Most Negative Treatment: Reversed
Most Recent Reversed: Bank of Montreal v. Dynex Petroleum Ltd. | 1999 ABCA 363, 1999 CarswellAlta 1271, 255 A.R. 116, 220 W.A.C. 116, [1999] A.J. No. 1463, [2000] A.W.L.D. 151, 15 P.P.S.A.C. (2d) 179, 74 Alta. L.R. (3d) 219, 15 C.B.R. (4th) 5, 2 B.L.R. (3d) 58, 2 B.L.R. (3d) 59, 182 D.L.R. (4th) 640, [2000] 2 W.W.R. 693, 93 A.C.W.S. (3d) 950 | (Alta. C.A., Dec 17, 1999)

1997 CarswellAlta 209
Alberta Court of Queen's Bench

Bank of Montreal v. Dynex Petroleum Ltd.

1997 CarswellAlta 209, [1997] 6 W.W.R. 104, [1997] A.J. No. 341, 12 P.P.S.A.C. (2d) 183, 145 D.L.R. (4th) 499, 202 A.R. 331, 31 B.L.R. (2d) 44, 46 C.B.R. (3d) 36, 50 Alta. L.R. (3d) 44, 70 A.C.W.S. (3d) 217

Bank of Montreal, Plaintiff and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Enchant Resources Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, NancyOil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., Meridian Oil Inc., North Canadian Oils Limited, Odessa Natural Corporation, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., D.S. Willness, Earl Gordon, Antelope Land Services Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Enron Oil Canada Ltd., and Channel Lake Petroleum Ltd., Defendants

Rooke J.

Judgment: April 4, 1997
Docket: Calgary 9301-08195, BK 039154

Counsel: *Richard B. Jones* and *Gordon S. Griffiths, Q.C.*, for Plaintiff Bank of Montreal.
James C. Crawford, Q.C., for Defendants Enchant Resources Ltd. and D.S. Willness.
Frank R. Dearlove and *Scott H.D. Bower*, for Defendants Meridian Oil Inc. & Odessa Natural Corporation.
Richard C. Dixon, for Ernst & Young Inc.

Subject: Insolvency

Related Abridgment Classifications
Bankruptcy and insolvency

VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles

Bankruptcy and insolvency

X Priorities of claims

X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.ix Bonds and debentures

Natural resources

III Oil and gas
III.5 Oil and gas leases
III.5.l Miscellaneous

Natural resources

III Oil and gas
III.6 Exploration and operating agreements
III.6.a Royalty agreement
III.6.a.iii Miscellaneous

Personal property security

I Scope of legislation
I.9 Real property interests
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Personal property security

IV Priority of security interest
IV.5 Subordination and postponement

Headnote

Bankruptcy --- Property of bankrupt — Trust property — General

Defendant bankrupt had given overriding royalty and net profit interest in oil and gas lease to other defendants — Rights were inconsistent with intention to create trust — Not every promise to pay constituted trust — Courts should be slow to find trust without clear intent to promote certainty in dealings with debtors.

Bankruptcy --- Priorities of claims — Secured claims — Forms of secured interests — Bonds and debentures

Plaintiff debenture holder claiming priority over defendants who had royalty and profit interest in oil and gas leases — Debenture holder and bankrupt agreeing that debenture holder's security subject to subordination to other defendants' interests — Subordination agreement survived bankruptcy and debenture holder's security subordinate to other defendants' interests — Law of Property Act, R.S.A. 1980, c. L-8, s. 59.2(3) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 40.

Personal Property Security --- Scope of legislation — Miscellaneous transactions

Plaintiff debenture holder claiming priority over defendants who had royalty and profit interest in oil and gas leases — Debenture holder and bankrupt agreeing that debenture holder's security subject to subordination to other defendants' interests — Interest not interest relating to real property, but rather constituted choses in action — Personal property security legislation applying to choses in action.

Personal Property Security --- Priority of security interest — Subordination and postponement

Plaintiff debenture holder claiming priority over defendants who had royalty and profit interest in oil and gas leases — Debenture holder and bankrupt agreeing that debenture holder's security subject to subordination to other defendants' interests — Subordination surviving bankruptcy — Legislation permitting defendant's interest to rank prior to defendant debenture holder even though subordination agreement made between bankrupt and debenture

holder — Law of Property Act, R.S.A. 1980, c. L-8, s. 59.2(3) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 40.

Oil and Gas --- Oil and gas lease — Miscellaneous issues

Plaintiff debenture holder claiming priority over defendants who had royalty and profit interest in oil and gas leases — Debenture holder and bankrupt agreeing that debenture holder's security subject to subordination to other defendants' interests — Interest not interest relating to real property, but rather constituted choses in action — Personal property security legislation applying to choses in action — Law of Property Act, R.S.A. 1980, c. L-8, s. 59.2(3) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 40.

The defendant D Ltd. and its predecessor companies granted overriding royalty and net profit interests to other defendants (the "ORRs") regarding D Ltd.'s oil and gas leases. Later, D Ltd. gave a debenture to the plaintiff bank, employing the leases as security. All of the documentation supporting the debenture stated that the ORRs' interests were permitted encumbrance. D Ltd. later defaulted on the bank loan. Shortly thereafter, D Ltd. was petitioned into bankruptcy. The bank brought an action against the bankrupt and the ORRs, seeking a declaration that the bank's claim ranked in priority to those of the ORRs in the context of the bankruptcy. All the parties requested a determination of the priorities between the bank and the ORRs after the bankruptcy.

Held: The ORRs' interests had priority over the bank's debenture.

The rights to royalties and net profit interests were choses in action. The interests of the ORRs were rights to receive a portion of the proceeds of the sale of petroleum and natural gas substances from the leases held by D Ltd. They were not rights to the sale of a specific tangible asset or thing. Ordinarily, these choses in action would constitute simple debts allowing the claimant to register an unsecured claim with the trustee in bankruptcy.

D Ltd. was able to allow the leases to expire, to abandon them, and to release or surrender them without liability to the third parties. These rights were inconsistent with the intention to create a trust. It was clear that not every promise to pay constituted a trust, and that absent a very clear intent, the courts should be slow to find so in the interest of certainty in dealings with a debtor.

The agreements did not create an interest in a lease, and thus a real property interest. Therefore, the ORRs could not be secured creditors by virtue of any real property interests.

The ORRs' interests were secured interests in personal property. Choses in action are able to be registered under the *Personal Property Security Act* (Alta.) (the "PPSA"). The interests were not interest in land, but interests created downstream of the lease. The interests were therefore not excluded from the reach of the PPSA. None of the interests was actually registered as a personal property security interest, and thus did not need to be assessed by the trustee to determine the the priorities of similar claimants.

As unsecured creditors, the interests of the ORRs ranked far below that of the bank. However, the subordination agreement which the bank gave in favour of the ORRs survived the bankruptcy of D Ltd. The trustee had no need to consider the subordination agreement in the context of the bankruptcy. However, as between the bank and the ORRs, the subordination agreement was relevant. The bank's subordination was a subordination of its interests to those of the ORRs, not simply a subordination of its security. The bankruptcy did not extinguish the choses in action of the third parties, but rather changed the nature of the enforcement available to them. The subordination agreement was broad, and did not contemplate the a bankruptcy terminating its existence.

The ORRs were not privy to the subordination clauses in the agreement between D Ltd. and the bank. However, s. 40 of the PPSA remedied this problem. Section 40 was not limited to personal property assets, by the application of s. 59.2(3) of the *Law of Property Act* (Alta.).

The trustee had the right to sell the real and personal property of D Ltd. on bankruptcy. As against the trustee, the ORRs were unsecured creditors, and thus the trustee could sell the assets unencumbered by their interests. As between the bank and the ORRs, the bank had to account to the third parties for any funds received directly or through the trustee from the sale of the ORRs' interests.

A circularity problem was created because the trustee in bankruptcy had priority over the ORRs. The ORRs in turn had priority over the bank, which, as a secured party, had priority over the trustee. To resolve the problem, the bank was obligated to hold in trust the proceeds it had realized from the oil and gas properties affected by the ORRs' interests, to the extent of the value of those interests, for the benefit of the ORRs.

