

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

ACTION NO: 0401-19905

IN THE MATTER OF

**TITAN INVESTMENTS LIMITED PARTNERSHIP, and TITAN GENPAR INC, and  
EVOLUTION CAPITAL MANAGEMENT LTD, and THE ESTATE OF DAVID  
COMTE, DECEASED, and THE COMTE FAMILY TRUST and  
PREDATOR HOLDINGS LTD.**

**IN THE MATTER OF THE *JUDICATURE ACT*, R.S.A. 2000, c. J-2,  
and RULES 467 and 468 OF THE ALBERTA RULES OF COURT**

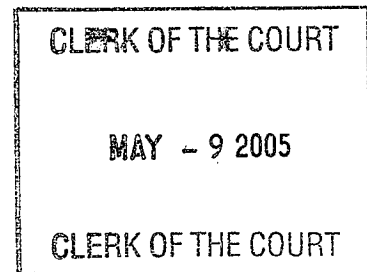
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**BRIEF AND AUTHORITIES OF THE INVESTORS COMMITTEE**

Chambers Application  
Scheduled for Tuesday, the 10<sup>th</sup> day of May, 2005 at 11:00 a.m.  
before The Honourable Mr. Justice LoVecchio

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## I. INTRODUCTION

1. This Brief is filed by the Investors Committee in response to the application of certain of those investors in the Titan Investments Limited Partnership ("Titan Partnership") that have recovered more than the amount of their original investment in the Titan Partnership (the "Overpaid Investors") for an Order:

- (a) creating a Respondents Committee of Overpaid Investors, and appointing its members;
- (b) directing that any legal fees, disbursements and other charges which may be incurred by the proposed Respondents Committee shall form a charge against the assets, to be paid out of the gross proceeds from the assets collected by Alger & Associates Inc. (the "Receiver") from time to time, subject to taxation, in priority to any charge held by or any other interest of any person in any of the assets, such charge to rank *pari passu* with the charge against the assets in favour of the Investors Committee, but subject to the first charge of the Receiver for its expenses, proper fees and disbursements;
- (c) adjourning *sine die* the hearing of the application brought by the Investors Committee and the Receiver scheduled to be heard on May 11, 2005;
- (d) directing that a case management meeting occur on May 11, 2005 commencing at 10:00 a.m. for the further delineation of issues and scheduling the necessary steps to bring those issues before the Court in an efficient and organized manner.

2. The Investors Committee does not oppose the application to create a Respondents Committee, but they wonder whether there is any point in doing so at this time. The Investors Committee vigorously opposes all other aspects of the proposed Respondents Committee's application.

## II. ISSUES

3. Should the legal fees, disbursements and other charges of the proposed Respondents Committee form a charge against the assets, to be paid out of the gross proceeds from the assets collected by the Receiver?
4. Should the May 11, 2005 hearing date be adjourned?
5. Should there be a case management meeting on May 11, 2005?

## III. FACTS AND ARGUMENT

### A. The Respondents Committee's legal costs should not form a charge on the Assets

6. The Receiver's Second Report states at 8.4.2 on page 26 that the funds collected by the Receiver at this time are "the property of the Unpaid Partners", meaning the property of those investors in the Titan Partnership that have not received payment of their principal investments with the Titan Partnership, or of "profits" on that principal investment. Those funds are the gross proceeds of the assets of Titan Partnership, Titan Genpar Inc, Evolution Capital Management Ltd, The Estate Of David Comte, Deceased, The Comte Family Trust and Predator Holdings Ltd. that have been collected by the Receiver (collectively, the "Assets"). The funds rightfully belong to the Unpaid Investors. The Overpaid Investors are not entitled to those funds, as they have already been paid the full amount of their principal investments, plus additional false profits.

Affidavit of Croft Axsen, sworn May 6, 2005.

7. The application to be made by the Receiver and the Investors Committee on May 11, 2005 is for an Order directing the Overpaid Investors to pay to the Receiver the amounts payable by them pursuant to the revised Re-Distribution Schedule attached as Exhibit "H" to the Receiver's Second Report, failing which the Receiver and/or the Investors Committee shall be entitled to judgment against those Overpaid Investors for the amounts unpaid by them under the revised Re-Distribution Schedule. The purpose of this joint application is to allow the Receiver to re-distribute these funds to all investors in the Titan Partnership in a fair and equitable manner that redresses the effects of the fraud upon the investors in Titan Partnership.

Notice of Motion of the Receiver and Investors Committee, filed March 18, 2005.

8. By directing that the legal fees, disbursements and other charges incurred by the Investors Committee form a charge against the Assets, and that they be paid out of the gross proceeds of the Assets in priority to any other charge or interest in any of the Assets, subject to the first charge of the Receiver for its expenses, fees and disbursements as approved by the Investors Committee, this Honourable Court has ensured that the legal costs of the Investors Committee are borne by all of the investors (and at this stage, where the Assets collected are rightfully the property of the Unpaid Investors, by all of the Unpaid Investors), rather than by the small group of investors appointed as members of the Investors Committee, in bringing the application for an Order permitting a fair and equitable re-distribution of funds to all investors in the Titan Partnership. This is fair and equitable to all of the investors.

Affidavit of Croft Axsen, sworn January 17, 2005, para. 9.

9. An Order directing that the legal fees, disbursements and other charges of the proposed Respondents Committee form a charge upon the Assets would permit the proposed Respondents Committee of Overpaid Investors to use the funds rightfully belonging to the Unpaid Investors to oppose the fair and equitable re-distribution of funds to all investors in the Titan Partnership, and would simply encourage the Overpaid Investors to prolong matters even further than they already have to use up all of the Assets by incurring professional fees, resulting in a professional feeding-frenzy funded solely by those who have suffered a significant financial loss already, the Unpaid Investors.

Affidavit of Croft Axsen, sworn May 6, 2005, para. 14.

10. Canadian Courts have held that a Court will only grant an Order that the legal fees of a group of creditors be paid out of the estate of a bankrupt when the applicant establishes that the legal work to be done by the applicant is work that will either benefit the estate, or is necessary for the management and preservation of the assets of that estate. In *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage*, [1998] B.C.J. No. 282 (B.C.S.C.) (QL) at para. 36, the Court held:

The general principle which I extract from these authorities is that the Court does have the jurisdiction to order that trust assets be charged with the remuneration and expenses of a third party if the work done by the third party is of benefit to the trust property or is necessary for the management and preservation of the trust assets. Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it. Two of the cases say that the Court should exercise its discretion sparingly, which I interpret to mean that the Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.

The decision was followed in the context of a representative of a group of creditors of a bankrupt estate applying for an Order directing that its legal fees be paid out of the estate in *Re Westar Mining Ltd.*, [1999] B.C.J. No. 2169 (B.C.S.C.) (QL).

*Re Westar Mining Ltd.*, [1999] B.C.J. No. 2169 (B.C.S.C.)  
(QL) at para. 23 ("*Westar*").

*Eron Mortgage Corp. (Trustee of) v. Eron Mortgage*, [1998]  
B.C.J. No. 282 (B.C.S.C.) (QL) at para. 36 ("*Eron*").

