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Protagonists of company reorganisation:

**A history of the *Companies' Creditors Arrangement Act*
(Canada) and the role of large secured creditors**

by Virginia Erica Torrie

A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy in Law

Kent Law School, University of Kent

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95,511 words

Abstract

In 1933 Canada enacted the *Companies' Creditors Arrangement Act* with little consultation. Parliament described the CCAA as federal 'bankruptcy and insolvency law' but the Act provoked constitutional controversy because it could compulsorily bind secured claims, which fell under provincial jurisdiction. Even after the Supreme Court of Canada upheld the CCAA, the intended beneficiaries of the Act preferred not to use it. In the 1950s the Act fell out of use, and by the 1970s commentators considered it a 'dead letter.' But during the 1980s and 1990s recessions, courts 'revived' the CCAA through progressive interpretations of its few 'enabling' provisions. This helped justify debtor-in-possession reorganisation as a policy objective of Canadian bankruptcy and insolvency law. This thesis attempts to understand why this occurred.

This study provides a theorised interpretation of CCAA history. I rely on concepts such as path dependence, interest groups and institutions to shed light on periods of stability and change in CCAA law over time. I bolster this with a socio-legal analysis that takes account of gradual changes in practice that often preceded and gave shape to formal reforms.

This thesis shows that large secured creditors have been major drivers and beneficiaries of CCAA law. The Act originally extended provincial receivership reorganisations into federal law. In the 1980s-1990s courts facilitated ongoing access to the CCAA by recasting it as a debtor-remedy. In

both instances the solvency of large secureds (financial institutions) highlighted the necessity of restructuring corporate borrowers, and prevailing social, economic, and political factors influenced the substance and mechanisms of legal changes. Despite its public stature as a 'debtor-remedy,' CCAA law continues to advance the interests of large secured creditors.

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List of abbreviations

- ABCP – Asset-Backed Commercial Paper
- ADR – Alternative Dispute Resolution
- BIA – Bankruptcy and Insolvency Act
- BPC – Bondholders’ Protective Committee
- CBA – Canadian Bankers’ Association
- CSC – Canada Statute Citator
- CCAA – *Companies’ Creditors Arrangement Act*
- CNR – Canadian National Railway
- DIP – Debtor-in-Possession
- DMIA – Dominion Mortgage and Investment Association
- FCAA – *Farmers’ Creditors Arrangement Act*
- FI – Financial Institution
- FS – Financial System
- GFC – Global Financial Crisis
- HI – Historical Institutionalism
- IMF – International Monetary Fund
- NDP – New Democratic Party
- OSB – Office of the Superintendent of Bankruptcy
- OSFI – Office of the Superintendent of Financial Institutions
- PBGF – Pension Benefits Guarantee Fund (Ontario)
- PC – Judicial Committee of the Privy Council
- PM – Prime Minister
- PPSA – *Personal Property Securities Act*
- UK – United Kingdom
- UNCITRAL – United Nations Commission on International Trade Law
- US – United States
- WUA – *Winding-up Act*
- WURA – *Winding-up and Restructuring Act*

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1. Introduction

I. Background and research questions

In the worst year of the Great Depression in Canada, Parliament enacted *An Act to facilitate Compromises and Arrangements between Companies and their Creditors*.¹ Debates on the new statute took up roughly six pages of Hansard. No Parliamentarian objected to the bill, which passed into law in just over one month's time. The Act was 20 provisions long. Commentators and the press scarcely took notice of these events, yet the enactment of the CCAA marked a significant moment in Canadian legal history. For the first time, federal bankruptcy and insolvency law could compulsorily bind secured creditor claims.

The Act was met with stunned reactions from the legal community. Lawyers refused to recommend it to their clients because they believed it was an unconstitutional exercise of federal jurisdiction. According to prevailing views of Canadian constitutional law, only the provinces could regulate secured creditor rights, irrespective of the debtor's insolvency. So sooner or later an arrangement under the new statute would surely provoke a constitutional challenge from an unhappy creditor. Once that happened the court would be compelled to declare the Act *ultra vires*, which lawyers feared would dissolve any restructuring already carried out under the CCAA.

¹ *Companies' Creditors Arrangement Act*, SC 1933, c 36.

The Act's framers anticipated constitutional challenge, but the CCAA's chilling effect ultimately prompted the Bennett (Conservative) government to send its own statute for constitutional reference. The PC charged the SCC with reviewing the constitutionality of the CCAA, and the SCC unanimously ruled that the Act was *intra vires*.² This decision astonished the legal community. But in its short judgement the SCC neglected to comment on the most controversial aspect of the legislation—the Act's facility for binding secured creditors to a compromise or arrangement. As a result, constitutional uncertainty persisted until a 1937 PC reference decision on a similar statute upheld this as a valid exercise of federal jurisdiction.³

After the Great Depression the CCAA slipped into relative obscurity, and ongoing confusion surrounding the objects of the skeletal Act led to several calls for its repeal. Along with limited Parliamentary debate and scanty scholarly commentary, the Act lacked a preamble or other clear policy statement. But instead of repealing the Act or issuing policy guidance, Parliament amended the CCAA in 1953 by adding a provision that limited its application to companies with outstanding issues of bonds or debentures issued under a trust deed and running in favour of a trustee.⁴ All restructurings carried out under the CCAA had to include a compromise or arrangement with respect to these claims. Nevertheless, due to continued disuse, by the early 1980s commentators (quite reasonably) saw the statute as a dead letter.

² *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75.

³ *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359, aff'd [1937] AC 391, [1937] 1 DLR 695 (PC), reviewing *Farmers' Creditors Arrangement Act*, SC 1934, c 53.

⁴ *Companies' Creditors Arrangement Act*, RSC 1952, c C-54, s 2A, as am by SC 1953 c 3, s 2. The bonds or debentures could be secured or unsecured.

Beginning in the late 1980s and early 1990s case-driven developments thrust the CCAA into legal and public consciousness. Relying on liberal interpretations of the statute, judges and counsel used the Act to facilitate a number of large, high profile reorganisations. At the time the CCAA was still the only insolvency statute that could compulsorily bind secured claims.⁵ Judges, counsel, academics and the press spun a new public interest narrative around the CCAA, which included a prominent public role for the concerns of stakeholder groups, such as organised labour. Relying on arguments put forward by counsel, judges read new social policy considerations into the statute and outwardly refashioned an obscure and antiquated Act into a versatile and modern DIP restructuring regime. During this period the CCAA came to be regarded as a functional equivalent to American chapter 11 restructuring, and this characterisation helped guide the direction of judicial interpretation. In the process, courts relegated the CCAA's few textual provisions to a supporting role in increasingly expansive exercises of judicial discretion.

