Jee - $7.00

Date: 20071115
Docket: CI 05-01-43350
(Winnipeg Centre)
Indexed as: Manitoba Securities Commission v. Crocus Investment Fund
Cited as: 2007 MBQB 280

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
	Robert A. Dewar, Q.C. and Karen R. Wittman for Deloitte & Touche Inc. Receiver and Manager of Crocus Investment Fund
THE MANITOBA SECURITIES COMMISSION, Applicant,	E. W. Olson, Q.C. and Robert W. Olson for The Government of Manitoba
- and -	David I. Marr for PricewaterhouseCoopers LLP
	Patrick G. Riley for Sherman Kreiner and Jane Hawkins
CROCUS INVESTMENT FUND, Respondent.	William S. Gange and Jacqueline G. Collins for The Manitoba Securities Commission
	Richard D. Buchwald for CTV Television and the Winnipeg Free Press
	Kenneth A. Filkow, Q.C. and Diane M. Stasiuk for Charles Curtis, Peter Olfert,

) Waldron (Wally) Fox-Decent,
) Lea Baturin, Albert Beal, Diane
) Beresford, Sylvia Farley,
) Robert Ziegler, John Clarkson,
) Hugh Eliasson, Ron Waugh,
) David G. Friesen, and
) Robert Hilliard
)
) Martin G. Tadman
) for Robert Hilliard
)
) Nicole M. Watson
) for Wellington West Capital
) Inc.
)
) Christopher P. Besko
) for the Manitoba
) Securities Commission staff
)
) J.R. Norman Boudreau
) for Bernard Bellan and
) Robert Nelson
)
) Richard W. Schwartz and
) Jason D. Kendall
) for James Umlah
)
) Judgment delivered:
) November 15, 2007

McCAWLEY, J.

[1] On October 26, 2007 Deloitte & Touche Inc., as Receiver and Manager of Crocus Investment Fund, brought a motion for the advice and direction of the court with respect to the distribution and publication of its recently completed Records Review Report (the "Report").

[2] The following day the court ordered that the Receiver file its Report with the court, but that it immediately be sealed until further order. As well, the

Receiver was ordered to provide copies of the Report to certain interested parties (the "Initial Recipients") subject to the imposition of restrictions against copying, reproducing, or in any way distributing the Report, and subject also to receiving a written undertaking from each Initial Recipient not to disclose the contents of the Report or provide access to it.

[3] A continuation of the hearing was set for November 7, 2007 to consider the issue of whether there should be a broader distribution of the Report. It should be noted that, whereas all previous Reports of the Receiver had been filed in court and posted on the Crocus website maintained by the Receiver without a court order, the Receiver was in this instance seeking a court order both as to distribution and publication.

[4] Counsel for the Receiver advised that, for its part, the Receiver did not require a broader distribution of the Report beyond the Initial Recipients or a posting of it on the Crocus website. Accordingly, the Receiver was taking a neutral position on the issue of further distribution although counsel did point out that there is a general presumption in favour of public access to court proceedings and court records. This is frequently referred to as the "open court principle" and the burden to show otherwise lies upon the party seeking to have the presumption displaced.

[5] BMO Nesbitt Burns Inc. and Wellington West Capital Inc. also took no position. All others were of the view that the open court principle should govern in the circumstances and that the Report should be made public in the usual way. However, counsel for twelve of the former directors argued that a

"Commentary" intended by way of response to the Report on their behalf should be appended to the Report and also distributed. Counsel for PricewaterhouseCoopers, while supporting the broad distribution of the Report, suggested it be postponed briefly to allow the Receiver to meet with them.

[6] The court was referred to several authorities articulating the principle of the openness of court proceedings and court records and its fundamental importance in a free and democratic society. Reference to these well established principles is also found in this court's "Policy: Access to Court Records in Manitoba" available on the court's website. The words of Dickson, C.J. referred to therein, speaking for the majority of the Supreme Court of Canada in ***Nova Scotia (Attorney General) v. MacIntyre***, [1982] 1 S.C.R. 175 are particularly applicable:

> ... Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in R. v. Wright, 8 T.R. 293, are apposite and were cited with approval by Duff J. in Gazette Printing Co. v. Shallow (1909). 41 S.C.R. 339 at p. 359:
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> > Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.
>
> . . .

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[7] It is worth remembering that this is a court appointed receivership and the within motion is a judicial proceeding. In none of the submissions made was it suggested that the ends of justice would be subverted or otherwise compromised by lifting the sealing order to allow for public access to the Report. Neither was it suggested that the Report might be used for an improper purpose.

[8] It is perhaps also worthwhile to observe that the Receiver's Report is not the result of a comprehensive investigation but rather comes before the court as a limited and selective review of some of the records of Crocus. It was undertaken by the Receiver to ascertain what the records would disclose with regard to the business and affairs of Crocus prior to the appointment of the Receiver in June 2005 insofar as they relate to the class action against Crocus and the position to be taken with respect to it and related issues. In its preparation, no interviews were conducted and no representations were made by any of the Initial Recipients. To the extent that any conclusions are drawn or opinions offered, they must be seen in this context.

[9] Given these limitations, in my view it would be inappropriate to distribute the proposed response of some of the former directors. I am also of the view that postponing the distribution of the Report to allow the Initial Recipients to meet with the Receiver (presumably to influence the Receiver to modify the

Report) would be ill-advised. I am persuaded by the Receiver's argument that since some of the Initial Recipients may be adverse in interest as amongst themselves, to do so would put the Receiver in the position of judge having to weigh its findings against representations made outside the judicial process. Equally important it could, in the eyes of some, confer on the Report a significance beyond that which was intended or to which it is entitled in law. In any event, but from a practical standpoint, since the Report took over a year to complete at considerable expense and use of resources a brief postponement of the distribution of the Report along the lines suggested would not allow for any meaningful response.

[10] The Receiver's request that the court confirm by court order that the distribution of the Report is part of a court process to which judicial privilege attaches provoked strong reaction from all of the parties. It was generally characterized as a request from the Receiver for absolute privilege or immunity in the event of any action by an affected party unhappy with the contents of the Report – an "anticipatory ruling" of sorts. In response to these concerns, the Receiver suggested that it was not necessary to deal with the question of whether and to what extent judicial privilege may attach at this stage and the court could simply order that the sealing order be lifted and the Report be posted on the internet.

[11] This suggestion met with even stronger opposition because, by ordering the posting of the Report on the Crocus website, the Receiver would indirectly gain the protection it was seeking without it being explicitly ordered. This could

potentially deprive any party who feels aggrieved from seeking a legal remedy to which it might otherwise be entitled without a proper consideration of the issues on the merits, a course of action it would be unfair to adopt.

[12] Having considered the submissions made and as a result of the foregoing it is ordered that the sealing order pronounced October 26, 2007 with respect to the Receiver's Records Review Report be and is hereby lifted and all those who provided undertakings in accordance with paragraph 4 of the order are hereby released from them. It is further ordered that copies of the Receiver's Records Review Report shall be provided to the Manitoba Securities Commission and the R.C.M.P.

M.J. McCawley

McCawley, J.