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

RESPONDING FACTUM OF COMPUTERSHARE TRUST COMPANY OF CANADA IN ITS CAPACITY AS TRUSTEE FOR THE HOLDERS OF CRYSTALLEX 9.375% SENIOR NOTES DUE DECEMBER 23, 2011 AND THE AD HOC COMMITTEE OF BENEFICIAL HOLDERS OF THE SENIOR NOTES

(Motions returnable November 18, 2021)

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PART I. OVERVIEW

1. The issues before the Court are narrow, yet fundamental to both this case and CCAA practice. At their core, the pending motions are about disclosure. Disclosure of a debtor's cash flow reporting and forecasts are a prerequisite to obtaining the continuing benefit of CCAA protection, filed on every single CCAA stay extension motion in every single CCAA case. Cash flow reporting provides creditors with insight into a debtor's liquidity and how it is spending money while creditors are stayed. The ability of creditors to access this information is critical to their ability to assess the debtor's financial position and conduct, provide informed input to the debtor and Monitor, take positions on matters that come before the Court, and raise issues if they are concerned. Timely disclosure of key financial information to allow creditors to do this is a critical component of ensuring the fairness of the CCAA process.

2. Despite recent rulings of this Court, the Court of Appeal and the Delaware District Court rejecting the secrecy Crystallex has sought to deploy and ordering disclosure, and despite its initial professed rationale for sealing being wholly undermined by disclosures in the U.S. enforcement process, Crystallex continues to try and impose a veil of secrecy over this case, seeking to provide non-insiders with only stale-dated highly aggregated financial information that is of limited utility. The Noteholders, effectively the CCAA debtor's only pre-filing creditors, seek timely disclosure of proper cash flow reporting and forecasts in order to protect their interests in a nearly decade-long CCAA proceeding where they have lost confidence that Crystallex will look out for their interests.[1]

3. The Noteholders' loss of confidence in Crystallex is not difficult to understand. Crystallex, a reporting issuer under securities laws, has two material groups of stakeholders at this stage: the Noteholders and the insider holders of junior CVRs (*i.e.*, Tenor and the two management directors).[2] Crystallex is run by

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[1] The "**Noteholders**" are, together, Computershare Trust Company of Canada in its capacity as trustee for the holders of Crystallex International Corporation ("**Crystallex**") 9.375% Senior Notes due December 23, 2011 (the "**Trustee**") and the Ad Hoc Committee of Beneficial Holders of the Senior Notes (the "**Noteholder Committee**"). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Responding Affidavit of Scott Reid sworn October 29, 2021.

[2] Shareholders are not expected to receive any value. In its Thirty-Third Report dated April 30, 2020, the Monitor reported that "while the Applicant's desire is to have some recovery for its shareholders, the Monitor's view is that such result is uncertain at this time."

a five-person board: two Tenor principals, the two management directors, and only one notionally "independent director" who is advised by the company's counsel. Crystallex, through its board, has a contentious relationship with the Noteholders. It has failed to advance the case or solve key issues, and despite receipt of $500 million in settlement proceeds to date, has made no distributions on account of the DIP, or paid any portion of the hundreds of millions of dollars owing to the Noteholders on account of principal, interest and expenses.

4. Reinforcing the Noteholders' loss of confidence, they recently learned Crystallex has already spent ***nearly 50% of the $180 million of cash*** it received from Venezuela in 2018, a staggering amount that was not timely disclosed to creditors. Moreover, the cash flows in the public versions of the now historic 35th and 36th Monitor's Reports are still so heavily redacted that the Noteholders cannot tell how Crystallex has been spending these massive disbursements. And although unknown to the Noteholders, Crystallex forecasts a

[redacted]

5. Crystallex's conduct during this six-month motion process has also further undermined the Noteholders' confidence in it. It treats (and characterizes) the Noteholders as adversaries, rather than key stakeholders. Notwithstanding the recent Court rulings rejecting its sealing requests, and despite making written commitments to provide at least some public current cash flow reporting, it has once again returned to a strategy of blanket sealing. The process Crystallex has deployed in these motions has also been unfair, from Crystallex first electing to withhold the entirety of its evidence from the Noteholders, to insisting on treating the entirety of cross-examination transcripts as confidential so they were not available to the Noteholders' affiant until after his own cross-examination, and culminating in withholding the current cash flows at issue until ***after*** cross-examinations.

6. Shortly before factums were due on these motions and after cross-examinations were complete, the unilateral new format Crystallex is using for its cash flow reporting and forecasts was made available through the Monitor's 38th Report. Remarkably, not one word of those cash flows are unredacted for the public—not

a single number and not a single letter—so non-insider stakeholders cannot even see what changes have been made to the reporting template. If the template had been disclosed, stakeholders would see that Crystallex has sought to further aggregate its cash flows, both in substance and temporally. Thus, Crystallex proposes to disclose even less information to the Court and stakeholders by unilaterally downgrading the standard cash flow template it has been using for years, so that even if the Court does not grant its sealing request, there is almost no meaningful information that will become public.

7. This is not the open and co-operative approach required of a CCAA debtor, particularly in the context of a decade-long case. As a result of Crystallex's positions, the Noteholders have had to litigate extensively to obtain even the most basic public disclosure, such as Crystallex's cash balance, DIP balance and the details of the settlement consideration received from Venezuela. Crystallex has nothing to lose by resisting the public disclosure sought by the Noteholders, and a lengthy informational disclosure delay to gain even if it is unsuccessful on the merits.

8. With respect to the specific issues in dispute on the pending motions, the Noteholders submit that:

(a) Crystallex's entire cash flow reporting and forecast should be publicly disclosed on a quarterly and current basis, with no disclosure lag;

(b) Crystallex should continue to provide its cash flows to the Monitor on the template it has used throughout this proceeding, rather than being permitted to increase the level of aggregation in an attempt to reduce meaningful disclosure to this Court and stakeholders;

(c) the stay of proceedings should be extended by the usual three months—not a year; and

(d) the percentage of the CVRs transferred to Crystallex's two management directors seven years ago (the "**CVR Information**") should be publically disclosed.[3]

[3] The Noteholders previously served and filed two factums that address the unsealing of the CVR Information, on which they continue to rely. For ease of reference, the portions of those factums that address the CVR Information are excerpted at Schedule "C" hereto.

9. Almost all of the evidence Crystallex has adduced over the past six months is irrelevant or tangential to these narrow issues and after providing brief background information, this factum focuses entirely on these specific issues.

10. The key legal issue on these motions is Crystallex's request to seal information in the Court file such that it cannot be accessed by stakeholders and the public. No sealing—whether for five years, six months or a day—is permissible as Crystallex has not met the Supreme Court of Canada's test for sealing, as recently recast in *Sherman Estate v. Donovan*. In summary:

(a) There is no "important public interest" in sealing the cash flow reporting or forecasts. On Crystallex's own evidence, [redacted]

(b) The evidence is that the specific risk of concern to Crystallex [redacted] This is not a "serious risk" and cannot justify overriding the open Courts principle – if Crystallex does not obtain the sealing order it seeks, the sky will not fall. Further, Court materials are not properly sealed from public view out of an abundance of caution;

(c) Any alleged benefits of a sealing order do not outweigh the significant negative effects it would have on the fairness of the CCAA process and the Noteholders' ability to participate in these proceedings; and

(d) Crystallex's commitment to make its cash flow information public once it is six to 12 months stale does not redress the harms of sealing it in the first instance. To the contrary, adopting Crystallex's proposal would mean creditors will have no ability to review, consider and address the significant ongoing expenses Crystallex is incurring on a timely basis, or to use that information to respond to any developments in the case or take proactive measures.

11. Finally, the one-year stay extension sought by Crystallex is unjustifiable. There is so much going on that impacts Crystallex, and so little consensus between the debtor and its key creditor constituent, that in order to continue to enjoy the significant CCAA protections Crystallex has had for nearly a decade, it should be required to demonstrate that it is entitled to a continuing stay and provide cash flow reporting and any other salient disclosure every three months. Its excuse for asking for a longer stay (reducing expenditures) rings hollow in the context of its [redacted] from September 2021 through November 2022. Crystallex cannot continue to take the benefit of CCAA protection while shirking its responsibilities to make timely and fair disclosure to the Court and its creditors. The better approach is for Crystallex to remove the informational irritant by simply providing the public disclosure it is required to provide, so that every three months it can have a stay extension motion that proceeds without a sealing fight.

PART II. SUMMARY OF THE FACTS

A. Background

12. The Noteholder Committee is comprised of beneficial holders of in excess of 66 2/3% of the $100,000,000[4] (principal amount) of the Notes. The Noteholders are Crystallex's only material pre-filing creditors, and believe they are currently owed approximately $328 million.

> Transcript of Cross-Examination of Robert Fung held August 5, 2021 ("**Fung Cross**"), p. 64 (Q220-Q223), Transcript Brief dated September 3, 2021 ("**Transcript Brief**"), Tab 1, p. 70;
> Affidavit of Scott Reid sworn October 29, 2021 ("**October Reid Affidavit**") at para. 10, Noteholder Responding Motion Record dated October 29, 2021 ("**Noteholder RMR**") at Tab 1, p. 14

13. The CVRs, which are subordinate to the Notes, entitle their holders (being the DIP lender and Crystallex's management directors) to 88.24% of any net proceeds remaining following payment in full of DIP principal and interest, the Noteholders and other creditor claims, and certain other specified priority obligations.

> Affidavit of Scott Reid sworn May 28, 2021 ("**First Reid Affidavit**") at para. 28, Responding and Cross Motion Record of the Noteholders ("**RCMR**"), Tab 2, p. 24;
> CCAA Financing Order dated April 16, 2012 at para 17, Exhibit 7 to the November Reid Cross, Second Transcript Brief dated November 15, 2021 ("**Second Transcript Brief**"), Tab 2, p. 666;
> Letter from counsel to Crystallex dated July 9, 2021, Exhibit E to the Fung Cross, Transcript Brief, Tab I.E, p. 346;

[4] Unless otherwise indicated, all amounts referenced herein are in U.S. dollars.

