IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Barbara M. Hamilton
Mr. Justice Martin H. Freedman

BETWEEN:

THE MANITOBA SECURITIES COMMISSION	***D. A. Klein*** *and* ***J. R. N. Boudreau*** *for the Appellant B. Bellan*
(Applicant) Respondent	
- and -	***R. A. Dewar, Q.C.*** *and* ***K. R. Wittman*** *for the Receiver Deloitte & Touche Inc.*
CROCUS INVESTMENT FUND	
(Respondent) Respondent	***K. A. Filkow, Q.C.*** *and* ***D. M. Stasiuk*** *for the Interveners C. Curtis, P. Olfert, W. Fox-Decent, L. Baturin, A. Beal, D. Beresford, S. Farley, R. Ziegler, D. Friesen, J. Clarkson and H. Eliasson*
- and -	
BERNARD BELLAN	
(Intervener) Appellant	
- and -	***D. A. Primeau*** *for the Intervener R. Waugh*
CHARLES CURTIS, PETER OLFERT, WALDRON (WALLY) FOX-DECENT, LEA BATURIN, ALBERT BEAL, RON WAUGH, DIANE BERESFORD, SYLVIA FARLEY, ROBERT HILLIARD, ROBERT ZIEGLER, DAVID G. FRIESEN, SHERMAN KREINER, JANE HAWKINS, JAMES UMLAH, JOHN CLARKSON and HUGH ELIASSON	***M. G. Tadman*** *for the Intervener R. Hilliard*
	Appeal heard: ***November 30, 2006***
	Judgment delivered: ***March 30, 2007***
(Interveners) Respondents	

Appeal from 2006 MBQB 19, 200 Man.R. (2d) 89
See: 2006 MBQB 276; 2006 MBQB 192, 207 Man.R. (2d) 127; 2006 MBQB 87, 203 Man.R. (2d) 151

FREEDMAN J.A.

OVERVIEW

1 Former directors and officers of Crocus Investment Fund (Crocus) have been, and continue to be, involved in certain legal matters. These include an investigation conducted by the Office of the Auditor General, an investigation conducted by the Manitoba Securities Commission and a proposed class action. The issue on this appeal is whether Crocus, a corporation which is not insolvent, although it is under the control of a receiver, should advance ongoing legal defence costs incurred by the former directors and officers, prior to the conclusion of the related legal matters. The judge decided that such advances should be made. The appellant in the present action, a shareholder of Crocus, has appealed the decision. In my opinion, the judge was correct in law in her decision, and she acted reasonably in exercising her discretion to direct that such advances be made.

BACKGROUND

2 Apart from one new issue raised for the first time by the appellant during oral argument, which I will address below, the background to this matter is clearly set out in the judge's detailed reasons (at paras. 2-5):

> On June 28, 2005 Deloitte [& Touche Inc.] was appointed Receiver and Manager of Crocus Investment Fund. This occurrence came fast on the heels of a series of rapidly unfolding events in the months preceding. They included an investigation into the operations of Crocus by the Office of the Auditor General; an investigation into the conduct of Crocus and its officers and directors by the Manitoba Securities Commission (MSC); the issuance by the MSC of a statement of allegations which, among other things, alleged improper conduct on the part of Crocus and certain officers and directors; the release of the Provincial Auditor's report in May 2005; and the mass resignation of the Crocus Board in June 2005. The Receiver

> was quickly appointed by the court at the behest of the MSC to fill the void.
>
> Prior to June 28, 2005, Crocus had made arrangements to pay the legal counsel representing the officers and directors in the course of these investigations. ...
>
> On July 7, 2005 the Receiver received a letter from counsel for Bernard Bellan and certain other shareholders advising that they were in the process of commencing a class action lawsuit. It contained a request that the Receiver not pay any fees on behalf of any former officers and directors who might be named in the litigation. A week later, on July 12, 2005, a statement of claim was issued although to date that claim has not been certified as a class action.
>
> It is important to note that in addition to the former officers and directors named in the proposed class action other officers and directors seek reimbursement from Crocus for legal fees incurred relating to the investigation of the Auditor General and the MSC. It should also be observed that Crocus has an officers' and directors' liability insurance policy with Chubb Insurance Company of Canada to a maximum of $5,000,000.00. For ease of reference this Venture Capital Asset Protection Policy #7043-0036 is referred to as the Chubb policy.

