Court File No. CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

THIRTY-SEVENTH REPORT OF ERNST & YOUNG INC. IN ITS CAPACITY AS MONITOR

September 3, 2021

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THIRTY-SEVENTH REPORT OF THE MONITOR

September 3, 2021

INTRODUCTION

1. This Court granted Crystallex International Corporation ("**Crystallex**" or the "**Applicant**") protection under the *Companies' Creditors Arrangement Act (Canada)* (the "**CCAA**") pursuant to the Initial Order of Mr. Justice Newbould dated December 23, 2011 (the "**Initial Order**"). Also pursuant to the Initial Order, this Court appointed Ernst & Young Inc. as the monitor (the "**Monitor**") of the Applicant and granted a stay of proceedings, which was most recently extended to November 5, 2021.

2. On the same date as the Initial Order, Crystallex also commenced a proceeding before the United States Bankruptcy Court in the District of Delaware (the "**Delaware Bankruptcy Court**") pursuant to Chapter 15 of the United States Bankruptcy Code to obtain an order recognizing this CCAA proceeding as the foreign main proceeding and providing a stay of proceedings in the United States (the "**Chapter 15 Proceedings**"). On January 20, 2012, the Delaware Bankruptcy Court granted an order approving the recognition of the CCAA proceeding as a foreign main proceeding and giving full force and effect in the United States to the Initial Order, including any extensions or amendments authorized under the CCAA proceeding.

3. To provide the necessary financing for its CCAA proceeding and to pursue its arbitration claim against the Bolivarian Republic of Venezuela ("**Venezuela**") in relation to certain mine sites that it alleged were expropriated, Crystallex obtained debtor-in-possession

financing ("**CCAA Financing**") from Luxembourg Investment Company 31 S.à.r.l. (successor to Tenor Kry Coöperatief U.A.) ("**Tenor**" or the "**DIP Lender**"). This Court granted an Order dated April 16, 2012 approving the CCAA Financing ("**CCAA Financing Order**"). The current outstanding principal owed to the DIP Lender is US$75,733,333**.**

4. On April 4, 2016, an arbitral tribunal constituted under the auspices of the Additional Facility of the International Center for Settlement of Investment Disputes granted an award (the "**Award**") in favour of the Applicant. The Award against Venezuela includes:
   a) Approximately US$1.4 billion in damages;
   b) interest accrued at 6-month average U.S. dollar LIBOR plus 1%, compounded annually, from April 13, 2008 to the date of the Final Award Order; and
   c) post judgment interest from the date of the Final Award Order.

PURPOSE

5. The Monitor is filing this thirty-seventh report (the "**Thirty-Seventh Report**") to provide the Court with its observations on and analysis of:

   a) the Applicant's motion for an order sealing portions of documents filed in connection with motions in this CCAA proceeding (as described in greater detail below); and

   b) Computershare Trust Company of Canada in its capacity as the trustee (the "**Trustee**") under the indenture governing the Applicant's $100 million 9.375% senior unsecured notes due 2011 (the "**Notes**") and the ad hoc committee of beneficial holders of the Notes (the "**Ad Hoc Committee**" and with the Trustee, the "**Noteholders**") request that certain information be unsealed in the Court Record and/or publicly disclosed by Crystallex.

6. In preparing this Thirty-Seventh Report and making the comments herein, the Monitor has been provided with, and has relied upon, unaudited financial information, books and records prepared by Crystallex, and discussions with and information from management of the Applicant ("**Management**") (collectively, the "**Information**").

7. The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Auditing Standards ("**GAAS**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information.

8. Capitalized terms not defined in this Thirty-Seventh Report are as defined in previous reports of the Monitor. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

INFORMATION SOUGHT TO BE SEALED BY THE APPLICANT

9. The Applicant has requested that the following information be sealed:

a) The cash balance of the Applicant as at September 30, 2020 and March 31, 2021;
b) The summary of the Applicant's actual receipts and disbursements for:
   i. the period from April 1, 2020 to September 30, 2020 compared to the cash flow forecast included in the Thirty-Third Report (Confidential Appendix "B" to the Thirty-Fifth Report);
   ii. the period from October 1, 2020 to March 31, 2021 compared to the cash flow forecast included in the Thirty-Fifth Report (Confidential Appendix "B" to the Thirty-Sixth Report);
c) The Applicant's cash flow projections (the "**Cash Flow Statement**") for:
   i. the period from October 1, 2020 to May 31, 2021 (Confidential Appendix "C" to the Thirty-Fifth Report); and
   ii. the period from April 1, 2021 to November 30, 2021 (Confidential Appendix "C" to the Thirty-Sixth Report),

(collectively, the "**Financial Information**").

10. The Applicant also seeks to redact descriptions of the Applicant's monetization and enforcement strategy, including views and predictions by Crystallex about positions taken

by Venezuela, competing creditors and the U.S. government (the "**Strategic Information**") contained in the Applicant's materials filed in connection with this motion and the stay extension motion heard on November 3, 2020 and the Monitor's Thirty-Fifth, Thirty-Sixth and Thirty-Seventh Reports and any related motion materials and documents.

11. The Monitor understands that the Noteholders do not oppose the redactions of the Strategic Information, but do not support or consent to its sealing and reserve the right to challenge the sealing of similar information in the future. As described in greater detail below, the Noteholders oppose the sealing of the Financial Information.

INFORMATION SOUGHT TO BE UNSEALED BY THE NOTEHOLDERS

12. The Noteholders have requested an Order that the following information be unsealed in the Court record and/or publicly disclosed by Crystallex:

a) the amount of contingent value rights ("**CVRs**") held by the DIP Lender;
b) the amount of CVRs transferred by Tenor to Robert Fung and Marc Oppenheimer, each of whom is a director and officer of Crystallex, and the terms of such transfer;
c) the current outstanding balance of the Tenor DIP facility;
d) the balance of the Tenor DIP facility as of the date of each future stay extension sought by Crystallex in these proceedings;
e) the issuer(s), type(s) (i.e., debt or equity) and market value at time of receipt of the securities received by Crystallex in 2018 pursuant to its amended settlement with Venezuela;
f) the identity of any advisors engaged by Crystallex in connection with the Citgo Sale Process (as defined below) and the terms of their respective engagements; and
g) the engagement terms of Crystallex's independent director, Sergio Marchi, and his financial advisor.

