Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters | Faculty Scholarship

2015

# A Traditionalist's Take on Bankruptcy Intersections

Stephanie Ben-Ishai
*Osgoode Hall Law School of York University*, sbenishai@osgoode.yorku.ca

## Source Publication:

LeBel, Louis. The Dignity of La : The Legacy of Justice Louis LeBel. Ed. Dwight Newman and Malcolm Thorburn. Markham, Ont: LexisNexis, 2015.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

 Part of the Bankruptcy Law Commons

## Repository Citation

Ben-Ishai, Stephanie, "A Traditionalist's Take on Bankruptcy Intersections" (2015). *Articles & Book Chapters*. 3140.
https://digitalcommons.osgoode.yorku.ca/scholarly_works/3140

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

# A Traditionalist's Take on Bankruptcy Intersections

**Stephanie Ben-Ishai***

## I. INTRODUCTION

Before the financial crisis of 2008 brought bankruptcy into the international spotlight, bankruptcy was often thought of as a highly technical area of law and a natural field for a traditional civil judge to shine. However, now more than ever, bankruptcy constantly interacts with other areas of law and is frequently the terrain for dealing with difficult questions about distributive and social justice — issues often thought to belong to public law. Even as traditionalism is under stress in bankruptcy law, like other areas of private law, Justice Louis LeBel, a traditional civil judge,[1] has left an important imprint on Canadian bankruptcy law. His discomfort with the need to depart from traditional hallmarks of procedural fairness in the context of "real time" bankruptcy litigation while maintaining a keen awareness of the most vulnerable of stakeholders' interests is notable. Justice LeBel's statement in his dissenting judgment in *Sun Indalex Finance, LLC v. United Steelworkers* highlights his general approach:

> ...The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA* [*Companies' Creditors Arrangements Act*]. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair

---

* Associate Professor, Osgoode Hall Law School. The research assistance provided by Yousaf Khan and Hongyi Geng is gratefully acknowledged. I also benefited from comments provided by Danny Priel, Anna Lund, Dwight Newman, Erik S. Knutsen, Benjamin Berger and Malcolm Thorburn. All errors are my own.

1 Madame Justice B.E. Romaine, "Conflicting Policy Objectives and the *CCAA* Courts: Lessons Learned and Future Challenges" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014) 35, at 46.

> procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better .... In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA* ....[2]

Since joining the Supreme Court of Canada, Justice LeBel wrote reasons in six bankruptcy decisions. This essay focuses on his reasons in the three cases that dealt with matters of concern to Canadian bankruptcy law in general: (1) *Schreyer v. Schreyer*;[3] (2) *Newfoundland and Labrador v. AbitibiBowater Inc.*;[4] and (3) *Indalex*.[5] The other three cases dealt with issues that are primarily of importance in the Quebec context.[6]

In each of *Schreyer*, *Abitibi* and *Indalex*, the Supreme Court of Canada was called upon to make difficult decisions in areas where bankruptcy law intersects with family, pension, or environmental law, respectively. My focus for this article is on Justice LeBel's important contribution to addressing these "bankruptcy intersections" by highlighting the most vulnerable stakeholders interests and insisting on procedural fairness even where the traditions of Canadian bankruptcy law and practice suggest a different approach. Many, but not all, bankruptcy cases involve bankruptcy intersections or intersections between bankruptcy law and other systems of law (often provincial). Cases that involve bankruptcy intersections are more likely than cases that involve a pure distribution of proceeds according to the scheme set out in bankruptcy legislation to find their way to appellate courts or give rise to detailed reasons at the trial level. By procedural fairness I refer to the concept that "decisions [must be] made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by

---

2 [2013] S.C.J. No. 6, [2013] 1 S.C.R. 271, at para. 276 (S.C.C.) [hereinafter "*Indalex*"].

3 [2011] S.C.J. No. 35, [2011] 2 S.C.R. 605 (S.C.C.) [hereinafter "*Schreyer*"].

4 [2012] S.C.J. No. 67, [2012] 3 S.C.R. 443 (S.C.C.) [hereinafter "*Abitibi*"].

5 *Indalex*, *supra*, note 2 (S.C.C.).

6 *Ouellet (Trustee of)*, [2004] S.C.J. No. 59, [2004] 3 S.C.R. 348 (S.C.C.); *Lefebvre (Trustee of)*; *Tremblay (Trustee of)*, [2004] S.C.J. No. 62, [2004] 3 S.C.R. 326 (S.C.C.); *Québec (Revenue) v. Caisse populaire Desjardins de Montmagny; Alternative Granite & Marbre Inc., Re*, [2009] S.C.J. No. 49, [2009] 3 S.C.R. 286 (S.C.C.).

the decision to put forward their views and evidence fully and have them considered by the decision-maker."[7]

This article proceeds as follows. Part II introduces the facts and context for the three decisions under consideration: *Schreyer*, *Abitibi* and *Indalex*. Part III outlines the consistent approach Justice LeBel adopted of identifying the vulnerable stakeholders and making them central to his decision while insisting on procedural fairness in reaching his decision in each of the three cases considered. Part IV concludes with lessons that can be extracted from Justice LeBel's jurisprudence as we move forward into an era where we can continue to expect a significant amount of bankruptcy litigation and negotiation to play out in the terrain of bankruptcy intersections.

