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The Six-Minute Debtor-Creditor and Insolvency Lawyer 2012

Chaired by:

Fred Myers
Goodmans LLP

Michael Myers
Papazian, Heisey, Myers

October 24, 2012

Continuing Professional Development
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130 QUEEN STREET WEST, TORONTO, ON M5H 2N6
E-MAIL: CPD@LSUC.ON.CA
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October 24, 2012
9:00 a.m. to 12:00 p.m.

Donald Lamont Learning Centre
The Law Society of Upper Canada
130 Queen Street West, Toronto, ON

SKU # CLE12-01011

Schedule of Events

9:00 a.m. – 9:10 a.m. **Welcome and Opening Remarks from the Chairs**

Fred Myers
Goodmans LLP

Michael Myers
Papazian, Heisey, Myers

How To Advise Your Client When:

9:10 a.m. – 9:18 a.m. **A Motion for Summary Judgment is Pending – The Full Appreciation Test in Debtor-Creditor Actions**

Mikel Pearce
Papazian, Heisey, Myers

9:18 a.m. – 9:26 a.m.	**A Supplier Wants to Reclaim Goods Sold and Delivered under Section 81.1 of the *Bankruptcy and Insolvency Act*** Marc Wasserman *Osler, Hoskin & Harcourt LLP*
9:26 a.m. – 9:34 a.m.	**The Business is Struggling – Who to Pay?** Alan Hutchens Senior Director, *Alvarez and Marsal*
9:34 a.m. – 9:42 a.m.	**It Wants to Move Assets – How Late is Too Late?** Brandon Jaffe *Jaffe & Peritz LLP*
9:42 a.m. – 9:50 a.m.	**Your Client's Debtor is Depleting its Assets** Doug Bourassa *Chaitons LLP*
9:50 a.m. – 9:58 a.m.	**Click-Wrap, Browse Wrap, Saran Wrap? – What We All Need to Know About Online Contracts** Mark Hayes, C.S. Managing Director, *Heydary Hayes PC*
9:58 a.m. – 10:06 a.m.	**Spam, Spyware and Avoiding Going Splat** Peter Ruby *Goodmans LLP*
10:06 a.m. – 10:14 a.m.	**The Employer Goes Bankrupt – *WEPPA*, An Update** Stuart Brotman *Fasken Martineau DuMoulin LLP*

10:14 a.m. – 10:22 a.m.	**When Faced with a Repudiation** Michael Myers *Papazian, Heisey, Myers*
10:22 a.m. – 10:30 a.m.	**Go Ahead and Ask Us (Question and Answer Session)**
10:30 a.m. – 10:50 a.m.	**Coffee and Networking Break**
10:50 a.m. – 10:58 a.m.	**When it Wants to Demand Payment? What is Reasonable?** Philip Cho *Kronis, Rotsztain, Margles, Cappel LLP*
10:58 a.m. – 11:06 a.m.	**A Tenant Defaults – Is Distress Still a Viable Remedy?** Robert De Toni *Merovitz Potechin LLP*
11:06 a.m. – 11:14 a.m.	**It Wants to Buy a Former Grow-Op** Francesca Ricci *Gowlings Lafleur Henderson LLP*
11:14 a.m. – 11:22 a.m.	**Leasing Assets –True Lease Versus Finance Lease** Fay Sulley *Torkin Manes LLP*
11:22 a.m. – 11:30 a.m.	**It Wants You to Examine its Bankrupt Debtor** Pamela Clarke (Via Audio Only From Halifax) *Wickwire Holm*

11:30 a.m. – 11:38 a.m.	**A Creditor Wants to Seize an RRSP -- Is a Judgment Debtor's RSP Exigible in Ontario?** Mitch Vininsky Director *Duff & Phelps Canada Restructuring Inc.*
11:38 a.m. – 11:46 a.m.	**It Wants to Sell Realty Under a "Stalking Horse" Process** David Ullmann *Minden Gross LLP*
11:46 a.m. – 11:54 a.m.	**It Wants to Move from Receivership or Restructuring to Bankruptcy – Are There Risks?** Fred Myers *Goodmans LLP*
11:54 a.m. – 12:00 p.m.	**Go Ahead and Ask Us (Question and Answer Period)**
12:00 p.m.	**Program Ends**

Total CPD = 3 Substantive Hours

Jockeying For Position:

The Implications of *Indalex* on the Invocation of Bankruptcy to Reorder Priority of Distribution in Insolvency

Fred Myers
Jonathan Edge[1]

A. INTRODUCTION

The insolvency profession is eagerly awaiting the decision of the Supreme Court of Canada in *Re Indalex Ltd.*, on appeal from the Court of Appeal for Ontario.[2] The case deals with a number of controversial issues, including the rights of pensioners in insolvency proceedings, the interplay among federal bankruptcy and insolvency laws and provincial deemed trusts, the fiduciary duties of pension plan administrators, and the use of constructive trusts to reorder priorities in insolvency proceedings, to name but a few. One issue that has gone practically unnoticed is the decision of the Court of Appeal, confirming the view of the judge at first instance in the Ontario Superior Court of Justice, that the invocation of bankruptcy proceedings should not be used to deprive pensioners of priority claims established under provincial law.[3]

In Ontario, the *Pension Benefits Act* provides that employee and pensioner rights to have contributions paid into a pension plan, either for normal course funding or to top-up amounts accrued but not yet due on the winding up of the plan, are protected by "deemed trusts."[4] That is, provincial law deems the employer to be holding these contributions in trust for the pensioners. By deeming funds to be held in trust, provincial law aims to remove those funds from the reach of the employer's creditors. As discussed below, deemed trusts are one of a number of statutory devices by which various governments have sought to protect or enhance the priority of certain payments beyond the priority which federal law would assign to those payments in insolvency proceedings. Under federal insolvency law, payments with the highest priority are paid before those with lower ranking priority, until the funds of the debtor or its bankrupt estate are exhausted. By increasing the

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1 Fred Myers is a partner in the Litigation and the Insolvency & Restructuring Departments of Goodmans LLP. Jonathan Edge is a student-at-law with the firm. Goodmans LLP is counsel for Sun Indalex Finance LLC in the *Re Indalex Ltd.* matter discussed in this paper.

2 2011 ONCA 265 [*Indalex*].

