

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

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

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

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**REPLY FACTUM OF THE DIP LENDER  
(Motions Returnable November 18, 2021)**

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November 17, 2021

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**I. The Ad Hoc Committee<sup>2</sup> Has Failed to Address the Key Issues that Support Continued Sealing**

1. The Ad Hoc Committee's 44 page<sup>3</sup> responding brief is telling not by what it narrowly focuses on, but by what it fails to address. Specifically, the Committee fails to address:

- a) This Court's [REDACTED]  
[REDACTED]  
concerns which are underscored by the subsequent discovery that a leading member of the Committee has significant financial interests in another competing creditor of Venezuela, Gold Reserve;<sup>4</sup>
- b) Crystallex's actual evidence on this motion of the harms and risks of public disclosure; the Committee has declined to review any of that evidence on a confidential basis for fear that doing so may prevent them from trading;<sup>5</sup>
- c) The fact that every judge that has overseen this unique proceeding has independently concluded that Crystallex has met the legal test for sealing on every occasion requested (in one case with only a single paragraph of evidence) and

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<sup>1</sup> Confidential Newbould Endorsement, Confidential Joint Compendium of Crystallex International Corporation and the DIP Lender ("**Joint Compendium**") at Tab 13.

<sup>2</sup> Terms not otherwise defined herein have the meanings ascribed to them in the Factum of the DIP Lender dated November 10, 2021.

<sup>3</sup> The Committee's reply factum is divided into a 25-page main brief and a further 19-page brief disguised as a "schedule".

<sup>4</sup> August Reid Transcript at pp. 19-22 qq. 69-76, Management Information Circular of Gold Reserve as of July 2020. Joint Compendium Tab 67 and 68.

<sup>5</sup> August Reid Transcript at pp. 170, qq. 638.

that there is an important public interest in protecting a CCAA debtor plaintiff's tactical information and its ability to maximize value;

- d) How this Court's continued sealing of sensitive information could in any way prevent "disclosure" to stakeholders, when the very information at issue has and remains available for disclosure to them on a confidential basis;
- e) This Court's direction on three separate occasions in this proceeding that if the Committee seeks to access sensitive information, they must sign a confidentiality agreement with Crystallex;<sup>6</sup>
- f) The fact that the Committee has significantly increased visibility today into Crystallex's current financial position, current cash balance, current DIP balance, other debt obligations and its forecasted spending through this month on an aggregated basis;
- g) Any compelling reasons why a six-month delay in public reporting of Crystallex's sensitive financial information is not appropriate in the current circumstances, and they have failed to retain any experts to provide competing views to the Court on this critical issue; and
- h) The fact that they have offered no qualified evidence to the Court about the risks of not sealing, and instead ask the Court to accept, over the experienced and expert evidence of Crystallex, the opinions and conjectures of a Committee member who admits he has absolutely no experience in the subject matter and has not currently retained any experts to guide him.<sup>7</sup>

## **II. The Actual Evidence and Facts of this Case Do Not Support the Ad Hoc Committee's Positions**

2. The remainder of the Committee's factum is replete with misrepresentations and untruths, each of which are made in an attempt to persuade this Court to abruptly abandon the logic underpinning the 14 prior decisions on sealing in this proceeding. Specifically:

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<sup>6</sup> Endorsement of Justice Newbould dated January 25, 2012, [2012 ONSC 538](#) at para. 3, 19, 22-26; Approval Order granted by Justice Newbould December 18, 2014, at para. 9.

<https://documentcentre.ey.com/api/Document/download?docId=15928&language=EN>

Endorsement of Justice Hainey dated January 15, 2019 at para. 6.

<https://documentcentre.ey.com/api/Document/download?docId=15942&language=EN>;

<sup>7</sup> August Reid Transcript at pp. 42, qq. 163-164 and pp. 167-170, qq. 625-637.

- a) **There is no truth to the Ad Hoc Committee’s claim that Crystallex could be currently paying down the DIP Loan or otherwise making distributions to its creditors, at this time.** The Committee’s affiant acknowledged the impediments to distribution in his cross-examination and yet the responding factum of the Committee shamefully pretends otherwise and suggests that Crystallex is just sitting on liquid proceeds instead of making distributions.<sup>8</sup> The Committee knows full well that no distributions can be made (including to the DIP Lender) until taxes (which rank higher in the waterfall than the DIP) are resolved with CRA and/or the OFAC sanctions are lifted and the Initial Payment Securities can be providently monetized.<sup>9</sup> All of Crystallex’s current efforts are directed at facilitating distributions.
- b) **It is a misrepresentation that continued sealing of Crystallex’s financial information will affect the ‘advancement’ of this case.** The Committee’s suggestion that Crystallex is not ‘advancing the case’ is patently false. As the Court of Appeal correctly described, “there is a single “pot of gold” asset which, if realized, will provide significantly more than required to repay the creditors.”<sup>10</sup> Crystallex is advancing its collection efforts through the US litigation process, and is vigorously advancing this CCAA proceeding including by engaging with CRA on a tax resolution, that will clear the way for distributions to its creditors. This Court has already approved a distribution mechanism for proceeds of the arbitration award so that when distributions can be made, they will be made.
- c) **Stakeholders have not lost confidence in Crystallex or its Board to deliver their legal entitlements.** The Committee’s affiant has openly praised Crystallex and its Board with the success of Crystallex’s litigation strategy and the recoveries achieved to date.<sup>11</sup> So, when the Committee talks about losing confidence in Crystallex’s Board, what they mean is that they are concerned that the Board will not simply acquiesce to their demands (i.e., a premium recovery on their claim) and will instead consider the interests of the corporation (i.e., maximizing value).

