Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act

By Virginia Torrie
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Reviewed by: David Rosenberg*

In her book, Professor Torrie tracks the history of the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA" or the "Act") since it first became law in 1933, at the time of the Great Depression, up until the early 21st century. She walks the reader through the remarkable transformation of the CCAA from its beginnings, as a statute firmly focused on serving the interests of major secured creditors, to its transformation as a more debtor-oriented statute which, alongside the interests of major secured creditors, gives greater recognition to the interests of debtors, and to the interests of the community at large, by providing them with opportunities to continue operating as going concerns as they sort out their affairs in the context of an insolvency. Originally, such opportunities were not available to them under the Act. Front and centre in achieving this transformation was judicial activism of the Courts. Starting in the 1950's, Courts showed a renewed willingness to allow debtors access to the restructuring mechanisms available under the Act, as evidenced through their acceptance of "instant trust deeds" at that time. That trend continued, and expanded significantly, in the 1980's and 1990's.

Tracking and providing insight and understanding into how this transformation occurred is the major thrust of Professor Torrie's book. She offers valuable historical insights into the factors that were at play in transforming the CCAA during this period. In her analysis, Professor Torrie includes an astute and thoughtful examination of the relationship between the judicial and legislative functions, and of the role lawyers can play in shaping the interpretation of a statute through their advocacy on behalf of clients. This, in turn, provides valuable insights and lessons into understanding how those same factors may be at play in other contexts involving other statutory regimes and other areas of governmental regulation.

Central to Professor Torrie's analysis is an examination in each period of the CCAA's existence, beginning in the 1930's, of the Act's "historical

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institutionalism" for that period, as contrasted with its "recursivity" for the same period. By "historical institutionalism," Professor Torrie is referring to a top-down examination of an institution to understand its influence on social, political and economic regimes over time. In the case of the CCAA, the "institution" would be the Act itself, which Professor Torrie refers to as a "parchment institution."[1] By "recursivity," Professor Torrie is referring to the dynamic process that exists when the "law on the books" (here, the Act, together with case law and academic commentary relating to the Act and the like) influences the "law in practice," and vice versa.[2] A superb and fulsome explanation of those terms and of their central role in her methodology for examining the history of the CCAA is provided in Chapter 1.

Chapter 2 provides context on the lending climate and norms that existed in Canada in the late nineteen and early twentieth centuries, leading to the enactment of the CCAA in 1933 at the height of the Great Depression. As Professor Torrie explains, before the CCAA was enacted, "Canadian corporate reorganization in the 1920s entailed navigating a complex framework of legislation, case law, and business practices."[3] However, for a variety of historical reasons, which Professor Torrie identifies and footnotes meticulously, "the uncoordinated legislative landscape in Canada was not equipped to handle the restructuring of credit,"[4] including the lack of a statutory basis for addressing unsecured and shareholder claims in the context of a reorganization. In response, the CCAA was enacted, modeled on the English *Companies Act, 1929*, creating a framework for reorganizations which was premised on the common use by bondholders at the time of floating charges and trust deeds, generating a new starting point of historical institutionalism for bankruptcy law in Canada.

Chapter 3 canvases the early days of the CCAA. According to Professor Torrie, over 200 companies restructured under the CCAA in the first few years it was on the statute books, dispelling the commonly held assumption that CCAA applications did not take off till the late 1980's.[5] Court involvement during this period was minimal and "served as judicial rubber stamp for essentially private arrangements worked out under the statute,"[6] the major beneficiaries being large bondholding interests (life

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1 Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies Creditors' Arrangement Act* (Toronto: University of Toronto Press, 2020) at 12.

2 *Ibid* at 3–19.

3 *Ibid* at 34.

4 *Ibid* at 37.

5 *Ibid* at 54.

6 *Ibid* at 42.

insurance companies, trust and loan companies, and the like).[7] This meant that "[t]he CCAA extended, rather than limited, bondholder rights by facilitating company reorganization where bondholders' interests were better served by restructuring than by liquidation."[8] Enactment also purported to make restructuring insolvent companies the exclusive domain of the federal government,[9] sparking a constitutional controversy in the legal community. The effects of that controversy, and its outcome (being affirmation by the Supreme Court of Canada of the CCAA as *intra vires* the federal government), are canvassed in Chapter 4.

Efforts to repeal the Act during a period of greater economic stability in the late 1930's to the early 1950's make for equally fascinating reading and tend to dispel misconceptions of the CCAA as a temporary measure in response to the Great Depression. Such efforts are described and discussed in detail in Chapter 5 and run the gamut from identifying the views expressed at the time on the CCAA by various interest groups, including politicians, Boards of Trade, the Dominion Mortgage and Investments Association, the Canadian Credit Men's Trust Association, the Office of the Superintendent of Bankruptcy, individual lawyers and their clients, and American investors. It includes a discussion about concerns expressed at the time about whether Section 11(2) of the Act had created an open invitation for fraud, because it allowed debtors to accept any claims for the purpose of voting and to reject claims after that when they had settled with creditors. As Professor Torrie explains, the possibility for fraud arose when a debtor admitted false claims in order to secure the votes needed for plan approval, thereby forcing a plan on its real creditors.[10] The chapter moves on to consider concerns about whether the CCAA had inadvertently opened the door to early debtor-in-possession restructuring attempts,[11] and includes an examination of possible predatory abuses of the CCAA at the time by "vulture capitalists."[12] Ultimately, all of these actions and the efforts of many stakeholders resulted in stasis, and led to the 1953 trust deed amendment, which limited application of the Act to compromises involving bondholders, thereby solidifying a continuation of existing practices.[13]

The period from the 1950's to the early 1980's was a period of strong economic growth in Canada and saw few cases involving use of the CCAA. However, certain changes were afoot which, as Professor

7 *Ibid* at 43.
8 *Ibid* at 44.
9 *Ibid* at 47.
10 *Ibid* at 79.
11 *Ibid* at 81.
12 *Ibid* at 80.
13 *Ibid* at 83.

