

Beyond the Tipping Point

***Re Indalex* and the Changing Face of Pension Protection in Canadian Insolvency Proceedings**

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I. Introduction

Insolvency law has always been pulled in two very different directions. On the one hand, businesses and institutional creditors are generally in favour of laws that protect existing property rights in a consistent and predictable manner. On the other hand, the rigid enforcement of property rights does not take into account the interests of other parties that may be adversely affected by a company's collapse. Pension protection in insolvency strains this dichotomy towards its breaking point.

There is no question that pensioners are particularly vulnerable in the event of a company's insolvency. Not only do pension beneficiaries lack the necessary information to determine the wellbeing of a corporation, in many cases an employee's future earnings (as represented by pension benefits and retirement savings) can be inextricably linked to the company's solvency.¹ Despite this, institutional creditors ultimately bear the financial risk of the failure of a company. Impeding these lenders from recovering their investment in the case of bankruptcy could drastically limit the ability of these institutions to extend credit, which could have negative systemic effects on a country's macroeconomic policy. Indeed, this discussion reveals, "the treatment of pension plans

¹ Further, employees lack the opportunity to bargain for a risk premium in the event of their employer's insolvency. As a result, employees can find themselves as involuntary and unsecured creditors during insolvency proceedings. See Kevin Davis and Jacob Ziegel, "Assessing the Economic Impact of a New Priority Scheme for Unpaid Wage Earners and Suppliers of Goods and Services" in Anthony J. Duggan et al, eds, *Canadian Bankruptcy and Insolvency Law: Cases, Texts, and Materials* (Toronto: Edmond Montgomery Publications Ltd., 2009) 405 at 405.

in circumstances of insolvency is an area in which the distinction between law and public policy can become very blurred.”²

Despite a history of legislative restraint and only moderate pension protection, Canada has recently joined a growing trend in Commonwealth nations towards heightened protection of pension claims at the expense of creditors’ rights. With the recent Ontario Court of Appeal decision of *Re Indalex*,³ Canada has joined the United Kingdom in the ranks of having the most aggressive pension protection in the Commonwealth. Not only did the decision of *Re Indalex* take the Canadian insolvency industry by surprise, it also flies in the face of the recent legislative amendments to the *Companies Creditors Arrangement Act*,⁴ and the *Bankruptcy and Insolvency Act*.⁵ As a result of this discrepancy, Canadian law on pension protection in insolvency is in a state of flux.

In order to maintain an effective and fair insolvency regime, Canada’s twin statutes, the *BIA* and the *CCAA*, must work harmoniously to balance the competing interests of individuals and institutions. In order to achieve this balance, Canada will have to reconcile the apparent rift that exists between the intentions of the legislature and the policy promoted by the judicature. Until this reconciliation is made, Canadian pension protection will remain unpredictable and highly volatile.

² Massimo Starnino and Mary Picard, “Freedom 55 Lost? The Recent Treatment of Pensions in Insolvency Proceedings” (Paper delivered at the Education Program at the conference of Commercial List Users Committee/OBA Insolvency Law Section/OAIRP, 2 June 2010) [unpublished] at 39.

³ *Indalex Limited (Re)* 2011 ONCA 265 [“*Re Indalex*”].

⁴ RSC 1985, c C-36 [“*CCAA*”].

⁵ RSC 1985, c B-3 [“*BIA*”].

