

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-3 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

Counsel	Telephone No:	Email/Facsimile No:
As per participant slip attached		

Heard: November 18, 2021

Conway J. - Endorsement

1. Crystallex has been in CCAA proceedings for years. It is a liquidating CCAA. It is a unique CCAA as the company's sole objective is to maximize its recovery on a \$1.4 billion (USD) arbitration award against the government of Venezuela. Its enforcement efforts are primarily in the U.S. through the "CITGO Litigation". It has obtained a Writ with respect to key Venezuelan assets located in the U.S. and is trying to obtain a license from OFAC to be able to sell the assets that are subject to the Writ.
2. On this motion, Crystallex, supported by the DIP lender, seeks to extend the stay period for 12 months, approve the 16th amendment to the DIP credit agreement and seal certain information from the public version of the Monitor's reports, in particular the 36th and 38th reports (and the related information in the materials filed on this motion).
3. The Ad Hoc Committee of the Noteholders (Committee) opposes the relief on the motion, except for the sealing of certain strategic information related to the U.S. litigation. It seeks a stay extension of only 3 months. It also brings a cross-motion to disclose the CVR information with respect to Messrs. Fung and Oppenheimer, the key executives that are pursuing the litigation and recovery efforts by Crystallex. It argues that the sealing of the

information in question obscures its window into the financial performance of the company.

4. The Monitor recommends the stay extension of 12 months and the 16th amendment to the DIP agreement. The Monitor has offered to meet with stakeholders (including the Committee representatives) every 3 months to keep them up to date on the company's operations and financial position.
5. The Monitor says that there is a benefit to the company of Messrs. Fung and Oppenheimer going to Venezuela. That will be lost to the company if the CVRs are disclosed due to concerns about their personal safety.
6. The Monitor makes no recommendations about the requested sealing order as it is a legal matter for me to determine. However, it notes that the Noteholders have been actively participating in the company's CCAA proceedings even with the sealing that has been in place over the years. It also notes that the Committee's counsel has signed a non-disclosure agreement and can obtain any of this information from the company. The Committee can also have access to this information if it signs an NDA.
7. At the conclusion of argument, I told counsel that I was granting the relief sought by Crystallex and the DIP lender and dismissing the cross-motion of the Committee to unseal the CVRs. I provided brief oral reasons and now provide them in writing.
8. I am granting the 12 month extension. The evidence of Mr. Fung is that no material steps will be occurring in the U.S. until late 2022. There will be no distributions in the meantime. The Monitor confirms that the company has sufficient liquidity for 12 months. The company is acting in good faith and with due diligence, as supported by the Monitor's report
9. Significantly, if this stay extension motion is any indication, these motions are battlefields for all sorts of issues that are time consuming and costly. Three months intervals will only consume additional resources and detract from the company's main focus, which is to secure recovery for stakeholders through the US enforcement proceedings.
10. The extension is subject to the condition that the Monitor conduct quarterly update sessions for stakeholders.
11. I approve the 16th amendment to the DIP credit agreement to provide additional funding to the company. I note that the waiver of default re the OFAC decision and related default interest are positive outcomes for the company.
12. The proposed redactions to the Monitor's reports relate to line items on cash flow variances and cash flow forecasts, explanatory notes with respect to the cash flows, and information on Crystallex's litigation strategy.
13. The cash flow information essentially provides details of Crystallex's litigation spend. It proposes to disclosure these figures on a six month lag basis. Cash and DIP balances will be disclosed on a current basis.

14. There is very detailed evidence before me from Mr. Fung as to the reasons for the requested redactions. All of it relates to the litigation and the perils of this information getting into the wrong hands, which threaten to disadvantage Crystallex in its enforcement proceedings. He explains quite thoroughly in his affidavit evidence the enforcement process, the steps taken by Crystallex, and the professional advice it has been following in the U.S.
15. Crystallex is fully prepared to make all of this information available to all stakeholders, including the Committee, on a confidential basis. However, the Committee is not prepared to sign a confidentiality agreement and takes the position that the information must be made public.
16. I have considered the test for sealing in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 and *Sherman Estate v. Donovan*, 2021 SCC 25. In my view, the sealing of this information meets the test. There is serious risk to an important public interest if this information is publicly disclosed. Crystallex is engaged in intensive protracted enforcement efforts to seek enforcement of a huge award, all for the benefit of its stakeholders in this CCAA proceeding. The information in question is commercially sensitive, is related directly to these enforcement efforts, and could seriously compromise Crystallex's position in the pursuit of those efforts. As noted by Chief Justice Morawetz in *Cash Store Financial Services Inc.*, 2021 ONSC 7143, at para. 19 and 25, there is a public interest in not placing a CCAA debtor at a tactical disadvantage in its litigation. That applies with equal force here.
17. I have considered the probability and magnitude of the potential harm. This is the one avenue of recovery for Crystallex's stakeholders. The harm in jeopardizing that recovery effort is self-evident.
18. This is the least restrictive alternative. The sealing will consist of only redacting very specific line items (cash flow variations, cash flow forecasts) and only for a period of six months. That period has been selected because the disclosure of that information after six months will be less damaging to the company.
19. As a matter of proportionality, the benefits of this order outweigh its negative effects. As noted, anyone can obtain this information via its counsel or by signing an NDA. The Monitor will be providing regular updates. And most importantly, the information will become public in six months.
20. I also agree that the strategic information should be sealed. That goes to the core of how the company is trying to enforce its award. The Committee raises an issue with paragraph 13 of the Monitor's 38th report that it says is a factual matter. I find it integrally related to the litigation strategy pursued by Crystallex.
21. The Committee raised an issue with respect to the aggregation of certain line items in the Monitor's 38th Report. It did not bring a motion to challenge this format but said I can take it into account on the motions before me today. The Monitor explains that while it received this information from the company, it was done in this fashion since the information will become public after six months. One of those aggregations is CCAA costs and arbitration

