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

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

FACTUM OF CRYSTALLEX INTERNATIONAL CORPORATION
(Re: Motion for Protective Order)

September 3, 2021

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PART I - OVERVIEW[1]

> "*There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.*"
> – *Re Danier Leather*, 2016 ONSC 1044 at para. 84

1. In this unique liquidating CCAA proceeding, Crystallex has been locked in battle for more than a decade with the government of Venezuela, seeking compensation on behalf of its stakeholders for Venezuela's expropriation of the Company's mining rights to the Las Cristinas gold mine. It is winning. The Company's sole objective for the past five years has been to maximize recovery on its only asset: an approximately US$1.4 billion arbitral award against Venezuela, rendered on April 4, 2016 in respect of the expropriation, and any proceeds therefrom.[2] Crystallex entered into CCAA protection in 2011 and spent five years in arbitration pursuing the Award.[3]

2. A key part of Crystallex's litigation strategy since at least December 2014 has been to prevent Venezuela from learning certain details about the Company's finances, including its cash balance and its historical and future cash flows.[4] Accordingly, the Company has sought Orders of this Court on 14 prior occasions to seal its financial information. On 13 of those occasions, the Orders were granted by the presiding case management judge – first Justice Newbould, then Justice Hainey. On the 14th, Justice Hainey declined to make the requested Order in respect of the Company's cash flows

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1 Capitalized terms used throughout this Factum but not defined herein have the meanings ascribed to them in the Affidavit of Robert Fung sworn May 21, 2021.

2 Affidavit of Robert Fung sworn October 28, 2020 ("**October Fung Affidavit**"), para. 4, Motion Record of Crystallex International Corporation dated October 28, 2020 ("**Oct. CMR**"), Tab 2, p.15.

3 *Ibid.*

4 Notably, notwithstanding the Ad Hoc Committee's opposition to this motion, they concede that Crystallex has been highly successful and has "done a tremendous job" in executing that strategy to date (see Cross-Examination of Scott Reid dated August 6, 2021 ("**Reid Cross-Exam**"), pp. 96-97, qq. 347-349, Supplementary Motion Record of Crystallex International Corporation dated September 3, 2021 ("**Supp. CMR**"), Tab 1, pp. 106-107.

and cash balance in the Monitor's 33rd Report (the "**Historical Financial Information**") on the basis that the single paragraph in the Company's evidence in support of sealing "does not provide detailed or compelling reasons about how the 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 "**May 2020 Decision**").

3. As the legal wrangling in the U.S. over Crystallex's enforcement efforts intensifies, the Company remains determined to safeguard its Financial Information (as defined in Schedule 1 hereto) from Venezuela and from competing creditors who would unquestionably use that information to harm Crystallex. In light of the May 2020 Decision, the Company has adduced in respect of this motion more than one hundred pages of evidence mapping out, in detail, the harm that it expects would be visited upon Crystallex and all of its stakeholders if this Court declines to seal the Financial Information.

4. The Ad Hoc Committee of beneficial holders of the $100 million principal amount of senior 9.375% notes due December 2011 (the "**Notes**") (the "**Ad Hoc Committee**") – conspicuously the only stakeholder of Crystallex to resist this motion – has proffered in response a myriad of vague complaints about the Company's lack of disclosure, none of which withstand scrutiny. Although the Ad Hoc Committee lauds the Company's wins to date, they complain that its strategy of not making certain information public is inappropriate. Notably, they do so on the basis of no experience in such enforcement proceedings, no advice from U.S. enforcement or sanctions counsel, and no details regarding the Company's specific concerns (which are themselves confidential).

5. If Crystallex's concerns (as described in detail by its long-time CEO, Mr. Bob Fung) come to pass, the near-certain result is that there will be no further recoveries for any of

its stakeholders.[5] As Mr. Scott Reid, the sole affiant for the Ad Hoc Committee, told the unitholders of the publicly traded Ravensource Fund ("**Ravensource**", of which Mr. Reid's company, Stornoway Portfolio Management, is Investment Manager) only last year:

> "Simply put, **Crystallex is not home free**. Due to U.S. sanctions surrounding Venezuela, Crystallex must obtain a license before completing the CITGO sale, which so far, it has yet to do. **We also know Venezuela will continue to obstruct the sale of CITGO, prolonging the battle over this valuable asset**".[6] [emphasis added]

6. Crystallex respectfully submits that it is incumbent upon this Court to protect, to the greatest extent possible, the Company's efforts to maximize the value of its assets, not only for the benefit of its stakeholders but in the public interest more broadly. In this case, for all of the reasons cited by Mr. Fung in his evidence and all of the reasons set out below, the Financial Information must be kept confidential.

PART II - FACTS

A. The CCAA Proceeding

7. This is a unique liquidating CCAA proceeding, in which the only assets are an arbitral award of approximately USD $1.4 billion against the government of Venezuela (the "**Award**") and the proceeds Crystallex has received in respect of the Award to date.[7]

8. Since the Award was rendered, Crystallex has been engaged in complex legal and geopolitical proceedings aimed at enforcing or otherwise realizing on the value of the Award, in competition with every other creditor of Venezuela, which includes large, well-funded adversaries. These proceedings have involved, among other efforts: (i) seeking

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5 Affidavit of Robert Fung sworn May 21, 2021 ("**May Fung Affidavit**"), para. 9, Motion Record of Crystallex International Corporation dated May 21, 2021 ("**May CMR**"), Tab 2, p. 11.