11. In *Westar, supra*, the Court noted that the legal work that was being undertaken by the applicant creditors of the bankrupt estate would not benefit the estate, and in fact, that the applicant creditors would be arguing that \$1.6 million should be excluded from the estate as trust funds payable to them. It was noted that this work would reduce the estate, not enhance it, and was directed at depleting, rather than preserving, the assets of the estate. It was not work that was necessary for the preservation or management of the estate.

12. The applicant creditors also argued that it would be unfair to them if their legal costs were not paid by the estate, where other creditors of the estate would be represented by counsel for the trustee, whose fees would be paid from the estate. The Court rejected that argument, noting that the fact that the trustee's fees were paid from the estate was consistent with the principles in *Eron, supra*: the trustee was working to benefit the estate, was doing work necessary to preserve and manage the estate, and was doing work for which it was fair and equitable that the owners of the estate (the other creditors) bear the costs.

13. The Court held that counsel for the applicant creditors had failed to discharge the onus of establishing that it was fair and just that the other creditors of the estate, as its

owners, bear the legal fees of the lawyers representing the applicant creditors. Furthermore, it was noted that the evidence showed that it would be inequitable and unfair for the other creditors of the estate to bear the applicant creditors' legal costs, because, if the applicant creditors were successful in their application, it would reduce the other creditors' asset – the estate.

14. Finally, the Court noted that its finding did not preclude an Order for costs against the estate, in the event that the applicant creditors were successful in proving their claim that the \$1.6 million should be excluded from the estate. The Court dismissed the applicant creditors' application for payment of its legal costs out of the estate.

*Westar, supra*, at paras. 23-26, 31-34.

15. The decision in *Westar, supra* is on point with the proposed Respondents Committee's application. As in *Westar*:

- (a) the legal work to be undertaken by counsel for the proposed Respondents Committee in defending the joint application of the Receiver and the Investors Committee will not benefit the estate of the Titan Partnership, and in fact will seek to prevent the Receiver from recovering funds on behalf of the estate to be redistributed fairly and equitably among all investors in the Titan Partnership;
- (b) the legal work to be undertaken by counsel for the proposed Respondents Committee neither manages nor preserves the assets of Titan Partnership, and in fact seeks to exclude assets from Titan Partnership;
- (c) the legal work of the proposed Respondents Committee in defending the Receiver and Investors Committee's application is not necessary in the sense that the Receiver would not have been required to do that legal work; in fact, the legal work is in defence to the Receiver's legal work for the benefit of the estate;
- (d) it is not just and equitable for the owners of the Assets collected by the Receiver, being the Unpaid Investors, to bear the expense of the Overpaid

Investors in defending the application which seeks a fair and equitable distribution to all investors in Titan Partnership;

- (e) it is not unfair or detrimental to the proposed Respondents Committee that they must bear their own legal costs, whereas the Investors Committee's legal costs will be paid out of the estate. Counsel for the Investors Committee is working to benefit the estate of Titan Partnership, is doing the work necessary to preserve and manage the estate by seeking to recover its assets, which work is being done jointly with the Receiver, and is doing work for which it is fair and equitable that the Unpaid Investors bear the costs, because the work seeks to ultimately benefit the Unpaid Investors;
- (f) in the event that the proposed Respondents Committee is appointed and is successful in defending the application brought by the Receiver and the Investors Committee, there is nothing to preclude this Honourable Court from making an Order for costs against the estate of the Titan Partnership in favour of the Respondents Committee.

16. Accordingly, the application of the proposed Respondents Committee for payment of its legal costs should be dismissed.

**B. The application to adjourn the May 11, 2005 hearing date is an attempt to further delay these proceedings and should not be granted**

17. The proposed Respondents Committee alleges that the Receiver and the Investors Committee, and/or their respective counsel, have delayed in providing a mailing list of Overpaid Investors to Fraser Milner Casgrain LLP, counsel for the proposed Respondents Committee, which has delayed this application and necessitates an adjournment of the May 11, 2005 hearing date.

Notice of Motion of the proposed Respondents Committee, filed May 6, 2005, para. 11.

18. It is Mr. Axsen's recollection that at the adjourned application on March 30, 2005, some counsel for the Overpaid Investors requested the service list for other counsel acting for

the Overpaid Investors. Mr. Axsen is advised, by his counsel, that this service list was forwarded to Fraser Milner Casgrain LLP on March 31, 2005.

Affidavit of Croft Axsen, sworn May 6, 2005,  
para. 5.

19. The complete service list was posted on the Receiver's website on April 8, 2005. Furthermore, counsel for Overpaid Investors were aware that they could and should contact the Receiver directly for information regarding the investors in the Titan Partnership, rather than going through counsel.

Affidavit of Croft Axsen, sworn May 6, 2005,  
para. 6.

20. Counsel to the Investors Committee provided contact information for all investors in the Titan Partnership to Fraser Milner Casgrain LLP on April 12, 2005. Neither the Receiver, its counsel, nor counsel for the Investors Committee has a service list that differentiates between Unpaid Investors and Overpaid Investors.

Affidavit of John McAra, sworn May 5, 2005,  
para. 12.

21. Fraser Milner Casgrain LLP did not write to investors (assumed to be Overpaid Investors) regarding its intention to establish a committee to co-ordinate common defences in relation to the May 11, 2005 application until April 20, 2005, eight days after receiving the service list from counsel to the Investors Committee. No explanation is given for this delay.

Affidavit of Croft Axsen, sworn May 6, 2005,  
para. 8.

22. The purpose of the lengthy five-week adjournment of the application to May 11, 2005 was to permit the Respondents to that application time to conduct cross-examinations on the Affidavits filed in support of that application, file their own evidence, file a brief, and to take whatever steps were necessary to respond to the application. None of these steps have been taken by the Respondents, and no explanation is given for the delay in doing so.

23. During the five-week adjournment, counsel for the Investors Committee proposed that the Investors Committee was willing to make the following factual concession:

The limited partners that received distributions from Titan received those distributions in "good faith". By "good faith" we mean that the limited partners that received distributions from Titan had no knowledge of the fraud upon which the distributions were based, nor did these limited partners have any intent to participate in the fraud.

Where the Investors Committee is willing to make this factual concession, the motion to be heard at the May 11, 2005 hearing is a simple one, and should not be further delayed.

24. Shortly after the adjourned application on March 30, 2005, counsel for the Investors Committee discussed with opposing counsel (including Mr. LeGeyt of Fraser Milner Casgrain LLP) that cross-examinations could be scheduled during the week of April 18, 2005. On April 7, 2005, counsel for the Investors Committee advised Mr. LeGeyt by letter that Mr. Axsen would be available for cross-examinations during the week of April 18, 2005. That letter also set out the factual concession that the Investors Committee was willing to make, requested confirmation that this concession was satisfactory for Mr. LeGeyt's purposes, and requested that Mr. LeGeyt advise as to what facts he proposed to be included in an Agreed Statement of Facts. No response was ever received to that letter, nor have there been any requests for any cross-examinations of either Mr. Axsen or the Receiver.

Affidavit of Croft Axsen, sworn May 6, 2005,  
paras. 7 and 8 and Exhibit "A".