13. The Monitor understands that following delivery of the Noteholders' cross-motion Crystallex has now publicly disclosed the following information:

a) the total CVRs earned by the DIP Lender;
b) the outstanding DIP balance as at July 31, 2021, and going forward, Crystallex has agreed to publicly disclose the DIP balance in its materials to be filed in connection with each of the Applicant's stay extension motions;
c) the Net Arbitration Proceeds Transfer Agreement that was approved by the Court and attached to the confidential affidavit of Harry Near sworn December 15, 2014, but not the CVR amounts transferred under the agreement to Robert Fung and Marc Oppenheimer. The amounts of the CVR transferred under the Net Arbitration Proceeds Transfer Agreement and the agreement itself were sealed by a prior order of this Court;
d) the identity and a summary of the terms of engagement of each advisor that Crystallex has engaged in connection with the sale process for the PDVH Shares that is currently pending before the United States District Court for the District of Delaware (the "**Citgo Sales Process**") excluding the monthly fee information for the Applicant's financial advisor, Moelis & Company. The Company has advised the Monitor that it will provide an unredacted copy of their agreement with Moelis & Company in response to a request made during cross-examinations; and
e) the annual compensation paid to Sergio Marchi and a summary of the terms of engagement of his financial advisor, Pirinate Consulting Group, LLC excluding the monthly fee information for Mr. Marchi's financial advisor. The Company has advised the Monitor that it will provide a copy of their agreements with Pirinate Consulting Group, LLC in response to a request made during cross-examinations with the fee information redacted.

14. The Applicant is not prepared to publicly disclose the details of the Initial Payment Securities (defined below) received from Venezuela (or its detailed views on the risks and harms that public disclosure of this information would present) other than to confirm that the Initial Payment Securities are comprised of debt. The details of the Initial Payment Securities were sealed by a prior order of this Court, without prejudice to an interested party bringing a motion to assert such details were not confidential.

15. Crystallex is prepared to provide the remaining undisclosed information, the Financial Information and the Strategic Information to any party, including the Noteholders, that executes a confidentiality agreement acceptable to Crystallex.

16. The parties attempted to resolve the outstanding disclosure issues in a mediation before The Honourable Robert Blair but were unable to find a mutually agreeable solution.

HISTORY OF DISCLOSURE OF FINANCIAL INFORMATION AND SEALING ORDERS

17. Prior to April 2014, the Applicant was making disclosure of its cash position and financial forecasts. By 2014, the Applicant had exhausted the $36 million initially advanced by the DIP Lender and had to enter an amending agreement with Tenor for additional DIP funding.

18. Given the unresolved status of its Arbitration claim at that time, limited cash on hand and a tight budget, the Applicant requested to seal its financial information, including the cash balance as at March 31, 2014, the variances of the actual and forecast receipts and disbursements for the period ended March 31, 2014, and the budget for the period ended on December 31, 2015 as attached as appendices to the eleventh report of the Monitor dated April 12, 2014.

19. The Noteholders opposed the sealing and requested, among other things, disclosure of the information regarding the Applicant's past expenditures and future anticipated expenditures on the grounds that a CCAA proceeding should be conducted with fairness, transparency and openness to all stakeholders. [

20. The Court declined the Noteholders' request on December 18, 2014 for the following reasons:

a) the Monitor had already disclosed the Applicant's past expenditures in its previous reports and had made these reports available on the Monitor's website established for these proceedings.
b) the Ad Hoc Committee already knew the purpose, quantum and the projected runway of the additional DIP and therefore the Court found that "it is questionable whether any

of the information is of great utility to the Ad Hoc Committee".

c) "[the Ad Hoc Committee] will continue to get historical financial information as in the past".
d) the Ad Hoc Committee should have obtained information following a procedure available under paragraph 29 of the Initial Order.
e) the Applicant's sealing request attempts to protect, not only its own narrow commercial interest, but also the interests of all stakeholders, including the Noteholders.
f) "It is also necessary to protect the integrity of the CCAA process. It would do little good to that integrity, if information harmful to all stakeholders was permitted to be used to their detriment".

A copy of the confidential Endorsement of The Honourable Justice Newbould dated December 18, 2014 is attached as confidential **Appendix "A"**.

21. Since that time, the Applicant has sought to seal its actual cash balance, the variances of actual and forecast receipts and disbursements, and the cash flow forecasts on every stay extension motion, including following receipt of additional DIP funding, receipt of the Award in 2016 and the negotiation of the Amended Settlement Agreement with Venezuela in 2017.

22. On January 21, 2016, further to the order of Justice Newbould dated December 23, 2015, counsel to the Noteholders executed a confidentiality agreement with Crystallex (the "**Confidentiality Agreement**").

23. After the execution of the Confidentiality Agreement, counsel to the Noteholders prepared a detailed listing of information requested from the Applicant. The Applicant, with the assistance of its counsel, created a confidential online data site and posted on it the documents that Crystallex believes to be appropriate for sharing with counsel to the Ad Hoc Committee pursuant to the Confidentiality Agreement. Each party who signed the Confidentiality Agreement is granted access to the data site. Upon reviewing the online data site, Counsel to the Noteholders advised the Applicant and the Monitor that the Applicant had largely failed to respond to the information request delivered by counsel to the Noteholders.

24. As described in the twenty-seventh report of the Monitor dated September 15, 2018 (the "**Twenty-Seventh Report**"), in early 2018, the Applicant was intensively negotiating an amendment of the Settlement Agreement with Venezuela and brought a motion for its approval in September 2018.

25. Also in the Fall of 2018, the Applicant held in-person meetings with counsel to the Noteholders, certain members of the Ad Hoc Committee and the Ad Hoc Equity Committee to address their various information requests. The Applicant shared certain confidential information with those parties that had signed the Confidentiality Agreement.

