

*Name of Deponent: Croft Axsen  
Affidavit Sworn: May 6, 2005*

ACTION NO: 0401-19905

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

**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**

**A F F I D A V I T**

I, Croft Axsen, of the City of Calgary, in the Province of Alberta, Businessman,  
MAKE OATH AND SAY THAT:

1. My wife and I have both sustained significant losses as investors in the business known as Titan Investments Limited Partnership (the "Titan Partnership"). I have also been appointed and acted as a member of the Investors Committee appointed pursuant to the Order of the Court dated January 21, 2005, and as such, I have a personal knowledge of the matters herein deposed to save where stated to be based on information and belief, in which case I verily believe the same to be true. I am authorized to swear this Affidavit on behalf of the Investors Committee.

2. Except as otherwise expressly defined herein capitalized terms shall have the meaning as defined in the Receiver's First Report. All funds, unless otherwise specifically denoted to be otherwise, are in U.S. dollars. The Receiver has issued a Second Report dated April 14, 2005 which is referred to in this Affidavit.

**A. THE MARCH 30 APPLICATION**

**a) Status of Proceedings**

3. On the instructions of the Investors Committee, Bennett Jones LLP brought an application returnable March 30, 2005 for approval of the Repayment Formula attached as Exhibit "D" to the Affidavit of Michael Costello and such other relief as set out in the Notice of Motion. I attended the Application on behalf of the Investors Committee.
4. The Application was adjourned, at the behest of counsel for certain of the Overpaid Investors (investors who have recovered more than the amount of their original investment) to May 11, 2005 to conduct any necessary cross-examinations and to allow the Investors Committee to provide opposing counsel particulars of the admission (that the Overpaid Investors acted in good faith without knowledge of any fraud) proposed by counsel for the Investors Committee.
5. It is my recollection that on the Application, some counsel for the Overpaid Investors requested the service list for other counsel acting for the Overpaid Investors which I am advised was forwarded to counsel on March 31, 2005.
6. I am further advised by Bennett Jones LLP that the complete service list was posted on the Alger web-site on April 8, 2005.
7. I am advised by Bennett Jones LLP and do verily believe that shortly after the Court Application, there were some discussions with opposing counsel (including Mr. LeGeyt) regarding scheduling cross-examinations during the week of April 18, 2005. Further, Bennett Jones LLP forwarded a letter to Mr. LeGeyt and all counsel acting for the Overpaid Investors on April 7, 2005 setting out the admissions which it proposed to make subject to final agreement from the Receiver's counsel and the Investors Committee. Counsel for the Overpaid Investors were asked to advise if the admission was satisfactory for their purposes, however, I am advised by Bennett Jones LLP that no response was ever received to this letter. Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of Bennett Jones LLP letter dated April 7, 2005.

8. I am further advised by Bennett Jones LLP that they have not received any further requests for any cross-examinations either of myself or the Receiver, although one of the members of the Investors Committee did receive two letters from Fraser Milner Casgrain LLP dated April 20, 2005 and April 27, 2005 to certain of the investors (which we have assumed were Overpaid Investors) with a view to establishing a committee to co-ordinate common defences in relation to this Application.

b) Service

9. As ordered on the March 30 Court Application, an Order for Service Ex-Juris was obtained for service on all of the Investors.

10. A letter indicating that the March 30 Application had been adjourned to May 11, 2005 was included in the material served upon the Investors.

11. All of the approximately 125 Investors have been served in accordance with the Orders of this Court.

**B. STATUS UPDATE**

a) Asset Realizations

12. I am advised by the Receiver that substantially all of the assets available to the estate have been realized or are secured pending a resolution of matters with Janet Comte and with CRA.

13. I am advised that the main substantive outstanding issues are those matters which are the subject of this Application.

b) Costs

14. The Investors Committee has now received an Application by the Overpaid Investors, who by definition are no longer partners in the Titan Partnership, seeking to be paid from the funds which clearly "are the property of the Unpaid Partners" (Receiver's Second Report at 8.4.2 on page 26) who are going to be facing substantial shortfalls.