25. The Investors Committee and the Receiver are prepared to proceed with the application on May 11, 2005. All investors in the Titan Partnership have been served with notice of the application. CRA has confirmed in writing its position on the various tax issues that have arisen. Substantially all of the assets available to the estate have been realized or are secured pending a resolution of matters with Janet Comte, which can now be concluded given resolution of the tax issues with CRA.

Affidavit of Croft Axsen, sworn May 6, 2005,  
paras. 11, 12 and 20 and Exhibit "B".

26. The tax ramifications to the Overpaid Investors are nil and therefore are not a factor to be dealt with in, or to cause delay of, the May 11, 2005 application.

Affidavit of Croft Axsen, sworn May 6, 2005,  
para. 21(a) and Exhibit "B".

27. The Investors Committee is unaware of any reason why the Receiver cannot make an interim distribution to the Unpaid Investors at this time and therefore seek Court approval or a direction authorizing the Receiver to do so, as was requested in the Notice of Motion filed in relation to the application to be heard on May 11, 2005.

Affidavit of Croft Axsen, sworn May 6, 2005,  
para. 23.

Notice of Motion of the Receiver and Investors  
Committee, filed March 18, 2005.

**C. Case management is unnecessary**

28. The proposed Respondents Committee alleges that counsel for the Receiver has indicated an intention to seek relief against the Overpaid Investors based on legal arguments not described in the application to be heard on May 11, 2005, which necessitates that a case management meeting occur on May 11, 2005.

Notice of Motion of the proposed Respondents  
Committee, filed May 6, 2005, para. 12.

29. In fact, counsel for the Receiver advised counsel for the Unpaid Investors that in the event that the application to be made on May 11, 2005 on the basis of fraudulent preferences was unsuccessful, counsel for the Receiver was reserving the Receiver's right to raise other legal arguments at a separate application. If the application on May 11, 2005 is successful, there will be no need to bring an application on the basis of other legal arguments.

Exhibit "C" to Affidavit of John McAra, sworn  
May 5, 2005.

30. In the event that the Receiver or the Investors Committee finds it necessary, after weighing all of the various economic considerations, to proceed with an application based on other legal arguments not delineated in the Notice of Motion filed by the Receiver and the Investors Committee on March 18, 2005, a separate Notice of Motion will be filed.

31. Accordingly, there is no need for a case management meeting on May 11, 2005.

32. Furthermore, at the adjourned application on March 30, 2005, counsel for the Investors Committee sought an Order setting a timeline for filing Affidavits, conducting cross-examinations, and filing Briefs with respect to the application to be heard on May 11,

2005. This was essentially a request for case management. The Honourable Mr. Justice LoVecchio dismissed the application for an Order setting a timeline.

**IV. CONCLUSION**

33. The Investors Committee respectfully submits that:

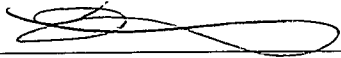
- (a) the application for an Order directing that the legal fees, disbursements and other charges of the proposed Respondents Committee form a charge against the Assets and be paid out of the gross proceeds from the Assets collected by the Receiver should be dismissed;
- (b) the application of the Receiver and the Investors Committee should proceed on May 11, 2005;
- (c) the application for case management should be dismissed; and
- (d) costs of responding to this application should be awarded in favour of the Investors Committee.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

BENNETT JONES LLP

Calgary, Alberta  
May 9, 2005

Per:

  
Frank R. Dearlove

Per:

  
Kelsey Drozdowski

Estimated Time for  
Argument: 1 hour

Counsel for the Investors Committee

V. TABLE OF AUTHORITIES

TAB	DESCRIPTION
1.	<i>Re Westar Mining Ltd.</i> , [1999] B.C.J. No. 2169 (B.C.S.C.) (QL).
2.	<i>Eron Mortgage Corp. (Trustee of) v. Eron Mortgage</i> , [1998] B.C.J. No. 282 (B.C.S.C.) (QL).

Indexed as:  
**Westar Mining Ltd. (Re)**

IN THE MATTER OF the bankruptcy of Westar Mining Ltd.

[1999] B.C.J. No. 2169  
Vancouver Registry No. 143440/92

**British Columbia Supreme Court  
(In Bankruptcy)  
Vancouver, British Columbia  
Sinclair Prowse J.**

Heard: September 14, 1999.  
Judgment: September 29, 1999.  
(43 paras.)

*Bankruptcy — Administration of estate — Application to court for directions — Practice — Legal costs.*

Application by a law firm for an order appointing it as counsel to a group of creditors, and for its costs to be paid from the estate. The trustee in bankruptcy applied for directions regarding notice to creditors. Westar Mining owned a mine that had gone into bankruptcy. The trustee was holding money that had been paid by Westar's joint venture partner in the mine. A number of creditors sought to have this fund set apart from Westar's estate and paid to them directly.

**HELD:** Applications allowed in part. The law firm was appointed representative counsel for a group of the creditors. The order would not prevent any creditors from retaining different counsel if they so desired. Any creditors represented by the firm would share proportionally in any money recovered by the firm. It was not appropriate to make an order that Westar's estate pay the firm's legal costs. The firm's work would not have benefitted the estate, and if successful, it would have depleted the estate. It would have been inequitable and unfair to have the owners of the estate bear the costs of an action that they opposed. If the firm were successful in its claim, it would have been entitled to seek costs against the estate. All of the creditors were to be notified by letter sent by ordinary mail of the upcoming application.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, s. 38.

**Counsel:**

L.C. Donaldson, for Arthur Anderson Inc., the trustee in Bankruptcy of the Estate of Westar Mining Ltd.  
B.J. Ingram, for some of the secured and unsecured creditors of Westar Mining Ltd.  
C. Bird and C. Shaley, for the law firm of Ladner Downs and for various unsecured Creditors of Westar Mining Ltd.

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**SINCLAIR PROWSE J.:—****I) NATURE OF PROCEEDING AND RELIEF SOUGHT**

¶ 1 In this bankruptcy action hearing, there were three applications made.

¶ 2 The first application, by the law firm of Ladner Downs, was a request to be appointed as the representative of a group of unsecured creditors of the bankrupt Westar Mining Ltd. ("Westar").

¶ 3 The second application, also by Ladner Downs, was that the cost of these legal services be borne by Westar's Estate.

¶ 4 The third application was made by Arthur Anderson Inc. who is the Trustee in Bankruptcy of the Westar Estate (the "Trustee"). Counsel for the Trustee requested directions on the procedure for giving notice to a particular group of creditors regarding an upcoming application.

**II) BACKGROUND**

¶ 5 To put these applications in context, prior to going bankrupt Westar operated two coal mines, the Greenhills Mine and the Balmer Mine. Both of these are situated in the east Kootenay area of British Columbia. These applications pertain to the Greenhills Mine.

¶ 6 Westar owned 80% of the Greenhills Mine. The other 20% was owned by Westar's joint venture partner. This joint venture partner, under the terms of the joint venture agreement, paid 20% of the operating expenses of the Greenhills Mine in return for 20% of its coal production. Westar was responsible for managing the mine.

¶ 7 At the time of bankruptcy, Westar was owed approximately \$8.5 million (the "Trust Money") by its joint venture partner, as its share of the operating expenses of the Greenhills Mine. This money has now been paid and is being held in trust by the Trustee.