Cross-Exam. of S. Reid conducted November 4, 2021 ("**November Reid Cross**"), p. 119-121 (Q501), Second Transcript Brief, Tab 2, p. 398-400.

14. Thus, four of Crystallex's five directors are incentivized to (among other things) seek to reduce the amount payable to the Noteholders and other creditors to increase the value, if any, of the CVRs. The Noteholders believe that Crystallex's directors' interest in the CVRs creates a significant and unaddressed conflict of interest.

15. Crystallex's sole independent director, Sergio Marchi, is ostensibly responsible for the conduct of the CCAA proceedings. However, on cross-examination, it emerged that Crystallex is not following its own governance rules: Mr. Marchi is not making independent decisions with respect to CCAA matters and does not have independent counsel to advise him (Crystallex's own counsel advises Mr. Marchi). Rather, all decisions (including with respect to disclosure of information) are made by the board of directors as a whole.

Fung Cross, p. 29 (Q84), p. 32 (Q101-103), p. 33 (Q107), p. 43-44 (Q145), p. 61-62 (Q210) p. 65 (Q228-233) and p. 170-171 (Q638-641), Transcript Brief, Tab 1, pp. 36, 39-40, 50-51, 68-69, 72 and 177;
Fung Answer to Undertaking to Q342-Q343, Transcript Brief, Vol. 2, Tab 4, p. 1623;
Transcript of the Cross-Examination of R. Fung held November 4, 2021 ("**November Fung Cross**") at pp. 45-46 (Q185-187), Second Transcript Brief, Tab 1, pp. 51-52

16. Notwithstanding receipt of approximately $500 million in settlement proceeds from Venezuela to date (including $180 million of cash), Crystallex has not paid down the DIP, made any distributions to creditors on account of proven claims, or advanced a plan or other restructuring option. Recent public disclosures show Crystallex has likely spent in the range of $85 - $90 million of the cash it received from Venezuela in 2018 and expects to spend its cash at an even more accelerated rate over the next year.

First Reid Affidavit, paras. 14-19, RCMR, Tab 2, pp. 22-23; Responding Affidavit of Robert Fung sworn July 9, 2021 ("**Fung Responding Affidavit**"), footnote 1, Crystallex Responding Motion Record, Tab 1, p. 2 (PDF p. 11); Fung Cross, p. 64 (Q221-Q223), Transcript Brief, Tab 1, p. 71; Monitor's 38th Report at Confidential Appendices D and E; October Reid Affidavit at para. 41, Noteholder RMR, Tab 1, p. 20

B. Disclosure in the U.S. Enforcement Proceedings

17. Until September 2021, Crystallex's stated rationale for sealing its cash flows and certain other

[redacted]

[redacted] While the Noteholders rejected this rationale for sealing, in September 2021, the argument was rendered moot when details of the securities were disclosed in the U.S. enforcement proceedings after the Court overseeing that case denied Crystallex's sealing request. Specifically, on September 8, 2021, Judge Leonard P. Stark of the United States District Court for the District of Delaware entirely rejected the secrecy Crystallex had sought to deploy:

> The Court further believes that the public should have access to all information in the Proposed Order and Report. Crystallex brought its dispute with the Republic in a court of law, which is funded by the public and operates for the public's benefit. Maintaining the Court's integrity in the eyes of the public is of paramount importance. Accordingly, the strong presumption is that court filings - especially those necessary to and affecting the Court's exercise of judicial power - will be available to the public. […]
>
> Crystallex seeks to use the Court's mechanisms to collect a judgment of the U.S. courts. Yet Crystallex attempts to hide relevant information, on the purported bases that disclosure will cause Crystallex competitive harm (vis-a-vis other creditors of the Venezuela Parties), that disclosure may harm certain third parties, and that disclosure will offend "principles of comity and respect for parallel foreign judicial proceedings" (because Canadian bankruptcy courts have sealed the information at issue). The Court does not find those countervailing interests to be "compelling" or sufficient to justify the sealing Crystallex seeks. Ultimately, Crystallex has not met its burden to "overcome the presumption of access to show that the interest in secrecy outweighs the presumption." The public's interest in disclosure of information that directly relates to a component of the Special Master's role far outweighs Crystallex's private interests. [Internal quotations to other case law and cites omitted.]
>
> October Reid Affidavit at para. 22, Noteholder RMR at Tab 1, p. 14

18. Judge Stark's ruling was significant to the pending CCAA motions for two reasons. First, the details of the securities (one of Crystallex's key assets) were one of the pieces of information sought on the Noteholders' cross-motion which Crystallex refused to disclose. Their public disclosure in the U.S. enforcement proceeding mooted that issue. Second, as described above, Crystallex's entire stated rationale

[redacted]

Thereafter, the ground having fallen out from under it, Crystallex consented to the Monitor disclosing some—but not all—of the updated cash balance and cash flow information in the 35th and 36th Reports that had been

temporarily sealed on a without prejudice basis pending Crystallex's sealing motion being argued. Since then, Crystallex has come up with a new—and even more tenuous—rationale for sealing, described below.

October Reid Affidavit at para. 23, Noteholder RMR, Tab 1, p. 14

C. The Information at Issue is Critical for the Noteholders

19. The evidence of Mr. Reid, the Noteholders' affiant, is that he has lost all confidence that Crystallex and its management will consider the interests of the Noteholders, particularly given the significant and unaddressed conflicts of interest described previously. His evidence is also that Crystallex's failure to provide timely financial disclosure: (a) impairs the Noteholder Committee's ability to formulate options and alternatives to advance this case; (b) to the extent Crystallex seeks any material relief, he lacks the basic information necessary to consider the impact of that relief on his investment funds' rights and interests, and to consult with and instruct counsel; and (c) the significant information asymmetry between the Noteholders, on the one hand, and Crystallex and Tenor, on the other, makes it difficult for them to negotiate on contentious issues. When Mr. Reid finally did receive some financial disclosure in September 2021, he was shocked to learn the extent of Crystallex's cash burn and is very concerned that he has no specific insight into how these funds have been spent. For him, the bottom line is that without timely disclosure of cash flow information, he cannot know what he is missing, provide fully informed input to Crystallex, the Monitor and the Court, understand the basis on which the Court makes decisions, protect his interests, and be ready to handle whatever events may unfold in this complex case. Notably, Mr. Reid made his affidavits partly in the dark with respect to Crystallex's evidence: only Crystallex's heavily redacted versions of the affidavits of Crystallex's Chairman, CEO and affiant, Robert Fung, were provided to Mr. Reid.

Reid Reply Affidavit, para. 34, Reply Cross-Motion Record of the Noteholders, Tab 1, p. 23;
First Reid Affidavit, paras. 64 and 90, RCMR, Tab 2, pp. 32 and 40;
October Reid Affidavit at paras. 40-44, Noteholder RMR at Tab 1, pp. 20-22

20. Crystallex has suggested that that there is no need for Mr. Reid or the other Noteholders to receive timely reporting from Crystallex and that a 12-month stay extension is appropriate, as nothing is anticipated to occur in the CCAA proceedings over the next year. But both Mr. Fung and Mr. Reid's evidence demonstrate that circumstances confronting Crystallex are fluid and complex. Those circumstances include:

(i) the status of the CITGO sale process (the approval hearing for which was held November 8, 2021) and the Special Master's stated intention to advance settlement discussions amongst the parties pending the commencement of the sale process; (ii) Venezuelan elections in January 2022 and the resulting implications for U.S. foreign policy and the current OFAC sanctions; (iii) OFAC's invitation, [redacted] to reapply for an OFAC license in early 2022; [redacted] (v) the reported engagement by CITGO of JP Morgan in an attempt to broker a settlement with Venezuela's creditors that are pursuing CITGO, including Crystallex; and (vi) the recent declaration of an event of default under the DIP, later waived, but only for a period of time and subject to various terms and conditions.

> October Fung Affidavit at para. 82, Crystallex MR, p. 40 (PDF 47-48);
> **November Fung Cross** at p. 17 (Q41), pp. 20-21 (Q48-53), p. 22 (Q60), p. 25 (Q 70-72), pp. 26-27 (Q 77-80), and p. 28 (Q 83-84), Second Transcript Brief, Tab 1, pp. 23-44;
> October Fung Affidavit at paras. 45-65, Crystallex MR, Tab 2, pp. 27-35 (PDF 34-42);
> October Reid Affidavit at paras. 36-38 and 59-62, Noteholder RMR, Tab 1, pp. 18-19 and 26-27;
> 38th Report of the Monitor at para. 13

21. While Crystallex makes the specious argument that the Noteholders have fully participated in the case to date and that Mr. Reid has been able to adequately report to his investors, almost all of the Noteholder actions referenced by Crystallex occurred before 2014 – a time when Crystallex did not seek to seal its financial information. Mr. Reid has also documented his concerns regarding sealing (among other issues) in no fewer than six affidavits dating back to 2017. The fact that Mr. Reid has done the best he could with the information available to him is not proof that Crystallex is complying with its obligations as a CCAA debtor, or that the Noteholders are not entitled to the financial disclosure they seek.