3 *Ibid* at 183; *Indalex Ltd., Re*, 2010 ONSC 1114 at para 55.

4 RSO 1990, c P8 at 57(4)-(5).

priority of certain payments, governments seek to increase the chances of the payments being made despite the insolvency of the debtors. In most of the cases, governments have sought to increase the priority of claims due to the provinces themselves, for taxes, or to provincial authorities, like workers' compensation boards.

While historically, the case law dealt primarily with provincial efforts to create priorities to reorder the bankruptcy scheme of distribution, the federal government too created its own deemed trusts and statutory priorities to try to protect its own taxes and other entitlements. In 1992, after extensive consultations with the provinces, Parliament amended the *Bankruptcy and Insolvency Act*[5] to add what is now section 86 to the statute. The section provides that all Crown claims, both federal and provincial, rank as unsecured claims in bankruptcy unless they are secured and registered in accordance with the general law of the province prior to bankruptcy. Moreover, deemed trusts are expressly invalidated in bankruptcy, except for a small number of very particular deemed trusts relating to employee withholdings (tax, CPP, and EI and their provincial equivalents). Although the historical cases dealt mainly with provincial efforts to reorder bankruptcy priorities, since the 1992 amendments, the principal basis for bankrupting liquidated debtors has been to reduce the deemed trust priority of GST arrears under the *Excise Tax Act*.[6]

Prior to *Indalex*, it was not only clear that the provincial attempts to reorder priorities in bankruptcy were not constitutionally valid, but that it was wholly proper and appropriate for creditors and insolvency authorities (receivers, trustees in bankruptcy, etc.) to petition or assign debtors into bankruptcy proceedings under the federal BIA, for the specific purpose of ensuring that only the priorities mandated in the BIA applied on the distribution of the limited funds of the debtors. However, even with such unusual certainty in the law, some insolvency officials have been hesitant to move proceedings from restructuring into bankruptcy for fear that those creditors who might be denied pre-bankruptcy priority would complain that the process was not being governed with an even hand. In an insolvency proceeding, by definition, there is not enough money to pay all creditors. Receivers, trustees and other insolvency officials are supposed to seek to enhance recovery

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5 RSC, 1985, c B-3 [BIA].
6 RSC 1985, c E-15 at 222.

for all creditors and be impartial as to who receives funds from the estate.[7] By moving a case into the bankruptcy realm, Parliament's chosen priority scheme is applied. Is this simply a case of doing exactly what the federal law mandates and Parliament wants to be done; or is it an act that illicitly deprives one creditor or group of creditors in favour of others? Until *Indalex*, and as recently as 2010, the law was clear and undisputed. The Supreme Court of Canada and all levels of courts had repeatedly held that moving a case to the bankruptcy regime was completely proper and, in fact, was often required, so as to enable the funds realized on the liquidation of an insolvent debtor to be distributed in the manner provided by Parliament.[8] The Courts have routinely held that since it is Parliament that is constitutionally charged with responsibility over bankruptcy and insolvency, it is only right, fitting and proper for resort to be had to Parliament's scheme of distribution when liquidating an insolvent entity. Moreover, as this paper will demonstrate, the fact that resort to the bankruptcy regime was sought expressly for the purpose of reducing a priority held by another creditor's claim was repeatedly upheld as a legitimate and proper purpose for invoking bankruptcy proceedings.

In *Indalex*, with almost no explanation, the judge at first instance and the Court of Appeal both held that the bankruptcy scheme of priorities and distribution should not be invoked to deny pensioners the provincial priority of their deemed trusts. What does this do to future cases? In almost every restructuring process, absent a successful restructuring of the balance sheet (which is comparatively rare in Canada) there comes a time when the day is done; the business is sold; and only the proceeds (i.e. money) remains awaiting distribution to creditors. This is, in fact, the very purpose of receivership and statutory liquidation proceedings – to maximize the proceeds realized on the debtors' assets. Now, when a receiver or liquidator is holding proceeds that are insufficient to pay all creditors and questions to whom the available funds should be paid, do they resort to the federal scheme of distribution and priorities or must the provincial and pre-bankruptcy laws be kept in place? What is the demarcation of when the bankruptcy system can be used and when does the non-

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7 In *Confederation Treasury Services Ltd., Re*, 1995 CanLII 7386 (ONSC), Farley J. states, "The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate."

8 *Re Ivaco Inc.*, (2006) 83 OR (3d) 108 [*Ivaco (ONCA)*]; *Ted Leroy Trucking [Century Services] Ltd., Re.*, 2010 SCC 60 [*Century Services*].

bankruptcy system apply? In the jockeying for position by creditors, who crosses the line first; who places; who shows; and who is out of the money.

Before *Indalex*, the answer was always to be found by applying the priorities mandated by the bankruptcy scheme of distribution. The answer today may be in doubt. Hopefully, after the decision of the Supreme Court of Canada is released, whichever way the Court may rule, there will once again be much needed clarity as to which rules apply so that the finish line will be readily visible to all.

B. TREATMENT OF PROVINCIALLY LEGISLATED PRIORITIES UNDER THE BIA

The facts in *Indalex* demonstrate the potential for conflict between provincial and federal priorities in restructuring and bankruptcy proceedings. This section will provide a brief overview of the judicial treatment of such conflicts. It will depict an ongoing struggle between the provinces and the federal Parliament to dictate the allocation of assets of an insolvent entity and will include an historical examination of how Canadian courts have chosen to address this issue. Importantly, it will serve to highlight the opportunity created within the legislation and associated jurisprudence for creditors to seek to use bankruptcy to reorder the priorities of distribution in their favour.