¶ 8 In an upcoming application, a number of the unsecured creditors of Westar will be seeking an order that a portion of the "Trust Money" be excluded from the Westar Estate and be paid to them directly. Included in this group of unsecured creditors are former employees of the Greenhills Mine and 166 suppliers of goods and services for that mine. (The 166 supply creditors will hereinafter be referred to as the "Greenhills Mine Suppliers Group" in this judgment).

¶ 9 In this upcoming application, both of the former employees of the Greenhills Mine and the Greenhills Mine Suppliers Group intend to argue that \$1.6 million of the Trust Money that was owed by the joint venture partner for goods and services supplied to that mine prior to the Companies Creditors Arrangement Act, R.S.C. 1985, C-36 (the "CCA") is impressed with a trust and is payable directly to them rather than to the Westar Estate.

¶ 10 That is, these unsecured creditors contend that these monies were only payable to Westar if it had already paid the operating expenses and therefore was entitled to be reimbursed. Otherwise, Westar held these monies in trust for the suppliers of goods and services to whom these monies were owed. As Westar had not paid these expenses, it was not entitled to be reimbursed for them. The monies are therefore held in trust for these creditors.

¶ 11 This "purpose trust" issue is to be determined at an upcoming hearing.

¶ 12 In the present hearing, the orders and directions sought pertain to the Greenhills Mine Suppliers Group and the upcoming "purpose trust" hearing only. (The former employees of the Greenhills Mine will be participating in this upcoming hearing and have their own counsel).

¶ 13 Some direction has already been given regarding the Greenhills Mine Suppliers Group and the upcoming hearing. Specifically, on April 21, 1999, the Court ordered that the Trustee send a letter to the 13 largest creditors of the Greenhills Mine Suppliers Group for the purpose of apprising them of the "purpose trust" issue. Eighty percent of the money owed to Greenhills Mine Suppliers Group is owed to these 13 creditors. (Exhibit B of the affidavit of Jerry P. Zuk sworn on September 3, 1999, sets out the names and the amounts owing to each of these creditors). These creditors, in turn, were to advise the Trustee within 15 to 20 days, as to whether they were going to participate in the determination of the "purpose trust" issue.

¶ 14 Since the making of the April 21, 1999 order, the thirteen creditors have been notified. To date 6 of these 13 creditors have contacted Ladner Downs to represent them. Moreover, Ladner Downs has been advised that some of the remaining seven creditors may also be contacting them to act as counsel.

### III) DISCUSSION AND DECISION

#### A) Application By Ladner Downs To Act As Representative of The Greenhills Mine Suppliers Group

¶ 15 As mentioned at the beginning of these reasons for judgment, Ladner Downs is seeking an order that it be appointed to represent the Greenhills Mine Suppliers Group. This order would not preclude any of the creditors in the Greenhills Mine Suppliers Group from retaining a different counsel should they choose to do so. Moreover, unless they agree otherwise, all of the creditors would participate proportionately in any money recovered by Ladner Downs on behalf of that group.

¶ 16 All of the participants in this hearing agreed that the Court had the jurisdiction to make such a representative order. In addition, earlier in this action this Court made a similar representative appointment for the employees of the Greenhills Mine.

¶ 17 The purpose of appointing representative counsel is that it would simplify the process for both the Trustee and the creditors in the Greenhills Mine Suppliers Group.

¶ 18 This application is unopposed.

¶ 19 Given that this appointment would simplify the process and that there is no apparent prejudice to anyone, Ladner Downs is appointed to represent the Greenhills Mine Suppliers Group.

¶ 20 As was touched on earlier, the creditors in the Greenhills Mine Suppliers Group are at liberty to retain another counsel should they choose to do so. Moreover, Ladner Downs may, upon application to this Court, seek to have their appointment as representative set aside should it be unable for whatever reason to arrange a mutually agreeable working relationship with the Greenhills Mine Suppliers Group.

#### B) Application By Ladner Downs That Their Legal Fees Be Paid From The Westar Estate

¶ 21 As was set out above, I have appointed Ladner Downs to act as a representative of the Greenhills Mine Suppliers Group.

¶ 22 In their second application in this hearing, Ladner Downs, as the representative of this group of creditors, sought to have its legal fees paid from the Westar Estate.

¶ 23 As was recognized in *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage* [Q.L. [1998] B.C.J. No. 282] (B.C.S.C.) at para. 36, to succeed in this application Ladner Downs must establish that the legal work it is doing for the Greenhills Mine Suppliers Group is work that will either benefit the Westar Estate or is work that is necessary for the management and preservation of the assets of that Estate. Eron, *supra*, also recognized that:

Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it.

The Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.

¶ 24 In the present case, the work that is being undertaken by Ladner Downs will not benefit the Westar Estate. Ladner Downs will be contending, on behalf of the Greenhills Mine Suppliers Group, that \$1.6 million should be excluded from the Westar Estate. Therefore, if successful, the work done by Ladner Downs will reduce the Westar Estate, not enhance it.

¶ 25 Similarly, the work to be done by Ladner Downs on behalf of the Greenhills Mine Suppliers Group is not work that would have to be undertaken by someone because it is necessary for the preservation or management of the Westar Estate. Instead, the work undertaken by Ladner Downs is directed at depleting, rather than preserving, the assets of the Westar Estate.

¶ 26 Furthermore, to permit these legal expenses to be paid from the Westar Estate would be neither fair nor equitable to the owners, that is the creditors, of the Westar Estate

¶ 27 During the proceedings, counsel for Ladner Downs argued that this claim for legal fees should be treated as being analogous to the application that a creditor might make when the Trustee has refused to act pursuant to s. 38 of Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3. Under s. 38, with leave of the Court, a creditor may be permitted to commence an action on behalf of the bankrupt after the trustee has refused to commence the action. The creditor, if successful, will benefit to the extent of his/her claim with the remainder belonging to the estate.

¶ 28 In the present situation, Counsel for Ladner Downs argued that as the Trustee had refused to take up this claim on behalf of the Greenhills Mine Suppliers Group, and as Ladner Downs had taken it up, its costs should be recoverable from the Estate.

¶ 29 In my view, the present situation is not analogous to situations covered by s. 38 of the Bankruptcy and Insolvency Act, *supra*. In this case, as was set out earlier, the claim is not a claim belonging to the Westar Estate, nor is it a claim that would benefit the Westar Estate.

¶ 30 If there are any analogies to be drawn, the present situation is more analogous to the situation of a creditor whose claim has been disallowed by the Trustee. That is, the fact that the Trustee has refused to accept the claim of the Greenhills Mine Suppliers Group in respect of the money held in trust may be similar to the refusal of the Trustee to accept a claim made by a purported creditor. In challenging such a refusal in the Courts, the purported creditor bears his/her own legal costs.

¶ 31 In addition, during this hearing Ladner Downs argued that it would be unfair to the members of the Greenhills Mine Suppliers Group if their legal costs were not paid by the Westar Estate. Ladner Downs contended that the unfairness arises from the fact that they would have to bear their own legal costs, whereas the other creditors of the Westar Estate would be represented by counsel for the Trustee whose fees will be paid from the Westar Estate.