6 Reid Cross-Exam, pp. 104-105, qq. 382-384, Supp. CMR, Tab 1, pp. 114-115.

7 October Fung Affidavit, para. 4, Oct. CMR, Tab 2, p.15.

recognition of the Award in United States courts, resulting in a judgment issued by the United States Federal Court for the District of Columbia (the "**Judgment**"); (ii) obtaining a writ of attachment for the Judgment against key assets of Venezuela situated in the United States (the "**Writ**"); (iii) negotiations directly with Venezuela (complicated by questions concerning who constitutes the legitimate government of Venezuela); and (iv) addressing the impact of certain sanctions that have been imposed against Venezuela by the United States Department of Treasury's Office of Foreign Assets Control ("**OFAC**") (the "**Sanctions**").[8] Crystallex has been navigating this delicate enforcement situation since obtaining the Award in 2016.[9]

9. The only way for Crystallex to pay its stakeholders is to successfully enforce the Award; if it cannot, the claims of all creditors will be materially compromised. REDACTED

REDACTED

B. Treatment of Financial Information in the CCAA Proceeding

10. Based on more than a decade of experience in proceedings against Venezuela, Crystallex has serious concerns that disclosure of its financial information could

8 October Fung Affidavit, paras. 10-14, 22, 33-34, Oct. CMR, Tab 2, pp. 17-18, 22, 25-26.
9 October Fung Affidavit, para. 5, Oct. CMR, Tab 2, p.15.
10 May Fung Affidavit, paras. 14, 21, May CMR, Tab 2, pp. 12, 15. Venezuela ultimately reneged on this settlement agreement.

irreparably harm its enforcement efforts.[11]

11. Accordingly, since December 2014 Crystallex has sought to redact the details of the Company's financial position, including its cash balance, each time the Monitor has filed a report containing that information.[12] Sealing of the Company's cash flow information was granted on every occasion since it was first sought in December 2014, but was denied for the first time in May 2020.

12. In the May 2020 Decision, Justice Hainey refused to redact the Historical Financial Information from the Monitor's 33rd Report, which contained no declared view on sealing one way or the other, on the basis that:

> "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…
>
> 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**".[13] [emphasis added]

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11 Confidential Appendix I to October Fung Affidavit, para. 24, Oct. CMR, Tab 2, pp. 49-50; Declaration of Stephen Childs in support of Sales Answering Brief dated July 7, 2020, Exhibit "P" to October Fung Affidavit, Oct. CMR, Tab 2, pp. 203-205.

12 Reid Cross-Exam, pp. 91-93, qq. 326-332, Supp. CMR, Tab 1, pp. 101-103. Notably, when the Company first requested that its financial information be redacted, Crystallex and the Ad Hoc Committee were subject to a standstill order, negotiated by counsel and issued on consent, and the Notes were earning entitlements that ultimately amounted to more than $37.6 million within a period of 2.5 years: see Reid Cross-Exam, pp. 85-91, qq. 293-325, Supp. CMR, Tab 1, pp. 95-101; Stay Extension and Standstill Order dated June 5, 2013, Exhibit 8 to Reid Cross-Exam, at para. 7, Supp. CMR, Tab 9, p. 366.

13 Endorsement of the Honourable Justice Hainey dated May 7, 2020: *Re Crystallex International Corporation*, 2020 ONSC 3434, Exhibit "A" to May Fung Affidavit, paras. 12-13, May CMR, Tab 2, p. 60. At the same time, Justice Hainey agreed to redact from the Monitor's 33rd Report certain strategic information concerning the U.S. enforcement proceedings. See also Justice Hainey's supplementary Endorsement dated August 31, 2020, Crystallex Book of Authorities ("**CBOA**"), Tab 4.

RE [redacted]

13. Crystallex sought leave to appeal the May 2020 Decision to the Ontario Court of Appeal, which was denied in February 2021.[14] Following the decision of the Court of Appeal, REDACTED [redacted]

D. Status of the U.S. Enforcement Efforts

14. Meanwhile, Crystallex's battle in the U.S. continues. It remains heavily engaged in the CITGO Litigation to enforce on the Writ through a sale of the assets of Venezuela to which the Writ attaches: shares in PDV Holding, Inc. ("**PDVH**") (the "**PDVH Shares**"), which indirectly controls 100% of CITGO Petroleum Corp. ("**CITGO**"). CITGO is an American oil company and Venezuela's largest overseas asset, valued at billions of dollars.[16] As explained by Mr. Fung, Venezuela "continues to employ a strategy of delay and to bring spurious motions to seek to overturn the Writ".[17]

15. In April 2021, the Court in Delaware appointed a special master (the "**Special Master**") to oversee the process for selling the PDVH Shares.[18] However, due to the Sanctions, the sale process for the PDVH Shares cannot be completed until Crystallex receives a license from OFAC. OFAC's licensing process is political in nature, and many of OFAC's licensing determinations are "guided by U.S. foreign policy and national

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14 May Fung Affidavit, para. 56, May CMR, Tab 2, p. 28.
15 May Fung Affidavit, para. 56, May CMR, Tab 2, p. 28.
16 May Fung Affidavit, para. 24, May CMR, Tab 2, p. 16.
17 May Fung Affidavit, paras. 25-29, May CMR, Tab 2, pp. 17-18.
18 May Fung Affidavit, para. 31, May CMR, Tab 2, p. 19.

security concerns".[19] Crystallex also requires a license from OFAC before it can providently monetize the Initial Payment Securities.[20]

16. Unless and until Crystallex can: REDACTED [21] It has no other assets, aside from the cash on hand necessary to continue the CITGO Litigation. One misstep in the enforcement proceedings could bring its ten-year battle to maximize value for stakeholders to an unceremonious end.

PART III - ISSUES

17. This motion by Crystallex raises two principal issues:

(a) Can the Financial Information be redacted under s. 10(3) of the CCAA?

(b) In the alternative, can the Financial Information be redacted pursuant to the common law test established by *Sierra Club of Canada v. Canada (Minister of Finance)*,[22] as recently reframed by the Supreme Court of Canada in *Sherman Estate v. Donovan*[23]?

18. The Company respectfully submits that under either test, the Financial Information should be redacted in order to preserve the value of Crystallex's assets.