> Crystallex Factum dated November 10, 2021 at para. 41

PART III. ISSUES AND THE LAW

22. The issues to be determined on Crystallex's November 2021 stay extension motion and the outstanding aspects of the motions made in May 2021 are:

(a) Should the cash flow reporting and forecast contained in the 38th Report be sealed until they are at least six-months stale? **No. Crystallex has not satisfied the *Sherman Estate* test for sealing this information: no sealing of any duration is permissible.**

(b) [redacted]

(c) Should a one-year extension of the CCAA stay be granted? **No. A standard three-month stay extension should be granted to ensure Crystallex reports to the Court and stakeholders on a timely basis, and so that Crystallex is required to demonstrate that it continues to act with good faith and due diligence, including with respect to its dealings with creditors.**

(d) Should Crystallex be permitted to unilaterally alter the template for its cash flows in order to disclose only highly aggregated information? **No. Crystallex's attempt to circumvent the Court's gatekeeping function with respect to sealing and reduce disclosure to creditors should not be countenanced.**

(e) Should the remaining redacted information in the cash flow reporting and cash flow forecasts contained in the 35th and 36th Reports be sealed? **No. Again, Crystallex cannot satisfy the *Sherman Estate* test for sealing this information.**[5]

[5] [redacted] This was the approach recommended by the Monitor to the Court with respect to the disclosure of this information in the 33rd Report (see the final unredacted explanatory note at Appendix C to the 33rd Report, which discloses accrued professional fees of $11.6 million, but not who they are owed to). [redacted]

(f) Should the CVR Information be unsealed? **Yes. The CVR Information was initially sealed on a without prejudice basis, and Crystallex cannot satisfy the *Sherman Estate* test for its continued sealing.**

A. The Cash Flows Should Not Be Sealed

(i) Crystallex must disclose cash flow reporting and forecasts to creditors in order to obtain the continuing benefit of a stay

23. Compromise and cooperation is at the very heart of the CCAA and the benefits of CCAA protection come with corresponding obligations of fairness, transparency and openness. This CCAA principle runs parallel to Judge Stark's ruling, quoted above, that since Crystallex seeks to use judicial mechanisms, it cannot hide relevant information. Yet Crystallex remains unwilling to make the routine but important public financial disclosure that is expected and required of a CCAA debtor. Any departure from the general rule permitting public access to materials filed in CCAA proceedings, particularly against the backdrop of Crystallex's disclosure obligations, must be restrictively interpreted and permitted only when warranted on the basis of strong underlying facts, which do not exist here.

> *Re Mecachrome Canada Inc.*, 2009 QCCS 6355 (CanLII) at para. 48, Noteholders' Book of Authorities ("**BOA**"), Tab 1

(ii) Crystallex cannot meet the requisite test for sealing

24. The leading authority about sealing records from public view is the unanimous decision of the Supreme Court in *Sherman Estate v. Donovan*, where the Court repeatedly emphasized that there "is a strong presumption in favour of open courts."

> *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman Estate*] at paras. 2, 30, 37, 39 and 63, BOA, Tab 2

25. Crystallex bears the burden of meeting the *Sherman Estate* test for sealing court records:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish 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.

Sherman Estate at para. 38, BOA, Tab 2

(a) Crystallex has not proven an "important public interest" is in play

26. The Supreme Court explained what it meant by an "important public interest," starting from the premise that "courts must be 'cautious' and 'alive to the fundamental importance of the open court rule' even at the earliest stage when they are identifying important public interests." It made clear that a sealing order may be refused where "the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle."

Sherman Estate at para. 42, BOA, Tab 2

27. Crystallex argues the public interest it seeks to protect through sealing its cash flow information is the maximization of the value of its estate through keeping Venezuela in the dark about its litigation spending. However, on Mr. Fung's own evidence, what Crystallex really seeks is this Court's assistance to weaponize secrecy as a sword:

[redacted]

November Fung Cross at p. 102 (Q474), Second Transcript Brief, Tab 1, p. 108

28. There is no important public interest in overriding CCAA disclosure obligations and the open courts principle in order to prevent mandatory public disclosure so as to hand a litigant a sword to use secrecy to avoid a fulsome legal determination on the merits. This is particularly the case where the debtor's largest creditor (a key beneficiary of the maximization of value public interest Crystallex relies on) entirely rejects the secrecy Crystallex seeks to deploy.

October Fung Affidavit at paras. 122 and 124, Crystallex MR, Tab 2, pp. 59-60 (PDF 65-66);
November Fung Cross at pp. 66-67 (Q 290-295), and p. 102 (Q 474-476), Second Transcript Brief, Tab 1, pp. 72-73 and 108;
October Reid Affidavit at para. 54, Noteholder RMR, Tab 1, p. 24

29. Tenor embraces Crystallex's reliance on secrecy as a sword as a public interest justifying a sealing order, relying on Chief Justice Morawetz's decision in *Cash Store Financial Services Inc.* However, the facts in that case are distinguishable from Crystallex's situation. In *Cash Store*, the Court was not being asked to seal cash flows (and, indeed, there has been no sealing of cash flows in the *Cash Store* case). Rather, the company's litigation trustee sought approval of a proposed litigation funding arrangement ("**LFA**"). To do so, it had to disclose the LFA, but sought to keep certain of the economic terms (available funding and the parties' underlying economic entitlements to any recoveries) confidential, as a ***shield against the mischief*** of "unfair tactical advantages for the defendants to the actions in question," particularly as relates to the defendants being able to triangulate a low-ball settlement offer based on the underlying economic interests of the LFA parties to any recovery. The noteholders in the case consented to and supported the requested sealing, which was otherwise unopposed. This is entirely different than giving a CCAA debtor, Crystallex, a [redacted] by sealing cash flows it is required to file with the Court over the strenuous objection of its main creditor group.

Cash Store Financial Services Inc., 2021 ONSC 7143 paras. 3, 16, 19 and 21, BOA, Tab 3

30. The only tenuous factual analogy Crystallex can attempt to draw to *Cash Store* is that sealing the total litigation funding available to *Cash Store* is akin to Crystallex's request to seal its actual and forecast spending. This analogy fails for two reasons. First, Crystallex's cash flows are not specific to its litigation spend: Mr. Fung's evidence was that the "Arbitration Costs" line item in its cash flows comprise a host of various U.S. professional expenses, and the company is also spending money on the CCAA proceedings, among other things (which expenses are now also aggregated with its arbitration expenses in its updated cash flow template). Second, Crystallex's total available litigation funding (its $95 million of cash on hand and securities with a market value at time of receipt of approximately $320 million) is already a matter of public record. While Crystallex previously sought to argue that sealing was necessary to prevent Guaido Venezuela from knowing what its "war chest" was, it has resiled from this position, acknowledging it was untenable in the face of the significant resources available to it to continue its enforcement and other litigation efforts. The Court's willingness in *Cash Store* to seal information to prevent tactical mischief so that litigation would be

decided or settled on its merits should not be a jumping off point for this Court to facilitate Crystallex withholding key cash flow information from its stakeholders.

November Fung Cross at pp. 66-67 (Q290-291), Second Transcript Brief, Tab 1, pp. 72-73

(b) Crystallex has not proven a "serious risk" to its litigation with Venezuela

31. The Supreme Court summarized in *Sherman Estate* that whether an important public interest is at "serious risk" is:

> a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case...

Sherman Estate, at paras. 42 and 62, BOA, Tab 2

32. The Supreme Court also specified what proof is required to show a "serious" risk:

> At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation. [citations omitted]

Sherman Estate at para. 97, BOA, Tab 2

33. In determining whether there is a serious risk to an important public interest, both the probability of feared harm and gravity of the harm are relevant.

Sherman Estate at para. 82, BOA, Tab 2

34. The serious risk relied upon by Crystallex has significantly narrowed over time. While it used to argue that disclosure of its cash flows could imperil any further recoveries from Venezuela, [redacted] This is not a "serious risk" at all. Importantly, there is no suggestion that Crystallex would lose the ability to take whatever step it was planning, or that its right to a fair and impartial determination in respect of the matter would be undermined.

October Fung Affidavit at para. 124, Crystallex MR, Tab 2, pp. 59-61 (PDF 66-68); Crystallex Factum dated September 3, 2021 at paras. 30-31

35. Consistent with its approach of using secrecy to avoid a fair determination on the merits, by the time of Mr. Fung's cross-examination, Crystallex had not yet provided the current cash flows it is moving to seal. Using the unredacted cash flows from the prior 36th Report provided to counsel the Noteholders (though still not the Noteholders themselves), Mr. Fung was cross-examined on what really could be gleaned from them. It turned out that although Mr. Fung had made generic comments about secret steps Crystallex was preparing that would be revealed if the Court does not make the requested sealing order, he could not identify anything of substance that could actually be learned. The disbursements associated with any secret steps were so mixed in with other expenses that they are not discernable to the reader. [redacted]

November Fung Cross, pp. 95-96 (Q 453), p. 98 (Q 461), p. 101 (Q 471-472), Second Transcript Brief, Tab 1, pp. 101-102, 104 and 107

36. Such speculation cannot be a "serious risk to an important public interest" justifying a sealing order. The cash flow information that Crystallex seeks to seal (whether at the line item or aggregate level, and whether under Crystallex's old cash flow template or its new one) is highly aggregated, meaning that readers can only garner high level information. As Mr. Fung confirmed on cross-examination, [redacted]

[redacted]

November Fung Cross at p. 94 (Q444-448), Second Transcript Brief, Tab 1, p. 100

37. The actual cash flow reporting and forecast appended to the 38th Report prove this point entirely. Venezuela could not possibly obtain an advantage from knowing Crystallex [redacted] Nor has Crystallex adduced any evidence in this regard. Similarly, [redacted]

38th Report, Confidential Appendices "D" and "E"

38. Crystallex's own conduct also establishes there is no serious risk as relates to disclosure of its actual cash flow reporting (which, as Mr. Fung acknowledged on cross-examination, is already several months stale when it is disclosed given the lag inherent in producing cash flow reporting, and because disbursements reflected in the actual cash flows relate to work performed at least one to two months earlier given the usual billing and payment cycle). Specifically, on September 28, 2021, Crystallex's counsel advised counsel to the Noteholders in writing that Crystallex's actual cash-flow reconciliation for the period April 2021 through October 2021 would be publicly disclosed on this motion, albeit with the line items and explanatory notes still redacted. Crystallex has since reneged on this commitment, and once again redacted the entirety of its cash flow reconciliation. Crystallex has not sought to explain or justify this changed position (either in substance or as a slip). That Crystallex has flip-flopped on public disclosure of its current aggregate cash flow reporting without explanation undermines its evidence of alleged serious risk.