II. Mechanisms of Pension Protection

a. Policy and Theoretical Considerations

Reduced to its simplest terms, insolvency law must choose between a principles-based approach that promotes maximizing returns to creditors and a values-based approach that promotes protecting the individuals affected by a company's financial failure. Scholars such as Thomas Jackson stand in support of the principles-based approach for its simplicity and logical cogency. Jackson regards bankruptcy law as a mechanism for enforcing existing property rights. Secured creditors acquire rights to the assets of a corporation that are enforceable both inside of bankruptcy as well as prior to entering bankruptcy. By granting creditors priority in distribution of an insolvent company's assets, the law upholds the existing rights of creditors.⁶ Any legislative mechanism that grants rights in bankruptcy to parties that did not have rights outside of bankruptcy is, to Jackson, a departure from a principled approach. Viewing bankruptcy law as a form of debt-collection service, Jackson states "bankruptcy law should not create [new] rights. Instead, it should act to ensure that the rights that exist are vindicated to the extent possible."⁷

Countering this position are critics such as Elizabeth Warren, who believe that insolvency law should take into account the interests of stakeholders other than secured creditors when a company collapses. To Warren, bankruptcy law must attempt to reconcile the

⁶ Thomas H. Jackson, "The Logic and Limits of Bankruptcy Law" in Anthony J. Duggan et al, eds, *Canadian Bankruptcy and Insolvency Law: Cases, Texts, and Materials* (Toronto: Edmond Montgomery Publications Ltd., 2009) 27 at 37.

⁷ *Ibid* at 35. See also Douglas G. Baird, "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren" in Anthony J. Duggan et al, eds, *Canadian Bankruptcy and Insolvency Law: Cases, Texts, and Materials* (Toronto: Edmond Montgomery Publications Ltd., 2009) 46. Baird, a frequent co-author of Jackson, supports a principles-based approach rooted in the protection of property rights.

gap that exists between substantive property rights and distribution of limited assets during bankruptcy.⁸ Pension claims provide an excellent example of this notion as beneficiaries are entitled to collect ongoing payments that are not secured by any form of property rights. To reconcile this void, Warren argues that the judiciary should be granted broad discretionary powers in order to respond to the particular needs of each individual case.

Both of these positions are fraught with counterarguments. While Warren's values-based approach promotes the interests of non-creditor stakeholders, the corollary of this position is a capricious and less predictable system of laws. Jackson's position, though logical, can lead to potentially harsh results for individuals affected by bankruptcy.

b. Legislative Considerations

Generally, pension plans can be broken into two groups: defined benefit plans and defined contribution plans.⁹ Defined benefit plans, which outline the precise monthly amount an employee is entitled to upon retirement, are seen as the "riskier" pension plan.¹⁰ Defined contribution plans, which determine the monthly input an employee will contribute, are generally seen as less risky to the company, as "all of the investment risk is carried by the employees."¹¹ Broadly speaking, defined benefit plans are more likely to fall into funding deficit for three reasons. First, the actuarial calculations that govern

⁸ Elizabeth Warren, "Bankruptcy Policy" in Anthony J. Duggan et al, eds, *Canadian Bankruptcy and Insolvency Law: Cases, Texts, and Materials* (Toronto: Edmond Montgomery Publications Ltd., 2009) 38 at 41.

⁹ Additionally, some plans feature aspects of both of these groups. See Ronald B. Davis, "Restructuring Proceedings and Pension Fund Deficits: A Question of Risk and Reward" [2003] *Ann Rev Insol L* 29 at 31 ["Davis 2003"].

¹⁰ *Ibid* at 32.

¹¹ *Ibid* at 39.

the investment decisions of the pension fund are susceptible to error.¹² Poor investment can lead to a funding deficit when the time comes to pay out entitlements. Second, unforeseen economic shocks can have a negative impact on the fund's portfolio value.¹³ Third, critics observe that there is a conflict of interest between the objectives of the pension plan and those of the company.¹⁴

Given these risk factors, defined contribution pension plans generally receive more legislative protection than defined contribution. Generally, legislative protections fall into three categories: government-backed insurance funds, statutory trusts, and alterations to the order of preference in distribution, with the last one typically seen as the most aggressive means of protecting pension plans.¹⁵

Currently, Ontario employs all three of these measures in some capacity. The Pension Benefits Guarantee Fund ("PBGF")¹⁶ is a government-backed fund that insures an individual employee's pension claim up to \$1000.¹⁷ This is the least intrusive approach, as the fund itself is not related to the assets of the corporation. Further, Ontario has a series of statutory deemed trusts that operate to preserve certain of the insolvent corporation's assets for the benefit of various parties. For example, s. 57 of the *PBA*

¹² *Ibid* at 33.