PART IV - LAW AND ARGUMENT

A. The Financial Information Should be Redacted Under Section 10(3) of the CCAA

19. Crystallex's primary submission is that the Financial Information should be

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19 May Fung Affidavit, para. 44, May CMR, Tab 2, p. 24.
20 May Fung Affidavit, paras. 42-43, May CMR, Tab 2, p. 24.
21 May Fung Affidavit, para. 9, May CMR, Tab 2, p. 11.
22 2002 SCC 41 [*Sierra Club*], CBOA, Tab 18.
23 2021 SCC 25 [*Sherman Estate*], CBOA, Tab 19.

redacted pursuant to s. 10(3) of the CCAA, which – as discussed below – establishes a less onerous test than the common law framework. Section 10(3) of the CCAA provides for a court-ordered publication ban *specifically directed at cash flow information* in the context of a CCAA proceeding:

> "**Publication ban**
>
> (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". [emphasis added]

20. As discussed below:

(a) On its face, section 10(3) requires a balancing of private interests, and not the more onerous balancing of public interests mandated by *Sierra Club*;

(b) A robust statutory interpretation of section 10(3) does not permit the imposition of *Sierra Club* principles on the analysis; and

(c) The release of the Financial Information would unduly prejudice Crystallex, and the requested Order would not unduly prejudice the Company's creditors, with the result that an Order under s. 10(3) is appropriate.

(i) The Grammatical and Ordinary Meaning of Section 10(3)

21. Notwithstanding that more than a decade has elapsed since s. 10(3) was proclaimed into force, the provision has received virtually no judicial attention. Of the two cases that cite it (both of which are Québec Superior Court cases), one mentions it only in passing, and the other suggests – without supporting analysis – that the provision is

merely a codification of *Sierra Club*.[24] A textual comparison of s. 10(3) to the *Sierra Club* test, however, highlights their clear differences:[25]

Section 10(3)	*Sierra Club* at para. 53
"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". [emphasis added]	"A confidentiality order […] should only be granted when: (a) **such an order is necessary in order to prevent a serious risk to an important interest**, including a commercial interest, in the context of litigation because **reasonably alternative measures will not prevent the risk**; and (b) **the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression**, which in this context includes **the public interest in open and accessible court proceedings**." [emphasis added]

22. Notably, whereas the test prescribed by *Sierra Club* is focused on the public interests put at risk by sealing the information at issue, and on balancing public interests for and against sealing (such as the right to a fair trial, the right to free expression and the public interest in open and accessible court proceedings), s. 10(3) does not invoke public interest considerations either implicitly or explicitly. Rather, the balancing exercise it requires is between: (i) undue prejudice to the debtor company, on the one hand; and (ii) undue prejudice to the company's creditors, on the other.[26]

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24 See *Groupe Dynamite inc. c. Deloitte Restructuring inc.*, 2020 QCCS 3086 at paras. 23, 33, CBOA, Tab 8; *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764 at paras. 77, 84, CBOA, Tab 22.

25 Although the Supreme Court of Canada has recently re-framed the test in *Sierra Club* in its decision in *Sherman Estate*, the *Sierra Club* comparison is most apposite for the statutory interpretation exercise because: (i) it remains, in substance, the basis for the common law test (see *Sherman Estate, supra* note 22 at para. 38, CBOA, Tab 19: "Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant…" [emphasis added]); and (ii) it reflected the state of the common law when s. 10(3) was enacted.

26 Commentary on the issue, including by leading members of the insolvency bar, has recognized these differences between s. 10(3) and the *Sierra Club* test: See Lloyd W Houlden, Geoffrey B

(ii) A Proper Interpretation of Section 10(3) Does Not Permit the Imposition of Sierra Club Principles

23. That s. 10(3) is separate and distinct from the test in *Sierra Club* is amply supported by a robust statutory interpretation of the provision. The context for the enactment of s. 10(3) plays an important role in the interpretive exercise.[27]

24. Section 10(3) received royal assent in 2005, and was proclaimed into force in September 2009 – more than seven years after the Supreme Court of Canada released its seminal 2002 decision in *Sierra Club*.[28] CCAA judges were well aware of, and had no trouble applying, *Sierra Club* in CCAA proceedings in the wake of its 2002 release.[29] However, Parliament still chose to proceed with the enactment of s. 10(3).[30]

25. Several statutory interpretation principles suggest that s. 10(3) represents a deliberate Parliamentary intention to change the test applicable to the sealing of cash flow information in a CCAA proceeding: (i) Parliament is presumed to know the law, and is thus presumed to have been fully aware of *Sierra Club* and its applicability in a CCAA

Morawetz & Dr Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009, loose-leaf), Companies' Creditors Arrangement Act at N§59 and N§62, CBOA, Tab 24; Denis Ferland, "The Evolving Role of the Monitor, Confidential Information and the Monitor's Cross-examination, a Quebec Perspective" (2011) Annual Rev of Insolvency Law 17 at 2-3, CBOA, Tab 25.

27 Canadian courts have endorsed, on numerous occasions, Professor Driedger's statement that "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see, for example, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, CBOA, Tab 15.

28 Canada, Parliament, *Debates of the Senate*, 38th Parl, 1st Sess, Vol 142, No 100 (25 November 2005) at 2239, CBOA, Tab 28; *Order Fixing September 18, 2009 as the Date of the Coming into Force of Certain Sections of the Acts*, Proclamation, 19 August 2009, SI/2009-68, (2009) C Gaz II, 1711, 1712, CBOA, Tab 29.

29 See, by way of example only, *Re Stelco Inc.*, [2006] O.J. No. 275 (S.C.J.), CBOA, Tab 16.

30 Notably, the 2009 CCAA reforms that first enacted s. 10(3) also expanded and prescribed requirements for cash flow disclosure as part of the materials that must accompany an initial application under the CCAA. In the circumstances, a reasonable inference can be drawn that the intention of Parliament in enacting s. 10(3) was to counter-balance the new cash flow disclosure requirements against a greater ability to prevent such information from becoming public, to the detriment of the debtor company.

context;[31] (ii) Parliament is presumed to legislate for a purpose;[32] and (iii) Legislation is paramount, with the result that, where both the common law and legislation govern a particular subject matter, the legislation will prevail to the extent of any conflict.[33]

26. Although it is generally presumed that Parliament does not, through its legislative actions, intend to change the common law, that presumption may be rebutted through an analysis of the legislative provision itself.[34] Thus, in determining whether Parliament intended the common law to continue to apply in the face of s. 10(1) of the *Income Tax Act*, a majority of the Supreme Court of Canada in *Friesen v. Canada* found that "The appropriate focus in determining whether s. 10(1) is a mere codification of the common law is upon the wording of the section itself".[35] Based on the plain wording of the Act, the majority held that previous common law limits could not be imposed on the provision, and that purporting to do so would be "a usurpation of the legislative function of Parliament".[36]

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31 Parliament is presumed to have "knowledge of whatever information or data is relevant to the law it enacts", including knowledge of the common law: Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Irwin Law, 2016) at p. 42 [Sullivan 2016], CBOA, Tab 26. See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Lexis, 2014) at §8.27 [Sullivan 2014], CBOA, Tab 27; and *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, 1992 CarswellNat 4 at paras. 23, 26 (S.C.C.), CBOA, Tab 3.

