

February 17, 2012

**IN THE MATTER OF: THE SECURITIES ACT**

- and -

**IN THE MATTER OF: THE CROCUS INVESTMENT FUND**

**AND IN THE MATTER OF: Charles Curtis, Peter Olfert, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Ron Waugh, Diane Beresford, Sylvia Farley, Robert Hilliard, Robert Ziegler (the “Board Members”)**

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**REASONS FOR DECISION  
OF  
THE MANITOBA SECURITIES COMMISSION**

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On January 17, 2012, a Panel of the Manitoba Securities Commission heard a motion made by Ron Waugh (“Waugh”) and Robert Ziegler (“Ziegler”). The motion by Waugh was for a declaration and an Order:

1. that the Panel has no jurisdiction to hear any matter or make any order that Waugh pay an administrative penalty pursuant to Section 148.1 of The Securities Act, R.S.M. 1988, c.S50 (the “Act) and that paragraph 4 of the Notice of Hearing referred to herein be struck out;
2. that the Panel has no jurisdiction to hear any matter or make any order that would retroactively or retrospectively apply Sections 148.1(1.1) or Section 148.3(1) of the Act to Waugh;
3. further, or in the alternative, that the Panel has no jurisdiction to hear any matter or make any order against Waugh prior to a determination that The Crocus Investment Fund has committed a contravention or failure referred to in Section 148.1(1)(a) of the Act;
4. that the Panel has no jurisdiction to hear any matter or make any order against Waugh, who is an employee and/or agent of the Government of Manitoba;
5. the costs of this Motion; and
6. such further relief as counsel may advise and this Panel may deem just.

The motion by Ziegler was the same as Waugh’s but did not include the relief referred to in paragraph 4 above.

These motions were made by Waugh’s counsel and Ziegler’s counsel at the time of an appearance before this Panel on November 2, 2011, arranged for the purpose of fixing a date for holding an adjourned hearing originally scheduled to be held May 6, 2005, in respect of the Notice of Hearing and Statement of Allegations of staff of The Manitoba Securities Commission (the “Allegations) both dated April 4, 2005.

In his motions brief counsel for Ziegler advised the Panel that Ziegler adopted the positions and relied on the authorities set out by Mr. Waugh in respect of the first three orders sought by Ziegler.

### **First Order Sought**

Waugh’s counsel submitted that Sections 52 and 55 of The Securities Act of Manitoba (“Act”) were raised for the first time in the Motion’s Brief of Staff and were not raised in the Notice of Hearing or in the Allegations.

Section 52(1) of the Act as then in force required that a prospectus shall contain a certificate signed on behalf of the board of directors in the following form:

“The foregoing constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus as required by Part VII of *The Securities Act*, and regulations thereunder.”

Section 55 of the Act as then in force read as follows:

“Where a material change occurs during the period of primary distribution to the public of a security that makes untrue or misleading any statement of a material fact contained in a prospectus filed under this Part in respect of which a receipt has been issued by the director, an amendment to the prospectus shall be filed with the commission as soon as practicable and in any event within ten days from the date the change occurs.”

The Panel was advised at the motion hearing that the Commission staff sent a letter respecting Section 41 of the Act to Waugh’s counsel in response to a request for particulars. The Panel was not given a copy of this letter. It apparently related to an alleged violation of that section, which reads as follows:

“41(1) A prospectus shall provide full, true and plain disclosure of all material facts relating to the securities proposed to be issued.

(2) A prospectus shall comply as to form and content with the requirements of this Act and the regulation.

(3) There shall be filed with a prospectus such documents, reports and other material as are required by the regulations.”

Section 6.01 of The Crocus Investment Fund Prospectus (“Prospectus”) dated January 23, 2003 states, inter alia, that:

“The Board of Directors ultimately is responsible for the Fund’s compliance with all legislation applicable to the Fund.”

The Notice of Hearing incorporated the Allegations. Those Allegations in Section A note that at the material time Waugh and Ziegler were members of the Board of Directors (the “Crocus Board”) of The Crocus Fund (the “Fund”). They also, under Section C set out a number of allegations of the failure of the Board of Directors to meet its obligations including, inter alia:

(a) Allegation 1(a) that the Prospectus did not contain full plain and true disclosure as the Crocus Board consistently failed to determine the fair value of the Fund’s Class “A” Common Shares at each valuation date, as was stated in the Prospectus; and,

(b) Allegation 1(c) that the Prospectus did not contain full plain and true disclosure concerning the A Share Price in that contrary to the disclosure in the Prospectus, the Fund accepted subscriptions and paid out redemptions for A Shares using an A Share Price that had not been approved by the Crocus Board at each valuation date.