¶ 32 I did not find this argument persuasive. The fact that the legal fees of the Trustee are paid from the Westar Estate is entirely in keeping with the general principles as reflected in the Eron, supra, case. Counsel for the Trustee is working to benefit the Westar Estate; is doing work necessary to preserve and manage the trust; and is doing work for which it is fair and equitable that the owners of the Estate bear the costs.

¶ 33 In this application the onus is on Ladner Downs to establish that it is fair and just that the creditors of the Westar Estate, as the owners, bear the legal fees of the lawyers representing the Greenhills Mine Suppliers Group. Ladner Downs has failed to discharge this onus. The evidence shows that it would be inequitable and unfair for them to bear these costs. That is, the owners of the Westar Estate oppose the work to be undertaken by Ladner Downs because, if it is successful, it will reduce their asset - the Westar Estate.

¶ 34 For all of these reasons, I have concluded that Ladner Downs has failed to establish that it is entitled to be paid from the Westar Estate. This application is dismissed. This finding, of course, does not preclude an order for costs against the Westar Estate should Ladner Downs, on behalf of the Greenhills Mine Suppliers Group, be successful in proving the "purpose trust" claim.

C) Application of the Trustee For Directions Regarding The Notification of Balance of the Greenhills Mine Suppliers Group

¶ 35 In this application, the Trustee sought directions as to the procedure it ought to follow in giving notice of the "purpose trust" hearing to the remainder (153 creditors) of the Greenhills Mine Suppliers Group.

¶ 36 In particular, the Trustee is seeking a direction that it be required at this stage to only give notice to those creditors who have \$2,500.00 or more at stake with respect to the "purpose trust" issue.

¶ 37 The order of April 21, 1999 provided that the Trustee could apply for further directions with respect to the procedure to be followed for determining the "purpose trust" issue. However, it would appear that the Court has already decided the issue regarding the notification of the remaining creditors.

¶ 38 The previous order includes the provision that the Trustee must notify the 13 largest unsecured creditors in the Greenhills Mine Suppliers Group. As well, if necessary, the Trustee can receive further directions on the procedure to be followed in respect of the "purpose trust" issue. Then the order states that, "[t]he balance of the unsecured creditors who filed proofs of claim in the Estate of Westar Ltd. in respect of the goods and services provided to the Greenhills Mine prior to the CCAA Order shall be notified of the purpose trust issue by letter after the hearing referred to in paragraph (3) above and shall be given a limited time frame by which to indicate their desire to participate in that issue".

¶ 39 Given these circumstances, it appears to me that the Court has already determined this issue and decided that all of the creditors remaining are to be notified by letter. Therefore, given this conclusion I do not have jurisdiction to revisit this issue.

¶ 40 However, if I am wrong with respect to this conclusion I have decided that all of these creditors should be notified in writing in any event.

¶ 41 All of the members of the Greenhills Mine Suppliers Group should be given the opportunity to determine whether they want to participate in the upcoming "purpose trust" application particularly as they may be expected to contribute to the legal costs.

¶ 42 The contents of the letter and the procedure to be followed in drafting the letter will be similar to the procedure set out for the letter sent to the 13 creditors. That is, the letter will apprise these creditors of the "purpose trust" issue and that Ladner Downs has been appointed to represent that group. The letter should be sent by ordinary mail.

¶ 43 The creditors should be given 15 to 20 days to advise Ladner Downs whether they wish to avail themselves of its legal services, and whether they intend to participate in the hearing of the "purpose trust" issue. The form of the letter should be approved by Ladner Downs before the Trustee sends it to the creditors.

SINCLAIR PROWSE J.

QL Update: 991006  
cp/i/drkJjl

\*\* Unedited \*\*

Indexed as:

**Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.**

Between

Eron Mortgage Corporation, in its capacity as Trustee, and  
others, petitioners, and  
Eron Mortgage Corporation, Her Majesty the Queen in Right of  
the Province of British Columbia, Eron Financial Services  
Limited and all investors as set out in schedule "A" attached  
to the petition, respondents

[1998] B.C.J. No. 282  
Vancouver Registry No. A972569

**British Columbia Supreme Court  
Vancouver, British Columbia  
Tysoe J.**

Heard: January 23, 1998.  
Judgment: filed January 29, 1998.  
(17 pp.)

*Trusts — Administration — Remedies of beneficiaries and others — Compensation of trustee —  
Encroachment on capital - - Judicial approval — Jurisdiction.*

The Applicants, the Eron Lenders Committee, requested an order granting the Committee a charge against Eron Mortgage Corp.'s assets for the remuneration and expenses of the Committee. Eron's business involved pooling funds from 4000 investors and providing syndicated loans to commercial developers. The Registrar of Mortgage Brokers suspended Eron's license. A Judicial Trustee and Receiver were appointed. The Eron Lenders Committee, organized by several investors, was an elected committee representing the interests of the investors. The committee issued a ballot whereby a majority of voters approved the remuneration of the committee members from Eron's trust assets. The Application for a charge against the assets was opposed by several lenders and development projects on the basis that the votes were from only 25 per cent of the lenders. They also opposed the remuneration as too high.

**HELD:** Application dismissed. The Court had jurisdiction to charge the trust assets with the Committee's remuneration if the work done was of benefit to the trust property or was necessary for the management and preservation of the trust assets. Therefore, the Court had jurisdiction to create a charge for the committee's work with respect to communications to the lenders and working with the Judicial Trustee and the Court. The Court did not have jurisdiction to charge the assets with the cost of litigation that the committee intended to pursue. That work did not benefit the trust assets. Notwithstanding that the Court had jurisdiction, it declined to create the charge because it was premature to ascertain what efforts of the committee would be of benefit to the trust assets and what was an overlap of the powers of the Judicial trustee.

**Statutes, Regulations and Rules Cited:**

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36. Judicial Trustee Act, R.S.B.C. 1996, c. 464, s. 97(1), 97(4). Law and Equity Act, R.S.B.C. 1996, c. 253. Mortgage Brokers Act, R.S.B.C. 1996, c. 313, s. 7.

**Counsel:**

Gordon R. Johnson, for Barbara Mayer and the Eron Lenders Committee.  
Michael A. Fitch and John F. Grieve, for the Price Waterhouse Limited, Judicial Trustee.  
Paul A. Cote, for Galaxy Trading Ltd.  
David G. Fredrickson, for David and Phyllis Patriquin.  
Various investors on their own behalf and on behalf of project committees.

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¶ 1 **TYSOE J.**— Barbara Mayer and the self-styled Eron Lenders Committee apply for two types of relief. The first is for an Order that Price Waterhouse Limited, as judicial trustee, be authorized to provide all reasonable co-operation with and all reasonable assistance to the Eron Lenders Committee and that there be liberty to apply to this Court if the Committee requests co-operation or assistance which Price Waterhouse Limited considers unreasonable. This aspect of the application is not controversial and I grant the requested Order.

¶ 2 The second type of relief is controversial. The request is for an Order that the Eron Lenders Committee have a charge against assets in respect of which Price Waterhouse Limited has been appointed judicial trustee for remuneration and expenses of the Committee. The remuneration and expenses would both be subject to approval of this Court. It is suggested that members of the Committee would charge \$33 an hour for up to a maximum number of hours a year (ranging from 606 to 1670 hours a year for the five members of the Committee). The expenses would include the costs of obtaining legal and other professional advice and assistance.