32 As explained by Professor Sullivan, "statutes are obviously enacted for a reason, and the language in which they are drafted reflects deliberate and careful choices by the legislature": Sullivan 2016, *supra* note 31 at p. 32, CBOA, Tab 26. A purposive analysis of legislation is based on the proposition that, among other things, "all legislation is presumed to have a purpose": Sullivan 2014, *supra* note 31 at §9.3, CBOA, Tab 27.

33 *Belo-Alves v. Canada (A.G.)*, 2014 FC 1100 at para. 66 [*Belo-Alves*], CBOA, Tab 2, citing Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law Inc., 2007) at 313-14. See also *Jackson v. Canadian National Railway*, 2013 ABCA 440 at para. 38, CBOA, Tab 9, where the Alberta Court of Appeal explains that legislation "is paramount, so that if it clearly expresses an intention to override or displace the common law, this effect must be given to the statute".

34 See *Friesen v. Canada*, 1995 CanLII 62 at para. 53 (S.C.C.) [*Friesen*], CBOA, Tab 7; *Prebushewski v. Dodge City Auto* (1984) Ltd., 2005 SCC 28 at para. 25 [*Prebushewski*], CBOA, Tab 11; and *Belo-Alves*, *supra* note 33 at para. 67, CBOA, Tab 2.

35 *Friesen*, *supra* note 34 at para. 53, CBOA, Tab 7.

36 *Ibid*. See also Sullivan 2014, *supra* note 31 at §17.18, CBOA, Tab 27 and *Prebushewski*, *supra* note 34 at para. 25, CBOA, Tab 11. Citing *Prebushewski* with approval, the Federal Court in *Belo-Alves, supra* note 33 at para. 67, CBOA, Tab 2, put the principle succinctly: "The Supreme Court of Canada has held that there is no basis for imputing common law tests into statutory

27. In this case, there can be no doubt that the narrow, focused test in s. 10(3) of the CCAA was intended to prevail over the broad test in *Sierra Club* when cash flow information is sought to be redacted in a CCAA proceeding.[37] As noted above, s. 10(3) on its face does not invoke any of the public-interest considerations raised by *Sierra Club*, and requires only a balancing of undue prejudices as between the debtor company and its creditors. A plain reading of s. 10(3) leads inexorably to the conclusion that, in circumstances where the information sought to be protected in a CCAA proceeding is cash-flow information, a different test applies.

28. Notably, the Supreme Court of Canada's recent re-framing of the *Sierra Club* test in *Sherman Estate v. Donovan* expressly adverted to the possibility of legislated exceptions to its application, stating: "This test applies to all discretionary limits on court openness, **subject only to valid legislative enactments**".[38] Section 10(3) is, in Crystallex's submission, one such valid legislative enactment.

(iii) A Balancing of Undue Prejudice Between Crystallex and Its Stakeholders Favours the Protection of the Financial Information

29. Section 10(3) permits this Honourable Court to make an order prohibiting the release of the Financial Information to the public "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". In this case, the Company's evidence is clear that

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provisions where the legislature has clearly designed the provisions so as to replace the common law."

37 Where, as here, a specific legislative provision "applies to the same facts as a general common law rule or remedy and application of the specific provision would be pointless if the common law continued to apply, resort to the common law is likely to be excluded": Sullivan 2014, *supra* note 31 at §17.32, CBOA, Tab 27, citing *Reference re Excise Tax Act (Canada)*, 1992 CarswellAlta 61 (S.C.C.), CBOA, Tab 17.

38 *Sherman Estate*, *supra* note 23 at para. 38, CBOA, Tab 19.

the release of the Financial Information risks jeopardizing Crystallex's decade-long effort to realize on its only asset; by contrast, the evidence of the Ad Hoc Committee reveals that it is not prejudiced in any way by the requested Order.

(a) Failure to Protect the Financial Information Will Jeopardize the Company's Enforcement Efforts

30. Disclosure of the Financial Information at this time REDACTED

REDACTED

31. REDACTED

REDACTED

(b) The Ad Hoc Committee Will Not be Prejudiced by the Protection of the Financial Information

32. By contrast, for the reasons set out below, it is clear that no prejudice will be

39 May Fung Affidavit, paras. 60 -73, 92, May CMR, Tab 2, pp. 31-36, 43.

40 May Fung Affidavit, paras. 93-114, May CMR, Tab 2, pp. 43-51; Confidential Appendix I to October Fung Affidavit, paras. 1-29, Oct. CMR, Tab 2, pp. 41-52.

suffered by Crystallex's creditors if the Financial Information is redacted from the public record.