This sketch of CCAA history raises several questions. Why did Parliament unanimously pass a (supposedly) unconstitutional statute with so little discussion? How did a dead letter Act come to represent Canada's major corporate restructuring regime? In other words, what drove these developments? And how might this historical account contribute to broader

⁵ Changes to the *Farmers' Creditors Arrangement Act* in 1943 made that statute useless to adjust secured debts after the 1940s, although the Act remained on the statute books until 1988. See Stephanie Ben-Ishai and Virginia Torrie, 'Farm Insolvency in Canada' (2013) 2 IIC Journal 33, 36-51.

understandings of corporate bankruptcy law and cycles of legal change? My thesis proposes answers to these research questions.

II. Significance of research within the literature

My study shows that the CCAA extended bondholder-led receivership reorganisations into federal bankruptcy and insolvency law. I demonstrate that Parliament intended the CCAA to be a secured creditor remedy carried out by a trustee or receiver, rather than a DIP restructuring statute. The historical record also shows little regard for contemporary 'public interest' considerations. Although the public narrative around the Act changed beginning in the 1980s, I demonstrate how the history and ongoing use of the CCAA as a remedy for large secured creditors continues to matter. While other creditor and stakeholder groups do benefit from CCAA reorganisations, this is largely incidental to the benefit restructurings convey to the most powerful creditors. This thesis accordingly shows that large secured lenders have been major drivers and beneficiaries of Canadian corporate reorganisation efforts under the CCAA over the past 80 years.

The CCAA represented a bold move by the federal government to appropriate an existing provincial legislative power governing secured creditor rights. In point of fact the compromise or arrangement provisions of the Act enshrined majority provisions into federal law from private financing instruments (trust deeds) governed by provincial law. This led to much constitutional controversy. The economic exigencies of the Great Depression both framed and spurred the

Bennett (Conservative) government to enact a statute that lawyers, commentators, and even bondholders, widely regarded as unconstitutional.

The impetus for this federal statute was to help prevent large bondholders (FIs) from failing, by allowing them to restructure debtors (read: restructure losses) and so return these companies (read: investments) to profitability. Leading up to the 1920s and 1930s, many Canadian companies omitted majority provisions from their trust deeds in order to attract American investors, and this left no mechanism for restructuring bondholder claims. So the broad policy underlying the CCAA was to help ensure stability in the Canadian FS by preventing failures of large FIs that may have resulted from winding-up many large debtors. The weightiness of this policy rationale—with the social, economic and political ramifications that financial instability entails—better counterbalances the constitutional risk that the CCAA represented in 1933.

My historical narrative goes on to interpret later CCAA law developments in the 1980s and 1990s in light of the Act's early history, as well as significant social, economic and political changes that took place in Canada after the 1930s. By the 1980s and 1990s, the social, political and economic backdrop, as well as new approaches to statutory interpretation, led Canadian courts to re-interpret the CCAA as a debtor-remedy on an essentially *a priori* basis. This modern assumption served as the subconscious lens through which later actors interpreted historical records, and in so doing obscured the origins of the Act. The very presence of the Act on the statute books came to stand for an implicit policy purpose: encouraging corporate reorganisations for the wider 'public

interest.’ It seems that this view tacitly dissuaded commentators from rigorously questioning or challenging ‘received wisdom.’ Encouraging corporate restructuring for the broader ‘public interest,’ as it is now understood, is a recent addition to CCAA law; one that courts added to the Act in the 1980s and 1990s, and which, through chronic reproduction of case law precedents, has assumed a self-perpetuating quality.

Nevertheless ‘liberalisation’ of CCAA law in the 1980s and 1990s occurred with the support of large secured lenders, which were primary beneficiaries (and proponents) of these changes. Secured lending practices changed leading up to the 1980s and 1990s recessions without corresponding changes in lender remedies. Thus, in the 1980s and 1990s large secured lenders found themselves without effective methods of reorganising debtors, echoing the situation of large bondholding interests in the 1930s. Once again, within the setting of an economic recession, large secured lenders wished to reorganise some of their largest debtors, but did not always have the legal tools to do so. Unlike the 1930s, however, in the 1980s and 1990s courts—rather than Parliament—facilitated legal change so that large secured lenders could effect reorganisations of corporate debtors. Although stalled bankruptcy reform contributed to the lack of effective reorganisation tools in the 1980s and 1990s, it is the active role of the courts that stands out in this period of legal change. The fact that such legal changes *could* come through the courts in the 1980s and 1990s illustrates how much factors such as statutory interpretation and judicialisation had advanced in Canada in just 50 years; judge-driven reforms of this nature would have been hard to imagine in the 1930s. In the 1980s and 1990s, courts adopted liberal,

policy-focused interpretations of the CCAA and drew on contemporary ideas about the public interest benefits of corporate reorganisation. In so doing, they applied a public interest ‘gloss’ to a secured lender remedy—reinventing the statute as a debtor remedy—and broke with traditional explanations for company restructuring, which were rooted in the rights of large secured creditors.

Conceptually departing from historical, bondholder remedy justifications for corporate reorganisations, and relying on broad statements of the ‘public interest’ for policy guidance led to certain difficulties. Unlike American chapter 11, for instance, debtors and creditors in Canada both have unilateral access to the CCAA, and there is no provision for cram down. This leaves large secureds as one of the few types of creditors with an effective veto over reorganisation attempts. Although DIP case law and statutory amendments have accreted onto CCAA law over the past 30 years the Act still functions as a secured lender remedy. So contemporary case law illustrates (apparently) conflicting uses for the Act. For example, liquidating CCAAs are at odds with the ‘implicit’ CCAA policy purpose of effecting going-concern reorganisations. A debtor-remedy view of CCAA law cannot easily explain the trend toward liquidating CCAAs. A lender-remedy perspective, however, offers promising prospects for a robust explanation, as well as justification, for these types of trends

In tracing the history of the CCAA and situating legal developments in a broader, social, economic and political context, this narrative also brings to light several interesting themes within Canadian corporate reorganisation. For instance, the

restructuring crises precipitated by the Great Depression as well as the 1980s and 1990s recessions were preceded by incremental, but ultimately sweeping, changes in secured lending. In both cases lending practices changed at a legal and industry level during periods of economic prosperity, without much (if any) thought given over to implications for corporate reorganisation during economic downturns. While lenders were apparently satisfied with liquidation as a remedy during periods of economic prosperity, this turned out to be an undesirable option during economic recessions when many corporate debtors encountered financial difficulty. Economic downturns highlighted secured lenders' need for corporate reorganisation as a potential remedy for debtor default.

