

CITATION: Holders of Senior Unsecured Notes of Crystallex International Corporation v. Crystallex International Corporation, 2010 ONCA 364
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COURT OF APPEAL FOR ONTARIO

Doherty, Simmons and Epstein JJ.A.

BETWEEN

Computershare Trust Company of Canada, in its capacity as Trustee for the Holders of 9.375% Senior Unsecured Notes of Crystallex International Corporation due December 23, 2011

Appellant

and

Crystallex International Corporation

Respondent

Derek J. Bell and Emrys C. Davis, for the appellant

Markus Koehnen and Amanda Klein, for the respondent

Heard: April 26, 2010

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated December 16, 2009, with reasons reported at [2009] O.J. No. 5435.

By the Court:

[1] The relevant background facts are fully and clearly summarized at paras. 1-17 of the application judge's reasons. We adopt and rely on that summary.

[2] The appellant, that acts as trustee for the Noteholders, raises three issues. Two issues arise out of the terms of the trust indentures under which the Notes were issued. The third issue arises out of the application judge's refusal to grant relief under the oppression provisions in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[3] Before examining those three issues, brief reference should be made to an unusual aspect of this case. Some of the material placed before the application judge and this court is subject to an order made by Campbell J. on March 19, 2009, and continued in this court by Feldman J.A. on April 6, 2010, protecting the confidentiality of the material. The application judge released two versions of his reasons dismissing the application. The first referred only to matters that were not subject to the order of Campbell J. The second version supplemented the first by addressing some of the material that was subject to the protective order issued by Campbell J. The second version is subject to the protective order. For the purposes of this appeal, it is only necessary to refer to the public version of the reasons. The second version of the reasons adds nothing to the application judge's legal reasoning, but does provide further factual support for his conclusions, particularly on the oppression remedy claim.

The Issues Arising Out of the Terms of the Trust Indentures

[4] The issues relating to the terms of the trust indentures are fundamentally matters of contractual interpretation. We approach both on a correctness standard.

[5] The arguments made in this court were fully addressed by the application judge, and we are in substantial agreement with his analysis. The first argument arises out of the following definition of Project Change of Control in the First Supplemental Trust Indenture:

Project Change of Control means the occurrence of any transaction as a result of which the Corporation ceases to beneficially own, directly or indirectly, at least a majority interest in the Las Cristinas Project assets. [Emphasis in original.]

[6] Under the terms of the trust indentures, the respondent (“Crystallex”) is required to purchase all outstanding Notes at 102 per cent of par upon a Project Change of Control.

[7] Counsel for the appellant submitted that the reference to “the Las Cristinas Project assets” must refer to Crystallex’s ability to acquire, explore, develop and exploit the mineral deposits that constitute the Las Cristinas Project. He argued that Crystallex has effectively lost its ability to work on the project by virtue of the refusal of the relevant government authorities to issue the necessary environmental permits. Counsel maintains that it is clear on the facts that the necessary permits will not be forthcoming.

[8] The application judge found at paras. 24-29 that the unilateral actions of the government authorities - refusing the necessary environmental permits - did not constitute a “transaction” for the purposes of triggering the Project Change of Control provisions. We need make no comment on that part of the analysis as we agree with his second reason for rejecting this argument.

[9] The application judge determined that Crystallex retained beneficial ownership of its contractual rights under the contract with Corporacion Venezolana de Guayana (“CVG”), the Venezuelan entity that had granted the mining rights to Crystallex. The application judge found at paras. 30-39 that the contract remained in full force and effect even though government authorities had to date refused to issue permits necessary to move forward with the project. We agree with the application judge’s analysis. Crystallex’s rights under its contract with CVG are the assets referred to in the Project Change of Control provisions. Crystallex maintains beneficial ownership of those contractual rights.

[10] The appellant’s second argument arising out of the terms of the trust indentures relates to the use that Crystallex could make of the proceeds of the Notes. Under the relevant terms, Crystallex was obliged to “[u]se the net proceeds of the ... Notes to fund the development of the Las Cristinas Project, which funding may include the provision of cash collateral security for Branch Indebtedness.”

[11] A breach of the provision governing the use of the proceeds of the Notes rendered the principal amounts of the Notes and any unpaid interest due and payable upon appropriate notice. The appellant had given that notice to Crystallex.

[12] The appellant claimed that Crystallex breached the provision restricting the use of the proceeds of the Notes by selling equipment that had been purchased with the proceeds

of the Notes and using the proceeds of that sale for matters other than the development of the Las Cristinas Project.