33. **The Ad Hoc Committee has Unfettered Access to the Historical Financial Information**. The Ad Hoc Committee gained access to the Company's Historical Financial Information in February 2021. It was able to view that information without signing a confidentiality agreement, and was free to trade the Notes on the basis of the Historical Financial Information.[41] Mr. Reid conceded on cross-examination that he is able to make an estimate of the Company's current cash balance using the information that is available to him, which includes the Historical Financial Information.[42]

34. **The Company's Current Focus is on the U.S. Enforcement Proceedings**. The Company's enforcement efforts are centred in the U.S., and Crystallex does not anticipate any material relief being sought in the CCAA in the immediate future.[43]

35. **The Ad Hoc Committee Understands Fully its Investment in Crystallex**: Even with certain of the Company's financial information having been redacted from the public record for more than six years of this proceeding, there can be no doubt that Mr. Reid – the Ad Hoc Committee's only affiant in respect of this motion – understands fully his investment in Crystallex. His evidence on cross-examination revealed that, notwithstanding his affidavit evidence that he has been unable to "monitor and fully assess the status of [his] funds' investment in the Notes",[44] and that it was "very difficult

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41 Reid Cross-Exam, pp. 170-178, qq. 639-667, Supp. CMR, Tab 1, pp. 180-188.
42 Reid Cross-Exam, pp. 121-122, qq. 453-458, Supp. CMR, Tab 1, pp. 131-132.
43 May Fung Affidavit, para. 118, May CMR, Tab 2, p. 52.
44 Affidavit of Scott Reid sworn May 28, 2021 ("**Reid Affidavit**"), para. 64(a), Responding and Cross-Motion Record of Computershare Trust Company and Ad Hoc Committee dated May 28, 2021 ("**AHMR**"), Tab 2, p. 32.

[for him] to fully and accurately assess Crystallex's situation" since the information was sealed:[45]

(a) The Ad Hoc Committee applied to lift the Ontario Securities Commission's cease-trade order on the Notes after the information began to be sealed, in order to permit the Notes to trade.[46]

(b) In its capacity as investment manager of Ravensource, Mr. Reid's company Stornoway Portfolio Management continued to make purchases of the Notes between December 2014 and February 2021 (while Crystallex's financial information remained sealed), increasing the amount of Ravensource's face value holdings by approximately 18%,[47] and from 9.43% of Ravensource's net assets to 26.75% of net assets.[48]

(c) Notwithstanding that the investment in Crystallex is a significant part of Ravensource's portfolio (26.75% of net assets as of September 2020),[49] at no point has Mr. Reid disclosed to Ravensource's unitholders that he is unable to assess the status of the Fund's investment in Crystallex,[50] and at no point has Mr. Reid disclosed to Ravensource's unitholders that he is unable to accurately assess Crystallex's situation.[51] Rather, Mr. Reid has advised Ravensource's unitholders repeatedly that Stornoway's strategy as

45 Reid Affidavit, para. 64(b), AHMR, Tab 2, p. 32.
46 Reid Cross-Exam, pp. 92-96, qq. 327-345, Supp. CMR, Tab 1, pp. 102-106.
47 Reid Cross-Exam, pp. 132-141, qq. 490-526, Supp. CMR, Tab 1, pp. 142-151.
48 Reid Cross-Exam, p. 32, qq. 117-119, Supp. CMR, Tab 1, p. 42; Reid Cross-Exam, pp. 34-39, qq. 127-148, Supp. CMR, Tab 1, pp. 44-49.
49 Reid Cross-Exam, pp. 37-38, qq. 140-143, Supp. CMR, Tab 1, pp. 47-48.
50 Reid Cross-Exam, pp. 147-149, qq. 554-557, Supp. CMR, Tab 1, pp. 157-159.
51 Reid Cross-Exam, pp. 147-149, qq. 554-557, Supp. CMR, Tab 1, pp. 157-159.

investment manager is to "concentrate capital in positions we know the best and where we hold the strongest convictions".[52]

36. **The Ad Hoc Committee Participates Fully in the CCAA**. Notwithstanding his statements that "Crystallex's failure to make routine public disclosure to its stakeholders has impaired Stornoway's ability to fully participate in the CCAA proceedings in order to protect and advance its rights and interests",[53] at no point has Mr. Reid disclosed to Ravensource's unitholders that Crystallex's disclosure practices have impeded in any way his ability to participate in the CCAA proceeding. To the contrary, Mr. Reid described his active involvement in the CCAA proceeding to Ravensource's unitholders in letters dated December 31, 2018, December 31, 2019, and December 31, 2020. Crystallex's financial information was redacted throughout this period.[54] Indeed, Mr. Fung's uncontroverted evidence is that the Ad Hoc Committee have been heavily involved in the CCAA proceeding.[55]

37. **The Notes are Overwhelmingly Concentrated in the Hands of Four Highly Sophisticated Investors**. According to Mr. Reid, as of December 31, 2020, over 90% of the Notes were held by four "highly sophisticated" investors,[56] who are more than capable of making informed decisions using the significant information at their disposal.

38. **Disclosure of the Financial Information Puts All Stakeholders at Risk**. As Mr. Reid conceded on cross-examination, harm to the Company's enforcement efforts puts

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52 Reid Cross-Exam, pp. 143-147, qq. 534-553, Supp. CMR, Tab 1, pp. 153-157.
53 Reid Affidavit, para. 43, AHMR, Tab 2, p. 28.
54 Reid Cross-Exam, pp. 161-165, qq. 605-620, Supp. CMR, Tab 1, pp. 171-175.
55 Reply Affidavit of Bob Fung sworn July 9, 2021 ("**Reply Fung Affidavit**"), paras. 12-15, Reply Motion Record of Crystallex dated July 9, 2021 ("**July CMR**"), Tab 1, pp. 10-11.
56 Reid Cross-Exam, pp. 152-153, qq. 568-573, Supp. CMR, Tab 1, pp. 162-163.

his investment at risk[57] – it also puts at risk the investment of each of Crystallex's creditors. This potential for significant harm is a further factor militating in favour of the Company's request to redact the Financial Information, and begs the question of why the Ad Hoc Committee is seeking to make the Financial Information public. Notably, one member of the Ad Hoc Committee – GreyWolf – is the most significant shareholder in Gold Reserve, a competing creditor that has a judgment of approximately US$740 million against Venezuela.[58]

