

COURT FILE NUMBER 1601-11552

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT NATIONAL BANK OF CANADA, IN ITS CAPACITY AS ADMINISTRATIVE AGENT UNDER THAT CERTAIN AMENDED AND RESTATED CREDIT AGREEMENT DATED JANUARY 15, 2016, AS AMENDED

RESPONDENT TWIN BUTTE ENERGY LTD.

DOCUMENT REVISED WRITTEN SUBMISSIONS OF THE AD HOC COMMITTEE OF DEBENTURE HOLDERS (for the Application to be heard by the Honourable Mr. Justice Yamauchi at 10:00 a.m. on September 20, 2017)

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. These are the written submissions of the *Ad Hoc* Committee of Debentureholders with respect to certain aspects of the application of FTI Consulting Canada Inc., the Receiver of Twin Butte Energy Ltd. (the "**Receiver**" and "**Twin Butte**") to be heard by the Honourable Mr. Justice K.D. Yamauchi on September 20, 2017. The *Ad Hoc* Committee is a group of registered and beneficial holders of the 6.25% Convertible Unsecured Subordinated Debentures (the "**Debentures**") due December 31, 2018 issued by Twin Butte, representing approximately 24% of all holders of the Debentures ("**Debentureholders**").¹

2. In these Written Submissions, the *Ad Hoc* Committee provides its position on certain claims against Twin Butte and the Receiver's proposed disposition of those claims.

II. FACTS

A. The *Ad Hoc* Committee and its Opposition of the Reignwood Transaction

3. The genesis of the *Ad Hoc* Committee was when an independent group of Canadian private investors, fund managers and investment advisors wanted to organize to oppose the proposed transaction between Twin Butte and Reignwood Resources Holding Pte. Ltd. ("**Reignwood**") that was announced by Twin Butte on June 24, 2016 (the "**Reignwood Transaction**"), which Twin Butte sought to implement by way of a Plan of Arrangement under the *Canada Business Corporations Act* ("**CBCA**").

4. The Reignwood Transaction offered cash consideration to Debentureholders in the amount of \$140 per \$1,000 principal amount of Debentures, plus accrued and unpaid interest, and cash consideration of \$0.06 per share to all of the outstanding common shareholders of Twin Butte. The cash amount (an aggregate sum of \$11.9 million) being offered to Debentureholders represented a very significant discount (approximately 86%) off the \$85 million face value of the Debentures, and was in fact less than the cash amount of \$21 million being offered to Twin Butte's shareholders and management, in their capacity as shareholders (Twin Butte management held various shares and share award entitlements). The *Ad Hoc* Committee considered the Reignwood

¹ Affidavit of Mike Maguire sworn April 19, 2017 ("**Maguire Affidavit**") at para. 2. The recitation of facts set out in these Written Submissions is a summary of the lengthy and more detailed facts in the Maguire Affidavit.

Transaction to be unfair to Debentureholders, and also contrary to the fundamental principle that shareholders rank behind creditors.²

5. The *Ad Hoc* Committee's communications with Twin Butte management indicated a refusal by them to look at any option other than the Reignwood Transaction, even though it seemed that proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") could be available to Twin Butte. The consistent message that Twin Butte seemed to be delivering was that Debentureholders had to take what they were offered in the CBCA arrangement, or they would receive zero in a receivership.³

6. The *Ad Hoc* Committee retained Macquarie Capital Markets Canada Ltd. ("**Macquarie Capital**") as their financial advisor⁴ and Bennett Jones LLP ("**Bennett Jones**") as legal counsel, on the advice of Macquarie Capital.⁵ With the assistance of Macquarie Capital and Bennett Jones, the *Ad Hoc* Committee took the following steps, among others, to oppose the Reignwood Transaction:

- (a) held discussions with the Twin Butte Special Committee to seek to have them revise their offer to Debentureholders, to explore other proposals and to agree to commission a fairness opinion for Debentureholders;
- (b) received calls from Debentureholders and discussed the particulars of the Reignwood Transaction;
- (c) reviewed the economics of the proposed Reignwood Transaction in the context of comparable transactions to demonstrate why the value provided to Debentureholders was not fair based on market precedents;
- (d) held discussions with Twin Butte's lenders regarding the possibility of an alternative pre-packaged transaction to be implemented pursuant to the CCAA;