3 Deloitte & Touche Inc., as court-appointed receiver (Receiver) of Crocus, applied for an order authorizing it to pay legal fees of former directors and officers to the date of its appointment, subject to certain rights of reimbursement. It also sought an order authorizing it to refrain from paying ongoing legal expenses of those persons until the completion of certain proceedings (or until further court order). The former directors and officers resisted that latter part of the application.

4 In comprehensive reasons the judge, *inter alia*, authorized and directed the Receiver to pay all reasonably incurred ongoing legal expenses of the former directors and officers, as well as the amounts of any related unfavourable judgments, subject to certain rights of reimbursement.

5 The appellant raised several objections to the judge's decision; his argument may be summarized this way. While as a strict matter of law the judge had the discretion to order as she did regarding the advancement of costs, she erred by (1) finding no evidence of bad faith; (2) ordering advancement of costs prior to any determination that the requirements of the governing statute had been met; (3) directing that the indemnity extend to unfavourable judgments, and (4) disregarding the absence of evidence of the ability of indemnified persons to repay any amount, if it is ultimately determined that there was no entitlement to the indemnity. Additionally, as noted, a new argument was raised at the hearing.

STATUTORY AND OTHER PROVISIONS

6 Crocus is governed by the provisions of *The Corporations Act*, C.C.S.M., c. C225 (the *Act*) (see *The Crocus Investment Fund Act*, C.C.S.M., c. C308, s. 2(1)). Like its federal counterpart, the *Canada Business Corporations Act* (*CBCA*) and other provincial corporation statutes, the *Act* contains provisions dealing with corporate indemnification of persons such as the former directors and officers. The relevant provisions of the *Act* are attached as an Appendix.

7 The main indemnification provisions are in s. 119(1) and (3). Section 119(1) states:

> **Indemnification**
> **119(1)** Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which

> the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if
>
> (a) he acted honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

8 Section 119(1) is permissive. Except in respect of an action by or on behalf of the corporation, a corporation such as Crocus may indemnify persons, such as the former directors and officers, who by virtue of their office reasonably incur legal costs in actions or proceedings, against such costs and the amount of related judgments, subject to two conditions. First, the person must have acted honestly and in good faith with a view to the corporation's best interests; this reflects part of the basic duty of a director and officer set out in s. 117(1) of the *Act*. Second, in certain instances, the person must have had reasonable grounds for believing his conduct was lawful.

9 Section 119(3) states:

> **Indemnity as of right**
> **119(3)** Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

> (a) was substantially successful on the merits in his defence of the action or proceeding; and
>
> (b) fulfils the conditions set out in clauses (1)(a) and (b).

10 Section 119(3) creates an indemnity as of right. It entitles a person such as a former director or officer to the indemnity described in the section if the two conditions in s. 119(1) are satisfied and if he or she was substantially successful in the proceeding. That is an entitlement, in those circumstances, even if the corporation has not taken any steps pursuant to s. 119(1). The entitlement is enforceable only after the proceedings are concluded.

11 Section 113(2)(e) provides that directors may be liable if they approve "a payment of an indemnity contrary to section 119."

12 The corporate by-laws of Crocus are important. By-law 1.7 (also attached as an Appendix) is the expression of a corporate intention that directors and officers shall be indemnified. This by-law is based on s. 119(1) of the *Act* and it creates a right of indemnity, again, subject to the two conditions. As well, there are indemnification provisions in severance agreements entered into by certain former officers.

THE CONTEXT AND THE JUDGE'S REASONS

13 This plethora of provisions relating to the subject of indemnity for costs and amounts incurred while acting in good faith suggests both a legislative and a corporate recognition of a reality which, if not entitled to judicial notice in the traditional sense, is nevertheless obvious to observers

of the Canadian business scene. That reality is simply that persons who serve as directors and senior officers of corporations whose securities are widely held expect, as incidental to that service, that, when they act honestly and in good faith, they will be indemnified for costs and amounts reasonably incurred in actions or proceedings, for which they might be personally responsible. The *Act*, like its counterparts, is framed to be consistent with this reality.