**BACKGROUND FACTS**

¶ 3 Eron Mortgage Corporation ("Eron") carried on the business of a mortgage broker but there was an aspect of its business which was different from most other mortgage brokers. Normally, a mortgage broker will match up one borrower with one lender and the security is granted by the borrower to the lender (in some cases, the mortgage broker will initially fund the loan and take the security in its own name, and will subsequently assign the security when a lender is located).

¶ 4 Eron's concept involved the pooling of funds into what are sometimes referred to as syndicated loans. Numerous investors would give their money to Eron which would pool or consolidate the funds and make a single loan to one borrower, usually in respect of a commercial development. The loan would be funded by Eron or one of the numbered companies which it incorporated and which are the other Petitioners in this proceeding (e.g., 475634 B.C. Ltd.). The mortgage or other security would be taken in the name of Eron or the numbered company which would sign a declaration of trust in favour of the investors. Approximately 4,000 people invested monies through Eron in this fashion and they advanced an aggregate of approximately \$250 million.

¶ 5 This proceeding was commenced by Eron and its numbered companies on October 3, 1997 and an ex parte hearing was arranged for the afternoon of that day. On the morning of October 3 the

Registrar of Mortgage Brokers suspended Eron's mortgage broker's licence, effectively putting its business into abeyance.

¶ 6 At the October 3 hearing Eron and its numbered companies requested that they be replaced as trustee by Price Waterhouse Limited with respect to the security which they were holding in trust for the investors. Two principal reasons were given for the request. First, some of the loans made by Eron on behalf of investors were to borrowers who were owned, in whole or in part, by the principals of Eron. This created a conflict of interest and had been a matter of concern expressed by the Registrar of Mortgage Brokers. Second, some of the loans made by Eron on behalf of investors had gone into default and it was necessary to take proceedings to enforce the security held for the investors. However, Eron's lawyers were concerned that the declarations of trust signed by Eron and the numbered companies might be inadequate to allow the trustee to make decisions with respect to the enforcement proceedings.

¶ 7 I heard the application and I agreed that it was in the best interests of the investors to have Eron and its numbered companies replaced as trustees for the investors. I appointed Price Waterhouse Limited as Judicial Trustee pursuant to s. 97(1) of the Trustee Act [See Note 1 below] in substitution of Eron and the numbered companies. I ordered that the trust assets be charged with the payment of the fees and expenses of Price Waterhouse Limited (subject to an allocation amongst the various trust assets which I have subsequently made in general terms).

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Note 1: Trustee Act, R.S.B.C. 1996, c. 464.

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¶ 8 Although the application was technically made on an ex parte basis, Eron's counsel had advised counsel for the Attorney General of the application and the Attorney General's counsel appeared at the hearing on behalf of Her Majesty the Queen. In addition to supporting the application for the appointment of the Judicial Trustee, the Attorney General's counsel made an oral application to have Price Waterhouse Limited appointed as Receiver of Eron and its related company, Eron Financial Services Limited, for a period of 14 days pursuant to s. 7 of the Mortgage Brokers Act. [See Note 2 below] This was an unorthodox application but it was not opposed by Eron's counsel. I joined Her Majesty the Queen and Eron Financial Services Limited as Respondents in the proceeding and I then appointed Price Waterhouse Limited as Receiver of the two companies for a period of 14 days. This appointment was subsequently extended for an indefinite period.

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Note 2: Mortgage Brokers Act, R.S.B.C. 1996, c. 313.

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¶ 9 Price Waterhouse Limited was appointed Receiver over the assets belonging to Eron and Eron Financial Services Limited (which do include assets held in trust by them for the investors or any other party), but it was intended that the Receiver would generally investigate the affairs of Eron and that this would likely assist Price Waterhouse Limited, as Judicial Trustee, in administering the security on behalf of the investors.

¶ 10 Accordingly, this proceeding is hybrid in nature. Price Waterhouse Limited is acting as Judicial Trustee of the trust assets and as Receiver of Eron's non-trust assets. A receiver would normally be appointed in a separate proceeding but I was satisfied that the exigencies of the situation and the nature of Eron's business made it just and convenient to have a combined proceeding.

¶ 11 The investigations of Price Waterhouse Limited have revealed, among other things, that there

was a commingling of monies by Eron and that trust funds were used for other than their intended purposes. For example, some of the loans were overfunded in the sense that more monies were provided by investors in respect of a particular project than were advanced to the borrower. Eron apparently used the excess funds for other purposes. Other problems exist in identifying which investors are entitled to which trust assets.

¶ 12 As would be expected, the suspension of Eron's mortgage broker's licence and the appointment of Price Waterhouse Limited as Judicial Trustee and Receiver caused concern among the investors. There was further reason for concern when it became apparent that a number of the loans made by Eron on behalf of investors were in jeopardy.

¶ 13 Although Price Waterhouse Limited was appointed to protect the interests of the investors, it was understandable that the investors would wish to take steps on their own behalf and they have organized into two different types of groups. The first type is a group of all of the Eron investors and this is the group which the Eron Lenders Committee represents. The second type of group which has organized are groups of investors corresponding to the particular developments or projects against which the security for their funds are held and they are represented by what have become known as the project committees (which is a bit of a misnomer because the investors have an interest in the mortgages against the projects, not the projects themselves).

¶ 14 The Eron Lenders Committee became organized through the efforts of several investors who called themselves the Eron Lenders Recovery Coalition. They were permitted to send a written communication to all of the investors in a mailing done by Price Waterhouse Limited on about October 20. The communication gave notice of an organizational meeting of all of the Eron investors to be held on November 2 for the purpose of creating a lender committee to speak for all of the investors on common issues. I understand that between 1,000 and 2,000 investors attended the meeting.

¶ 15 A voting ballot was given to each of the investors who attended the organizational meeting and the ballot was mailed to all of the other investors. The voting closed on November 14.

¶ 16 There were four questions on the ballot. The first was for the creation of the Eron Lenders Committee and it was approved by 1,415 of the 1,454 votes cast (a majority of 97%). The last question related to the election of the seven people who would be on the Committee.

¶ 17 The second and third questions on the ballot related to the payment of remuneration and expenses for the Committee. The second question asked whether the costs of the Committee, including the costs for obtaining legal and other professional advice and assistance, should be paid from Eron's assets and the trust assets and loan assets of the Eron Lenders. Of the 1,452 votes cast on the question, 1,313 (90%) voted in favour. The third question asked whether it was fair that the members of the Committee "be paid a reasonable amount, to be approved by the Supreme Court of British Columbia, for the time which they devote to the services of the lenders committee", with any such amounts to be paid from the same source as the costs of the Committee. Of the 1,440 votes cast on the question, 1,060 (74%) voted in favour.

¶ 18 The mandate of the Committee was set out in the ballot form. In general terms, the mandate of the Committee is to represent the Eron lenders on matters of common concern, including the following:

- (a) to provide an organization structure for the communication of information;
- (b) to investigate legal claims available to lenders;
- (c) to facilitate the commencement of litigation where there are common interests

- and justifying circumstances;
- (d) to negotiate settlements of legal claims of lenders;
  - (e) to monitor Price Waterhouse Limited to encourage the prompt provision of service without unreasonable cost;
  - (f) to represent the lenders as a group in court where the interests of the lenders are perceived as differing from those of the judicial trustee or where legal representation would be of assistance to the judicial trustee.

