

**Virginia Torrie**, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act*. Toronto: *University of Toronto Press*, 2020.xvi + 300pp., table, figures, appendices, notes, bibliography, index. Cloth; 9781487506421, \$75.00.

In her book, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act*, Virginia Torrie chronicles the improbable story of the Companies' Creditors Arrangement Act (CCAA or the Act) and celebrates its surprising success. It is an undertaking for which Professor Torrie is an associate professor in the Faculty of Law at the University of Manitoba and who serves as the Editor-in-Chief of the *Banking and Finance Law Review*, is particularly well qualified to pursue, given her expertise in the field of insolvency law and her capability as a legal historian.

The author tracks the somewhat surprising trajectory of the Act since its original enactment in 1933 using an analytical framework that utilizes two concepts. Firstly, "historical institutionalism", a research approach which considers the influence of institutions on social, political, or economic regimes over time. And secondly, the "recursivity of law" which takes the view that the flow of the law proceeds not only from formal laws to legal practice but also *vice versa*.

It may surprise you, given the Act's recent importance in the field of insolvency restructuring in Canada, that the origins of the CCAA actually go back over 85 years. Professor Torrie introduces this story by explaining that the first significant Canadian bondholder financings were extended by British lenders under trust indentures which effectively established the priorities for the borrower's creditors in the event of borrower's failure. However, the increasing prevalence of U.S. lenders in the Canadian market in the 1920s and 1930s led to more widespread use in Canada of U.S. lending practices. But by the early 1930s, none of these lending arrangements had proven to be particularly effective in addressing the severe impact of the Great Depression in Canada. Then, in 1933, Prime Minister R. B. Bennett's federal government identified the need for a different kind of insolvency management regime to better cope with the challenges facing the country's declining economy and took action by enacting the CCAA. In this regard, it had concluded that there was a need for legislation which could bind third party creditors, including those whose lending arrangements were governed by provincial law. The new law was the first Canadian federal legislation to provide for the restructuring of insolvent corporations.

As explained by Professor Torrie, while this was welcomed in some quarters, there was, nevertheless, considerable skepticism in both the business and legal communities that the legislation was constitutionally valid under the federal government's authority to legislate with respect to bankruptcy and insolvency. In an effort to put such concerns to rest, the federal government took the precaution of referring the question to the Supreme Court of Canada in a constitutional reference proceeding. The court upheld its validity notwithstanding the active opposition of the governments of both Ontario and Quebec. This leads one to wonder why the enactment of this new and progressive legislation at a time when there appeared to be a significant need for it, and when that legislation had received the constitutional endorsement of the Supreme Court of Canada, there was a continuing reluctance on the part of commercial parties to have recourse to it.

In this regard, Professor Torrie sets forth two likely reasons for this. One is that the Supreme

Court's opinion on the Act had not been considered by the Judicial Committee of the Privy Council. Therefore, the possibility existed that the Supreme Court could be over-ruled in a future case. In addition, there was a fairly widespread view that the strongest arguments against the law being upheld had not been sufficiently presented to the Supreme Court during the 1934 constitutional reference. This was so, even though the Judicial Committee, a few years later, upheld the constitutionality of the CCAA's companion Depression-era legislation, namely, the Farmers' Creditors Arrangement Act.

A third contributing factor may have been that the CCAA seems not to have been well understood by the public in general. The Act had been introduced with little fanfare or public explanation of its intended purpose. It was comprised of some 20 largely skeletal sections that lacked any sort of preamble or statement of its principal objectives. Another circumstance which may have had a bearing on its limited use is the fact that its principal purpose, to the extent that it was understood, was not avowedly to facilitate corporate reorganizations initiated by financially struggling debtor companies, but was seen, primarily, as a large secured creditors remedy.

As a consequence of all of this and the concerns aroused by its negative implications for property rights (which led to demands for the Act's repeal), the legislation languished and saw limited usage during the next half century. Quite a remarkable development in view of its later importance in the field of insolvency law in Canada. This was then a situation where a potentially useful legislative tool (the CCAA), which had been introduced at the very depth of the Great Depression in Canada for the purpose of facilitating needed financial reorganizations and with a view to ameliorating further harm to the economy, basically had to wait a further 50 years before finding its proper place in the field of Canadian insolvency law and practice.