The treatment of provincially enacted priorities under federal bankruptcy legislation has been a topic of debate for over 50 years. In 1949, Parliament enacted a new version of *The Bankruptcy Act*,[9] which provided for certain "preferred creditors," including landlords of bankrupt tenants. Prior to 1949, the Act had been silent on the status of landlords, who were considered "secured creditors" under provincial legislation. Secured creditors were then and continue to be entitled to enforce their security independent and ahead of the claims of creditors in bankruptcy.[10] As the bankruptcy distribution scheme permitted the status of secured creditors to be determined by provincial legislation, prior to the 1949 amendments landlords could exercise their rights of distress as secured creditors. Several early cases dealt with the question of whether landlords could still be considered secured creditors according to provincial legislation, or whether they were to be considered lower

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9 SC 1949, c 7 (2nd Sess) [1949 Act].
10 BIA, *supra* note 5 at 136.

ranking preferred creditors according to the explicit text of the 1949 Act. In *Re Radioland Ltd.*,[11] the Saskatchewan Court of Appeal held that a landlord was a preferred creditor due to the supremacy of the federal provisions. This decision was cited by the Supreme Court of Canada in the 1962 case of *Re Gingras automobile Ltée*,[12] which also relegated the claim of a landlord to preferred status and therefore lower in priority than secured creditors. The Ontario Court of Appeal interpreted the 1949 Act similarly in *Re Polycoating & Films Ltd.*, holding that the "combined effect of ss. 95 and 100 of the Bankruptcy Act is to subordinate the full amount of a landlord's claim to the rights of secured creditors."[13] It was within this context that the invocation of bankruptcy by creditors to reorder priorities first arose.

While these early cases laid the foundation of the modern approach to disputes involving conflicting provincial and federal priorities, the substance of the contemporary framework was developed in a series of Supreme Court of Canada cases known at the "quartet." These four cases arose out of disputes over the treatment of provincially-enacted priorities in favour of the Crown.

In *Quebec (Deputy Minister of Revenue) c. Rainville*,[14] the trustee in bankruptcy sought to cancel a priority on the bankrupt's immovable property registered under a provincial sales tax statute. Under the 1949 Act, Crown claims were listed as preferred claims, similar to those of landlords. The Supreme Court of Canada held that the 1949 amendments had created an expanded scheme of distribution which specifically addressed the priority of such claims in bankruptcy. Pigeon J. reasoned that "Parliament intended to put all debts to a government on equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority."[15] As such, the claim of the provincial Crown was held to be a preferred claim according to the scheme of the bankruptcy statute, and not a secured claim as provided for in the provincial legislation.

The reasoning of the Supreme Court of Canada was followed closely in *Deloitte, Haskins & Sells Ltd. v. Alberta (Worker's Compensation Board)*.[16] In this case, provincial legislation established a

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11 (1957) 36 CBR 158.
12 (1962) 4 CBR (N.S.) 123 [*Gingras*].
13 (1965) 8 CBR (N.S.) 163 [*Polycoating*] at para 32.
14 [1980] 1 SCR 35 [*Rainville*].
15 *Ibid* at para 14.
16 [1985] 1 SCR 785 [*Deloitte*].

secured charge upon the property of the bankrupt for unpaid assessments under a worker's compensation statute. Again, at issue was whether the provincial legislation established worker's compensation assessments as a secured claim to be paid ahead of the bankrupt's creditors or whether the Worker's Compensation Board assessment claim had to be interpreted as a preferred claim under the priority scheme in the 1949 Act. Citing the decision of Pigeon J. in *Rainville*, the majority decision ruled that the provincial charge was not a secured claim, as it was specifically contemplated under a provision of the federal priorities scheme. The judgment states, "Mr. Justice Pigeon made it abundantly clear that priorities of provincial claims must be determined in accordance with s.107(1) priorities of the Bankruptcy Act notwithstanding any statutory preference to the contrary."[17] Wilson J. later added, "while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s.107(1) determined the status and priority of the claims specifically dealt with in the section."[18] Upon this reasoning, the provincial charge was deemed a preferred claim under the scheme of distribution priorities.

The third case of the quartet, *Federal Business Development Bank v. Commission de la santé et de la sécurité du travail,*[19] also involved a provincial charge on worker's compensation assessments. However, the question before the Supreme Court of Canada was whether the worker's compensation authority could enforce its provincial priority when another secured creditor sold the bankrupt debtor's property under its own security under provincial law wholly apart from the debtor's bankruptcy proceedings. Lamer J. (as he then was) followed the previous decisions in *Rainville* and *Deloitte* in finding that the worker's compensation authority could only enforce its preferred creditor status once there was a bankruptcy, regardless of how the debtor's property was sold. He stated:

> ... I feel that the decisions in [*Rainville*] and *Deloitte* are conclusive as to the fate of this appeal. These cases stand for the following proposition: in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied. If a bankruptcy occurs, the order of priority is determined by that ranking in s.107 of the Act, and any debt mentioned in that provision must therefore be given the specified priority.[20]

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17 *Ibid* at para 36.
18 *Ibid* at para 39.
19 [1988] 1 SCR 1061 [*FBDB*].
20 *Ibid* at para 20.

Thus, the first three cases of the quartet firmly established that although provincial statutes may create secured interests outside of the priority scheme of bankruptcy legislation, once a bankruptcy occurs any provincial claims contemplated within the bankruptcy scheme will be confined to their priority in bankruptcy.

The fourth, and arguably most important, case of the quartet involved judicial treatment of the provincial legislative response to the previous three cases. In *British Columbia v. Henfrey Samson Belair Ltd.*[21] the Supreme Court of Canada addressed the creation of provincial deemed trusts for Crown claims in the bankruptcy context. Section 67 of the BIA removes assets held in trust from the scope of the bankrupt's distributable property. Therefore, the creation of a trust coming within this section would have provided priority to Crown claims through the circumvention of the bankruptcy scheme of priorities. A majority of the Supreme Court of Canada held that a statutory deemed trust created under provincial legislation was not a valid trust of the purposes of the BIA but was, instead, a preferred Crown claim under the scheme of distribution. Speaking for the majority, McLachlin J. (as she was then) wrote:

> To interpret s.47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the Bankruptcy Act and to invite a different scheme of distribution on bankruptcy from province to province... The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act.[22]

This authoritative judgment established that for a trust asset to be excluded from the property divisible among a bankrupt's creditors, it must arise under general principles of law and not by statutory deeming. If the funds subject to the provincial deemed trust are comingled with the debtor's other funds, the deemed trust will not meet the requirements of a trust under general law and the claim will be governed by the bankruptcy scheme of priorities. The decision in *Henfrey Samson Belair* thus prevented the circumvention by the provinces of the priorities established by Parliament within the federal bankruptcy legislation.

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21 [1989] 2 SCR 24 [*Henfrey Samson Belair*].
22 *Ibid* at paras 42-48.