¶ 19 Since its creation, the Eron Lenders Committee has appointed legal counsel (who has appeared in Court on its behalf) and has met with representatives of Price Waterhouse Limited, the Financial Institutions Commission and their respective solicitors. The Committee has held meetings once a week and also attends the meetings of the representatives of all of the project committees.

¶ 20 Two of the members of the Committee have resigned. One resigned for health reasons. The other person to resign was the only one of the remaining six members of the Committee who had said that he did not want to be compensated for his time. He resigned on January 19, 1998 because he felt that the original mandate of the Committee had been achieved. He believes that the Committee should be dissolved and that there should be a new committee existing of one Eron investor and a law firm, with the investor being remunerated out of the proceeds of the litigation that is anticipated to be undertaken.

¶ 21 In addition to legal counsel speaking to the Committee's application, several investors spoke in support of the Committee members being remunerated and the remuneration and expenses of the Committee being a charge against the trust assets. However, two counsel acting for investors and seven individual investors spoke in opposition to the application. Of these nine investors, five were on the committees of investors in respect of particular developments or projects.

¶ 22 Both of the counsel acting for investors questioned the jurisdiction of the Court to make the Order being sought by the Committee. Some investors thought that the application was premature and that there should have been prior discussion with the project committees. Some of the opposing investors agreed that the Committee members should be remunerated but felt that \$33 an hour was too high - they pointed out that the question on the ballot only made reference to a reasonable amount and there was no evidence that the majority of the Eron investors agreed to remuneration at a rate of \$33 an hour. It was noted that while the number of the Eron investors who voted in favour of remuneration for the Committee members may have constituted 74% of the ballots cast, they only represented approximately 25% of the total number of investors. Finally, it was submitted that it was not fair to create a charge against the "good projects" because the investors who will be fully repaid from their security would be financing the efforts of the Committee but would not be receiving any benefit from those efforts.

## DISCUSSION

¶ 23 It is my opinion that the Eron Lenders Committee performs valuable functions on behalf of the Eron investors and that it should be encouraged to continue in some form. I view the enumerated aspects of the Committee's mandate as falling into three basic functions. The first is communication between Price Waterhouse Limited and the investors. Counsel for Price Waterhouse Limited indicated that this function is the most significant in its view. The second function is working with Price Waterhouse Limited and the Court in furtherance of the best interests of the Eron investors as a whole. I anticipate that I will probably find submissions on behalf of the Committee to be useful on future applications. The third function is pursuing litigation in an attempt to offset some or all of the shortfalls on the Eron loans.

¶ 24 I certainly share the view of the majority of the investors who cast ballots that it is fair for the members of the Committee to be paid a reasonable amount for their efforts. It is also appropriate for the Committee's professional advisors to be paid. The more difficult question is who should pay for the Committee's remuneration and expenses. This question involves the threshold issue of whether the Court has jurisdiction to create a charge against the trust assets.

¶ 25 The jurisdiction relied upon by the Notice of Motion filed by the Eron Lenders Committee was the Trustee Act, the Law and Equity Act [See Note 3 below] and the inherent jurisdiction of the Court. During his submissions, counsel for the Committee only made reference to the Trustee Act and the inherent jurisdiction of the Court. No mention was made of any particular section in the Law and Equity Act and I infer the abandonment of that source of jurisdiction.

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Note 3: Law and Equity Act, R.S.B.C. 1996, c. 253.

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¶ 26 The relevant provision of the Trustee Act is subsection 97(4) which reads as follows:

The court may, either on request or without request, give a judicial trustee general or special directions in regard to the trust or its administration.

As I indicated during the course of the oral submissions, this provision does not give the Court jurisdiction to make the requested Order. I am not being requested to give any directions to the Judicial Trustee. The Court is being asked to create a charge against the trust assets.

¶ 27 My initial reaction was that the Court has inherent jurisdiction to create a charge against the trust assets for the remuneration and expenses of the Committee. My reaction was based on my experience with the Companies Creditors Arrangement Act. [See Note 4 below] Counsel for the Committee referred to my decision *Re Woodward's Limited* [See Note 5 below], *Woodward's Ltd. (Re)* [1993] B.C.J. No. 115, where I implicitly relied on the Court's inherent jurisdiction to order that the debtor company pay 50% of the costs of three creditors' committees. Leave to appeal my decision regarding the creation of the creditors' committees was refused by the Court of Appeal. [See Note 6 below]

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Note 4: Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Note 5: *Re Woodward's Limited* (January 21, 1993), Vancouver Docket No. A924791 (B.C.S.C.).

Note 6: *Re Woodward's Limited* (1993), 105 D.L.R. (4th) 517 (B.C.C.A.).

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¶ 28 Another example under the Companies Creditors Arrangement Act is *Re Westar Mining Ltd.* [See Note 7 below] where Macdonald J. created a first charge against the assets of the debtor company to secure the accounts of suppliers which were providing goods and services to the debtor company during the period of attempted reorganization. Macdonald J. relied on the Court's inherent jurisdiction to create the charge:

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Note 7: Re Westar Mining Ltd. (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

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The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., vol. 37, para 14) as:

... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so ...

Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects. (p. 12)

Macdonald J. distinguished the decision of *Lochson Holdings Ltd. v. Eaton Mechanical Inc.*, [See Note 8 below] a case involving a receiver-manager, on the basis that receiver-manager cases involve the Court safeguarding property while the concern of the Court in C.C.A.A. proceedings is the survival of the company owning the property for long enough to present a plan of reorganization. Two other reasons justify a more liberal use of the Court's inherent jurisdiction in C.C.A.A. proceedings to create charges against the assets of the debtor company. First, it is the debtor company which has come to the Court for protection and assistance in connection with its reorganizational efforts. Second, the Court should be given flexibility in order to achieve the goal of the legislation to facilitate successful reorganizations.

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Note 8: *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C.C.A.).

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¶ 29 The decision of *Lochson Holdings* referred to by Macdonald J. had followed the earlier decision of the Ontario Court of Appeal in *Kowal Investments Ltd. v. Deeder Electric Ltd.* [See Note 9 below] In that case, the Court held that, as a general rule, a court has no power to authorize receivership expenses at the expense of prior mortgagees or lienholders without their approval. There are recognized exceptions to this general rule and, while acknowledging that it was not an exhaustive list, the Court referred to the following three exceptions:

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Note 9: *Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.).

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1. The receiver's expenses will be given priority over the security pursuant to which the receiver was appointed;
2. The receiver's expenses to preserve and realize assets for the benefit of all interested parties, including secured parties, will be given priority over the secured parties, provided that, at least in the case of borrowings by the receiver, there must be compelling and urgent reasons for the obligations of the receiver to be given such priority if there is opposition from the secured creditors;
3. Expenditures made by a receiver for the necessary preservation or improvement of the property may be given priority over secured creditors.

