Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

ABBREVIATED JOINT BOOK OF AUTHORITIES OF THE MONITORS, FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED; DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS MONITOR OF JTI-MACDONALD CORP.; and ERNST & YOUNG INC., IN ITS CAPACITY AS MONITOR OF ROTHMANS, BENSON & HEDGES INC.

(MOTION FOR LEAVE BY HEART AND STROKE FOUNDATION OF CANADA RETURNABLE APRIL 14, 2023)

April 6, 2023

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AND TO: **THE COMMON SERVICE LIST**

Court File No. CV-19-615862-00CL
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Applicants

ABBREVIATED JOINT BOOK OF AUTHORITIES OF THE MONITORS

INDEX

See para. 3

2004 CarswellOnt 1843
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 1843, [2004] O.J. No. 1912,
130 A.C.W.S. (3d) 898, 49 C.B.R. (4th) 175

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF SECTION 191 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: April 27, 2004
Judgment: April 27, 2004
Docket: 03-CL-4932

Counsel: Frederick W. Chenoweth for Moving Party, Thomas Rodney Wickerson
Monique Jilesen for Monitor, Ernst & Young Inc.
Ashley Taylor for Air Canada
Gregory R. Azeff for GECAS

Subject: Insolvency; Civil Practice and Procedure

MOTION for leave to file late dispute notice in proceeding under *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 I have reviewed this request from the viewpoint of *Blue Range, Royal Oak* and *Eaton's Liquidation*. On the basis of the facts before me I am satisfied that leave ought to be granted to late file the dispute notice, provided that same is given to the Monitor by May 13, 2004 together with the supporting documentation.

2 I think it key to that leave that the Alberta counsel acknowledged that it was his error in not reading the rejection when it came in and then compounded the error when he hesitated for several weeks in doing anything as he thought that the Alberta WCB ruling would make the issue moot. More importantly the errors were acknowledged in a fairly short time period and this motion was brought (essentially all within a 2 month timeframe). The extension of time will not cause a hardship to any interested party or prejudice AC's reorganization at this time.

3 I would however, wish to emphasize that no one should assume that an extension will usually be granted. "Corrective" action must be taken forthwith upon the error being realized (or ought reasonably to have been appreciated). Lying in the weeds is not an option.

Motion granted.

End of Document

See paras. 18, 26-28

2018 ONSC 2443
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp. (Re)

2018 CarswellOnt 9950, 2018 ONSC 2443, 148 W.C.B. (2d) 381, 294 A.C.W.S. (3d) 693, 62 C.B.R. (6th) 303

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

In the Matter of a Plan of Compromise or Arrangement of Crystallex International Corporation (Applicant)

Hainey J.

Heard: March 28, 2018
Judgment: May 22, 2018
Docket: CV-11-9532-00CL

Counsel: James Doris, for Applicant, Crystallex International Corporation
David Byers, Lesley Mercer, for Monitor
Timothy Pinos, Ryan Jacobs, Shayne Kukulowicz, for DIP Lender
Aubrey G. Kauffman, for Robert Fung and Marc Oppenheimer
Clifton Prophet, Delna Contractor, for Ad Hoc Committee of Shareholders
Chris Armstrong, for Ad Hoc Committee of Noteholders

Subject: Civil Practice and Procedure; Corporate and Commercial; Criminal; Insolvency; Property

MOTION by ad hoc committee of shareholders for order lifting stay of proceedings and varying previous orders to permit their claims to be commenced and continued.

***Hainey J.*:**

Overview

1 This is a motion by the Ad Hoc Committee of Shareholders of Crystallex International Corporation ("Ad Hoc Committee") for the following relief:

> a) An order lifting the stay of proceedings to allow the Ad Hoc Committee to commence and continue the claims below with respect to alleged oppression of the

shareholders of Crystallex International Corporation ("Crystallex") and a breach of the criminal interest rate provisions in the *Criminal Code of Canada*;

b) An order varying the following orders of Newbould J. (collectively "Final Orders") to the extent necessary to permit the claims to be commenced and continued:

(i) Order dated June 5, 2013 approving the terms of the Second Credit Agreement Amendment dated June 5, 2013;

(ii) Order dated April 14, 2014 approving the terms of the Third Credit Agreement Amendment dated April 16, 2014;

(iii) Order dated December 18, 2014 approving the terms of the Fourth Credit Agreement Amendment dated March 12, 2015; and,

(iv) Order dated December 18, 2014 approving the Net Arbitration Proceeds Transfer Agreement among the Applicant, the DIP Lender, Robert Fung and Marc Oppenheimer dated March 12, 2015.