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<sup>8</sup> Responding Factum of the Committee dated November 15, 2021 (“**Committee Factum**”) at para 3.

<sup>9</sup> August Reid Transcript at pp. 107-119 qq. 392-443.

<sup>10</sup> Appeal Decision, [2012 ONCA 404](#) at para 82.

<sup>11</sup> August Reid Transcript at pp. 97-104 qq. 349-378.

This is the purported “conflict” that the Committee is concerned about. Crystallex directors owe a fiduciary duty to the corporation – not to the Committee.

- d) **The Ad Hoc Committee advances a false narrative that significant relief may be needed in this CCAA proceeding over the next 12 months.** All parties agree that over the next twelve (12) months, Crystallex will have its hands full with necessary US enforcement efforts and initiatives in order to advance recovery and distributions in this CCAA proceeding. These efforts, which the Committee acknowledges, include the Special Master Sales Process, Crystallex’s re-application to OFAC for a license to enforce on the PVDH Shares, and potentially other efforts to collect on the Award. As a result, no relief is anticipated to be necessary in the CCAA proceeding while these actions are being undertaken.<sup>12</sup> Yet despite this, the Committee pretends that significant relief may be needed in this CCAA proceeding in the same timeframe. The reality is that the only material relief that may be sought over the next 12 months are in respect of motions threatened by the Committee. The Committee’s only objection to a 12-month stay extension is that there would be fewer opportunities to regularly threaten these litigations, in an effort to extract some kind of concessions from Crystallex.
3. The current situation is a déjà vu moment to one of the first hearings before Justice Hailey when he had assumed carriage of this case from Justice Newbould. The Committee saw an opportunity to try to force public disclosure using general catch phrases like “transparency” and “open court principle”. Like his predecessor [REDACTED]  
[REDACTED]<sup>13</sup> Justice Hailey similarly denied the objections to sealing.
4. Notably, in the last contested sealing decision in this proceeding, the Court concluded over the objection of the Committee, that continued sealing of Crystallex’s cash flow information “...**make[s] good sense** under the circumstances **and constitute[s] a fair and reasonable balance...**” [emphasis added].<sup>14</sup>
5. As it relates to the Retention Amounts, the Committee baldly asserts that Crystallex bears the onus to justify their continued sealing, relying solely on a provision of the sealing order entitling

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<sup>12</sup> Affidavit of Robert Fung dated October 25, 2021 at para. 86 and 88. Joint Compendium Tab 6.

<sup>13</sup> Confidential Newbould Endorsement. Joint Compendium at Tab 13.

<sup>14</sup> Endorsement of Justice Hailey dated August 31, 2020.

<https://documentcentre.ey.com/api/Document/download?docId=32332&language=EN>

any party to seek modification or to assert that the materials should not be confidential. The sealing order was granted after full argument and opposition by the Committee and it remains their burden to demonstrate grounds for modification of that order. This has been unambiguously affirmed by the Supreme Court of Canada less than two months ago.<sup>15</sup> The Committee has failed to meet their burden.

6. Finally, in a concerning change of position, the Committee *in its factum* seeks for the first time the unsealing of strategic litigation enforcement information, specifically the fact that [REDACTED]

[REDACTED] This is despite the Committee and its affiant having consistently confirmed on multiple occasions that they did not oppose sealing of that type of information:

Q. So when you say that Crystallex should be making ongoing and fair public disclosure of its business affairs, do you mean its enforcement strategy?

Mr. Reid. No. I think we have been clear that we have not asked for that.<sup>17</sup>

In any event and contrary to the Committee's suggestion, the Fung Affidavit is replete with detailed evidence about the need to seal sensitive strategic litigation enforcement information.<sup>18</sup>

## CONCLUSION

7. It is unusual for a CCAA court to openly and frequently criticize a party about their conduct in a proceeding. The Committee has been the subject of this Court's frequent criticism of their actions, describing their conduct as [REDACTED]<sup>19</sup> and being "tactical and raised to get a perceived leg up"<sup>20</sup> for leverage purposes. The Committee's objections to sealing and their request to unseal the Retention Amounts should be viewed through the same lens. They have failed to provide any compelling evidence that justifies the relief they seek, let alone read and challenge all of the actual evidence of Crystallex of the serious harms and risk to its

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<sup>15</sup> Discussed in paras 70-72 of the Factum of the DIP Lender dated November 10, 2021.

<sup>16</sup> Committee Factum at paras 22(b) and 56.

<sup>17</sup> November Reid Transcript at p. 25 q. 87 and pp. 84-85 q. 321.

<sup>18</sup> See for example Affidavit of Robert Fung dated October 25, 2021 at paras 24-26.


<sup>19</sup> Confidential Newbould Endorsement, Joint Compendium at Tab 13.

<sup>20</sup> Endorsement of Justice Newbould dated February 5, 2013, [2013 ONSC 823](#) page 4, para. 13.

enforcement efforts that public disclosure at this moment would cause (positions guided by the advice of Crystallex's experts).

8. For all of the foregoing reasons, the DIP Lender respectfully requests that the Court grant the relief requested by Crystallex and deny the Committee's Cross-Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of November, 2021.



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