¹³ *Ibid* at 34.

¹⁴ For example, "the employer is receiving all of the employee's consideration for performing the pension promise ahead of any actual performance," (*Ibid.* at 35.) As a result, there is incentive on both sides to shirk their responsibilities under the agreement. *Re Indalex* has perhaps confounded the notion as a conflict of interest. As will be discussed, this decision places directors in a fiduciary relationship with pension beneficiaries in a way that conflicts with the best interests of the company.

¹⁵ *Ibid* at 56.

¹⁶ Created pursuant to the *Pension Benefits Act*, RSO 1990, c P.8 s 77 ["*PBA*"] and Ontario Reg 909, RRO 1991 s 34.

¹⁷ Ronald B. Davis, "Time to Pay the Piper: Pension Risk Sharing, Intergenerational Equity and Dissonance with the Conceptual Paradigm of Insolvency Law in Canada" (2011) *Ann Rev Insolvency* L 183 at 190 ["Davis 2011"].

creates a deemed trust in favour of certain payments made by the company into a pension scheme. This measure diverts and preserves assets that would otherwise be available to satisfy the company's debts, and thereby reduces the overall claims pool in insolvency. Finally, alterations to the distribution priority are seen as the most aggressive protective measure as certain party's rights are promoted at the expense of others. This means of protection can be seen in the example of *Re Indalex*, discussed below.

Lawmakers face the constant battle of determining the extent of protection needed and implementing legislative mechanisms to further these objectives. However, as the judiciary is responsible for the interpretation and application of the law, in practice insolvency law is comprised of equal parts common law and statute - for better or for worse.

III. Re Indalex

Re Indalex came as a surprise to many industry observers for its departure from previous jurisprudence and its opposition to the restraint urged by legislators in the crafting of Bill C-55 and Statute c.47.¹⁸ Generally, until *Re Indalex* both *CCAA* and *BIA* cases had consistently denied pension claims super-priority status, relegating such claims to unsecured status in distribution.¹⁹ This judicial trend promoted the legislative policy of promoting systemic fairness, even if certain decisions seemed harsh to certain parties' interests. Recent amendments to the *CCAA* and the *BIA*, and more importantly

¹⁸ See notes 28-29, *infra*.

¹⁹ Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy Insolvency Act and the Company's Creditors Arrangement Act* (November 2003) (Chair: Hon. Richard H. Kroft) ["Senate Report"] at 96-99.

recommended amendments that were not ultimately adopted, provided certain protections for pension beneficiaries, but super-priority was conspicuously rejected by Parliament. The reasoning behind this decision introduces a healthy dose of uncertainty into Canadian insolvency law.

The facts of *Re Indalex* are fairly unique for a restructuring claim. Indalex sponsored two pension plans: a defined benefit plan for its employees, and a mixed defined benefit/defined contribution plan for its executives. Prior to initiating restructuring proceedings, Indalex wound up the employee fund. Importantly, the executive fund was not wound up at the time *CCAA* proceedings commenced. Indalex failed to provide notice to the Superintendent of Pensions, or to union representatives that a *CCAA* application was forthcoming.

Debtor-in-possession [“DIP”] lenders agreed to finance Indalex’s restructuring provided they be granted a priority charge in the *CCAA* proposal (a common and essential request in *CCAA* proceedings.)²⁰ This charge was approved in court. However, in a subsequent motion the quantum of the DIP loan was reduced. Here, again, Indalex failed to provide notice to the Superintendent and other pension representatives. Parties interested in the pension plan wrote a letter to Indalex reserving their rights pursuant to the *PBA*’s deemed trust provisions. Regrettably, Indalex did not reply to this letter – an act that was construed by the Court of Appeal as a deliberate snubbing of the company’s pensions obligations.