November Fung Cross, pp. 56-58 and 85 (Q235-Q244 and Q398-399), Second Transcript Brief, Tab 1, pp. 62-64 and 91;
October Reid Affidavit at paras. 26-27 and Ex. "B", Noteholder RMR at Tab 1, pp. 15 and 58 -59

39. There is also scant evidence of any increased ***marginal risk*** from disclosure of the cash flow reporting or forecasts. One thing Crystallex and the Noteholders agree on is that Venezuela is a recalcitrant debtor who has vigorously defended and sought to obstruct Crystallex's enforcement efforts, and will continue to do so to try and protect CITGO at all costs. [redacted]

Affidavit of Robert Fung sworn May 21, 2021, at para. 23-32 and 36, Crystallex Motion Record dated June 21, 2021, pp. 16-20 and p. 29;
October Fung Affidavit at paras. 49 and 124, Crystallex MR, pp. 29, 59-61 (PDF 36 and 66-68)

(c) Crystallex has not met the proportionality prerequisite of *Sherman Estate*

40. The Noteholders submit that it is not necessary for the Court to consider the proportionality prerequisite for a sealing order because neither of the "important public interest" nor the "serious risk" prerequisites are met. However, for completeness, the Noteholders provide submissions about why Crystallex has also not met the proportionality prerequisite.

41. The third part of the *Sherman Estate* test requires the party resisting disclosure to establish that "as a matter of proportionality, the benefits of the [sealing] order outweigh its negative effects." In *Sherman Estate*, the Supreme Court reviewed the general negative effects of a sealing order, including the impingement on "maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately their legitimacy." These effects are particularly important in CCAA proceedings, because, like in class actions, they serve "public purposes that go beyond the immediate interests of the

parties." Gascon J.S.C. (as he then was) emphasized "…the benefits that the [CCAA] gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders." In exchange for the benefits of CCAA protection, the debtor discloses information to its creditors that might otherwise remain confidential were a company not in CCAA. Crystallex cannot have it both ways: it can either exit these proceedings after nearly a decade, obviating the need for CCAA disclosure, or it can provide proper public disclosure to its creditors.

> *Sherman Estate* at para. 39, BOA, Tab 2
> *Re Mecachrome Canada Inc.*, 2009 QCCS 6355 at para. 48, BOA, Tab 1
> *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789 at para. 51, BOA, Tab 4
> *Prendiville v. 407 International Inc.*, 2002 CarswellOnt 2174 (Ont. Sup. Ct.) at paras. 12 and 13, BOA, Tab 5

42. In this CCAA proceeding, where four of the five directors of Crystallex have an interest in the CVRs, and the independent director who is exclusively charged with conducting these CCAA proceedings in fact only makes decisions as part of the full board, for there to be confidence in and understanding of Crystallex's choices, creditors and the public need to be able to see the cash flow information.

> Fung Cross, p. 32-33 (Q101-Q107); p. 60-61 (Q207-Q208); p. 124 (Q448-Q449); p. 144 (Q515); and p. 152-153 (Q560), Transcript Brief, Tab 1, pp. 39-40, 67-68, 131-132, 151 and 159-160

43. The Divisional Court recently observed that arguments in favour of sealing that are based on erring on the side of caution have been consistently rejected by the courts. The jurisprudence does not permit sealing orders out of an abundance of caution, but only where they are necessary. While no doubt it would be ultra-cautious for Crystallex's insiders to withhold nearly all information from the public, a similar allegation could be made by virtually any CCAA debtor, *i.e.*, that operating in a black box reduces risks to a restructuring.

> *Turner v. Death Investigation Council et al.*, 2021 ONSC 6625 (CanLII) (Div. Ct.) at paras. 48 and 49, BOA, Tab 6

44. The abundance of caution approach and ignoring what Gascon J.S.C. called a CCAA debtor's obligations of "fairness, transparency and openness" is reflected in a statement Mr. Fung volunteered to the effect that Crystallex's entire focus is on protecting its enforcement effort, seeing it as his ***only*** duty, with no weight at all on Crystallex's disclosure obligations to creditors:

> … The reason I'm doing that is because ***my fiduciary responsibility is to protect the asset as best I can***, and ***the asset before me is the enforcement proceedings***. And what I'm doing is I am acting in the best interest of the corporation at large. [emphasis added]
>
> Fung Cross, p. 144 (Q515), Transcript Brief, Tab 1, p. 151

45. On cross-examination, Mr. Fung conceded that it was "reasonable" for the Noteholders to want details regarding Crystallex's cash burn and largest expenses—Crystallex just gives no weight whatsoever to this reasonable desire (and entitlement). It only cares about "protecting the asset."

> Fung Cross, p. 155-157 (Q574-583), p. 161-162 (Q597-Q603), 163-166 (Q609-Q618), p. 86-87 (Q304-Q306), p. 157 (Q584), p. 168 (Q632-Q635) and 177-178 (Q665-Q672), Transcript Brief, Tab 1, pp. 162-164, 168-173, 92-94, 175-176 and 184-185

46. By comparison, Mr. Reid's uncontested evidence is that it is critical for the Noteholders to have access to timely and fair financial disclosure from Crystallex so they are prepared to address any eventualities that may arise, have the ability to proactively seek to advance the case should they elect, and have reasonable insight into how much and on what Crystallex has been and expects to spend money so they can exercise some degree of oversight, raise questions and, as necessary, seek to intervene ***before*** the money has already been spent. Mr. Reid's evidence also highlights the risks of delayed and/or partial disclosure of information to creditors: it can lead to creditors being mislead. By way of concrete example, Mr. Reid only recently came to learn that Crystallex's actual cash burn over the last several years is a full 50% higher than the estimate he had previously made based on the prior limited public information made available to him in February 2021. This was because Mr. Reid only had access to a narrow range of stale cash flow information, and no disclosure of how much cash Crystallex had received from Venezuela to begin with. Crystallex's proposed delayed disclosure regime would create a similar set of circumstances going forward by depriving the Noteholders of access to current information, making them entirely reliant on assumptions based on stale data that does not reflect Crystallex's current reality.

> October Reid Affidavit at paras. 34-43, Noteholder RMR at Tab 1, pp. 18-22

47. In the circumstances of an unresolved, decade old and ever-evolving case where the debtor has been and continues to spend millions of dollars a month that has not been adequately accounted for, where the DIP lender (which also holds two board seats) recently purported to declare an event of default, and where

significant governance concerns have been raised and remain unaddressed, the negative effects of sealing on the Noteholders and the fairness of the CCAA process outweigh any alleged benefit to Crystallex.

(iii) Subsection 10(3) of the CCAA is not applicable

48. Crystallex states that its cash flows ought to be sealed pursuant to ss. 10(3) of the CCAA. Notably, the "cash-flow statement" that is the object of ss. 10(3) in the CCAA is restricted to ***forecasts only***, and only those filed on a CCAA initial application:

> **cash-flow statement**, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's ***projected*** cash flow; [Emphasis added.]
>
> CCAA, s. 2(1)
>
> **Documents that must accompany initial application**
>
> 10 (2) An initial application must be accompanied by
>
> (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company; […]
>
> CCAA, s. 10(2)(a)

49. Accordingly, ss. 10(3) has no applicability to the cash flows at issue on these motions, and even were it taken to apply outside the context of a CCAA initial application, it would only be relevant to Crystallex's cash flow forecasts, and not the actual cash flow results and reconciliations that Crystallex also seeks to seal.

50. Crystallex cites no authority for its novel argument that a debtor seeking the protection of ss. 10(3) is not required to meet the common law *Sherman Estate* test for a sealing order. Indeed, Crystallex cites authority from the Quebec Superior Court of Justice (Commercial Division) in *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764 (CanLII) that stands for the proposition that ss. 10(3) "is merely a codification of *Sierra Club*." While Crystallex alleges that *White Birch* reaches this conclusion without analysis, the case in fact quotes from and relies on the *2010 Annotated Bankruptcy and Insolvency Act* of Houlden, Morawetz and Sarra. Further, in rejecting Crystallex's request for a blanket sealing order in respect of its cash flows last summer, Justice Hainey did not draw a distinction between the common law sealing test and ss. 10(3), referencing them both in his reasons and then applying the common law test to reach his decision.

Crystallex Factum at para. 29, p. 14, PDF p. 19, citing *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764 (Comm. Div.) [*White Birch*] at para. 84 and para. 81, BOA, Tab 7;
Crystallex International Corporation (Re), 2020 ONSC 3434 (CanLII) at paras. 11-16 (leave to appeal denied, *Crystallex International Corporation (Re)*, 2021 ONCA 87)

51. The fact that the leading insolvency text and prior decisions of both this Court and the Quebec Superior Court contradicts Crystallex's interpretation and proposed application of ss. 10(3), and not a single CCAA court in the many years since ss. 10(3) was enacted has even dealt with Crystallex's novel argument, is a persuasive indication of Crystallex's misreading.

52. Finally, there is nothing in the words of ss. 10(3) that militate in favour of the "balancing of undue prejudices" and "private interests" test that Crystallex now proposes. Rather, ss. 10(3) calls for a determination that two prerequisites to a publication ban are met: (a) the release of a cash-flow statement ***would*** unduly prejudice the debtor company; ***and*** (b) the making of the publication ban order ***would not*** unduly prejudice the debtor company's creditors. The text of the legislation does not call for any balancing. If a Court were to find that either prerequisite was not satisfied, an order under ss. 10(3) could not issue. In this case, neither prerequisite is satisfied, for the same reasons described above in the context of the *Sherman Estate* test.

