COURT FILE NUMBER	1601-11552
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	NATIONAL BANK OF CANADA IN ITS CAPACITY AS ADMINISTRATIVE AGENT UNDER THAT CERTAIN AMENDED AND RESTATED CREDIT AGREEMENT DATED JANUARY 15, 2016, AS AMENDED
DEFENDANT	TWIN BUTTE ENERGY LTD. IN THE MATTER OF THE RECEIVERSHIP OF TWIN BUTTE ENERGY LTD.
APPLICANT	FTI CONSULTING CANADA INC. in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of TWIN BUTTE ENERGY LTD.
RESPONDENTS	GEOCAP ENERGY CORPORATION and SUTTON ENERGY CORPORATION
DOCUMENT	**BRIEF OF LAW AND ARGUMENT of the COURT-APPOINTED RECEIVER (Declaration re: GeoCap/Sutton Energy Lost Profit Claim)** ***December 13, 2017*** **Honourable Madam Justice K. Horner**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Norton Rose Fulbright Canada LLP 3700, 400 Third Ave SW Calgary, Alberta T2P 4H2 Phone: 403.267.8222 Fax: 403.264.5973 **Howard A. Gorman Q.C.** **Aditya M. Badami** **Lucy L'Hirondelle** File No. 01020497-0005 *Counsel for the Applicant, FTI Consulting Canada Inc.*

I. INTRODUCTION

1. This Brief is submitted on behalf of FTI Consulting Canada Inc. in its capacity as Court-appointed receiver and manager (**Receiver**) of Twin Butte Energy Ltd. (**Twin Butte**).

2. Before the receivership of Twin Butte, GeoCap Energy Corporation (**GeoCap**) and Sutton Energy Corporation (**Sutton**) commenced litigation against Twin Butte, as operator, of a certain oil well. The lawsuit claimed damages of $2,040,927.42 and alleged that Twin Butte was grossly negligent in performing a gas lift that resulted in a surface casing vent flow and in the remedial action it took to attempt to repair the well. The well is now inoperable.

3. The lawsuit was stayed by the receivership.

4. GeoCap and Sutton submitted an unsecured claim against the Twin Butte receivership estate pursuant to the Claims Procedure Order granted by Your Ladyship on May 1, 2017. The claim against the estate mirrors what was asserted in the pre-receivership lawsuit.

5. The Receiver has reviewed the proof of claim submitted by GeoCap and Sutton which comprised certain pleadings, affidavit evidence, and two expert reports. In addition, the Receiver has assessed all the pleadings in the action[1], the questioning transcripts, and has discussed the claim with Twin Butte personnel. The Receiver considered the claim in light of the 1990 CAPL Operating Procedure (**Operating Procedure**), the governing contract.

6. The interpretation of one clause in the Operating Procedure is at issue in this application.

7. The Receiver's view is that clause 401 of the Operating Procedure bars Sutton and GeoCap from recovering $1,593,000 of the claimed damages, and they may only recover the remaining damages for incremental abandonment costs ($124,088) if they can establish that Twin Butte was grossly negligent.

8. The Receiver seeks a declaration that the effect of clause 401 of the Operating Procedure is to prohibit liability to joint-operators, in this instance Twin Butte, for lost profits resulting from loss or delay of production from the joint lands. The effect of such declaration would be to lower GeoCap's and Sutton's claim for damages by approximately $1.6 million.

9. The declaration requested by the Receiver accords with the ordinary principles of contract interpretation. Indeed, those principles lead to the conclusion sought.

[1] The Proof of Claim did not include all the pleadings filed in the pre-receivership proceedings, which involved two actions that were consolidated.

10. A declaration as to the proper interpretation of clause 401 is a straightforward application of the principles of statutory interpretation. No questionings or extensive affidavit evidence are required. The result of such a declaration will allow to the Receiver to appropriately apply clause 401, and avoid a trial.