26. After attending these meetings, the Noteholders and their counsel continued to believe that sealing of information, including the existence and terms of the Amended Settlement Agreement, was not appropriate. As a result, counsel to the Noteholders requested an adjournment of the motion for approval of the Amended Settlement Agreement and an order for disclosure of the unredacted Twenty-Seventh Report on the ground that the Applicant's request for sealing did not meet the *Sierra Club* test. Counsel to the Noteholders further requested that the matter be heard in open court.

27. The Court declined the relief requested by the Noteholders in light of the terms of the Amended Settlement Agreement and the urgency of the motion. In addition, the Court found that the Applicant had satisfied the *Sierra Club* test for sealing its motion materials and certain portions of the Twenty-Seventh Report. Further, the Court stated that it was of the view that it is reasonable to expect stakeholders to execute a Confidentiality Agreement if they would like to receive confidential information, including the Amended Settlement Agreement. A copy of the Endorsement of the Honourable Justice Hainey dated **J**anuary 15, 2019 is attached as **Appendix "B"**.

28. On January 30, 2019, counsel to the Noteholders sent a letter to counsel for the Monitor requesting certain key financial information be provided on a public basis in order to permit the principals of the participants in the Ad Hoc Committee to engage in detailed discussions with the Applicant and the DIP Lender. With the Monitor's assistance, the Applicant provided some, but not all, of the requested information to the Ad Hoc Committee. The Ad Hoc Committee was not satisfied with the level of disclosure.

29. After numerous without prejudice discussions between the Applicant, the DIP Lender, the Ad Hoc Committee and the Monitor, the parties agreed to attend a voluntary mediation before the Honourable Mr. Robert Blair in an attempt to resolve issues between them (the "**2019 Mediation**").

30. On November 18, 2019, the 2019 Mediation was terminated without resolving certain disputes that are described in the Thirty-Third Report.

31. On January 10, 2020, the Noteholders delivered an amended Motion Record (the "**Noteholder Motion Record**") to Crystallex, the DIP Lender and the Monitor seeking, among other things, an amendment to the Initial Order to permit the Monitor, and not Crystallex, to determine what information is shared publicly with stakeholders (the "**Variance Motion**").

32. In response, the Applicant, with the support of the DIP Lender, advised that it intended to bring five preliminary motions, including a motion to dismiss, without any further evidence, the Variance Motion.

33. At a case conference on January 27, 2020 to discuss the proposed filing and scheduling of the various motions, Justice Hainey directed that all the "parties should attempt to mediate their disputes with Mr. Blair or if he is not available another mutually agreeable mediator. If the disputes cannot be resolved counsel will schedule the Motions with me and they will be heard expeditiously". A copy of the Endorsement dated January 27, 2020 is attached as **Appendix "C"**.

34. The mediation was conducted throughout 2020 and 2021 and has not resulted in a resolution of certain of the issues in dispute (see Thirty-Third Report of the Monitor dated April 30, 2020 which outlines the issues in dispute between Crystallex and the Noteholders).

35. In connection with its stay extension hearing on May 4, 2020, Crystallex sought an order of this Court sealing (among other things) the following information in the Monitor's Thirty-Third Report: (i) the Applicant's cash balance as at March 31, 2020, (ii) a summary of the Applicant's actual receipts and disbursements for the period of October 1, 2019 to

March 31, 2020, and (iii) Cash Flow Forecasts for the period of April 1, 2020 through November 30, 2020 (collectively, the "**Historical Financial Information**").

36. By endorsements dated June 8, 2020 and August 31, 2020, Justice Hainey denied the Applicant's sealing request in part, refusing to seal the Historical Financial Information (collectively, the "**2020 Sealing Decisions**"). Copies of these endorsements dated June 8, 2020 and August 30, 2020 are attached as **Appendices "D"** and **"E"**.

37. On August 14, 2020, the Applicant and the DIP Lender sought leave to appeal the 2020 Sealing Decisions to the Ontario Court of Appeal.

38. In November 2020 and prior to the Ontario Court of Appeal releasing its decision on the leave to appeal, Crystallex brought a motion to extend the stay of proceedings and to seal, among other things, the Applicant's cash balance as at September 30, 2020 and its actual receipts and disbursements for: (a) the period from April 1, 2020 to September 30, 2020 compared to the cash flow forecast included in the Thirty-Third Report, and (b) cash flow projections for the period from October 1, 2020 to May 31, 2021. The parties agreed to adjourn the argument and hearing of the sealing portion of that motion until after the Ontario Court of Appeal's release of its decision.

39. On February 9, 2021, the Ontario Court of Appeal released its Endorsement refusing leave to appeal sought by the Applicant and the DIP Lender. A copy of the Endorsement dated February 9, 2021 is attached as **Appendix "F"**.

40. [redacted]

41. As described in greater detail in paragraph 9 above, the Applicant is seeking to seal the financial information filed in connection with its motions to extend the stay returnable in November 2020 and May 2021.

42. In addition to the Noteholders, a shareholder, Adelso Adrianza, has written numerous letters to the participants, the Court, and the Chapter 15 Court raising numerous concerns, including with respect to the redacted materials in this case. In July 2021, Mr. Adrianza

filed a motion with the Chapter 15 court seeking appointment of an examiner and independent counsel to represent shareholders, which motion was supported by other shareholders and opposed by the Applicant. The motion was adjourned by Judge Silverstein pending the Applicant responding to certain questions she posed.

THE APPLICANT'S POSITION

43. The Applicant's position is set out in Mr. Fung's affidavits filed in connection with Crystallex's motion and the Noteholders' cross-motion (the "**Fung Affidavits**").

44. Crystallex is of the view that its litigation and legal enforcement strategy to date has proved successful. According to Crystallex, its decision to maintain the confidentiality of its financial and strategic information has been and remains a critical component of its enforcement strategy and a significant element in its success.