Crystallex Factum at para. 30, p. 15 (PDF 20)

(iv) The Crystallex Mirage: a confidentiality agreement as an antidote to the Noteholders objection to sealing

53. The availability of information under a theoretical NDA is simply not germane to the Court's consideration of the first two parts of the *Sherman Estate* test, and cannot be relied on to justify sealing at the proportionality stage where there is clear evidence that the type of NDA Crystallex wants can never be agreed to by the Noteholders.[6]

[6] The Monitor's statement, at paragraph 54 of the 38th Report, that NDAs are often used to deal with "sensitive" information in CCAA cases misses the point completely: the cash flow information the Noteholders seek access to is not the type of sensitive information, such as detailed business plans or bids received during a sale process, that creditors may elect to sign short-term NDAs to access. To the contrary, the information that Crystallex seeks to seal is the core ongoing financial disclosure required to be provided by the debtor in every CCAA case, which the Noteholders firmly believe is not "sensitive" in any way. When the Noteholders posed a written question to the Monitor on whether it had ever been involved in a case where cash flow information

54. The record is clear as to what the sticking point is on an NDA: the Noteholders believe they cannot agree to an NDA that does not include a near-term date on which all MNPI disclosed under the NDA will become public (known as a "blow-out" or "cleansing" date). When on cross-examination, Crystallex's counsel sought to suggest to Mr. Reid that disclosing cash flow information on a six month lag was tantamount to Crystallex addressing the Noteholders blow-out concern, Mr. Reid rejected this suggestion, stating that six months is "way too long" to potentially be in receipt of MNPI (for the reasons described below) and his view remained that "…this cash flow statement, with all of the detail that's provided to the court, should be a public document."

> Fung Cross p. 146-152 (Q522-559), p. 155 (Q569-570) and p. 170 (Q637), Transcript Brief, Tab 1, pp. 153-159, 162 and 177; November Reid Cross at p. 80 (Q 309), Second Transcript Brief, Tab 2, p. 359

55. Mr. Reid's rationale for why he cannot agree to an NDA without a near term blow-out date is not, as Crystallex and Tenor have suggested, a self-interested desire to maintain flexibility to trade in the Notes for profit. To the contrary, Mr. Reid's funds, Stornoway and Ravensource, have been invested in the Notes for nearly a decade, and Mr. Reid has been a committed member of the Noteholder Committee since very early on in this case. Rather, as Mr. Reid explained, being in receipt of MNPI under a confidentiality agreement is inconsistent with Stornoway's obligations and duties to its funds' investors, including as it could potentially impair Stornoway's ability to meet investor redemption requests, manage its portfolio and satisfy ongoing regulatory requirements. The "option" of receiving information under an NDA without a near-term blow out is a Hobson's choice for the Noteholders that Crystallex knows will never be acceptable.

> First Reid Affidavit at paras. 3 and 77-82, RCMR, Tab 2, pp. 18 and 36-37; Reid Cross, p. 49-51 (Q188-Q189) p. 156-157 (Q589-Q590), p. 222-224 (Q826-Q830), Transcript Brief, Tab 2, pp. 481-482, 588-589, 654-656;
> October Reid Affidavit at para. 17(i), Noteholder RMR, Tab 1, p. 12

[redacted]

56. Crystallex has also sought to redact an important factual update that the Monitor—but not Crystallex—felt was necessary to disclose to the Court. Namely, on October 12, 2021, Crystallex sent the

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was sealed where creditors opposed sealing and were not involved in litigation against the debtor, the Monitor refused to answer the question. (See: Noteholder Document Brief dated October 6, 2021, Tab 3, p. 102, Answer 25.)

[redacted] In addition to being another example of the fluidity of Crystallex's circumstances, [redacted] Crystallex has led absolutely no evidence in support of sealing this important development, which is one that not only implicates what may unfold in negotiations over the coming months, but also Crystallex's expenditures. And its failure to do so cannot be explained away as a timing issue: Mr. Fung's latest affidavit was delivered nearly two weeks [redacted] In the circumstances, there is simply no credible basis to justify Crystallex's attempt to keep this important development hidden from its stakeholders. Its attempt to do should be refused.

> Monitor's 38th Report at para. 13; October Fung Affidavit at Exhibit M (OFAC Letter dated September 10, 2021), Crystallex MR, Tab 2, p. 342 (PDF 348)

B. Crystallex should not be permitted to unilaterally revise its cash flow reporting template

57. Crystallex has also unilaterally modified the cash flow template it has used for years to reduce the disclosure it provides to the Court and stakeholders, both by further aggregating what were already highly aggregated line items and by aggregating its reporting period from monthly increments to six-month increments. The Noteholders were not consulted on this decision, and on cross-examination, Mr. Fung refused to disclose what, if any, feedback Crystallex received from the Monitor about these changes.

> November Fung Cross, p. 60 (Q255), Second Transcript Brief, Tab 1, p. 66

58. The Noteholders have concluded that, along with delaying the release of information, this change is what Crystallex's motion is all about. It seeks to reduce financial disclosure going forward to meaningless aggregations that prevent the Noteholders (and the Court) from having any insight into Crystallex's spending, impairing their ability to ask questions or raise potential concerns. Such an approach ought not to be

countenanced and Crystallex should be required to continue reporting its financial information in the same format it has used throughout this proceeding.

59. The Canadian Association of Insolvency and Restructuring Professionals Standards of Professional Excellence (the "**CAIRP Standards**"), which regulates the conduct of the Monitor, provides that a cash flow statement produced in respect of a CCAA debtor "is to provide information that is relevant and transparent" and that "the line items that are disclosed will depend on the components of the operations that are ***significant to the enterprise, with a view to providing information that is not aggregated to the point of being meaningless***." [emphasis added] Mr. Fung agreed on cross-examination that the line items that Crystallex intends to remove from its from its reporting—payroll and benefits, administration, insurance, arbitration, and CCAA costs—are significant to Crystallex's finances, not meaningless. As such, they ought to be reported to the Court and stakeholders.

> CAIRP Standards at s. 9.8.20, Exhibit BB3 to the November Fung Cross, Second Transcript Brief, Tab 1.1.BB, p. 271;
> November Fung Cross at p. 122-123 (Q576-579) and p. 125 (Q594), Second Transcript Brief, Tab 1, pp. 128-129

60. The Monitor has not explained in its 38th Report its views on Crystallex's new cash flow template, including as relates to the CAIRP Standards. And because Crystallex kept the new template and its substance secret from even counsel until only a few days ago, this Court is in the unfortunate position of not having the benefit of the new cash flows being tested through cross-examination. Such gamesmanship is antithetical to a fair determination of Crystallex's motion on the merits and should not be rewarded by the Court.

> November Fung Cross at p. 31 (Q97-101), p. 32 (Q105-106), p. 35 (Q115-117), Second Transcript Brief, Tab 1, pp. 37-38 and 41

C. A twelve-month stay extension is not appropriate

61. Crystallex urges this court to extend the CCAA stay of proceedings for an unprecedented twelve-month period in order to reduce CCAA costs on the basis that nothing is expected to occur in the U.S. litigation until later in 2022, notwithstanding Crystallex's own evidence that in light of the "fluid situation in Venezuela … changed circumstances are thus inevitable" and Mr. Fung's repeated statements on cross-examinations that circumstances in Venezuela and United States are changing on a "daily basis".

October Fung Affidavit at paras 62-63 and 88, Crystallex MR, Tab 2, pp. 34 and 42-45 (PDF 41 and 49-52);
November Fung Cross at p. 23-24 (Q66-67), Second Transcript Brief, Tab 1, pp. 29-30

62. A twelve-month stay extension would be extraordinary in an unresolved and contested CCAA proceeding, and Crystallex has cited no authority for its assertion that it should be allowed here (other than the fact that the stay in this case was once extended for a longer period *on consent of the parties*). At present, given the lack of consensus among stakeholders, Crystallex's governance structure and unaddressed conflicts of interest, the significant sums being spent by Crystallex, and the ever-evolving situation in the U.S. and Venezuela, a three-month stay extension should be ordered to ensure that Crystallex is justifying a continuing entitlement to CCAA protection and reporting to the Court and its stakeholders every three months.

PART IV. ORDER REQUESTED

63. The Noteholders respectfully request that this Court dismiss Crystallex's motions to seal the cash flow reporting and forecasts in the 35th, 36th and 38th Monitor's Reports [redacted] order that the CCAA stay be extended for a three-month period, and direct Crystallex and the Monitor to deliver a public version of Crystallex's current cash flow reporting and forecast using the same template utilized in the 36th Report. The Noteholders also respectfully request that the Court unseal the CVR Information, and direct the Monitor to post a version of the affidavit containing the unredacted CVR Information on the Monitor's website.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 15, 2021

/s/ Goodmans LLP
Goodmans LLP

SCHEDULE A

LIST OF AUTHORITIES

1. *Re Mecachrome Canada Inc.*, 2009 QCCS 6355
2. *Sherman Estate v. Donovan*, 2021 SCC 25
3. *Cash Store Financial Services Inc.*, 2021 ONSC 7143
4. *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 789
5. *Prendiville v. 407 International Inc.*, 2002 CarswellOnt 2174 (Ont. Sup. Ct. J.)
6. *Turner v. Death Investigation Council et al.*, 2021 ONSC 6625
7. *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764 (Comm. Div.)
8. *Crystallex International Corporation (Re)*, 2020 ONSC 3434, leave to appeal refused, *Crystallex International Corporation (Re)*, 2021 ONCA 87

SCHEDULE B

TEXT OF RELEVANT STATUTES AND REGULATIONS

Courts of Justice Act, R.S.O. 1990, c. C.43

Documents public
137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents
(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public
(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies
(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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

Definitions
2 (1) In this Act,
…
cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (état de l'évolution de l'encaisse)

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
(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.

SCHEDULE C

EXCERPTS FROM PRIOR FACTUMS RE: UNSEALING CVR INFORMATION

[ATTACHED]

EXCERPTS FROM NOTEHOLDERS PRIOR FACTUMS ON UNSEALING OF CVR INFORMATION

NOTEHOLDERS' FACTUM DATED SEPTEMBER 3, 2021

1. The Noteholders[1] seek by cross-motion (the "**Noteholder Cross-Motion**") that the Court: (i) unseal in the Court record the issuer(s), type of debt (e.g. bond, promissory note or other) and 2018 market value (at time of receipt by Crystallex) of the securities Venezuela provided to Crystallex pursuant to a 2018 settlement agreement (the "**Securities Information**") and the quantum of CVRs held by Crystallex's two management directors (a form of economic interest described below) (the "**CVR Information**"); and (ii) require the disclosure of the engagement terms of two key advisors to Crystallex (the "**Advisor Engagement Terms**").[2] Certain other information sought in the Noteholders' notice of cross-motion has since been received by the Noteholders and, therefore, no relief on those points is required.