Table of Authorities

Cases considered by *Rooke J.*:

Bank of Montreal v. Dynex Petroleum Ltd. (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291 (Alta. Q.B.) — referred to

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Bellini Manufacturing & Importing Ltd., Re (1981), 32 O.R. (2d) 684, 14 B.L.R. 63, 37 C.B.R. (N.S.) 209, 1 P.P.S.A.C. 259, 122 D.L.R. (3d) 472 (Ont. C.A.) — considered

Canadian Imperial Bank of Commerce v. International Harvester Credit Corp. of Canada (1986), 6 P.P.S.A.C. 273, 19 O.A.C. 397, [1987] C.L.D. 213 (Ont. C.A.) — referred to

Chiips Inc. v. Skyview Hotels Ltd. (1994), 21 Alta. L.R. (3d) 225, [1994] 9 W.W.R. 727, 27 C.B.R. (3d) 161, 7 P.P.S.A.C. (2d) 23, (sub nom. *Chiips Inc. v. Skyview Hotels Ltd. (Receivership)*) 155 A.R. 281, (sub nom. *Chiips Inc. v. Skyview Hotels Ltd. (Receivership)*) 73 W.A.C. 281, 116 D.L.R. (4th) 385 (Alta. C.A.) — considered

Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4th) 289, 8 O.A.C. 1, 54 C.B.R. (N.S.) 65, 4 P.P.S.A.C. 271 (Ont. C.A.) — considered

Kenmore Building Materials Ltd., Re, [1966] 2 O.R. 159, 9 C.B.R. (N.S.) 41, 56 D.L.R. (2d) 205 (Ont. C.A.) — referred to

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Rico Enterprises Ltd., Re (1994), 24 C.B.R. (3d) 309, 92 B.C.L.R. (2d) 67 (B.C. S.C.) — considered

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 67 — considered

s. 67(1)(a) — considered

s. 71 — referred to

s. 81 — referred to

s. 81(3) — referred to

Law of Property Act, R.S.A. 1980, c. L-8
s. 59.2(3) [en. 1992, c. 21, s. 22] — considered

Personal Property Security Act, S.A. 1988, c. P-4.05
s. 1(1)(u) "instrument" — considered

s. 1(1)(oo) "security" — considered

s. 1(1)(qq) "security interest" — considered

s. 4 — considered

s. 4(g) — considered

s. 20 — considered

s. 20(1)(b) — considered

s. 20(1)(b)(i) — considered

s. 40 — considered

APPLICATION for determination of priorities on bankruptcy.

***Rooke J.*:**

I. Introduction

1 The issue in this Decision, in its simplest form, is to determine the effect of the bankruptcy of a petroleum and natural gas company, Dynex Petroleum Ltd., then in receivership, on the competing interests of the secured real and personal property, duly registered and crystallized debenture holder, the Plaintiff, the Bank of Montreal (the "B of M"), as against certain overriding royalty and net profits interests of various Defendants (including the parties to this hearing, Enchant Resources Ltd. ("Enchant"), Meridian Oil Inc. ("Meridian"), Odessa Natural Corporation ("Odessa"), and D.S. Willness ("Willness")) (collectively the "ORRs"), granted by Dynex or its predecessors (collectively "Dynex") under petroleum and natural gas leases, when the B of M's debenture was subordinated to the interests of only partially registered ORRs.

II. Executive Summary

2 After considering all of the issues herein, as set out in these Reasons, I have concluded that the priorities between the B of M and the ORRs relate less to the status of these parties in the bankruptcy (as a secured creditor and unsecured creditors respectively, as I have found) than to the effect of the bankruptcy on the subordination. I have found that the subordination of the B of M to the ORRs survives the bankruptcy of Dynex, and that the ORRs are entitled to recover any of their loss in bankruptcy (that is not recovered from the Trustee) from the B of M.

III. Simple Facts

3 The simple facts necessary to have a proper appreciation of this Decision, by someone other than the parties, can be set out fairly succinctly utilizing the very helpful headnote of the Alberta Law Reports in the decision that I granted on some earlier questions between these parties: *Bank of Montreal v. Dynex Petroleum Ltd.* (1995), 39 Alta. L.R. (3d) 66 (Alta. Q.B.), flowing from oral reasons for decision granted December 19 and 20, 1995 (the "December 1995 Decision", on three separate specific issues, and a formal Order dated December 20, 1995.

4 Those simple facts, relying on the Alberta Law Reports headnote (with necessary changes), are as follows:

> [Dynex and its predecessors] had granted overriding royalty and net profit interests to certain third parties [ORRs] in respect of its oil and gas leases. Some time later, [Dynex] went to the [B of M] for financing, employing the oil and gas leases as security. [Dynex] gave a debenture [and other security documents including "General Assignments" under what is now Section 426 of the *Bank Act*, formerly Section 82 and later Section 177], and all of the documentation supporting the transaction stated that the [ORRs] interests were permitted encumbrances.... [Dynex] eventually defaulted on the loan and the [B of M] put it into receivership under the debenture [May 14, 1993]. A short time later [Petition - May 26, 1993 and Receiving Order May 27, 1993] [Dynex] went into bankruptcy. The [B of M] sued [Dynex, in bankruptcy] and the numerous [ORRs], seeking, as against the [ORRs], a declaration that the security granted by [Dynex] to the [B of M] ranked in priority to the [ORRs] in the context of bankruptcy. [In the hearings held in December, 1995] the [B of M] applied for a preliminary determination that the interest claimed by the [ORRs] were not interests in land. [Some of the ORRs] applied for summary judgment dismissing the action. [All of the parties to the application requested the Court to determine the priorities between the B of M and the ORRs after crystallization of the debenture security on May 14, 1993 and prior to the Bankruptcy Petition of May 26, 1993].

5 There are substantially more detailed facts than set out above within the December 1995 Decision and referred to in the legal briefs of the parties then, and in the within application, and as contained in numerous documents filed by the parties prior to the December 1995 Decision and in this application (the latter 2 volume binder set referred to as the "Document Record"). However no useful purpose would be served in these Reasons by setting out the facts in any greater detail at this point. Accordingly, I will not do so, except as may later be necessary to make the within Decision

and provide these Reasons. Anyone wanting a more detailed analysis of the facts will have to look at the background material.

IV. December 1995 Decision

6 In the December 1995 Decision, I basically came to three conclusions, namely:

> (1) the ORRs interests, being granted "downstream" of leases, could not, as a matter of law, become interests in land, and, in the alternative, if that decision was incorrect in law, a trial of an issue would be necessary to determine whether, as a matter of fact, the documentation pertaining to the ORRs did create such an interest in land;
>
> (2) the priorities in bankruptcy could not be determined on the summary application, and therefore, summary judgment was denied; and
>
> (3) after crystallization of the debenture (and other related security), but before the bankruptcy, the B of M's interests were subordinated to the interests of the ORRs.

7 While the aforementioned three points constituted the substance of the December 1995 Decision of the Court, it is, once again, set out fairly succinctly, but in somewhat more detail, in the headnote of the Alberta Law Reports, which I adopt, with the necessary changes, for this purpose. The decision as therein stated is as follows (at 67):

> As a matter of law, a lessee of an oil and gas lease, which, as a *profit à prendre*, is itself an interest in land, obtained from a lessor, cannot pass on an interest in land. If it was permissible in law to have an interest in land downstream of a profit à prendre, then the language of the instrument creating the interest would have to reflect an intention to create an interest in land. Examination of such instrument[s] could not be made in a summary proceeding.
>
> The Statement of Claim referred to the parties' interest in the context of bankruptcy, while it was apparent that the defendants' motion referred to the parties' interest at a point in time after the appointment of a receiver, but prior to the bankruptcy. Clearly, therefore, there were triable issues in respect of the parties' interest after the bankruptcy, and summary judgment would not be available to determine the parties' interest in that context.
>
> The defendants' main application concerned the rights and priorities between the [B of M] and [ORRs] at the point after the Receiver had been appointed, but before the bankruptcy....
>
> The subordination clauses within the debenture and loan agreements, by their terms, contemplated a subordination of the [B of M's] interest under the debenture to the previously granted interests of the [ORRs]. Explicitly, they allowed those [ORRs] to rank ahead of the debenture holder in regards to their interests.... The commercial reality in the oil and gas industry, in conjunction with the financial industry, required that documents of that nature be given that effect.

8 The December 1995 Decision has been appealed to the Court of Appeal and is expected to be heard in the fall of 1997. Notwithstanding the Court's ruling with respect to the application for summary judgment therein (and a similar ruling I understand was made on a similar application by the B of M before another member of the Court), the parties have now requested (by consent) that the Court determine the priorities between the parties in bankruptcy on a summary basis, relying on the material before the Court. It is further contemplated that, because of the substantial issues to be determined and the dollar effect of those issues, the within Decision will be added by the unsuccessful party(ies) to the matters to be heard before the Court of Appeal in the fall. Accordingly, the application resulting in this Decision comes forward by way of an agreement between the parties, concurred in by the Case Management Justice, Forsyth, J., that the matter be heard by myself.

V. Issue - Question to be Decided and its Relevance

9 The precise question to be decided was intentionally not articulated by the Court in the formal Order setting the hearing of the application, so as to permit further arguments on, and refinement of, the question during the hearing of the application. However, in substance the issue it is to ask the same question as in the December 1995 Decision, but at a later time, namely, the priorities between the B of M and the ORRs, after the point of bankruptcy.

10 While not substantially different in substance, the parties describe the question in various ways. Counsel for B of M stated it thus in their legal brief:

> ...the effect or effects, if any, of the bankruptcy of Dynex upon the finding of the Court in its Order of December 20, 1995.

Counsel for Meridian Oil Inc. and Odessa Natural Corporation ("Meridian and Odessa") stated it thus in their legal brief (opening and para. 14[1]):

> ...the effects, if any, of the intervening bankruptcy of Dynex ... on the subordination of the [B of M's] security interest to Odessa's and Meridian's overriding royalty.
>
> Has the intervening bankruptcy of Dynex ... affected the subordination of the [B of M's] security interests to Odessa's and Meridian's overriding royalty?

