Virginia Torrie

Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangements Act. Toronto: University of Toronto Press, 2020. 300 pp.

In *Reinventing Bankruptcy Law,* Virginia Torrie challenges the orthodox history of *The Companies' Creditors Arrangement Act* ("CCAA"). The CCAA is used in contemporary insolvency practice to liquidate or restructure large businesses. Since the 1980s, courts have adopted a remarkably flexible approach to interpreting the CCAA, justifying their approach on the grounds that the statute's underlying policy is to facilitate the restructuring of large businesses and thereby prevent the negative repercussions to jobs and local economies that result when businesses are liquidated. Torrie argues that courts have misunderstood the underlying policy of the CCAA, which, she argues, has always been aimed at benefiting secured creditors. Her book is a welcome addition to the small but growing body of historical scholarship on Canadian commercial law. I outline here central points in her analysis.

A secured creditor faced with a distressed debtor may more effectively minimize its losses by restructuring the debtor's obligations (e.g., giving the debtor more time to pay) than by liquidating the debtor (e.g., shutting down the debtor and selling off its assets). Liquidation can be particularly unprofitable during times of generalized economic distress, when there may be little demand for a debtor's assets.

In the early twentieth century in Canada, secured creditors had a contractual right to restructure a debtor's payment obligations. Secured creditors would purchase bonds issued by a debtor. The bonds were governed by trust deeds, and the trust deed agreements entitled creditors to restructure the underlying debt. In the 1920s and 1930s, in an attempt to attract American investment, some trust deed agreements dropped the restructuring provision. When the Great Depression hit in the 1930s, many businesses were unable to pay their debts and their secured creditors had no effective restructuring tool. The financial fallout threatened the solvency of some of Canada's big financial institutions because they held bonds issued by the troubled businesses. Failure of these institutions was politically unpalatable, so the federal government passed the CCAA to provide secured creditors with a statutory restructuring remedy.

The legal community greeted the CCAA with scepticism. The statute purported to bind secured creditors, but in the 1930s, most people believed that secured creditors' remedies were the exclusive purview of provincial governments. To assuage doubters, the federal government referred the legislation to the Supreme Court of Canada. In 1934, the Court upheld the CCAA as a constitutional exercise of the federal government's bankruptcy and insolvency power. However, the decision did not explicitly address the legislation's ability to bind secured creditors. Doubts about the CCAA's constitutionality remained until 1937, when the Judicial Committee of the Privy Council upheld the *Farmers' Creditors Arrangement Act* as

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constitutional, clearly affirming the federal government's jurisdiction over secured creditors' remedies *if* a debtor is insolvent.

The CCAA then fell into disuse for a period of decades, in part due to a strong Canadian economy and in part to a 1953 amendment that restricted the statute's application to companies that had issued bonds. This amendment was intended to limit the CCAA to restructurings led by secured creditors and forestall those led by debtors. However, unanticipated changes in the secured-lending landscape in the years following the amendment meant that it effectively barred most secured creditors from using the Act. Instead of buying bonds governed by trust agreements, secured creditors were lending money pursuant to the new provincial personal property security acts and the federal *Bank Act*. Secured creditors found themselves again without an effective restructuring tool when the recessions of the 1980s and 1990s hit.

Enterprising lawyers came up with a workaround that allowed secured lenders to use the CCAA: the debtor company would issue a small number of bonds with nominal value on the eve of starting CCAA proceedings to comply with the 1953 requirement. The courts condoned these "instant trust deeds" because this practice helped to facilitate the going-concern reorganization of businesses and consequently avoid the disruptions to jobs and to local economies that would be caused by liquidation of a company. Once courts said that the purpose of the CCAA was to facilitate going-concern reorganizations, they proceeded to interpret the statute to advance this purpose: sometimes liberally, sometimes narrowly, and sometimes in ways that seemed untethered from the text of the legislation. Parliament then enshrined many of these decisions in the CCAA through statutory amendments.

Why did courts in the 1980s and 1990s characterize the CCAA as being intended to protect the public interest by promoting restructuring over liquidation, despite historical evidence to the contrary? Torrie offers a range of answers to this question. The statute itself was equivocal. Early case law obscured the purpose of the CCAA as a secured creditor's remedy, because it was not clear that the federal government could constitutionally legislate on this subject. Relevant academic commentary was published in a journal that subsequently went out of print. The social context in which the statute was operating had changed, and the new public-interest orientation fit better in a world where academics, governments, and courts were broadening their view of the business stakeholders who should be protected through regulatory, corporate, and insolvency law.

Courts tout the CCAA as benefiting the public by promoting restructurings, but Torrie argues that it is still secured creditors who are the primary beneficiaries of this regime, just as they were when it was enacted in 1933. Courts play a central role in contemporary CCAA practice, and big secured lenders, like banks, have the resources to advocate for their interests in court. They have helped to write CCAA law by applying for court approval of new practices; in time, these practices have become regularized as standard fare. Even when debtors initiate proceedings, secured creditors can exert control in pre-filing negotiations or by providing credit to fund the CCAA process. Torrie argues that there is a troubling disconnect between who purportedly benefits from the CCAA and who actually benefits.

Torrie's book raises provocative questions that will interest a range of readers. Scholars of historical institutionalism will be interested in the history of Canadian corporate insolvency law as a case study of the process of legal change. Scholars of statutory interpretation will be interested in the range of evidence Torrie unearths whilst investigating the underlying policy of the CCAA. Constitutional law scholars will find rich insights into the scope of the federal government's bankruptcy and insolvency power. For those working in the insolvency field and beyond, the book should trigger reflection on how appealing arguments about promoting the public good and safeguarding weaker stakeholders may—counter-intuitively—benefit powerful ones.

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