[…]

5. With respect to the Securities Information and CVR Information, Crystallex has not met the Supreme Court of Canada's test for sealing, recently recast in *Sherman Estate v. Donovan*. In summary:

(a) there is no "important public interest" in sealing the Securities Information;

---

[1] The "**Noteholders**" are, together, Computershare Trust Company of Canada in its capacity as trustee for the holders of Crystallex International Corporation ("**Crystallex**") 9.375% Senior Notes due December 23, 2011 (the "**Trustee**") and the Ad Hoc Committee of Beneficial Holders of the Senior Notes (the "**Noteholder Committee**").

[2] The Securities Information is in the 31st Report of the Monitor dated May 1, 2019, paras. 24 and 54, and the CVR Information is in the Affidavit of Harry Near sworn December 15, 2014, para. 47.

(b) there is no "serious risk" caused by both sets of information being unsealed because the risk is already present, *i.e.*, there is no marginal increased risk caused by unsealing the information; and

(c) the benefits of a sealing order do not outweigh its negative effects, a balancing to which Crystallex has not apparently even turned its mind.

[…]

10. The charges granted in the CCAA proceedings establish the relative priorities of the parties:

(a) The DIP Charge, which secures the DIP obligations (*e.g.*, principal and interest), excluding the CVRs;

(b) The Prefiling Unsecured Creditors' Charge, which secures the claims of pre-filing creditors, including the Noteholders' Court-approved irrevocable claim of approximately $188 million as at December 31, 2015, that, with ongoing interest and expense reimbursement entitlements, the Noteholders calculate to be in excess of $314 million as at May 2021; and

(c) The Lender Additional Compensation Charge, which secures the CVRs held by the DIP lender, Tenor (which has appointed two of Crystallex's five directors), and Crystallex's two management directors. The CVRs are an entitlement to the net proceeds of the Award, if any, calculated based on (i) the amount of Award proceeds recovered from Venezuela, and (ii) the amounts necessary to repay the DIP principal and interest, the Noteholders and Crystallex's other creditors and certain other specified priority obligations in full, with Tenor and the management

directors being entitled to 88.24% of any net proceeds remaining following payment in full of the amounts specified in (ii).

Affidavit of Scott Reid sworn May 28, 2021 ("**First Reid Affidavit**") at para. 15, Responding and Cross Motion Record of the Noteholders ("**RCMR**"), Tab 2, p. 22; CCAA Financing Order dated April 16, 2012, para. 17;
Letter from counsel to Crystallex dated July 9, 2021, Exhibit E to the Fung Cross, Confidential Transcript Brief, Tab I.E, p. 346

11. In other words, Tenor and the two management directors benefit under the CVRs to the extent Crystallex collects more from Venezuela than is required to satisfy the obligations in priority to the CVRs, incentivizing them to (among other things) attempt to reduce the amount payable to the Noteholders and other creditors. The Noteholders believe that Crystallex's directors' interest in the CVRs create a significant conflict of interest in many aspects of the case.

[…]

PART III – ISSUES AND THE LAW

24. The issues to be determined on the Noteholder Cross-Motion are:

(a) Should the Securities Information and the CVR Information continue to be sealed by this Court? **The answer to this question is no. Crystallex has not satisfied the *Sherman Estate* test for sealing this information.**

[…]

A. The Securities Information and CVR Information Should Not Be Sealed

25. The leading authority about the open courts principle and sealing records from public view is the recent unanimous Supreme Court of Canada decision in *Sherman Estate v. Donovan*. In that decision, the Supreme Court repeatedly emphasized that there "is a strong presumption in favour of open courts", using a variety of strong language.

Sherman Estate v. Donovan, 2021 SCC 25 [*Sherman Estate*] at paras. 2, 30, 37, 39 and 63, Noteholders' Book of Authorities ("**BOA**"), Tab 1

26. Crystallex has the burden of meeting the *Sherman Estate* test for sealing court records:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish 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.
>
> *Sherman Estate* at para. 38, BOA, Tab 1

[…]

31. The interest Crystallex seeks to protect by sealing the CVR Information is the personal safety of the two management directors of Crystallex holding CVRs, Messrs. Fung and Oppenheimer, were they to travel to Venezuela. The Noteholders agree protecting individuals from violence outside Canada is an important public interest, although, as explained below, there is absolutely no evidence that disclosure of the CVR Information would cause or exacerbate this risk.

[…]

39. As relates to the CVR Information, while protecting Messrs. Fung's and Oppenheimer's safety is a serious matter, there is no evidence of any increased marginal risk to them as a result of disclosing their individual CVR interests. Venezuela is a dangerous country for ***any*** foreign national to visit (the U.S. Department of State flatly recommends that no one should travel to Venezuela). [redacted] It is pure speculation that making public the ***amount*** of management's CVRs (that they hold CVRs is already public), would ***increase*** the

physical risk in Venezuela for people already known to be litigating against Venezuela. This analysis and conclusion is analogous to the Supreme Court's personal security analysis in *Sherman Estate*: physical harm is a grave matter, but based on the speculative evidence it was not a proper inference that there was an objective serious risk of harm to the beneficiaries of the Sherman estate as a result of unsealing the Court file.

> Fung Responding Affidavit, para. 16(b), Crystallex Responding Motion Record dated July 9, 2021, Tab 1, p. 8 (PDF p. 15); Fung Cross, p. 120 (Q431-432) and p. 121-122 (Q436-438), Transcript Brief, Tab 1, pp. 127-129
>
> *Sherman Estate* at para. 99, BOA, Tab 1

[…]

42. In this CCAA proceeding, where one of Crystallex's three assets is the securities, four of the five directors of Crystallex have an interest in the CVRs, and the independent director who is exclusively charged with conducting these CCAA proceedings in fact only makes decisions as part of the full board, for there to be stakeholder confidence in and understanding of Crystallex's choices, the public needs to be able to see the Securities Information and CVR Information for the reasons that follow.

> Fung Cross, p. 32-33 (Q101-Q107); p. 60-61 (Q207-Q208); p. 124 (Q448-Q449); p. 144 (Q515); and p. 152-153 (Q560), Transcript Brief, Tab 1, pp. 39-40, 67-68, 131-132, 151 and 159-160

43. The CVR Information has been under seal for more than seven years, and goes to the heart of the management directors' interest in the CVRs and resulting governance/conflict issues. The Securities Information and CVR Information are factual details reported to the Court by Crystallex or the Monitor, presumably because they are important points of information. Sealing this information from the public, including from all stakeholders, is an extraordinary measure that undermines the CCAA regime by leaving non-insiders without an opportunity to fully evaluate

and protect their interests and take fully informed positions on matters that come before the Court, or which they may wish to bring to the Court.

> *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 78, BOA, Tab 8

[…]

46. As relates to the Noteholders' interest in understanding the extent of management's interest in the CVRs, on cross-examination, Mr. Reid explained its importance to understanding and assessing the extent of the resulting conflict:

> Q. And the extent to which they have CVR is, you know -- I suggest to you that from the standpoint of any allegation of conflict of interest it's the fact of holding CVR that's important and not the precise percentage?
>
> A. I could not disagree with you more. In a management information circular where they disclose everybody's ownerships who are directors and officers, et cetera, they don't have an amount of your economic interest as a "yes" or "no". I mean I think it's pretty settled in the investment committee it's not sufficient to just say somebody has a stake. Because, as I'm sure you'll agree with me, owning one share of a company is very different than owning a million shares of a company. And it is to do with the materialness whether it comes in to conflict -- if it is a conflict or not and the materialness of the conflict. I think that's pretty settled in Canada. I didn't think this was -- I hope we do not go back to a "yes" or "no" world where directors and officers are not reporting their holdings.
>
> Reid Cross, p. 220-221 (Q819-Q820), Transcript Brief, Tab 2, pp. 653-654

47. This point is particularly important since Mr. Fung disclosed that Crystallex's decision to seek to seal information is not being made by the independent director who is exclusively charged with the conduct of the CCAA proceedings, but rather by the entire, conflicted, Crystallex board:

> Q. I'm asking you if Mr. Marchi expressly authorized the Crystallex sealing motion that's going to be heard in October?
> A. Yes.
> Q. And you had a conversation about -- with him about that topic?
> A. Mr. Marchi was present in conversations when we discussed the document.
> Q. Okay. And was it his decision to make the motion?
> A. It was the Board's decision to make the motion.

> Q. Okay. Now, let's turn to the Noteholders' cross-motion that's also being heard in October. Did Mr. Marchi expressly authorize Crystallex opposing that motion by the Noteholders?
> …
> A. Yes, Mr. Marchi is aware of it. Mr. Marchi, as a member of the Board, has essentially agreed with it.
>
> Fung Responding Affidavit, para. 11, Responding Motion Record of Crystallex dated July 12, 2021, Tab 1, p. 6 (PDF p. 15); Fung Cross, p. 32-33 (Q101-Q107); p. 60-61 (Q207-Q208); p. 124 (Q448-Q449); p. 144 (Q515); and p. 152-153 (Q560), Transcript Brief, Tab 1, pp. 39-40, 67-68, 131-132, 151 and 159-160

48. Another factor in the proportionality analysis is that Crystallex was and is a reporting issuer under securities law with an obligation to publically disclose to its security holders the very information it continues to seek to keep private, for the good reason that the public should be informed of material matters of a company that issued publicly traded securities such as the Notes.