While it is incomprehensible to the Investors Committee that we would have to fund those who oppose our Application, what is even more disconcerting is the fact that this would simply encourage the Overpaid Investors to prolong matters even further than they already have, resulting in a professional feeding-frenzy funded solely by those who have suffered a significant financial loss already.

c) **Revised Repayment Schedule**

15. The Receiver has made minor adjustments to the Repayment Schedule attached as Exhibits "D" and "E" to Michael Costello's March 18, 2005 Affidavit.

16. The key changes are:

	<b>Partners</b>	<b>Gross Investments</b>	<b>Potential Shortfall %</b>	<b>Redistribution Amount</b>
March 18 figures	85	\$12,324,845	23.4%	\$3,413,416
April 14 figures	84	\$12,051,538	25%	\$3,149,059
Difference	1	\$ 273,307	1.6%	\$ 264,357

17. The changes occurred primarily as a result of non-cash transfers as outlined in the Receiver's Second Report.

18. I am advised by the Receiver that any party requiring further particulars of this change should contact the Receiver directly. Revised Payment Schedules are attached as Exhibit "H" to the Receiver's Second Report.

C. **CRA**

19. Subsequent to the Application, the Receiver and Bennett Jones LLP met with and provided a complete background letter to senior representatives of CRA setting out the facts and discussed the appropriate tax treatment of the various interested parties.

20. I am further advised that Bennett Jones LLP and the Receiver met with CRA on April 29, 2005 to further discuss the CRA's position on the appropriate tax treatment and after further discussions they have now been advised of and have confirmed in writing the CRA's position on the various tax issues. Attached hereto and marked as Exhibit "B" to this my Affidavit is a true copy of a letter dated May 4, 2005 from Bennett Jones LLP to CRA, with confirmation from CRA on the last page that the letter sets out the current position of CRA.

21. I am advised by Bennett Jones LLP and do verily believe that the impact of the CRA position on the various interested parties is as follows:

(a) Overpaid Investors:

(i) the net tax paid by an investor who received an amount from Titan and returns such amount to Titan will be nil.

(b) Janet Comte:

(i) Janet Comte will be entitled to recover all or substantially all of the tax paid on amounts returned to Evolution (and ultimately Titan).

(c) Estate of David Comte:

(i) the Estate will be entitled to a deduction for amounts returned to Evolution (and ultimately Titan) however the tax paid on such amounts may not be fully recovered.

(d) Titan, and its Predecessors:

(i) Titan and its predecessors will recalculate their income from prior years to remove all fictitious profits which will result in all partners who previously reported income to recover any tax paid thereon.



BENNETT JONES LLP

JOB #173

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BENNETT JONES

FAX MESSAGE

Mr. David LeGeyt  
Fraser Milner Casgrain LLP  
30th Floor, Fifth Avenue Place  
237 - 4 Avenue SW  
Calgary, AB T2P 4X7

Bennett Jones LLP  
4500 Bankers Hall East  
855 - 2nd Street S.W.  
Calgary Alberta  
T2P 4K7

Tel 403.298.3202  
Fax 403.265.7219

FAX NO. (403) 268-3100

PHONE NO. 268-3075

DATE April 7, 2005

FROM Frank R. Dearlove

LAWYER NO 043 FILE NO 54784-1

Original Status - Retained on File

This is the first page of 3

If all pages not received, call 403.298.3234 for assistance.

This facsimile was successfully transmitted at:

MESSAGE

Please see attached.

THIS IS EXHIBIT " A " referred to in the ( Affidavit Declaration ) of

Croft Axsen

Sworn Declared ) before me this 6th day of May A.D. 20 05

*[Signature]*  
Commissioner for Oaths in and for the Province of Alberta

**RUSH!**

Kelsey J. Drozdowski  
Barrister and Solicitor

DMSLegat05478400001\2031885v1 THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE. THANK YOU.