14 The interplay between the policy underlying the statutory provisions and the legitimate exigencies of the corporate world was well expressed in the unanimous Supreme Court decision in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5. Iacobucci J., writing for the court, made the following observation which was relied on by the judge here (at para. 74):

> ... [T]he broad policy goals underlying indemnity provisions ... allow for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection. Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurism. It is for this reason that indemnification should only be denied in cases of *mala fides*. A balance must be maintained. ...

15 Although the issue at present focusses on the financing of ongoing legal costs, the policy context relating to indemnification, which is inextricably linked to the reason why the costs are being incurred, is both relevant and instructive.

16 One of the cases cited by the judge in her decision was *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, [2001] 10 W.W.R. 305. The position advanced there by the directors and officers of the subject

bankrupt corporation was that "directors and officers require indemnities and commercial necessity dictates that these indemnities have real value" (at para. 61). The judge in *National Bank* agreed with the fundamental argument, saying: "[a]n indemnity is a well-known commercial concept business people routinely use to eliminate or reduce risk and should be recognized as a necessary and desirable obligation" (at para. 67).

17 The judge referred also to *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1989), 61 D.L.R. (4th) 161 (Alta. C.A.). In that case, the equivalent provision of s. 119(1) was not the governing section, because the action was one on behalf of the corporation itself, thus bringing into play the exception in the opening words: "[e]xcept in respect of an action by or on behalf of the corporation." The Alberta Court of Appeal held that, under the equivalent of s. 119(2) and (3), the right to an indemnity depended on the result of the action, so prior to the conclusion of the lawsuit ongoing defence costs could not be advanced.

18 The other case noted by the judge was *Chromex Nickel Mines Ltd. v. British Columbia (Securities Commission)* (1991), 4 B.L.R. (2d) 189 (B.C.S.C.). The British Columbia Securities Commission was investigating the president of Chromex. The board passed a resolution to indemnify him. Chromex and the president then sought a declaration that the indemnification was authorized under s. 124(1) of the *CBCA*, the equivalent of s. 119(1) of the *Act*. The Commission argued that indemnification had to wait until the proceedings were over and until the president was substantially successful. This argument failed.

19 Errico J. of the British Columbia Supreme Court found that the *CBCA* authorized Chromex to indemnify the president against legal expenses actually incurred. In the course of his reasons, he said (at paras. 8, 11-13):

> ... Section 124(3) is directed to circumstances where the applicant has the right to indemnity and s. 124(1) to circumstances where the corporation is permitted to indemnify. ...
>
> I do not think that the decision in *Canada Deposit Insurance Corp.*, supra, is authority for the proposition that ... s. 124(1) requires that the action be concluded before indemnity may be given.
>
> ... [N]o [court] approval is required under s. 124(1) and it is for the corporation through its directors, to determine if the applicant for indemnification has satisfied the conditions. ...
>
> I am reinforced in my conclusions by consideration of s. 118(2) of the Act which reads:
>
> > (2) Directors of a corporation who vote for or consent to a resolution authorizing
> >
> > . . .
> >
> > (*e*) a payment of an indemnity contrary to section 124,
> >
> > . . .
> >
> > are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.
>
> That section provides that the directors of a corporation are personally liable to ensure that the conditions set out in subss. 124(1)(*a*) and (*b*) are met. This does not suggest that they must await the outcome of the proceeding to grant indemnity, although it might be prudent for them to do so. Rather, it places the responsibility for compliance with s. 124 on those directors.

20 The judge said (at para. 33), and I agree with her, that *Chromex* stands for two propositions: that there is no statutory requirement to pay ongoing

defence costs, and that if a corporation decides to pay such costs, payment need not await the completion of proceedings.

21 The judge concluded that there is a discretion in the court to direct payment of ongoing defence costs, or to delay such payment until substantial completion of the proceedings. She also found that the former directors and officers had a legitimate need for legal representation, and that there was no evidence of dishonesty or bad faith on their part. She found *Blair* to be persuasive, and said that it favoured payment of reasonable defence costs on an ongoing basis. She said (at paras. 45-46):

> Whereas it is recognized that the court should always exercise prudence in circumstances such as these, and particularly where the protection of s. 113 of **The Corporations Act** is not available, I am satisfied that those who are entitled to potential indemnification should be presumed to have acted in good faith in the absence of evidence to the contrary and should receive payment on an ongoing basis of all reasonable defence costs incurred. ...
>
> As agreed, I make no finding as to the entitlement of any individual former officer or director. It will be up to the Receiver, or alternatively the court, to make that determination on proper evidence. Should it happen that defence costs are paid and conduct which would disqualify a former officer and director subsequently comes to light, such payments would necessarily cease and the Receiver would be entitled to make a claim for reimbursement with interest at the Receiver's earned rate.

