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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

THE MANITOBA SECURITIES COMMISSION,

Applicant,

- and -

CROCUS INVESTMENT FUND,

Respondent.

David G. Hill, Donald G. Douglas and Karen R. Wittman for Deloitte & Touche Inc. Receiver and Manager of Crocus Investment Fund

John T. McJannet, Q.C. for Crocus Investment Association

Douglas G. Ward and Catherine E. Howden for the Manitoba Federation of Labour

Douglas E. Finkbeiner, Q.C. for GrowthWorks Canadian Fund Ltd.

Kenneth A. Filkow, Q.C. for Charles Curtis, Peter Olfert, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Diane Beresford, Sylvia Farley, Robert Ziegler, John Clarkson, and Hugh Eliasson

and on behalf of: Ron Waugh, James Umlah, David G. Friesen and Chubb Insurance

) Company of Canada
)
) Martin G. Tadman
) for Robert Hilliard
)
) David M. Wright
) for Wellington West Capital
) Inc.
)
) Christopher P. Besko
) for the Manitoba
) Securities Commission
)
) J.R. Norman Boudreau
) for Bernard Bellan, Intervenor
)
) Judgment delivered:
) November 30, 2006

McCAWLEY, J.

[1] The Manitoba Federation of Labour (MFL) brings a motion for, among other things, the following relief:

1. an order that John T. McJannet, Q.C. be appointed as solicitor for the Class A shareholders of Crocus Investment Fund and that his reasonable fees and disbursements be paid out of the assets of Crocus;

2. an order that a special meeting of the Class A shareholders of Crocus be held, the costs of which to be paid out of the assets of Crocus;

3. an order directing Deloitte & Touche Inc. (the Receiver) to provide the MFL and the Crocus Investors Association with a list of the said shareholders pursuant to s. 21 of ***The Corporations Act*** of Manitoba, C.C.S.M. c. C225;

4. an order that pending such meeting of the shareholders and a subsequent report to the court by the Receiver, the Receiver shall not, subject to paragraph 5, dispose of any property or assets of Crocus except in the ordinary course of business; and

5. an order amending the order of this court signed November 30, 2005 to prohibit the Receiver from selling any assets of Crocus valued at $1M or more without prior court approval.

BACKGROUND

[2] Crocus is a labour-sponsored investment Fund created pursuant to ***The Crocus Investment Fund Act***, C.C.S.M. c. C308. Its purpose is to promote long-term capital investment as well as employee ownership or management participation in Manitoba businesses.

[3] The common shares of the Fund (Class A shares) were available for purchase by individuals between 1992 and December 10, 2004 when trading was suspended. Regulatory approval to halt sales and suspend redemption of Crocus shares was obtained so that an organizational review and comprehensive assessment of the value of the Crocus portfolio could be undertaken by the office of the Auditor General. What was initially intended to be a limited examination

of the Fund was expanded in February 2005. Two months later, in April 2005, the Manitoba Securities Commission (MSC) commenced proceedings against the Crocus Board for alleged misconduct. Shortly thereafter, the Crocus Board announced it had written down the Fund's net asset value by approximately $46M.

[4] The situation continued to worsen with the office of the Auditor General releasing a report critical of the Fund's operations and governance. Around mid-June the Board announced it would no longer offer other Class A shares for sale but would work with interested parties to dispose of the assets of the portfolio in a manner that realized the highest value to shareholders.

[5] The following day an independent prosecutor from Ontario recommended that the matter be referred to the R.C.M.P. for a criminal investigation and on June 23, 2005 the members of the Board of Crocus announced their resignation effective June 29, 2005.

[6] On June 28, 2005, on motion by the MSC, Deloitte & Touche was appointed Receiver and Manager of Crocus. The MFL was present at the hearing and, although it did not object to the appointment of the Receiver, requested time to consider whether other alternatives existed which would result in a better return for the shareholders of Crocus. The MFL was given until July 13, 2005 to present a plan of action but in the meantime the Receiver was appointed to fill the void. As no alternative plan of action was forthcoming on July 13, 2005, the

receiving order was continued and has remained in place since subject to some variations.