BENNETT JONES

FAX MESSAGE

Mr. David LeGeyt  
Fraser Milner Casgrain LLP  
30th Floor, Fifth Avenue Place  
237 - 4 Avenue SW  
Calgary, AB T2P 4X7

**Bennett Jones LLP**  
4500 Bankers Hall East  
855 - 2nd Street S.W.  
Calgary Alberta  
T2P 4K7

Tel 403.298.3202  
Fax 403.265.7219

FAX NO. (403) 268-3100

PHONE NO. 268-3075

DATE April 7, 2005

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Frank R. Dearlove  
Barrister and Solicitor  
Direct Line: 403.298.3202  
e-mail: dearlovef@bennettjones.ca  
Our File No.: 54784-1

April 7, 2005

SENT VIA FACSIMILE

Mr. David LeGeyt  
Fraser Milner Casgrain LLP  
30th Floor, Fifth Avenue Place  
237 - 4th Avenue SW  
Calgary, AB T2P 4X7

Dear Mr. LeGeyt:

**Re: Titan Investments Limited Partnership**

We are in receipt of your letter received via facsimile on March 30, 2005. I was out of the office from April 1 to April 4 so I have not had a chance to review your request in detail with Mr. Llewellyn or to obtain formal instructions from the Investors' Committee but I wanted to keep the dialogue going in order that we do not lose the May date that Justice LoVecchio has given us.

You requested that we set out the legal issue which we believe is to be determined. We see those issues as set out in paragraphs 22 and 23 of our Brief of Law, however, if you require those issues to be broken down further or further particularized, we believe the key issue is whether the distributions made by Titan to certain of the limited partners constituted fraudulent preferences either pursuant to the *Fraudulent Preference Act* and/or *Statute of Elizabeth*. If those distributions did constitute fraudulent preferences then the issue is whether those distributions are voidable and should be declared void by the Court and the funds repaid to the Receiver.

With respect to the Partnership Agreement, we would advise that it is already a part of the Court record and is attached as Exhibit "A" to the Affidavit of Croft Axsen dated January 17, 2005. This Affidavit and the Partnership Agreement are posted on the Alger website under "Notice of Motion and Affidavit of Croft Axsen with Exhibit "A" attached – January 17, 2005".

April 7, 2005  
Page Two

With respect to the factual concession we are willing to make, I would propose, subject to Mr. Llewellyn's agreement and final confirmation of the Investor's Committee the following:

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.

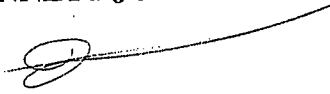
Please let me know if that is satisfactory for your purposes.

Mr. Axsen and I will make ourselves available during the week of April 18, 2005 at Investors' Counsel's convenience to conduct any examinations you wish.

With respect to any Agreed Statement of Facts, please let me know what additional facts other than those contained in the Affidavits of Messrs. Costello and Axsen, you would like to see in that Agreed Statement, particularly given our proposed admission.

Yours truly,

**BENNETT JONES LLP**



Frank R. Dearlove

FRD/cl/sj

cc. Fleming LLP  
Attention: Clive O. Llewellyn (via email)  
cc: Mr. M. Costello  
cc: All Counsel, Investors Committee

Curtis R. Stewart  
Direct Line: 403.298.3074  
e-mail: stewartc@bennettjones.ca  
Our File No.: 54784-1

May 4, 2005

Canada Revenue Agency  
Calgary Tax Services Office  
220 - 4th Avenue SE  
Calgary, Alberta  
T2G 0L1

Attention: Marlene White

Dear Ms. White:

Re: Titan Investments Limited Partnership et al.

We write in furtherance of our letter of April 21, 2005 wherein we set forth for your consideration the appropriate tax treatment of the various issues related to Titan Investments Limited Partnership ("Titan"), Evolution Capital Management Ltd., the Estate of David Comte, Janet Comte and Predator Holdings Ltd. The taxation issues arise as a consequence of a large-scale fraud perpetrated on Titan and its partners.