Counsel for Enchant Resources Ltd. and D.S. Willness ("Enchant and Willness") was slightly more elaborate (para. 51):

> At the moment in time after the Bankruptcy of [Dynex] and after debentures issued by [Dynex] to [B of M] had crystallized, is the security granted by [Dynex] to [B of M] in those debentures and securities under the *Bank Act* subordinated to or do they rank in priority to, or extinguish, the interests of [Meridian and Odessa, and Enchant and Willness] in the said Overriding Royalty Agreements and Net Profit Agreements?

Finally, Ernst & Young Inc., in its capacity as Trustee in Bankruptcy for the Estate of Dynex, a bankrupt, and, as Court appointed Receiver Manager, pursuant to the B of M security (by Orders of June 25 and August 20, 1993), of Dynex ("Ernst & Young[2]") stated the question this way:

> What effect, if any, does the bankruptcy of May 26, 1993 of [Dynex] have with respect to the Court's findings, as reflected by its December 20, 1995 Order?

All of these expressions, in my view, create the same question, as identified at the beginning of these Reasons, but, in hindsight, the articulation by Counsel for Meridian and Odessa most precisely defines the point in issue.

11 I intend to build on the facts found in the December 1995 Decision, which, in large part, set out the nature of the interests of the parties, and the nature of the subordination, just prior to bankruptcy. With those interests properly understood as a background, I then propose to look at what the interests of the parties were at the point of bankruptcy (ignoring the subordination for the moment), and finally to analyze the effect of the bankruptcy (if any) on the subordination. This order of determining rights in not an inappropriate way in which to determine matters, as pointed out by *Goode, Principles of Corporate Insolvency Law* (London: Sweet & Maxwell, 1990) ("*Goode* - Principles"), at 17:

> ...corporate insolvency law for the most part recognizes and adopts rights conferred by the general law and by contract.
>
> . . . . .
>
> The general rule is that the commencement of an insolvency proceeding does not of itself terminate contracts or extinguish rights, though it does inhibit the pursuit of remedies. The starting position of insolvency law is that rights accrued prior to the insolvency proceeding will be respected. To this principle there are important exceptions....

12 I said in the December 1995 Decision that the question of the priorities between the parties after receivership and prior to bankruptcy was not moot. Answers to further enquiries in the within application elaborated upon that. As I understand it, without intending to be too technical about the matter, there have been ongoing revenues in the form of the proceeds from the sale of petroleum and natural gas production resulting from the leases, notwithstanding the financial troubles of Dynex. To a certain point in time, the share due to the ORRs flowed to them in regular monthly cash payments. While the bankruptcy was relatively quick on the heels of the receivership, there were some funds generated during the period of (and perhaps even before) the receivership and prior to bankruptcy, for which the ORRs claim an interest, but which are held by the Trustee. Moreover, there are the regular proceeds of the production that have been held by the Trustee subsequent to bankruptcy, which, since the sale of Dynex's assets by the Receiver to Channel Lake Petroleum Ltd. ("Channel Lake"), approved, with reservations, by Court Order dated September 1, 1993 (on which more later in these Reasons), constitute in excess of $1.1 million (Meridian & Odessa legal brief, para. 9). Finally, there are the proceeds of the sale of the assets of Dynex by the Trustee to Channel Lake (including the interest of Dynex in the subject leases), from which have been reserved and held in the hands of the Trustee some $5 million purporting to represent the value of the acquisition of the ORRs interests. This latter matter deserves some further recognition of the facts.

13 To be stated relatively simply, as I understand it from the material, after the bankruptcy, the Receiver Manager effected a Court approved sale of the oil and gas properties of Dynex to Channel Lake, reserving out certain issues with respect to whether or not the Receiver Manager had the right to sell the ORRs interest and the effect of the bankruptcy on the revenues from the production. For the purposes of these Reasons that circumstance is set out relatively succinctly, but in more detail, among other places, at paragraph 24 of the legal brief of Counsel for Enchant and Willness, referring back to the legal brief of Counsel for the B of M filed November 9, 1994 in the within action. That statement, appropriately edited, is as follows:

> Shortly after this action was commenced, a receiving order was made against [Dynex] under the *Bankruptcy and Insolvency Act* and Ernst & Young was appointed as Trustee in Bankruptcy. Pursuant to orders of this Court made on June 25, 1993 and August 20, 1993, [Ernst & Young] was also appointed by this Court as a Receiver under the *Judicature Act* of all the petroleum and natural gas properties of Dynex and of all the claimed interests of the [ORRs] therein under the contracts specified in the Order. By order made August 20, 1993, the Receiver was authorised to sell the properties to [Channel Lake]. Channel Lake was ordered to pay and to continue to pay to the Receiver all payments attributable to the [ORRs] pursuant to the Royalty Agreements which were designated as the "Disputed Interests". These payments now aggregate approximately $5,000,000 with respect to all the [ORRs] in this Action and are being held pending determination of the relative priorities of the parties to this action.

14 Therefore I understand that proceeds not only from the sale of the "Disputed Interests", but also the proceeds from production from the properties since bankruptcy, for which the ORRs claim an interest, are being held by the Trustee to the extent of the purported interest of the ORRs.

VI. Categorization of the Interest of the ORRs

15 Without retreading on the December 1995 Decision that the interests of the ORRs were not interests in land (on which I will have more to say later), because, on the material before me, they could not, in law, be interests in land, the question then remains as to what were the interests of the ORRs. If the interest of the ORRs were not interests in land (upon which the Court of Appeal will undoubtedly have further to say), it is clear that the interests are, in that context, *choses in action*.

16 While this is not the decision in which to provide a treatise on the meaning of a *chose in action*, a brief understanding may be helpful to consider more clearly the true nature of the interests of the ORRs. A right to benefit under a contract is a *chose in action*: Waters, *Law of Trusts in Canada* (Second Edition) (Toronto: Carswell, 1984), at 141. *Black's Law Dictionary* defines a *chose in action* as "a right to personal things which the owner has not the possession, but merely a right of action for their possession", including "all property in action which depends entirely on contracts express or

implied". While there are undoubtedly further and even more detailed definitions of a *chose in action* in law, this case is more easily resolved if one looks first at a *chose in action* in a simple, common, lay form of understanding (as I tried to do throughout my December 1995 Decision and will attempt to do so in these Reasons).

17 In lay language, pertinent to this case, the interests of the ORRs, are rights, to the extent of the percentage of their interests in accordance with the documents creating the same, to receive a portion of the proceeds of the sale of petroleum and natural gas substances from the leases held by Dynex. Keeping with lay terminology, they are not rights to any specific tangible chattel or thing. Moreover, to the extent that the December 1995 Decision is correct, they are not interests in real property. That is, they are not rights to a *piece* of property (personal or real). What are these rights? They are intangible personal property rights - contractual rights - in this case, as I have said, the rights to receive a portion of a revenue stream from production. Using a hypothetical example, they are as if, for consideration, but without providing a capital fund, the ORRs were given rights to a monthly annuity equal to some percentages of production, or shares of profits, etc.

18 What is the effect of a bankruptcy of the holder of these contractual rights? Normally, in a bankruptcy, such rights would (absent other facts) constitute simple debts for past (and damages for future) revenues, the rights to which would be changed by the bankruptcy to a right to register an unsecured claim with the trustee in bankruptcy. However, the issue in the case at hand, is whether the documentation under which the ORRs received these interests, the registration (or lack thereof) of the documentation, and the subordination by the B of M of its interest to those interests, give them more? Let us look at the possibilities and consequences, and then determine whether the ORRs interests are merely unsecured claims in debt/damages in bankruptcy, in comparison to the claim of the B of M, or some higher state.

VII. Classification of the Interest of the ORRs and The Bankruptcy Consequences of the Classification

19 From the legal briefs and the submissions of Counsel to the Court, it appears that the interests of the ORRs in bankruptcy consists of one of four possibilities. These four possibilities are the following:

(1) trust interests;

(2) secured creditor status as to real property, by virtue of real property interests;

(3) secured creditor status as to personal property, by virtue of personal property interests; and

(4) unsecured creditors.

20 For the purposes of these Reasons, it is recognized that, in comparison, the interest of B of M is that of a secured creditor, with fully registered real and personal property interests, a status effectively recognized by the Court on August 20, 1993, when it was declared that the Bank had a valid and subsisting charge on all of the assets of Dynex, subject to the determination of the issues relating to the interests of the ORRs.

21 Simply put, without considering the considerable issue of subordination (to which I will turn shortly), the bankruptcy consequences of these classifications (using the same numbering) are that the interests of the ORRs in question would have priorities, *vis-à-vis* the B of M, as follows:

(1) preferred and rank in priority to the B of M;

(2) secured creditors, ranking at least equal to the B of M, as to real property interests;

(3) secured creditors, ranking equal to the B of M, as to personal property interests, but ranking after the B of M in respect of any real property interests; and

(4) unsecured creditors, subject in priority to the B of M secured creditor interest.

Each of these possibilities deserve further detailed examination.

A. Trust Interest

22 Insofar as the ORRs interests represent a trust interest, it would mean that Dynex held the interests in trust for the ORRs and it is generally conceded (Counsel for Ernst & Young admits) that such interests would be outside of the bankruptcy.