ARGUMENT AND ANALYSIS

[7] The central issue in the within motion is the MFL's request for an order requiring the Receiver to convene a special meeting of the shareholders of Crocus. The stated purpose of the meeting is so that the shareholders of Crocus can consider a resolution supporting an offer by GrowthWorks Canadian Fund Ltd. to purchase all or substantially all of the assets of Crocus. The MFL is supported in the motion by GrowthWorks and the Crocus Shareholders Association.

The Proposed Shareholders' Meeting

[8] A number of arguments were advanced in support of the position that the Receiver's refusal to convene a special meeting of the shareholders of Crocus to consider the GrowthWorks' proposal is wrong and the Receiver should be ordered to do so.

1. Compliance with The Corporations Act

[9] The evidence disclosed that prior to the hearing the MFL and the Crocus Investors Association had canvassed some of the shareholders of Crocus to ascertain whether there was any interest in convening a shareholders' meeting to consider the GrowthWorks' offer. Requisitions were received from approximately

3,900 shareholders (over 5%) supporting a special meeting which were delivered to the Receiver.

[10] Accordingly, it was argued that pursuant to s. 137(1) of ***The Corporations Act*** the Receiver is statutorily obligated to call a meeting of the shareholders for the purpose stated in the requisition. Section 137(1) provides:

> **Requisition of meeting**
>
> 137(1) The holders of not less than 5% of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.

[11] To be successful the court must accept the proposition that the Receiver stands in the shoes of the directors and is bound by those provisions of the ***Act*** that apply to directors. This position, however, is contrary to the overwhelming weight of authority with respect to the role of a court-appointed Receiver and its effect on the rights of the officers, directors and shareholders of a corporation. For the sake of brevity, only some authorities are referred to here.

[12] In *Kerr on the Law and Practice as to Receivers and Administrators*, 17th Ed., Sir Raymond Walton, London, Sweet & Maxwell (1989), Chapter 9 entitled "Managers", it is stated at p. 214:

> ... Where the court appoints a manager of a business or undertaking, it in effect takes the management of it into its own hands; for the manager is an officer of the court. Managers, when appointed by the court, are responsible to the court, and can have no regard to orders of any of the parties interested in the business.... (emphasis added)

[13] Also relevant is Chapter 6 of *Kerr* entitled "Effect of Appointment and Possession of a Receiver", at pp. 143, 144:

> ... When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave.... The court will not allow the possession of its receiver to be interfered with or disturbed by anyone, whether claiming by title paramount to or under the right which the receiver was appointed to protect.... A man who thinks he has a right paramount to that of the receiver must, before he presumes to take any step of his own motion, apply to the court for leave to assert his right.... (emphasis added)

And at p. 219, Chapter 9:

> ... The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, ... but the company is entirely superseded in the conduct of that business, and deprived of all power to enter into contracts in relation to that business, or to sell, pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. The powers of the directors in this respect are entirely in abeyance so far as the business of the company is concerned, and the relevant powers of the company are exercised by the receiver under the direction of the court. (emphasis added)

[14] *Bennett on Receiverships*, 2nd Ed., Frank Bennett, Toronto, Carswell (1999), states at p. 25:

> The duties of a court-appointed receiver are well summarized in the leading case of *Parsons et al. v. Sovereign Bank of Canada*,[10] wherein Viscount Haldane stated:
>
> > A receiver and manager appointed. . . . is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs. (emphasis added)
>
> In Canada, the duties [of a court-appointed receiver and manager] are set out in *Ostrander v. Niagara Helicopters Ltd. et al.*:[11]
>
> > A very clear distinction must be drawn between the duties and obligations of a receiver-manager . . . appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is

> appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest. (emphasis added)
>
> .....

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10 [1913] A.C. 160 at p. 167, 9 D.L.R. 476 (P.C.).