2 The grounds for the motion are as follows:

Leave Motion

a) On June 5, 2013, Newbould J. directed that no party is to bring a motion in these proceedings without leave of the court after consultation with the Monitor;

b) On June 7, 2016, Newbould J. further directed that any party seeking to bring a motion in this proceeding is to provide draft motion material to counsel for the Applicant and request arrangements be made to appear at a chambers appointment to address the scheduling and hearing of the motion (the "Motion Protocol");

c) The Ad Hoc Committee has provided its draft motion material to counsel for the Applicant and has requested a scheduling attendance, in compliance with the Motion Protocol;

d) Crystallex's shareholders have an economic interest in the Applicant in view of the US$1,202 billion arbitration award ("Arbitration Proceeds") made in favour of Crystallex against the Bolivarian Republic of Venezuela ("Venezuela");

e) I approved a contract of Transaction and Settlement dated November 15, 2017 between the Applicant and Venezuela described by the Monitor in paragraph 27 of its Twenty-Second Report as providing "significant value to the Applicant over time beyond the quantum of asserted creditor claims against the Applicant";

f) As particularized in the Ad Hoc Committee's draft statement of claim, Crystallex's shareholders' interests have been diluted such that they currently represent a very small percentage of the Net Arbitration Proceeds ("NAP"), which are the Applicant's only remaining asset;

g) The dilution of Crystallex's shareholders' interests has been caused by DIP credit agreements that confer ever-increasing percentages of NAP on the DIP Lender. These arrangements were approved by the court without any effective notice to Crystallex's shareholders and in circumstances in which the Applicant, is directors and the DIP Lender acted in a manner that was oppressive, unfairly prejudicial to and in unfair disregard of the interests of Crystallex's shareholders;

h) Unless leave to bring this motion is granted to allow the claims set out in the Ad Hoc Committee's statement of claim to proceed, Crystallex's shareholders will have no opportunity to be heard in relation to the severe dilution of their interests and they will lose very significant value and be denied access to justice;

Lift Stay re Oppression Claim

i) The Ad Hoc Committee seeks to issue and proceed with a claim which alleges, among other things, that the granting of compensation to the DIP Lender in the form of percentage interests in the NAP that are very substantial, was oppressive, in unfair disregard of, and unfairly prejudicial to the interests of Crystallex's shareholders (the "Oppression Claim");

Lift Stay re Breach of Criminal Interest Rate

j) The Oppression Claim further alleges that the compensation provided to the DIP Lender is in breach of the *Criminal Code of Canada*.

Issue

3 The Ad Hoc Committee represents the interests of over 218 shareholders ("Complaining Shareholders") who together hold almost 30% of the common shares of Crystallex. According to the Ad Hoc Committee the fundamental question raised by this proposed motion is whether it is in the interests of justice for the court to vary the Final Orders.

4 I have concluded that the answer to this fundamental question is "no" for the following reasons.

Analysis

5 The Final Orders made over the last five years approving amendments to the DIP credit agreements were all declared to be fair, reasonable and appropriate by Newbould J. The DIP Lender relied upon these orders to advance and permit Crystallex to access over $75 million to pursue its claim against Venezuela. Its claim resulted in an arbitration award of approximately US$1.3 billion. This would not have occurred without the substantial financial support from the DIP Lender.

6 The Complaining Shareholders have been aware of this CCAA proceeding since early 2012. They were aware of the Monitor's website where information concerning the motions to amend the DIP credit agreements and the Final Orders was readily available. They took no steps to participate in this proceeding or to challenge any of the orders sought by the DIP Lender to amend the DIP credit agreements despite having notice and many opportunities to do so.

7 The Complaining Shareholders now seek to overturn the Final Orders long after the applicable appeal periods have expired to the serious detriment of the DIP Lender who relied upon the orders in advancing a significant amount of financing so that Crystallex could pursue is claim against Venezuela.

8 In my view, in light of this background, the Final Orders, which were made following full hearings in court, and were issued and entered long ago, are a complete bar to the Ad Hoc Committee's proposed claim.