Provincial circumvention of the bankruptcy scheme of distribution was also prevented by the Supreme Court of Canada in *Husky Oil Operations Ltd. v. Minister of National Revenue.*[23] This case involved an attempt by a provincial authority to employ the concept of "setoff" to obtain priority. The majority held that, even if it does not intend to intrude into the established scheme of priorities in bankruptcy, a province may not do indirectly what it cannot do directly. The Court thus found the provincial provisions to be in operational conflict with the bankruptcy scheme of distribution and hence invalid.

The principles espoused in the quartet, and summarized succinctly in *Husky Oil*, have been addressed in countless other cases. For the purposes of this paper, it is sufficient to note that they have withstood the test of time and were reaffirmed by the Supreme Court of Canada as recently as the 2010 decision of *Century Services.*

As noted above, in 1992, the bankruptcy regime for Crown claims underwent a fundamental change in an effort to stem the ongoing efforts of the provinces and certain federal departments to find ever more creative ways to avoid the statutory scheme of distribution under the BIA. Crown claims are now specifically classified as unsecured claims unless secured by a law of general application or registered according to the provisions of the BIA.[24]

One perhaps unintentional corollary of the change in priority scheme as creditors enter bankruptcy is that it creates incentives that can affect restructuring proceedings. In cases where a liquidation (whether going concern or not) is likely, creditors understand that the BIA scheme of distribution will provide different priorities than the pre-existing non-bankruptcy scheme. As was resolutely communicated in the quartet, once bankruptcy occurs, any provincial priorities in conflict with the modern scheme of distribution of the BIA are rendered inoperable and, apart from the few specifically protected deemed trusts, Crown claims will rank as unsecured claims.

When should creditors be able to rely on their provincial and federal non-bankruptcy priorities and when will creditors be entitled to rely on the bankruptcy scheme? If the position of a creditor is improved by relegating a Crown or other claim to preferred or unsecured status in bankruptcy, then

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23 [1995] 3 SCR 453 [*Husky Oil*].
24 BIA, *supra* note 5 at 86.

that creditor may have an incentive to push the debtor into bankruptcy in order to protect the creditor's own recovery. Might this incentive upset a restructuring in progress and be contrary to the interests of creditors generally? Might a premature bankruptcy cost jobs and destroy a going concern that could otherwise be saved by a liquidating going concern sale of the enterprise? The transition from restructuring proceedings to bankruptcy and the limitations imposed on a creditor seeking to invoke bankruptcy for the purpose of reordering priorities in accordance with the principles laid down in the quartet is the focus of the balance of this paper.

C. INVOKING BANKRUPTCY TO REORDER PRIORITIES UNDER THE *BIA*

The previous section of this paper provided a history of the judicial treatment of provincially created priorities conflicting with those established within the BIA. It depicted an ongoing struggle for supremacy between the provinces and the federal Parliament to dictate the scheme of priorities in bankruptcy. While provinces retain their constitutional power to legislate for liens, deemed trusts and security, the Supreme Court of Canada has repeatedly held that, when in conflict with a provision of the federally-enacted BIA, the doctrine of paramountcy necessitates resolution in favour of a common federal scheme. Thus, once bankruptcy is invoked, the distribution scheme of the BIA reigns supreme even when assets are realized wholly outside of bankruptcy under creditors' security. Any priorities established by provincial law which run contrary to the bankruptcy scheme are simply inoperative. Although the same constitutional restrictions do not apply to federal statutory provisions federally created deemed trusts have generally also been reduced to unsecured status under the provisions of the BIA.

The supremacy of the BIA distribution scheme provides much needed certainty to the distribution process but also creates powerful incentives amongst creditors. During a restructuring, particularly one with a limited chance of success, creditors may find their interests better served within the distribution scheme of the BIA and prefer the invocation of bankruptcy to ongoing efforts at reorganization. As will be demonstrated, such a shift typically requires a lift of the stay imposed

under *Companies' Creditors Arrangement Act*[25] proceedings and an order of bankruptcy under the BIA. Both orders require judicial approval and are subject to judicial discretion.

This section will address the issue of proceedings that are brought to bankrupt a debtor expressly for the purpose of reordering priorities. It will review the development of the applicable jurisprudence, and will identity the contemporary statutory basis for such an order. Lastly, it will outline those considerations which will inform judicial discretion to stay CCAA proceedings and reorder priorities through the granting of a bankruptcy order.

1. Historical Development of Relevant Jurisprudence

Jurisprudence addressing the subject of invoking bankruptcy for the purpose of reordering priorities has been clear and consistent. Over a forty year period, Canadian courts have provided unwavering support to the notion that it is both equitable and proper for creditors, even those with secured claims, to invoke bankruptcy to reorder priorities to their benefit.

Modern judicial support for this position is based upon a series of cases involving conflicting claims in bankruptcy between landlords and secured creditors under the 1949 Act. The issue was first addressed in *Re Develox Industries Limited*,[26] which involved a disputed claim between a landlord and a secured chattel mortgagee as to priority over the assets of a bankrupt tenant. Houlden J. (as he then was) noted that as a result of the decisions of the Court of Appeal for Ontario in *Polycoating* and Supreme Court of Canada in *Gingras*, provincially created rights of distress of a landlord were subordinate to the claims of a secured creditor once bankruptcy was invoked. Addressing the main issue in contention, he held that it was not improper to seek a bankruptcy order for the purpose of causing the landlord's distress right to be defeated in bankruptcy. Relying on the Ontario Supreme Court case *John Forsyth Co. v. Thorburn*,[27] Houlden J. stated that in inducing bankruptcy to reorder priorities in its favour, "the chattel mortgagee has merely been attempting to assert the rights given to it by law."[28]

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25 RSC, 1985, c C-36 [CCAA].
26 [1970] 2 OR 199 [*Develox*].
27 [1964] 1 OR 450 [*John Forsyth*].
28 *Develox, supra* note 26 at para 8.

While this position has withstood the test of time, the Court's rationale was not fully developed. In *John Forsyth*, Donnelly J. ruled in favour of a chattel mortgagee who, knowing that his security was invalid, seized and sold the chattel subject to the mortgage. This decision relied heavily on the nineteenth century case of *Cookson v. Swire*,[29] where a chattel mortgagee seized and sold the goods at a discount to the son of the defaulting debtor, thus defeating an execution by a third party creditor and keeping those goods in the possession of the family of the dying debtor. Lord Blackburn held "there is nothing whatever illegal, there is nothing immoral, there is nothing improper in that."[30] Based upon this ruling, Donnelly J. held in *John Forsyth*, "if the procedure adopted in the *Cookson* case was highly moral and right, I cannot criticize the defendant in this action."[31] In relying on that judgment, Houlden J. stated in *Develox*, "similarly, in this case I can find nothing improper in what the chattel mortgagee has done."[32] It is from the questionable comparability and internal logic of these early cases that the modern approach to the reordering of priorities in bankruptcy originates.