11 (1973) 1 O.R. (2d) 281 at p. 286, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (S.C.), followed in *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.) and *Royal Bank v. Vista Homes Ltd.* (1984), 58 B.C.L.R. (2d) 354, 54 C.B.R. (N.S.) 124 (S.C.).

[15] Section 91 of ***The Corporations Act*** accords with the foregoing statements of the common law:

> **Directors' powers cease.**
> **91** If a receiver-manager is appointed, by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

[16] The receiving order of June 28, 2005 granted the Receiver broad powers to deal with all of Crocus's assets, both current and future. As the foregoing makes clear, whereas the Receiver is in a fiduciary relationship with all of the Crocus stakeholders, it takes direction only from the court.

[17] One of the concerns raised by the Receiver with respect to the proposed shareholders' meeting is that it is an attempt by the shareholders of Crocus to employ an extra judicial mechanism to influence the conduct of the receivership. Although not expressly stated, a possible implication of convening a meeting is that the Receiver might be less conscientious about protecting the interests of "all the parties involved in the contest" when faced with the opinion of hundreds of shareholders. This is hardly an approach to be encouraged. Furthermore, the

law is clear that the Receiver is entitled to carry out its responsibilities and obligations without interference from others. Indeed, paragraph 3 of the receiving order concludes with words to the effect:

> **RECEIVER'S POWERS**
>
> ... in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons ... and without interference from any other Person.

[18] "Person" is specifically defined to include "... current and former directors, officers, employees, agents, accountants, legal counsel and shareholders" of Crocus.

[19] For the foregoing reasons I find that s. 137(1) of ***The Corporations Act*** does not impose a statutory obligation on the Receiver to convene a shareholders' meeting to consider the GrowthWorks' offer.

2. Change of Circumstances - The GrowthWorks' Proposal

[20] There is a certain déjà vu quality to the within motion. In October 2005, a similar motion was made by the MFL asking the court to order the Receiver to convene a special meeting of the shareholders to consider a proposal by GrowthWorks. That motion was dismissed in reasons for decision dated October 27, 2005.

[21] Since that time, however, the Receiver has had continuing discussions with GrowthWorks and the Crocus Investors Association regarding the purchase of the assets of Crocus by GrowthWorks and whether the Receiver should call a special meeting of the shareholders to consider any such proposal. These

dealings are summarized in the Receiver's June 30, 2006 Quarterly Report and Supplementary Report to the court. Of particular relevance to this motion is an exchange of correspondence, largely between the Receiver and GrowthWorks, starting with a proposal dated March 9, 2006 and continuing up to the date of hearing.

[22] Counsel for the MFL argued that there has been a substantial change in circumstances since the earlier GrowthWorks proposal was considered and the May 23, 2006 proposal it is now seeking to have considered by the shareholders. The material difference relied upon is that the latest GrowthWorks' offer includes an indemnity whereby the plaintiffs in a proposed class action lawsuit against Crocus (the proposed class consisting of all the shareholders of Crocus) have agreed to indemnify Crocus provided the sale of all, or substantially all, of the Crocus assets to GrowthWorks is consummated. One of the reasons the MFL's earlier motion was dismissed was because of the existence of the proposed class action and the difficulties it poses in determining the liabilities of Crocus. It should be noted, however, that although that action was filed in July 2005, it has yet to be certified and has not advanced in any appreciable way since being initiated.

[23] It is the position of the Receiver that the May 23rd proposal does not constitute an offer capable of acceptance by it so as to create a binding agreement. Accordingly, the Receiver says there is no offer to put before a

meeting of the shareholders. Additionally, the Receiver says the proposed indemnity does not protect Crocus to the extent suggested by the MFL.

[24] In order to fully understand the two positions it is necessary to review what has transpired leading up to and following the May 23, 2006 proposal.