This thesis serves as a case study about how law, ideas and institutions can change 'from the ground up' to become quite different from the way they were before. CCAA history particularly showcases how practices 'on the ground' can influence formal lawmaking because Parliament made no substantive formal changes to the Act for several decades, during which time practices under the statute changed dramatically. Yet periods of formal stasis do not always generate changes in practice. For example, although the *Bankruptcy Act* of the 1930s also went decades without substantive reforms, no similar judge-made law occurred under that statute. This demonstrates that the factors that lead to conditions that are ripe for the sort of judicial changes that occurred under the CCAA are more complex than a mere lack of Parliamentary action. The textured research approach I employ in this thesis helps me to identify and explain distinct cycles of legal change, and also serves as a useful contribution to academic literature in this regard.

Although the CCAA is over 80 years old, it is only in the last 30 years or so that it (like the topic of bankruptcy law more broadly) has started to attract significant scholarly attention in Canada. Since the 1980s and 1990s a number of commentators and scholars have published journal articles on Canadian corporate reorganisation law under the CCAA. One scholar, Janis Sarra, published a book on contemporary CCAA law based on her S.J.D. thesis, called *Creditor Rights and the Public Interest*.⁶ Sarra has also written a more practitioner-oriented text on CCAA law and practice, which is now in its second edition.⁷ There has also been scholarly attention dedicated to historical bankruptcy law under the Canadian *Bankruptcy Act* and its predecessor statutes over the past few decades. Thomas G.W. Telfer has written several articles on bankruptcy law in nineteenth- and early twentieth-century Canada.⁸ In 2014 Telfer published a book on historical Canadian bankruptcy law based on his journal articles and S.J.D. thesis: *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919*.⁹ Along with Bruce L. Welling, Telfer has also written an article with

⁶ Janis Sarra, *Creditor Rights and the Public Interest* (Toronto: University of Toronto Press, 2003).

⁷ Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Markham, ON: Carswell, 2nd ed, 2013). See also David E. Baird, *Baird's Practical Guide to the Companies' Creditors Arrangement Act* (Markham, ON: Carswell, 2009).

⁸ Thomas G.W. Telfer, 'The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?' (1995) 24:3 CBLJ 357; Thomas G.W. Telfer, "'A Canadian World without Bankruptcy Law": The Failure of Bankruptcy Reform at the End of the Nineteenth Century' (2004) 8:1 Austl J Legal Hist 83; Thomas G.W. Telfer, 'The Evolution of Bankruptcy Exemption Law 1867-1919: The Triumph of the Provincial Model' 2007 ARIL 18; Thomas G.W. Telfer, 'Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law, 1867-1880' (2010) 60:2 UTLJ 603.

⁹ Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014). See also Virginia Torrie, 'Book Review: *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014)' [forthcoming in (2016) BFLR].

an historical component on the federal WURA, which applies to certain insolvent companies, such as banks and insurance companies.¹⁰

Aside from the sketches of CCAA history contained in Sarra's books and in several journal articles,¹¹ there has not yet been a systematic, historical study of CCAA law, or a comparison of historical company reorganisation with contemporary practices in Canada. Although Telfer's research on Canadian bankruptcy law is historically oriented, the statutes he focuses on were mainly concerned with the overindebtedness of individuals and traders, rather than of large companies. While the Telfer and Welling article on WURA does address the historical treatment of some large companies in insolvency, this Act only applies to certain types of companies, and is primarily concerned with winding-up, rather than restructuring these debtors. So there is little substantive literature on the broad topic of historical approaches to Canadian company reorganisation in cases of insolvency, and no substantive scholarship that addresses how reorganisations were carried out under the CCAA. This thesis is accordingly an original contribution to Canadian bankruptcy scholarship in both of these respects.

III. Theoretical approach and methods

In order to offer a robust, historical account of these CCAA developments I rely on ideas from HI and a recursivity of law analysis. My historical narrative is

¹⁰ Thomas G.W. Telfer and Bruce L. Welling, 'The Winding-Up and Restructuring Act: Realigning Insolvency's Orphan to the Modern Law Reform Process' (2008) 24 BFLR 233.

¹¹ A 2014 article provides an overview of the legislative history of the CCAA based on the Tassé Report: Alfonso Nocilla, 'The History of the *Companies' Creditors Arrangement Act* and the Future of Restructuring Law in Canada' (2014) 56:1 CBLJ 73.

attentive to the role of institutions and history in contributing to periods of stasis and change within legal regimes. By adopting a long and broad view of history that takes into account the political-economic and socio-legal contexts of reorganisation, I am able to identify continuities and ruptures in CCAA law over time.

A recursivity of law analysis illustrates the way in which practices ‘on the ground’ shape more formal legal developments, as well as the way in which professionals and courts help mediate the application of ‘law on the books’ into practice. This approach factors in the importance of ideas, interest groups and the relative political and legal strength of the parties into distinct cycles of legal change. My recursivity of law analysis sheds light on periods of stability and change in CCAA law and provides a systematic account of the mechanisms by which changes occurred at key points in time.

A longer view of history and the way changes in practice factor into formal legal changes illustrates the role of large secured creditors as key drivers and beneficiaries of corporate restructuring law, and underscores its importance as a secured creditor remedy. Twice during the study period economic downturns showcased secured creditors’ need for (and lack of) effective legal mechanisms for restructuring debtors. These were rare yet significant events in the development of Canadian corporate restructuring law. Concepts from HI help explain why things developed the way they did, and also shed light on the enduring legacy of the ‘restructuring crises’ that these two economic downturns precipitated. A recursivity of law analysis illuminates the substance of the

restructuring 'solutions' that each crisis gave rise to, as well as the mechanisms by which solutions from legal practice shaped subsequent changes to formal law. An HI and recursivity of law framework together illustrate how gradual changes in financing practices led to circumstances that were ripe for legal change and likely to have a profound and enduring impact on the law and practice of Canadian corporate reorganisation. Very little about these historical events unfolded the way one might have expected from the 1920s looking forward.

