2011 ONSC 7701
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp., Re

2011 CarswellOnt 15034, 2011 ONSC 7701, 210 A.C.W.S. (3d) 574, 89 C.B.R. (5th) 313

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

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

Newbould J.

Heard: December 23, 2011
Judgment: December 28, 2011
Docket: CV-11-9532-00CL

Counsel: Markus Koehnen, Andrew J.F. Kent, Jeffrey Levine, for Applicant
Richard Swan, S. Richard Orzy, Emrys Davis, for Computershare Trust Company of Canada
Alex L. MacFarlane, for Tenor Capital Management
David R. Byers, for Ernst & Young Inc.

Subject: Insolvency

APPLICATIONS by debtor and noteholders for initial order pursuant to *Companies' Creditors Arrangement Act*.

***Newbould J.*:**

1 This is a contest between two competing CCAA applications. One is proposed by the debtor Crystallex International Corporation ("Crystallex") and one is proposed by Crystallex's principal creditor, the noteholders under a 2004 Trust indenture (the "Noteholders") who are represented by the trustee Computershare Trust Company of Canada. Both Crystallex and the Noteholders agree that a CCAA application is appropriate. They disagree over which application should proceed.

2 This is not the first contest between Crystallex and the Noteholders. On two previous occasions the Noteholders applied for a declaration that there had been a "Project Change of Control" within the meaning of the trust indenture which, if it were the case, would have required Crystallex to purchase the notes of the Noteholders before their maturity at 102% of par value plus accrued interest. Both applications were dismissed.

3 Both CCAA applications were filed on December 22, 2011, the day before the notes held by the Noteholders became due. I heard argument on December 23, 2011 and on that day made an Initial Order in the application brought by Crystallex and dismissed the application by the Noteholders, with reasons to follow. These are my reasons.

Business of Crystallex

4 The business of Crystallex and its difficulties in Venezuela are referred to in some detail in the two prior decisions dismissing the Noteholders' applications. It is not necessary to review here all of those details. A few will suffice.

5 The principal asset of Crystallex is its right to develop the Las Cristina gold project in Venezuela. Las Cristinas is one of the largest undeveloped gold deposits in the world containing indicated gold resources of approximately 20.76 million ounces.

6 Crystallex obtained the right to mine the Las Cristinas project in September 2002 through a Mining Operation Contract (the "MOC") with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. Crystallex's position is that it complied with all of its obligations under the MOC and that neither the CVG nor the Government of Venezuela raised any material concerns about lack of compliance. The CVG confirmed on several occasions that the MOC was in good standing and that Crystallex was in compliance with it.

7 On February 3, 2011, CVG purported to "unilaterally rescind" the MOC. CVG rationalized its termination of the contract for reasons of "expediency and convenience" and because Crystallex had allegedly "ceased activities for over a year" on the project. Crystallex's position is that it did not cease activities. It was maintaining the mining site in a shovel-ready state and was awaiting receipt of an environmental permit which the Ministry of Environment advised would be issued, and for which the Ministry sent Crystallex a bill that Crystallex paid.

8 On February 16, 2011 Crystallex filed a Request for Arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID") against Venezuela pursuant to a Bilateral Investment Treaty between Canada and Venezuela. ICSID is a mechanism through which private investors can seek legal redress against a foreign government for conduct that might be otherwise immune from suit.

9 In the arbitration, Crystallex claims restitution of the MOC, issuance of the environmental permit and compensation for interim losses. In the alternative, Crystallex seeks compensation of $3.8 billion for the value of its investment.

Crystallex's liquidity crisis

10 Crystallex has a number of liabilities, the most of significant of which is liability of approximately $100 million in senior unsecured notes that were issued pursuant to a Trust Indenture dated December 23, 2004. The notes fell due on December 23, 2011. In addition, Crystallex has other liabilities of approximately Cdn. $1.2 million and approximately US $8 million.

11 The principal asset of Crystallex is its arbitration claim of US$3.8 billion against Venezuela. In addition, Crystallex has mining equipment with a book value of approximately $10.1 million and cash of approximately $2 million.