[25] On March 9, 2006 GrowthWorks wrote to Crocus with an offer to acquire all or substantially all of the assets of Crocus. The proposal provided that GrowthWorks would merge with Crocus through the acquisition of Crocus assets. The shareholders of Crocus would exchange their holdings for equivalent shares in GrowthWorks with a net asset value calculated on a "going concern" basis to be determined at the time of closing of the transaction. The letter outlined the principle terms of the offer which included that the value to be ascribed to the Crocus portfolio would be determined by an independent evaluator. In response, the Receiver wrote on March 22, 2006 advising that it had identified a number of important "preliminary considerations" that in its view had to be addressed before embarking on a time-consuming and costly due diligence process.

[26] In fact, the Receiver had a number of concerns about the terms being proposed. Without going into the details, among the issues to be resolved which the Receiver identified then, or which subsequently emerged in discussions were:

- the proposed method of valuation;
- whether liquidation on a piecemeal basis was now preferable to the sale of the remaining assets *en bloc*;

- the Receiver's unwillingness to suspend its efforts to liquidate the Crocus portfolio until completion of any due diligence process and negotiation of a definitive agreement;
- the Receiver's refusal to give GrowthWorks a right of first refusal on any sale that the Receiver might negotiate in the interim;
- a difference of opinion on the type of assets to be included in the sale to GrowthWorks;
- the Receiver's concerns with the agreement in principle to indemnify Crocus from any direct or third party claims arising from the class action lawsuit; and
- the proposed role of the shareholders of Crocus with respect to the sale.

[27] The May 23rd proposal which the MFL now wishes to have considered by the shareholders appears to be a consolidation of the March 9th proposal and following discussions. It provides that the shareholders of Crocus would:

> ... exchange their Crocus holdings for an aggregate amount equal to (i) a cash amount equal to the cash and cash equivalent assets held by Crocus ... less amounts needed to extinguish, satisfy or create a reserve fund for liabilities of Crocus ...

[28] To address the problem that the liabilities of Crocus cannot be ascertained until its exposure in the class action is determined, GrowthWorks' offered to make the "definitive agreement" arising out of the May 23rd proposal conditional on GrowthWorks providing "an enforceable litigation settlement agreement with the proposed representatives of the Crocus shareholders' class action lawsuit

against any potential, direct or indirect liability of Crocus to its shareholders". Attached to the May 23rd proposal was a Memorandum of Understanding (MOU) dated May 15, 2006 between GrowthWorks and the class action plaintiff.

3. The Class Action Memorandum of Understanding

[29] Pursuant to the MOU, Crocus would be obligated to consent to certification of the class action by the court. As well Crocus would pay $1M to counsel for the class action plaintiff. The class action against Crocus would be dismissed and a "bar order" (an order confirming what is commonly referred to in Manitoba as a "Pierringer Agreement") would be made by the court.

[30] The "bar order" would permit the shareholders of Crocus to continue their class action against all defendants other than Crocus (that is against the non-settling defendants) but only with respect to the several liability of the non-settling defendants as between themselves and Crocus. The non-settling defendants would be enjoined from pursuing any claims against Crocus except to the extent that any non-settling defendant was entitled to indemnification from Crocus on account of that non-settling defendant's several liability to the class.

[31] As well, pursuant to the MOU, the class action plaintiff (the shareholders) would indemnify Crocus and GrowthWorks for any indemnity claims successfully made by the non-settling defendants against Crocus with respect to any non-settling defendant's liability to the class. Crocus would also be required to provide all possible assistance to the class in the class action and the class action

plaintiff and GrowthWorks would enter into a detailed settlement agreement to give effect to the MOU.

[32] The Receiver took strong objection to a number of the terms in the MOU. In particular, it noted that, whereas Crocus was called upon to fulfill certain obligations, as was the class action plaintiff, GrowthWorks was not required to do anything other than benefit from the agreement. Most significantly, the MOU was to be contingent on acceptance by Crocus of the GrowthWorks' offer and the closing of the transaction, failing which Crocus' potential exposure to the class action would remain.