II. BACKGROUND

1-35 Well Incident

11. Pursuant to a Pooling and Farmout Agreement dated April 1, 2002, a Farmout and Option Agreement dated April 2, 2002, and a Participation Agreement dated December 4, 2002 (collectively referred to as the **Agreements**) Twin Butte, Sutton, GeoCap and two other parties (Penn West Petroleum Ltd. (**Penn West**), and Euromax Resources Ltd.) were working interest holders in the Sawn Lake 102/01-35-090-13W5M well (the **1-35 Well**).[2] Under the Agreements, the parties agreed to be bound by the provisions of the Operating Procedure.[3]

12. At the material time, Twin Butte was the operator of the 1-35 Well.[4]

13. In 2008 the 1-35 Well experienced operational failures; in particular, beginning in or about August 12-13, 2008, the well stopped flowing. Attempts were made to achieve well flow, including by injecting methanol into the well. Ultimately, Twin Butte decided to attempt a gas lift to unload the well (the **Unloading Procedure**).

14. A surface case vent flow occurred during the Unloading Procedure. The well was shut-in.

15. Between September 2008 and December 2008 various remedial steps were taken with respect to the surface case vent flow. Meanwhile, production from the well remained offline.

GeoCap and Sutton Claim

16. Two separate actions before the Alberta Court of Queen's Bench were consolidated into ABQB 1001-02577 on June 4, 2010. Pleadings closed and the parties proceeded with questionings until the Receivership Order was granted against Twin Butte in September 2016, resulting in a stay of proceedings.

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[2] Affidavit of William Tobman sworn July 19, 2017 (**Tobman Affidavit**), at para 4 and Exhibits A, B, and C [**Appendix D to Receiver's Eleventh Report**].
[3] Tobman Affidavit at para 8, Exhibit C, Participation Agreement, dated December 4, 2002, Article 1 [Appendix D to Receiver's Eleventh Report].
[4] ABQB 1001-02577 Statement of Claim at para 7 [**Appendix B to Receiver's Eleventh Report**]; ABQB 1001-02577 Statement of Defence [**Appendix B to Receiver's Eleventh Report**]; Tobman Affidavit at para 7 [Appendix D to Receiver's Eleventh Report].

17. The damages claimed in the pleadings exceeded $5 million (Sutton and Penn West) and $3 million (GeoCap); however, after conducting a quantification of damages, Sutton and GeoCap claim $2,040,927.42 in their Proof of Claim submitted to the Receiver pursuant to the Claims Procedure Order.

18. On February 17, 2010, Twin Butte commenced an action, ABQB 1001-02577, against Sutton and Penn West for recovery of their share of expenses incurred in relation remedial actions taken after unloading the 1-35 Well.

19. On March 19, 2010, Sutton and Penn West filed a Statement of Defence and Counterclaim. They denied liability and alleged that Twin Butte was grossly negligent and in breach of its duties as operator.

20. Sutton and Penn West claimed that Twin Butte caused the problems at the 1-35 Well by using a high-risk unloading procedure, and in the manner it responded to the alleged surface casing vent flow and casing failure.

21. Sutton and Penn West claimed that Twin Butte's actions in the Unloading Procedure were grossly negligent and a breach of their duties to the working interest owners. They plead that the alleged surface casing vent flow and alleged casing failure was the direct, obvious and foreseeable result of the Unloading Procedure.

22. Sutton and Penn West claimed over $5 million in damages for, *inter alia*, the lost value of its share of reserves and abandonment costs.[5] Twin Butte filed a Defence to Counterclaim denying all allegations in the Counterclaim.

23. On May 6, 2010, GeoCap and Euromax commenced an action, ABQB 1001-06764, against Twin Butte for gross negligence and breach of its duties as operator.[6] The allegations contained in the Statement of Claim are almost identical to those contained in the Statement of Defence and Counterclaim of Sutton and Penn West and arise from the same incidents. In fact, the pleadings in both actions are drafted by the same counsel.