## II. FACTS AND CONTEXT

### 1. *Schreyer*

The Schreyers were a heterosexual married couple who lived on a farm that was solely registered in the name of the husband.[8] In December 1999, the marriage broke down and the wife left the farm while the husband stayed. In March 2000, the wife filed for divorce and sought, amongst other things, equal division of the marital property, which included the farm.[9] In December 2000, they consented to an order referring to a master the valuation of the family assets.[10] Prior to the valuation, however, on December 20, 2001, the husband made an assignment into bankruptcy and received a discharge nine months later. The wife was not listed as a creditor and received no notice of the assignment prior to the discharge.[11] Following the discharge, the Master valued the equalization claim at $41,063.48 and noted the farm was exempt from execution in bankruptcy.[12]

A Master of the Queen's Bench in Manitoba found that the wife was entitled to the equalization payment. The Court of Queen's Bench

---

7 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 22 (S.C.C.).

8 *Schreyer*, *supra*, note 3, at para. 2.

9 *Id.*, at para. 3.

10 *Id.*, at para. 4.

11 *Id.*, at para. 5.

12 *Id.*, at para. 6.

confirmed this decision and ordered the husband to make these payments. Both parties appealed, and on appeal, the Court of Appeal found the confirmation of the master's report in error and reversed the decision.[13] The main issue the Supreme Court of Canada considered was whether the discharge from bankruptcy had released the husband from the wife's equalization claim with respect to the family assets. The appeal was dismissed, with the Supreme Court agreeing in substance[14] with the Court of Appeal decision, finding the wife's equalization claim was properly characterized as a debt that was provable in bankruptcy and from which the husband was released upon being discharged.[15] *Schreyer* stands for the proposition that in equalization jurisdictions, upon discharge from bankruptcy, a bankrupt spouse will be released from equalization debts, unless, pursuant to family law legislation, a proprietary interest in favour of the creditor-spouse arose in the assets through an agreement between the parties or a court order.[16]

Justice LeBel wrote the reasons for a unanimous Court. He held that because Manitoba is an equalization province — where the value of the family assets is divided equally between separating spouses — the valuation and division give rise to a debtor-creditor relationship in the sense that the creditor spouse obtains a monetary claim against the debtor spouse as opposed to a proprietary or beneficial interest in the assets themselves.[17] Justice LeBel held that "interpretation of the *BIA* [*Bankruptcy and Insolvency Act*] requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption."[18] Further, being discharged "means that [creditors] 'cease to be able to enforce claims against the bankrupt that are provable in bankruptcy'...".[19]

The wife had argued that her interest in the farm was not solely monetary, but had proprietary elements and consequently could not be discharged in bankruptcy. Justice LeBel held that the equalization claims at issue were not "hybrid claims" that have both elements of a monetary

---

13 *Id.*, at paras. 7-8.
14 *Id.*, at para. 21.
15 *Id.*, at paras. 18, 20, 29, 43.
16 *Id.*, at paras. 11, 20, 23, 29.
17 *Id.*, at paras. 15-16.
18 *Id.*, at para. 20.
19 *Id.*, at para. 21.

and proprietary claim, and thereby do not survive the bankruptcy.[20] As the debt owed to the wife existed at the time of bankruptcy and was easily quantifiable, the claim was provable in bankruptcy.[21] A creditor who is not listed as such by the bankrupt has only limited remedies against the debtor following the discharge under the *Bankruptcy and Insolvency Act* ("BIA").[22] For example, a creditor can sue the discharged bankrupt, but only for the amount of the dividend the creditor would otherwise have received. There was no dividend paid to any of the husband's creditors.[23]

Justice LeBel concluded that "... Parliament could amend the *BIA* in respect of the effect of a bankrupt's discharge on equalization claims and exempt assets. But the absence of such an amendment makes the outcome of this case unavoidable."[24]

### 2. *Abitibi*

During a period of financial distress, in 2008, Abitibi announced the closure of its mill in Newfoundland.[25] Within two weeks of the announcement, the provincial government of Newfoundland and Labrador (the "Province") transferred most of Abitibi's property in Newfoundland to the Province and barred Abitibi from contesting the expropriation in the province's courts.[26] Abitibi began proceedings under NAFTA's Chapter 11[27] and eventually received compensation of $130 million for the expropriation from the government of Canada.[28] In 2009, Abitibi sought and was granted a stay of proceedings pursuant to

---

20 *Id.*, at paras. 22-24.

21 *Id.*, at paras. 26-27.

22 R.S.C. 1985, c. B-3; *id.*, at paras. 34-37.

23 *Id.*, at para. 34.