22 The judge's order authorized and directed that the Receiver pay:

> ... [A]ll reasonably incurred past and future legal expenses of former officers and directors on an on-going basis, and any resulting unfavourable judgments arising from the investigation of the Office of the Auditor General, proceedings taken by the Manitoba Securities Commission, the proposed class action proceeding ...

unless those persons did not meet the applicable qualifying criteria in s. 119(1) (or the related Crocus by-law or individual indemnity agreements).

The order also required undertakings to repay funds if it is ultimately determined that the individual was not entitled to the indemnity.

ANALYSIS

(1) New Argument on Appeal

23 I noted earlier that the appellant raised an argument at the hearing that had not been identified in his notice of appeal or factum. He argued that the motion by the Receiver, being an interim or interlocutory motion, should have been decided in accordance with the three-part test set out in *Re Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, and affirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. In particular, he argued, the judge did not consider the question of irreparable harm, an integral part of the test. He was not able to point to any authority for his argument that the three-part test should apply in a circumstance like this.

24 The three-part test applies in cases of interlocutory injunctions and stays of proceedings. It would also apply in other circumstances where a remedy is sought which, if granted, would impact the respondent as profoundly and potentially permanently as does a stay or an injunction. See Beetz J. in *Metropolitan Stores* (at p. 127):

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions... .
>
> [Emphasis added]

25 Both interlocutory injunctions and stays are recognized, for good reason, as "extraordinary" remedies (see, e.g., *Bhattacharya v. St. Boniface General Hospital*, 2000 MBCA 51, 148 Man.R. (2d) 115, and *Merck & Co. v. Apotex Inc.*, 2003 FCA 234, 227 D.L.R. (4th) 106). Nothing about this case meets that description. This motion about the funding of legal expenses is no more than an interim step during the course of an action which resulted in a remedy solidly grounded in the *Act* and in Crocus's by-law. It has none of the extraordinary features of a stay or an injunction.

26 In *Metropolitan Stores*, Beetz J. referred to tests prescribed by statute. It is clear that different tests have been legislated when a party seeks an interlocutory injunction, and when a receiver seeks relief from a court. In the first instance, *The Court of Queen's Bench Act*, C.C.S.M., c. C280, gives the court power to grant an injunction when it is "just or convenient to do so" (s. 55(1)). The three-part test applies on such an application; see, e.g., *T-W Insurance Brokers Inc. v. Manitoba Public Insurance Corp.* (1997), 115 Man.R. (2d) 305 (C.A.), and *4849052 Manitoba Ltd. v. Cairns*, 2005 MBQB 9, 207 Man.R. (2d) 7.

27 On the other hand, this application by the Receiver is governed by the *Act* (s. 95) which gives the court authority on such an application to "make any order it thinks fit." (See also, s. 119(5).) There is a conceptual distinction between the two standards. See *Ross v. Ross* (1984), 39 R.F.L. (2d) 51 (Man. C.A.), where Matas J.A. said (at p. 63):

> One of the meanings listed in The Oxford Universal Dictionary for "fit" is "Suited to the circumstances of the case, answering the purpose, proper or appropriate". As for "just", one of its definitions reads: "Consonant with the principles of moral right; equitable; fair. Of rewards, punishments,

> etc.: Merited. Constituted by law or by equity, lawful, rightful; legally valid." ...

28 There are different words used in the two statutes, and different tests are applicable. The standard is different when a court deals with a motion relating to indemnities and legal fees, which in my view does not lead to an extraordinary remedy, and when a court grants an interim injunction or a stay.