23 This conclusion is consistent with the following "second principle of insolvency identified by *Goode* - Principles, at 18:

> **Second Principle: only the assets of the debtor company are available to creditors**
>
> ...It is not the function of corporate insolvency to confiscate for the benefit of creditors assets in the company's possession or control which belong to others. Only that which is the property of the company at the time of liquidation or comes into its hands thereafter is available for its creditors. So assets held by the company on trust do not form part of its estate...

It is also consistent with s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), which provides as follows:

> (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,

24 The onus is on the party claiming a trust relationship to establish it, by showing, *inter alia*, that it capable of being identified and that there was a clear intention to create a trust: *Bennett on Bankruptcy* (Third Edition) (North York: CCH Canadian, 1993), at 97.

25 Again, in lay language, property that is held in trust for a third party by an entity that/who becomes bankrupt, is, on bankruptcy, delivered to that third party by the trustee in bankruptcy, and no other creditor has a claim on it, because it never was the property of the bankrupt, and the trustee only takes what the bankrupt owned. Again, a hypothetical example, in simple lay language, could be considered. If a third party takes furniture to a furniture repair establishment for repair and, prior to its redelivery to the customer, the repair company goes into bankruptcy without title to the furniture passing to the repair company, that would be, in simplistic terms, a trust relationship where the property would remain owned by the third party and be delivered to the third party by the trustee in bankruptcy. This is to be distinguished from a situation where, if the furniture were sold to the furniture repair company, but the payment proceeds were not delivered to the third party prior to bankruptcy. In such a case, the funds held by the trustee would not be trust funds but would be held subject only to an unsecured claim by the third party who had sold the furniture. At the risk of oversimplifying the matter, that is the difference between them, and applicable to this case.

26 It is clear from the hypothetical example, and in law, that there need not be a specific document or specific types of wording to constitute a trust: *Bank of Nova Scotia v. Société Générale (Canada)*, [1988] 4 W.W.R. 232 (Alta. C.A.) (the "*Sorrel*" case). Indeed, the whole relationship of trust is being continually expanded into resulting trust, constructive trusts and other fiduciary relationships.

27 Counsel for Enchant and Willness argued that a trust existed because the assignment of the interests to the ORRs were absolute, for consideration, and without the need for any conversion or "back in" by the ORRs. Again, however, while no specific words are necessary, the intention that Dynex held the interests in trust for the ORRs as against all the world must both be clear, and they must be interests capable of being so held. Here the interests are not interests in real property, or lease payments from the lease of real property (e.g. as in *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321 (Alta. Q.B.) (Hunt, J.)), or a specific personal asset (e.g. an existing fund, as in the *Sorrel* case), but contractual rights to future revenues after bankruptcy - a *chose in action* [3] . They are property rights, in the sense that they

relate to personalty, but they are rights to future revenues, unlike a specific existent fund held in a trust account - e.g. an RRSP, a deposit, etc.. Even if that does not prevent such a trust, there must be an intention to create a trust relationship.

28 In *Sorrel*, the issue related to specifically ear-marked funds paid to the operator of petroleum production facilities, by non-operators, that were in excess of that required for operations. The headnote sets this out in the following way:

> The creation of a trust does not require express words, and ... a trust could be inferred from an examination of the entire agreement. The subject-matter (the excess funds and revenues [on deposit with the operator] and the object (the non-operators) of the trust were certain, and the agreement as a whole evinced an intention to create a fiduciary relationship between the parties.

Consequently, in *Sorrel*, the Court held that excess revenues and interest thereon were trust funds.

29 It is also clear from the documentation that the ORRs owned nothing independent of, or except through, the interest of Dynex. This is evident in the documentation in that Dynex (in the case of Odessa and Meridian, as can be seen in the Document Record, Tab 25) was entitled to fail to keep the subject leases in good standing, and to allow them to expire, to abandon them, to release them, or surrender them (not transfer or encumber). Therefore, in effect, Dynes was entitled to abandon any of its interest, without liability to the ORRs - I find such rights to be inconsistent with the intention to create a trust.

30 The Trustee argued that this was not the time or method to determine if there was a trust relationship, but that it should be determined under the expedited procedure of s. 81 of the BIA, the onus of which was on the party seeking to establish the trust under s. 81(3). More substantively he argued that all the documentation was against the interpretation of a trust - if it was trust property, then there was no interest for which to make the B of M subordinate, and, indeed, there would be no need for a subordination..

31 Counsel for the B of M argued (this argument was not challenged) that to create a trust there must be three elements of certainty: intent, subject matter and object. His further argument (not accepted by Counsel for the ORRs) was that there was no certainty of subject matter because the interests were, at best, rights to a revenue stream which, at any future point (after bankruptcy) were not certain. Counsel for Enchant and Willness argued that there was certainty, and that production records and monthly statements confirmed this. Counsel for the B of M further argued that there was no evidence of intent, and noted that the agreements were commercial contracts between sophisticated parties and, while no words of trust was necessary, the agreements not only had not one word to suggest a trust, but did not look like a trust either.

32 On the documentation I have examined, I can find no words that would constitute a trust relationship, any more than a promissory to pay (as in a promissory note) would constitute a trust. It is clearly not every promise to pay that constitutes a trust, and, in my view, the courts should be slow to so find, absent a very clear indication, such an intention. This so because there is a need for certainty as to whether or not a trust exists and that is particularly important so that parties (such as the B of M and the ORRs in this case) dealing with a debtor (Dynex in this case) can be aware of what their rights might be in the context of various scenarios (for example what happened in this case, a bankruptcy), and contract accordingly.

33 In considering this matter, I am very mindful that there is a substantial desire by the ORRs that their interests be classified as trusts because that would effectively determine this issue in their favour and in priority to the B of M. Indeed, there may be good policy basis for declaring such interests to be trusts. However, this Court is not a policy court, but rather must rely upon the facts as known to the Court and the law applicable thereto.

34 In the result, I have concluded that Counsel for the ORRs have not met the onus on them to establish that the interests of the ORRs are trust interests - that is, there is nothing present in the documentation to create trusts, or to show intentions to create trusts, in favour of the ORRs.

B. Secured Creditor by Virtue of an Interest in Real Property

35 As noted, it is conceded that, to the extent that the registered security of the B of M gives it an interest in real and personal property, it is a secured creditor for both the real and personal property of Dynex in the bankruptcy. As a result of this conclusion, the issue of the nature of the interests of the ORRs (if less than real or personal property registered security interests) may be academic, unless the ORRs benefit from the subordination of the B of M's interest to theirs in any event of bankruptcy, because it would appear from the submissions before the Court, that any interest that is caught by the secured creditor status of the B of M would more than consume the assets of Dynes, leaving nothing for the Trustee to distribute to the unsecured creditors.

36 In the December 1995 Decision, I have already ruled that the interests of the ORRs, being neither interests in a lease, nor rentals therefrom, but interests ranking below a lease, cannot, at law, be real property interests, and, in the alternative, if that decision were wrong in law, that a trial of an issue would need to be held to determine whether real property interests had in fact been created. Such latter determination might be further complicated in cases where the ORR was the lessee and remains bare leasehold title holder still (*vis-à-vis* the lessor), but had assigned the leasehold interest to Dynex, retaining a royalty or net profit interest only - see, for example para. 3 of the legal brief of Counsel for Enchant and Willness.

37 The December 1995 Decision having been made on this point, I am *functus* on the issue and the result, pending appeal, can only be that the ORRs have no real property interests, or, alternatively, if they potentially can, that has not been determined. Therefore, I have effectively determined that the ORRs are not secured creditors by virtue of any real property interests. That being the case, the ORRs would have no priority over the B of M, but, indeed, in bankruptcy, and without considering the effect of the B of M's subordination agreement, would be unsecured creditors, subordinate to the B of M.

38 While the legal brief of Counsel for Enchant and Willness takes great pains to point of their registration of caveats at the relevant land titles office ("LTO"), there is no real issue of registration of the ORRs interests at the LTO because the B of M was not only aware of their interests (see paras. 35 and 47 of the legal brief), but specifically recognized them, and subordinated its interest to the ORRs. It is equally clear, as Counsel for Enchant and Willness pointed out (paras. 29 and 38 of his legal brief, and para. 2 of his reply legal brief), that the B of M did not purport to register any claim to the interests of the ORRs or to seek any security interest in the ORRs interests - indeed, the subordination specifically excluded these interests from the B of M security.

C. Secured Interest in Personal Property

39 Again, consideration of this may well be academic, aside for the issue of subordination, because, it was fairly conceded that to the extent that the B of M did not consume all of the assets of Dynex as a secured creditor, based on it real property security, it had personal property security duly registered to capture any remainder, leaving nothing for unsecured creditors. Thus all that would be left by the ORRs attaining this status would be for the ORRs to rank equally (subject to the subordination issue) with the B of M for any remaining personal assets of Dynex.

40 Counsel for the ORRs argue that the documentation under which the ORRs obtained their interests contain certain "charging language" which creates a personal property security interest. This argument does not appear to be made to support a secured position in bankruptcy, because it was acknowledged that the ORRs did not register any such interest and therefore had no priority over the Trustee under s. 20 of the *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("PPSA"). However, the argument was apparently made to answer the argument of Counsel for the B of M that s. 40, which resolved the lack of privity issue, only applied to security interests (see para. 12 of Counsel for Meridian and Odessa's legal brief). I have already deal with that in the December 1995 Decision by holding that it applies to "any interest". Nevertheless, I will address the arguments based on "charging language".