Such failures of the Prospectus to contain full plain and true disclosure are contrary to Section 41(1) of the Act. We note that the phrasing of Section 41(1) is “full, true and plain disclosure” as opposed to “full plain and true disclosure” but nothing turns on that difference in wording.

Waugh stated in paragraphs 9 and 10 of his affidavit filed with his Notice of Motion that he became a director of the Fund on September 10, 2004, attended his first meeting of the Crocus Board on September 23, 2004, and remained on the Board for “79 days before the Crocus A Shares were cease traded”. Counsel for Ziegler in his motions brief noted that Mr. Ziegler was on the Crocus Board just 58 days before the Fund ceased trading.

The Notice of Hearing also gives notice that consideration be given to removing registration exemptions from Fund board members under Section 19(5) of the Act which section reads:

“Notwithstanding subsections (1), (2) and (3), the commission may, where in its opinion such action is in the public interest,

(a) order that subsection (1) or (3) does not, with respect to such trades referred to in that subsection as are specified in the order, apply to the person or company named in the order; and

(b) order that subsection (2) does not, with respect to such of the securities referred to in that subsection as are specified in the order, apply to the person or company named in the order.”

Paragraph 4 of Waugh’s Motion’s Brief reads:

The Notice does not allege that Waugh contravened or failed to comply with a provision of the Act or the regulations, nor does it allege Waugh contravened or failed to comply with a direction, decision, order or ruling of the Commission, or any other provision of section 148.1(1)(a). Accordingly, there is nothing for the panel to determine pursuant to section 148.1 of the Act. In other words, the Notice discloses no cause of action against Waugh.

(underlining added)

Having regard to the foregoing material, it is the Panel’s view that Waugh and Ziegler should, as members of the Crocus Board, have been aware of their obligations under Sections 41, 52 and 55 of the Act and that the Notice of Hearing and Allegations do disclose in sufficient detail the cause or causes of action against them and they have proper notice of the case to be answered. Support for this position is found in cases cited in the Motion’s Brief of Staff, namely:

Bartel v. Manitoba (Securities Commission), 2003 MBCA 30

and

Del Bianco v. Alberta Securities Commission, 2004 ABCA 344

The Panel also notes that a hearing will in any case be conducted in respect of Section 19(5) of the Act and, in the Panel's view, it is clear that the evidence that will be presented on that hearing will be substantially the same as required for the Panel to make a determination under Section 148.1(1) of the Act. Accordingly consideration of Section 148.1(1) must await the determination made at such hearing. The panel has jurisdiction to hold such hearing and subsequent consideration of Section 148.1(1), if appropriate after its determination. Accordingly, the motion for the first Order in respect of Waugh and Ziegler is dismissed.

### **Second Order Sought**

This motion is premature. Section 148.1(1.1) of the Act will need to be considered only if after a hearing the commission determines that the Fund has committed a contravention or failure referred to in clause 148.1(1)(a) of the Act and a director of the Fund authorized, permitted or acquiesced in the intervention or failure. Section 148.3(1) of the Act will be considered after the hearing has taken place.

### **Third Order Sought**

The Panel agrees that the Fund must be found to have "contravened or failed to comply" as set out in Section 148.1(1) of the Act. It is apparent to the Panel that the evidence concerning contraventions of the Act by the Fund and by the directors will be essentially the same. It is not appropriate to bifurcate the hearing by first determining that the Fund has contravened the Act and second, determining if Waugh and Ziegler contravened the Act.

### **Fourth Order Sought**

The Panel is of the view that based only upon Waugh's Affidavit evidence, it is not in a position to make an informed decision. That evidence is not clear that Waugh was acting in his capacity as a government employee or that he was an agent of the Manitoba Government when acting as a director of the Fund. It is also noted that Section 117 of the Manitoba Corporations Act requires every director of a corporation in exercising his powers and discharging his duties to act honestly and in good faith with a view to the best interests of the corporation. This section appears to impose on Waugh the obligation to act in an interest that may be other than that of the Manitoba Government and in the first instance appears to negate the proposition or argument that Waugh is acting in his capacity as an employee or agent of the Manitoba Government. Further evidence is required for the determination of this matter.

Respecting the second, third and fourth motions, having regard to the foregoing, the Panel has concluded that its decision on the merits of Waugh's and Ziegler's submissions be deferred until the conclusion of the hearing called by The Manitoba Securities Commission.

**Costs**

It is left to the parties to take action regarding costs with respect to these motions.

*February 17, 2012*

*"R.D. Bell"*

R.D. Bell, Q.C.  
Chairman

*"R.A. Shaw"*

R.A. Shaw, Q.C.  
Member

*"G.S. Posner"*

G.S. Posner  
Member