29 Even in certain cases of stays courts have sometimes not applied the three-part test. This may occur where the request is for an interlocutory stay of proceedings before a court, unlike the situation in *Metropolitan Stores* where the proceedings were before an administrative tribunal. A number of cases of stays of court proceedings have applied the test of whether the interests of justice clearly outweigh the respondents' right to proceed with their cause of action. See, *Association of Parents Support Groups in Ontario (Using Toughlove) Inc. v. York et al.* (1987), 14 C.P.R. (3d) 263 (F.C.T.D.), and *Alberta v. Canada (Minister of the Environment) et al.* (1991), 46 F.T.R. 40.

30 All the authority I can find supports the view that the judge's analysis was not flawed because she did not apply the three-part test. I conclude that there is no merit in this argument.

(2) Corporate Indemnification and Advancement of Defence Costs

31 Pursuant to s. 119(1) of the *Act*, a corporation governed by the *Act*, like Crocus, may decide to indemnify its directors and officers. Crocus has so decided, and enacted By-law 1.7 pursuant to that section.

Indemnification under that section (in contrast to the s. 119(3) indemnification) is permissive, but once a corporation decides to act under that section the indemnity becomes an entitlement subject only to the satisfaction of conditions (a) and (b). The right to be indemnified may, but will not necessarily, later be negated by the outcome of the lawsuit, that is, if it transpires that conditions (a) or (b) were not satisfied.

32 The policy underlying the indemnification provisions was explained in *Blair*. As the judge noted, *Blair*, like the other cases cited by her, is factually distinguishable from the present situation. Nevertheless, it provides clear guidance to the proper interpretation of the statutory provisions.

33 *Blair* involved a battle for control of a corporation. Mr. Blair was the corporation's president and chaired a shareholders' meeting. In doing so, he acted on legal advice. He sought indemnification for his legal costs. The issue was not advancement of costs, but rather, as Iacobucci J. said for a unanimous court: "who should bear the costs of legally contesting a disputed directors' election: the corporation, or the chairman in his personal capacity...?" (at para. 2).

34 Whether Mr. Blair had acted in good faith was an issue. Iacobucci J. stated, as a premise, that (at para. 35):

> ... [P]ersons are assumed to act in good faith unless proven otherwise: *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, at p. 548. In this respect, contrary to the appellant's submissions before this Court, I believe that a proper construction of the statute and law related to good faith issues reveals that Blair is not required to prove his good faith, although he may certainly call evidence in this regard to counter whatever evidence of

> bad faith may be adduced against him. To a large extent, it is the corporation that must establish, to the satisfaction of the court, exactly what Blair did that was inimical to its best interests.

35 In the present case there was no evidence before the judge that could support any finding that the former directors and officers had acted other than in good faith. This is an important point, to which I will return.

36 Iacobucci J. then identified the three conditions that must exist "in order to receive indemnification for the costs of defending in litigation" (at para. 36):

> (1) the person must have been made a party to the litigation by reason of being a director or an officer of the corporation;
>
> (2) the costs must have been reasonably incurred; and
>
> (3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

37 The court found that Mr. Blair had met all three conditions. Moreover, permitting Mr. Blair to be indemnified conformed to "the broad policy goals underlying indemnity provisions" (at para. 74), and see para. 14 above).

38 Iacobucci J. also said (at para. 75):

> Given the circumstances of this appeal, denying Blair indemnification would, in my mind, run afoul of these policy concerns. See also Daniels and Hutton, "The Capricious Cushion: The Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance" (1993), 22 *Can. Bus. L.J.* 182, at p. 187:
>
> > To temper excessive care and activity level reactions to potential gatekeeper liability, modern corporate law statutes permit a corporation

> to indemnify a director for any expense reasonably incurred in defending, settling or satisfying a judgment for any action, provided that the director's fiduciary duty to act "honestly and in good faith and with a view to the best interests of the corporation" has been fulfilled.

39 Mainly on the persuasive reasoning articulated in *Blair*, the judge found that the circumstances favoured advancement of defence costs on an ongoing basis for the benefit of the former directors and officers. There was no evidence before her of dishonesty or bad faith, and she said that good faith must, therefore, be presumed (at para. 44-45).

40 The appellant referred to "serious allegations of wrongdoing" and argued that the Auditor General's report, the allegations of the Manitoba Securities Commission, and the existence of the receivership all point to a misleading of shareholders by the former directors and officers which constitute evidence of bad faith. That is not correct. There was no evidence of bad faith before the judge, even taking into account that "the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness" (*Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17 at para. 39). Allegations in pleadings or by the Manitoba Securities Commission, or the extra-judicial conclusions of the Auditor General, are not evidence, and cannot, unless and until they are established in a legal proceeding, displace the presumption of good faith which is well recognized at law.