²⁰ See *CCAA*, *supra* note 4 s11.2(1).

Despite a motions court approving the DIP lender's charge, the Court of Appeal found that the pensioners' claim for the \$2 million funding deficit (pursuant to a deemed trust in the *PBA*) outranked the priority charge, effectively granting the pension claim super-priority status attaching to all assets of the company.

This case is a perfect storm of facts. The pension deficit is relatively small; the company's actions can be construed as negligent if not high-handed;²¹ the pension beneficiaries were not provided a forum to assert their claim. As a result, the Court of Appeal stepped in to not only enforce the pensioners' rights, but also to denounce the behaviour of the company.²² This case is the embodiment of the maxim "bad facts make for bad law."

Re Indalex is a monumental case not only for its central holding, but also for the ancillary reasoning that led to this decision. The *ratio decidendi* in *Re Indalex* can be broken into two premises that inform one conclusion. First, board members of a company that has a pension plan owe a fiduciary duty to beneficiaries of the plan. Second, the corpus of the deemed trust created by s. 57 of the *PBA*²³ extends to the entire outstanding amount facing a pension deficit. Therefore, the court in *Re Indalex* rectified the directors' breach of fiduciary duty by granting the pension claim a super-priority over all assets of the company that outranked a court-approved debtor-in-possession lender priority charge.

a. Super-Priority Status for Pension Claim

²¹ See *Re Indalex*, *supra* note 3 at 134.

²² *Ibid* at 143.

²³ *Supra* note 16.

The effect of the decision in *Re Indalex* is to subordinate a DIP lenders' priority charge to a pension claim.²⁴ However, such a decision seems to fly in the face of the legislature's intentions in drafting the recent amendments. The possibility of enhanced pensions protection was the subject of discussion in the Standing Senate Committee on Banking, Trading, and Commerce's 2003 report.²⁵

Committee discussions focused on the theme of fairness. Since any amendments to the existing statutory framework would necessarily prefer certain parties to others, the Senate Committee's final recommendation is an attempt "to be fair to employees, employers, creditors and taxpayers."²⁶ The protection of vulnerable parties is an exercise in risk allocation, which begs the twin questions of who is best suited to bear the risk of a company's bankruptcy, and who deserves to bear this risk.²⁷ Ultimately, although the Senate Committee's final recommendation "recognizes the vulnerability of current

²⁴ Robin Schwill and Natasha vandenHoven, "Flash: Ontario Court of Appeal Decision Fundamentally Changes Corporate Restructuring Landscape" (11 April 2011), online: Davies Ward Phillips & Vineberg LLP < http://www.dwpv.com/en/17620_25900.aspx > ["Davies"].

²⁵ *Supra* note 19.

²⁶ *Ibid* at 95.

²⁷ The Senate Committee describes the careful consideration of fairness in simple terms *Ibid* at 95:

An insolvent employer should have to bear part of the cost of protection, but so too should its employees, since they are – in some sense – creditors, having supplied services yet awaiting payment.

Employees are not, however, like other creditors in every respect, and thus should perhaps be protected differently. For example, they probably have a situation of economic dependence not found with other creditors, and are not well placed to assess accurately the probability that their employer will become insolvent. Fairness to taxpayers suggests that a fund financed out of the Consolidated Revenue Fund is inappropriate, while fairness to creditors means that they should not bear all of the cost of the employer's indebtedness to employees. Finally, fairness to solvent employers means that they should not have to bear the burden of costs incurred by insolvent employers.

pensioners” the Committee “did not believe that changes to the *BIA* regarding pension claims should be made at this time.”²⁸