² Maguire Affidavit at para. 4

³ Maguire Affidavit at para. 6

⁴ Maguire Affidavit at para. 7

⁵ Maguire Affidavit at para. 9

- (e) had discussions with Twin Butte's financial advisor Peters & Co., to seek to have them re-auction Twin Butte's assets because energy prices had increased since the assets were last marketed; and
- (f) had discussions with Reignwood's advisors.⁶

7. On August 9, 2016, the day before the vote on the proposed CBCA arrangement, Twin Butte announced that it had engaged Canaccord Genuity Corp. ("**Canaccord**") as a financial advisor and Canaccord had provided the board of directors of Twin Butte with a fairness opinion indicating that the consideration was fair, from a financial point of view, to Debentureholders. Twin Butte also announced that it would postpone to August 29, 2016 the meeting of security holders to vote on the unaltered CBCA arrangement.⁷

8. The *Ad Hoc* Committee strongly disagreed with the conclusion of the fairness opinion and believed that the fairness opinion did not address the concerns inherent in the offer to Debentureholders. The *Ad Hoc* Committee strongly believed that other alternative superior transactions were available, including remarketing Twin Butte's assets in the improved energy pricing environment.⁸

9. The *Ad Hoc* Committee, with the assistance of Macquarie Capital, tried to engage with Twin Butte's Special Committee, its Banking Syndicate and Reignwood after the August 10 vote was postponed, to try to find a solution to the impasse, as the *Ad Hoc* Committee believed that Twin Butte was postponing the vote because it had early indications that the Debentureholders would vote to defeat the CBCA arrangement. With no change to Twin Butte's original offer, the likelihood of a "no" vote on August 29 appeared more likely.⁹

10. The *Ad Hoc* Committee believed that Twin Butte's assets were worth more than was being offered in the Reignwood Transaction. Business conditions for Twin Butte had improved as energy prices had recovered significantly since the early part of 2016, and since the time when Twin Butte had agreed to the Reignwood Transaction. The *Ad Hoc* Committee started to

⁶ Maguire Affidavit at para. 10

⁷ Maguire Affidavit at para. 11

⁸ Maguire Affidavit at para. 12

⁹ Maguire Affidavit at para. 13

contemplate a pre-packaged CCAA or recapitalization proposal for Twin Butte, which was cash flow positive per its second quarter financial statements published on August 11, 2016.¹⁰

11. Macquarie Capital and the *Ad Hoc* Committee met with Twin Butte's Special Committee and Twin Butte's legal counsel on August 16, 2016 and:

- (a) advised that the *Ad Hoc* Committee had secured enough votes to ensure the Reignwood Transaction would be voted down by Debentureholders and that they had an alternative proposal for the Special Committee to consider;
- (b) discussed a proposal consisting of DIP financing together with a debt equity swap and a concurrent \$30 million equity injection by way of a rights offering;
- (c) advised the Special Committee that, should it be required, they had a buyer for roughly 10% of Twin Butte's production that would enable bank debt to be paid down by roughly 25%;
- (d) when asked if they would participate in a rights offering, all three Special Committee members replied "yes" and acknowledged this was a viable alternative worth pursuing in the event the Debentureholders voted "no" on August 29;
- (e) the Special Committee members agreed to meet the *Ad Hoc* Committee and Macquarie Capital after the vote to pursue this alternative further under a CCAA filing; and
- (f) they also discussed an alternative split of the consideration from the proposed transaction whereby Debentureholders would convert their debt holdings at the equity offer price and realize a greater share of the total consideration as a result.¹¹

12. The *Ad Hoc* Committee publicized its alternative transaction via press release and on August 25, 2016, Twin Butte responded in its own press release that "A proposal to convert debentureholders into equity shares was provided by Mr. Bockhold [a member of the *Ad Hoc* Committee] and Mr. Edmonstone [of Macquarie Capital] to Reignwood's advisors and they have

¹⁰ Maguire Affidavit at para. 14

¹¹ Maguire Affidavit at para. 15

informed Twin Butte that they will not entertain such proposal. In fact, Reignwood is firm that there will be no changes to their current offer."¹²

13. Despite this entrenchment by Twin Butte, the *Ad Hoc* Committee continued looking for alternatives that would benefit all Debentureholders including an alternative transaction proposal that was submitted to Twin Butte for review on the morning of the postponed vote on the Reignwood Transaction, August 29, 2016.¹³