12 Because of Venezuela's refusal to allow Crystallex to exploit Las Cristinas, Crystallex did not have the funds to pay out the 2004 notes on December 23, 2011. It is Crystallex's belief that a settlement of the arbitration claim or recovery on an arbitration award will result in Crystallex receiving cash far in excess of what is required to pay all of its creditors in full.

Crystallex application

13 The Crystallex application seeks the authority to file a plan of compromise and arrangement, an order that it remain in possession of its assets with the authority to continue to pursue the arbitration against Venezuela and continue to retain all of the various experts necessary for that purpose. It seeks a directors' and officers' indemnity and charge not exceeding $10 million to the extent that they do not have directors' and officers' insurance, which insurance may not be subrogated, and an administration charge of $3 million to cover the expenses of the Monitor, Crystallex and their solicitors.

14 Crystallex also seeks authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor. Crystallex has already received expressions of interest in DIP financing and an unsolicited offer of DIP financing from Tenor Capital Management. However the board of directors of Crystallex was not comfortable accepting the terms of the proposed DIP without a broader canvas of the market to determine if there were more favourable terms available.

Noteholders' application

15 The affidavit of Mr. Mattoni filed on behalf of the Noteholders is critical of the actions of Crystallex taken since at least the time that litigation between the two parties commenced in December 2008. It states that the Noteholders instructing Computershare hold approximately 77% of the outstanding notes and have made it clear that they will never support a restructuring that does not repay them in full immediately or which keeps the current management and board in a position of control going forward.

16 The Noteholders propose a Plan of Compromise and Reorganization to be authorized in the Initial Order, which contemplates:

> (a) New common shares will be issued by Crystallex and all existing shares will be cancelled without any repayment of capital or other compensation.
>
> (b) The Plan will involve a structured process by which there will be an attempt to raise sufficient new equity funds to repay all of the creditors in full.
>
> (c) The existing shareholders will be entitled first to subscribe for the new common shares. Any new common shares not taken by the existing shareholders may be subscribed for by new investors.
>
> (d) If the new common share offering is not fully subscribed for, then it will not proceed and the claims of creditors will be satisfied through a pro rata conversion of those claims to equity, such that all existing debt holders would become the equity holders and Crystallex would be debt-free.

17 The Plan contemplates a meeting of creditors to vote on the plan of arrangement and reorganization after a claims bar process has taken place.

18 The Initial Order proposed by the Noteholders provides that Crystallex shall carry on only such operations as are necessary to facilitate and implement the Plan and may continue to retain employees, consultants etc. to the extent necessary to facilitate and implement the Plan. It contains no ability of Crystallex to pursue the arbitration or to seek DIP or permanent refinancing.

19 In short, if the CCAA application of the Noteholders succeeds, it will mean that the interests of the current equity holders will be immediately cancelled.

Analysis

20 The CCAA is intended to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), per Farley J. The benefit to a debtor company could, depending upon the circumstances, mean a benefit to its shareholders.

21 It is clear that the CCAA serves the interests of a broad constituency of investors, creditors and employees. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.). See also *Janis P. Sarra*, Rescue! The Companies' Creditors Arrangement Act (Thomson Carswell) at p.60. Thus it is appropriate at this stage to consider the interests of the shareholders of Crystallex.

22 In my view, to cancel the shares of the existing shareholders at this stage is premature. The value of the gold at Las Cristinas is staggering. Las Cristinas contains at least 20,000,000 ounces of gold. At today's gold prices, the gold has increased in value by approximately $20 billion since Crystallex acquired its rights under the MOU. Crystallex's damage claim is for $3.8 billion.

23 No one can be sanguine about the outcome of the arbitration. The noteholders, however, have not argued that the arbitration will not succeed, which is not surprising, because if their Plan is accepted, they may well end up owning Crystallex and pursuing the arbitration for their own gain. Mr. Swan stated in argument that the Noteholders do not intend to stand in the way of the arbitration claim. I dealt with the issue of CVG having grounds to rescind the CVG contract in my reasons of September 29, 2011 on the second attempt by the Noteholders to obtain a declaration that there had been a "Project Change of Control" and stated that while the issue of whether CVG breached its contractual provisions purporting to rescind the CVG contract is a matter for the arbitration, the noteholders had not established that CVG had grounds to rescind the CVG contract. There is no new evidence before me to suggest otherwise.