Despite the Senate Committee’s recommendations, some changes were made in Statute c.47 that improved protection for pension claims. As a result of the 2005 amendments sections 81.5(1) and 81.6(1) of the *BIA* were added to create a priority for pensions claims with respect to certain unpaid pensions contributions.²⁹ Specifically, beneficiaries can claim for unpaid Pension contributions deducted from employee paycheques, employer contributions to a defined contribution plan, as well as “normal cost” contributions to a defined contribution plan.³⁰ Significantly, these amendments do not apply to “special cost” contributions to a defined contribution plan. Nevertheless, the Court in *Re Indalex* interpreted these provisions to apply to both normal cost and special cost contributions, greatly expanding an employer’s liability.³¹ By including both normal cost and special cost contributions, *Re Indalex* effectively renders employers liable for the entire amount of a pension plan deficit – an outcome equaled in the Commonwealth only by the UK’s comprehensive pension protection in the *Pensions Act 2004*. Whereas the UK enabled a regulatory body with the specific mandate to secure funding for the

²⁸ *Ibid* at 98. The Committee went on to clarify its position, stating that “since this proposal would be unfair for taxpayers, solvent employers and the employees of these employers. In this situation, we believe that fairness is best served by the status quo.”

²⁹ David F. Baird and Ronald B. Davis, “Labour Issues” in Stephanie Ben-Ishai and Anthony Duggan, eds, *Canadian Bankruptcy and insolvency Law: Bill C-55, Statute c.47 and Beyond* (Markham: LexisNexis, 2007) at 83.

³⁰ *Ibid*.

³¹ *Re Indalex*, *supra* note 3 at 108.

entire amount of a pensions deficit,³² this result was achieved through the judiciary in *Re Indalex*.

Significantly, *Re Indalex* appears to contradict recent Canadian jurisprudence on the issue of pension claim priorities. The issue of pension priorities in bankruptcy proceedings came before the Court of Appeal in *Re Ivaco*.³³ On the issue of a provincial deemed trust altering the *BIA* distribution priority, the court in *Re Ivaco* stated: “the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute.”³⁴

Similarly, another recent Court of Appeals decision, *Nortel Networks Corporation (Re)*,³⁵ refused to grant a *CCAA* pension claim super-priority status in a trusts context. Here, the Court of Appeal was asked to distribute certain funds allocated under Nortel’s Health and Welfare Trust to amounts owing to employee entitlements in the aftermath of the company’s bankruptcy. The court dismissed this request outright on the grounds that “any subsequent order for distribution of the corpus of the [Health and Welfare Trust] could, in turn, become the subject of a further application for leave to appeal. The restructuring of Nortel would be unduly delayed.”³⁶ Since this decision is not addressed

³² The Pensions Regulator is required through ss.43-51 of the *Pensions Act 2004 (Commencement No. 2, Transitional Provisions and Consequential Amendments) Order 2005* (UK) c 35 [“*Pensions Act 2004*”] to issue either a Financial Support Directive or a Contribution Notice to a company facing a pensions plan deficit. These regulatory mechanisms allow the Pensions Regulator to seek the entire amount of the deficit. See also See Devi Shah et al, “Regulator Imposed Support for Pension Schemes: A New Category of Super Priority Insolvency Expense” (2011) *International Corporate Rescue* 3.

³³ *Re Ivaco*, [2006] OJ No 4152 (CA).

³⁴ *Ibid* at 38. The Court adds at 65, “Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the *BIA*, neither can it do so indirectly.”

³⁵ *Nortel Networks Corporation (Re)* 2011 ONCA 10.