9 Further, I have concluded that there is no basis in law to vary the Final Orders as the Ad Hoc Committee seeks to do. The Supreme Court of Canada made it clear in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.) at paras. 115 and 116 that, "... subject to an appeal, parties are secure in the reliance on the finality of superior court decisions" and "only in strictly limited circumstances can a court revisit an order or judgment..."

10 The only "limited circumstances" available for varying a final, issued and entered order are the following:

a) The court's inherent jurisdiction to correct slips or errors in expression;

b) Rule 59.06(2) of the *Rules of Civil Procedure* (the "Rules"); and

c) Rule 37.14 of the Rules.

Inherent Jurisdiction

11 The power of a court to vary an order after it has been issued and entered is limited to making the order conform to the judgment pronounced or intended to be pronounced. The Complaining Shareholders are not seeking to correct a slip or an error in the expression of a judgment. Rather, they are seeking to overturn key provisions of the Final Orders. The applicable jurisprudence is clear that this court does not have the inherent jurisdiction to review or vary these Final Orders in the manner requested by the Ad Hoc Committee.

12 The fairness and reasonableness of the terms of the transactions contemplated by the original DIP credit agreement as amended by the Final Orders was determined at the time the orders were approved by the court. This was before the DIP Lender and Crystallex relied and acted upon those court approvals. A complaint that a shareholding interest that arguably had no value upon the CCAA filing in 2011 may be worth more now, following six years of DIP Lender support and effort by Crystallex to create value for stakeholders, is not evidence of an injustice to the Complaining Shareholders that warrants overturning the Final Orders.

13 For these reasons, I am not prepared to vary the orders on the basis of my inherent jurisdiction.

Rule 59.06(2)

14 There are no allegations that, if proved, would permit me to amend or vary the Final Orders pursuant to the limited exceptional circumstances under Rule 59.06(2) of the Rules.

15 The two limited exceptional circumstances under Rule 59.06(2) are: (i) fraud, or (ii) new facts that have arisen or have been discovered after the order was made.

16 The Ad Hoc Committee's motion does not make any allegations of fraud or of new facts that would permit me to reopen and vary the Final Orders under this rule. Instead, the motion is an attempt to re-litigate the merits of the Final Orders based on arguments that could have been advanced when the Final Orders were sought and granted many years ago. No new facts have arisen, or are alleged to have arisen, since the Final Orders were made.

17 I am, therefore, not prepared to vary the Final Orders on the basis of Rule 59.06(2).

Rule 37.14

18 There is also no basis to amend or vary the Final Orders under Rule 37.14 of the Rules. Under this Rule, the court may only vary an order where "no notice or insufficient

notice" has been provided to an affected party and where the party affected by the order moves forthwith to vary the order.

Notice Effected

19 Service and notice in this CCAA proceeding were effected in compliance with the Initial Order and s. 23 of the CCAA. There is no requirement in the CCAA or the Initial Order to give any other specific notice to shareholders.

20 It was open to any one of the Complaining Shareholders to file a notice of appearance and to be added to the Service List. In fact, counsel for two shareholders were added to the Service List and, therefore, received notice of all subsequent proceedings, and made submissions at hearings dealing with the Final Orders now under attack by the Ad Hoc Committee.

21 The Complaining Shareholders did nothing to be added to the Service List. The motion material for the Final Orders was served upon everyone on the Service List. The Final Orders provide that no further service is required.

22 Mr. Justin Fine, who testified on behalf of the Ad Hoc Committee, confirmed that the Complaining Shareholders were aware of the proceedings shortly after the granting of the Initial Order. They also had various discussions with representatives of Crystallex and the Monitor and they were aware of the Monitor's website.

23 The Complaining Shareholders also knew or ought to have known about the Final Orders shortly after they were issued and entered. They were in a position to have known the amounts of the additional DIP loans and the percentage of the NAP to be earned by the DIP Lender. Each of the Final Orders was posted on the Monitor's website after being issued and entered. The Final Orders approving the Second and Third Credit Agreement Amendments contained the amounts of the additional DIP loans and the percentage of the NAP to be earned by the DIP Lender. The order approving the Fourth Credit Agreement Amendment contained a term allowing any creditor or shareholder to obtain a copy of the relevant terms from Crystallex, on such terms as Crystallex and the Monitor agreed, or on further order of the court.