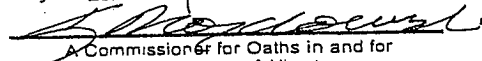
The purpose of this letter is to confirm the CRA's position as to the appropriate tax treatment on the various issues so as to allow the Receiver and Manager of Titan Investments Limited Partnership, Titan Genpar Inc., Evolution Capital Management Ltd., the Estate of David Comte, deceased, the Comte Family Trust and Predator Holdings Ltd. to proceed to make appropriate tax filings and to provide advice to the partners/investors as to the basis of the Receiver's actions.

We understand the position of the CRA to be as follows:

1. Partnership Reporting

- (i) Titan and its predecessors will prepare and file amended T5013 slips for the 2002 and 2003 years on the basis that the income of Titan and its predecessors is nil (except to the extent interest income was earned in the years). Titan and its predecessors would not deduct from income any Incentive Fees paid to Evolution in such years however, such amounts will be considered to be payments on account of capital and will be considered in Titans' calculation of capital gain (loss) in the years;

THIS IS EXHIBIT " <sup>B</sup> "  
referred to in the (<sup>Affidavit</sup>~~Declaration~~) of  
Croft Axsen  
Sworn  
~~Declared~~ before me this 6th  
day of May A.D. 2005

  
A Commissioner for Oaths in and for  
the Province of Alberta  
A Notary Public

Kelsey J. Drozdowski  
Barrister and Solicitor

- (ii) Titan and its predecessors will prepare and file T5013 slips for the 2004 year on the basis that the income of Titan and its predecessors is nil (except to the extent interest income was earned in the year). Titan and its predecessors would not deduct from income any Incentive Fees paid to Evolution in the year however, such amounts will be considered to be payments on account of capital and will be considered in Titans' calculation of capital gain (loss) in the years;
- (iii) To the extent Titan receives returns of misappropriated funds in 2005 from Evolution, the Estate of David Comte, Predator Holdings Ltd., the Comte Family Trust or Janet Comte, such amounts would not be considered to be income to Titan however such amounts will be considered to have been on capital account and however, such amounts will be considered to be payments on account of capital and will be considered in Titans' calculation of capital gain (loss) in the years;
- (iv) To the extent Titan distributes amounts to partners in 2005 (or such later date as a distribution may occur), such amounts will be considered to be a distribution or return of capital to the partners. Each partner would be required to calculate his or her capital gain or loss in respect of such distribution. To the extent any partner's distributions/returns of capital from Titan or its predecessors is less than their original investment/contribution such shortfall shall be treated as a capital loss. To the extent any partner's distributions/returns of capital from Titan or its predecessors is more than their original investment/contribution such excess shall be treated as a capital gain, subject to verification that no account is of an income nature.

**2. Partners Reporting – Previous Income Allocated by Partnership**

- (i) Partners will receive revised T5013 slips from Titan and its predecessors for the 2002, 2003, 2004 years which will reduce the income allocated to nil (except to the extent interest income was earned and allocated in the year. The CRA will reassess partners who file amended T1 returns so as to reflect this redetermination of partnership income, subject to normal verification procedures;
- (ii) Partners will receive T5013 slips from Titan or its predecessors for the 2004 year which will reduce the income allocated to nil (except to the extent interest income was earned and allocated in the year). To the extent any partner reported an amount as income from Titan for the 2004 year the CRA will reassess partners who file amended T1 returns so as to reflect the T5013's issued, subject to normal verification procedures;

### 3. Partners Reporting – Distributions Received/To be Received

- (i) To the extent partners of Titan or its predecessors who received amounts prior to the appointment of the Receiver and the discovery of the fraud return such amounts to the Receiver for subsequent "redistribution", whether voluntarily or pursuant to Court Order, such partners shall:
- report a capital gain as applicable in the year the funds were received, subject to verification that no account is of an income nature;
  - report a capital loss or non-capital loss, as applicable, in the year the funds are returned to Titan or its predecessor;
  - be entitled to carryback such capital loss or non-capital loss in accordance with the *Income Tax Act*; and
  - be entitled to apply for relief from any interest related thereto in accordance with CRA's fairness provisions.

