Docket: CI 05-01-43350
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:		**APPEARANCES:**
THE MANITOBA SECURITIES COMMISSION,	)	For the Applicant: Christopher P. Besko
Applicant,	)	For the Manitoba Federation of Labour: Douglas G. Ward, Q.C.
- and -	)	
CROCUS INVESTMENT FUND,	)	For Deloitte & Touche Inc., Receiver and Manager of Crocus Investment Fund: Robert A. Dewar, Q.C. Dave G. Hill Allegra C. Frank
Respondent.	)	
	)	For Bernard Bellan et al. in MBQB Suit No. CI 05-01-42765: J. David Soper
	)	Judgment delivered: October 27, 2005

McCAWLEY J. (orally)

[1] Deloitte & Touche Inc., as Receiver and Manager of Crocus Investment Fund, brings a motion for an order approving its plan for the sale of the assets of Crocus as set forth in Receiver's Report #5 and Supplementary Report #5-A.

[2] As well, the Receiver seeks an order amending paragraph 3(l) of the order of Justice Scurfield dated June 28, 2005 by replacing that paragraph with

wording which would permit the Receiver to sell, convey, transfer, lease or assign the property of Crocus, whether within or outside the ordinary course of business, without court approval.

[3] The Receiver also seeks an order replacing paragraph 4 of the order of Justice Scurfield. The proposed amendment would require the Receiver to file quarterly reports commencing with the quarter ending December 31, 2005, including a statement of receipts and disbursements. The first of such quarterly reports would be filed on or before January 15, 2006, and the remainder thereafter until the Receiver is discharged or until further order of this court.

[4] Concurrently, the Manitoba Federation of Labour (the "MFL") brings a motion for an order requiring the Receiver to forthwith convene a meeting of the shareholders of Crocus to consider whether they wish to approve the Receiver's plan or, alternatively, whether they wish to approve a plan proposed by the MFL as set out in several affidavits filed in support.

BACKGROUND

[5] 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 in Manitoba businesses as well as employee ownership or participation in management, thereby contributing to economic stability in the province, job creation and retention, and ownership of Manitoba

businesses by Manitobans. Throughout these reasons, I may refer to it as "Crocus" or "the Fund", but they are one and the same.

[6] The common shares of the Fund ("Class "A" shares") were available for purchase by individuals between 1992 and December 2004 when trading of the shares was suspended. As at June 28, 2005, when Deloitte was appointed Receiver, there were approximately 33,700 Class "A" shareholders who had cumulatively invested approximately $185.2 million in the Fund.

[7] In addition to the Class "A" shareholders, there were other shareholder classes:

(a) The Class "L" shareholder being the MFL which contributed $200 in capital to Crocus and was previously entitled to elect a majority of the Board of Directors of Crocus;

(b) The Class "G" shareholder being the Government of the Province of Manitoba which contributed $2.0 million to the Fund as a founding shareholder and was previously entitled to elect one director to the Board; and

(c) The Class "I" shareholders consisting of the Manitoba Government & General Employees' Union, the Workers Compensation Board of Manitoba, the United Health Services Corporation, and Fonds de solidarité des travailleurs du Québec. This class of shareholder contributed varying

amounts of capital to Crocus and, as at June 28, 2005, had a collective investment totaling approximately $0.8 million. Collectively they were also entitled to elect one person to the Board of Crocus.

[8] I do not intend to go into a detailed review of the chronology of events leading up to the appointment of Deloitte as Receiver last June. This information is available on the Deloitte & Touche / Crocus Investment Fund website for anyone who is interested. The following brief summary is sufficient for our purposes today.

[9] As a result of an announcement by Crocus on December 10, 2004 that it had received regulatory approval to halt sales and suspend redemption of its shares in order to conduct an organizational review and comprehensive assessment of the value of its portfolio, the Office of the Auditor General decided to embark upon a limited examination of the Fund. This limited examination was subsequently expanded in February 2005.

