

COURT OF APPEAL FOR ONTARIO

CITATION: Crystallex International Corporation (Re), 2021 ONCA 87

DATE: 20210209

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Rouleau, Benotto and Thorburn JJ.A.

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 Crystallex
International Corporation

Robin Schwill, Natalie Renner and Maureen Littlejohn, for the moving party
Crystallex International Corporation

Timothy Pinos, Shayne Kukulowicz, and Ryan Jacobs, for the moving party
Tenor Special Situation I, LP

Alan H. Mark, Robert J. Chadwick, Peter Ruby, and Chris Armstrong, for the
responding parties Computershare Trust Company of Canada in its Capacity as
Trustee for the Holders of 9.375% Senior Notes of Crystallex International
Corporation and the Ad Hoc Committee of Noteholders

Heard: in writing

Motion for leave to appeal from the order of Justice Glenn A. Hainey of the
Superior Court of Justice, dated June 8, 2020 and August 31, 2020.

REASONS FOR DECISION

[1] Crystallex International Corporation ("Crystallex") and DIP lender Tenor
Special Situation I, LP ("Tenor") seek leave to appeal the motion judge's order

dismissing, in part, Crystallex's motion to seal certain information contained in the Monitor's Thirty-Third Report. For the reasons that follow, we refuse leave.

Background

[2] Crystallex has been under the protection of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), since December 2011. Since that time, Crystallex's sole business activity has been pursuing its claim against the Republic of Venezuela for having expropriated its rights to the Las Cristinas gold mine. In 2016, the World Bank's International Centre for the Settlement of Investment Disputes awarded Crystallex \$1.202 billion, and the company has been seeking to enforce the award ever since.

[3] In May 2020, Crystallex sought an extension of its initial order and requested that certain information in the Monitor's Thirty-Third Report, including certain financial information, be sealed.

[4] Computershare Trust Company of Canada in its capacity as Trustee for the Holders of 9.375% Senior Notes of Crystallex and the Ad Hoc Committee of Noteholders opposed the sealing order sought by Crystallex insofar as it related to the sealing of Crystallex's (i) cash balance, (ii) cash-flow statement, and (iii) cash-flow forecast.

[5] In his endorsement dated June 8, 2020, Hailey J. refused to seal the contested financial information. He noted that it was significant that the Monitor did

not fully support Crystallex's request for a sealing order. He held that the *Sierra Club* test was not satisfied: *Sierra Club of Canada v. Canada (Ministry of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. The affidavit evidence did "not provide detailed or compelling reasons about how this information, if disclosed, could be used to the detriment of Crystallex or any details whatsoever as to the feared consequences of its disclosure to the public". The evidence was "highly speculative and [did] not specify any incremental risk that Crystallex may suffer from the disclosure of this information over and above the risk it is already exposed to."

[6] Following the hearing, the Monitor identified certain redactions that should be made to its report if the full sealing order requested by Crystallex were not granted. Indicating that he thought the proposed redactions made sense, the motion judge permitted the parties to make further submissions with respect to the proposed redactions. In addition, Crystallex filed a supplementary affidavit detailing why it was of the view that disclosure of key financial information, including its cash balance, could harm its efforts to enforce its award against Venezuela.

[7] In his endorsement dated August 31, 2020, Hainey J. agreed to the Monitor's proposed redactions. He continued to be of the view that the proposed redactions made sense and represented a fair and reasonable balance between the

protection of Crystallex's important commercial interest and public disclosure in keeping with the open court principle.

[8] The result was that the Company's motion was dismissed in part. The motion judge ordered that the Thirty-Third Report be redacted as proposed by the Company, except for references to Crystallex's cash balance and related information.

[9] In seeking leave, Crystallex and Tenor submit that the motion judge made a number of errors, including erring in interpreting and applying the *Sierra Club* test, in failing to apply s. 10(3) of the CCAA, and in relying on the Monitor's submissions as to whether the test for a sealing order had been met. In their submission, the motion judge's order is inconsistent with prior sealing orders in this proceeding, as well as established practice in Ontario. They strenuously contend that disclosure of Crystallex's cash balance could undermine the company's enforcement efforts.


The Test for Leave is Not Met

[10] Leave to appeal is granted sparingly in CCAA proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider: (1) whether the proposed appeal is *prima facie* meritorious or frivolous; (2) whether the points on the proposed appeal are of significance to the practice; (3) whether the points on the proposed appeal are of significance to the action; and (4) whether

the proposed appeal will unduly hinder the progress of the action: see, for e.g., *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24; *Timminco Ltd. (Re)*, 2012 ONCA 552, 2 C.B.R. (6th) 332, at para. 2; *Nortel Networks Corp. (Re)*, 2016 ONCA 332, 36 C.B.R. (6th) 1, at para. 34.

[11] Having reviewed the extensive materials filed on this leave motion, we are not satisfied that the proposed appeal is *prima facie* meritorious or that the case is of significance to the practice. Crystallex and Tenor seek to challenge a discretionary order of the motion judge, who as the supervising judge is intimately familiar with this CCAA proceeding. The motion judge applied the well-established *Sierra Club* test in light of the evidence before him. In our view, he did not give improper consideration or weight to the Monitor's views. Nor do we see any other basis on which to interfere with the motion judge's order.

[12] In light of our view that the first two prongs of the leave test are not satisfied, we refuse leave. Costs, to be shared equally by Crystallex and Tenor, are fixed at \$1,000.


M. L. Benotto J.A.
J.A. Thibault J.A.