41 Such charging language is seen in the documentation conveying the overriding royalty interest in paragraph 2. (c) of the Odessa Overriding Royalty Agreement dated August 29, 1975 (later assigned to Meridian) (see Document Record, Tab 24):

> The said royalty shall be deemed hereafter to be a charge and encumbrance against the [Dynex] interest and accordingly any ... alienation of the [Dynex] interest shall be subject to the said royalty.

There was no such "charging language" appearing in the brief overriding royalty agreement of February 27, 1974, by which Mr. Willness received his interest, or the Enchant overriding royalty agreements of January 22 and 24 (3 in number), 1975. However, as set out in detail in the December 1995 Decision (and, in particular, paras. 53 - 70), the various debentures and loan agreements between Dynex and B of M refer to the lands being free of any "lien", "charge", "encumbrances", or "permitted encumbrances" (or wording of like effect), except for the ORRs interests, and were specifically "subject to" those ORRs interests. Nevertheless, I believe that the ORRs would be hard pressed to have such language interpreted as "charging language" so as to found "security interests" in a legal sense, whether personal or real, based on such language.

42 However, whether there are "charging" provisions to create a security interest, or not, is not necessary to decide because I agree with Counsel for Meridian and Odessa (para. 11) that their interests in the overriding royalties entitling them to a stream of revenues are sufficient, without "charging language", to constitute security interests to personal property in themselves.

43 We see from s. 1(1)(qq) of the PPSA that a "security interest" includes "an intangible that secures payment or performance of an obligation", which would include a *chose in action*, unless otherwise excluded by another definition or provision of the PPSA. Section 4 provides that:

> Except as otherwise provided under this Act, this Act does not apply to the following:
>
> > (g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land, but not including a right of payment evidenced by a security or an instrument;

A "security" and an "instrument" under s. 1(1)(oo) and(u) respectively would appear, in general lay language, to include such things as a share or other investment certificate, or a bill of exchange, or, in general, some form of negotiable instrument. Thus, we see that, as *choses in action*, the interests of the ORRs are registerable under the PPSA, by virtue of s. 1(1)(qq), unless excluded under s. 4.

44 Counsel for Enchant and Willness argued that the interests that the ORRs received were created and arising, if not in, "in connection with", an interest in land, as contemplated by s. 4. He argued that the ORRs interests were created at the time of the creation of the leases, as *profits à prendre*. I have rejected that status in my December 1995 Decision. Of course, it follows that if Counsel is correct, and I am wrong, and if the PPSA does not apply, s. 20(1)(b) has no effect and does not create any rights in favour of the Trustee. As this would appear to depend on my reasoning in the December 1995 Decision, and I am *functus*, I leave the matter for the further consideration of the Court of Appeal. Nevertheless, s. 40 referenced in my December 1995 Decision, would still apply, because it gets its application, not from the interests of the ORRs, but from the registration by the B of M of its security interests, in which the subordination is included. Put another way, even if the ORRs interests did not qualify as security interests under s. 1(1)(qq), such a determination is not necessary for s. 40, because it can be "any other interest". Thus, in Alberta, the ORRs can rely upon s. 40 to avoid the privity issue, fatal at common law (*Chiips*, at para. 76), whether or not their interests were security interest or registered under the PPSA - different from the Ontario PPSA, as I held in the December 1995 Decision, and Counsel for Meridian and Odessa correctly restates in paras. 1(a), and 7 - 10 of their legal reply brief.

45 However, as I interpret s. 4(g), in conjunction with my December 1995 Decision that the ORRs interests are not interests in land, it is only rental payments to lessors, or the equivalent, that "arise in connection with an interest in land", that are excluded. The exclusion would not relate to overriding royalty or net profit interests of the type held by the ORRs, unless the ORRs could establish that they were akin to lessor rental "payment that arises in connection with an interests in land". Leases are interests in land, and accordingly lease payments to lessors pertinent thereto "arise in connection with an interest in land". However, in my view, as the ORRs interests are not payments to lessors arising from the leases, but interests created "downstream" of the lease, they are not interests in land, and the payments thereunder do not "arise in connection with an interest in land". The result is that the ORRs interests are registerable under the PPSA, and registration is not excluded by s. 4.

46 However, while registerable, none of the interests of the ORRs were in fact registered under the PPSA. Accordingly, no registered personal property security interest sufficient to create a secured creditor status (as to personal property) has been established by the ORRs.

47 Further, as the ORRs interests were never registered under the PPSA, s. 20(1)(b)(i) thereof makes it clear that any security interest is not effective as against a trustee in bankruptcy:

> A security interest
>
> . . . . .
>
> (b) in collateral is not effective against
>
> (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, ...

The effect of this, as Counsel for the B of M argued, and Counsel for the ORRs concede (Counsel for Meridian and Odessa, para. 13), was that, as of the bankruptcy, at best, the ORRs had a unperfected security interest, and because it was unperfected it was ineffective against the Trustee (see *Bellini Manufacturing & Importing Ltd., Re* (1981), 32 O.R. (2d) 684 (Ont. C.A.), at 691). Accordingly, all property interests in Dynex that were not subject of a real or personal property interest duly secured and registered (which would, subject to the subordination, not include the interests of the ORRs), passed to the Trustee: s. 71 of the BIA.

48 However, this may not end the matter, because Counsel for Meridian and Odessa argued that failure of the ORRs to register their personal property interests under the PPSA did not extinguish the ORRs rights in subordination at common law (authority for this is argued to be seen in *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985), 16 D.L.R. (4th) 289, 4 P.P.S.A.C. 271 (Ont. C.A.)), or under the BIA. I shall address this issue below.

49 Counsel for Enchant and Willness argues that it would be ridiculous to believe that the ORRs would have to register under the PPSA to protect their interest in certain situations, and, in effect, that this was not the intention of the law. The response is that even if this was not what the PPSA had set out to do in the context of these (or other) oil and gas interests, that would appear to be the effect of the law (as discussed above), and those who did/do not take the steps to register might not be protected in certain situations - bankruptcy being the one in this case.

50 The result of the application of the PPSA to the ORRs is that s. 20 is applicable to make any unregistered security interests of the ORRs ineffective against the Trustee, thereby denying secured creditor status as to personal property.

D. The Unsecured Creditor

51 As I indicated above, the interests of the ORRs, based upon the limitations from my December 1995 Decision relative to real property, are that of *choses in action*, which entitles them to their appropriate proceeds from the sale of petroleum and natural gas substances - in essence a revenue stream based thereon.

52 The result, I find, in the context of bankruptcy, is merely the entitlement to a debt for a past, or damages for an ongoing, monetary sum against Dynex which would render the ORRs unsecured creditors.

53 On this basis, leaving aside the issue of the subordination, it is clear that the ORRs rank much behind the B of M as to priorities in bankruptcy. The interests of the ORRs prior to bankruptcy had priority over the claim of the B of M because they were specifically permitted to be encumbrances ("permitted encumbrances") in the subordination by the B of M to the ORRs, as I found in the December 1995 Decision. If this subordination survives the bankruptcy (which I will examine below), this may not be fatal to the ORRs. However, if the subordination does not survive the bankruptcy, the priority that existed to the ORRs prior to bankruptcy would be lost. Theoretically, that such priority would be lost in a bankruptcy should not be surprising, as with so many other circumstances, bankruptcy changes the rights of parties and the relationship between parties. Again, by way of analogy, and in support of this basic conclusion, Counsel for the B of M effectively pointed to the example of the status of employees who, in a general sense (without being too legalistic), would have priority for their salaries prior to bankruptcy, but in a bankruptcy would be limited to a certain fixed amounts and thereafter would rank as unsecured creditors.

VIII. The Effect of Bankruptcy on the B of M's Subordination to the ORRs

54 I have determined that, in the bankruptcy of Dynex, the true interests of the ORRs are those of unsecured creditors and the interest of the B of M is that of a secured creditor (over both real and personal property) of Dynex and in priority to the ORRs.

55 In face of this the lay person then would ask: "Well, what is the effect of the B of M's specific agreement to subordinate its interest to that of the ORRs?" In short, is the effect of that subordination lost by the act of bankruptcy?

56 Before commencing this subject, it should be noted that it appears from the authorities that Counsel have provided, and some brief Canada wide case research that I have done myself, that there are very few useful (especially case) authorities on the subject of subordination. This caused Goode, in a text released prior to his *Principles of Corporate Insolvency Law*, to observe at one point, in *Legal Problems of Credit and Security* (London: Sweet & Maxwell, 1988) ("*Goode* - Problems"), at 24:

> Again, I cannot quote chapter and verse. So far as out textbooks are concerned, nobody ever enters into subordination agreements, because they are nowhere mentioned!

Although Philip Wood appears to have answered this call in his later text, *The Law of Subordinated Debt* (London: Sweet & Maxwell, 1990) ("*Philip Wood*"), this remains an area of extremely limited authority. With this severe limitation, I start the discussion to attempt to determine this issue.