The differences between the legal changes of the 1920s and 1930s and those of the 1980s and 1990s are also striking. The ideas that influenced corporate reorganisation policy in the 1980s and 1990s, and the mechanisms through which legal changes occurred bear little resemblance to the 1920s and 1930s. On the importance of an historical approach to understanding developments in US bankruptcy law David A. Skeel Jr. notes that scholarship which 'focus[es] solely on the process that led to the 1978 reforms ... cannot provide a full explanation why the 1978 Code so thoroughly repudiated the existing approach to corporate reorganization.'¹² Accounts of 1980s and 1990s developments in Canada give rise to a similar problem. They tend not to recognise that these cases represented a marked break with earlier approaches to corporate restructuring, let alone offer an explanation for why they occurred. For instance, understanding the historical background illustrates that 'purposive' interpretation of the trust deed amendment in the 1980s and 1990s turned the original policy of the Act on its head. My recursivity of law approach illustrates that informal changes in practice and case law beginning in the 1980s and 1990s were incrementally

¹² David A. Skeel Jr., *Debt's Dominion* (Princeton: Princeton University Press, 2011), 13-14.

'reforming' CCAA law along new lines, despite formal textual stasis. These changes generated positive feedback and influenced the way subsequent parties approached the Act. My two-pronged theoretical framework captures the way formal law reform has tended to *follow* and *borrow from* the substance of less formal changes in Canadian corporate restructuring practice. This allows me to identify and explain cycles of legal change within CCAA law.

A wide historical context also illuminates the broader political and economic importance of restructuring as a secured creditor remedy. This study shows how debtor restructuring as a lender remedy during economic downturns is linked to lender solvency concerns. The macroprudential dimensions of corporate restructuring may provide a possible explanation for why large, sophisticated lending institutions failed to ensure they had ongoing access to an important lender remedy. Corporate restructuring for lenders' benefit accordingly holds significance for studying FS stability in Canada.

A significant degree of contingency surrounded many CCAA law developments. Although change was probably inevitable to address the restructuring crisis of the 1930s, the specific way events unfolded was not—the outcomes of the SCC and PC reference cases on point looked implausible to commentators and lawyers in the early 1930s, for example. Nevertheless the sequence of the events that did transpire—although unlikely—is quite important for understanding the development and trajectory of CCAA law over time. A second example is the fact that the Act was essentially dead letter by the early 1980s, which made it look inevitable that it would be repealed in the next round of bankruptcy reforms. But

its technical presence on the statute books ultimately led to its regeneration and it became a major part of modern Canadian bankruptcy and insolvency law. Ideas from HI such as 'critical junctures', 'positive feedback' and 'path dependence' help explain how unlikely or even accidental events factor into legal developments over time, and a recursivity of law analysis illustrates the mechanisms that contribute to these phenomena.

Another interesting theme that arises in this narrative is how changes to corporate lending practices to bring Canadian practices more in line with American norms made it difficult or impossible to rely on existing restructuring mechanisms, which were rooted in historical English practices. One might think that the importance of foreign investment or American influence would lead a country like Canada to more fully embrace US approaches to corporate financing and restructuring. Or a legal origins analysis might suggest that English approaches would win out, and facilitate a greater role for British investment in Canada. The way historical events unfolded, however, tends to be more complex and nuanced. For example, Canadian companies removed provisions in financing instruments that US investors found objectionable in the 1920s and 1930s, and in so doing (inadvertently) eliminated their ability to restructure as well. The Canadian government 'responded' to this problem by enshrining majority provisions into legislative form (the CCAA) in order to facilitate company restructurings by bondholders. The Act also ensured ongoing access to US debt markets, since the *US Trust Indenture Act of 1939* formally barred bonds governed by Canadian majority provisions from the NYSE. Yet most Canadian companies used the CCAA to reinsert majority provisions into their trust

deeds—effectively opting out of access to US debt markets. Canadian, rather than British investors represented nearly 100 per cent of purchasers of new Canadian corporate bonds for the next 15 years. So although American influence and legal origins represent two significant factors, they are only part of a larger, multifaceted story.

Another example of this is how Canadian corporate restructuring has outwardly come to resemble American approaches under chapter 11 since the 1980s and 1990s, but in practice still has much in common with historical English bondholder reorganisations. While comparative legal analyses tend to describe the CCAA as a functional equivalent to chapter 11 (which is broadly true),¹³ this characterisation belies the distinctly different origins and development of the former Act. The most unique aspect of the CCAA to date—the feature that makes the CCAA ‘the CCAA’—is arguably the way in which it has paradoxically remained true to its original function as a remedy for large secured creditors (FIs) *despite* and *because of* new, and quite different, judicial interpretations of this statute to suit an evolving societal landscape. This applies to earlier bondholder reorganisations to a certain extent as well. In both cases limited Parliamentary intervention helps to facilitate this process. The result is an area of law that draws on historical English and contemporary American approaches, and yet is distinctive from both—in neither of those two countries do the

¹³ See eg Jacob S. Ziegel, ‘The Modernization of Canada’s Bankruptcy Law in Comparative Context’ (1998) 33 *Tex Int’l LJ* 1, 7; Timothy C.G. Fisher and Jocelyn Martel, ‘Should We Abolish Chapter 11? Evidence from Canada’ (1999) 28:1 *J Leg Stud* 233; Stephanie Ben-Ishai and Stephen Lubben, ‘Sales or Plans: A Comparative Account of the “New” Corporate Reorganization’ (2010) 56 *McGill LJ* 591, comparing approaches under chapter 11 and the CCAA. See also discussion in Chapter 4.

mechanisms of (and justifications for) legal change rely so heavily, overtly, and in such a sustained way on judge-made law concerning corporate reorganisation.¹⁴

My theoretical framework therefore allows me to offer a theorised, historical account of CCAA law. It illustrates how this Act, and the bondholder reorganisations that inspired it, represents an example of keeping what works about a legal regime while remaining flexible to adapt to changing circumstances. The theories I employ provide insight into periods of stability and change in this legal regime, and the answers I propose to the research questions set out above contribute to a greater understanding of the origins and development of CCAA law and practice over time. In particular, this study highlights the significant role played by large secured lenders as drivers of the law and practice of corporate reorganisation in Canada, and shows how much legal change in this field has tended to occur ‘from the ground up.’ Although the history of CCAA law displays a significant degree of contingency, the theories I employ produce some insights that extend beyond bankruptcy law. This allows me to suggest some ways in which the history of CCAA law can contribute to broader understandings of Canadian federalism, judicialisation, and policy development, for example.