24. The plaintiffs in ABQB 1001-06764 claimed over $3 million in damages for, *inter alia*, the loss of the 1-35 Well, loss of production and revenue, and abandonment costs.[7]

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[5] ABQB 1001-02577 Counterclaim at para 24 **[Appendix B to Receiver's Eleventh Report]**.
[6] ABQB 1001-06764 Statement of Claim filed May 6, 2010 **[Appendix C to Receiver's Eleventh Report]**.
[7] ABQB 1001-06764 Statement of Claim [Appendix C to Receiver's Eleventh Report].

25. Neither Penn West nor Euromax are pursuing a claim against Twin Butte through the receivership process.[8] Penn West and Twin Butte settled out of Court.

26. On October 28, 2010, Penn West discontinued its counterclaim against Twin Butte and Twin Butte discontinued its claim against Penn West without costs in Action No. 1001-02577.

27. By way of summary, Sutton and GeoCap claim that Twin Butte was grossly negligent and acted in breach of its duties as operator for two principal reasons:

> a) in conducting the Unloading Procedure that was "reckless" and "inappropriate" without consulting the working interest holders; and
>
> b) in the remedial action Twin Butte took to address the surface vent casing flow that allegedly resulted from the Unloading Procedure, which was allegedly concealed from the regulatory authorities and the working interest owners.

28. Further particulars of Sutton's and GeoCap's theory of their case are found in the Proof of Claim which is attached as Appendix "A" to the Receiver's Eleventh Report.

29. Sutton and GeoCap quantified their damages at $2,040,927.42, with $1,593,000.00 of that amount comprising lost profit (**Lost Profit**); $124,088.00 comprising abandonment costs; $241,853.41 comprising expert and legal fees; and $81,986.01 comprising pre-judgment interest.

Clause 401 of Operating Procedure

30. As noted, the Receiver seeks a declaration as to the interpretation of a particular clause in the Operating Procedure, namely clause 401 which limits the legal responsibility of the operator:

> 401 Limit of Legal Responsibility – **Notwithstanding Clauses 303 and 304**, the Operator, its Affiliates, directors, officers, servants, consultants, agents and employees shall not be liable to the other Joint-Operators, or any of them, for any loss, expense, injury, death or damage, whether contractual or tortious, suffered or incurred by the Joint-Operators resulting from or in any way attributable to or arising out of any act or omissions, whether negligent or otherwise, of the Operator or its Affiliates, directors, officers, servants, consultants, agents and employees in conducting or carrying out joint operations, except:

[8] Tobman Affidavit at para 14 [Appendix D to Receiver's Eleventh Report].

[...]

> (B) **when and to the extent that such loss, expense, injury, death or damage is direct result of, or is directly attributable to, the gross negligence or wilful misconduct** of the Operator or its Affiliates, directors, officers, servants, consultants, agents and employees, provided that an act or omission of the Operator or its Affiliates, directors, officers, servants, consultants, agents and employees shall be deemed not to be gross negligence or wilful misconduct, insofar as such act or omission was done or was omitted to be done in accordance with the instructions of or with the concurrence of the Joint Operators.
>
> To the extent that the conditions in Subclauses (a) or (b) of this Clause apply (but subject to the exceptions provided therein), the Operator shall be solely liable for such loss, expense, injury, death or damage and, in addition, shall indemnify and save harmless each other Joint-Operator and its Affiliates, directors, officers, servants, consultants, agents and employees from and against all actions, causes of action, suits, claims and demands by any person or persons whomsoever in respect of any such loss, expense, injury, death or damages, and any costs and expenses relating thereto. **However, in no event shall the responsibility of the Operator prescribed by this Clause extend to losses suffered by the Joint-Operators respecting the loss or delay of production from the joint lands, including, without restricting the generality of the foregoing, loss of profits or other consequential or indirect losses applicable to such loss or delay of production.** [Emphasis added.]

31. Clauses 303 and 304 of the Operating Procedure establish the standard of care for an operator. The operator is required to conduct all operations "diligently, in a good and workmanlike manner, in accordance with good oilfield practice and the Regulations" as an independent contractor.

Receiver's View

32. The Receiver analyzed the Proof of Claim prepared by GeoCap and Sutton and the relevant contracts, evidence, and pleadings associated with the claim.