57 As noted above, It is clear that enforcement of a subordination agreement does not require that the beneficiary of the subordination register his interest: *inter alia*, *Chiips Inc. v. Skyview Hotels Ltd.* (1994), 21 Alta. L.R. (3d) 225 (Alta. C.A.), at 237 (para. 34), referencing *Euroclean*; and Cuming & Wood, *Alberta Personal Property Security Act Handbook* (Third Edition) (Carswell) ("*Cuming & Wood*"), at 337.

58 While not decisive of the matters before me, it would appear that the subordination has no direct effect on the Trustee, or the results in the bankruptcy itself. This is so because, as I understand it, the Trustee does not normally recognize interests, except insofar as they, having created some form of security status in bankruptcy, must be examined further to determine priorities. If two claimants had the same security position in bankruptcy, then the Trustee would have to give effect to interparty subordinations to determine the priorities of the similar claimants. Thus, if the ORRs had registered their security interests in their *choses in action* under the PPSA, such that there was a competition between the ORRs and the B of M for Dynex's personal property interests, those interests would be binding on the Trustee, and the subordination might need to be considered to determine the priority between them. However, that is not applicable in this case by virtue of the failure of the ORRs to register their security interests, and accordingly they gained no security

position that the Trustee had to recognize, by virtue of s. 20 of the PPSA. Thus, the Trustee had no need to have regard to any subordination arguments because the ORRs failure to register under the PPSA had the effect in the bankruptcy that the ORRs are unsecured, and therefore rank considerably behind the B of M. Therefore, the subordination in this case has no direct relevance to the bankruptcy itself, or to the Trustee.

59 That the benefit of the subordination to the ORRs was lost in bankruptcy was the nature of the argument of Counsel for the B of M, when in their legal brief they stated (paras. 27, 30, 31 and 32):

> 27. *If the ... interest of* the beneficiary of the subordination [*the ORRs*] should be satisfied, *discharged*, invalid or *otherwise unenforceable* against the debtor's [Dynex] property, *the subordination ceases to have any effect. There is no interest which can have the benefit*.
>
> . . . . .
>
> 30. The bankruptcy of Dynex vested all of its property in its trustee in bankruptcy subject only to the rights of secured creditors as holders of security that would be enforceable against such property and the trustee in bankruptcy. The only holder of such security is the [B of M].
>
> 31. The charges, encumbrances or interests of [the ORRs] ... are not effective against the trustee in bankruptcy since they ... were never perfected in accordance withe the PPSA.
>
> 32. *As a result of the bankruptcy* of Dynex, *the* [*interests*] *of* [*the ORRs*] in ... Dynex *ceased to exist*. The only remaining rights of [the ORRs] ... are to claim as unsecured creditors....
>
> 33. ... *Upon bankruptcy ...* [*t*]*here is no longer any interest that can receive the benefit of a subordination...* [Emphasis added.]

By this I understand the position of Counsel for the B of M to be that, on bankruptcy, as the *chose in action* rights of the ORRs give way to merely unsecured creditor claims, because the ORRs have no registered security interests to pursue those rights directly (as they would if they were secured creditors, by virtue of registration under the PPSA), any such previous rights held at the time of the subordination are "lost" and there is nothing left to be the subject of the subordination, and, thus, the effect of the subordination is equally lost.

60 Counsel for the ORRs argue, however, in effect, that: "[b]oth before and after the bankruptcy of Dynex, the [B of M's] security is subordinated to the interests of [the ORRs]" (para. 15); the subrogation by the B of M was not in favour of any specific security interests held by the ORRs, but of all (and any) of the interests of the ORRs, whatever those interests were, including any rights as unsecured creditors; the loss of the *chose in action* interests of the ORRs by virtue of the bankruptcy did not leave the ORRs without any interests, but merely converted them into other interests, namely the interests of unsecured creditors; while collection from the Trustee might, in the circumstances, be impossible, the subordination by the B of M to the ORRs (of what ever interest they had remaining - their unsecured creditors interests) is not lost in the bankruptcy; and, by way of mechanics, the B of M, in realizing on its secured interest, holds that realization in trust for the ORRs to the extent of their interest as unsecured creditors, by virtue of the continuing subordination.

61 There is however a flaw in the arguments of Counsel for Odessa and Meridian (paras. 19 - 22), as I understand them and the authorities relied upon, in support of the proposition that the bankruptcy does not affect the priorities or the subordination. The flaw is that Counsel, relying upon (at para. 19), *inter alia, Goode* - Principle (at 18) "Third Principle: security interests and other real rights created prior to the insolvency proceedings are unaffected by the winding up", presumes that the ORRs are "secured parties" and have real property or personal property security interests, or rights similar in legal effect and status to the B of M - a position that I find does not exist. A subordination agreement does not, by virtue of the subordination alone, and in the absence of specific language to that effect, create a security interest in favour of the beneficiary of the subordination: *Cuming & Wood*, at 336. However, that position is unnecessary for Counsel for the ORRs to take, because the subordination of the B of M to the ORRs may exist without the ORRs having any security status.

62 The argument of the ORRs is based on the assertion (paras. 20 and 23 respectively and 15 of the reply legal brief) that "contractual subordinations ... remain enforceable between the parties despite the bankruptcy of the debtor" and "Odessa and Meridian have priority over the Bank by virtue of the Bank's subordination". The authority cited (at para. 20) is *Philip Wood* (at 120) that:

> Contractual subordinations of debt remain enforceable between the parties despite the bankruptcy of the debtor....

Also at 23, *Philip Wood* makes this similar observation:

> The better view is that an arrangement between junior creditor and the debtor that the junior creditor is to be contractually subordinated should not in principle conflict with English insolvency rules that liabilities of the insolvent are to be paid *par passu*, but the matter is undecided in England.

No other authority is cited in direct support of this proposition, nor is there any authority cited directly against it by Counsel for the B of M.

63 The argument of Counsel for the B of M in my view can only succeed if the subordination by the B of M in favour of the ORRs was, by its terms, or in law, terminated by the bankruptcy.

64 Looking at it another way, is be impossible for the ORRs to succeed to have priority over the B of M after a bankruptcy, where the B of M is a secured creditor, and the ORRs are merely unsecured creditors? In my view, it would not be, but there would be a couple of requirements. In the absence of finding a trust in favour of the ORRs, what would be required would be a finding that the subordination by the B of M was so broad in its terms, in the absence of any specific statutory or case law to the contrary, as to survive a bankruptcy, and be indifferent to the different security status that the ORRs had in the bankruptcy. That such a subordination is available appears to be recognized by both *Cuming and Wood*, and *Wood* himself, as seen in the former at 302 where they state:

> The subordination agreement may subordinate the debt of the junior creditor to all debt owed by the debtor to the senior creditor. The subordination may postpone the junior debt from the outset, or may provide that the postponement is effective only upon the occurrence of a specified event. The subordination agreement may also limit the subordination to certain kinds of debt (such as debt arising out of a specific credit agreement, debt incurred prior to a specified date, debt up to a specified amount or debt associated with a specific issue of debt securities).

Reference is also made to *Wood*, at 6 - 8.

65 Accordingly, it appears that express agreements between creditors could subordinate priorities in bankruptcy in a way that survives the bankruptcy (and the court should give effect to it), even if the interests are not the same: *Ogden Enterprises Ltd., Re* (1978), 22 N.B.R. (2d) 344 (N.B. Q.B.), at 358; and *Cuming & Wood*, at 302 (section 40[1]). The subordination by the B of M in favour of the ORRs is not expressly in relation to bankruptcy. However, is it expressly, or by law, terminated by bankruptcy?

66 From these latter mentioned authorities, we see that a subordination by agreement or law may be "effective only upon the occurrence of a specified event". Accordingly, it would seem to follow that it could be equally "ineffective upon the occurrence of a specified event". The question is whether it is, by agreement or law, ineffective on bankruptcy? If it were not ineffective, with such a broad subordination in place, a subrogation of the type envisioned by Counsel for Odessa & Meridian (relying on *Goode* - Problems, at 98, which in turn relies on *Woodroffes (Musical Instruments) Ltd., Re*, [1985] 2 All E.R. 908 (Eng. Ch. Div.), at 912) would appear to give the ORRs the right to recover through the B of M.

67 Counsel for the B of M argued that the subordination of B of M to the ORRs was a subordination of security not a subordination of debt, and, as a result, the remaining debt of the ORRs in Dynex did not enjoy a priority position to the debt of B of M. I reject this conclusion as unsupported in law or in fact. Let us examine both.

68 In support of the B of M's argument, it is clear that the subordination must be clear and unequivocal: *Sun Life Assurance Co. of Canada v. Royal Bank* (1995), 37 C.B.R. (3d) 89 (Ont. Gen. Div. [Commercial List]), at 94 (para. 23). Nevertheless, "a subordination clause is given effect according to its terms" and "commercial reality requires that documents of this nature be given effect": *Chiips*, at, *inter alia*, 243 (para. 57). While there was great debate in Chiips (referring back to *Euroclean*; *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.); *Canadian Imperial Bank of Commerce v. International Harvester Credit Corp. of Canada* (1986), 6 P.P.S.A.C. 273 (Ont. C.A.); and *Transamerica Commercial Finance Corp., Canada v. Imperial T.V. & Stereo Centre Ltd. (Receiver of)* (1993), 13 Alta. L.R. (3d) 99, 6 P.P.S.A.C. (2d) 99 (Alta. Q.B.) (Nash, J.)) as to the adequacy of the wording of any purported subordination clause, it being conceded that a vague and non-specific clause is not sufficient (see *Chiips*, at para. 49), I believe that no specific "magic" words, such as "rank" or "priority" [4], or any other words are necessary (although they may be helpful) to convey subordination, any more than the word "trust" is necessary to create a trust. *Chiips* seems to confirm this when (relying upon authorities I will not repeat) Foisy, J.A. said (para. 30):

> It is interesting to note that it is possible under the [PPSA] to prove a subordination in fact without the existence of a specific subordination agreement....