I rely primarily on qualitative methods of enquiry to answer my research questions. The historical component of this research draws mainly from case

¹⁴ See eg *Re Philip's Manufacturing Ltd.* (1991), 9 CBR (3d) 1, 60 BCLR (2d) 311 (SC), para 34, stating in part ‘If that is judicial legislation, so be it.’ See also discussion in Chapter 4.

The term ‘reorganization’ lacks a technical statutory definition. See Clémentine Sallée and David Tournier, ‘Reorganization: A Commercial Concept Juridically Defined’ (2009) 88 Can Bar Rev 97.

law, legal facta, legislation, news sources, scholarly writing (published and unpublished), trade journals and pamphlets, histories, Parliamentary materials (published and unpublished), and other archival materials. My historical narrative benefits from several historical sources not available to earlier scholars, including legal facta for the CCAA reference, Parliamentary committee minutes concerning a 1938 CCAA repeal bill, and an unpublished Parliamentary sessional paper from 1938.

Where available I also incorporate some quantitative data to add texture to my historical narrative and to supplement my qualitative analysis. My quantitative data includes historical figures on the number of Dominion companies in bankruptcy or receivership, frequency of commercial failures, and number of filings under the CCAA, all of which were listed in Parliamentary materials. As quantitative data, these figures are limited in several ways. For example, in some instances it only includes data on federally incorporated companies, and so does not provide details for companies incorporated under provincial legislation. Nevertheless this data is helpful to illustrate general trends, and I rely on it in this way as part of my qualitative analysis.

I also compiled some of my own quantitative data for this project. The first data set consists of reported cases that reference the CCAA from 1933 to 2011 inclusive. This data illustrates a sharp increase in reported decisions around the late 1980s and early 1990s. I compiled this data from consulting the print edition of the CSC and Supplements. If a single case was listed more than once in the CSC, I recorded it as a just one datum. I sorted data on reported cases by the year in

which they were reported. If there was any disparity between different law reporters in terms of publication year, I allocated the case to the year in which the court rendered its decision.

In addition I compiled available data on the number of CCAA applications in the 1930s and 2000s. This data is neither complete, nor exhaustive for years prior to 2010. However, it does provide a rough contrast between the numbers of CCAA applications in the 1930s as opposed to the 2000s. CCAA filing data from the 1930s only refers to applications filed in Montreal and comes from statistics presented by the Montreal Board of Trade to the 1938 Parliamentary Committee. The Montreal Board of Trade relied on notices in trade publications to compile this data on CCAA applications. Hence, this provides an underinclusive picture of 1930s CCAA applications rates. In the third quarter of 2009 the OSB began keeping records on CCAA applications, and I relied on this information to compile data on CCAA applications from this point through to the end of 2013. Accordingly, these more recent filing rates provide a more accurate picture of the number of CCAA applications throughout Canada.

I rely on these two quantitative data sets to illustrate general trends only. As Parliamentary records and academic commentary demonstrate, and as comparing these two sets of quantitative data confirms, the vast majority of early CCAA cases went unreported. 1930s CCAA applications far outpaced reported CCAA decisions. Conversely the number of reported decisions mentioning the Act eclipses more recent filing rates. It is important to note that cases that reference the CCAA do not necessarily have to do with restructuring. For

instance, a number of cases simply discuss the SCC's ruling on the constitutionality of the CCAA. Furthermore, contemporary reorganisations under the Act tend to produce multiple reported decisions of judicial rulings on various aspects of the same restructuring. This phenomenon amplifies the appearance of a sharp upturn in reported cases beginning in the 1980s and 1990s, as does the general growth of law reporting in Canada since the 1930s.

Despite its limitations as a quantitative data set, this data is still useful to a qualitative understanding of CCAA history. Judges and counsel in the 1980s and 1990s looked primarily to reported cases to get a sense of the history of the Act and the frequency with which it was used, so the small number of early decisions they found factored into their narrative of the statute. Since no formal records were kept on the CCAA until autumn 2009, reported decisions also informally (and often tacitly) served as a rough proxy for the frequency of CCAA applications. The appearance of exponential growth in reported decisions in the past few decades thus serves as part of the contextual backdrop for much conventional wisdom concerning the Act.

IV. Structure of research

Chapter two lays out my theoretical framework. I explain how I have drawn ideas from HI and socio-legal theories to construct a novel research approach for this project. I highlight how this approach lends itself well to providing a robust, historical explanation for the enactment and development of CCAA law over the past 80 years, and offers some insights for examining existing theoretical work

on business bankruptcy. This chapter also illustrates some of the insights and points of broader significance that my research approach yields.

Chapter three provides an historical account of the enactment and early history of the CCAA. I show that the Act was a continuation of longstanding receivership reorganisation practices under provincial law, which large bondholding interests (FIs) routinely carried out under private agreements (trust deeds.) By extending receivership remedies into the federal sphere, the CCAA sparked constitutional controversy, and ultimately redrew part of the dividing line between provincial and federal jurisdiction. In an era of wide interpretations of provincial powers, Parliamentary boldness with respect to the CCAA calls attention to pressing economic and political factors then at stake. Although the Great Depression provided the impetus to pass the CCAA my theoretical framework brings to light the longer-run causes that were making a statutory scheme for restructuring secured debt increasingly necessary in early twentieth-century Canada. Hundreds of reorganisations under the CCAA reaffirmed federal bankruptcy and insolvency law as a useful mechanism for restructuring companies. Together with other noteworthy legal, political and economic factors, this early utility helps explain the resilience of the CCAA, despite several Parliamentary calls for repeal, beginning in 1938.