24 *Id.*, at para. 25.

25 *Abitibi*, *supra*, note 4, at paras. 5, 7.

26 *Id.*, at para. 6.

27 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, Can. T.S. 1994 No. 2, 3 I.L.M. 289 (entered into force January 1, 1994), c. 11 [hereinafter "NAFTA"].

28 *AbitibiBowater v. Government of Canada* [hereinafter "Settlement Agreement"] (August 24, 2010) (Ch. 11 Arbitration, Arbitrators: Andreas Bucher, Doak Bishop, Gavan Griffith) appended to *AbitibiBowater v. Government of Canada* [hereinafter "Consent Award"] (August 24, 2010) (Ch. 11 Arbitration, Arbitrators: Andreas Bucher, Doak Bishop, Gavan Griffith), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/dispdiff/AbitibiBowater_archive.aspx?lang=en&view=d> (last accessed January 4, 2015).

the *Companies' Creditors Arrangement Act* ("CCAA").[29] A few months later, the Province issued five orders pursuant to the *Environmental Protection Act* (the "EPA orders") that required Abitibi to remediate the environmentally damaged property in Newfoundland, some of which Abitibi still owned and some of which had been expropriated by the Province.[30]

The Quebec Superior Court (the "CCAA Court") dismissed the Province's motion for an order that the stay under CCAA did not bar the Province from enforcing the EPA orders.[31] The Court of Appeal denied leave to appeal, believing it had no reasonable chance of success.[32] The issue for the Supreme Court of Canada was whether environmental remediation orders issued by a regulatory body were monetary claims that could be compromised under the CCAA.[33] If they were monetary claims, Abitibi would emerge from the restructuring free of the obligation. If they were not monetary claims, Abitibi would continue to have a legal obligation to remediate the properties following a restructuring.

The Supreme Court saw no error of law and no reason to interfere with the findings of fact of the CCAA Court and dismissed the appeal.[34] The Court held that "as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and ... can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor."[35]

Justice Deschamps, writing for the majority, held that while not all orders issued by a regulatory body are provable claims in an insolvency proceeding, some may be, even if the amount is not quantified.[36] There are three requirements that orders must meet in order to be considered claims that may be subject to the insolvency process:

1. there must be a debt, a liability, or an obligation to a *creditor*;[37]

---

29 R.S.C. 1985, c. C-36; *Abitibi*, *supra*, note 4, at para. 7 (S.C.C.).

30 *Id.*, at para. 9.

31 *Id.*, at para. 12.

32 *Id.*, at para. 13.

33 *Id.*, at para. 14.

34 *Id.*, at para. 4.

35 *Id.*, at para. 59.

36 *Id.*, at para. 3.

37 Once a regulatory body exercises its enforcement powers against a debtor, it qualifies as a creditor. *Id.*, at para. 27.

2. the debt, liability, or obligation must be incurred *before the debtor becomes bankrupt*;[38] and

3. "it must be possible to attach a *monetary value* to the debt, liability, or obligation."[39]

The Court held that where the order is not framed in monetary terms, the court must determine whether it is a claim that will be subject to the claims process.[40] The court must look to the order's substance over its form in making this determination.[41] There must be sufficient certainty that the regulatory body will ultimately perform remediation work and assert a monetary claim to conclude that the order can be subject to the bankruptcy process.[42] Some indicators the court will look to in determining whether an order is a provable claim include: (1) "whether the activities are ongoing"; (2) "whether the debtor is in control of the property"; (3) "whether the debtor has the means to comply with the order"; and (4) "the effect that requiring the debtor to comply with the order would have on the restructuring process."[43]

Based on the findings of the CCAA court (which was that the EPA orders were likely meant to offset against Abitibi's NAFTA claim of expropriation[44] — as evidenced by the Premier's statement that there would be no "net payment to Abitibi"[45] — Abitibi's inability to realistically complete the remediation work,[46] and intentional targeting of Abitibi by the Province[47]), Deschamps J. confirmed that the Province was a creditor with a monetary claim that should be subject to the CCAA process.

Chief Justice McLachlin, in her dissenting reasons, while agreeing with the majority that environmental remediation orders can be considered monetary claims subject to the bankruptcy process, held that the majority's approach only functions where a province has done the

---

38 Unlike other claims, environmental claims can be provable even if they arise after the date of bankruptcy because of the temporal flexibility provided by s. 11.8(9) of the CCAA and s. 14.06(8) of the BIA. See *id.*, at paras. 28-29.

39 *Id.*, at para. 26 (emphasis added by the Court).

40 *Id.*, at para. 3.

41 *Id.*, at paras. 19, 31.

42 *Id.*, at para. 36.

43 *Id.*, at para. 38.

44 *Id.*, at para. 51.

45 *Id.*, at para. 52.

46 *Id.*, at para. 54.