14. On August 29, 2016, the Debentureholders voted on Twin Butte's CBCA arrangement, with 68% voting against. As a result, Twin Butte's CBCA arrangement failed.¹⁴

15. On August 30, 2016, the *Ad Hoc* Committee made public its proposal and recapitalization plan, to have Twin Butte file for CCAA protection, convert the Debentures into shares to reduce debt, raise capital and potentially proceed with select sales of assets for which Macquarie Capital was aware of strong market interest. All of these steps were intended to allow Twin Butte and all its stakeholders to benefit from the strengthening energy market. Unfortunately, Twin Butte announced late on August 30, 2016 that it had received a Notice of Intention to Enforce Security and a Receivership Application from the Banking Syndicate and that Twin Butte had agreed to waive its 10-day notice period under that Notice of Intention.¹⁵

16. During this phase, the *Ad Hoc* Committee with its advisors Macquarie Capital and Bennett Jones advanced the interests of all Debentureholders, with a view to improving the very low offer or significant discount to par made for the Debentures, with all solutions being considered including accepting the Reignwood Transaction. However, given market data intelligence, recent industry transaction metrics, the overall value of the Reignwood Transaction and improved capital markets for the industry compared to early 2016 (as well as the fundamental principle that shareholders can only be paid after creditors are repaid), it seemed that Debentureholders should fare better than under the Reignwood Transaction. Regardless, and despite being presented with a viable alternative transaction, Twin Butte remained steadfast and continued its warning that the

¹² Maguire Affidavit at para. 16

¹³ Maguire Affidavit at para. 17

¹⁴ Maguire Affidavit at para. 19

¹⁵ Maguire Affidavit at para. 21

only alternative to the Reignwood Transaction was a receivership, in which Debentureholders and shareholders would receive nothing.¹⁶

17. On September 1, 2017, the Court granted an order appointing the Receiver. During the Receivership, the *Ad Hoc* Committee's focus was to ensure the maximum possible value was recovered from Twin Butte's assets in the Receivership, for the benefit of all of the Debentureholders. Through Macquarie and Bennett Jones, the *Ad Hoc* Committee continued to provide input on the Court-ordered sales process (including opposing the appointment of Peters & Co. as the sole sales agent for Twin Butte). The *Ad Hoc* Committee spent considerable time, money and effort defending the interest of all Debentureholders (including contacting various parties to encourage them to bid on the assets and continuing to explore recapitalization or other transactions), and the *Ad Hoc* Committee is the only party who did so, in assessing and monitoring developments in the Receivership, and appearing in Court to represent all Debentureholders' interests.¹⁷

18. On March 30, 2017, the Receiver closed the sale of Twin Butte's assets and immediately paid out Twin Butte's lending syndicate in full. The Receiver's present application is for an interim distribution of the surplus proceeds of sale from this transaction.

19. On April 27, 2017, the *Ad Hoc* Committee applied to the Court seeking funding for the costs they had incurred and would continue to incur, to Bennett Jones and Macquarie Capital with respect to Twin Butte. The Honourable Madam Justice K.M. Horner issued an Order directing that:

- (a) the fees of Bennett Jones incurred by the *Ad Hoc* Committee (both before and after the date of the application) would be payable first from any distribution or distributions by the Receiver to or on behalf of any Debentureholders and that those legal fees would be borne by all of the Debentureholders collectively, *pro rata*, based on each Debentureholder's proportionate share of the aggregate amount outstanding under the Debentures; and

¹⁶ Maguire Affidavit at para. 22

¹⁷ Maguire Affidavit at paras. 26 - 41

- (b) the fees of Macquarie Capital incurred by the *Ad Hoc* Committee would not be borne by all Debentureholders (with the effect that those fees are being borne only by the members of the *Ad Hoc* Committee);

(the "**Funding Order**").¹⁸ The Funding Order has not been appealed and is a final order.

20. Also on April 27, 2017, Justice Horner granted a Claims Procedure Order that, among other things, granted to the *Ad Hoc* Committee:

- (a) the right to consult with the Receiver regarding claims to which the Receiver ascribed value over \$75,000;
- (b) the right to provide a differing assessment of such claims to the Receiver; and
- (c) the right to make a Court application regarding claims with respect to which the *Ad Hoc* Committee's assessment differed from the Receiver's assessment by a margin of 50% or more.