[33] The Receiver posed the legitimate question which is, if the true objective of the class action plaintiff were to obtain justice from those persons, other than Crocus, who have wrongfully dealt with the shareholders of Crocus and caused them damage, why would a similar arrangement not be sought directly from the Receiver? Under the MOU the Receiver would be prohibited from entering into such an agreement directly with the class action plaintiff, although a letter from GrowthWorks to the Receiver dated May 23, 2006 states, "... We also believe that your fiduciary obligation to the shareholders of Crocus and the court requires you to place a high value on the elimination of that potential liability."

[34] All of this leaves the strong impression of an attempt by GrowthWorks to gain an advantage by Machiavellian design. Certainly it lends legitimacy to the concern of the Receiver that by tying the MOU to acceptance of the offer and completion of the sale by Crocus on GrowthWorks' terms, GrowthWorks has co-

opted the support of the class action plaintiff in an attempt to hold a gun to the Receiver's head.

[35] Another concern arises from the fact that under the MOU the non-settling defendants are still entitled to pursue Crocus for indemnification. Crocus is, as already noted, entitled to indemnification against the class but it is unclear how, in practical terms, Crocus would enforce its indemnity. Furthermore, the officers' and directors' insurance policy with Chubb provides coverage for defence costs as well as judgments arising from the class action. Accordingly, to the extent the limits of the policy may be exceeded, the officers and directors have indemnification entitlements against Crocus for such costs and judgments. Although the MOU addresses indemnifications against Crocus as to judgments which may arise from the class action, it does not address the issue of costs. Neither does the MOU address existing indemnification obligations owed by Crocus to certain of the officers and directors which extend beyond the class action to, for example, the proceedings before the MSC.

[36] This situation is further complicated by the obligation of Crocus contained in the MOU to provide all possible assistance to the class in the class action in advancing their claims against the officers, directors and others. It is difficult to see how Crocus's obligation to do so is compatible with the indemnification it owes to these same parties.

[37] Counsel speaking on behalf of Chubb's interests noted that before entering into any settlement agreement with the class, Crocus would be required

to obtain Chubb's consent. The court was advised that Chubb is not prepared to give its consent to the terms of settlement currently proposed in the MOU and would consider any funding by Crocus to the class to be a breach of the Chubb policy.

[38] In my view these concerns raise legitimate questions which remain unanswered. They cannot be characterized as insignificant details coincidental to an agreement in principle but are fundamental to the May 23rd proposal the MFL seeks to be put before the shareholders. The lack of agreement on them, as evidenced by the exchange of correspondence between the Receiver and GrowthWorks, raises the question as to what could fairly and responsibly be put to a shareholders' meeting if one were to be called.

[39] Although the Receiver acknowledges that there may be circumstances which would make the convening of a shareholders' meeting appropriate (for example if a definitive agreement of the kind contemplated by the May 23rd proposal were ultimately concluded with GrowthWorks or some other entity), such circumstances do not exist here.

4. The Propriety of the Proposed Shareholders' Meeting

[40] The Receiver raised a concern about the propriety of seeking an endorsement from the shareholders of any proposed sale without first obtaining court approval. While recognizing that the shareholders of Crocus are an important stakeholder in the receivership, and reiterating the Receiver's desire that they receive the greatest possible return on their investment, the fact is

there is no legal obligation on the Receiver to obtain approval of the shareholders as to any action the Receiver deems appropriate to take. Nevertheless, the Receiver has always given its assurance that, in light of the complexity of the sale of all or substantially all of the assets of Crocus, court approval would be sought with notice to all interested parties so that the court would have the benefit of all points of view.

[41] The Receiver points out, however, that if it were to agree to a meeting of shareholders to consider and vote on a proposed sale prior to its being presented to the court, the court could potentially find itself in the awkward position of having to consider a proposed transaction that the Receiver recommended but the shareholders rejected, or the Receiver rejected but the shareholders approved. Obviously such a situation is to be avoided.