47 *Id.*, at para. 55.

work, or where it is "sufficiently certain" that it will do the work.[48] Bankruptcy legislation (and the relevant case law) draws a distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.[49] Where the government has not performed the remediation work, for the order to become a provable claim in bankruptcy, there must be more than a "mere possibility the work will be done".[50] "Sufficiently certain" requires "likelihood approaching certainty".[51] Here the properties posed no immediate health risk, and there was no evidence that the Province had taken any steps towards doing the work or had set aside any money to do the work.[52] According to McLachlin C.J.C., the CCAA court did not correctly interpret the law and failed to consider the critical question of whether it was "sufficiently certain" that the Government would do the work.[53]

In separate reasons, Justice LeBel, also writing in dissent, held that the only regulatory orders that can be subject to compromise are those that are monetary in nature.[54] The CCAA court's decision was not consistent with the principle that the CCAA does not apply to purely regulatory obligations. In addition, while agreeing with the majority's test, Justice LeBel held that there was not enough evidence before the Supreme Court to support a conclusion that it was "sufficiently certain" that the Province would perform the work.[55] The CCAA court was more concerned with the fact that the arrangement would fail if Abitibi was not released from its regulatory obligations and its belief that the Province had acted in bad faith towards Abitibi.[56] Therefore, Justice LeBel held that the EPA orders were not monetary claims compromisable under the CCAA.

48 *Id.*, at para. 65.
49 *Id.*, at paras. 72-73.
50 *Id.*, at para. 84.
51 *Id.*, at para. 86. With the exception of the Buchans site, see *id.*, at paras. 89-90.
52 *Id.*, at para. 92.
53 *Id.*, at para. 94.
54 *Id.*, at para. 98.
55 *Id.*, at para. 99.
56 *Id.*, at para. 101.

### 3. *Indalex*

In 2009, Indalex Canada Inc. ("Indalex") and its parent, Indalex Holding Corp. ("Indalex US"), both manufacturers of aluminum extrusions, became involved in a cross-border restructuring process. In March 2009, Indalex US filed for Chapter 11 protection, and on April 3, 2009, Indalex filed under the CCAA.[57]

Following an attempt to sell the two companies as going concerns, Indalex sought and obtained an order on April 9, 2009 approving a debtor-in-possession ("DIP") financing agreement with lenders authorizing Indalex to borrow USD $24.4 million (subsequently increased to USD $29.5 million)[58] and granting the DIP lenders priority over all other creditors for this amount.[59] The Superior Court found that the DIP financing was necessary to support Indalex's business until a sale could be completed.[60] On July 20, 2009, Indalex obtained an order approving the sale of the company's assets as a going concern.[61] In addition, it also sought approval of the distribution of the sale proceeds to the DIP lenders.[62]

At the start of the bankruptcy proceedings, Indalex was the administrator of two registered pension plans for the benefit of their employees — the salaried and executive plans, respectively.[63] The salaried plan was wound up in the course of the proceedings and the executive plan was going to be wound up at a later date. Both plans were deficient, with the total deficiency being estimated at USD $4.8 million.[64] At the sale approval hearing, representatives of some of the plan members argued, amongst other things, that their claim for deficiency had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the Ontario *Pensions Benefits Act* (the "PBA") and that Indalex had breached its fiduciary duty owed to the pension members by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.[65] As such, the Superior Court ordered that part of the sale

---

57 *Indalex*, *supra*, note 2, at paras. 3-4, 10.
58 *Id.*, at para. 11.
59 *Id.*, at paras. 7, 9.
60 *Id.*, at para. 9.
61 *Id.*, at para. 15.
62 *Id.*, at para. 14.
63 *Id.*, at para. 5.
64 *Id.*, at para. 7.
65 *Id.*, at para. 14.

proceeds (USD $6.75 million) be retained pending determination of the plan members' rights.[66]

Taking into account the amounts retained pursuant to the court order, the sale resulted in a shortfall of USD $10 million, and, pursuant to the guarantee contained in the DIP lending agreement, Indalex US paid the shortfall and was subrogated to the priority of the DIP lenders.

On August 28, 2009, the employee representatives sought a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of sale and that they had priority over Indalex US's subrogated claim. Concurrently, Indalex brought a motion for an assignment in bankruptcy which would have the effect of nullifying the deemed trust under the PBA.[67]

The employee representatives' claims were dismissed by the Superior Court.[68] The appeal to the Court of Appeal for Ontario was successful, with the salaried pension plan's deficiency subject to the deemed trust, and the executive plan's deficiency covered by a constructive trust to remedy Indalex's breach of its fiduciary obligations.[69] In addition, the Court of Appeal for Ontario held that the deemed trust had priority over Indalex US's subrogated claim.[70]

The following issues were considered by the Supreme Court of Canada:[71]

1. Does the deemed trust provided for in the PBA apply to the salaried plan's deficiencies, and if so, does it rank in priority before the subrogated claim of Indalex US?

2. Did Indalex owe a fiduciary obligation to its pension fund members when making decisions in the context of the bankruptcy proceedings?