33. The Receiver's counsel met with the claimants' counsel to provide the Receiver's determination that a significant portion of the claim, i.e. that portion representing lost profits, should be disallowed. The Receiver also advised that it intended on bringing this application in the event the claimants disagreed with the Receiver's interpretation of the Operating Procedure.

34. While the Receiver has its views on the claim for gross negligence[9], it seeks the Court's direction on the application of the exclusion found in clause 401 of the Operating Procedure. In particular, the Receiver seeks confirmation that clause 401 extinguishes the claimants' right to claim lost profits which by their own accounting comprises ~$1.6 million of the claim.

35. With a judicial determination from this Honourable Court as to the correct interpretation of clause 401 the Receiver anticipates being able to settle or compromise whatever remains of the GeoCap and Sutton claim.

36. A declaration from the Honourable Court will permit the most efficient resolution of the matter, as it will allow the Receiver to properly apply clause 401.

III. LAW AND SUBMISSIONS

Principles of Contract Interpretation

37. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation.[10] To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix".[11] Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole.[12]

38. Commercial contracts should be interpreted in accordance with sound commercial principles and good business sense.[13] In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result.

39. In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* the Supreme Court of Canada noted that standard form contracts are highly specialized contracts typically sold widely to customers without negotiation of their terms and their interpretation could affect a large number of people. As a result, the Supreme Court determined it would be undesirable for courts to interpret identical standard form provisions inconsistently.[14]

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[9] The claimants and the Receiver agree that to seek any damages under clause 401, gross negligence has to be established first. If there has not been gross negligence, there is no liability under clause 401.
[10] *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 at para 49 [**TAB 1**].
[11] Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) at 33 [**TAB 2**].
[12] *Tercon Contractors Ltd v British Columbia (Minister of Transportation and Highways)* 2010 SCC 4 at para 64 [**TAB 3**].
[13] John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 763-766 [**TAB 4**].
[14] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at paras 4, 24, 46, 48 [**TAB 5**].

Operating Procedure is Standard Form

40. The Operating Procedure is a standard form contract that is widely used in the oil and gas industry. While parties are at liberty to modify the provisions of the contract as they see fit, in many instances the standard form is accepted as is. This was the case with respect to clause 401 in the Operating Procedure: the parties did not deviate from the template.

41. The Receiver has not identified any decision interpreting the exclusion of lost profit found in clause 401.

Accordingly, the Receiver submits that it is appropriate for this Court to provide its interpretation which will not only resolve the issue in dispute here but will be a useful precedent for the industry.

Application to Clause 401

42. The wording of clause 401 is clear and unambiguous throughout. The last sentence of clause 401, which excludes liability for lost profits, is particularly lucid. It explicitly excludes liability for loss of profit due to loss or delay of production. Such exclusions are subject to strict interpretation.[15]

43. Due to the high risk nature of oil and gas development, well-site operators bear significantly more risk associated with the development of the asset without a significant financial reward for doing so; this is the factual matrix within which to interpret the clause.

44. The Annotated 1990 CAPL Agreement notes that the "exclusion of liability respecting the loss or delay of production is relatively new to North American agreements [...] however the concept has received significant support in Europe where proponents argue that the magnitude of a potential loss of this type is such that the assumption of operatorship would not be viable without such an exemption".[16] The annotation continues by noting that "the most obvious loss resulting from this type of damage, of course, would be a loss of profits."[17]

45. Reading clause 401 in the broader context of the Operating Procedure, there is nothing that detracts from or varies the exclusion of lost profits.

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[15] *Adeco Exploration Co v Hunt Oil Co of Canada Inc*, 2008 ABCA 214 at para 33 [**TAB 6**].
[16] Annotated 1990 CAPL Operating Procedure at 10(ix).
[17] *Ibid.*

46. In "no event shall the responsibility of [Twin Butte...] extend to losses suffered by the Joint-Operators respecting the loss or delay of production from the joint lands, including, without restricting the generality of the foregoing, loss of profits."