[42] With respect to the Receiver's concern that convening a meeting prior to court approval could falsely raise the expectations of the shareholders as to their role and the weight to be given to their voice, as this court noted in its reasons of October 27, 2005, ¶31, dismissing a similar motion by the MFL:

> ... At best, a consultation with the shareholders of Crocus would simply provide them with an opportunity to express their opinion as to what they would like to see happen from their vantage point. It would not be binding on the court.... In so saying, I in no way wish to minimize the legitimate interests and concerns of the shareholders. Rather, I merely underline the fact that their view is <u>one</u> perspective, understandably informed by self-interest, and one that cannot be taken to reflect the broader interests which this court, and indeed the Receiver as a court-appointed neutral party, must take into account.

[43] For the foregoing reasons I find that in the current circumstances it is neither desirable nor appropriate for the convening of a meeting of the shareholders.

APPOINTMENT OF AN *AMICUS CURIAE*

[44] The MFL seeks the appointment of John T. McJannet, Q.C. as *amicus curiae* pursuant to Queen's Bench Rule 13.02. That rule provides:

> **Leave to intervene as a friend of the court**
>
> 13.02 Any person may, with leave of the court or at the invitation of the court and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[45] Whether to grant the status of *amicus curiae* is a matter within the court's discretion (***Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (Public Utilities Board)***, [1994] M.J. No. 106 (C.A.)).

[46] In considering the role of an *amicus curiae* the following excerpt from the *Canadian Encyclopedic Digest* (Western 3rd Ed. at §580) is helpful:

> Traditionally, the use of amicus curiae is restricted to situations where a matter of importance is before the court which could affect many other persons and the court invites the Attorney General to appear as amicus curiae; where the amicus curiae may address the court to prevent injustice by calling the court's attention to decisions or points of law that might have been overlooked; or where the amicus curiae represents the unrepresented. Amicus curiae are barristers who assist the court, usually at the court's request, and are otherwise disinterested in the proceeding.[1]

[47] In support of its request for the appointment of an *amicus curiae*, the MFL argued that the shareholders of Crocus have not been consulted at any step of the proceedings so far. Given that there are approximately 34,000 of them, it was argued that it as a matter of public interest their views must be heard.

Accordingly, it was proposed that Mr. McJannet, as an independent solicitor, would provide his opinion on the efficacy of any transactions being proposed by the Receiver and would serve the interests of the Class A shareholders. It was also proposed that his legal fees be paid out of the assets of Crocus.

[48] In the ***Manitoba Motorcycle*** case relied on by the MFL, the Consumers Association of Canada (Manitoba) Inc. and the Manitoba Society of Seniors requested intervenor status as friends of the court with respect to an appeal against certain orders made by the Public Utilities Board dealing with motorcycle insurance rates. The court found that there was a broad public interest at stake and that the applicants were in a better position than the respondent Board to represent the other side of the appellant's argument. However, the case has limited application here because, in coming to its conclusion, the court was heavily influenced by its view that it would be inappropriate for the Public Utilities Board to defend itself against allegations that it had improperly or unfairly conducted its proceedings. In such circumstances it was found that the argument should more appropriately be advanced by an *amicus curiae*.

[49] In my view the proposal by the MFL, supported by GrowthWorks, represents a fundamental misunderstanding of the role of *amicus curiae*. Clearly Mr. McJannet is not "otherwise disinterested" in these proceedings. He is counsel to the Crocus Investors Association, an entity closely affiliated with the MFL and GrowthWorks, and has been for some time. As well, it appears it has recently come to light that his legal fees are being underwritten by

GrowthWorks. It is therefore difficult to see how Mr. McJannet could represent the public interest, which necessarily extends beyond that of the shareholders, or how he could provide the court with unbiased and independent advice.

[50] Although the court was invited, if it did not find Mr. McJannet acceptable, to appoint another lawyer as *amicus curiae*, there is no evidence that the interests of the shareholders are not being properly taken into account by the court-appointed Receiver, acting in its fiduciary capacity.