Torrie explains in Chapter 6, would ultimately have a profound effect on the role of the CCAA. Significant among these changes were new and evolving modes of lending, and a trend in Canadian Courts to be far more policy-conscious, as embodied in the stewardship of the Supreme Court of Canada from 1973 to 1984 by Chief Justice Bora Laskin. In addition, the late 1970's and early 1980's saw the adoption by the Courts of Elmer Dredger's modern principles of purposive statutory interpretation, which placed greater emphasis on the policy behind legislation and the intention of parliament.[14] These changes, together with the skeletal nature of the CCAA as a statute (the Act did not contain a preamble or other statements describing its purpose, which Courts took as conferring more scope for judicial discretion),[15] and a host of economic, political and social circumstances that were different than those that existed when the CCAA was enacted in 1933,[16] set the stage for the reinvention of the CCAA in the 1980's and 1990's.

Chapters 7 to 9 provide a rich, and in many ways remarkable, accounting of the various factors at play during the 1980's and 1990's which ushered in a new, debtor-oriented interpretation of the CCAA. Professor Torrie expands on her discussion of the changes identified in Chapter 6, building on them to paint a more complete picture. It is not feasible to reproduce all of the factors that Professor Torrie discusses here, but significant among them are the role of Section 12 of the *Interpretation Act* (Canada) in judicial decision-making, which provided a natural complement to Driedger's purposive approach to statutory interpretation,[17] and enactment in 1978 of Chapter 11 of the *United States Bankruptcy Code*, which promoted and legitimized going-concern reorganizations as a normative policy goal for corporate insolvency legislation.[18] Also significant was the advocacy of the many constituencies involved in corporate insolvencies during the recessions of the 1980's and 1990's, as exemplified in the *Sklar-Peppler* reorganization. In *Sklar-Peppler*, the Court described the purpose of the Act as intending to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations, and to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which it carries on its business operations.[19] The judicial sanction of tactical devices (like the use of "instant trust deeds"), allowing debtors to gain easier access to the Act,[20] and the practice of the

14 *Ibid* at 91.
15 *Ibid* at 112.
16 *Ibid* at 91.
17 *Ibid* at 111.
18 *Ibid* at 115.
19 *Ibid* at 119.
20 *Ibid* at 128–48.

Courts in dealing with major insolvencies on a case-by-case basis, away from Ottawa, which had the effect of "circumvent[ing] stalled bankruptcy reform efforts,"[21] were also significant, as was a public interest narrative put forward by debtors, unsecured and smaller secured lenders, counsel, Courts and academics that focused on the interests of weaker creditors and stakeholder groups, like employees, which "outwardly had the effect of refashioning the CCAA into a DIP remedy."[22] Delays in the reform of the *Bankruptcy Act*, which resulted in large creditors coordinating their efforts around the institutional arrangements enshrined in the CCAA[23] had a significant impact as well. In regard to this last factor, Professor Torrie observes that, "[b]y the time similar provisions were added to the BIA in 1992, the CCAA was already the preferred means—both by debtors and large secureds—of restructuring large enterprises in Canada."[24]

In concluding her thesis in Chapter 10, Professor Torrie offers the reader her thoughts on possible future developments relating to the Act, but readily acknowledges that she does not have a crystal ball, and that, even if she did, a meaningful historical accounting is not really possible until enough time has passed to allow for thoughtful reflection after the occurrence of certain events. Accordingly, whilst she provides some very interesting and thoughtful insights on the present and near future, she shows a prudent self-restraint from commenting too expansively on recent events relating to the Act, as we are still living through them.

When reflecting on Professor Torrie's account of the history of the CCAA in his forward, Professor Duggan observes that, "the history of the CCAA demonstrates the triumph of commercial pragmatism over the rule of law."[25] I must admit that the import of those words was somewhat lost on me, that is, until I was taken by the hand and walked through the history of the Act so thoughtfully, and in a such a detailed way, by Professor Torrie. Her book made it possible for me see and observe the CCAA in a much clearer, much more nuanced way. It also corrected a number of misconceptions about the Act that I had acquired over the years when I had been in private practice. I highly recommend reading the book and taking that same walk through history. Regardless of your background and area of expertise, there is a lot to be gained by developing a more nuanced understanding of the push and pull that goes on between the legislative and judicial branches of government (in all areas of the law). In particular, Professor Torrie's book highlights that the importance of understanding how shifts in the law can sometimes gain momentum

21 *Ibid* at 149.
22 *Ibid* at 150.
23 *Ibid* at 153.
24 *Ibid* at 154.
25 *Ibid* at xii.

from the advocacy being employed by lawyers on behalf of their clients on a case-by-case basis, and from the ground-up. For practicing lawyers, this recommendation may seem a bit counter-intuitive, as it may not be obvious that a legal "history" book would be good use of your time, but if reading the book helps develop a better understanding of the range of possibilities that may be available to your clients, it would be time well spent.