[10] Two months later, in April 2005, the Manitoba Securities Commission (the "MSC") issued a Notice of Hearing and Statement of Allegations against the Crocus Board. The Statement contained serious allegations which included, among other things, allegations with respect to failure to disclose, failure by the Board to comply with its obligations regarding the valuation of shares, and allegations against certain individual Board members. Around the same time, it was also announced that the Crocus Board had written down the Fund's net

asset value by approximately $46 million as a result of external valuations completed by four independent national accounting firms. The public was advised that, coupled with operating losses and other expenses, the shares, which had been at $10.45 when trading halted in December 2004, would be valued at slightly below $7.00.

[11] Only a matter of weeks later, at the end of May 2005, the Office of the Auditor General released a report outlining concerns with the Fund's operations and governance. That report also indicated that the investment portfolio appeared to have been overstated as at August 31, 2004 and likely earlier, resulting in overvalued shares.

[12] On June 13, 2005, the Board announced that it would not offer further Class "A" shares for sale and that Crocus would look for the best way to realize maximum value for shareholders from the Fund's portfolio and other assets. Citing damage to the Fund's reputation, high net operating costs, poor investment performance, the threat of litigation, and other factors, the Board concluded that the financial interests of shareholders would be best served by working with interested parties to dispose of the assets in the portfolio in a manner that realized the highest value.

[13] The following day, on June 14, 2005, after reviewing the Office of the Auditor General's report on Crocus, an independent prosecutor from Ontario

recommended that the matter be referred to the R.C.M.P. for a criminal investigation.

[14] Then, on June 23, 2005, the members of the Board of Crocus announced that they had resigned effective June 29, 2005, citing as a key issue their inability to secure adequate Directors and Officers insurance. Although an extension of the current D & O insurance coverage had been negotiated and some additional coverage was available, the Board determined that it was insufficient given the potential future liability of Crocus. Although Crocus had requested that the Government of Manitoba indemnify the Board and senior officers of the Fund, that request was declined.

[15] On June 28, 2005, the Receiver was appointed. 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 court agreed to provide the MFL with some time, (until July 13, 2005), to present a plan of action to the court, but in the meantime, appointed the Receiver.

[16] On July 12, 2005, a class action lawsuit was filed on behalf of certain of the Class "A" shareholders of Crocus claiming damages in the amount of $200 million from various parties including former officers and directors of Crocus, the external auditor, the lead brokers, the MSC, and Crocus.

[17] The next day, at a hearing before Justice Clearwater, the receiving order was continued, but the parties were given an opportunity to further explore the issues.

[18] Since then, a number of orders have been granted, mostly of a housekeeping nature, to permit the Receiver to do its job. The court orders have been based on comprehensive reports filed by the Receiver which concurrently have been made available on the website referred to earlier. Copies of the court orders made are also posted.

[19] On September 22, 2005, a court hearing was held to consider approval of Receiver's Report #5. After hearing representations from counsel for the Receiver, the MFL, the MSC, and Bernard Bellan representing the interests of the class action lawsuit, the matter was adjourned until October 19, 2005 to allow any further proposals to be filed in court and any cross-examinations on affidavits to be conducted.

[20] Following the adjournment, the MFL issued a Request for Proposals with a view to finding a third party manager with experience in the venture capital business to administer the assets of Crocus under the control of the Receiver and the court. The process resulted in a proposal by GrowthWorks Ltd., a venture capital fund manager in Vancouver. This is the proposal which the MFL now advances as an alternative to the plan of the Receiver contained in Receiver's Report #5 and Supplementary Report #5-A.

THE PLANS

(1) The Plan of the Receiver

[21] As a result of its involvement since June 28, 2005 the Receiver is of the view that it is highly unlikely that Crocus will be in a position to resume its normal operations of raising and investing capital. Its reasons for arriving at this conclusion may be briefly summarized as follows:

(a) It is unlikely that Crocus will be able to address the issues necessary to receive regulatory approval from the MSC in order to resume operations;

(b) The reputation of Crocus has been harmed as a result of extensive media coverage of the investigations of the Office of the Auditor General, the MSC, the R.C.M.P., as well as the class action proceeding;

(c) The officers and directors named as defendants in the class action claim indemnity against Crocus which, if valid, would impair Crocus's ability to raise or distribute funds to Class "A" shareholders until liability under the indemnities is determined. Furthermore, the litigation and investigations may be lengthy and costly to Crocus, but the extent of them cannot now be known;