[51] To the extent that the Receiver's obligation to protect the interests of all stakeholders may be perceived by some as leaving them without a voice, it is worth observing that from the outset of this receivership the court, and the Receiver under its supervision, has encouraged the participation of all those who are affected. Although that participation must necessarily have limits, and does not extend to the appointment of an *amicus curiae* as requested, the Crocus Investors Association can continue to have a voice through counsel when and as is appropriate.

AMENDMENT TO THE COURT ORDER FOR GREATER SUPERVISION

[52] The MFL asks that the receiving order of June 28, 2005, as varied by this court on October 27, 2005, be amended so that any proposed sale of Crocus assets valued at $1M or more would require prior court approval subject to whatever conditions may be appropriate.

[53] The order of October 27, 2005 removed the requirement of prior court approval for any transaction or aggregate thereof exceeding $100,000.00. At that time I made the following comments at ¶39 and ¶40:

> [39] Although it was suggested that consideration be given to raising the monetary amount, the real issue is the degree of confidence reposed in the Receiver and the corresponding deference it should enjoy. The Receiver is an officer of the court, and the court should not second-guess it or substitute its so-called "expertise" for that of the Receiver, but rather confine itself to necessary supervision and oversight. Requiring the Receiver to come to the court for approval of transactions exceeding any dollar amount, which it is willing to do, would be costly and cause delay and is unnecessary in the circumstances.
>
> [40] I am confident the Receiver will continue to exercise sound judgment and will bring matters which merit the court's attention for its review and consideration. The requirement of quarterly reporting as proposed by the Receiver should provide additional comfort to any who might be concerned. Should unanticipated difficulties arise in the future, the issue can be revisited.

[54] I am unaware of any difficulties, unanticipated or otherwise, to cause me to reconsider this view. Indeed, quite the opposite is true. As the June 30 report of the Receiver discloses, considerable progress has been made in liquidating the Crocus portfolio pursuant to the various orders of this court. The Receiver anticipates that by the fall of 2006 in excess of 70% of the portfolio will have been sold or will be subject to exit strategies, and that the cash and cash equivalent position of the Fund will have increased to approximately $60M. The report also indicates that the original estimated timetable of approximately five years to deal with the majority of the Crocus portfolio remains on track, as well as other details of the work accomplished. This and more detailed information are included on an ongoing basis in the Receiver's reports which are summarized and available on its website.

[55] It is acknowledged that the remaining Crocus assets may be more difficult to liquidate and may take more time. However, there is no evidence before me to suggest the Receiver has not conducted itself responsibly in the best interests of all stakeholders or that it will not continue to do so.

[56] The ability of any interested person to apply to the court if a Receiver is failing to perform its duties properly, and the role of the court in conducting a review, is described in *Bennett*, *supra*, at p. 183:

> Finally, throughout the receivership, any interested person may apply to the court if the court-appointed receiver is failing to perform its duties properly or is otherwise abusing them. In reviewing the conduct of a court-appointed receiver, the court will first assume that the receiver is acting properly unless the contrary is shown. It is incumbent upon the person alleging the abuse to prove it. The court presumes that the receiver is acting honestly and in good faith unless it is otherwise established. Secondly, the court will be reluctant to second-guess the receiver on its decisions with the benefit of hindsight. And thirdly, the court should review the receiver's conduct in light of the specific mandate in the order.

[57] I see no basis on which to accede to the MFL's request. The reasons given approximately a year ago in support of a reduced supervisory role are as pertinent now as they were then. I accept the Receiver's advice that greater supervision is not required and in particular, that the value the investee companies place on privacy in their negotiations has significantly facilitated the liquidation process to date and will continue to do so. In light of the Receiver's track record, I am confident the court can continue to rely on its guidance and expertise within the process that has been adopted.