39. **The Ad Hoc Committee's Resistance to the Order is Not Grounded in Fact**. Although Mr. Reid asserts that the Ad Hoc Committee should be allowed to make a "judgment call" concerning disclosure of the Financial Information, the Ad Hoc Committee have taken no steps to ensure that such a "judgment call" would or could be made on an informed basis. Although the Company's enforcement proceedings are centred in the U.S.,[59] the Ad Hoc Committee have not retained U.S. enforcement counsel to advise on Crystallex's enforcement activities.[60] They have not retained OFAC counsel to advise on the impact of the Sanctions on Crystallex's enforcement activity.[61] They have not retained advisors to provide advice concerning the Venezuelan political situation and its impact on Crystallex's enforcement efforts.[62] For his part, Mr. Reid has never been involved in the enforcement of a significant judgment against a foreign sovereign.[63] Moreover, no member of the Ad Hoc Committee has so much as reviewed an unredacted version of

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57 Reid Cross-Exam, p. 131, q. 486, Supp. CMR, Tab 1, p. 141.
58 Reid Cross-Exam, pp. 18-22, qq. 57-76, Supp. CMR, Tab 1, pp. 28-32.
59 Reid Cross-Exam, p. 167, q. 624, Supp. CMR, Tab 1, p. 177.
60 Reid Cross-Exam, pp. 167-169, qq. 625-635, Supp. CMR, Tab 1, pp. 177-179.
61 Reid Cross-Exam, pp. 168-169, qq. 628-635, Supp. CMR, Tab 1, pp. 178-179.
62 Reid Cross-Exam, pp. 169-170, qq. 636-637, Supp. CMR, Tab 1, pp. 179-180.
63 Reid Cross-Exam, pp. 40-42, qq. 156-164, Supp. CMR, Tab 1, pp. 50-52.

Mr. Fung's detailed explanation of why Crystallex believes that disclosure of this information could imperil its enforcement efforts.[64] Thus, while they demand the right to make a "judgment call", it is difficult to fathom why that judgment – based on limited information, limited experience and limited advice – should outweigh the strategic, well-informed decisions of Crystallex and its counsel, which have produced unprecedented results to date.

40. **The Notes are Unsecured Creditors**. The Ad Hoc Committee's demand to make a "judgment call" regarding disclosure of the Financial Information should be particularly troubling to the Court in circumstances where the Noteholders are unsecured creditors who are currently out of the money.[65]

41. If the Company is wrong concerning the potential harm to its enforcement efforts of disclosing the Financial Information, the worst-case scenario is that it will be accused of having been overly conservative. If the Company is right, however, the worst-case scenario is that the Noteholders will receive no recoveries in respect of their investments in Crystallex. In all of the foregoing circumstances, there can be no doubt that the balancing of interests required by s. 10(3) militates against disclosure of the Financial Information.

B. In the Alternative, the Test Prescribed by *Sierra Club* and *Sherman Estate* Requires that the Financial Information be Protected from Disclosure

42. For all of the reasons set out above, if this Court accepts that redaction of the Financial Information is appropriate under s. 10(3) of the CCAA, Crystallex submits that

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64 Reid Cross-Exam, p. 170, q. 638, Supp. CMR, Tab 1, p. 180.

65 Reid Cross-Exam, pp. 116-119, qq. 427-443, Supp. CMR, Tab 1, pp. 126-129; Reid Cross-Exam, pp. 122-123, qq. 459-461, Supp. CMR, Tab 1, pp. 132-133.

there is no need to analyze whether the Company has also satisfied the burden under *Sierra Club*. In any event, however, Crystallex submits that its evidence in respect of the Financial Information readily satisfies the *Sierra Club* test, as recently re-framed by the Supreme Court of Canada in *Sherman Estate*.[66]

43. In *Sherman Estate*, a unanimous Supreme Court of Canada re-cast the *Sierra Club* test as three prerequisites, requiring the moving party seeking an exception to the open court principle to show that:

> "(1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects".[67]

44. In respect of Crystallex's request to seal the Financial Information, each of those criteria is clearly met.

(i) Publicizing the Financial Information Poses a Serious Risk to Important Public Interests

45. This stage of the *Sierra Club*/*Sherman Estate* analysis requires the Court to assess two factors: (i) the important public interest engaged by disclosure of the Financial Information; and (ii) whether such disclosure gives rise to a "serious risk". Crystallex agrees with and adopts the submissions of the DIP Lender that:

(a) There are clear public interests engaged in a CCAA proceeding, including

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66 *Sherman Estate*, *supra* note 23, CBOA, Tab 19.

67 *Ibid* at para. 38. See also *Sierra Club*, *supra* note 22 at para. 53, CBOA, Tab 18.

the public interest in a supporting framework for the resolution of corporate insolvencies and the public interest in maximizing both recovery and the value of the debtor company's assets in an insolvency;[68] and

(b) The seriousness of the risks posed by disclosure must be considered both in terms of the magnitude of the risk and the gravity of the feared harm[69], such that "[w]here the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely".[70]

46. In Crystallex's case, the important public interest in maximizing the value of the Company's assets in this CCAA proceeding would be put seriously at risk by the disclosure of the Financial Information. As described above in **section IV(A)(iii)**, Mr. Fung has explained in detail the manner in which he believes that the Financial Information would be used by Venezuela REDACTED REDACTED. In light of the Company's current cash position, and the fact that the Initial Payment Securities cannot currently be providently monetized, the Writ and enforcement on the PDVH Shares currently represent the best chance of recovery for Crystallex's stakeholders.[71] If the disclosure of the Financial Information REDACTED

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68 *Re Nortel Networks*, [2009] O.J. No. 3169 at para. 29 (S.C.J.), CBOA, Tab 14. See also *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 42, CBOA, Tab 1; *Re Danier Leather Inc.*, 2016 ONSC 1044 at paras. 82-84, CBOA, Tab 12; *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898 at para. 35, CBOA, Tab 20; *Urbancorp*, 2020 ONSC 7920 at para. 24, CBOA, Tab 21; *Re Lydian International Limited*, 2020 ONSC 3850 at para. 27, CBOA, Tab 13; *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347 at paras. 23-27 [*Bridging Finance*], CBOA, Tab 10; *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789 at para. 45 [*Fairview Donut*], CBOA, Tab 6.

69 *Sherman Estate*, *supra* note 23 at para. 82, CBOA, Tab 19.

70 *Ibid* at para. 98.