(d) Wellington West Capital Inc. and BMO Nesbitt Burns, the lead brokers for the Fund who are defendants in the class action, have claimed indemnification by Crocus pursuant to their broker agreements with it. In addition to the foregoing, this potential liability has an adverse effect on

Crocus's ability to raise or distribute funds to Class "A" shareholders and will depend on the validity of their claims and the length and ultimate disposition of the litigation; and

(e) The Receiver also raised a concern about commitments on behalf of certain investee companies which may not have been reflected in the records of Crocus, which could adversely affect the ability of Crocus to resume operations. It now appears that there is one of these in the amount of $3 million.

[22] The Receiver has stated clearly that, despite the inability of Crocus to resume operations, it recognizes that the portfolio of Crocus must be managed or sold so as to maximize the realization available to the shareholders once the liabilities of Crocus are determined and paid. Accordingly, it has considered various options detailed in its report which include the sale of the portfolio "en bloc"; the use of a management company; and the orderly sale of the portfolio by the Receiver.

[23] In the end, it is the Receiver's recommendation to the court that there be an "orderly sale of the assets of Crocus over a reasonable period of time". The Receiver proposes that each of the 46 investee companies be dealt with separately on their own merits, although it remains possible that an acceptable investor might be identified who would purchase more than one of the Crocus investments. The proceeds from any dispositions, net of costs incurred, would

be held in trust by the Receiver pending further order of the court. In the event that confidentiality issues, rights of first refusal or other contractual obligations of Crocus might hinder the Receiver's efforts, the Receiver would apply to the court with appropriate notice to interested parties for the necessary relief, advice or direction.

(2) The MFL/GrowthWorks Proposal

[24] The alternative plan advanced by the MFL is less clear but essentially would see a third party appointed to manage and administer the portfolio of Crocus under the supervision and control of the Receiver until such time as a proposal or Plan of Arrangement could be presented and approved by the court. The plan, as outlined in two affidavits filed by the president of the MFL, envisages that if the class action lawsuit were settled or otherwise disposed of, the assets of Crocus would be transferred to another fund, either separately into a new fund or merged into an existing fund, under the **Companies' Creditors Arrangement Act**, R.S.C. 1985, c. C-36 (the "**CCAA**"). As stated, at paragraph 33 of the affidavit of Darlene Dziewit, affirmed October 16, 2005:

> ... Crocus could then be managed in such a way as to grow and prosper in order to maximize shareholder value. It might even, in the future, return to market. The MFL, as a sponsor of Crocus, would like to offer this option to the shareholders in order that a vote may be conducted in the matter.

[25] The MFL proposes GrowthWorks as the third party manager. The proposed process is not entirely clear but seems to be that, after obtaining shareholder approval, the protection of the **CCAA** would be invoked as described

above and ultimately a transfer of assets would occur to a new Labour-Sponsored Investment Fund or to GrowthWorks. In either event, the shareholders of Crocus would become shareholders of the new entity or GrowthWorks with the same equity. The Receiver's appointment would then be terminated.

ANALYSIS AND DECISION

[26] The chronology of events that I have briefly described, the millions of dollars involved, the varied and competing interests at stake, not surprisingly have commanded significant media attention and have attracted a large audience in the courtroom. As in all cases, but particularly where such dynamics exist, it is important to get back to basic principles.

[27] Throughout these proceedings, constant reference has been made to the need to "maximize shareholder value" and this is a goal shared by everyone. However, it cannot and should not be at any cost without regard to the legitimate interests of others.

[28] At our last appearance in court, I observed that whereas counsel have the luxury of representing a particular interest or constituency, the role of the court is to reconcile the various competing interests in the hope of achieving an appropriate balance, in accordance with well established principles of fairness and the law. It is important that this be kept in mind by all concerned.

[29] Let me now turn to the MFL's motion for an order requiring the Receiver to convene a meeting of the Crocus shareholders to consider the two plans before the court.