24 Accordingly, the Complaining Shareholders were in a position to obtain the necessary information to advance the allegations now asserted had they exercised modest due diligence in response to the Initial Order or following the dates on which any of the Final Orders were made.

25 I am, therefore, satisfied that the Complaining Shareholders had sufficient notice concerning the Final Orders.

Failure to Move "Forthwith"

26 The Complaining Shareholders did not move "forthwith", as required by Rule 37.14, despite the fact that they were aware, or could have been aware, of the Final Orders, prior to or at the time they were made, or at least shortly thereafter once posted on the Monitor's website.

27 Serving this motion in December 2017, seeking to vary the Final Orders that were issued, entered and posted publicly between June 2013 and December 2014, was clearly not done "forthwith".

28 I have concluded that the Complaining Shareholders' failure to move forthwith is also a bar to the variation of the Final Orders pursuant to Rule 37.14.

Legal Barriers to Variation

29 I have also concluded that the following legal barriers prevent the variation of the Final Orders sought by the Ad Hoc Committee:

a) a court will not disturb a final order if parties have acted and relied upon it;

b) the Ad Hoc Committee's claims are barred by s. 142 of the *Courts of Justice Act*;

c) the Ad Hoc Committee's claims are statute-barred pursuant to the *Limitations Act*; and

d) the Ad Hoc Committee's claim based upon a criminal interest rate is bound to fail.

Reliance on Final Orders

30 CCAA jurisprudence is consistent that final orders that have been relied upon by parties to the CCAA proceeding will not be disturbed. In *DBDC Spadina Ltd. v. Walton*, 2015 ONSC 870 (Ont. S.C.J. [Commercial List]), at para. 16, Newbould J. held that a court should be loath to vary an order if persons relying on the order would be materially prejudiced. With respect to CCAA initial orders, Farley J. commented on comeback motions in *Muscle tech Research and Development Inc., Re* 2006 ONSC 316 at para. 5 as follows:

> Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question.

31 More recently, in *Target Canada Co., Re*, 2016 ONSC 316 (Ont. S.C.J.), Morawetz R.S.J. rejected a plan of arrangement that would conflict with a final order made in the CCAA proceeding, stating as follows at para. 81:

> The CCAA process is one of building of blocks. In this [sic] proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made a number of orders. It is essential that court orders made during CCAA proceedings be respected... Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

32 In this case Crystallex and the DIP Lender have relied in good faith on the Final Orders. In particular, the DIP Lender has advanced and permitted Crystallex to use in excess of US$75 million in reliance on the Final Orders.

33 In my view, to vary the Final Orders now would turn this entire CCAA proceeding into chaos, result in a default under the DIP credit agreement and the amendment agreements and undermine the commercial certainty and reliability of the DIP financing process in every future CCAA proceeding. I am not prepared to vary the Final Orders which have been relied upon by parties in good faith who have taken significant risks and expended substantial resources to maximize value. Particularly since throughout this proceeding the Complaining Shareholders chose to sit on the sidelines.

Claims Barred by the Courts of Justice Act

34 Section 142 of the *Courts of Justice* Act provides that a person is not liable for any act done in good faith in accordance with a court order. There is no allegation of bad faith here. At all times, the DIP Lender acted in good faith in reliance upon the Final Orders. In my view, it cannot now be liable for oppression for having done so.

Claims Barred by the Limitations Act

35 I have also concluded that the Ad Hoc Committee's claims for oppression and breach of s. 347 of the *Criminal Code* are statute-barred by the *Limitations Act*. A claimant is presumed to have known of the loss or damage on the day the act or omission on which the claim is based took place, unless the contrary is proved. To prove the contrary, the claimant must show that it was highly unlikely, if not impossible, with reasonable due diligence, to have obtained the necessary information within the limitation period. The Ad Hoc Committee has not demonstrated this.

36 As described above, the Complaining Shareholders knew or ought to have known about the Final Orders at the time they were made and posted on the Monitor's website or shortly thereafter. They had ample opportunity to challenge or oppose these terms but instead, failed to act forthwith or with reasonable diligence within the limitation period.

Claims regarding criminal interest rate are bound to fail

37 Section 347(1) of the *Criminal Code* provides that "every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receive a payment or partial payment of interest at a criminal rate" is guilty of an offence.