³⁶ *Ibid* at 6.

in *Re Indalex*, it is uncertain why the court did not consider this argument.³⁷ Given the contentiousness of the *Re Indalex* decision, further appeal and ongoing delays are likely.³⁸

b. Fiduciary Duty of Board of Directors

The Court of Appeal’s finding that Indalex’s board members owed a fiduciary duty to pension beneficiaries is based on the Court’s “two-hats” analogy.³⁹ Simply put, board members owe duties to the corporation, and at other times owe duties to pension beneficiaries.⁴⁰ *Re Indalex* asserts “Indalex could [not] ignore its role as administrator or divest itself of those obligations without taking formal steps [...]”⁴¹ In this case, the court found that in the chaos of restructuring, Indalex neglected its duties to pension beneficiaries in a way that left plan members exposed.⁴² Although the Court agrees that Indalex was trapped in a conflict of interests that should have been resolved by acting in the best interests of the corporation,⁴³ the Court goes on to state that “Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator.”⁴⁴

³⁷ It is, however, possible that the reasons in *Nortel Networks Corporation (Re)*, *Ibid*, being released mere months before *Re Indalex*, were not available for consideration.

³⁸ Although there is some speculation that given the relatively modest quantum of Indalex’s pension deficit combined with the fact that the company is US-based, there is little motivation to carry the case through to the Supreme Court.

³⁹ *Re Indalex*, *supra* note 3 beginning at 129.

⁴⁰ The court relies on *BCE Inc v 1976 Debentureholders*, [2008] 2 SCR 560 at 81-84 and *Imperial Oil Ltd v Ontario (Superintendent of Pensions)* (1995), 18 CCPB 198 at 33 for this assertion.

⁴¹ *Re Indalex*, *supra* note 3 at 135

⁴² *Ibid* at 132, the Court does not conceal its sympathies for the plan beneficiaries, stating: “The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure their interests were even considered – much less protected – during the DIP negotiations.”

⁴³ *Ibid* at 140.

⁴⁴ *Ibid* at 143.

Industry observers have interpreted this to place a positive obligation on companies to provide notice throughout *CCAA* proceedings. However, some critics note that “avoiding a breach of fiduciary duty finding that leads to a constructive trust remedy of paying out all pension plan deficiencies first — will be considerably more difficult (if not impossible) to address,”⁴⁵ given that “the Court gave surprisingly little weight to the fact that the potential for such conflicts of interest are inherent in most pension plan governance structures, and it is normally accepted that fiduciary obligations only arise during the performance of an employer’s duties as plan administrator.”⁴⁶

Certainly pension beneficiaries are stakeholders in a company’s financial wellbeing, but shareholders, and creditors, and certainly DIP lenders in the context of restructuring proceedings are parties that have vested financial interests in an orderly distribution of an insolvent company’s assets. The fiduciary duty imposed by the court in *Re Indalex* puts directors of an insolvent company in a nearly impossible position to navigate, especially if the company cannot make use of *CCAA* proceedings to obtain breathing room during difficult financial times.

c. Deemed Trust Corpus

Further, *Re Indalex* dramatically expands the corpus of the statutory deemed trust pursuant to s. 57 of the *PBA*. In this case, the company had made all of its statutorily

⁴⁵ Davies, *supra* note 24.

⁴⁶ Paul Litner, Ian McSweeney et al, “Indalex Decision: Implications from a Pensions and Benefits Perspective” (19 April 2011), online: Osler, Hoskin & Harcourt LLP <<http://www.osler.com/NewsResources/Details.aspx?id=3398>> [“Osler”].

mandated payments but still faced a funding deficit of approximately \$10 million.⁴⁷ *Re Indalex* reconfigured the ambit of the deemed trust by holding that the trust applies to the entire funding deficit, and not merely any outstanding payments.⁴⁸

Prior to *Re Indalex* special payments typically fell outside the scope of the s. 57 deemed trust.⁴⁹ However, the Court of Appeal unequivocally reversed this pattern by declaring, “the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75.”⁵⁰ This decision therefore dramatically increases the scope of a potential pensions claim by applying the *PBA* deemed trust to the entire pension funding deficit rather than merely outstanding payments into the fund.