[30] It was argued by counsel for the MFL that the shareholders should be consulted as to what they would like to see happen. This is expanded upon in the affidavits filed in support of the motion wherein it is suggested that alternatives ought to be explored that might offer the shareholders of Crocus an opportunity to govern and make decisions for themselves (paragraph 9(d) of the affidavit of Darlene Dziewit affirmed September 21, 2005). A further rationale is found at paragraph 12 of her affidavit of October 16, 2005 in which it is stated that none of the problems of Crocus should be visited on the shareholders because, "They invested in Crocus in good faith and they ought not to lose any more value in their investment without being consulted, particularly if there is another way that a higher value can be realized."

[31] To the extent such a suggestion might raise the expectation that the shareholders of Crocus should decide on what approach is to be taken, it must be stated clearly that this decision rests solely with the court. 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. Even ignoring for a moment the considerable problems of logistics, timing and expense to

ascertain the view of some 33,700 shareholders (or portion thereof), in all candour such input would be of questionable value. 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 one 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.

[32] As a result, it is my view that the calling of a shareholders' meeting, when objectively considered from the perspective of first principles, is neither necessary nor of assistance to the court.

[33] Turning now to a consideration of the plans, I see a number of difficulties with the third party management plan proposed by the MFL. These were canvassed in some detail by counsel for the Receiver and counsel for the MSC. While not referring to them all, among the more significant concerns are the following:

- The proposal minimizes the effect of the class action and other litigation on the long-term viability of Crocus as a going concern. Although the problem of the litigation was identified early on by the MFL, interestingly, there is a marked shift in the affidavits of the president of the MFL over a short period of time. In her first affidavit, she confirms her understanding that the class action is a contingent liability that is "real" and cannot be ignored. This

contrasts significantly with her affidavit less than a month later in which she emphasizes that the class action is only a contingent claim and that there is "no guarantee" it will even become a "real" claim. One cannot help but sense a certain element of wishful thinking in this. More important, however, the proposed plan fails to acknowledge that the class action does not simply involve a lawsuit by some Crocus shareholders that could ultimately be resolved. In addition, there are issues of the indemnification of officers and directors and others, including indemnity claims by Wellington West Capital Inc., BMO Nesbitt Burns, and PricewaterhouseCoopers which could ultimately be costly to Crocus;

- Little consideration is given to the payment of the liabilities of Crocus once they are known beyond the class action. Only passing reference is made to the fact that the claims of others may be "compromised", the concern apparently being only that the shareholders not lose more than they already have. Nowhere is mention made of the fact that in an ordinary receivership the shareholders' interests would come after any creditors';

- GrowthWorks, the third party manager proposed by the MFL, is not licensed to operate in Manitoba;

- Whereas it is stated that legislative changes are required, no details as to what they are, how and when that would be accomplished, and what would happen if such legislative changes did not occur, are addressed;

- Although regulatory issues are recognized as a problem, again they receive little attention other than passing mention;

- It is proposed that once Crocus gets rid of the "impediment" posed by the class action and regulatory issues, the protection of the **CCAA** be invoked. There is a difference of opinion as to whether Crocus would qualify for **CCAA** protection, which is an issue that would have to be resolved. More important, there is a difference of opinion as to what impact such proceedings would have on the interests of parties other than the shareholders' and which could result in further litigation and delay;

- Under the proposed plan, the third party manager accepts no risk and the Receiver and court oversight would remain in place for an undefined period of time. This raises a real question of the necessity of involving the third party manager at all. Whereas GrowthWorks could undoubtedly offer considerable experience and expertise, the Receiver is presently free to consult with whatever experts it may choose, including those with experience in venture capital funds, and indeed it has done so. It also bears mentioning that, in response to the Request for Proposals by the MFL, Ensis offered to assist the Receiver in this capacity and such assistance would not be precluded by adopting the Receiver's plan if the Receiver deems such consultation appropriate;

- The GrowthWorks plan is contingent on the approval of the Board of GrowthWorks which may not be forthcoming. As well, GrowthWorks is entitled to walk away at any time and Crocus would be right back where it is today;

- There is no commitment in the GrowthWorks plan advanced by the MFL to act as a source of funds;

- The plan fails to raise or address the inherent conflict of interest which would arise if GrowthWorks' stated intention to ultimately merge the Crocus assets into its existing operation went forward. Although GrowthWorks says this can be addressed, no details are provided;

- Similarly, issues with respect to confidentiality and rights of first refusal were not raised or addressed beyond the simple statement that they can be;

- Despite a detailed letter from the MSC which was provided to GrowthWorks outlining its concerns, these and others raised by the Office of the Auditor General and the Receiver are not dealt with in the proposal.