THE SHAREHOLDERS' LIST

[58] The MFL also seeks an order directing the Receiver to provide it and the Crocus Investors Association with a list of the shareholders of Crocus in compliance with s. 21 of ***The Corporations Act***.

[59] The MFL and Crocus Investors Association take the position that obtaining the list is necessary to call a shareholders' meeting. Since no order to convene a meeting is being made, the reason for requesting the list disappears.

[60] Even had I found otherwise, consistent with my reasons as to why the Receiver is not obligated under the provisions of s. 137(1) of the ***Act*** to convene a meeting, similarly it is not bound by s. 21 to produce the shareholders' list.

[61] For possible future reference, I also make the following comments. The Receiver has maintained throughout that the shareholders' list contains information which, subject to applicable privacy laws, may be of value as part of a final package of assets for sale to some person seeking to establish or expand a mutual fund or similar business in the Province of Manitoba. Although this assertion was disputed by counsel to the MFL and GrowthWorks, common sense suggests that there may well be value in the list. As well, and as was argued by counsel for the Receiver, the close relationship between the MFL, the Crocus Investors Association and GrowthWorks would suggest that if produced, the list could find its way into the hands of GrowthWorks to be used to further its own ends. Since it appears that there has already been an instance where a privileged communication from the Receiver fell into the wrong hands and

became public, caution would seem to be the prudent course. Accordingly, had a shareholders' meeting been ordered, I would have ordered it to be held in the manner suggested by the Receiver without disclosing the list.

OTHER RELIEF

[62] The other relief claimed in the amended notice of motion is dependent on the calling of a shareholders' meeting. Having determined that a meeting of the Class A common shareholders is at this stage neither appropriate nor desirable, it need not be dealt with further.

ROLE OF THE MFL

[63] Since it falls to the court to exercise a supervisory role over the administration of the Crocus receivership and in light of the Receiver's criticism of the role of the MFL, some comment is warranted.

[64] As all are aware, from the inception of Crocus until the appointment of the Receiver in June 2005, the MFL controlled the Board of Directors. The Receiver's appointment was occasioned by the mass resignation of the MFL's nominees to the Board, along with the other Board members, following a substantial devaluation of the assets of Crocus and other events already described. Counsel for the Receiver complains that since the Receiver first assumed its role, the MFL has attempted to regain control of Crocus and influence the conduct of the receivership.

[65] This perception finds support in a number of events over the past 18 months, including the MFL's failed attempt to have GrowthWorks appointed as

Manager of Crocus over and above the Receiver and the current attempt to have GrowthWorks positioned, to the exclusion of all others, to purchase the remaining Crocus assets. Compounding this is the MFL's close association with GrowthWorks already referred to and its efforts to have a lawyer appointed as *amicus curiae* to give independent advice to the court at Crocus' expense when this is the role of the Receiver.

[66] Added to this are several strong statements on behalf of the MFL and GrowthWorks that "the assets of Crocus belong to the shareholders" and "it is their money" so they should decide what will happen. With all due deference, this is not quite accurate.

[67] No one involved in this receivership fails to appreciate the significant stake the shareholders have in the outcome of these proceedings and the concern and frustration they undoubtedly feel. However, and as was observed, by investing in Crocus the shareholders traded dollars for shares and unfortunately now find themselves in a position where others have a prior claim and the return on their investment is uncertain. This is not to say the situation is entirely bleak. The ultimate outcome remains to be seen. Rather it is meant as a reminder that the Receiver has a job to do and should be left to carry out its responsibilities as best as can be done in order to maximize the realization to shareholders once liabilities are determined and paid.

[68] In so saying, it is recognized that the MFL has, as does any other interested person, a right to bring their concerns to the court if the Receiver is

not fulfilling its duties properly. However, such right must be exercised judiciously, upon proper evidence, so as not to incur unnecessary expenses and erode what is ultimately available to the stakeholders.

[69] The motion of the MFL is dismissed in its entirety.

[70] Costs may be spoken to if the parties are unable to agree.

M.J. McCawley J.