21. Since the Claims Bar Date on June 1, 2017, the *Ad Hoc* Committee has had extensive consultations with the Receiver and has worked closely with the Receiver in assessing the legal validity and quantum of all claims exceeding \$75,000 filed in the Claims Procedure.

22. On June 30, 2017, the *Ad Hoc* Committee made an application for the benefit of all Debentureholders, seeking a declaration that the claims of the Debentureholders be paid *pari passu* with, rather than subordinate to, the claims of other unsecured creditors. This application was opposed by the Receiver and by a number of unsecured creditors, and was dismissed by the Honourable Mr. Justice P.R. Jeffrey.

III. WRITTEN SUBMISSIONS ON CERTAIN CLAIMS

A. Disputed Claims

23. At paragraphs 21 and 22 of its September 7, 2017 Tenth Report (the "**Tenth Report**"), the Receiver describes certain disputed claims totaling \$4,864,611. The *Ad Hoc* Committee supports the Receiver's disallowance and/or revision of these claims. As discussed above, the *Ad Hoc*

¹⁸ Funding Order of Madam Justice K. M. Horner dated April 27, 2017 [TAB 1]

Committee worked closely with the Receiver in assessing these claims and understands and agrees with the Receiver's rationale for disallowing and/or revising these claims.

24. In particular, the *Ad Hoc* Committee supports the Receiver's disallowance of the \$471,510 being claimed by one of Twin Butte's former executives. The facts set out above with regard to the Reignwood Transaction and the conduct of Twin Butte in the summer of 2016 demonstrate a complete lack of regard by Twin Butte of the best interests of the Debentureholders. Twin Butte told Debentureholders that the Reignwood Transaction (which would pay them only \$140 per \$1,000 of Debentures, plus accrued interest) was the best deal available for Debentureholders and was fair. As the Tenth Report discloses, the assets of Twin Butte were worth far more than what was being offered in the Reignwood Transaction. Debentureholders will recover approximately \$690 per \$1,000 of Debentures in the initial distribution sought by the Receiver, with the potential for further substantial distributions to follow.

25. Based on the foregoing, the *Ad Hoc* Committee submits that the Reignwood Transaction was clearly **not** in the best interests of Debentureholders, as the *Ad Hoc* Committee was indeed vehemently advocating to Twin Butte in August 2016. Twin Butte should have considered alternative transactions in August 2016, rather than persisting with the manifestly unfair Reignwood Transaction.

26. In these circumstances, the *Ad Hoc* Committee submits that it would be inequitable and unconscionable to reward this former executive of Twin Butte, who was providing Twin Butte's leadership in July and August 2016, by allowing him to share in the distribution of the proceeds of sale of Twin Butte's assets. Among the many factors considered by the Receiver in disallowing his severance claim, the *Ad Hoc* Committee understands that one consideration is that he in fact resigned his position. He was not terminated, but instead chose to leave.

27. The *Ad Hoc* Committee submits that this Honourable Court should uphold the Receiver's disallowance of this claim.

B. Accepted Claims – Unsecured Executive

28. At paragraphs 19 and 20 of the Tenth Report, the Receiver describes three claims from other former executives of Twin Butte, which it has accepted, totaling \$1,230,500. The *Ad Hoc*

Committee understands the legal rationale for the Receiver's allowance of these claims. However, for the reasons set out above, the *Ad Hoc* Committee submits that it would be equally inequitable and unconscionable to reward these former executives of Twin Butte, who were also providing Twin Butte's leadership in July and August 2016, by allowing them to share in the distribution of the proceeds of sale of Twin Butte's assets. In addition, the *Ad Hoc* Committee understands that these three executives were in fact offered employment by the purchaser of Twin Butte's assets (thereby giving them an opportunity to fully or partially mitigate any damages they might have suffered when Twin Butte ceased operating). However, their employment contracts with Twin Butte contain "no mitigation" provisions and it is on the basis of those provisions that they advance their severance claims.

29. Had it not been for the efforts of the *Ad Hoc* Committee, the Reignwood Transaction would have proceeded and the large surplus of proceeds now available (after payment in full of Twin Butte's lending syndicate) would not have become available. Given the efforts of Twin Butte in opposing the *Ad Hoc* Committee's efforts to maximize the recovery of Debentureholders, it seems unjust that Twin Butte's former management should receive distributions from those surplus proceeds, at the expense of all the Debentureholders.