costs, which are integrally related since the purpose of the CCAA is to recover the arbitration award. I do not view this as a reason to refuse the relief sought today.

22. Finally, I am not prepared to unseal the CVR information with respect to Messrs. Fung and Oppenheimer. This information has been sealed for years. There is no compelling reason to unseal them now and far more compelling evidence that their lives could be in danger should the amounts now become public. That would in turn obviously disadvantage the company. The Committee's cross-motion is dismissed.
23. I direct counsel to prepare and send me a form of order consistent with these reasons. They may email it to me directly with a copy to the Commercial List office.'
24. Finally, counsel for Crystallex (or the Monitor) is directed to file a hard copy of the unredacted version of the Monitor's reports and all related motion materials. These materials shall be filed in a sealed envelope with a copy of this endorsement and the signed order.



Justice Conway

Released: November 18, 2021

Participant Information

CASE	INFORMATION
-------------	--------------------

Court File Number	CV-11-9532-00CL
Court Location (e.g. Hamilton)	Toronto
Case Name	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
Date of Hearing	November 18, 2021

PARTICIPANT	INFORMATION
--------------------	--------------------

For the Applicant:

Name of Person Appearing	Name of Party	Phone Number ²	Email Address
Robin B. Schwill	Crystallex International Corporation	416.863.5502	rschwill@dpwpv.com
Natalie Renner	Crystallex International Corporation	416.367.7489	nrenner@dpwpv.com
Maureen Littlejohn	Crystallex International Corporation	416.367.6916	mlittlejohn@dpwpv.com

For the For Court-Appointed Monitor:

Name of Person Appearing	Name of Party	Phone Number²	Email Address
David Byers	Ernst & Young Inc.	416.869.5697	dbyers@stikeman.com
Maria Konyukhova	Ernst & Young Inc.	416.869.5230	mkonyukhova@stikeman.com

For the Ad Hoc Committee:

Name of Person Appearing	Name of Party	Phone Number²	Email Address
Robert Chadwick	Computershare Trust Company of Canada, in its capacity as Trustee for the holders of 9.375% holders of unsecured Notes of Crystallex International Corporation and the Ad Hoc Committee of holders of the Notes (the “ Ad Hoc Committee ”)	416.597.4285	rchadwick@goodmans.ca
Peter Ruby	Ad Hoc Committee	416.597.4814	pruby@goodmans.ca
Chris Armstrong	Ad Hoc Committee	416.849.6013	carmstrong@goodmans.ca
Carlie Fox	Ad Hoc Committee	416.849.6907	cfox@goodmans.ca

For DIP Lender:

Name of Person Appearing	Name of Party	Phone Number2	Email Address
Tim Pinos	DIP Lender	416.869.5784	tpinos@cassels.com
Shayne Kukulowicz	DIP Lender	416.860.6463	skukulowicz@cassels.com
Ryan C Jacobs	DIP Lender	416.860.6465	rjacobs@cassels.com

Counsel for Robert Fung and Marc Oppenheimer:

Name of Person Appearing	Name of Party	Phone Number	Email Address
Aubrey E. Kauffman	Robert Fung and Marc Oppenheimer	416.868.3538	akauffman@fasken.com

Monitor:

Name of Person Appearing	Name of Party	Phone Number	Email Address
Brian M. Denega	Ernst & Young Inc.	416.943.3058	brian.m.denega@ca.ey.com
Fiona Han	Ernst & Young Inc.	416.943.3739	Fiona.Han@ca.ey.com

Other:

Name of Person Appearing	Name of Party	Phone Number	Email Address
Scott Reid	Ad Hoc Committee		
Adrian Weisberg	Ad Hoc Committee		
Carlo Mattoni	Ad Hoc Committee		

Nick Brumm	Ad Hoc Committee		
Robert Fung	Crystallex Corporation		
Brennan Caldwell	N/A	416.849.6896	bcaldwell@goodmans.ca
Emily Windrim	N/A	N/A	ewindrim@goodmans.ca

¹ The Participant information Form replaces the Counsel Slip.

² Please provide a phone number where you can be reached during the hearing, if necessary