¶ 30 I have made reference to the Kowal decision in view of another decision of the Ontario Court of Appeal in the case of Ontario (Securities Commission) v. Consortium Construction Inc. [See Note 10 below] In that case, Consortium Construction Inc. and related companies sold units in real estate projects. The units were held in trust by the Consortium companies for the investors. A receiver of the Consortium companies was appointed at the instance of the Ontario Securities Commission. The Ontario Court of Appeal upheld the decision of the trial judge that receivership costs could be paid from the trust assets which were beneficially owned by the investors.

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Note 10: Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321 (Ont. C.A.).

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¶ 31 Two of the appellate judges provided concurring reasons and it is not stated in the report whether the third judge participated in the judgment and, if so, with whom he agreed. Galligan J.A. found the jurisdiction of the Court in the wording of the Ontario Securities Act and his reasons do not provide any assistance to the present case.

¶ 32 Carthy J.A. found the jurisdiction by analogy to the receivership cases. After quoting the passage from Kowal setting out the second exception to the general rule, he stated that if the jurisdiction of the Court is coincident and extends to trust funds, it is subject to the limitations referred to in the Kowal decision. He then quoted the following passage from Re Berkeley Applegate (Investment Consultants) Ltd., [See Note 11 below] which also involved trust assets:

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Note 11: Re Berkeley Applegate (Investment Consultants)Ltd.; Harris v. Conway, [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71 (Eng. H.C.).

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The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *In re Marine Mansions Co* (1867) LR 4 Eq 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v. Nesbitt* (1808)14 Ves 438), and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Boardman v. Phipps* [1966] 3 ER 721). In my judgment this is a case in which the jurisdiction can properly be exercised. (p. 83 of [1988] 3 All E.R. and quoted at p 10 of 14 C.B.R. (3d))

After citing four other authorities where receiver's costs had been imposed against trust assets, Carthy J.A. stated that there was jurisdiction for such an Order but that the discretion to grant the Order should be sparingly exercised. He concluded that the trial judge's discretion had not been improperly exercised because there had been a commingling of monies and it would have been necessary for some person to identify the various assets and funds.

¶ 33 The principal case relied upon by Carthy J.A., Berkeley Applegate, involved a liquidator of a

company which held investors' funds in trust awaiting investment in mortgages. The Court held that the liquidator's remuneration and costs in administering the trust property could be paid out of the trust property in view of the facts that the liquidator's work benefitted the trust and the work would have had to be done by the investors or a receiver if it was not done by the liquidator.

¶ 34 The issue was re-visited by the Ontario Court of Appeal in Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp. [See Note 12 below] The underlying facts were fairly similar to the present case. Matrix was a mortgage broker and it held mortgages in trust for individual investors. Complaints were made about Matrix and a receiver was appointed on the application of the Registrar of Mortgage Brokers. The Order appointing the receiver created a charge against the trust assets for the fees and disbursements of the receiver. On a subsequent application Farley J. held that the applicable statute did not authorize the appointment of a receiver and that the receiver was not entitled to any compensation from the trust assets.

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Note 12: Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp. (1993), 106 D.L.R. (4th) 132 (Ont. C.A.).

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¶ 35 The Ontario Court of Appeal held that the receiver was entitled to recover a portion of its fees and disbursements because it was under a legal obligation to comply with the Order as long as it remained in force. After commenting that Farley J. should have inquired into the propriety of fixing the trust assets with the obligation to compensate the receiver in accordance with the principles referred to in the Consortium decision, the Court continued as follows:

As Farley J. regarded the absence of statutory authority for the initial application to appoint Peat Marwick as a trustee/receiver as dispositive of the investors' obligation to pay the fees and expenses of Peat Marwick, he made no effort to determine what part of the work done by Peat Marwick was properly attributable to the management and preservation of the trust assets. In my view, some part of Peat Marwick's efforts, as detailed in its reports, was expended in connection with the preservation and management of the trust assets. Those efforts were necessary given the state of affairs left by Matrix and had to be performed by or on behalf of the investors. According to the principles referred to in Ontario (Securities Commission) v. Consortium Construction, supra, those fees and expenditures necessary to the management and preservation of trust assets were properly chargeable against the trust assets. (p 137)

¶ 36 The general principle which I extract from these authorities is that the Court does have the jurisdiction to order that trust assets be charged with the remuneration and expenses of a third party if the work done by the third party is of benefit to the trust property or is necessary for the management and preservation of the trust assets. Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it. Two of the cases say that the Court should exercise its discretion sparingly, which I interpret to mean that the Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.

¶ 37 With this principle in mind, I return to the three aspects of the Committee's mandate:

1. Communication - it appears to me that the Committee has undertaken part of the Judicial Trustee's function in the sense that it has simplified communications

and that less time will be required of the Judicial Trustee in this regard. As the fees and expenses of the Judicial Trustee form a charge against the trust assets, it is equitable in my view to pay out of the trust assets the remuneration and expenses of the Committee in connection with communications which would otherwise been done by the Judicial Trustee. The Judicial Trustee feels this is the most significant aspect of the Committee's work and I infer the reason is that it has assisted the Judicial Trustee in the performance of its duties as they relate to communications with the Eron investors.

2. Working with the Judicial Trustee and the Court - to the extent that the Committee's remuneration and expenses in this regard are beneficial to the trust assets by increasing their value or by reducing the amount of the Judicial Trustee's costs charged against them, it is appropriate that they be paid out of the trust assets.
3. Litigation - the litigation which the Committee intends to pursue is not aimed at benefitting the trust assets, nor does it relate to the administration of the trust assets. Rather, the goal is to attempt to make up shortfalls between the funds advanced by the investors and the amounts recovered from the trust assets.

Accordingly, the Court has jurisdiction to charge the trust assets with some or all of the Committee's remuneration and expenses in connection with the first two aspects (but not the third aspect). However, I face difficulties which preclude me from creating a charge at this time.

¶ 38 The difficulty I encounter with respect to the first aspect is that I cannot determine on the evidence before me as to what extent the communication function undertaken by the Committee has relieved the Judicial Trustee from tasks that it would otherwise have been required to perform. The difficulty I face with respect to the second aspect is that it is premature at this stage to ascertain what efforts of the Committee, if any, will be of benefit to the trust assets. My view at present is that it will probably be necessary to deal with this aspect on an instance-by-instance basis.

¶ 39 In the circumstances, I dismiss the Committee's application for a charge against the trust assets in respect of all of its remuneration and expenses but I grant liberty to re-apply on a more limited basis in accordance with these Reasons for Judgment.

¶ 40 I would note that it is open to the Judicial Trustee and the Committee to enter into an arrangement whereby the Judicial Trustee could agree to compensate the Committee for its assistance in communicating with the Eron investors. As the expenses of the Judicial Trustee form a charge against the trust assets, the Committee would be assured of payment of its compensation. It may be that the Judicial Trustee would want to seek directions from the Court under s. 97(4) of the Trustee Act approving any such arrangement.

¶ 41 As I am not creating a charge against the trust assets at this stage, I need not deal with the level of remuneration being sought by the Committee members. I will say, however, that there was merit in the submission that the answers to the questions on the ballot do not support a conclusion that the Eron investors are generally in agreement with the proposed amount of remuneration. I think it would be helpful on any future application to know the views of the investors with respect to the amount of the remuneration, which could be learned either from a general canvassing of the investors or from discussions between the Committee and the project committees.

¶ 42 I make no order of costs with respect to this application.

TYSOE J.

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