Chapter four examines another significant moment of legal change in Canadian corporate restructuring law. This chapter provides a detailed and systematic study of CCAA case law from the 1980s and 1990s and offers an explanation for why and how courts re-interpreted the Act as a debtor-, rather than a secured

creditor-remedy. American conceptions of bankruptcy helped shape interpretations of the CCAA in this regard. Insolvency professionals and large creditors also influenced these principally case-driven developments, while Parliament left the Act essentially untouched. The utility of the CCAA for effecting restructurings within a rather open-ended framework of judicial discretion became its predominant policy justification. Fairly loose conceptions of stakeholder concerns and the wider 'public interest' came to serve as guiding principles for the Act's interpretation. The outcomes of 1980s and 1990s CCAA restructurings nevertheless achieved functionally similar results to those of the 1930s. Accordingly, this episode in CCAA history represents a distinct rupture in Canadian restructuring practices in some respects, while remaining continuous with historical approaches in other ways. In the 1980s and 1990s the courts forged a modern public policy narrative for the CCAA that remains a touchstone for corporate reorganisation today. The mechanisms by which legal change occurred 'from the ground up' remain key features of current case law developments under the Act and shed light on the development and trajectory of CCAA law over the past few decades.

Chapter five synthesises the discussion and analysis of the previous chapters. This chapter provides a theorised interpretation of the development of Canadian corporate reorganisation law within a long and broad view of history. By adopting a longer view of history that is attuned to socio-legal mechanisms of change, I am able to test the theoretical approach I lay out in Chapter two, with fruitful results. I draw together history and theory to offer insight into the underlying factors that have contributed to periods of stability and change in

restructuring law and practices over time. This chapter accordingly brings to light several long-term trends in this area of law and illustrates the usefulness of a systematic approach to studying commercial law history. I also highlight several ways in which this project holds wider significance for scholars working in law, history and related disciplines.

Chapter six concludes this thesis. In this chapter I tie together the preceding chapters and recap the answers to my research questions. I highlight the broader significance of this study as well as its limitations, and situate my thesis within the scholarly literature on Canadian corporate insolvency law. I also identify some ramifications of my study for the theory and policy of corporate reorganisation law. Finally, I suggest a few potential avenues for further research in this area in light of the contribution of my thesis.

2. Theoretical framework

I. Introduction

In my thesis I draw on some central aspects of HI to test how helpful these ideas are to understanding stability and change in Canadian corporate insolvency law over time. I also employ a recursivity of law analysis to examine how legal practices influenced formal lawmaking, and vice versa, in order to discern and analyse cycles of change within CCAA law. My study sheds light on the origins and development of the Act as a corporate restructuring regime by highlighting the importance of historical and institutional factors. I further situate my analysis of stability and change in CCAA law in terms of the political-economic and socio-legal contexts surrounding corporate reorganisation, from the early twentieth-century to the present day. This theoretical framework guides my analysis of the CCAA, and offers an historically attuned explanation for its enactment, resilience to repeal efforts, and transformation into a contemporary DIP restructuring regime.

The rest of this chapter is arranged as follows. Section II provides an explanation of the key terms and ideas that make up my theoretical framework. This section describes the theoretical approach I adopt in my historical study of the CCAA. I also highlight some of the insights and points of broader significance that this approach yields. Section III concludes.

II. Explanation of key terms and ideas

A. Historical Institutionalism

'Historical Institutionalism' is a social sciences research approach that examines the influence of institutions on social, political, or economic regimes over time. It covers a variety of authors and approaches and has been applied in a number of different contexts. For instance, scholars have adopted an HI approach to the study of developments in health policy,¹ federalism,² labour movements,³ sovereignty,⁴ and democracy.⁵ Bankruptcy scholars Terence C. Halliday and Bruce G. Carruthers also incorporated some elements of HI in their recent book on bankruptcy reform in Indonesia, Korea and China.⁶ Additionally, in a paper on historical approaches to corporate reorganisation in England and France, Jérôme Sgard used the HI idea of path dependence to help explain the longstanding

¹ See eg Jacob S. Hacker, 'The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian and U.S. Medical Policy' (1998) 12 *Stud in Am Polit Develop* 57 [Hacker 1998].

² See eg Ronald L. Watts, 'The American Constitution in Comparative Perspective: A Comparison of Canada and the United States' (1987) 74 *J of Am Hist* 769, cited in Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton, NJ: Princeton University Press, 2004), 120.

³ See eg Ruth Berins Collier and David Collier, *Shaping the Political Arena: Critical Junctures, The Labor Movement, and Regime Dynamics in Latin America* (Princeton: Princeton University Press, 1991), cited in Pierson, *ibid* 134.

⁴ Stephen Krasner, 'Sovereignty: An Institutional Perspective' in James A. Caporaso (ed), *The Elusive State: International and Comparative Perspectives* (Newbury Park, CA: Sage, 1989), cited in Pierson, *ibid* 134.

⁵ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), cited in Pierson, *ibid* 158-159.

⁶ Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009) [Halliday and Carruthers 2009], 17, citing Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck & Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (New York: Cambridge University Press, 2005) [Streeck and Thelen 2005].

English tradition of using bankruptcy alternatives, such as trust deeds, to restructure large companies.⁷

The HI ideas I employ in my thesis are drawn primarily from political scientists, particularly the work of Paul Pierson, who builds on the work of modern institutionalists such as Douglass North.⁸ I use a broad definition of the term ‘institution,’ which may be used to describe a formal institution, such as the OSB, as well as less formal institutional arrangements, such as the practice of restructuring companies under trust deeds.

In adopting an HI approach, some scholars emphasise the institutional influences in studying how things change over time.⁹ Others tend to lean more toward historical factors which have helped shape both the development of institutions and later changes within a given regime or policy.¹⁰ These historians conduct what Pierson refers to as ‘genuine’ historical research; they examine history to see what they might find, rather than merely to find historical examples to support existing arguments or ideas.¹¹

⁷ Jérôme Sgard, ‘Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth-Nineteenth Century)’ (2009-2010) OXPO Working Paper online: <<http://oxpo.politics.ox.ac.uk>>.

⁸ Pierson, n 2 above.

⁹ Pierson, *ibid* 8. Eg Halliday and Carruthers 2009, n 6 above.

¹⁰ Pierson, *ibid* 8 citing eg Jacob Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge: Cambridge University Press, 2002); Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, Japan and the United States* (New York: Cambridge University Press, 2004).

¹¹ Stefano Bartolini, ‘On Time and Comparative Research’ (1993) 5:2 J of Theoretical Politics 131, 144, cited in Pierson, *ibid* 5.