71 May Fung Affidavit, para. 5, May CMR, Tab 2, pp. 9-10.

REDACTED

REDACTED Mr. Fung's uncontroverted evidence is that Crystallex would likely have no ability to provide a recovery to its stakeholders.[72] This would undermine seriously the important public interests served by this CCAA proceeding.

47. Mr. Fung has been a director of Crystallex since 1996, Chairman of the Board since 1998 and CEO since June 2008.[73] He has decades of experience in dealing with Venezuela, including its relentless efforts to re-open and re-litigate Crystallex's enforcement victories. Mr. Fung has provided clear and compelling explanations as to how Venezuela's access to the Financial Information could harm irreparably the Company's efforts to collect the balance owing on the Judgment. The clear spectre of harm raised by Mr. Fung's evidence, grounded as it is in "objective circumstantial facts",[74] permits this Honourable Court to draw any necessary inferences to establish the risks averred to by the Company. This branch of the *Sherman Estate* test is clearly satisfied.

(ii) Redacting the Financial Information is Necessary to Prevent a Serious Risk to the Company's Estate Because Reasonably Alternative Measures Will Not Prevent This Risk

48. This branch of the test requires the Court to consider "not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question".[75] This does not, however, require adoption of "the absolutely least restrictive option"; the Court

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72 May Fung Affidavit, para. 9, May CMR, Tab 2, p. 11.
73 May Fung Affidavit, para. 1, May CMR, Tab 2, p. 8.
74 *Sherman Estate*, *supra* note 23 at para. 97, CBOA, Tab 19. See also *X v. Y*, 2011 BCSC 943, CBOA, Tab 23.
75 *Sierra Club*, *supra* note 22 at para. 55, CBOA, Tab 18.

is focused, instead, on the availability of *reasonably* alternative measures.

49. Crystallex has, for many years, offered to make available to all of its stakeholders confidential financial information, provided that it receives assurances that the information will not end up, directly or indirectly, in the hands of Venezuela or other competing creditors.[76] Unfortunately, due to their private financial interests in preserving their ability to trade the Notes, the members of the Ad Hoc Committee have steadfastly refused to confidentiality terms that will offer this assurance.[77]

50. The Financial Information to be redacted comprises a minor part of each of the Monitor's Reports in question. The Company will make public the Financial Information when it is made public in the context of the CITGO Litigation, and in the interim, stakeholders have access to the Financial Information through the reasonable middle ground of a confidentiality agreement.[78] Both Justice Hainey and Justice Newbould have found that the signing of a confidentiality agreement is a reasonable alternative to give stakeholders access to the Company's confidential information.[79]

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76 May Fung Affidavit, paras. 123-24, May CMR, Tab 2, p. 54.

77 With respect to the Ad Hoc Committee's sole affiant on this motion, this remains the case even though: (i) Mr. Reid has advised Ravensource unitholders that "we are not looking to exit through the market. Consistent with most of our investments, our exit will likely come from a strategic transaction or cash distribution directly from Crystallex" (December 31, 2020 Management Letter to Unitholders, Exhibit 11 to Reid Cross-Exam, p. 6, Supp. CMR, Tab 12, p. 413); and (ii) as of December 31, 2020, more than 90% of the outstanding Notes were owned by "four sophisticated investors… leaving little opportunity for outside investors to buy" (December 31, 2020 Management Letter to Unitholders, Exhibit 11 to Reid Cross-Exam, p. 6, Supp. CMR, Tab 12, p. 413).

78 May Fung Affidavit, para. 90, May CMR, Tab 2, p. 42.

79 Confidential Endorsement of Justice Newbould dated December 17, 2014, confidential Appendix "A" to the Monitor's 37th Report; Endorsement of Justice Hainey dated January 15, 2019: *Re Crystallex International Corporation*, 2019 ONSC 408, CBOA, Tab 5.

(iii) As a Matter of Proportionality, the Benefits of Redacting the Financial Information Far Outweigh its Prejudicial Effects

51. In this case, the benefits of an Order redacting the Financial Information far outweigh its prejudicial effects. Among other things:

(a) The redaction of the Financial Information is a minimal intrusion into the public's right to access information relating to the CCAA proceeding, where no material steps are being taken at this time;[80]

(b) Any deleterious effects of redacting the Financial Information lie far from the "core values" underlying freedom of expression as discussed in *Sierra Club*, making a confidentiality order easier to justify;[81]

(c) The Ad Hoc Committee has access to the Historical Financial Information, knows that the Company has no further sources of funds aside from its enforcement efforts, and knows that the Company's money is only being spent on enforcement activities and in the CCAA proceeding;[82]

(d) Crystallex's stakeholders are also well aware that the Company has insufficient cash resources even to pay off the balance owed to the DIP lender, leaving aside the ongoing uncertainty relating to amounts owing to the Canada Revenue Agency,[83] and that all of the Company's efforts and resources (aside from the ones being diverted by the Ad Hoc Committee on

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80 In *Sierra Club*, the Supreme Court of Canada found relevant the "narrow scope of the order" (which related only to a handful of documents) in tempering the deleterious effects of the requested confidentiality order on the public interest in open courts: *Sierra Club*, *supra* note 22 at para. 87, CBOA, Tab 18.

81 *Ibid* at para. 75.

82 May Fung Affidavit, paras. 116-123, May CMR, Tab 2, pp. 51-54.

83 Reid Cross-Exam, pp. 114-123, qq. 417-461, Supp. CMR, Tab 1, pp. 124-133.

CCAA motions practice) are being devoted to U.S. enforcement proceedings, for the benefit of all stakeholders;[84]

(e) For all of the reasons set out above with respect to the analysis under s. 10(3) of the CCAA, the prejudice to Crystallex in refusing to make the Order far outweighs any alleged prejudice to the Company's stakeholders.[85]

52. Although these factors are sufficient to ground a finding that the Financial Information should be protected in accordance with *Sherman Estate*, the Court found it relevant, in *Fairview Donut Inc. v. TDL Group Corp.*, to consider whether "the request for disclosure is abusive or being used for the purpose of an unfair tactical advantage – for example, to force the defendant to settle to avoid disclosure of potentially damaging information".[86] In this case, there are a number of factors that suggest that the Ad Hoc Committee's resistance to protecting the Financial Information should be viewed as a tactical attempt to gain leverage over the Company, rather than a *bona fide* objection.

