

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.
DOCUMENT	BENCH BRIEF of the COURT-APPOINTED RECEIVER (Declaration re: Interest Stops Rule) <i>September 20, 2017</i> Honourable Mr. Justice Yamauchi
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 File No. 01020497-0005 <i>Counsel for the Applicant, FTI Consulting Canada Inc.</i>

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. The Receiver seeks a declaration that the “interest stops” rule applies to the unsecured claims for post-filing interest asserted by Her Majesty the Queen in Right of Canada as Represented by the Minister of National Revenue (**CRA**) and Her Majesty the Queen in Right of the Province of Alberta as Represented by the President of the Alberta Treasury Board and Minister of Finance (**Alberta Treasury**), (their claims being referred to herein collectively as the **Tax Claims**).
3. The “interest stops” rule is a longstanding common law doctrine in Canadian insolvency law that has been codified under section 122 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 (**BIA**). The rule does not differentiate between its application to tax authorities and other unsecured creditors of the insolvent. Nor is there any practical or policy reason for making such a differentiation.

II. BACKGROUND

Tax Claims

4. On May 16, 2017, CRA submitted a claim in the Twin Butte claims process in the amount of \$6,199,879.00 including claims for penalties and interest. The Receiver has filed 2016 tax returns that offset this claim; the CRA is reviewing the returns. Meanwhile, the Receiver intends on holding back the full amount of the CRA’s claim.
5. On May 2, 2017, Alberta Treasury submitted a claim in the amount of \$3,191,487.00 in connection with 2014 and 2015 income tax that had been re-assessed by Alberta Treasury in 2016.
6. On June 15, 2017, the Receiver filed a Notice of Disallowance on the basis that the Receiver had filed 2016 tax returns with losses sufficient to fully offset Alberta Treasury’s claim.
7. On June 21, 2017, Alberta Treasury issued a notice of re-assessment to the Receiver advising that they had carried back the 2016 losses as filed in the 2016 tax returns filed thereby offsetting the 2014 and 2015 re-assessed taxes owing. Nevertheless, Alberta Treasury continues to assert a claim for interest and penalties totalling \$247,859.25, which is the amount proposed to be held-back by the Receiver pending direction from this Court concerning post-filing interest.

III. LAW AND SUBMISSIONS

“Interest Stops” Rule Applies to Tax Claims

8. The “interest stops” rule is a principle of insolvency law prohibiting interest payments on a debt from the date of bankruptcy or winding-up.¹ The courts have held the rule to be a necessary corollary of the *pari passu* principle,² a “governing principle of insolvency law,” that requires an insolvent’s assets “to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency.”³
9. The “interest stops” rule emanates from a 19th century English decision styled *Humber Ironworks*, which stated: “in the case of an insolvent estate, all the money [...] should be applied equally and rateably in payment of the debts as they existed at the date of winding-up.”⁴ As the Court of Appeal for Ontario stated in *Shoppers Trust*: “Unless this is the case, the principle of *pari passu* distribution cannot be honoured.”⁵
10. Further elaborating the rule, Lord Justice James stated that “I should agree with the rule, seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man’s property as it stood at that time.”⁶
11. The “interest stops” rule is codified in the *BIA*. Section 122(2) states that:

Interest – If interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum **to the date of the bankruptcy from the time the debt or sum was payable**, if evidenced by a written document, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed. [Emphasis added.]
12. In short, and as noted by Houlden, Morawetz, and Sarra in their annotated *BIA*, the division of the debtor’s property is carried out as if frozen in time at the date of bankruptcy, and no interest accrues after that date.⁷
13. In its enunciation of the “interest stops” rule the *BIA* does not differentiate between unsecured creditors like the CRA and Alberta Treasury and, for example, unsecured trade

¹ *Canada (Attorney General) v Confederation Life Insurance Co.*, [2001] OJ No 2610 (SCJ) at para 20.

² *Re Nortel Networks Corporation et al*, 2015 ONCA 681 at para 25.

³ *Canada (Attorney General) v Confederation Life Insurance Co.*, [2001] OJ No 2610 (SCJ) at para 20; quoted in *Re Nortel Networks Corporation et al*, 2015 ONCA 681 at para 23.

⁴ *In re Humber Ironworks and Shipbuilding Company* (1869), LR 4 Ch App 643 at 657.

⁵ *Shoppers Trust Corp (Liquidator of) v Shoppers Trust Co* (2005), 251 DLR (4th) 315 (ONCA) at para 25.

⁶ *Re Savin* (1892), 7 Ch 760 (CA) at 764, cited in *Canada (Attorney General) v Confederation Life Insurance Co.*, [2001] OJ No 2610 (SCJ) at para 20, cited in *Re Nortel Networks Corporation et al*, 2015 ONCA 681 at para 12.

⁷ *Canada Deposit Insurance Corp. v Canadian Commercial Bank*, 21 CBR (3d) 12, 143 AR 266 (QB); Lloyd W Houlden et al, *The 2016-2017 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Reuters, 2016-2017) at p 663.

creditors of the insolvent debtor. Accordingly, the Receiver submits that the “interest stops” rule applies to preclude claims for post-filing interest asserted in the Tax Claims. The Receiver has not identified any authority to the contrary.

14. Further, to permit post-filing interest under the Tax Claims would run afoul of the *pari passu* principle.
15. The declaration requested by the Receiver would accord with longstanding insolvency law principles as reflected in the common law and as codified in the *BIA*.

IV. CONCLUSION AND RELIEF SOUGHT

16. For all the reasons stated herein, the Receiver respectfully requests the Court’s confirmation and declaration that the “interest stops” rule applies to the CRA and Alberta Treasury in respect of their Tax Claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF SEPTEMBER, 2017.



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