3. Was a constructive trust the appropriate remedy for the breach of fiduciary duties?

The Supreme Court concluded as follows:

- *Deemed Trust*: By a majority of 4-3 in split decisions, the Court held that the deemed trust pursuant to the PBA extended to contributions

66 *Id.*, at paras. 15-16.
67 *Id.*, at para. 18.
68 *Id.*, at para. 20.
69 *Id.*, at paras. 21-22.
70 *Id.*, at para. 22.
71 *Id.*, at para. 25.

an employer must make to ensure that the salaried plan fund was sufficient to cover all liabilities upon wind-up.[72] The Court was unanimous that the deemed trust did not extend to the executive plan.[73]

- *Breach of Fiduciary Duty and Constructive Trust*: The Court unanimously held that the fiduciary duty owed by Indalex to the plan members had been breached, but a 5-2 majority held that a constructive trust was not an appropriate remedy.[74]

- *Priority Ranking*: The Court was unanimous that the doctrine of paramountcy deemed that the CCAA priority ranking of the DIP lenders superseded that of the plan members, which was based on provincial legislation.[75]

Justice Deschamps (joined by Moldaver J.) agreed with the Court of Appeal for Ontario that, with respect to the salaried plan, Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.[76] She found support for this position in the relevant provisions of the PBA[77] and in the legislative history.[78] With respect to the executive plan, no deemed trust could be impressed on any amounts through the PBA, as the legislation only protects wound up plans, not plans that would be wound up in the future.[79] While acknowledging that provincial deemed trusts continue to apply in CCAA proceedings, she held that deemed trusts are nevertheless subject to the doctrine of federal paramountcy.[80] And, while the BIA priorities are not those of the CCAA,[81] court-ordered priorities under the CCAA have the same effect as a statutory priority.[82] Because the provincial deemed trust conflicts with the (federal) DIP lender priority, the doctrine of federal paramountcy mandates that the DIP priority supersedes the deemed trust.[83]

---

72 *Id.*, at paras. 45, 121, 265.
73 *Id.*, at paras. 46, 118, 265.
74 *Id.*, at paras. 78, 280.
75 *Id.*, at paras. 52, 242, 265.
76 *Id.*, at para. 45.
77 *Id.*, at paras. 26-27.
78 *Id.*, at para. 38.
79 *Id.*, at para. 46.
80 *Id.*, at para. 52.
81 *Id.*, at para. 51.
82 *Id.*, at para. 60.
83 *Id.*

Justice Deschamps went on to hold that Indalex, as plan administrator, owed a fiduciary obligation to the plan members.[84] This duty was put in conflict with Indalex's fiduciary duty owed to the corporation when it sought a DIP charge that ranked in priority to the plan members, and was breached when the plan members were not provided with reasonable notice of the DIP financing motion.[85] However, Deschamps J. rejected the plan members' argument that the doctrine of equitable subrogation applied to Indalex's subrogated claim.[86] In addition, she disallowed the constructive trust imposed by the Court of Appeal for Ontario, stating: "... [i]t is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property .... [T]his condition is not met [here]".[87] Moreover, it was unreasonable for the Court of Appeal for Ontario to reorder the priorities, as, even in spite of the breach of Indalex's fiduciary obligation by providing no notice, the DIP arrangement would have still been approved as such.[88]

Justice Cromwell (joined by McLachlin C.J.C. and Rothstein J.) held that in order for a deemed trust to exist with respect to a pension plan under the PBA, it must meet the following requirements: (1) the plan must be wound up; and (2) the amounts in question must be (i) employer contributions, (ii) accrued to the date of the wind-up and (iii) not yet due.[89] Justice Cromwell agreed with Deschamps J.'s reasoning that there could be no deemed trust for the executive plan as it had not been wound up.[90] With respect to the salaried plan, the only issue was whether the amounts had accrued to the date of the wind-up, which Cromwell J. found they had not, arguing this was the most plausible grammatical interpretation of the words — one that was reinforced by the statutory context of the provision and the legislative history of the PBA.[91] Nevertheless, Cromwell J. agreed with Deschamps J. that had there been a deemed trust, its priority would have been superseded by the operation of the doctrine of federal paramountcy.[92]

---

84 *Id.*, at paras. 62, 65, 67.
85 *Id.*, at para. 73.
86 *Id.*, at para. 77.
87 *Id.*, at para. 78.
88 *Id.*, at paras. 79-80.
89 *Id.*, at para. 118.
90 *Id.*
91 *Id.*, at para. 121.
92 *Id.*, at para. 242.