> OSC Reporting Issuer List as of May 28, 2021, Exhibit F to the First Reid Affidavit, RCMR, Tab F, p. 120

[…]

PART IV – ORDER REQUESTED

57. The Noteholders respectfully request that this Court unseal the Securities Information and the CVR Information, with the Monitor to reissue on the public record its reports containing this unredacted information, and order the public disclosure of the Advisor Engagement Terms.

NOTEHOLDERS' REPLY FACTUM DATED OCTOBER 5, 2021

PART I – OVERVIEW

1. After service of the Noteholders' Moving Factum, there were various developments, described below, the result of which is that virtually all of the outstanding information sought on the Noteholder Cross-Motion has now been publicly disclosed. As such, the single remaining dispute on the Noteholder Cross-Motion relates to unsealing of the CVR Information, *i.e.*, the

percentage of CVRs given to two of Crystallex's directors and senior officers in 2014 in order to incentivize them to remain with Crystallex.[3]

[…]

5. With respect to the CVR Information, since Crystallex cannot justify continued sealing under *Sherman Estate*, it has advanced two arguments in response:

(a) Crystallex contends that the Noteholders are somehow collaterally attacking Justice Newbould's 2014 sealing order, and that the onus lies on the Noteholders to demonstrate a material changed circumstance to lift sealing. In making this argument Crystallex ignores (and does not even bring to the Court's attention) the provision of the 2014 sealing order that provides ***nothing in the order would prejudice any party's rights to modify the sealing of the CVR Information or assert that the CVR Information is not confidential***. While the onus for sealing appropriately remains on Crystallex as a result, the record does, in any event, demonstrate material changed circumstances, including the passage of seven years in an unresolved CCAA case where the Noteholders have lost all confidence that Crystallex and its management will consider their interests, in part because of the conflicts arising from management's unspecified interest in the CVRs.

(b) Second, Crystallex relies on the sealing of individual key employee retention plan ("**KERP**") entitlements in support of its position. However, unlike in all the KERP sealing cases Crystallex points to, not even the ***aggregate*** CVR entitlements of

[3] Capitalized terms used herein and not otherwise defined have the meaning given to them in the Noteholders' factum dated September 3, 2021, delivered in support of their cross-motion brought May 28, 2021 (the "**Noteholders' Moving Factum**").

management have been publicly disclosed to date. Moreover, as senior officers and directors of a public reporting issuer, Messrs. Fung's and Oppenheimer's compensation and interests in Crystallex are required to be disclosed under securities law, and were in fact disclosed until Crystallex ceased to comply with its public reporting obligations. Management can have no reasonable expectation of privacy with respect to the CVR Information, and there is no public interest in protecting information that is required to be disclosed by securities laws.

6. For these and the other reasons detailed below and in the Noteholders' Moving Factum, the Noteholders respectfully request that the Court unseal the CVR Information so that stakeholders will have a complete understanding of the extent of the management's interest in the CVRs and be able to make an informed assessment of the resulting conflict and governance implications.

PART II – SUMMARY OF THE FACTS

7. The Noteholders rely upon the facts as set out in paragraphs 9 to 23 of the Noteholders' Moving Factum. The following facts are also pertinent to the Noteholders' reply to Crystallex's and Tenor's responding submissions.

A. Crystallex is a reporting issuer under securities law

8. The Notes were issued on a public basis pursuant to a prospectus. Crystallex remains a reporting issuer under securities law, but has been noted in default by the Ontario Securities Commission as a result of its failure to make required filings and pay certain fees.

> First Reid Affidavit at paras. 70 – 72 and Exhibit "F" (Ontario Securities Commission's Reporting Issuers List), Noteholders' Responding and Cross Motion Record, Tab 2, pp. 34-35

9. Pursuant to its continuous disclosure obligations, Crystallex made regular public disclosures, such as filing interim and annual financial statements and related management discussion and analysis. Included in Crystallex's securities filings were detailed disclosures regarding the compensation, incentives and securities holdings of Crystallex's senior officers and directors. For instance, Crystallex's May 11, 2011, Management Information Circular disclosed that Mr. Fung's total compensation was $1,031,043 in 2010, and provided specific details of his salary, stock options and other non-equity based incentive plan entitlements, as well the fact that he held 19,500 shares in Crystallex. Similar disclosures were made regarding Mr. Oppenheimer. Crystallex's securities filings initially continued following the commencement of the CCAA proceedings, but ceased in and around August 2013.

> First Reid Affidavit at paras. 71, Noteholders' Responding and Cross Motion Record, Tab 2, pp. 34-35
> Crystallex Management Information Circular dated May 11, 2011 at pp. 4, 5 and 12-17, Noteholders Document Brief dated October 5, 2021, Tab 1

B. The CVR Information

10. In December 2014, Crystallex sought approval of further DIP financing that saw Tenor's interest in the CVRs increase to over 88% (inclusive of the amount it agreed to transfer to Messrs. Fung and Oppenheimer), leaving Crystallex with only a 11.758% interest in any net arbitration proceeds (being the proceeds of the Award remaining, if any, following repayment in full of priority obligations, including amounts owing to the Noteholders and other creditors). However, as a result of the "Override" provision of the DIP (and a related provision of this Court's Stay Extension and Standstill Order dated June 5, 2013), the entitlements of the CVR holders are calculated based on an artificially increased "deemed" amount of net arbitration proceeds, thereby further reducing (and likely eliminating) any entitlement of Crystallex to the net arbitration proceeds, and, by extension, any interest of its shareholders. As a result of the Noteholder Cross-

Motion, the public record now discloses that Tenor and Messrs. Fung and Oppenheimer are collectively entitled to over 88% of the CVRs. However, in light of the Override, they may in fact be entitled to 100% of any actual net arbitration proceeds. Consistent with this, the Monitor has reported its view that any recovery for Crystallex's shareholders is "uncertain".

> Stay Extension and Standstill Order dated June 5, 2013, Exhibit H to the First Reid Affidavit, Noteholders' Responding and Cross-Motion Record, Tab 2.H, p. 197

11. The KERP Crystallex sought and received approval of at the outset of the case is referred to as the management incentive plan ("**MIP**"). Like the CVRs, the MIP represents a potential percentage entitlement to any net arbitration proceeds, based on a sliding scale. However, unlike the CVRs, the MIP is capped at 25% of the amount that is available to Crystallex's shareholders after payment of the CVRs. In light of the fact that the CVRs are highly (if not entirely) dilutive of shareholder interests as described in the preceding paragraph, the MIP is likely worthless. In light of this, Messrs. Fung and Oppenheimer negotiated a separate arrangement with Crystallex and Tenor pursuant to which Tenor agreed to transfer a portion of its CVR entitlements to them.

> Affidavit of Harry Near sworn December 15, 2014 ("**Near Affidavit**") at paras. 9, 10, 42 and 52-56
> Stay Extension and Standstill Order dated June 5, 2013 at para. 25, Exhibit "H" to the First Reid Affidavit, Noteholders' Responding and Cross Motion Record, Tab 2.H, p. 208
> Monitor's 33rd Report dated April 30, 2020 at para. 17

C. Justice Newbould's December 2014 Order

12. In December 2014, Justice Newbould sealed the CVR Information. The CVR Information was a subset of Crystallex's wider sealing request to seal all materials marked "Confidential" that it had filed on its December 2014 motion, most notably the terms of the proposed additional DIP financing that saw Tenor's interest in the CVR's increase to over 88% as described above.

13. Crystallex, however, has failed to aver the Court to a critical provision of Justice Newbould's order sealing the CVR Information that entirely undermines its arguments on onus:

> 7. THIS COURT ORDERS that all materials filed in connection with this motion that have been labeled as "Confidential" (the "Sealed Materials") shall be sealed and not form any part of the public record in this proceeding.
>
> 8. THIS COURT ORDERS that the Sealed Materials shall not be copied or disseminated beyond counsel or experts previously authorized in this proceeding or to be authorized by the Applicant or by further order of this Court.
>
> 9. ***THIS COURT ORDERS that any party may apply to the Court on proper notice to all parties in interest to modify the provisions in paragraphs 7 and 8 of this Order and nothing in this Order shall be deemed to prejudice their rights to seek such modification or to assert that the Sealed Materials are not confidential.*** [emphasis added]
>
> Net Arbitration Proceeds Transfer Agreement Order dated December 18, 2014, paras. 7-9, Crystallex Document Brief, Tab 1

PART III – ISSUES AND THE LAW

14. The only remaining question to be determined on the Noteholder Cross-Motion is whether the CVR Information should continue to be sealed by this Court. The answer is no.

A. Crystallex bears the onus on continued sealing of the CVR Information

15. The Noteholders' Moving Factum, at paragraphs 25 and 26, describes the *Sherman Estate* test for sealing court records, including that the onus lies with the person seeking sealing to establish that it is appropriate:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish 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.

Sherman Estate at para. 38, First BOA, Tab 1

16. Crystallex points to the recent decision of the Supreme Court in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 (CanLII) ("*CBC*") to argue that the Noteholders, and not Crystallex, bear the onus to establish that sealing is no longer appropriate, and that in order to do so, they must establish a material change in circumstances relative to when the CVR Information was initially sealed. Indeed, Crystallex goes so far as to allege that challenging the continued sealing of the CVR Information is a collateral attack on Justice Newbould's 2014 order and an abuse of process.[4]

17. Crystallex's argument is unfounded: as discussed above, Newbould J.'s order expressly authorized the Noteholders to bring a motion to unseal the CVR Information. There is no collateral attack.

18. The argument is also complete misapplication of *CBC*, a case in which the Supreme Court overturned the Manitoba Court of Appeal's finding that it had no jurisdiction to consider the CBC's motion to lift a publication ban because it was *functus officio*. The Supreme Court found that even if the Court of Appeal were *functus* on the main underlying proceeding, it retained jurisdiction to oversee its record to consider the CBC's request to lift the publication ban. In the result, the Supreme Court referred the CBC's motion back to the Court of Appeal for determination based on the generally applicable test for discretionary limits on court openness, *i.e.*, the *Sierra Club* test as recently recast by the Supreme Court in *Sherman Estate*.