In my thesis I adopt an interdisciplinary historical approach similar to bankruptcy historians David A. Skeel Jr.¹² and Thomas G.W. Telfer,¹³ in which I situate legal developments within their historical, political and economic context. Although Janis Sarra's study of the CCAA is not principally historical, I build on the historical sketch she and others offer and contextualise the statute's enactment during the Great Depression.¹⁴ In *Debt's Dominion*, Skeel uses public choice analysis (particularly focusing on interest groups) to present a 'textured' political-economic history of American bankruptcy law. He thus offers a theorised explanation for the existing American bankruptcy law system, and how it arose.¹⁵ Telfer also draws on interest group and institutional analyses in his historical studies of Canadian bankruptcy law, and similarly situates developments in their broader political, economic and historical contexts.¹⁶

Like these bankruptcy historians, I use interest group and institutional analyses in my historical study. However, I also rely on HI ideas in order to demonstrate the broader significance of my study. As Pierson notes, historically oriented scholars are often reticent to generalise based on historical studies.¹⁷ By emphasising the strong temporal dimensions of certain mechanisms, however,

¹² David A. Skeel, Jr., *Debt's Dominion* (Princeton: Princeton University Press, 2001).

¹³ Thomas G.W. Telfer, 'The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?' (1994-1995) 24 CBLJ 357 [Telfer 1994-1995]; Thomas G.W. Telfer, 'A Canadian "World without Bankruptcy": The Failure of Bankruptcy Reform at the End of the Nineteenth Century' (2004) 8 Austl J Legal Hist 83 [Telfer 2004]; Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: Osgoode Society for Canadian Legal History & University of Toronto Press, 2014) [Telfer 2014].

See also Thomas G.W. Telfer and Bruce Welling, 'The Winding-Up and Restructuring Act: Realigning Insolvency's Orphan to the Modern Law Reform Process' (2008) 24:1 BFLR 233.

¹⁴ Janis Sarra, *Creditor Rights and the Public Interest* (Toronto: University of Toronto Press, 2003), 11-17; Alfonso Nocilla, 'The History of the *Companies' Creditors Arrangement Act* and the Future of Restructuring Law in Canada' (2014) 56:1 CBLJ 73.

¹⁵ Skeel, n 12 above, 13.

¹⁶ Telfer 2014, n 13 above.

¹⁷ Pierson, n 2 above, 6.

Pierson refines an HI approach that is capable of producing some generalisations which can travel beyond a given time and place, as well as capture the importance of historical and institutional factors in the evolution of change within regimes.¹⁸

Drawing on Pierson's approach, I blend genuine historical research with an institutionalist framework in order to bring to light both historical and institutional influences at play in the advent and development of CCAA law. I incorporate a significant historical component in my use of HI, by paying particular attention to, for example, issues of timing and the sequence of changes in my historical study. I rely on Pierson's conception of 'positive feedback' and 'path dependence' to help account for the stickiness of institutional arrangements and their tendency to become more resilient to change over time. 'Positive feedback' refers to a process by which 'each step along a particular path produces consequences that increase the relative attractiveness of that path for the next round.'¹⁹ I use the term 'path dependence' to mean, 'once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.'²⁰

Pierson further notes that sequencing is significant in path dependent processes because 'outcomes of early events may be amplified [through positive feedback],

¹⁸ *ibid* 6.

¹⁹ *ibid* 18.

²⁰ Margaret Levi, 'A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis' in Mark I. Lichbach and Alan S. Zuckerman (eds), *Comparative Politics: Rationality, Culture, and Structure* (Cambridge: Cambridge University Press, 1997) 28, cited in *ibid* 20.

while the significance of later events or processes is dampened.²¹ From this he concludes, '*when a particular event in a sequence occurs will make a big difference.*'²² I am attentive to the sequence of events leading up the enactment of the CCAA and changes at other points in the Act's history, which have helped shape developments in this area of law over time.

Path dependent processes often unfold over long periods of time, and early historical events tend to put these processes on a certain 'path.' Positive feedback, or self-reinforcement, however, does not necessarily involve the recreation of those same early events. As Arthur Stinchcombe describes,

an effect created by causes at some previous period [can become] ... *a cause of that same effect in succeeding periods.* In such arguments, the problem of explanation breaks down into two causal components. The first is the particular circumstances that caused a tradition to be started. The second is the general process by which social patterns reproduce themselves. [Emphasis in original.]²³

Hence, Pierson observes that 'explanation requires the examination of considerable stretches of time.' In my study of CCAA history, I consciously adopt a longer view of business reorganisation than the lifespan of the Act itself in order to identify longer-term processes, or reorganisation 'traditions,' which predate formalisation in federal insolvency law.

²¹ Pierson, *ibid* 45.

²² *ibid* emphasis in original.

²³ Arthur Stinchcombe, *Constructing Social Theories* (New York: Harcourt, Brace, 1968), cited in Pierson, *ibid* 46.

The institutionalist ideas that I rely on in my thesis particularly focus on the increasingly resilience of institutions to change the longer they have been in place.²⁴ Due to the tendency of institutions, particularly ‘parchment institutions’ such as legislation, to be longstanding²⁵ and even outlast certain interest groups, institutionalism provides a broader picture of developments over time than do interest group analyses alone. Moreover, interest groups may form around existing institutions, which further underscores the importance of studying institutional factors as part of historical analyses.

When reform efforts face off against a longstanding institution, ‘institutional resilience’ may lead to ‘layering’ or ‘institutional conversion,’ rather than broad, or overt institutional change. ‘Layering’ refers to ‘the partial renegotiation of some elements of a given set of institutions while leaving others in place.’²⁶ It may also ‘involve the creation of parallel or potentially subversive institutional tracks.’²⁷ ‘Institutional conversion’ describes a situation where ‘existing institutions are redirected to new purposes, driving changes in the role they perform and/or the functions they serve.’²⁸

One phenomenon that can contribute to institutional resilience is ‘asset specificity.’ ‘Asset specificity’ refers to the result of various actors coordinating around existing institutional arrangements in a way that is not easily

²⁴ Pierson, *ibid* 142.

²⁵ *ibid* 143.

²⁶ Kathleen Thelen, ‘How Institutions Evolve: Insights from Comparative –Historical Analysis’ in James Mahoney and Dietrich Rueschemeyer (eds), *Comparative Historical Analysis in Social Sciences* (Cambridge: Cambridge University Press, 2003) [Thelen 2003] 226, cited in *ibid* 137.