[34] These are just some of the concerns raised which militate against the MFL / GrowthWorks proposal and in favour of the plan of the Receiver. Looking at it, I make the following observations:

- Although it does not contemplate the continued operation of Crocus as a going concern, the plan of the Receiver also does not propose an immediate

liquidation of assets but rather the disposition of assets over a reasonable period of time. The "up to five years" now contemplated potentially could provide some of the investee companies with the opportunity to achieve a higher value before sale thereby benefitting the shareholders;

- The Receiver's recommendation has the advantage of being based on its involvement with the inner workings of Crocus and the investee companies over the past four months, an advantage admittedly not available to the others who responded to the MFL's Request for Proposals;

- The Receiver is a neutral, court-appointed party which has been operating under the supervision of the court and under the watchful eye of many interested parties and onlookers. In that capacity, it has conducted itself in an objective and professional manner and there have been no complaints of which the court is aware. Indeed, to her credit, the president of the MFL attested that the Receiver has been cooperative and helpful throughout;

- I place considerable significance on the fact that the recommendation of the Receiver is consistent with the view of the Crocus Board just prior to its resignation in June and with that of the president of the MFL until just over a month ago;

- The Receiver's recommendation is made after due consideration and ultimate rejection of other alternatives, including the third party manager option, for the reasons stated in its reports;

- Although the Receiver has taken the position that a meeting of the shareholders is unnecessary (and for reasons already stated, I share that view), it has gone to considerable lengths to ensure that the shareholders have been kept informed through written communications, the establishment of a website and the availability of an inquiry line. Although not formally consulted, the degree of transparency seen in the process it has followed to date is commendable and should engender shareholder confidence;

- All involved in these proceedings have recognized from the outset that this is not a typical receivership and that the issues presented are varied and complex. The fact remains, however, that it is almost one year since the trading of Crocus shares ceased and there are a number of Crocus investee companies which require at least some degree of certainty as they move forward. The Receiver has advised that five of them are considering the possibility of leaving Crocus. Two are asserting rights on the basis of the insolvency of Crocus and these claims have been denied. Further delays would not be justified;

- Given the cautious approach being taken by the Receiver and the gradual disposition of assets contemplated, a decision today approving the Receiver's plan does not preclude the possibility of other plans coming forward at some later date, for example, to purchase some of the Crocus assets "en bloc".

[35] Taking all of these factors into consideration and recognizing the overarching responsibility of the court, I am satisfied that the Receiver's plan as contained in Receiver's Report #5 and Supplementary Report #5-A should be approved.

[36] In so finding, I rely also on the authorities before me which speak to the obligation of the court to repose trust and confidence in the integrity and competence of the Receiver it has appointed. Considerable deference is owed to the Receiver in the absence of unfairness or lack of good faith and there is no suggestion of either here. Although the cases cited, ***Anvil Range Mining Corp., Re*** (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), and ***Royal Bank of Canada v. Soundair Corp.***, [1991] O.J. No. 1137 (C.A.), deal with situations where the court reviewed the past actions of the Receiver, the same principles apply to proposed future conduct submitted to the court for approval.

[37] With respect to the Receiver's request to amend paragraph 3(l) of the order dated June 28, 2005 to remove the requirement that any transaction or aggregate thereof exceeding $100,000 and any transaction that it does outside the ordinary course of business be court approved, I am of the view that such requirement is no longer necessary.

[38] That limitation may have made sense when the Receiver was first appointed. However, as observed by counsel for the Receiver, in most receiverships, the receiver is not required to come back for court approval but is

expected to carry out its responsibilities subject always to seeking advice and direction from the court, or approval, when warranted. I see no reason why that should not occur now as matters move forward.

[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.

[41] The motion of the MFL is denied. The motion of the Receiver is granted.