24 Crystallex has spent over $500 million on the project. In the event that Crystallex only recovered that amount, without interest and without any compensation for the loss of the ability to develop the project, Crystallex would still have more than enough to pay all of its debts and have substantial value left over for its shareholders.

25 There is evidence that Venezuela has a history of settling arbitrations and examples of substantial sums being paid are included in the record, including offering Exxon a settlement of $1 billion in December 2011 arising from the nationalization of certain assets. [1] At a procedural meeting on December 1, 2011, the arbitration tribunal in the claim by Crystallex against Venezuela established Washington D.C. as the seat of the arbitration proceeding and established a timetable for the arbitration which requires Crystallex to submit its witness statements, supporting documents and written argument in February 2012. The hearing of the arbitration is scheduled for November 2013.

26 In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.

27 The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.

28 The Noteholders contend that their Plan is reasonable as it permits investors to invest in new shares of Crystallex and gives Crystallex the ability to determine if the market thinks that the arbitration claim is worth at least $100 million, the amount required by the Noteholders' Plan to permit the issuance of the new shares. There is no evidence, however, that the attempt to raise funds in a tight timetable as set out in the Noteholders' Plan by means of issuance of new common shares is the best or the only possible means of raising money, or a true test of the market's view of the value of the arbitration claim, and for a court at this stage to require that to be done would in my view be impermissibly usurping the power of the board of directors of Crystallex in its restructuring efforts. See *Stelco Inc., Re*, [2005] O.J. No. 4733 (Ont. C.A.) at para. 26.

29 In the circumstances, I am not prepared to act on the Noteholders' Plan or to issue an Initial Order as proposed by them. In my view, the Crystallex proposal in its proposed Initial Order is in keeping with the objectives of the CCAA and will permit a fair and balanced process at this initial stage.

30 Mr. Swan said that with respect to the Crystallex application, the most significant concern of the Noteholders is that the DIP financing may be used as a long-term financing vehicle for months and years without presenting a real

refinancing plan, and that to provide security would change the status quo. It seems to me that this concern is somewhat premature, as it is not known what financing, DIP or otherwise, will be achieved and proposed for approval by the Court.

31 Crystallex proposes a Directors' and Officers' charge of $10 million to secure the indemnity provided to them in the Initial Order. In its proposed Initial Order, the Noteholders proposed an indemnification secured by a charge of $100,000. In argument, Mr. Swan contended that $500,000 to $1 million was more typical and that $10 million was wholly excessive. It must be remembered that the charge only applies to liabilities in excess of the D&O insurance coverage that the directors and officers have, which is $20 million and in place until September 2012. It is not known whether the policy can be renewed in September 2012 at a reasonable cost. It may be that the charge may never be needed, in which case the Noteholders should have no concern about the size of it. If it is needed, however, I would not at this stage limit it to the amount suggested by the Noteholders. There has already been extensive litigation involving Crystallex and the directors and officers understandably need assurances of the kind normally provided in CCAA proceedings. To lose the senior officers and directors of Crystallex at this stage would undoubtedly have a negative impact on the preparation and prosecution of the arbitration claim. Mr. Byers on behalf of Ernst & Young Inc., the proposed Monitor, stated that the Monitor would be prepared to look at the quantum of the charge. In the circumstances, I accept the $10 million figure for the charge with the proviso that the Monitor review it and if thought appropriate report back to the Court.

32 Crystallex proposes an Administration Charge of $3 million. The Noteholders propose an Administration Charge limited to $1 million. In light of the contentious nature of the relationship between the Noteholders and Crystallex, I think the Administration Charge of $3 million is reasonable.

Conclusion

33 It was necessary that the Initial Order be signed on December 23, 2011. Its provisions reflect my comments in this endorsement. The return date for any application for the extension of the stay provisions in the Initial Order is scheduled for January 20, 2012 at 9 a.m.

Debtor's application granted; noteholders' application dismissed.

Footnotes

1 In the first attempt of the Noteholders to obtain a declaration of a Change of Control as a result of the threats of Venezuela to confiscate Crystallex's interests, there was evidence that Crystallex had advice that it was better to try to negotiate rather than arbitrate, which had led the board of directors to attempt to negotiate. Whether there has been a change of policy in Venezuela is no doubt a question mark.

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