53. Notably, in the period between June 2013 and December 2015, the Company and the Ad Hoc Committee agreed to a standstill order preventing further litigation by the Ad Hoc Committee that resulted in the Noteholders earning an increased rate of interest and other entitlements on their Notes.[87] Mr. Reid later estimated the entitlements that accrued during the standstill period as being worth more than $37,000,000[88] on Notes with an aggregate face value of $100,000,000 and a coupon rate of 9.375%. Mr. Reid currently

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84 May Fung Affidavit, paras. 118-122, May CMR, Tab 2, pp. 52-53.

85 Notably, the Honourable Chief Justice Morawetz in *Bridging Finance* found it relevant, in balancing the interests required by Sherman Estate, that no stakeholders would be materially prejudiced by the requested Order: *Bridging Finance, supra* note 68 at para. 27, CBOA, Tab 10.

86 *Fairview Donut, supra* note 68 at para. 68, CBOA, Tab 6.

87 Reply Fung Affidavit, para. 14, July CMR, Tab 2, p. 11.

88 Reid Cross-Exam, pp. 85-89, qq. 293-312, Supp. CMR, Tab 1, pp. 95-99.

believes that the Notes should be paid more than 100 cents on the dollar in respect of their claim, which he understands will come at the expense of other stakeholders.[89]

54. The substantial risk posed by disclosure of the Financial Information is difficult to fathom unless it is being created for the purpose of seeking leverage over the Company. Notably, despite the Company's requests that Mr. Reid avoid, as much as possible, REDACTED Mr. Reid has instead continued to disclose and re-publicize the May 2020 cash balance.[90] As Justice Newbould observed in a confidential endorsement rendered in December 2014:

REDACTED

55. The highly questionable motives on the part of the Ad Hoc Committee are, in Crystallex's respectful submission, relevant to the balancing exercise to be undertaken at the third step of the *Sherman Estate* test.

PART V - RELIEF SOUGHT

56. For all of the foregoing reasons, the Company respectfully requests that the Financial Information be redacted, and that the Ad Hoc Committee be made to bear the significant expense to the Company of having to pursue this motion – which it has brought for the benefit of all stakeholders – on a contested basis.

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89 Reid Cross-Exam, pp. 181-183, qq. 680-687, Supp. CMR, Tab 1, pp. 191-193.
90 Reid Cross-Exam, pp. 170-178, qq. 639-667, Supp. CMR, Tab 1, pp. 180-188.
91 Confidential Endorsement of Justice Newbould dated December 17, 2014, confidential Appendix "A" to the Monitor's 37th Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of September, 2021.

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SCHEDULE 1

Financial Information Sought to be Redacted

(a) The Company's cash balances as at September 30, 2020 and March 31, 2021;

(b) The summary of the Company'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 Monitor's Thirty-Third Report (Appendix "B" to the Monitor's Thirty-Fifth Report);

(ii) the period from October 1, 2020 to March 31, 2021 compared to the cash flow forecast included in the Monitor's Thirty-Fifth Report (Appendix "B" to the Monitor's Thirty-Sixth Report);

(c) The Company's cash flow forecasts (the "**Cash Flow Forecasts**") for:

(i) the period from October 1, 2020 to May 31, 202` (Appendix "C" to the Monitor's Thirty-Fifth Report); and

(ii) the period from April 1, 2021 to November 30, 2021 (Appendix "C" to the Monitor's Thirty-Sixth Report).

SCHEDULE "A"
LIST OF AUTHORITIES

A. Case Law

1. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10
2. *Belo-Alves v. Canada (A.G.)*, 2014 FC 1100
3. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, 1992 CarswellNat 4 (S.C.C.)
4. Endorsement of the Honourable Justice Hainey dated August 31, 2020
5. Endorsement of the Honourable Justice Hainey dated January 15, 2019
6. *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789
7. *Friesen v. Canada*, 1995 CanLII 62 (S.C.C.)
8. *Groupe Dynamite inc. c. Deloitte Restructuring inc.*, 2020 QCCS 3086
9. *Jackson v. Canadian National Railway*, 2013 ABCA 440
10. *Ontario Securities Commission v. Bridging Finance*, 2021 ONSC 4347
11. *Prebushewski v. Dodge City Auto (1984) Ltd.*, 2005 SCC 28
12. *Re Danier Leather Inc.*, 2016 ONSC 1044
13. *Re Lydian International Limited*, 2020 ONSC 3859
14. *Re Nortel Networks*, [2009] O.J. No. 3169 (S.C.J.)
15. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
16. *Re Stelco Inc.*, [2006] O.J. No. 275 (S.C.J.)
17. *Reference re Excise Tax Act (Canada),* 1992 CarswellAlta 61 (S.C.C.)
18. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
19. *Sherman Estate v. Donovan*, 2021 SCC 25
20. *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898
21. *Urbancorp*, 2020 ONSC 7920

22. *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764

23. *X v. Y*, 2011 BCSC 943

B. Secondary Sources

24. Lloyd W Houlden, Geoffry B Morawetz & Dr Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009, loose-leaf), Companies' Creditors Arrangement Act

25. Denis Ferland, "The Evolving Role of the Monitor, Confidential Information and the Monitor's Cross-examination, a Quebec Perspective" (2011) Annual Rev of Insolvency Law 17

26. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Irwin Law, 2016)

27. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Lexis, 2014)

28. Canada, Parliament, Debates of the Senate, 38th Parl, 1st Sess, Vol 142, No 100 (25 November 2005)

29. Order Fixing September 18, 2009 as the Date of the Coming into Force of Certain Sections of the Acts, Proclamation, 19 August 2009, SI/2009-68, (2009) C Gaz II, 1711, 1712

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act
R.S.C., 1985, c. C-36

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

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.

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

FACTUM OF CRYSTALLEX INTERNATIONAL CORPORATION
(RE: MOTION FOR PROTECTIVE ORDER)

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