The CRA will reassess such partners who file amended T1 returns to the extent such amounts were previously reported so as to reflect this adjustment.

- (ii) To the extent partners of Titan or its predecessors who received amounts prior to the appointment of the Receiver and the discovery of the fraud do not voluntarily or are not required pursuant to Court Order to return such amounts to the Receiver for subsequent "redistribution", such partners will be required to report the applicable capital gain/loss or income related to such amounts in the year in which they were received.
- (iii) Upon a "(re)distribution" by the Receiver to partners, such partners who receive amounts shall be required to report such receipts in the manner set out in 1(iv) above.

### 4. Evolution – Reporting

- (i) To the extent Evolution received partnership units from Titan or its predecessors as partial consideration for payment of Incentive Fees, the value of such units (as originally calculated) will be removed from income in the year they were received (to the extent they were reported as income). The CRA will reassess Evolution, subject to verification, upon Evolution preparing and filing an amended return so as to reflect the actual value of the units at the time of acquisition. If, subsequently, as a result of a court order, the units are returned to the partnership, Evolution will be deemed to have disposed of the partnership units for an amount equal to the proceeds of

disposition. Any gain or loss calculated thereof will be included in the income of Evolution in accordance with the provisions of the *Income Tax Act*;

- (ii) To the extent Evolution receives a return of amounts from Janet Comte, the Estate of David Comte, the Evolution EPSP or Predator Holdings Ltd. such amounts shall be included in Evolution's income for the year;
- (iii) To the extent Evolution returns misappropriated/fraudulently obtained funds to Titan or its predecessors in 2005 (or subsequently) such amounts shall be deductible from Evolution's income in the year restitution is paid;
- (iv) To the extent it is determined that the Evolution EPSP to be a validly constituted EPSP no adjustments to deduction by Evolution for its contribution shall be required. To the extent it is determined that Evolution is not a validly constituted EPSP, the deductibility of any payments characterized as contributions to an EPSP is to be determined by the CRA based upon a review of the transactions.

5. **Janet Comte/Estate of David Comte**

- (i) To the extent Janet Comte, the Estate of David Comte or Predator Holdings Ltd. return, directly or indirectly, any misappropriated amounts to Evolution (or directly to Titan) in their 2005 year (or subsequently) such amounts shall be deductible in the year the payment is made, including amounts received as allocations from the Evolution EPSP. To the extent Janet Comte, David Comte, the Estate of David Comte or Predator Holdings Ltd. have a non-capital loss arising from the repayment it shall be entitled to carryback or carryforward such non-capital losses in accordance with the Act;

6. **GST - Evolution**

- (i) Evolution shall be entitled to recover GST remitted on Incentive Fees received from Titan or its predecessors pursuant to subsection 232(2) of the *Excise Tax Act* on amounts of Incentive Fees returned to Titan or its predecessors.

We believe the above accurately sets out the present position of the CRA. We acknowledge, however, that CRA may revise its position on any of these transactions as a result of further review or audit. If we are correct we would ask that you confirm by executing the duplicate of this letter and returning same to the writer.

May 4, 2005  
Page Five  
"Without Prejudice"

We also wish to confirm that this letter is not intended to acknowledge that the Receiver/Manager or any affected parties agree with the present CRA position.

Yours truly,

**BENNETT JONES LLP**



Curtis R. Stewart

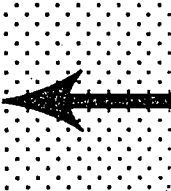
CRS/rs

We hereby confirm the above sets out the current position of the CRA.

Dated this 5 day of May, 2005.



Marlene White  
Assistant Director, Verification & Enforcement Division



Name of Deponent: Croft Axsen  
Affidavit Sworn: May 6, 2005

ACTION NO: 0401-19905

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THE ALBERTA RULES OF COURT

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A F F I D A V I T

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Our File No.: 54784-1