69 Bearing these cases and principles in mind, I find, as I believe I already made apparent in the December 1995 Decision (especially paras. 97, 105, and 110), with detailed references to the clauses themselves (especially at paras. 53 - 70), not lack of clear and unambiguous wording to support a very broad subordination in this case - the B of M, to use the language of Harradence, J. A. in *Chiips* (para. 53), was "clearly acknowledging that these [ORRs interests] rank ahead in priority". Further, I find that the subordination by the B of M, on the face of the documents, and at law, was an "unhyphenated" subordination - it was the subordination of the *interest* of the B of M (what ever it was) to the *interests* of the ORRs (what ever they were). It was not a subordination by the B of M over only "part of the property of the debtor held by a junior creditor", nor does the subordination relate only to the B of M's security interest in "personal property of the debtor ... in favour of the interests in such personal property [of the ORRs]", as argued in paras. 21 and 23 of the legal brief of Counsel for the B of M (and other similar declarations in other paragraphs - e.g. 28, and in the Trustee's legal brief at para. 20). Furthermore, there is nothing to say, as Counsel for the B of M would appear to argue (in paragraphs 25 and 26 of the B of M's legal brief), that the subordination was limited to assets over which the beneficiary of the subordination (the ORRs) had a "charge over", or "security interests" registered, or registerable, under the PPSA, or "any other interest". It was a subordination, pure and simple, of what ever are the B of M's interests to the interests (what ever they were or may now be as a result of the bankruptcy) of the ORRs.

70 To this extent, I agree entirely with the arguments of Counsel for Odessa and Meridian at paras. 1(a), 4 - 10, and 18 of their reply legal brief.

71 Additionally, this is not a case, in my view, where there was subordination only of a floating charge security and not a fixed charge security as in the *Chiips* case (para 23), but rather it was a subordination of all of the interest of the B of M.

72 I agree with the essence (if not the precise words) of the reply legal brief of Counsel for Odessa and Meridian (paras. 19 - 22) that the bankruptcy did not extinguish the *choses in action* of the ORRs - indeed, it is those interests that made them creditors (albeit as unsecured) of Dynex in bankruptcy. While it is clear that the nature of the enforcement of the ORRs interests changed from *choses in action* subject of suit, to unsecured creditor claims that would appear to be worthless in themselves, that does not mean that all rights of the ORRs vanished on bankruptcy. To that extent I also agree that "[t]here remains an interest that can receive the benefit of the Bank's subordination". However, to recognize this, I would restate what Counsel for Meridian and Odessa said in the third sentence of para. 21 of their legal brief to indicate that the ORRs in bankruptcy, because their interests were not secured, lose the right to continue to receive revenues under their overriding royalties (the *choses in action*), and, instead, are each left merely with an unsecured creditor's claim based on those *choses in action*. They nevertheless, in my view, continue to be entitled to the benefit of the subordination.

73 In this case I find that the subordination, on its terms, is: for all of the interest of the ORRs in priority of all of the interest of the B of M; it is in effect from the outset, that is, prior to any advances by the B of M; and is not limited by any particular kind of interest. The question then is whether it is expressly or implied broad enough to continue through a bankruptcy? I find that the subordination is broad and that it does not, expressly, or by implication, contemplate a bankruptcy terminating its existence. It does not exclude a bankruptcy, and, with *contra proferentum* running against the B of M (see my December 1995 Decision at paras. 57 and 106), inclusion should be implied. I find that subordination continues, after bankruptcy, in favour of the ORRs against the B of M.

IX. The Inter-Relationship of S. 40 of the PPSA and S. 59 of the LPA

74 While, in reality the following argument is in reference back to my December 1995 Decision (para. 75), it deals with an aspect that was not there argued in detail, or, alternatively the significance of it was not fully understood by the Court (para. 76). However, it was raised again in this hearing, with a significance that is clearer to the Court. Accordingly, to the extent that I did not there expressly decide the issue, I will respond to the new aspects of this argument, which may be of benefit to the parties, if only for consideration of the Court of Appeal.

75 The issue is privity of contract. In this case the ORRs were not privy to the subordination clauses in the agreements between the B of M and Dynex, and, accordingly, at common law, could not enforce them: *Euroclean*. However, this is remedied for personal property by s. 40 of the PPSA, which, simply put, reads:

> A secured party may -- subordinate his security interest ... and the subordination ... may be enforced by a third party if the third party is the person ... for whose benefit the subordination was intended..

Nevertheless, the argument was made by Counsel for the B of M that s. 40 only provides privity to the subordination of the B of M's personal property interests and not its real property interests. The answer, Counsel for Meridian and Odessa argued (most specifically at para. 23 of the reply legal brief) is that s. 59.2(3) of the *Law of Property Act*, R.S.A. 1980, c. L-8 ("LPA") makes the lack of privity "solution" in s. 40 applicable to the real property interests. However, Counsel for the B of M advanced the new argument, in oral argument in these proceedings, that s. 59.2(3) was only mechanical to allow personal property registration under the LPA, and not substantive. It has significance because if Counsel for the B of M is correct, the B of M would not be affected by subordination of any of its real property security, due to the lack of privity, leaving only the personal property assets of Dynex available for subordination (see Counsel for the B of M's argument at para. 34).

76 I agree with the argument of Counsel for Meridian and Odessa as a matter of interpretation of the wording of s. 59.2(3). It reads clear, as it relates to s. 40:

> Section ... 40 ... of the [PPSA] ... appl[ies] with necessary modifications to registrations under this section.

It can only mean that the same considerations that apply to personal property interests registered under the PPSA (a cure of the privity issue) also apply to real property interests registered under the LPA. In my view this conclusion is unaffected by whatever is the effect on the LPA of the other PPSA sections referenced in s. 59.2(3) - whether "mechanical", procedural or substantive.

X. Effect of the Sale by the Trustee to Channel Lake

77 I do not find that the sale of the Dynex assets by the Receiver makes any question moot (as Counsel for the B of M asserts at para. 34) until the determination of these questions, and the Orders of Forsyth, J. of August 20, 1993 (especially para. 5) and September 1, 1993 (especially paras. 2, 5 and 8), were broad enough to make that perfectly clear both as to the validity and priority of the B of M's security and the sale respectively. Accordingly, I agree with the argument in para. 22 of Counsel for Odessa and Meridian's reply legal brief.

78 As to the ability of the Receiver to sell the leases from which the ORRs obtained their flow of revenues from production, the first reaction (beyond the fact that such sale was specifically authorized by the Court) is that the Receiver could only sell what Dynex had (Per Lord Herschell, L.C. in *McEntire v. Crossley Brothers Ltd.*, [1895] A.C. 457 (U.K. H.L.), at p. 461, referenced at 690 - 1 of *Bellini*), which did not include, or was subject to, the interest of the ORRs. However, the fact is that the Receiver, on behalf of the B of M, received from the Trustee, all of the assets to which the B of M had security that the Trustee received on the bankruptcy. Thus the rights of the Receiver, through the B of M's security, were as great as what the Trustee could have sold, from the assets acquired on bankruptcy, had there been no secured creditors. As the sale of the leases would be a real property interest and the ORRs had no real property interests, the Trustee, or Receiver thereunder, would have an unfettered right to sell the real property. Counsel for the B of M described it thus in their legal brief (para. 35):

> Since the [ORRs] rights ... do not constitute interests in land, there is no encumbrance upon the real property of Dynex other than the real property charges ... held by the [B of M]. Since the interests of [the ORRs] are not interests in real property,the sale by the [Trustee] was free of such claims...

79 Insofar as the sale was of personal property interests, including the interests held by the ORRs prior to bankruptcy, the result is the same by a different route. *Bellini*, accompanied by s. 20 of the PPSA, is authority (at 691) that failure to perfect a security interest under the PPSA means that the creditor cannot rely on the doctrine of *McEntire*, even though failure to prefect such an interest does not in itself destroy the effect of the subordination by another creditor: *Euroclean*. In that regard, because the ORRs failed to register under the PPSA, the Trustee acquired, on bankruptcy, more than Dynex had before, because the ORRs unregistered security interests on bankruptcy were converted from specific *choses in action* into mere unsecured claims. It follows that, if the ORRs only interests in bankruptcy were as unsecured creditors, the Trustee is free to sell the assets of Dynex unencumbered by such an interest, and through the B of M security, so is the Receiver.