45. Crystallex's only assets now are the Award and the related proceeds of recovery on the Award received to date. At this time, Crystallex has three possible avenues of recovery on the Award: (i) settlement with Venezuela, (ii) monetization of the Initial Payment Securities[1], and (iii) enforcement of the Writ[2]. According to Crystallex, for reasons that are explained more fully in the Fung Affidavits, the Writ currently represents the best (and possibly the only realistic) prospect for recovery to stakeholders.

46. In order for Crystallex to realize on the PDVH Shares through the Writ, there are two prerequisites: [redacted] Crystallex is of the view that if the Financial Information is made public, Venezuela will use it in a number of ways harmful to

[1] Pursuant to the Amended Settlement Agreement, Venezuela (under the Maduro Government) made a USD$425 million Initial Payment to Crystallex that was comprised of cash and securities (the "**Initial Payment Securities**").
[2] As part of its enforcement efforts, Crystallex registered the Judgment in the United States District Court for the District of Delaware and thereafter obtained orders (collectively, the "**Writ Order**") declaring that Petroleos de Venezuela, S.A. ("**PDVSA**"), Venezuela's national oil company, was the alter ego of Venezuela. The Writ Order authorized the attachment (the "**Writ**") of PDVSA's shares in its U.S. subsidiary PDV Holding, Inc. ("**PDVH**" and the "**PDVH Shares**") which controls CITGO Petroleum Corp. ("**CITGO**"). CITGO is an American oil company and Venezuela's largest overseas asset, valued at billions of dollars.
[3] The United States Department of Treasury and Office of Foreign Assets Control ("**OFAC**") have imposed sanctions against Venezuela (the "**Sanctions**"), which have made it impossible at this time for Crystallex either to providently monetize the Initial Payment Securities or to execute on the PDVH Shares subject to the Writ, without first obtaining a license from OFAC.

Crystallex as described below and in the Fung Affidavit.

47. As described in greater detail in the Fung Affidavits, Crystallex points out that Venezuela as led by the Guaido government (one of the two competing government regimes in Venezuela at this time) has repeatedly requested details about what was paid under the Settlements and the details of the calculation of the balance remaining on the Judgment . The Monitor understands that the Guaido government does not have access to the information regarding the payments made by the Maduro regime. Crystallex is of the view that public disclosure of the details of the [redacted] would:

[redacted]

48. Crystallex is of the view that disclosure of the Financial Information would allow [redacted]

49. Crystallex is of the view that if the Financial Information or details about the Initial Payment Securities are made public, Venezuela will use it in the CITGO Litigation against Crystallex as follows:

[redacted]

[redacted]

50. [redacted]

51. Based on the recent information requests that Crystallex has been receiving from Venezuela, it appears to Crystallex that the Guaido government of Venezuela [redacted]

52. In addition, Crystallex is of the view that disclosure of the Financial Information following [redacted]

[redacted]

53. The Applicant also submits that its strategy of maintaining confidentiality of its financial and other sensitive information has never been directed at Crystallex's stakeholders and the Applicant has been and remains prepared to provide all of its information to any of its stakeholders and their advisors, on a confidential basis.

54. The Applicant also submits that the Noteholders will not suffer any prejudice if the Financial Information is sealed, particularly in light of [redacted]

55. With respect to the amount of the CVRs transferred to Mr. Fung and Mr. Oppenheimer, the Applicant asserts that maintaining confidentiality of that information is necessary at this time to protect Mr. Fung and Mr. Oppenheimer from physical harm in Venezuela where they may need to attend in the future for in-person negotiations with Venezuela.

56. The Monitor understands that the DIP Lender, based on the recommendations of the Applicant's US advisors, supports the Applicant's request to seal the Financial Information and refusal to unseal some of the information requested to be publicly disclosed by the Noteholders in order to maintain the Applicant's litigation advantage over Venezuela and prevent risk to enforcement and recovery.

THE NOTEHOLDERS' POSITION

57. The Noteholders oppose the sealing of the Financial Information and request that certain previously sealed information be unsealed and certain additional information be publicly disclosed. All information which the Noteholders seek to have unsealed was previously sealed without prejudice to an interested party bringing a motion seeking to modify the sealing order.

58. With respect to Crystallex's request to seal the Financial Information, the Noteholders assert that the Historical Financial Information is already more than a year stale and although stakeholders can estimate Crystallex's current cash balance by assuming the same burn rate disclosed in the April 2020 cash flow forecast, they have no way of knowing if this estimate is at all accurate. According to them, this uncertainty increases with each passing day to the extent Crystallex is permitted to once again seal its cash flow information on a go-forward basis, including because the data points available to the public are becoming increasingly stale.

59. In addition, the Noteholders state that they have no visibility into the details of Crystallex's spending and assert that more information is being made available publicly in the US Citgo proceedings than in the Canadian CCAA proceedings.

60. The Noteholders are also seeking to unseal the amounts of the CVRs transferred to Mr. Fung and Mr. Oppenheimer, two of the Applicant's directors, by Tenor. Their position is that the CVRs are subordinate to the Notes and that persons holding CVRs have a pecuniary incentive to attempt to minimize the amount ultimately paid to the Noteholders (and to other creditors) in order to increase the potential value, if any, of the CVRs. Therefore, they argue, disclosure of the amount of CVRs provided by Crystallex to Mr. Fung and Mr. Oppenheimer, is necessary in order to understand the economic entitlements of Crystallex's insiders, fully understand and assess the potential impact of any conflict of interest among Crystallex's directors and officers, as well as to fully understand Crystallex's capital structure and resulting optionality for Crystallex.

61. With respect to unsealing the disclosure of the details of the Initial Payment Securities, the Noteholders assert that these securities represent a material asset of Crystallex that will be a part of any resolution or material transaction in this case and also represent a potential source of liquidity for Crystallex. The Noteholders believe that they and other creditors are entitled to some portion of the value of these securities and, therefore, ought to know their particulars.

62. In the absence of disclosure of the details of the Initial Payment Securities, the Noteholders state they are unable to undertake an assessment of the value of these securities and how they impact the case, including with respect to stakeholder recoveries and how the securities are ultimately dealt with.