Out of *Develox* sprang a series of cases in the late 1970s that served to consolidate the judicial approach to this issue. Each involved conflicting claims between a secured creditor protected under the federal bankruptcy legislation and the provincial rights of distress of a landlord. In the oft cited case *Re Gasthof Schnitzel House Ltd. v. Sanderson*,[33] Ruttan J. of the Supreme Court of British Columbia held:

> That the secured creditors have urged on the filing of this assignment by the bankrupt does not mean that the application is for an improper purpose. Both parties have merely been jockeying for position, each hoping to enforce the legal remedies given to them by law.

This decision was subsequently relied upon in *Re Koprel Enterprises Ltd.*[34] In that case, Legg J., also of the Supreme Court of British Columbia, held on the authority of *Gasthof Schnitzel House* and *Develox* that there was nothing improper in a secured creditor promoting a bankruptcy in order to defeat the priority of a landlord and to thereby rank ahead in the scheme of distribution. A similar

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29 (1884) App Cas 653 [*Cookson*].
30 *Ibid* at para 667.
31 *John Forsyth, supra* note 27 at para 44.
32 *Develox, supra* note 26 at para 8.
33 [1978] WWR 756 [*Gasthof Schnitzel House*].
34 (1978) 27 CBR (NS) 22.

finding was made by Henry J. of the Ontario Supreme Court in *Re Harrop of Milton Inc.*,[35] where it was held that "it is not improper for a secured creditor to file a petition or procure an assignment in bankruptcy for the purpose of defeating a landlord's priority, even though no benefit accrues to the unsecured creditors."[36] However, Henry J. added that "I am obliged to follow these authorities in this case, notwithstanding that I have some misgivings."[37]

By the early 1980s, the law was, in the words of C.H. Morawetz, Q.C., "quite settled that it is not improper for a secured creditor whose rights to the chattels of the bankrupt on the leased premises conflict with a distraint against the same chattels asserted by the landlord to promote a bankruptcy in order to defeat the priority otherwise afforded the distress of a landlord and to permit a security holder to rank ahead of the landlord."[38] In *Re Beverley Bedding Corp.*, Gray J. of the Ontario Supreme Court relied upon the forgoing authorities, and found nothing improper in the motives of the secured creditor petitioning a debtor into bankruptcy to reorder priorities. However, he too raised doubts concerning the soundness of the precedent in stating "I am very sympathetic with the position of the landlord on this application but, of course, it goes without saying that I must decide the matter on the law as I find it."[39] Thus, while precedent has been zealously enforced, judges did not always do so with relish.

Any judicial misgivings, however, were firmly quashed by the 1982 judgment in *Re Black Brothers*.[40] McLachlin J. (as she was then) of the Supreme Court of British Columbia wrote a powerful statement in support of the precedent, stating:

> 6 One purpose — usually the main purpose — of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. However, another purpose may be to permit creditors to avail themselves of provisions in the Act which may enhance their positions, for example, by giving them certain

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35 (1979) 29 CBR (NS) 289 [*Harrop of Milton*].
36 *Harrop of Milton, supra* note 35 at para 20.
37 *Ibid* at para 21.
38 (1982) 40 C.B.R. (N.S.) 95 [*Beverley Bedding*] at Annotation (retrieved from WL Can on August 31, 2012).
39 *Ibid* at para 16.
40 (1982) 41 CBR (NS) 163 [*Black Brothers*].

> priorities which they would not otherwise enjoy. The latter purpose, on the authorities, is a proper and sufficient basis for granting an order.[41]

On this reasoning, she granted an order for bankruptcy to a secured creditor against the debtor, thus giving it priority over certain conflicting statutory claims. This passage was subsequently cited in cases involving landlord rights of distress throughout the remainder of the 1980s and early 1990s. Among these cases was *Re Fresh Air Fireplaces*,[42] confirmed by the Alberta Court of Appeal in 1987.[43]

During this period, a number of other landlord rights of distress in bankruptcy cases were decided on the authorities considered in *Black Brothers*. These included *Re Public's Own Market (Prince George) Ltd.*[44] and the appellate level decisions in *Triona Investments Ltd. v. Smythe, McMahon Inc.*,[45] and *Re Serabec Ltée*.[46] In *Re Serabec*, the Quebec Court of Appeal stated that "although the parties were effectively 'playing chess with each other', there was nothing illegal or improper in the result."[47]

In the late 1980s, however, the subject matter of the disputed claims involving this precedent began to change. No longer were cases solely concerned with the rights of landlords *vis-à-vis* secured creditors. Instead, as already discussed in the previous section, a series of provincially created priorities in the form of liens, deemed trusts and secured interests, came into conflict with the federally legislated bankruptcy distribution scheme. Unpaid Crown remittances and employee claims to taxes, worker's compensation, unpaid wages, vacation pay, GST and pension contributions were the subject of judicial examination throughout the early 1990s.

The most important case, which contains the only analysis of the Supreme Court of Canada directly on point concerning the practice of invoking bankruptcy to reorder priorities, is *FBDB*. In that case, the question before the Court was whether federal or provincial law determined the order of

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41 *Ibid* at para 6.
42 (1986) 62 CBR (NS) 39 (ABQB).
43 (1987) 65 CBR (NS) 21.
44 (1984) 54 CBR (NS) 222 (BCSC).
45 (1988) 67 CBR (NS) 281 (BCCA) [*Triona Investments*].
46 (1985) 61 CBR (NS) 97 (QCCA) [*Serabec*].
47 *Ibid* at Annotation (retrieved from WL Can on September 9, 2012).

priorities of distribution when a secured creditor attempted to liquidate its security outside of the bankruptcy proceedings. According to the Hon. Y. Goldstein, "of greatest significance, of course, is the statement by Lamer J. that, effectively, uniformity of practice across Canada in bankruptcy matters is a desirable object and one to be achieved even at the price of making use of the Bankruptcy Act for the sole purpose of causing the priorities of s.107 to avail in any insolvency situation."[48] Speaking in obiter, Lamer J. stated specifically:

> 20 It is true that such a solution may encourage secured creditors to bring about the bankruptcy of their debtor in order to improve their title. On the other hand, this solution has obvious advantages... As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.[49]

This statement of the Supreme Court of Canada thus further reinforced the prevailing precedent allowing the invocation of bankruptcy to reorder priorities. However, instead of characterizing such an action as creditors "playing chess" or "jockeying for position," it portrays such a tactic as entailing advantages to the bankruptcy system generally through the provision of certainty and consistency across the country.

