

**Change of Operator:
Norcen v Oakwood of no Application in the Case of a Bankruptcy**

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Case Commented On: *Bank of Montreal v Bumper Development Corporation Ltd*, [2016 ABQB 363](#)

This case involves the 2007 version of the CAPL Operating Agreement as well as a construction, ownership and operation agreement for a battery (COO Agreement). In his judgment Justice Alan Macleod enforced the immediate replacement provisions of the operating agreement in favour of a co-owner (Eagle Energy Inc.) and against the purchaser of the assets (Forent Energy Ltd.) from the receiver\manager appointed under under s 243 of the [Bankruptcy and Insolvency Act, RSC 1985, c B-3](#). The Order of the Court appointing the Receiver provided that

No Exercise of Rights or Remedies

9. All rights and remedies (including, without limitation, set-off rights) against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court...

Eagle relied on the following provisions from CAPL 2007 and the COO Agreement:
CAPL 2007

2.02 Replacement of Operator

A *Immediate Replacement*- The Parties acknowledge that the Operator's ability to fulfill its duties and obligations for the Parties' benefit is largely dependent on its ongoing financial viability and that the Operator may not seek relief at law, in equity or under the Regulations to prevent its replacement in accordance with this Subclause. The Operator will be replaced immediately after service of notice from Non-Operator to the other Parties to such effect if:

- a) the Operator becomes bankrupt or insolvent, commits or suffers any act of bankruptcy or insolvency, is placed in receivership or seeks debtor relief protection under applicable legislation (including the [Bankruptcy and Insolvency Act](#) (Canada) and the [Companies' Creditors Arrangement Act](#) (Canada)), and it will be deemed to be insolvent for this purpose if it is unable to pay its debts as they fall due in the usual course of business or if it does not have sufficient assets to satisfy its cumulative liabilities in full;

...

Any such notice from a Non- Operator must be a *bona fide* notice that specifies the basis for replacement under this Subclause and includes verifiable evidence substantiating that basis in reasonable detail. Subject to the restrictions in Subclause 2.06B on the appointment of a successor Operator, the Party with the largest Working Interest will then act as Interim Operator on the same basis as in Subclause 2.06D, unless the Parties have otherwise appointed a successor Operator under Clause 2.06.

COO Agreement

3.03 Operator shall immediately cease to be Operator in the circumstance described in Subclauses (a) and (b) below and in all circumstances described on this Clause a replacement. Operator appointed pursuant to Clause 304 if:

(a) Operator becomes bankrupt or insolvent, commits or suffers any act of bankruptcy or insolvency, is placed in receivership or a receiver/manager or person filling that role is appointed with respect to its property...

3.04 (a) Upon Operator resigning or otherwise ceasing to be Operator and until a replacement Operator being appointed, the Owner with the largest Facility Participation... shall automatically become the Interim Operator

Eagle notified the Receiver (appointed pursuant to an application of February 16, 2016) that the above provisions were triggered and of its intention to assume the operatorship. The Receiver responded by letter of February 29, 2016 indicating that Eagle's notice was stayed by virtue of paragraph 9 of the Court Order (above). Both Eagle and Forent submitted bids to the Receiver to acquire the relevant properties. Eagle and the Receiver reached an understanding following a meeting and conversation that the Receiver would not purport to convey the operatorship as part of the sale of the properties if the successful bidder were any other than Eagle.

Forent was the successful bidder and the Receiver applied for approval of the sale and a vesting order. Following an intervention by Eagle the Vesting Order was granted subject to Eagle's right to assert its claim to assume operatorship of the relevant properties. This judgment is the adjudication of that claim. In the course of finding for Eagle Justice Macleod stated as follows (at paras 18 - 23):

[18] Had Eagle pursued its right to be Operator at the time of the granting of the Receivership Order or soon thereafter, I can think of no reason why this Court would not have acceded to Eagle's request to lift the stay and grant a declaration with respect to both the wells and the Battery.

[19] The stay was granted incidental to the appointment of the Receiver to permit for orderly realization and distribution. Eagle's right to operate, however, arises under a contract which pre-dates the receivership. Also, there is no reason to interfere with the contractual rights of Eagle which are not subject to the security of Bumper's creditors.

[20] This is not a situation such as the one facing this Court in *Norcen Energy Resources Ltd v Oakwood Petroleum Ltd* (1988), 1988 CanLII 3560 (AB QB), 92 AR 81 (ABQB), 63 Alta LR (2d) 361 . In that case s 11 of the *Companies Creditor's*

Arrangement Act, RSC 1970, c C-25 (CCAA) was at issue. Section 11 gives very broad powers to the Court in situations where arrangements involving compromise can be utilized to rescue insolvent companies. The CCAA has proved to be an extraordinarily flexible Act. The Act has been used effectively to give debtors respite from creditors in order to allow the stakeholders to negotiate a proposal for continuing the business, rather than allowing the business to fall into bankruptcy. Here, the issue is not Bumper's survival but the realization on its assets.

Justice Macleod went on to conclude that Eagle had not slept on its rights but had acted reasonably in light of the Receiver's stated position and had "negotiated a deal" with the Receiver that was designed to protect its position. Forent could not have any reasonable expectation that it was purchasing the operatorship. In these circumstances it would, in Justice Macleod's view "be unfair to deprive Eagle of its clear contractual right to be Operator of both the wells and battery. To do so would be tantamount to appropriating Eagle's right for the benefit of Bumper's creditors." (at para 23) The stay was lifted *nunc pro tunc* and a declaration issued to the effect that "Eagle is entitled to operate both the wells and Battery in question. It is also directed that the Receiver and others, including Forent, transmit to Eagle all accounts, licences etc. which are reasonably necessary for Eagle to succeed Bumper as Operator under both of the agreements." (at para 27)

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