80 It would therefore follow that the aforementioned determinations also have the effect of determining this additional issue, which was specifically reserved by the Order of Forsyth, J. of September 1, 1993. The effect of this determination is that Channel Lake acquired its interest in the Dynex properties (by the agreement of August 4, 1993), as to real property unaffected by the ORRs as they had no real property interest, and free of the ORRs' overriding and net profits interests in personalty because they failed to register under the PPSA. As such, the $5 million sale proceeds (apparently purporting to represent the value of those chose in action rights) should be released by the Trustee to be distributed in the bankruptcy, and any proceeds of production paid to the Trustee under the terms of the Order for the production since the sale (that pertained to what would otherwise be the entitlement of the ORRs) must be accounted by the Trustee back to Channel Lake effective the date of sale, because they owned those rights as of sale and would no longer be required to account for the revenues therefrom.

81 It follows from the ORRs position as unsecured creditors that, as against the Trustee, any revenues generated from production after bankruptcy to the point of sale, to which the ORRs were otherwise entitled, and the proceeds of sale of the ORRs interests (to neither of which the B of M had any interest), go to the Trustee for distribution in the bankruptcy, unaffected by any claim by the ORRs, except as unsecured creditors. To the extent that those proceeds flow to the ORRs as unsecured creditors, that lessens their loss, and the liability of the B of M to them. However, on the facts before me, in the bankruptcy, I presume those revenues will flow, in the bankruptcy, to the B of M as a secured creditor under registered secured real and personal property documentation, *vis-à-vis* the Trustee.

82 However, that does not end the matter.

83 The revenues from production held by the Trustee for the period of production between the receivership crystallisation and the bankruptcy, are for distribution, without issue as I understand it, to the ORRs (subject to appeal of my December 1995 Decision and this Decision), based on the acknowledgement of Counsel for the Trustee (para. 14 of the Trustee's legal brief) that the proceeds in the hands of the Trustee, as Receiver, relating to the period prior

to bankruptcy are held in trust for the ORRs to the extent of their interest. They are unaffected by this Decision and accordingly should, subject to appeal, be so disbursed. However, to the extent that the revenues held by the Trustee for the period between the receivership and the bankruptcy are unable in law to be transferred to the ORRs to the extent of their interests, and flow to the B of M as secured creditor, the B of M must also account for those to the ORRs as hereinafter set forth.

84 It follows that as between the B of M and the ORRs, the B of M, because of its subordination will have to account (see below) to the ORRs for any funds it received directly, or through the Trustee, from the sale of the ORRs interests, and the revenues from production relating to those interests after the bankruptcy until the point of sale. Allow me to elaborate.

85 The additional proceeds paid by Channel Lake ($5 million) pending this determination, I assume, without deciding, represent the fair value of the ORRs *chose in action* interests. The B of M has no *direct* claim on those funds as its security interests specifically excluded rights to those interests. However, to the extent that those proceeds, as between the Trustee and the creditors in bankruptcy, should be paid by the Trustee to the B of M, or flow directly to the B of M, based on its secured creditor rights to priority in the bankruptcy, as between the B of M and the ORR's, the B of M must account for them to the ORRs. This brings us to the mechanics of how the ORRs can follow these funds.

XI. Mechanics of Recovery by the ORRs from the B of M

86 The mechanics of collection what is due to the ORRs by the effect of the continued subordination, after the bankruptcy, without doing damage to the priorities within the bankruptcy (see *Kenmore Building Materials Ltd., Re* (1966), 9 C.B.R. (N.S.) 41 (Ont. C.A.), at 48; and *Philip Wood*, at 23 (*supra*)) was presented, with authority, by Counsel for Meridian and Odessa, at paras. 23 and 24 (see, similarly, para. 15 of Counsel for Meridian and Odessa's reply legal brief):

> An apparent circularity problem does arise, in that the trustee in bankruptcy has priority over the unregistered interests of Odessa and Meridian; Odessa and Meridian have priority over the [B of M] by virtue of the [B of M's] subordination; and the [B of M] has priority over the trustee in bankruptcy by virtue of it security. However, the solution to the apparent circularity has long been recognized in similar situations occurring in bankruptcy proceedings.
>
> R.M. Goode, *Legal Problems of Credit and Security*, at 98 (substituting the parties in this action [which I have "collected", and added my own "substitutions"] for Professor Goode's generic parties):
>
> > At all events, the problem is readily soluble through the principle of subrogation. Since [the ORRs] ha[ve] priority over [the B of M] by virtue of their agreement [between the B of M and Dynex, but to which the ORRs have rights by virtue of s. 40 of the PPSA], so that [the B of M] would to accountable to [the ORRs] for moneys received in the liquidation to the extent of [the B of M's] subordination, all the interests are satisfied by treating [the ORRs] as subrogated to [the B of M] to the extent necessary to give effect to the subordination agreement. That is to say, [the ORRs] will collect from the liquidator *in right of* [*the B of M*] the amount due to [the B of M], or such part of that amount as is necessary to satisfy [the ORRs claim].... That this is the correct solution was conceded in...
>
> *Re Woodroffe's...*
>
> *Re Bankruptcy of Rico...*
>
> Accordingly, ... the [B of M] is obliged to hold in trust for [the ORRs] the proceeds it realised from the oil and gas properties affected by [the ORRs'] overriding royalty interests to the extent of the value of those overriding royalty interests.

87 In *Rico Enterprises Ltd., Re* (1994), 24 C.B.R. (3d) 309 (B.C. S.C.), at 322 (para. 38), Tysoe, J. said (I have substituted the parties in this case for his generic terms):

> If [the B of M] subordinates its claim to the claim [5] of [the ORRs] without subordination to other claims ranking in priority to the claim of the [ORRs], it is my view that a distribution of the assets of the bankrupt debtor should be made as if there was no subordination, except to the extent that the share of the distribution to which the [B of M] would otherwise be entitled should be paid to the [ORRs]....

88 The concept of the subordinated creditor holding in trust and accounting to the senior creditor was also discussed by *Goode* - Problems, at 23 - 24, where he said:

> ...If the subordinated creditor enforces his security he holds what he receives on trust for the senior creditor up to the amount due to the latter or any lower sum fixed by the subordination agreement - but that in other respects each of the two [interest holders] retains exactly the same interest as he held before. No security interest is intended and none is created.

89 After a consideration of these passages and the arguments of both Counsel for the ORRs and the B of M, I accept this solution as the mechanics by which the ORRs are to recover what is due to them by the continuation of the subordination after bankruptcy.

90 In such circumstance the present value of the ORRs would have to be calculated and paid out to the ORRs by the B of M. The effect of this, from a simplistic lay perspective, would be that the subordination by the B of M, no matter what the status of Dynex, would ensure (I use this word in a lay, not legal, sense) that the ORRs did not rank behind the B of M in any case where Dynex, or the Trustee on its behalf, has an inability to pay the ORRs.

XII. Conclusion

91 Based upon the above analysis I find that the interests of the ORRs in bankruptcy are those of unsecured creditors, but that the subordination of the B of M to those interests prior to bankruptcy is not lost in bankruptcy, such that the B of M must account to the ORRs for the revenues earned from production until the sale of those interests to Channel Lake, and the value of those interests on the sale to Channel Lake.

92 Accepting the "Order Sought" provisions of Counsel for Meridian and Odessa (para. 25), I conclude and declare that:

> ...the bankruptcy of [Dynex] does not affect the subordination of the [B of M's] security interest to [the ORRs] overriding royalty and that the [B of M] continues to be obliged to hold in trust for [the ORRs] the proceeds it realized from the oil and gas properties to the extent of the value of [the ORRs] overriding royalty interests.

XIII. Other Arguments and Issues Considered - Position of Willness

93 Counsel for the Trustee, in the Trustee's legal brief, raised certain arguments against the status of Mr. Willness as a party to the proceedings. This issue was clearly out of the scope of the issues to be decided at the subject hearing, and notice was not given to Mr. Willness's Counsel, nor did he have an opportunity to respond in his legal brief (filed prior to the counsel for the Trustee's legal brief). As such this matter is not properly before the Court, and accordingly was agreed to be adjourned *sine die*.

XIV. Order and Costs

94 Counsel may speak to the Court to resolve any slips or lack of clarity (if any) in these Reasons (relatively hastily assembled), and, if necessary, to work out the terms of the formal Order resulting herefrom.

95 Counsel may also speak to costs at an appropriate time before the formal Order is taken out, by agreement or on motion, but, subject to any such further determination by the Court at the request of Counsel, the ORRs are entitled to their costs, in Schedule "C", in any event of any issues remaining in the cause.

Order accordingly.

Footnotes

1 References to paragraph numbers in relation to arguments, unless otherwise stated, or the context requires, are to the paragraphs of the party's written legal brief (or reply brief) filed prior to the hearing.

2 The fact that the same firm fulfils both the role of Receiver-Manager and Trustee makes it more difficult to keep separate the function being performed - while I will try to keep these separate, the reader should permit some inadvertent and unintentional confusion.

3 I do not believe it to be disputed in this case that funds otherwise earned by the ORRs up to the point of bankruptcy of Dynex will be accounted to them.

4 However, in the case at bar I note that "ranking" and "priority" are specifically referenced in the B of M's debenture as seen at para. 64 of the December 1995 Decision.

5 In the case at bar it is not the "claims" that are subordinated but the "interests".