Arguments for the contrary position have not found favour. Reference was made above to the principle argument, that using bankruptcy to deprive a creditor of its provincial priority and render the creditor a preferred creditor under the BIA only helps the other secured creditors and leaves the unsecured creditors' claims primed by the preferred claim. Yet secured creditors' priority is not governed by the BIA, but occurs due to the statement in section 136 of the BIA that the scheme of distribution in bankruptcy is "subject to the rights of secured creditors".[50] That is, Parliament leaves provincial secured claims to be resolved generally under provincial law and section 72 of the BIA reinforces the supremacy of provincial law except in case of express conflict with the BIA. The BIA is focused on creating a national scheme for the *pro rata* sharing among unsecured creditors. Why should the BIA be concerned with driving a result among two secured creditors that occurs outside of the BIA and offers no benefit to the general body of unsecured creditors? In *Abraham v.*

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48 *FBDB, supra* note 19 at Annotation (retrieved from WL Can on September 4, 2012)
49 *Ibid* at paras 19-20.
50 BIA, *supra* note 5 at 136(1).

Canadian Admiral Corp. (Receiver of),[51] Wilson J. of the Ontario Court (General Division) adopted this argument to protect the provincial rights of employee claimants against a bank secured creditor. She reasoned that since only vacation pay was referenced specifically in the BIA list of preferred claims, only vacation pay deemed trusts were invalidated in bankruptcy. She would have upheld pension and wage deemed trusts.[52] The case was overruled on appeal on other grounds without mention of this little-known and singular decision to the contrary.[53]

Shortly after the *FDBD* decision was released, the British Columbia Court of Appeal addressed the issue of whether a secured creditor bank could petition a debtor into bankruptcy to enhance its own priority over the enhanced statutory priority of unremitted sales tax, worker's compensation assessments, unpaid wages and vacation pay, and unremitted employee deductions for income tax in *Bank of Montreal v. Scott Road Enterprises Ltd.*[54] The Court noted that the bankruptcy order was sought "solely for the purpose of bringing into effect the scheme of distribution in the Bankruptcy Act... and thus destroying the priority which other creditors would otherwise have had."[55] In a separate decision, Wallace J.A. found the judgment in *FBDB* to be sufficient to decide the appeal, and found in favour of issuing the bankruptcy order to the secured creditors. However, in the majority decision, Esson J.A. found "no decision directly on point which is binding on this court."[56] After a careful review of the decisions in *Black Brothers, Triona Investments* and *Harrop of Milton*, Esson J.A. then turned to two contemporary academic articles on the subject, *Bankruptcy in a Receivership* by Alan Kemp-Gee[57] and *The Use of the Bankruptcy Act by Secured Creditors* by

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51 (1993) 20 CBR (3d) 257 at para 203.

52 However, the Supreme Court of Canada decisions in *Henfrey Samson Belair* and *Husky Oil* seem to have determined that all provincial deemed trusts fail in bankruptcy in addition to Crown deemed trusts that are now invalidated (with limited exceptions) by section 86 of the BIA. See *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, (2005) 74 OR (3d) 382 (ONCA).

53 *Abraham v. Canadian Admiral Corp. (Receiver of)*, (1998) 2 CBR (4th) 243 (ONCA).

54 (1989) 73 CBR (NS) 273 [*Scott Road*].

55 *Ibid* at para 1.

56 *Ibid.*

57 Alan Kemp-Gee, "Bankruptcy in a Receivership" (1984), 1 Nat Insolvency Rev 23.

Andre Giroux.[58] Both authors make the argument that the invocation of bankruptcy by secured creditors to reorder priorities "seems to contravene the spirit of the legislation."[59]

In response to the submissions of the appellant, the Court was sympathetic to the argument that invoking bankruptcy for the purpose of reordering priorities is "contrary to the spirit, the purpose, and the object of the Bankruptcy Act, and is so clearly inequitable in its consequences as to provide 'sufficient cause' for refusing to make the order."[60] In fact, Esson J.A. stated that, "were it not for one matter to which I have not yet referred, I would conclude that the facts and circumstances to which I have referred constitute 'sufficient cause' why not order ought to be made, and that the petition ought to have been dismissed on that ground."[61] That decisive matter, Esson J.A. later explained, was the Supreme Court of Canada ruling in *FBDB*. Referring to the statement of Lamer J. in *obiter*, Esson J.A. explained:

> 37 ... The paragraph represents a considered dictum of the court in relation to a question, essentially one of policy, as to the effect to be given to a federal statute. It is a dictum which, in my view, we are bound to follow and to apply by holding that such a circumstance is not sufficient cause to refuse to grant the receiving order. If the present state of the law is unsatisfactory, it is for Parliament to remedy it.[62]

Thus, while the Court of Appeal was divided in its opinion of whether the decision in *FBDB* was binding upon the issue in the case, both judgments in *Scott Road* are clearly deferential to the content of *FBDB*. In the result, the Court allowed the bankruptcy order to stand.