IV. Conclusion

This essay has attempted to outline the difficulty lawmakers face in striking an appropriate balance between commercial efficiency and protection of vulnerable individuals. Where the legislature establishes clear policy objectives and the judiciary enforces those policy objectives in a uniform way, the outcome is at least predictable, if

⁴⁷ *Ibid.*

⁴⁸ Specifically, by clarifying the interplay between ss. 75 and 57 of the *PBA*, the Court of Appeal found that payments owing under both s 75(1)(a) and (b) fell under the ambit of the deemed trust created by s. 57 (*Re Indalex*, *supra* note 3 at 108.) Where the pension plan is a defined benefit plan, the employer is obligated to make “normal cost” contributions to the pension fund. These payments are made in monthly installments to maintain service obligations to the fund (*Ibid* at 83.) Further, pension funds are audited regularly to ensure the fund is growing to meet the plan’s future obligations. Where an audit reveals deficiencies the employer is required to make additional “special” payments pursuant to *PBA* s 75(1)(b) (*Ibid.* at 83, and 92-97)

⁴⁹ Davis 2003, *supra* note 9 at 52.

⁵⁰ *Re Indalex*, *supra* note 3 at 101. The rationale for this decision can be found at paragraphs 97-101. First, the court states that all liabilities under the plan crystallize on the date the pension plan is wound up (*Ibid* at 97.) Therefore it is possible to identify the scope of liability by determining the sum of normal costs owing plus any special payments owing. Second, based on principles of statutory interpretation, “the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations” (*Ibid* at 101.)

unpopular in certain communities. Given that *Re Indalex* espouses a much more aggressive approach to pension protection than was imagined in Parliament, there is an incentive for creditors to force companies into bankruptcy proceedings, an outcome that will have adverse systemic effects.⁵¹

How long the current state of the law will survive is unknown. The May 2, 2011 federal election further complicated the issue with the election of the Conservative Party of Canada [“CPC”] as a majority government. While the CPC is in favour of a Pooled Retirement Pension Plan as a state-backed insurance fund, the party is opposed to alterations to distribution in bankruptcy proceedings.⁵² The New Democrat Party [“NDP”], as official opposition, supports the opposite policy, and intends to “amend federal bankruptcy legislation to move pensioners and long-term disability recipients to the front of the line of creditors.”⁵³ Despite the NDP’s intentions, their ability to alter distribution priority may be limited by the CPC majority government. In either case, given that both parties have strong stated policies on this issue, it is likely that the consequences of *Re Indalex* will be addressed by the legislature in the near future.

In the meantime, there will be a continued sense of trepidation among parties to *CCAA* restructurings until this matter is settled one way or the other.⁵⁴ While the flexible framework of the *CCAA* is intended to allow companies and their creditors to reach

⁵¹ See Davies, *supra* note 24, Osler, *supra* note 46, as well as Barbara J Boake et al, “Follow Up Commentary on Indalex” (21 April 2011) online: McCarthy Tetrault LLP <http://mccarthy.ca/article_detail.aspx?id=5382>.

⁵² Conservative Party of Canada, “Platform 2011” (1 May 2011) online: CPC <http://www.conservative.ca/policy/platform_2011/> at 29.

⁵³ New Democrat Party Platform, “Practical First Steps to Give Your Family a Break” (1 May 2011) online: NDP <<http://www.ndp.ca/platform/give-your-family-a-break#section-1-1>>.

⁵⁴ Osler, *supra* note 46.

mutually beneficial arrangements in order to carry on business, the *BIA* still provides a rigid default procedure where a satisfactory arrangement cannot be achieved. Given that *BIA* proceedings still maintain an ordered distribution scheme, it is possible that creditors will forego restructuring through the *CCAA* in favour of the increased likelihood of recovering their investments. Until the *CCAA* and the *BIA* are interpreted harmoniously, there will be an ongoing policy disconnect in Canadian insolvency law as a result of *Re Indalex*.