63. Overall, the Noteholders disagree with what they believe is unnecessary secrecy surrounding many of Crystallex's actions and information. The Noteholders assert that Crystallex's failure to make fair and reasonable public disclosure negatively impacts the Noteholders' full and effective participation in the case to protect and advance their rights and interests, including in that it impairs their ability to respond to Crystallex's actions, consult with and instruct counsel, formulate options and alternatives that may assist in

advancing the case for the benefit of stakeholders and creates an unproductive (and unfair) negotiating dynamic given the significant information asymmetry between the parties.

64. The Noteholders' position is that the relief they seek is modest, but important to the Noteholders, other non-insider stakeholders and to the open courts principle. According to the Noteholders, informational transparency which they say is lacking in this proceeding is a core matter for the supervising CCAA court and a subject that has proven to involve irreconcilable positions between the parties to date, previously requiring adjudication by this Court and the Court of Appeal. They also assert that disclosure of financial information is a basic requirement of any CCAA applicant and is customary in CCAA proceedings.

65. The Noteholders are not prepared to sign a confidentiality agreement without both sides agreeing a near-term blow out date (which they say is market in a restructuring) in order to receive the information they are seeking. The Noteholders state that receiving material non public information on a confidential basis for an indeterminate period would restrict their ability to trade in the Notes indefinitely which would cause prejudice to the Noteholders and their investors as they would be unable to sell the Notes to fund investor redemptions and comply with their regulatory obligations (for instance). They also state that based on Crystallex's past conduct, they are concerned that they will not receive fulsome disclosure from Crystallex even if they did sign a confidentiality agreement.

66. Finally, the Noteholders point out that several of Crystallex's competitors that are similarly pursuing enforcement against Venezuela are making regular public disclosure of their financial information, and that Crystallex is a reporting issuer under securities law.

MONITOR'S ANALYSIS

A. The Monitor's Understanding of the Applicable Legal Framework

67. In the Monitor's view, each sealing request must be examined and determined on its merits in the context of the particular circumstances in place and the evidence before the Court at the time of the request. The evidence put forward by the Applicant at the most recent motion regarding sealing the Historical Financial Information heard by Justice Hainey in May 2020, was much less extensive than the evidence the Applicant put forward on this

motion. Similarly, as described in greater detail below, some of the circumstances considered by the Monitor in its analysis of Crystallex's sealing request with respect to the Financial Information have changed as well, in particular as a result of the Noteholders receiving the Historical Financial Information.

68. The Monitor understands that the *Sierra Club* test and s. 10(3) of the CCAA govern the issue of whether there should be a sealing order. Under the *Sierra Club* test, the Court must be satisfied of the following in order to grant a sealing order:

a) That the sealing order is necessary to prevent a real and substantial serious risk to an important commercial interest. The risk must be well-grounded in the evidence and pose a serious threat to the commercial interest in question;

b) There must be no other reasonable alternative to the sealing order and the order, if granted, must be restricted as much as reasonably possible; and

c) The salutary effects of the sealing order must outweigh its deleterious effects including its effect on the open-court principle.

69. Recently, the Supreme Court of Canada restated the common law test for the granting of sealing orders in civil matters in *Sherman Estate v. Donovan* ("**Sherman Estate**"). In its analysis in *Sherman Estate*, the Supreme Court found that the Sierra Club test rests upon three core prerequisites, which must be established in order to obtain a sealing order:

a) court openness poses a serious risk to an important public interest;

b) the sealing order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c) as a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

70. In addition, with respect to the Financial Information, the Court has the power under s. 10(3) of the CCAA to order that cash flow information not be made available to the public, based on a showing of undue prejudice to the debtor company and a balancing of that prejudice to the debtor company if the order is not made against the prejudice to its creditors if the order is made. Section 10(3) provides:

> *10(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.*

71. The Monitor expects the parties will make extensive submissions on how these provisions and jurisprudence ought to be interpreted and applied to the present case and does not propose to comment further on the test to be applied. However, the Monitor considered the above legal framework in assessing (a) the request for sealing each of the Applicant's cash balance, actual receipts and disbursements and cash flow forecast, and (b) the request by the Noteholders to publicly disclose certain sealed information.

B. Investigative Steps Taken by the Monitor

72. In considering the Applicant's request to seal the Financial Information and the Noteholders' request to unseal certain information, the Monitor reviewed the materials filed by all the parties in connection with these motions and attended the cross-examinations of Mr. Fung and Mr. Scott Reid. The Monitor also had numerous in-depth discussions with:

a) the Applicant's management and its Canadian counsel;
b) the Applicant's U.S. enforcement counsel Gibson, Dunn & Crutcher ("**Gibson**");
c) the DIP Lender and its counsel;
d) the Noteholders and their counsel; and

e) the Monitor's US counsel specializing in OFAC and sanctions issues, as well as general US litigation and enforcement issues.

C. Analysis

i. Evidence of Risk

73. Crystallex operates in a very complicated environment. It is litigating to recover on its only asset in the face of opposition from large, well-funded adversaries (competing creditors of Venezuela) and two competing government regimes in Venezuela all while navigating a complex politically driven U.S. regulatory environment.

74. The Monitor agrees that Crystallex's litigation and legal enforcement strategy to date has proved highly successful and that the Applicant has made progress and is continuing to pursue collection of the Award in good faith and with due diligence.

75. The Applicant is advised by its US enforcement counsel that maintaining confidentiality of its financial and strategic information is a significant element in the Applicant's success so far and continues to be critical to its continued success.

76. Based on its review of the Applicant's serious concerns with disclosure of the Financial Information and the details of the Initial Payment Securities detailed in the Fung Affidavits and discussions with the Applicant's US counsel and its own US counsel, the Monitor is of the view that disclosure of the Financial Information and Initial Payment Securities, when coupled with [redacted]

77. At the very least, it appears very possible that disclosure of the Financial Information, particularly [redacted]

[redacted] to Venezuela and Crystallex's competing creditors in their fight against Crystallex's enforcement efforts.

78. These risks are difficult (if not impossible) to prove, disprove or quantify. However, the Monitor is of the view that the evidence presented by the Applicant demonstrates and is compelling that the release of the Financial Information and details about the Initial Payment Securities could cause prejudice to the Applicant and that there is serious threat to an important commercial interest.