38 In order for there to be an offence, the agreement or arrangement in question must, on its face, require payment of interest at a criminal rate. The DIP credit agreement does not require, and in fact expressly prohibits, the payment of interest at a criminal interest rate:

> a) the parties to the DIP credit agreement specifically agreed to comply with enumerated and detailed procedures for the adjustment, if necessary, of interest payable under the DIP credit agreement in any given year to ensure that "no receipt by the [DIP] Lender of any payments to the [DIP] Lender hereunder would result in a breach of section 347 of the *Criminal Code (Canada)*"; and
>
> b) the law is clear that where a payment that might be considered interest is not fixed, but is dependent upon future events (like the collection of the Arbitration Award) which may or may not cause it to exceed the criminal interest rate prohibition, the agreement is not contrary to s. 347(1) of the *Criminal Code*.

39 Further, the claim for receipt of interest by the DIP Lender at a criminal interest rate is premature because no interest has yet been received, A claim based on the alleged receipt of interest at a criminal rate is a "wait-and-see" cause of action. It cannot accrue until interest has actually been paid and its timing and quantum are known so as to permit the calculation of the effective rate of interest.

Conclusion

40 For all of these reasons the Ad Hoc Committee's motion is dismissed.

41 If the parties cannot agree on costs they may schedule a 9:30 a.m. attendance with me.

42 I thank counsel for their helpful submissions.

Motion dismissed.

End of Document

2018 ONCA 778
Ontario Court of Appeal

Crystallex International Corporation (Re)

2018 CarswellOnt 15724, 2018 ONCA 778,
296 A.C.W.S. (3d) 472, 64 C.B.R. (6th) 1

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 (Applicants)

Robert J. Sharpe, R.G. Juriansz, S.E. Pepall JJ.A.

Judgment: September 25, 2018
Docket: CA M49312

Proceedings: leave to appeal refused *Crystallex International Corp. (Re)* (2018), 62 C.B.R. (6th) 303, 2018 CarswellOnt 9950, 2018 ONSC 2443, Hainey J. (Ont. S.C.J. [Commercial List])

Counsel: Clifton P. Prophet, Nicholas Kluge, for Moving Party, Ad Hoc Committee of Shareholders of Crystallex International Corporation
Timothy Pinos, Ryan C. Jacobs, Shayne Kukulowicz, for Respondent, DIP Lender
Jay A. Swartz, James Doris, Robin Schwill, for Respondent, Crystallex International Corporation
Aubrey E. Kauffman, for Respondents, Robert Fung and Marc Oppenheimer

Subject: Corporate and Commercial; Insolvency

Proceeding: Motion/Application for Leave to Appeal.

APPLICATION by ad hoc committee for leave to appeal judgment reported at *Crystallex International Corp. (Re)* (2018), 2018 ONSC 2443, 2018 CarswellOnt 9950, 62 C.B.R. (6th) 303 (Ont. S.C.J. [Commercial List]), dismissing motion to lift stay in proceedings under *Companies' Creditors Arrangement Act*.

***The Court*:**

1 The Ad Hoc Committee of Shareholders of Crystallex International Corporation (the "Committee") seeks leave to appeal the order of the motion judge dated May 22, 2018, which was made in the context of proceedings relating to Crystallex International Corporation ("Crystallex") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA").

2 The Committee represents the interests of over 200 shareholders who together hold approximately 30% of Crystallex's common shares. The motion judge dismissed the Committee's motion for an order lifting the stay of proceedings, imposed by the Initial Order granted in the CCAA proceedings, to allow the shareholders to commence an action. The Committee wished to vary Debtor in Possession ("DIP") financing orders that had received court approval four to five years ago. The proposed action alleged oppression and breach of the criminal interest rate provisions in the *Criminal Code*.

3 When Crystallex sought CCAA protection in December 2011, its assets consisted of an arbitral claim for US$3.8 billion against the Bolivarian Republic of Venezuela for breach of an exclusive mining contract relating to the Las Cristinas gold mine.

