**Misconduct**")

Part 2: RELIEF SOUGHT

21. Dominion seeks the following relief against DDMI:

- (a) a declaration that DDMI has conducted operations in breach of or in a manner inconsistent with the JV Agreement;
- (b) general damages;
- (c) special damages;
- (d) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
- (e) costs; and
- (f) such further and other relief as this Court may deem just.

Part 3: LEGAL BASIS

Breach of Contract

22. Pursuant to the JV Agreement and in light of its fundamental purpose, Dominion is entitled to reasonably expect, among other things, that:

- (a) the funds supplied by Dominion pursuant to the terms of the JV Agreement will be devoted to optimizing profitable economic production;
- (b) DDMI will regularly consult with Dominion; and

- (c) the Participants, including DDMI in its capacity as Manager, will not operate in such a manner as to cause significant harm to Dominion or substantially impair the objective of the agreement, being, again, the profitable economic production of product from the Diavik Mine.

23. The Manager and Management Committee must exercise decision-making powers in accordance with the JV Agreement and the duties of all participants to act fairly and in good faith. As both Manager and controlling participant on the Management Committee, DDMI's fundamental obligations include a duty not to undermine the purposes of the JV Agreement and not to deprive Dominion of the intended benefits of the JV Agreement.

24. DDMI's continued course of conduct, including its Misconduct, defies reasonable expectations and amounts to a flagrant breach of DDMI's obligations under to the JV Agreement, including its fundamental duty to act honestly, reasonably and in good faith in the performance of its contractual obligations.

Breach of Fiduciary Duty

25. At all material times and by virtue of DDMI's role as Manager, DDMI owed and continues to owe fiduciary obligations to Dominion, including but not limited to fiduciary obligations of loyalty, good faith, disclosure and avoidance of a conflict of duty and self-interest. DDMI's continued course of conduct, including but not limited to the Misconduct, amounts to a breach of DDMI's fiduciary obligations.

Willful Misconduct and Gross Negligence

26. At all material times, DDMI owed and continues to owe a duty of care requiring DDMI to, among other things, conduct all operations in an efficient manner and in accordance with sound mining and other applicable standards and practices.

27. DDMI's continued course of conduct, including but not limited to DDMI's Misconduct, breached DDMI's duty of care and amounts to willful misconduct and gross negligence. Dominion's acts and omissions exhibit a conscious or reckless indifference to Dominion's rights and a marked departure from the standards according to which a reasonable Manager in DDMI's position would conduct themselves.

Loss and Damage to Dominion

28. As a result of DDMI's wrongful acts and omissions, including the breaches, willful misconduct, and negligence described herein, Dominion has suffered and continues to suffer loss and damage including but not limited to economic losses and damages resulting from DDMI's misuse of funds supplied by Dominion during DDMI's management of the Diavik Mine.

Plaintiff's address for service: Blake, Cassels & Graydon LLP
Barristers and Solicitors
Suite 2600, Three Bentall Centre
595 Burrard Street, PO Box 49314
Vancouver, BC V7X 1L3
Attention: Joe McArthur

Fax number address for service (if any): 604-631-3309

E-mail address for service (if any): N/A

Place of trial: Vancouver, B.C.

The address of the registry is: 800 Smithe Street, Vancouver, B.C.

Date: 16/June/2020



Signature of Joe McArthur
[x] lawyer for Plaintiff

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a List of Documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is a claim in breach of contract, breach of fiduciary duty and negligence related to a joint venture.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

Court Order Interest Act, R.S.B.C. 1996, c. 79

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE
OUTSIDE BRITISH COLUMBIA**

The Plaintiff claims the right to serve this notice of civil claim on the Defendant outside British Columbia on the ground that, among other things, the proceeding:

- (a) concerns contractual obligations, and, by its express terms, the contract is governed by the law of British Columbia; and
- (b) concerns a business carried on in British Columbia.