While this might seem to be something of a "missed opportunity", the CCAA did not go away; nor was it repealed. The need for it likely declined over time as the economy recovered. However, beginning in the 1980s the economy experienced a series of economic recessions. This, in turn, led to a number of large firms finding themselves in financial difficulty. Their creditors, then took a further look at the CCAA, with a view to effecting the corporate restructuring of their businesses. Yet, in contrast to the circumstances some 50 years before, the situation appears to have been looked at quite differently. Instead of the CCAA being regarded, primarily, as a secured creditor remedy to assist in the *liquidation* or *winding up* of the debtor company, it was more frequently being utilized by these debtor corporations themselves to effect their own restructuring in order to *continue* in business. This occurred most often, in some reorganized form which might maximize and preserve the corporation's own asset values and minimize losses to creditors, business partners and other stakeholders.

This shift in attitude regarding the purpose for seeking protection under the CCAA was undoubtedly stimulated by developments south of the border when in 1978 Chapter 11 was added to the U. S. Bankruptcy Code and became a remedy of choice for the reorganization of large failing businesses there. This included, in particular, debtor in possession (DIP) - led corporate reorganizations. Although bankruptcy reform in Canada to address shortcomings in the existing Bankruptcy and Insolvency Act had long been under consideration, it was not to come about until quite a bit later (1992). This led, in the meantime, to a situation where the CCAA, rather than being repealed, was instead being looked to as a mechanism for overcoming some of

these problems. Ultimately, these solutions were not to come about as a consequence of legislative reforms but rather by virtue of the courts evolving novel and pragmatic interpretations of the CCAA in order to facilitate more desirable, and financially beneficial, corporate restructurings.

Significantly, as Professor Torrie notes, the courts moved in this direction, not with the benefit of any specific amendments to the CCAA, which, as mentioned had originally been seen as providing protection for large secured creditors, rather than to protect debtor corporations themselves. As the author explains it, what was thought to be most needed in corporate reorganizations structured in the 1930s at the behest of large secured creditors seeking to liquidate and wind-up such corporations was a very different thing from the objectives of financially challenged debtor corporations in the 1980s and 1990s seeking to preserve a viable future for themselves and other stakeholders in the corporation. Yet it was perhaps not unthinkable to consider this happening even without the benefit of amendments to the legislation statute. It is therefore possible that the courts, looking at things some 50 years later might have been inclined to repurpose the CCAA in this way even in the absence of enabling legislation.

It perhaps did not hurt, as the author notes, that the original intentions of Parliament in framing the CCAA were, at a minimum, somewhat obscure, although the legislation was always understood to be remedial in nature. All of this facilitated the transformation of the law as it may have been intended to operate back in the 1930s into a more flexible and pragmatic vehicle for the reorganization of financially troubled firms, 50 or 60 years later. That the action taken to facilitate such a transformation of the law's original intent to a more useful, efficient and modern result was effected by judges dealing with applications made pursuant to the CCAA seems appropriate given the fact that, at the end of the day, it is the court which is called upon to approve (or not) any arrangement proposed under the Act as being "fair and reasonable" in all circumstances.

The matter of so-called "judicial law-making" or "judicialization" of the law (as Professor Torrie describes it) is invariably a controversial topic since it is often seen as an unwelcome and/or unjustified abridgement of the "rule of law". Indeed, one detects in the author's comments on this subject some reticence (and, indeed even some hand-wringing) about it. Nevertheless, there appears to have been an openness to accepting such interpretations, indeed leading to the point where, in later years, many such judicial determinations have been codified by amendments to the Act.

Although there were some doubts concerning the expansion or repurposing of the CCAA being implemented on *an hoc* basis by the courts during this time period, an early indication of the courts' generally sympathetic support for the enlargement of its scope by such means was evident in their response to a 1953 amendment to the Act. The amendment contained a provision limiting the Act's application to companies with outstanding issues of bonds or debentures issued under a trust deed running in favour of a trustee and requiring that all restructurings under the Act had to include an arrangement of such claims. Had there not been a judicially sanctioned device to overcome this restriction, much of the CCAA's utility to facilitate debtor-led reorganizations under the Act would not have been possible. But in a number of subsequent cases, courts accepted the practice of permitting such companies to overcome this limitation

through the technical ruse of issuing so-called “instant trust deeds”, securing a nominal borrowing by the debtor, and thereby bringing its application within the ambit of the Act.

More broadly, the courts responsible for adjudicating upon applications under the CCAA, pursued a parallel practice of construing the legislation with its supposed objective of facilitating debtor-led reorganizations by attributing to it such remedial authorities considered necessary to achieve its assumed purposes. Thus, while the subject of judicial law-making remains controversial, there is, I think, an argument to be made for it here. Today, most commentators would likely agree that, in the case of the CCAA, this judicial intervention has had an overall positive impact on the development of the law in this area.

Professor Torrie has written a scholarly, impressively researched and thought-provoking analysis of Canada’s foremost insolvency legislation. In the course of so doing she has provided her readers with a most interesting revelation of its history.

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