41 The essence of the judge's decision is set out in two conclusions. First: "I am satisfied that those who are entitled to potential indemnification should be presumed to have acted in good faith in the absence of evidence to

the contrary" (at para. 45). There is ample authority in *Blair* for this conclusion.

42 Second, she continued: "... and [they] should receive payment on an ongoing basis of all reasonable defence costs incurred" (*ibid.*).

43 The *Act*, and its federal counterpart, the *CBCA*, were each enacted, and then amended, in the 1970's. It was recognized at some later point that the statutory provisions were not as clear as they might be on the present question, the advancement of legal costs under the indemnity provisions (see Lyne Tassé, *Canada Business Corporations Act, Discussion Paper, Director's Liability* (Ottawa: Industry Canada, 1995). In 2001 the *CBCA* was amended such that s. 124(2) now reads:

> **Advance of costs**
> **(2)** A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

44 No similar amendment has been made to the *Act*. Nevertheless, while such an amendment would remove any doubt about a corporation's authority to advance costs, I am satisfied that even without that amendment, a corporation governed by the *Act* has the power to make such advances in appropriate cases.

45 The appellant acknowledges that a corporation has broad powers of indemnification and advancement of costs. His factum states: "the board of directors of a corporation may vote to authorize indemnification of officers and directors for defence costs prior to the conclusion of litigation pursuant

to s. 119(1)."

46 The appellant further recognizes that a judge has broad discretion when considering a receiver's application, such as the one before her: "[i]n a receivership, the court has discretion to determine when and whether directors' legal costs should be indemnified" (emphasis added).

47 The board of directors of a corporation has wide-ranging authority to manage the business and affairs of the corporation (see s. 97(1) of the *Act*). In my opinion it is within the power and authority of a board to decide that the corporation should advance defence costs to persons potentially indemnified by virtue of s. 119(1), so long as the board is satisfied that the three conditions referred to above (see para. 36) are satisfied. It would normally be expected that a board would require the kind of repayment undertaking that was required and obtained here.

48 Since a board of directors would have the authority described above, so would a receiver acting under court direction. It is, then, as the appellant accepts, a matter of a judge's discretion whether and when to authorize or direct the receiver to advance defence costs.

49 The appellant argued that in exercising her discretion, the judge erred in finding no evidence of bad faith, an argument I dealt with earlier. He also argued error in that there has been no judicial determination that the conditions in s. 119(1) have been satisfied, but that is a flawed argument. With the presumption of good faith, absent evidence to the contrary, the conditions in s. 119(1) must be presumed to be satisfied until it is established otherwise. To adopt the appellant's argument would be to convert the

s. 119(1)/By-law 1.7 entitlement into a s. 119(3) entitlement, which delays enforcement until proceedings are over. That is not what is meant by the indemnity provisions in the *Act*.

50 The judge's decision is founded on sound legal principles and is consistent with the commercial exigencies spoken of in *National Bank* and *Blair*. While it is possible that the present lawsuit will be resolved in short order, it is more likely that it will take some time before that happens. I agree with the judge when she said: "[t]hese matters are lengthy and complex and are unlikely to be completed for some considerable time" (at para. 41). In the meantime, the former directors and officers, presumed so far to have acted in good faith, have an immediate and legitimate need for counsel. Under the present circumstances they ought not to be obliged to finance their own defence costs.

51 The judge had the discretion to order the advancement. Consistent with the policy rationale explained in *Blair*, she had a sound basis for exercising her discretion as she did. In doing so, she directed that undertakings from the former directors and officers be obtained, promising repayment if it subsequently developed that "he or she was not entitled to payment," thus ensuring so far as possible that the interests of other stakeholders were protected.