While the Court of Appeal for Ontario found a number of breaches of Indalex's fiduciary duty owed to the plan members, Cromwell J. again agreed with Deschamps J. that, while Indalex owed a fiduciary duty to the plan members, this duty was only breached when Indalex pursued actions in conflict with this duty and failed to provide notice of such action to the plan members so that they may have adequately protected themselves.[93] With respect to the constructive trust remedy granted by the Court of Appeal, Cromwell J. held: "a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset."[94] As such, he found that a constructive trust was not an appropriate remedy and that the Court of Appeal for Ontario "erred in principle".[95]

In dissenting reasons, Justice LeBel (joined by Abella J.) agreed with the majority that no deemed trust arose with respect to the executive plan, and agreed with Deschamps J.'s reasoning that while a deemed trust did arise with respect to the salaried plan, the DIP priority prevailed by reason of the doctrine of federal paramountcy.[96] Unlike the majority, Justice LeBel agreed with the Court of Appeal for Ontario that the remedy of a constructive trust should be imposed in the circumstances, taking a different view of the nature and extent of the fiduciary duty owed by Indalex to its pension members.[97] In reaching this decision, Justice LeBel relied on a number of facts, including: the relative vulnerability of the pension members;[98] Indalex's adversarial attitude towards the interests of the pension members;[99] Indalex's failure to appropriately address the conflict of interest between its two fiduciary duties (one to the corporation, the other to the plan members);[100] Indalex's attempt to assign itself into bankruptcy "essentially to harm the interests of the [plan] members";[101] and the failure to conduct the CCAA

93 *Id.*, at paras. 182, 215.
94 *Id.*, at para. 227.
95 *Id.*, at para. 241.
96 *Id.*, at para. 265.
97 *Id.*, at paras. 264, 266.
98 *Id.*, at para. 268.
99 *Id.*, at para. 271.
100 *Id.*, at para. 272.
101 *Id.*, at para. 274.

proceedings "according to the spirit and principles of the Canadian system of civil justice."[102]

## III. Vulnerable Stakeholders and Procedural Fairness

### 1. *Schreyer*

Justice LeBel's decision in *Schreyer*, which resulted in denying the former creditor spouse any interest in the family farm, has been the source of some academic commentary. For example, Professors Sarra and Boyd have used the decision to highlight that while the relationship between family law and gender-based inequality is well-established, the gendered nature of bankruptcy law is less obvious.[103] They argue that bankruptcy law's treatment of all unsecured creditors on a *pari passu* basis directly conflicts in a number of cases with the objective of family law to ensure an equitable division of property. In his critique of *Schreyer*, Robert Klotz argues, among other points, that where an equalization claim against exempt assets in bankruptcy is allowed, heed should be paid to the "fairness" of any decision against the bankrupt spouse.[104]

Professor Leckey departs from other commentators by taking issue with Justice LeBel's prescriptive call for reform to the BIA, arguing that Justice LeBel did not attend to the complexities arising from the provincial law respecting spousal entitlements and exemptions from seizure. Robert Leckey is critical of a judgment that he sees as focused on a unifying mission for provincial policy choices. He suggests that the judgment's most lasting contribution is likely to be the endorsement of the potential role of an application for lifting the bankruptcy stay as a remedy for the creditor spouse.[105] Finally, Professor Leckey also demonstrates how the judgment highlights a source of injustice for women

---

[102] *Id.*, at para. 275.

[103] Janis Sarra & Susan B. Boyd, "Competing Notions of Fairness: A Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2012), at 207.

[104] Robert A. Klotz, "Case Comment: *Schreyer v. Schreyer*" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2011* (Toronto: Carswell, 2012) 269, at 277.

[105] Robert Leckey, "Bankruptcy, Provincial Law, and the Family Farm" (2012) 91 Can. Bar. Rev. 435, at 445-46.

in farm families and gendered assumptions about farm families where the law is focused on preserving the family farm.[106]

As someone who has long been interested in the gendered nature of bankruptcy law, I would have liked to have seen a different result in *Schreyer*.[107] It appears that Justice LeBel himself was not happy with the result he reached ("the outcome of the case [is] unavoidable").[108] As Professor Leckey has argued, I too am critical of the decision in this case to not allow the remedy of lifting the stay to allow the creditor spouse to have access to the family farm where there would not have been harm to any other creditors.[109] However, the hallmarks of Justice LeBel's consistent approach in dealing with bankruptcy intersections are present in this case. He clearly identifies the vulnerable stakeholders at issue and the gendered nature of bankruptcy that is highlighted by the facts of *Schreyer*, recognizing "the economic effects of divorce when those effects are compounded by insolvency, and the role of such situations in the 'feminization of poverty'".[110]

Justice LeBel's legislative deference and call for reform to the BIA is consistent with this commitment to procedural fairness. His approach is also consistent with one of the main goals of bankruptcy law — a single system that addresses all claims and issues relating to the debtor. On the one hand, the *Schreyer* decision highlights the limits of a traditional approach in bankruptcy law in comparison to the Supreme Court's bold and innovative methods of social innovation in areas such as family law, tort law, or constitutional law. On the other hand, the decision highlights the important role that a traditional judge who is not "afraid" of bankruptcy and all of its distributive consequences can play. That is, Justice LeBel recognizes that the system results in case-by-case unfairness at times but these instances are justified by the benefits of having a comprehensive single model system.