4 Following an auction process supervised by the Monitor, Tenor KRY Cooperatief U.A., Tenor Special Situation 1, LLC, and Luxembourg Investment Company 31 S.a.r.l. (the "DIP Lender") were selected to provide the DIP financing. Pursuant to an initial credit agreement, the DIP Lender proposed to provide US$36 million to Crystallex to fund its arbitral claim against Venezuela in exchange for a 35% interest in Crystallex's potential recovery in that proceeding (the "Net Arbitration Proceeds" or "NAP"). An agreement containing a management incentive plan also provided for the discretionary compensation of Crystallex management who would receive a percentage of the NAP if the arbitration was successful. Management included Robert Fung and Marc Oppenheiner, both directors of Crystallex (the "individual respondents"). Fung is now the Chairman and CEO of Crystallex and Oppenheimer was previously the company's CEO. On April 16, 2012, Newbould J. granted orders approving both agreements.

5 The Trustee of the Noteholders unsuccessfully appealed the April 16, 2012 orders to this court: *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.). Hoy J.A., as she then was, concluded, at paras. 71-72, that there was no basis to interfere with Newbould J.'s discretionary decision to approve the DIP financing and the management incentive plan.

6 On June 5, 2013, April 14, 2014, and December 18, 2014, Newbould J. granted orders amending the initial credit agreement. Those amendments collectively increased Crystallex's indebtedness to US$75 million and gave the DIP Lender an

increasingly higher percentage interest in the NAP. The funding was primarily to enable the continuation of the arbitral proceedings. In the December 18, 2014 order, Newbould J. also approved a NAP transfer agreement which gave the individual respondents a further percentage of the NAP.

7 On April 4, 2016, Crystallex obtained an arbitral award of approximately US $1.4 billion against Venezuela. Subsequently, Venezuela and Crystallex entered into a settlement agreement which was approved by the motion judge on November 29, 2017.

8 The shareholders allege in their proposed action that the DIP financing amendments and the NAP transfer agreement severely diluted their interest in the arbitral award by assigning all but a small percentage of the proceeds to the DIP Lender and the individual respondents. They claim that these amendments were entered into in unfair disregard of and to the prejudice of the interests of the shareholders.

9 In its May 2018 motion, the Committee sought to vary the amending orders but did not impugn the initial orders approving the DIP financing and the management incentive plan. The Committee contended that the amending orders in 2013 and 2014 were granted without prior notice to the shareholders.

10 On May 22, 2018, the motion judge dismissed the shareholders' motion to lift the stay of proceedings, thus precluding the Committee from commencing the proposed action. He concluded that the orders granted by Newbould J. approving the DIP financing amendments and the NAP transfer agreement were final in nature and constituted a complete bar to the relief requested.

11 The motion judge concluded that there was no basis in law to vary the impugned amending orders. He noted that the limited circumstances for varying a final, issued and entered order are: the court's inherent jurisdiction to correct slips or errors in expression: r. 59.06(2) of the *Rules of Civil Procedure*; and r. 37.14 of the *Rules of Civil Procedure*.

12 He concluded that the Committee was not seeking to correct a slip or error but to overturn key provisions of the orders. He noted that the fairness and reasonableness of the terms had been determined at the time the orders were approved and at a time before the DIP Lender and Crystallex relied and acted upon them. Accordingly, he was not prepared to vary the orders on the basis of his inherent jurisdiction. Nor was he persuaded that the limited circumstances under r. 59.06(2) had been established. He concluded that this was not a case of fraud or newly discovered facts.

13 Finally, he rejected the argument that the orders should be varied under r. 37.14 because the shareholders had insufficient or no notice of the motions to approve the amendments. He concluded, at para. 19, that service and notice were effected

in compliance with the Initial Order and with s. 23 of the CCAA. Based on the shareholders' own materials, he concluded that they had been aware of the CCAA proceedings since early 2012. Any one of the complaining shareholders could have filed a notice of appearance and been added to the service list. Finally, the Committee had not moved forthwith, as required by r. 37.14, to vary the orders that had been granted some four to five years earlier.

14 He also noted various legal barriers to variation of the orders. He observed that courts are loathe to vary a CCAA order if persons relying on the order would be materially prejudiced and that, in this case, the DIP Lender had relied in good faith on the court orders. Furthermore, the claims for oppression and for breach of the *Criminal Code* interest rate provisions were time-barred. He stated that the complaining shareholders had had ample opportunity to challenge or oppose the terms of the orders but had failed to act with reasonable diligence within the applicable limitation period.