Following *Scott Road*, the law as found by the Supreme Court of Canada was applied again by the British Columbia Court of Appeal in *Bank of Montreal v. Titan Landco Inc.*,[63] the Ontario Court (General Division) in *Toronto Dominion Bank v. Usarco Ltd.*[64] and the Ontario Court of Justice in *Re Selox Inc.*[65] These cases involved the claims of secured creditors in conflict with Crown capital

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58 Andre Giroux, "The Use of the Bankruptcy Act by Secured Creditors" in *Bankruptcy – Present Problems and Future Perspectives*, Meredith Memorial Lectures (1985), McGill University.
59 Kemp-Gee, *supra* note 57 at 29.
60 *Scott Road, supra* note 54 at para 33.
61 *Ibid* at para 34.
62 *Ibid* at paras 34-37.
63 (1990) 78 CBR (NS) 231.
64 (1991) 42 ETR 235 [*Usarco*].
65 (1992) 14 CBR (3d) 285.

tax liens, deemed trusts for unfunded pension plans, and unperfected security under the PPSA, respectively. In *Boeing Co. v. Island Jetfoil Corp.*,[66] McKenzie J. stated, "It is trite law that a secured creditor may utilize the Bankruptcy Act to reorder priorities, vis-à-vis the Crown and/or landlords."[67] As such, with the exception of brief considerations in cases such as *Re 699845 Ontario Ltd.*[68] and *Re 176871 Canada Inc.*,[69] there is a significant gap in the jurisprudence addressing this issue. For over a decade, there were no meaningful appellate level decisions on the subject of invoking bankruptcy for the sole purpose of reordering priorities.

However, in 2006 the Court of Appeal for Ontario released its decision in *Ivaco (ONCA)*, providing clear guidance on the considerations shaping judicial discretion to order a transition from restructuring to bankruptcy. The decision upheld the lower court judgment of Farley J. which stated, "once a creditor has established the technical requirements of s.42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made."[70] Farley J. further observes, borrowing from his decision in *Usarco*, that:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA [*sic*] which may enhance their position by giving them certain priorities which they would not otherwise enjoy.[71]

In upholding the trial judgment, a unanimous panel of Laskin, Rosenberg and Simmons JJ.A. held that, "the petitioning creditors have met the technical requirements for bankruptcy... their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order."[72]

Thus, the legal landscape prior to the release of the Court of Appeal's judgment in *Indalex* was clear and consistent. Secured creditors were entitled to invoke bankruptcy with the sole purpose of

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66 (1990) 3 CBR (3d) 41 (BCSC).
67 *Ibid* at para 36.
68 (1997) 48 CBR (3d) 32 (ONCJ).
69 [1996] RJQ 2865 (QCCA).
70 *Re Ivaco Inc.* (2005) 12 CBR (5th) 213 (ONSC) [*Ivaco (ONSC)*].
71 *Usarco*, *supra* note 64 at para 11.
72 *Ivaco (ONCA)*, *supra* note 8 at para 76.

availing themselves of the favourable distribution scheme of federal bankruptcy legislation. Numerous cases demonstrate that the purpose of seeking an order in bankruptcy is not irrelevant in the exercise of judicial discretion. However, over the past 40 years, from *Develox* to *Ivaco (ONCA)*, Canadian courts at all levels have all held that it is proper to seek bankruptcy for the purpose of reordering priorities.

2. Contemporary Legislative Framework

Nowadays, the invocation of bankruptcy to reorder priorities is most commonly pursued during CCAA proceedings, often by secured creditors seeking to subordinate provincial deemed trusts or federal GST claims. As most restructuring cases involve a going concern sale and distribution of funds, at some point in the process, a secured creditor is likely to seek a bankruptcy and avail itself of the scheme of distribution contained in s.136 of the BIA.

This transition from restructuring under the CCAA to bankruptcy under the BIA is a two step process. First, the creditor must typically lift the stay of proceedings, generally ordered upon the initial application under s.11.02 of the CCAA. The purpose of this stay of proceedings is to maintain the *status quo*, and prevent creditors from bringing actions against the debtor while it attempts to restructure its affairs. Thus, for a creditor to seek an order in bankruptcy, it must first convince the court to exercise its general discretion under s.11 of the CCAA and issue a partial lifting of any applicable stay of proceedings. Second, once a creditor has obtained a lifting of the stay of proceedings under the CCAA, it can then seek an order in bankruptcy, often from the same judge, pursuant to s.43 of the BIA. This order is subject to judicial discretion under s.43(7), which permits the dismissal of an application for bankruptcy for sufficient cause. Thus, under both s.11 of the CCAA and s.43 of the BIA, the creditor must convince the court that a transition to bankruptcy is appropriate.

As has been illustrated through an historical examination of the jurisprudence in this area, judges have long been willing to exercise their discretion and make orders for the sole purpose of reordering priorities and subordinating provincially enacted privileges. This is not true, however, for number of purposes which have been judicially characterized as improper motives for a transition to bankruptcy. Applications for a bankruptcy order to rid a business of a competitor, oust the president

of the debtor company, use the bankruptcy court as a collection agency or for extortion, harass the debtor, or terminate a contract have all been denied and held to be for improper purposes.[73] Conversely, the previous review of the applicable case law has demonstrated that courts across the country, and at all levels, have consistently, though not always wholeheartedly, endorsed the reordering of priorities as a proper purpose.

However, recent decisions have begun to delve deeper into the statutory basis for an order invoking bankruptcy for the benefit of a secured creditor. While most decisions continue to conflate the discretionary authority to lift a stay under the CCAA with the judicial authority to dismiss an application for an order in bankruptcy under the BIA, or simply address one of the two issues, recent jurisprudence has attempted a more thorough analysis of the two provisions. Instead of simply accepting precedent based upon its longevity, courts are now taking a number of factors into consideration in determining how to exercise the discretion granted to them by statute.

In *Ivaco (ONSC)*, Farley J. of the Ontario Superior Court of Justice laid out several considerations relevant to the judicial decision to permit a transition from restructuring to bankruptcy. These considerations were subsequently supported by the Court of Appeal for Ontario and are summarized by Houlden and Morawetz as follows:

> The court will grant an order to transfer from CCAA to BIA proceedings where: (1) the majority of the debtor's operational assets have been sold; (2) no reorganization is possible; (3) the compromise of claims may be adequately effected under the BIA regime; (4) the creditor wishes to proceed forthwith with the bankruptcy instead of letting the application languish for a prolonged period of time; (5) the debtor is essentially in a distribution of proceeds mode; and (6) on balance, there is no relative benefit to the stakeholders to maintain the CCAA proceedings...[74]

However, discussion of the extent of and limitations upon judicial discretion in both the CCAA and BIA is not limited to cases involving the invocation of bankruptcy for the reordering of provincial priorities. A thorough examination of these issues was also conducted recently by the Supreme Court of Canada in *Century Services* which involved a reordering of federal non-bankruptcy priorities. In

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[73] Houlden & Morawetz, *Annotated Bankruptcy and Insolvency Act*, at D§16 – Application Filed for an Improper Purpose (retrieved from WL Can on September 5, 2012).