---

106 *Id.*, at 447-52.

107 See, *e.g.*, Stephanie Ben-Ishai, "The Gendered Dimensions of Social Insurance for the 'Non-Poor' in Canada" (2005) 43 Osgoode Hall L.J. 289-319.

108 *Schreyer*, *supra*, note 3, at para. 25.

109 See *Re Schreyer*, [2014] M.J. No. 68, 302 Man. R. (2d) 205 (Man. Q.B.), for a review of what happened following the Supreme Court of Canada's decision. In a motion following the decision, the husband's discharge was set aside to allow the wife to bring her claims. The lower court was very much influenced by the fact that there were no unsecured creditors other than the former wife.

110 *Schreyer*, *supra*, note 3, at para. 38.

## 2. *Abitibi*

Even more so than *Schreyer*, the decision in *Abitibi* has resulted in significant commentary and criticism. One group of commentators clearly set out the nature of the competing policy issues at stake:

> From a policy perspective, the debate is between those who accuse large corporations of using the insolvency process as a "regulatory car wash" to circumvent the applications of the "polluter-pay principle", on the one hand, and insolvency professionals who argue that the very purpose of the insolvency process is to allow the debtor a "fresh start" by compromising *all* of the debtor's past liabilities, whether environmental or not.[111]

Following *Abitibi*, the commentary has centred on the application of the test set out by Deschamps J. and the question of whether it is a broad test focused on incorporating all obligations into a single proceeding model of bankruptcy law, or whether it requires a court to examine environmental remediation orders on a case-by-case basis to determine whether it is sufficiently certain that the Province would perform the remediation.[112] The latter approach has been adopted by the Court of Appeal for Ontario in two subsequent decisions.[113] This approach is consistent with Justice LeBel's dissenting reasons which would have held that the EPA orders were not monetary orders in *Abitibi*.

Again, Justice LeBel's clear identification and empathy for the vulnerable stakeholders — those who live and work on and around contaminated properties and have an interest in the Province doing the remediation work — is clear in his reasons. In addition, Justice LeBel is not willing to apply an interpretation of the test that the majority of the Supreme Court of Canada had created to balance the public's interest in a

---

[111] Sean F. Dunphy, Guy P. Martel & Joseph Reynaud, "Unstoppable Force Meets Immovable Object: The Supposed Clash Between Environmental Law and Insolvency Law after *AbitibiBowater*" (2012) J. Insolv. Can. 35, at 35 (citations omitted).

[112] See Anna Lund, "*Newfoundland & Labrador v. AbitibiBowater* Environmental Issues in Abitibi's Insolvency, Examining the Regulator-Creditor and Past-Operations Expense Tests" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013), at 509; Dunphy, Martel & Reynaud, *id.*; Robin B. Schwill, "Policy Choices in Insolvency: A Decision Framework", (2013) 2 I.I.C. 1 (Westlaw); Stephanie Ben-Ishai & Stephen J. Lubben, "Involuntary Creditors and Corporate Bankruptcy" (2012) 45 U.B.C. L. Rev. 253-81; Sara-Ann Van Allen, Kenneth Kraft & John Salmas, "Environmental Claims: Are They Different From Other Claims?" (2013) 30 Nat'l Insolv. Rev. 53; Luc Béliveau & Guillaume-Pierre Michaud, "Insolvency and Environmental Law following the AbitibiBowater Case: Still a Murky Intersection", [nd] 2 I.I.C. 1 (Westlaw).

[113] See *Nortel Networks Corporation (Re)*, [2013] O.J. No. 4458, 6 C.B.R. (6th) 159 (Ont. C.A.); *Northstar Aerospace Inc. (Re)*, [2013] O.J. No. 4460, 8 C.B.R. (6th) 154 (Ont. C.A.).

healthy and protected environment with the desire to facilitate reorganization (or, orderly liquidations) in a way that results in virtually all environmental orders found to be provable claims. Such a result would depart from his commitment to procedural fairness.

### 3. *Indalex*

Like *Schreyer* and *Abitibi*, *Indalex* presented a vexing legal challenge for the Supreme Court of Canada as it tackled one of the most difficult issues in Canadian bankruptcy law — the use of proprietary remedies. Professor Anthony Duggan describes the interplay of principles as a tension between

> (1) the *pari passu* sharing principle, which establishes that unsecured creditors are entitled to equal treatment in a debtor's bankruptcy; and (2) what might be called the property of the estate principle, which holds that the property available for distribution among creditors is limited to the debtor's own property at the date.[114]

In resolving this conflict, in each instance, the challenge is for the court to determine when it is appropriate as a policy matter to give the claimant a proprietary interest.

In his dissenting reasons in *Indalex*, Justice LeBel took the bold step of agreeing with what was likely the most controversial and criticized Court of Appeal for Ontario decision in 2013[115] and held that the constructive trust would have been appropriate. Here again, Justice LeBel was motivated by what he identified as the most vulnerable stakeholders — the pension members — and actions he identified as running against principles of Canadian civil justice.