[13] In October 2009, Crystallex sold equipment with a book value of \$22.1 million for \$11.3 million. The proceeds of the sale of the equipment were dispersed according to the terms of an order made by Campbell J. on October 7, 2009. \$4.3 million was paid to Crystallex on its own account; \$4.6875 million was held in trust for the appellant to be released either upon payment of the full amount owing or upon payment of the next interest instalment due. The balance, about \$2.3 million, was held by Crystallex in escrow. Under the terms of the order of Campbell J., the parties' agreement as to the distribution of the proceeds of the sale of the equipment did not prejudice the appellant's claim that the sale contravened the terms of the trust indentures and triggered the provisions rendering the entire amounts due and payable.

[14] The trust indentures do not refer specifically to the use of the proceeds of any sale of equipment. The appellant could have bargained for that term or taken security in the equipment. In fact, the appellant did seek security during its negotiations with Crystallex but was unsuccessful. Nothing in the trust indentures specifically restricts the sale of any of the equipment. We agree with the application judge that it is not for the court to read into the documentation terms that would enhance the protection afforded to the appellant by the agreed to terms.

[15] We also agree with the application judge that, in any event, the use to which the proceeds of the sale of the equipment were put falls within the phrase “the development of the Las Cristinas Project”. The Las Cristinas Project is defined as “the acquisition, exploration, development and exploitation of the mineral deposits”. Development of that project goes far beyond steps taken to actually mine the deposits. For example, money paid by Crystallex in efforts to maintain the CVG contract in good standing is properly viewed as part of its efforts to acquire the mineral deposits. Like the application judge, we reject the very narrow definition of development drawn from certain tax cases and relied on by the appellant.

The Oppression Remedy Claim

[16] The application judge’s careful analysis of the oppression claim at paras. 72-100 is entirely consistent with the approach outlined in *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560. The application judge made three important factual findings:

- The Noteholders had no reasonable expectation that the directors of Crystallex would follow any particular course of action should difficulties be encountered in obtaining the necessary permits from the Venezuelan authorities (paras. 84-85);
- The Noteholders were very aware of the political climate and history of the property and hence, were fully aware of the risks associated with obtaining the permits necessary to allow Crystallex to operate the mine. In the face of that

knowledge, the Noteholders, sophisticated lenders, sought no protection in the trust indentures against those risks (paras. 86-88); and

- The decision made by the directors of Crystallex to carry on with attempts to bring the project to fruition rather than to abandon it and proceed with an arbitration claim was reasonable and made on an informed basis after taking professional advice (paras. 97-99).

[17] All three findings are supported in the record. We defer to those findings. Taken cumulatively, they justify the application judge's determination that the appellant had not made out a case for oppression.

[18] In this court, Mr. Bell, for the appellant, forcefully argued that the application judge had failed to consider that Crystallex was insolvent at the relevant time. He submitted that while the directors' duties were ultimately to the company, the directors were obligated to give primacy to the interests of the creditor stakeholders once the company crossed the line into insolvency.

[19] Leaving aside the value of any arbitration claim under an international treaty, at the time of the application, the liabilities of Crystallex exceeded its assets. However, Crystallex had paid all the interest due on the Notes in a timely fashion. It had paid other debts as they became due. Crystallex was, however, rapidly running out of available cash

- hence the sale of some of the equipment. Absent a fresh injection of funds, Crystallex would be in serious financial difficulty in the near future.

[20] It does not matter, for the purpose of determining whether the appellant was entitled to relief under the oppression provisions, whether Crystallex was technically insolvent at the relevant time. What matters is the actual financial condition of Crystallex insofar as that condition is relevant to the assessment of the reasonable expectations of the various stakeholders and the reasonableness of the business decisions taken on behalf of Crystallex by its directors. When determining whether the appellant was entitled to relief, it is the reality of Crystallex's financial circumstances that matters, not whether the insolvency label can be said to aptly describe those circumstances. The application judge properly considered the oppression claim in the context of Crystallex's actual financial circumstances.

[21] We reject the contention that insolvency necessarily compels the directors to favour the interests of the creditors to the exclusion of all other stakeholders. As indicated in *BCE*, at para. 82:

There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner

Conclusion

[22] The appeal is dismissed. The parties agreed that the successful party on appeal should have its costs in the amount of \$40,000. Costs to Crystallex in that amount inclusive of GST and disbursements.

RELEASED: "DD" "MAY 19 2010"

"Doherty J.A."
"Janet Simmons J.A."
"Gloria Epstein J.A."