[74] *Ibid* at E§91 – Companies' Creditors Arrangement Act (retrieved from WL Can on September 10, 2012).

that case, Deschamps J. held that, "Appropriateness [of an order] under the CCAA is assessed by inquiring whether the order advances the policy objectives underlying the CCAA."[75] As already discussed, the purpose of bankruptcy legislation as "a vehicle available to distribute the assets of a debtor equitably amongst the unsecured creditors."[76] In *Century Services* , the Supreme Court of Canada applied the decision of the Ontario Court of Appeal in *Ivaco (ONCA)* including going so far as to endorse the suggestion that once a debtor's assets have been fully realized upon, the resulting distribution of funds **must** occur under the BIA in accordance with BIA priorities.

Despite the growing jurisprudential examination of the issues underlying judicial discretion to grant an order in bankruptcy for the purpose to reordering priorities, the Court of Appeal for Ontario in *Indalex* added little to the discussion, while reaching a surprising conclusion. Gillese J.A., speaking for a unanimous panel, states only that "a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation."[77] While the case may be confined to its facts for a number of reasons that are not germane here, the breadth of this holding conflicting, as it does, with decades of case law on the subject, is difficult to justify.

D. CONCLUSIONS

The original aim of this paper was to rationalize the state of the law in Canada regarding the invocation of bankruptcy to reorder priorities, based upon *Century Services* and the upcoming decision in *Indalex*. However, without the decision of the highest court, we are constrained to trying to understand the decision of the Court of Appeal.

In *Century Services*, Deschamp J. noted the risk that allowing provincial priorities to remain applicable in restructuring proceedings would create incentives for secured creditors to seek to invoke bankruptcy at an early stage in order to defeat the provincial priorities or federal deemed trusts. In *Indalex*, Gillese J.A. wrote that she did not see the risk of bankruptcy as creating incentives on debtors to act contrary to their own interests in restructuring proceedings by going bankrupt at an

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75 *Century Services, supra* note 8 at para 70.
76 *Scott Road, supra* note 54 at para 29.
77 *Indalex, supra* note 2 at para 183.

inapt time.[78] However, she ignored that the relevant incentive is not on *debtors* but the incentive for secured *creditors* who wish to prevent other creditors with voidable claims from being paid ahead of or *pari passu* with the secured creditors. If a secured creditor fears that it may have to share its recovery with a creditor whose claim can be reversed in bankruptcy, the secured creditor will seek to bankrupt the debtor before the completion of the restructuring to prevent such payments. This adverse outcome is what Laskin J.A. referred to in *Ivaco (ONCA)* in writing:

> 64 Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.[79]

At the Supreme Court of Canada hearing of *Indalex* in June, 2012, counsel for the secured creditors argued that leaving provincial priorities in place during a restructuring creates incentives to bankrupt the debtor and is antithetical to the goal of the CCAA to facilitate restructuring to avoid the devastating social consequences of bankruptcy. Increasingly however, the cases which have come before the courts involve competing policy issues with social implications. No longer are the "losers" just unsympathetic government entities who may be perceived as queue jumpers. Counsel for the pensioners' interests in *Indalex* argued at the Supreme Court of Canada that the victims of a defeated priority or deemed trust are sympathetic people – pensioners, employees and families. Old questions are being asked in a new context. Is it appropriate to subordinate the provincial law claims of these groups to avoid creating unhelpful incentives in restructuring proceedings? Are the historical rationales appropriate for resolving disputes among secured creditors whose claims are not subject to the *pari passu* sharing regime under the BIA in any event? In *Wallace v. United Grain Growers Ltd.*,[80] the Supreme Court of Canada found that the protection of families is an important consideration informing interpretation of the BIA. Speaking for the Court, Iacobucci J. expressly

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78 *Ibid* at para 182.
79 *Ivaco (ONCA), supra* note 8 at paras 63-64.
80 [1997] SCR 701.

refers to "... Parliament's intention to put the needs of families ahead of creditors."[81] Further, cases such as *Rizzo & Rizzo Shoes Ltd. (Re)*,[82] have made it clear that legislation is to be interpreted in a manner to fulfil "the object of the legislative enactment."[83] Counsel for the pensioners argued that application of the scheme of priorities of the BIA, and the termination of provincial priorities and federal trusts does not align with the broader social policy objectives of the CCAA and the BIA in the 21st century.[84]

Overall, it is clear that the issues concerning how CCAA restructurings and BIA proceedings interrelate are complex and depend on competing principles and incentives. One can question whether cases assessing the jockeying for position among distraining landlords and competing chattel mortgage lenders under the 1949 Act offer much guidance on the issues currently under discussion. Is a 19th century assessment of a "quick flip" of secured collateral to a debtor's relative the moral touchstone for these questions today? In our view, the analysis should involve an assessment of Parliament's goals under the CCAA and consider how the issue of reordering priorities affects peoples' ability to utilize the statute to best attain those goals. Both *Ivaco (ONCA)* and *Century Services* embarked upon this assessment and reaffirmed that the reordering of priorities under the BIA is not an improper purpose under subsection43(7) of the statute. Is there more to come?

While *Indalex* may be an anomaly and may be overruled on any number of bases, among its less discussed implications is that it might have reopened the issue of when the BIA ought to be available to reorder priorities. *Indalex* has created uncertainty and provided no real doctrinal basis to distinguish the holdings to the contrary in *FBDB, Ivaco (ONCA)* and *Century Services*. But seeking to handicap the outcome of the appeal would be folly. Instead, stay tuned for the next installment.

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81 *Ibid* at para 69.
82 [1998] 1 SCR 27.
83 *Ibid* at para 27.
84 *Scott Road, supra* note 54 at para 29.

SCHEDULE A

The relevant discretionary provisions at issue in a transition from restructuring to bankruptcy are:

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. R.S., 1985, c. C-36, s. 11;1992, c. 27, s. 90;1996, c. 6, s. 167;1997, c. 12, s. 124;2005, c. 47, s. 128.4

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Bankruptcy application

43. (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

If applicant creditor is a secured creditor

(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.[...]

Dismissal of application

(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

R.S., 1985, c. B-3, s. 43;1992, c. 27, s. 15;2004, c. 25, s. 28.

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