79. With respect to the Noteholders' request to unseal the amount of the CVRs transferred to Mr. Fung and Mr. Oppenheimer, the Monitor notes the Applicant's evidence that such disclosure may increase the risk of physical harm to Mr. Fung and Mr. Oppenheimer if they travel to Venezuela. The Monitor also notes and agrees that it may be beneficial to Crystallex's collection strategy for Mr. Fung and Mr. Oppenheimer to be able to travel to Venezuela at some point in the future to negotiate a settlement or continued payment under existing settlements in person. The Monitor is not well placed to assess whether disclosure of the amount of a prospective payment (since the CVR will only be payable upon successful enforcement against or voluntary payment by Venezuela) increases the risk of physical harm to Mr. Fung and Mr. Oppenheimer.

ii. Deleterious Effects of Requested Sealing

80. The Monitor also considered the effects of sealing of the Financial Information and not disclosing the already sealed information on the Applicant's stakeholders, in particular the Noteholders, and has had numerous discussions with counsel for the Noteholders on this issue.

81. [redacted]

[redacted]

82. The Monitor notes that the Applicant's request to seal the Financial Information is only until further Order of this Court and that the Applicant's stay under the CCAA is currently set to expire in November 2021 at which time it will have to file updated cash balance and forecast. Any request for sealing of that financial information will again be subject to review and scrutiny in the circumstances that will be in existence at that time.

83. The Monitor does not anticipate the Applicant taking any major steps in the CCAA proceeding in the next 6 months as there are insufficient funds to make any distributions or payments other than in respect of professional fees.

84. Given the status of the CCAA proceeding and the lack of any significant potential steps that will have to be taken in the next 6 months, the Monitor is of the view that there is no material prejudice to the Noteholders' ability to effectively participate in the CCAA proceedings if the Financial Information is sealed.

85. With respect to the requested public disclosure of the details of the Initial Payment Securities, it is unclear to the Monitor how its continued sealing affects the Noteholders' ability to participate in the Crystallex CCAA Proceedings at this time. As at today's date, Crystallex cannot trade in the Initial Payment Securities as a result of the OFAC sanctions and it is unclear when it may be able to do so.

86. With respect to the Noteholders' request for public disclosure of the amount of the CVRs transferred to Mr. Fung and Mr. Oppenheimer, the Monitor understands the Noteholders' rationale for seeking to receive that information in order to better assess the potential conflict of interest that such CVR holdings might create.

87. The Monitor is also mindful of the fact that the Applicant has been and remains prepared to provide the Financial Information and the previously sealed information Noteholders are seeking to unseal to the Noteholders under a non-disclosure agreement acceptable to Crystallex. The Monitor notes that the reasons the Noteholders do not wish to enter into a

confidentiality agreement are personal to the Noteholders and involve their commercial interests.

All of which is respectfully submitted this 3rd day of September 2021.

ERNST & YOUNG INC.
In its capacity as Court-appointed Monitor of
Crystallex International Corporation

Per:

Brian M. Denega
Senior Vice President

APPENDIX B

CITATION: Crystallex International Corporation (Re) 2019 ONSC 408
COURT FILE NO.: CV-11-9532-00CL
DATE: 2019/01/15

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR. JUSTICE	)	TUESDAY, THE 15TH DAY OF
	)	
GLENN A. HAINEY	)	JANUARY, 2019

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

ENDORSEMENT

[1] This is a motion for an order approving an Amended and Restated Settlement Agreement dated September 10, 2018 between the Applicant and the Republic of Venezuela (the "Amended Settlement Agreement") and sealing the motion materials marked "Confidential" as well as those redacted portions of the Monitor's Twenty-Seventh Report.

[2] The evidence filed by the Applicant in support of this motion sets out facts which justify why the Amended Settlement Agreement and the subject matter and substance of the motion should remain confidential at this time. I note that the Monitor supports the Applicant's request for an order approving the Amended Settlement Agreement and sealing the relevant material.

[3] I hereby approve the Applicant's request for sealing, having found that the Applicant has satisfied the burden for sealing the materials under the test set forth in Sierra Club, including the subject matter of the motion, the Approval Order dated September 17, 2018, this endorsement and the redacted portions of the Monitor's Twenty-Seventh Report.

[4] I also hereby approve the Amended Settlement Agreement on the basis that the provisions and terms of the Amended Settlement Agreement are proper, fair and reasonable and are in the best interests of the Applicant and its stakeholders based on the material before me.

[5] Counsel for Computershare Trust Company of Canada in its capacity as Trustee for the holders of Senior Notes and an ad hoc committee of holders of the Senior Notes (the "Noteholder Committee and Trustee") as well as an ad hoc committee of shareholders (the "Shareholder Committee") requested an adjournment of this motion to permit it to obtain and consider further information concerning the Amended Settlement Agreement. In particular, Counsel for the Noteholder Committee and Trustee requested an order for disclosure of the unredacted Monitor's

Report to stakeholders (most notably paragraphs 5, 10, 11 and 26) arguing that the confidentiality provision in the Amended Settlement Agreement permits disclosure as ordered by the Court, that CCAA proceedings are to be fair transparent and open to all stakeholders, that similar settlements involving Venezuela had been publically disclosed, and that the Applicant's request for sealing did not meet the test set forth in Sierra Club.

[6] I declined to grant the relief requested by the Noteholder Committee and the Trustee and the Shareholder Committee in view of the terms of the Amended Settlement Agreement, the urgency of this motion and the approval required. I also found that the Applicant had satisfied the Sierra Club test for sealing of the materials. Counsel to the Noteholder Committee and the Trustee as well as counsel to the Shareholder Committee have each signed a confidentiality agreement and have reviewed all of the unredacted materials pertaining to this motion. In the circumstances before me, it is reasonable that if stakeholders are not prepared to sign a confidentiality agreement (unless it is subject to a condition that all confidential information received will be made public by a date certain or the happening of specified events), they cannot receive confidential information about the Amended Settlement Agreement.