---

[114] Anthony Duggan, "Proprietary Remedies in Insolvency: A Comparison of the Restatement (Third) of Restitution & Unjust Enrichment with English and Commonwealth Law" (2011) 68 Wash. & Lee L. Rev. 1229, at 1232.

[115] For commentaries on the controversial and criticized decision, see, *e.g.*, David F.M. Cohen, Matthew Literovich & Lisa MacDonnell, "*Re Indalex:* The Current State of the Law" (October 3, 2012), online: Gowlings Lafleur Henderson LLP <http://www.gowlings.com/knowledgecentre/PublicationPDFs/20121102_Indalex.pdf>; Kevin P. McElcheran, "*Indalex* Priority Case Decided — Ontario Court of Appeal Gives Priority to Pension Plan Deficiency Over Secured Lenders" (April 8, 2011), online: McCarthy Tetrault LLP <http://www.mccarthy.ca/article_detail.aspx?id=5365>; Eleonore Morris, "*Indalex* Case Comment" (May 2011), online: Minden Gross LLP <http://www.mindengross.com/docs/articles/indalex-case-comment---eleonore-morris-(may-11)>.

## IV. Conclusion

As this short tour through Justice LeBel's reasons while he was a Supreme Court of Canada judge has shown, it is almost impossible to practise or study bankruptcy law without knowing something about pension law, environmental law, or family law; and *vice versa*. Bankruptcy intersections are rampant and the impact of decisions in these areas is most significant for vulnerable stakeholders. Where bankruptcy intersects with family law, questions can arise about the impact of the bankruptcy on the division of property; the remedies available to a spouse who is an ordinary creditor in a bankruptcy; and the role that spousal support should play in dealing with any potential inequities from a distribution in a bankruptcy of a former spouse. When bankruptcy intersects with environmental law, one of the fundamental intersections is the public's interest in a healthy and protected environment versus the fresh start objective of the bankruptcy system. In addition, environmental regulators' method of regulation through remediation orders is often difficult to characterize as "provable claims" for bankruptcy purposes. With respect to pension claimants, intersections arise between the rights of employees to pensions and the rights of secured lenders who have stepped in at a time of deep financial distress to help restructure a company.

Courts do not always play a role at these bankruptcy intersections; often parties reach out-of-court agreements on how to deal with the complexities of the bankruptcy intersections on their own. For example, DIP lenders will often consider how to address the interests of smaller creditors, such as pensioners, on their own and the court will play a limited role. However, when given the opportunity, at each of these bankruptcy intersections, the challenge for legislators, academics and the courts, centres on how to address competing public-regarding justifications while ensuring that the end result is not one that is opposite to the one intended or the primary public policy justification. Going forward, Canadian bankruptcy jurisprudence will benefit from judicial decision-making informed by an accurate understanding of the paradoxes of a regulatory state.[116]

[116] This concept is drawn from Cass Sunstein's work. See, *e.g.*, Cass R. Sunstein, "Paradoxes of the Regulatory State" (1990) 57 U. Chicago L. Rev. 407.

Professor Sunstein defines a regulatory paradox as a self-defeating regulatory strategy[117] where legislators create regulation to limit or eliminate certain consequences but as a result of unintended choices or unanticipated consequences, those consequences are in fact not limited or eliminated. Based on his analysis of six regulatory paradoxes he concludes that nearly all of the paradoxes are a product of the government's failure to understand how various actors will adapt to the regulatory programs.[118] Professor Sunstein suggests that regulatory paradoxes provide concrete lessons for legislators and the judiciary or administrators. In general, legislators should be attentive to the incentive effects of regulatory statutes and the possibility of strategic or self-interested adaption by administrative agencies.[119] Administrators and judges, Sunstein asserts, should rely on an informed understanding of the paradoxes of the regulatory state and the unanticipated systemic effects of regulatory controls when using their discretion or deciding whether an agency's decision is "arbitrary".[120]

In the bankruptcy context, there are at least two potential regulatory paradoxes — the bankruptcy law versus other areas of law paradox and the bankruptcy law pursuing its own goals with unintended consequences paradox. Justice LeBel provides a model for the judiciary in dealing with each of these potential regulatory paradoxes. That is, an approach which clearly lays out and balances the interests affected by bankruptcy intersections and at the same time recognizes that in the bankruptcy context, procedural fairness is an essential component of the process, especially as far as the most vulnerable stakeholders are concerned.

While I do not agree with all aspects of Justice LeBel's reasons in *Schreyer*, *Abitibi*, or *Indalex*, they serve as a bold and important model for how Canadian courts can continue to build on the difficult task of dealing with bankruptcy intersections.

---

117 *Id.*, at 407.
118 *Id.*, at 413.
119 *Id.*, at 432.
120 *Id.*