15 Finally, he stated that the claims regarding the criminal interest rate were bound to fail because the DIP financing agreements did not require, and in fact prohibited, the payment of interest at a criminal interest rate.

Discussion

16 The test for leave to appeal from the decision of a judge supervising a CCAA proceeding is not contentious. The moving party must demonstrate serious and arguable grounds that justify the granting of leave. The court will consider whether the proposed appeal is: (i) *prima facie* meritorious and not frivolous; (ii) of significance to the practice; (iii) of significance to the proceeding, and (iv) whether the appeal will unduly hinder the progress of the action: *Nortel Networks Corp., Re*, 2016 ONCA 332, 130 O.R. (3d) 481 (Ont. C.A.), at para. 34.

17 For the reasons that follow, we conclude that the applicant's motion founders on the first factor, a consideration of the *prima facie* merits of the proposed appeal.

18 The issue to be addressed on this leave to appeal motion is the motion judge's ability to vary the impugned orders. The motion judge was entitled to rely on the record before him. He fairly concluded that there was no slip or error in expression in the orders, nor had the shareholders alleged any fraud or newly discovered facts. In our view, there was no basis to vary the orders based on inherent jurisdiction or r. 59.06(2) of the Rules. The shareholders rely on *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, 131 O.R. (3d) 511 (Ont. C.A.), a case involving variation of a consent order. Variation of such an order engages principles that differ from those applicable to variation based on inherent jurisdiction or r. 59.06(2). See *Hebditch v. Birnie*, 2017 ONCA 169 (Ont. C.A.), at para. 13.

19 Variation of an order pursuant to r. 37.14(1)(a) or (b) requires an absence of or insufficient notice. As the motion judge correctly observed, notice was effected in accordance with the Initial Order and with s. 23 of the CCAA. In this regard, the Monitor published notices of the CCAA proceeding and created a website on which it posted its reports, court orders, and motion materials. The Monitor issued a press release that identified the website's address. With one exception, all of the motion materials disclosed the amounts of the additional loans and the proposed percentage of the NAP to be retained by the respondents.

20 None of the shareholders now represented by the Committee took any steps to be placed on the service list. They took no steps to participate and failed to attend the hearings in 2013 and 2014 when the orders in issue were granted. According to their own evidence, the shareholders knew of the CCAA proceeding since early 2012. The motion judge concluded that the shareholders had notice. In our view, he made no palpable and overriding error in this regard. The Committee has been unable to demonstrate that the motion judge exercised his discretion unreasonably or made any error in principle in dismissing its motion.

21 We are also of the view that the remaining factors to be considered on a motion for leave to appeal a CCAA order do not favour the Committee's position. The use of litigation funding agreements in CCAA proceedings may well be of importance to the insolvency bar. However, this is not the issue on which this leave to appeal motion turns. To challenge these agreements, the Committee must first overcome the hurdle of varying the orders granted by Newbould J. The issue regarding variation of these CCAA orders is not of public importance as the law on varying orders is neither new nor contentious. The motion judge's conclusion that there was no basis to vary the orders was a fact-specific determination which is of limited significance to the practice or to the public.

22 While we agree that the appeal may be of significance to the action, standing alone, this factor is insufficient to warrant granting leave to appeal: *Nortel Networks*, at para. 95.

23 Lastly, the motion judge accepted that varying the final orders would have a serious impact on the credit arrangements and would throw the CCAA proceedings into chaos. We see no basis on which to interfere with his conclusion.

24 In essence, this is a case of too little too late. Potentially interested stakeholders cannot sit idle and await the outcome of realization proceedings. They must act to protect their interests or suffer the attendant consequences.

25 In closing, we note that DIP financing was originally conceived as a means to fund operations while a company under CCAA protection restructured. The disposition of this motion should not be interpreted as an endorsement or a rejection of the amendments approved by Newbould J.

Disposition

26 The motion for leave to appeal is dismissed. The parties are to bear their own costs.

Application dismissed.

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 JTI-MACDONALD CORP., IMPERIAL TOBACCO CANADA LIMITED, IMPERIAL TOBACCO COMPANY LIMITED, AND ROTHMANS, BENSON & HEDGES INC.

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

ABBREVIATED JOINT BRIEF OF AUTHORITIES OF THE MONITORS

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