[7] Counsel for the Noteholder Committee and Trustee further requested that the matter be heard in open court. For the same reasons I declined to grant this request and ordered that the hearing be held in chambers.

[8] At the request of counsel for the Shareholder Committee, the Monitor will provide the Court and the parties to this proceeding with its views concerning the acceptability of the Acceptable Collateral (as defined in the Amended Settlement Agreement) from time to time.

[9] Without suggesting any existing non-compliance, all parties who have signed or will sign confidentiality agreements are reminded that the Court expects strict observance of the requirements of those agreements.

Hainey, J.

Date: January 15, 2019

APPENDIX C

January 27, 2020

The parties shall attempt to mediate their disputes with the Clerk of the Court or another mutually agreeable mediator.

If the disputes cannot be resolved a second will schedule the Motions with the and they will be heard expeditiously.

Harley J

APPENDIX D

CITATION: Crystallex International Corporation (Re), 2020 ONSC 3434
COURT FILE NO.: CV-11-9532-00CL
DATE: 20200608

SUPERIOR COURT OF JUSTICE – ONTARIO
– COMMERCIAL LIST

RE: **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

BEFORE: Hainey J.

COUNSEL: *Robin B. Schwill* and *Natalie Renner*, for the Applicant, Crystallex International Corporation

David Byers and Maria Konyukhova for the Monitor

Alan Mark, Peter Ruby and Chris Armstrong for Computershare Trust Company of Canada

Shayne Kukulowicz, Ryan C. Jacobs and Timothy Pinos for Tenor Special Situation I

Rahim Moloo and Jason Myatt US Lawyers for Crystallex International Corporation

HEARD: May 7, 2020

ENDORSEMENT

[1] This motion was heard by videoconference (ZOOM) in accordance with the changes to the operation of the Commercial List in light of the COVID-19 crisis and the Chief Justice's Notices to the Profession.

[2] On May 4, 2020, I granted Crystallex International Corporation's ("Crystallex") motion for an order, *inter alia*, extending the stay of proceedings in these *CCAA* proceedings to November

6, 2020 and sealing certain material in the Monitor's 33rd Report which Crystallex relied upon in support of its motion.

[3] At para. 13 of my order I indicated that a further hearing would be held on May 7, 2020 to determine whether the material in the Monitor's report should remain subject to a sealing order.

[4] At the hearing on May 7, 2020 I reserved my decision with respect to the request for a sealing order. I indicated that I would provide my decision in due course. This is my decision.

[5] Crystallex requests a sealing order with respect to the following three areas of the Monitor's 33rd Report filed in support of the motion:

a) Crystallex's current cash balance and projected litigation and enforcement expenses;

b) Information pertaining to the impact of sanctions on Crystallex's asset recovery initiatives and related sanctions and strategic litigation initiatives; and

c) Detailed descriptions of disputes and arguments between Crystallex and the Ad Hoc Committee of holders of senior notes of Crystallex ("Ad Hoc Committee") which are the subject of an ongoing confidential mediation.

[6] The Ad Hoc Committee and the Trustee for the holders of the senior notes ("Trustee") oppose the sealing order sought by Crystallex as it relates to the sealing of Crystallex's (i) cash balance; (ii) cash-flow statement; and (iii) cash-flow forecast.

[7] According to the Ad Hoc Committee and the Trustee, their opposition to the sealing of this information is based upon the importance of the disclosure of this type of information in *CCAA* proceedings to allow creditors and other stakeholders to assess decisions being made by the debtor during the stay extension period in order to protect those stakeholders' own rights and interests.

[8] The Ad Hoc Committee and the Trustee make the following submissions at para. 3 of their factum:

> 3. Crystallex's request to redact and seal the portions of the Monitor's Thirty-Third Report dealing with Crystallex's financial position is unfounded for three reasons:
>
> a) One of the burdens of a company being granted the benefit of a stay of creditor claims under the *CCAA* is the sharing of information with stakeholders. At the very least, creditors must be kept informed of the *CCAA* debtor's financial circumstances.
>
> b) Precluding creditors and the public from having access to information based on which Crystallex, the Monitor and the Court make decisions is a serious matter. Crystallex must meet the sealing order test established by the courts, and this *CCAA* Court should strictly apply that test – not treat sealing as a routine matter.

c) The evidence in support of sealing must be compelling. The evidence adduced by Crystallex on this motion is not. It consists of bald statements, which do not come even close to meeting the applicable test for a sealing order.

[9] Crystallex's *CCAA* proceedings have been ongoing for more than eight and a half years. Throughout this entire period, Crystallex's sole business activity has been pursuing, and now enforcing, its claim against Venezuela for having unilaterally rescinded its gold mining operation contract. Crystallex's arbitration award and related judgement enforcing the arbitration award are now final.

[10] It is significant to me that the Monitor does not fully support Crystallex's request for a sealing order.

[11] The Monitor submits that the *Sierra Club* test and s. 10(3) of the *CCAA* governs the issue of whether there should be a sealing order. Under the *Sierra Club* test I must be satisfied of the following in order to grant a sealing order:

a) That the sealing order is necessary to prevent a real and substantial serious risk to an important commercial interest. The risk must be well-grounded in the evidence and pose a serous threat to the commercial interest in question;

b) There must be no other reasonable alternative to the sealing order and the order, if granted, must be restricted as much as reasonably possible; and

c) The salutary effects of the sealing order must outweigh its deleterious effects including its effect on the open-court principle.

[12] The onus is on Crystallex to satisfy me that it has met the requirements of the *Sierra Club* test. The only evidence before me with respect to the *Sierra Club* requirements is para. 65 of Robert Fung's affidavit sworn April 26, 2020 which states as follows:

> 65. The Report discloses certain key information regarding the Company's enforcement and monetization strategy and financial position. It is critical that information be kept confidential to retain Crystallex's competitive advantage. Crystallex continues to remain concerned that if Venezuela or such other third parties have access to the confidential information contained in the Report, they might use it for strategic purposes to the detriment of Crystallex and its stakeholders.