CBC at paras. 73 and 79-84, Crystallex Book of Authorities ("**KRY BOA**"), Tab 1

[4] Crystallex also suggests that the Noteholders are somehow seeking to attack the transfer of the CVRs to Messrs. Fung and Oppenheimer. The Noteholders seek no such relief.

19. *CBC* has little application to the present facts given Crystallex has not alleged (and cannot allege) the Court is *functus* with respect to the sealing of the CVR Information given the terms of Justice Newbould's prior order that expressly permit a party to move to this Court for its modification. If anything, the Supreme Court's direction that the Court of Appeal consider the CBC's motion to lift the publication ban at issue in light of *Sherman Estate* is precisely what the Noteholders ask this Court to do.

20. Inasmuch as *CBC* (and the cases it points to, such as *R. v. Adams*, [1995] 4 S.C.R. 707 (CanLII)) stands for the general proposition that a party seeking to modify a prior order made during the course of a proceeding must establish that it either did not receive notice of the making of the order or that there has been a material change in circumstances, there is a critical distinction that can be drawn between these authorities and the present case: Justice Newbould's 2014 order expressly authorizes any party to apply to this Court on proper notice to modify the existing sealing, and, if they elect to do so, "…***nothing in [the prior sealing order] shall be deemed to prejudice their rights to seek such modification or to assert that the Sealed Materials are not confidential***."

> *R. v. Adams*, [1995] 4 S.C.R. 707 (CanLII)
> Net Arbitration Proceeds Transfer Agreement Order dated December 18, 2014, para. 9, Crystallex Document Brief, Tab 1

21. Given this express language, there can be no suggestion that the doctrine of finality in court decisions is in any way engaged that would justify treating the Noteholders' Cross-Motion as a motion for reconsideration (as Crystallex in effect suggests), or that anything other than the Court applying the usual test for sealing is appropriate.

22. Crystallex's and Tenor's arguments simply ignore the plain language of Justice Newbould's 2014 order, which set the terms for any future motion dealing with the sealing of the CVR Information.

B. Circumstances have changed materially since 2014

23. Even if this Court were to find that a material change in circumstances were required to unseal the CVR Information, the record demonstrates a number of material changes since the CVR Information was sealed in 2014.

24. The CCAA proceedings have continued for a further seven years, and there is no consensus between the parties on the status or direction of the case. Mr. Reid testified that he has lost all confidence that Crystallex's directors will consider the interests of the Noteholders and other creditors in their decision making process. One of the reasons he believes this is the significant conflict of interest that arises from four of Crystallex's five directors having a direct or indirect interest in the CVRs, the particulars of which, in the case of the management directors, are undisclosed. Mr. Reid's evidence on both direct and cross-examination was that knowing the CVR Information was critical to understanding and assessing the level of conflict and considering Crystallex's governance.

> First Reid Affidavit at paras. 70-72, Noteholders' Responding and Cross Motion Record, Tab 2, pp. 34-35; Reid Reply Affidavit, para. 34, Reply Cross-Motion Record of the Noteholders, Tab 1, p. 23; Reid Cross, p. 220-221 (Q819-Q820), Transcript Brief, Tab 2, pp. 653-654

25. The sealing of the CVR Information in December 2014 was just one facet of the sealing sought by Crystallex at that time: in addition, Crystallex sought to seal the terms of the additional DIP financing it sought approval of (including the additional CVRs it was providing to Tenor), and even the fact that it was seeking authorization for additional DIP financing.

26. Notably, no evidence was led by Crystallex in 2014 that disclosure of the CVR Information could potentially threaten the personal safety of Messrs. Fung or Oppenheimer were they to travel to Venezuela. Rather, Crystallex's entire case for sealing all of the information it marked "Confidential" on the motion [redacted] Nowhere in Crystallex's evidence in 2014 or in Justice Newbould's endorsement is there any indication that the CVR Information was sealed for any other reason.

> Near Affidavit, at paras. 62-63
> Confidential Endorsement of Justice Newbould dated December 17, 2014, confidential Appendix "A" to the Monitor's 37th Report

27. Crystallex's strategic position *vis-à-vis* Venezuela has significantly improved since 2014. [redacted] Now it has an Award that has been recognized by judgments of both the U.S. and Canadian Courts, a writ of attachment in respect of the PDVH shares, and has more than $90 million of cash on hand (among other assets) to continue its enforcement efforts.

28. Further, as detailed in in the Noteholders' responding factum dated September 30, 2021, Crystallex's "strategic harm" argument in support of sealing was recently rejected by Judge Stark with the result that various financial information concerning Crystallex was disclosed in the U.S. enforcement proceedings and Crystallex withdrew its request to seal at least some of the financial

information it was previously asking this Court to seal. Moreover, that Tenor and Crystallex management collectively hold 88% of the CVRs has been disclosed by Crystallex.

29. With this information now in the public record and Crystallex's financial situation significantly improved, there is no credible basis to suggest (if there ever was) that disclosure of the CVR Information could somehow be used against Crystallex [redacted] Rather, Crystallex's case for sealing now rests entirely on the alleged personal harm that Messrs. Fung and Oppenheimer would be exposed to if the CVR Information were unsealed (indeed, this is the only evidence Crystallex led in support of sealing the CVR Information). That Crystallex has changed its entire position on the basis for sealing the CVR [redacted] establishes the material changed circumstances over the past seven years.

> Public Version of First Fung Affidavit at paras. 4 and 5, Public Version of Crystallex Motion Record dated June 21, 2021, Tab 2; Stark Memorandum Order, NR BOA, Tab 1; 36th Report of the Monitor at PDF pp. 23 and 26

C. KERP precedents are of no assistance to Crystallex

30. The Noteholders acknowledge that CCAA courts routinely seal the specific details of the payments or other remuneration to be provided to individual participants under KERPs. As reflected in Justice Pepall's (as she then was) decision in *CanWest*, the typical rationale for sealing individual KERP details is that: (i) employees have a reasonable expectation of privacy as relates to compensation details, and the public interest in privacy would be undermined by disclosure of individual compensation details; and (ii) disclosure of individual compensation details adds little

value from a disclosure perspective in circumstances where the aggregate details of the KERP have been publicly disclosed to stakeholders.[5]

> *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (Sup. Ct. [Comm. List]) at paras. 51-52, KRY BOA, Tab 20

31. Prior decisions sealing individual KERP entitlements are of little assistance to Crystallex. First, Messrs. Fung and Oppenheimer are directors and senior management of a company that is a reporting issuer under securities law that is required to disclose the compensation and incentive details and securities holdings of its directors and key management (and has, in fact, disclosed this information in respect of Messrs. Fung and Oppenheimer in the past).

> National Instrument 51-102 (Unofficial Consolidation) at ss. 9.3.1(1) and 11.6(1) and Form 51-102F6 Statement of Executive Compensation (Unofficial Consolidation), Noteholders' Reply Book of Authorities, Tabs 1 and 2

32. Notably, Crystallex led no evidence that either Messrs. Fung or Oppenheimer had any sort of privacy expectation with respect to the CVR Information, and any such expectation would not be reasonable in the face of Crystallex's disclosure obligations under securities law and past public reporting. Accordingly, the fundamental premise that underlies the sealing of individual KERP details is lacking in the present case: there can be no public interest in maintaining the confidentiality of compensation details that are required to be disclosed by securities law and for which there is, and can be, no privacy expectation.

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[5] In *Sherman Estate*, the Supreme Court did not recognize privacy, generally, as a public interest, but rather only a public interest in maintaining a narrower dimension of privacy where the personal information at issue strikes at a person's biographical core and its public disclosure would threaten their integrity. To counsel to the Noteholders' knowledge, no Court has considered whether an individual's KERP details strikes at their biographical core such that its disclosure would threaten their personal integrity. See *Sherman Estate* at para. 7, First BOA, Tab 1.

33. Further, unlike all the KERP sealing decisions Crystallex relies on, Crystallex has not even disclosed the ***aggregate*** amount of CVRs that have been transferred to management.[6] While the CVR entitlements of Messrs. Fung and Oppenheimer do not impact on creditor recoveries in the way a typical KERP would (because the CVRs are junior to creditor entitlements), Mr. Reid's evidence was that understanding the details of management's CVR entitlements is critical to assessing the conflicts of Crystallex's board members and his related governance concerns. To paraphrase his evidence, owning one share of a company is very different than owning 1,000,000 shares when it comes to assessing the level of conflict, and right now stakeholders do not know whether management is entitled to 1%, 15%, or any different percentage of the CVRs. While the Noteholders do not believe that continued sealing of the CVR Information is justified, one option available to the Court would be to order unsealing of the aggregate amount of CVRs that have been transferred to management so that stakeholders would at least have that level of information.

PART IV – ORDER REQUESTED

34. The Noteholders respectfully request that the Court unseal the CVR Information, and award the Noteholders their costs of the Noteholder Cross-Motion.

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[6] (i) *Re Danier Leather Inc., (Re)*, (4 February 2016), Toronto, Ont. Sup. Ct. J. (Commercial List) 3-CL- 2084381 (Affidavit of Brent Houlden at para. 91 disclosing the aggregate size of the KERP as $213,500); (ii) *Ontario Securities Commission v. Bridging Finance Inc.* (9 June 2021), Toronto, Ont. Sup. Ct. J. (Commercial List) CV-21-0066145800CL (Notice of Motion at para. 9 disclosing the aggregate size of the KERP as $366,000); and (iii) *Canwest Global Communications Corp., (Re)*, (5 October 2009), Toronto, Ont. Sup. Ct. J. (Commercial List) 09-8396-00CL (Affidavit of John E. Maguire at Exhibit Q disclosing the aggregate size of the KERP as $5,867,191).

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

Responding Factum of Computershare Trust Company of Canada in its capacity as Trustee for the Holders of Crystallex 9.375% Senior Notes due December 23, 2011 and the Ad Hoc Committee of Beneficial Holders of the Senior Notes

(Motions returnable November 18, 2021)

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