52 Viewed from the corporation's perspective, a decision to advance defence costs is an interim financing decision. Based on the criteria and safeguards applicable here, the corporation is not necessarily at risk. I agree with the following observations of Chancellor Allen of the Delaware Court

of Chancery in *Advanced Mining Systems, Inc. v. Fricke*, 623 A. 2d 82 (1992) which, while in the context of statutory language closer to the present *CBCA* than the *Act*, is nevertheless applicable (at p. 84):

> ... [T]he decision to extend advancement rights should ultimately give rise to no net liability on the corporation's part. The corporation maintains the right to be repaid all sums advanced, if the individual is ultimately shown not to be entitled to indemnification. Thus the advancement decision is essentially simply a decision to advance credit.

53 And that is the situation here. If a former director or officer ultimately is entitled to indemnification, costs would be part of that entitlement. If a former director and officer is ultimately disentitled to indemnification, that person has undertaken to pay back all advanced costs.

54 The appellant argued before us that the judge ought to have considered the ability of indemnified persons to repay amounts, if required to do so. While the obligation to repay is clear, the ability to do so in each case has not been assessed. The judge did not require security for the repayment undertakings. It was within her discretion, as it would have been in the discretion of Crocus's board of directors, not to require such security. The implications of a decision to require security might be significant, but no such decision was made here, so consideration of those implications will be left for another day.

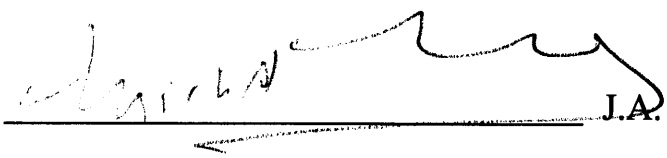
55 The reasons of the judge, and the related parts of her order, authorizing the Receiver to pay judgments unless the former directors and officers are not entitled to be indemnified, do no more than express in judicial form what is already permitted by s. 119(1) and mandated by

Crocus's By-law. While the appellant objected to this part of the order, there is no justifiable basis for the objection.

CONCLUSION

56 As a general principle, we should be "highly reluctant" to interfere with the exercise of the judge's discretion (*Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1374). There was no misdirection by the judge, nor any wrong amounting to an injustice (see *Elsom*, at p. 1374). Her decision was correct in law and the exercise of her discretion was reasonable. The decision should be endorsed, and I would dismiss the appeal with costs.

J.A.

I agree:  J.A.

I agree:  J.A.

APPENDIX

The Corporations Act

Duty to manage or supervise management
97(1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

Further liability of directors
113(2) Directors of a corporation who vote for or consent to a resolution authorizing

. . . . .

(e) a payment of an indemnity contrary to section 119;

are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

Duty of care of directors and officers
117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Indemnification
119(1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if

(a) he acted honestly and in good faith with a view to the best interests of the corporation; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

Indemnification in derivative actions
119(2) A corporation may with the approval of a court indemnify a person referred to in subsection (1) in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which he is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by him in connection with the action if he fulfils the conditions set out in clauses (1)(a) and (b).

Indemnity as of right
119(3) Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

(a) was substantially successful on the merits in his defence of the action or proceeding; and

(b) fulfils the conditions set out in clauses (1)(a) and (b).

Directors' and officers' insurance
119(4) A corporation may purchase and maintain insurance for the benefit of any person referred to in subsection (1) against any liability incurred by him

(a) in his capacity as a director or officer of the corporation, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the corporation; or

(b) in his capacity as a director or officer of another body corporate where he acts or acted in that capacity at the corporation's request, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the body corporate.

Application to court
119(5) A corporation or a person referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

Notice to director
119(6) An applicant under subsection (5) shall give the Director notice of the application, and the Director is entitled to appear and be heard in person or by counsel.

Other notice
119(7) Upon an application under subsection (5), the court may order notice to be given to any interested person and that person is entitled to appear and be heard in person or by counsel.

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1.7 Indemnity of Officers and Directors: Each Officer and each Director of the Fund and each former Officer and each former Director of the Fund and each person who acts and/or has acted at the Fund's request as a Director or Officer of a body corporate of which the Fund is or was a Shareholder or creditor and her or his heirs and legal representatives shall be indemnified against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by her or him in respect of any civil, criminal or administrative action or proceeding to which she or he is made a party by reason of being or having been a Director or Officer of the Fund, if

(a) she or he acted honestly and in good faith with a view to the best interests of the Fund; and

(b) in the case of criminal or administrative action or proceeding that is enforced by a monetary penalty, she or he had reasonable grounds for believing that her or his conduct was lawful.