47. The language is clear and unambiguous. The purpose of the clause is rational. Its plain meaning should be given effect: GeoCap and Sutton are disentitled by clause 401 from claiming any lost profits.

48. Moreover, given the clarity and standard form of the clause, confusion in the oil and gas industry would result if this Honourable Court gave the clause a meaning that departs from its plain wording.

Lost Profits cannot be reframed as something else

49. The Receiver expects that GeoCap and Sutton may seek to re-characterize their claim for lost profit as a non-excluded category of loss. The Receiver submits that such a re-characterization would be improper and should be disallowed by this Honourable Court.

50. The Statement of Claim expressly pleads damages including: "(a) loss of the 1-35 Well and all costs incurred to drill and equip the Well; (b) loss of production and revenue from the 1-35 Well; (c) the costs to be incurred to drill a well to replace the 1-35 Well; (d) the costs to abandon the 1-35 Well; and (e) such further damages and losses as may be proven at trial."[18]

51. On the other hand, the Proof of Claim only claims damages for lost profits and abandonment costs.[19] GeoCap and Sutton intentionally decided only to pursue its lost profits claim in its Proof of Claim, because the other damages pled were not provable.

52. With respect to loss of the 1-35 Well and all costs incurred to drill and equip the well (item (a) above), the 1-35 Well commenced production in late 2003 and produced until July 2008.[20] GeoCap and Sutton benefitted financially for five (5) years which off-set, either entirely or substantially, all of the costs incurred to drill and equip the 1-35 Well.

53. With respect to loss of production and revenue from the 1-35 Well (item (b) above), clause 401 of the Operating Procedure expressly bars the claim for loss of production and revenue

[18] Statement of Claim, at para 16.
[19] Proof of Claim, page 11.
[20] Affidavit of Bryan Joa sworn July 17, 2017, Exhibit A, GLJ Petroleum Consultants Report, covering letter, dated May 30, 2017 re: valuation of reserves, being GeoCap's and Sutton's expert report regarding damages.

from the 1-35 Well that resulted from a loss or delay in production. This is exactly what GeoCap and Sutton are seeking, and it is explicitly prohibited by the Operating Procedure.

54. With respect to the costs to be incurred to drill a well to replace the 1-35 Well (item (c) above), GeoCap and Sutton admit that they have no intention to drill a replacement well. Their Proof of Claim explicitly states that the "cost to place the reserves back on production is prohibitive and uneconomic."[21]

55. The Receiver is amenable to negotiating the amounts described in items (d) and (e) of the Statement of Claim.

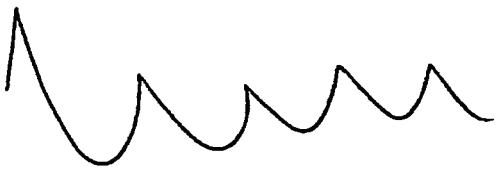
56. Notably, the Proof of Claim itself expressly states that "Lost profit due to Twin Butte's gross negligence and breach of its duties as operators therefore totals $1,593,000." Given this admission, the Receiver submits it would be improper to permit the claimants to re-categorize this $1.59 million sum under a different head of damages.

57. Lost profits are lost profits. They are calculated in a particular way; other heads of damages are calculated differently. They cannot be converted into something else by giving them a different label.

IV. CONCLUSION AND RELIEF SOUGHT

58. For all the reasons stated herein, the Receiver respectfully requests the Court's confirmation and declaration that GeoCap's and Sutton's claim for Lost Profit be denied by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF NOVEMBER, 2017.



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[21] Proof of Claim, page 9 [Appendix A to Receiver's Eleventh Report].

TABLE OF AUTHORITIES

TAB	Authority
1	*Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53
2	Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012)
3	*Tercon Contractors Ltd v British Columbia (Minister of Transportation and Highways)*, 2010 SCC 4
4	John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012)
5	*Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37
6	*Adeco Exploration Co v Hunt Oil Co of Canada Inc*, 2008 ABCA 214