

Supreme Court rules against victims in Eron scandal: Investors won't recover \$180 million still owed to them

Saturday, November 17, 2001
Page: A1 / FRONT
Section: News
Byline: David Baines
Source: Vancouver Sun

The last hope for victims of the Eron Mortgage Corp. scandal to make any significant financial recovery evaporated Friday when the Supreme Court of Canada dismissed their class-action lawsuit against the B.C. registrar of mortgage brokers.

"We are dead in the water. This is the end of the road," said James Tindle, chair of the Eron Lenders' Committee, which represents aggrieved investors.

On Friday, the Supreme Court of Canada ruled the registrar has no duty of care to investors under the B.C. Mortgage Brokers Act. That means that more than 3,000 Eron investors have no hope of recovering the \$180 million still owed to them.

Meanwhile, former Eron president Brian Slobogian and vice-president Frank Biller have not paid a cent of the \$100,000 fines the B.C. Securities Commission assessed after finding they had defrauded investors.

RCMP have still not completed their criminal investigation, even though more than four years have passed since the registrar accused Eron of serious financial misconduct and revoked its licence.

"There is a message for anyone who is investing," said lawyer David Church, who fought the case on behalf of Eron investors. "Make sure you are prepared to look after yourself."

From 1993 to 1997, Eron raised \$222 million for a variety of projects, most real-estate related, by offering exceptionally high interest rates.

In some instances, funds were diverted from one project to another, or used for personal purposes. In other cases, far more money was loaned to projects than they were worth, leaving serious security shortfalls. Most projects were just not economic and did not generate nearly enough cash flow to pay the promised returns to investors.

Eventually, it became evident that Eron was running a kind of Ponzi scheme: By paying earlier investors with money raised from later investors, they could create the illusion of a viable business.

In October 1997, Robert Hobart, then-registrar of mortgage brokers, suspended Eron's licence and forced the company into receivership. Investors have recovered only \$40 million, leaving a shortfall of about \$180 million.

In September 1998, North Vancouver realtor Mary Frances Cooper, who lost \$94,500, filed a lawsuit

under the Class Proceedings Act alleging that Hobart knew at least a year before he revoked Eron's licence that the firm was engaging in financial misconduct, but failed to warn investors.

In March 1999, a B.C. Supreme Court judge, David Tysoe, ruled that Cooper's pleadings raised a claim at law; that is, whether the registrar owed a duty of care to Eron investors. In June that year, he certified the lawsuit as a class action.

In February 2000, the B.C. Court of Appeal overturned Tysoe's decision, ruling the B.C. Mortgage Brokers Act imposes no duty of care on the registrar to investors. However, the court conceded the case "raises an important question of tort law that has not yet been considered by the Supreme Court of Canada."

"If this decision is appealed, it is hoped the question of duty of care will engage the interest of the Supreme Court of Canada and that lower courts will be given clear and practical guidance regarding cases of this kind. . . ," it stated.

By the time Church appealed to the Supreme Court of Canada, he found himself facing not only lawyers for Hobart and the B.C. government, but counsel for seven other government bodies -- the attorney-general ministries of Canada, Ontario, New Brunswick and Alberta, and the securities commissions of Alberta, Ontario and British Columbia.

On Friday, the court upheld the B.C. appeal court decision.

"The plaintiff must show proximity -- that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances," the court asserted.

In this case, it noted, there was no relationship between Cooper and the registrar. In fact, she was not even aware of his existence.

The court further asserted that no new duty of care had been established: "Even though to some degree the provisions of the act serve to protect the interests of investors, the overall scheme of the act mandates that the registrar's duty of care is not owed to investors exclusively, but to the public as a whole."

The court said the act imposes no limit on how much investors may invest in mortgages, and the registrar has no way of controlling the amount.

As a result, it said, "the spectre of indeterminate liability would loom large if a duty of care was recognized between the registrar and investors in this case."

The court said it must also consider "the impact of a duty of care on the taxpayers who did not agree to assume the risk of private loss to persons in the situation of the investors. To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public. There is no indication that the legislature intended that result."

The decision not only represents a large financial loss for Eron investors, it represents a significant loss for Church and his partners, who took the case on a contingency basis. He estimates they invested more than \$500,000 in time and disbursements. With the case scuttled, they have no hope of recovering that investment.

Asked whether he has any regrets, Church replied: "No, it was a claim well worth pursuing."

Tindle, who lost \$300,000 he had invested in Eron, agreed: "How can a court say that a regulator does not owe a duty of care to people who come under his jurisdiction?"

He quoted from a decision by B.C. Supreme Court Justice William Grist, in which Grist ruled that lax enforcement of provincial building codes by Delta was partly to blame for water damage at the Riverwest condominium complex in Ladner:

"Once a public authority embarks on a scheme to regulate an endeavour, it owes a duty of care to all those who may suffer a loss as a result of negligence and the implementation of that scheme."

Remarked Tindle: "Now the Supreme Court of Canada says, 'No, you guys are all wrong.' The judges seem to be contradicting each other."

With regard to Slobogian and Biller, he said, "The securities commission has already concluded that this is massive fraud, and yet these guys are still walking free."

RCMP Superintendent Gordon McRae, in charge of commercial crime in B.C., said he can understand why investors are impatient.

"From a personal perspective, this is not a reasonable amount of time. A lot of people suffered financial loss and they are looking for some sort of results. But from a commercial crime perspective, an investigation of this length, when you consider its complexity, is not that unusual."

He added: "This has been, and continues to be, a high priority. I don't want anybody to think that this case is sitting on a shelf waiting for police resources. It is not."