30. The *Ad Hoc* Committee respectfully requests that this Honourable Court deny the Receiver's request to pay \$1,230,500 in severance to the three former executives, and instead direct the Receiver to consider and assert all equitable bases available, to disallow these claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 18th day of September, 2017.

Estimated Time for Argument:
10 minutes

BENNETT JONES LLP

Per: _____

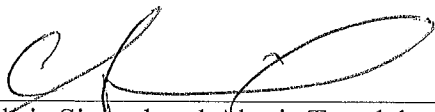
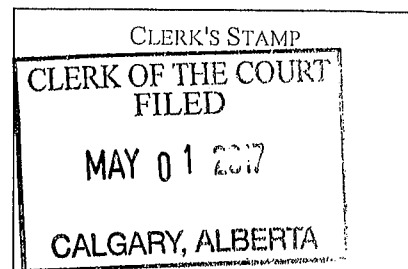

Chris Simard and Alexis Teasdale
Counsel for the *Ad Hoc* Committee

TABLE OF AUTHORITIES

1. Funding Order of Madam Justice K. M. Horner dated April 27, 2017

TAB 1



COURT FILE NUMBER 1601-11552
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

NATIONAL BANK OF CANADA, IN ITS
CAPACITY AS ADMINISTRATIVE AGENT
UNDER THAT CERTAIN AMENDED AND
RESTATED CREDIT AGREEMENT DATED
JANUARY 15, 2016, AS AMENDED

TWIN BUTTE ENERGY LTD.

DOCUMENT ORDER (Funding Order)

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Chris Simard / Alexis Teasdale
Tel No.: 403-298-4485 / -3067
Fax No.: 403-265-7219
Client File No.: 76739-1

DATE ON WHICH ORDER WAS April 27, 2017
PRONOUNCED:

LOCATION WHERE ORDER WAS Calgary, Alberta
PRONOUNCED:

NAME OF JUSTICE WHO MADE The Honourable Madam Justice K. M. Horner
THIS ORDER:

UPON the application of the *Ad Hoc* Committee (as defined in the April 19, 2017 Affidavit of Mike Maguire, hereinafter the "**Maguire Affidavit**"); AND UPON having read the Maguire Affidavit, the Seventh Report of FTI Consulting Canada Inc., in its capacity as the Receiver (the "**Receiver**") of Twin Butte Energy Ltd. ("**Twin Butte**"), and the Affidavits of Murray D'Angelo, John Chodzicki, Neil Arthur Jobin, Rob Duguid, Manoj Khandavelli and Brett Herman,

all filed; AND UPON hearing from counsel for the *Ad Hoc* Committee and counsel for the Receiver;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

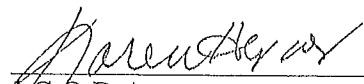
1. The time for service of notice of this application and supporting materials is hereby abridged, if necessary, and service of such notice is deemed good and sufficient.

FUNDING

2. The professional fees incurred by the *Ad Hoc* Committee to their legal counsel Bennett Jones LLP including the fees incurred prior to the granting of this Order (the "**Committee Legal Fees**"), shall be payable first from any distribution or distributions by the Receiver to or on behalf of any of the holders of the Twin Butte 6.25% Convertible Unsecured Subordinated Debentures due December 31, 2018 (the "**Debentures**" and the "**Debentureholders**"). For certainty, all of the Committee Legal Fees shall be borne by all of the Debentureholders collectively, *pro rata*, based on each Debentureholder's proportionate share of the aggregate amount outstanding under the Debentures.
3. Bennett Jones LLP shall provide copies of all of their invoices to the Receiver, subject to such redactions to the invoices as are necessary to maintain solicitor/client privilege.
4. The application to have all of the Debentureholders collectively pay the fees incurred by the *Ad Hoc* Committee to their financial advisor Macquarie Capital Markets Canada Ltd., is hereby dismissed.

MISCELLANEOUS

5. This Order need only be served on those parties in attendance at the hearing of this application, and this Order may be served by regular mail, facsimile, or as an attachment to an email transmission. The Receiver shall post this Order on the website it is maintaining with respect to these proceedings.



J.C.Q.B.A.