[13] I accept Mr. Byers' submission, on behalf of the Monitor, that Mr. Fung's evidence at para. 65 of his affidavit does 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.

[14] I have concluded that under the *Sierra Club* test the level of risk from disclosure must be higher to justify a sealing order than what Mr. Fung has described at para. 65 of his affidavit. Mr. Fung's evidence is highly speculative and does 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.

[15] I am unable to conclude on the strength of Mr. Fung's evidence that the public disclosure of this information would create a real and substantial risk to Crystallex's commercial interests or that there is a serious risk grounded in evidence that would justify the sealing order requested by Crystallex.

[16] Crystallex's Motion for a sealing order is therefore dismissed for these reasons.

[17] Following the hearing, the Monitor identified certain redactions that should be made to its report if I decide not to grant the full sealing order requested by Crystallex. These redactions are set out in the attached email from Maria Konyukhova dated May 12, 2020 attached as Appendix A. As Ms. Konyukhova points out in her email, these redactions "represent only the Monitor's proposal and views", and other parties may wish to make further submissions on the Monitor's proposed redactions.

[18] The Monitor's proposed redactions make sense to me, however, if any party wishes to make further submissions only with respect to the Monitor's proposed redactions, they may file written submissions of no more than three pages within five days of the date of this endorsement. After reviewing any submissions, I will decide if a further hearing by video conference on this issue is necessary.

[19] I thank counsel for their helpful submissions.

Hainey J.

Released: June 8, 2020

Appendix A

From: Maria Konyukhova <MKonyukhova@stikeman.com>
Sent: Tuesday, May 12, 2020 11:33:41 AM
To: Hainey, Mr. Justice Glenn (SCJ) <Glenn.Hainey@scj-csj.ca>
Cc: David Byers <DByers@stikeman.com>; rschwill@dwpv.com <rschwill@dwpv.com>; Renner, Natalie <nrenner@dwpv.com>; Pinos, Timothy (tpinos@cassels.com) <tpinos@cassels.com>; Jacobs, Ryan (rjacobs@cassels.com) <rjacobs@cassels.com>; 'Armstrong, Christopher (carmstrong@goodmans.ca)' <carmstrong@goodmans.ca>; Mark, Alan <amark@goodmans.ca>
Subject: Crystallex - sealing motion

Justice Hainey:

Attached please find the redactions we would propose to the Monitor's report and Appendices if you decide that the sealing requested by the Applicant should not be granted in full. The blue highlighting in the body of the report is what the Monitor proposes to stay redacted and the yellow highlighting is what was asked to be redacted that the Monitor proposes not be redacted. The Applicant consented to not redacting the last sentence of paragraph 17 of the report.

With respect to the cashflows, the Monitor proposes that all the line items in the cash flows except for total receipts and disbursements be redacted so as to not make public the details of the CCAA debtor's spending on any particular issue – e.g. US enforcement vs. CCAA costs. All the notes to the cashflows that provide details on such line items are also redacted.

Lastly, the Monitor is of the view that public disclosure of the existence of the deferred fees to Venezuela counsel may place that counsel in significant risk in Venezuela. Therefore, you will see modified redactions in the body of the report in the paragraphs dealing with that issue. The Monitor is proposing publicly disclosing the potential for such fees that would rank ahead of the claims of the Noteholders under the DIP Waterfall and you will see that in the Notes to the cashflows the following addition: "The total cash disbursements of $10.7 million does not include any estimated potential accounts payable of approximately $11.6 million that is projected to be outstanding as of November 30, 2020."

These redactions represent only the Monitor's proposal and views. The Monitor understands that if your Honour decides not to allow all of the redactions requested by the CCAA debtor, parties will wish to make submissions on the redactions proposed by the Monitor. I have cc'd counsel to the CCAA Applicant, the DIP Lender and the Noteholders on this correspondence.

Thank you and please let us know if the Monitor can be of any further assistance to the Court on this issue.

Maria Konyukhova

APPENDIX E

Court File Number: CV-11-9532-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

IN THE MATTER OF
Plaintiff(s)

AND

CRYSTALLEX INTERNATIONAL CORPORATION
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

(1) On June 8, 2020, I dismissed Crystallex's Motion for a Sealing Order.

(2) In my endorsement I referred to certain

_____ Date

_____ Judge's Signature

☐ Additional Pages_____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

redacting that the Monitor had suggested should be made to its 33rd Report if I did not grant the full sealing order requested by Crystallex.

(3) I invited parties to make further submissions with respect to the Monitor's

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

proposed redactions which I indicated made "sense to me".

(4) I apologize to the parties for taking so long to consider these additional submissions and finalize my endorsement.

(5) Having carefully considered the additional

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

submissions and the supplementary affidavit of Mr Tung, I continue to be of the view that the Monitor's proposed redactions make good sense under the circumstances and constitute a fair and reasonable balance between the protection

Judges Initials _____

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

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

@ The Monitor's 33rd report shall be redacted in accordance with the Monitor's proposed redactions

Hainey J.

Judges Initials _____

August 31, 2020

APPENDIX F

COURT OF APPEAL FOR ONTARIO

CITATION: Crystallex International Corporation (Re), 2021 ONCA 87
DATE: 20210209
DOCKET: M51677

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, Hainey 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.CR. 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.

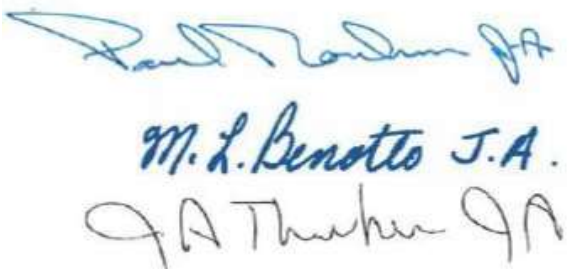
The Test for Leave is Not Met

[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.



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

Court File No: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

THIRTY-SEVENTH REPORT OF ERNST & YOUNG INC. IN ITS CAPACITY AS MONITOR

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Lawyers for Ernst & Young Inc., in its Capacity as Monitor