²⁷ Pierson, *ibid* 137.

²⁸ Thelen 2003, n 26 above, cited in Pierson, *ibid* 138.

transferable to new or different institutional arrangements.²⁹ In other words, the arrangements or coordination (the 'assets') are specific to a certain institution. Accordingly, where actors have coordinated around institutional arrangements in this way, asset specificity suggests that these actors will be inclined to oppose institutional change.³⁰ While HI scholars tend to write in the context of political institutions, the phenomenon of asset specificity may also be usefully applied in the context of legal institutions and institutional arrangements, such as the CCAA.

With the benefit of hindsight it can be tempting to attribute any longstanding institutional arrangement to path dependence or institutional resilience. To keep from doing so, one must be diligent in historical research to identify when positive feedback processes contributed to path dependency concerning institutional arrangements, as well as when this did *not* occur. In my thesis, I aim to identify when things changed and when existing arrangements were reaffirmed (for example, through positive feedback); as well as when things did *not* change,³¹ and when there was no evidence of self-reaffirming processes. By paying attention to periods of (apparent) stasis and periods of change, as well as identifying contingent events in the history of the CCAA, I endeavour to present a fuller historical picture of the origins and development of this statute.

²⁹ Pierson, *ibid* 148, citing James E. Alt *et al.*, 'The Political Economy of International Trade: Enduring Puzzles and an Agenda for Inquiry' (1996) 29:6 *Comparative Political Studies* 689; David A. Lake, *Entangling Relations: American Foreign Policy in Its Century* (Princeton: Princeton University Press, 1999).

³⁰ Pierson, *ibid* 148, citing Peter Alexis Gourevitch, 'The Governance Problem in International Relations' in David Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton: Princeton University Press, 2000), 144-45.

³¹ See Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *Univ Penn L Rev* 1121, 1123, cited in Telfer 2004, n 13 above, 85.

Identifying 'critical junctures' in the course of CCAA history is one way in which I identify significant instances of change. The term 'critical juncture' in HI literature refers to periods of significant institutional change. It is the window of time in which an equilibrium or period of stasis is 'punctuated' by change.³² Pierson describes these junctures as 'critical' because 'they place institutional arrangements on paths or trajectories, which are then very difficult to alter.'³³ As Jacob Hacker notes, path dependence helps explain 'the *reproduction* of a critical juncture's legacy ... [and] suggests why the effects of critical junctures are so profound and enduring.'³⁴

Literature on critical junctures, however, has a difficult time explaining what causes critical junctures in the first place.³⁵ Pierson notes that critical junctures are often attributed to 'big, exogenous shocks,' and no doubt such events play a role in certain institutional changes. To capture gradual processes that may help bring institutional arrangements to the brink of critical junctures, I employ a socio-legal historical approach that takes account of changes in practice, which sometimes precede formal changes. For instance, while economic downturns in the Canadian pulp and paper industry and the onset of the Great Depression triggered the enactment of the CCAA, these big exogenous events do not fully explain why a statutory approach was suddenly necessary in 1933. Why did previous recessions and depressions not lead to similar legislation much earlier in Canadian history? Attention to gradual changes in practice, however, reveals

³² Kathleen Thelen, 'Historical Institutionalism and Comparative Politics' (1999) 2 Annual Rev Poli Sci 369 [Thelen 1999]; Thelen 2003, n 26 above; Krasner, n 4 above; Collier and Collier, n 3 above; all cited in Pierson, n 2 above, 134-135.

³³ Pierson, *ibid* 135.

³⁴ Hacker 1998, n 1 above, 78 [emphasis in original.]

³⁵ Thelen 1999, n 32 above; Thelen 2003, n 26 above; both cited in Pierson, n 2 above, 135.

that incremental changes in trust deed financing during the 1920s preceded (and eventually necessitated) the enactment of a statutory mechanism for restructuring companies. This need was dramatically brought to light by major economic downturns in the 1920s and 1930s. So one way a critical juncture can arise is when fundamental problems in existing arrangements are brought into relief by a large exogenous event. This ‘recursivity of law’ and ‘punctuated equilibrium’ framework is discussed in greater detail in the following subsection.

While parchment institutions, like statutory law, do tend to be resilient to formal change, merely existing on the statute books—for example, escaping notice or repeal attempts—without actually being used, does not in itself amount to institutional resilience. As many commentators noted in the early 1980s, the CCAA (like the FCAA) was still on the statute books, but it was widely believed it already had, or would soon become a ‘dead letter.’ However, as 1980s and 1990s corporate restructurings illustrate, mere disuse does not a dead letter make. New judicial interpretations of ambiguous provisions moulded the CCAA to fit contemporary circumstances. The FCAA on the other hand, which contained clearer restrictive provisions, was relegated to ‘dead letter’ territory, despite the lack of other effective methods of dealing with farmer overindebtedness, a financial crisis in the Canadian farming industry, and the formation of a pressure group of Canadian farmers that wanted to see the Act—or a similar statute—reinstated. Thus, formal endurance—for example, remaining on the statute books—can significantly contribute to institutional resilience in the longer term by providing a formal institution (whether little used or not) around which later actors may coordinate, or around which new interest groups may spring up. As

the FCAA and subsequently enacted FDRA demonstrate, even ‘dead letters’ can contribute to institutional resilience at a broader level, by providing an historical precedent which may inform ‘new’ institutional arrangements at a later date.

An added challenge with historical research—especially concerning a statute with obscure origins like the CCAA—is that sometimes documentary evidence has been lost, or there simply was no formal written record kept. When *no* records are found in a given area, even after diligent historical research, it is tempting to conclude that there were *never* any such records. However, as my historical study shows, this is not a sound basis from which to make such deductions. For instance, the difficulty some scholars have faced in locating early material on the CCAA was not primarily due to a lack of material—although the written record is fairly limited. The main difficulty was that contemporary scholars tended to look in the bankruptcy literature, whereas early CCAA commentary generally fell under company law texts and journal articles. In my thesis, I try to avoid drawing conclusions about what written records did or did not exist based solely on a lack of historical material. When I do so, I aim to base this opinion on a wider contextual or comparative analysis, for instance, by comparing attention given to the CCAA versus the FCAA in news media, in order to formulate an interpretation of public interest or sensitivity to these enactments.

B. Recursivity of law

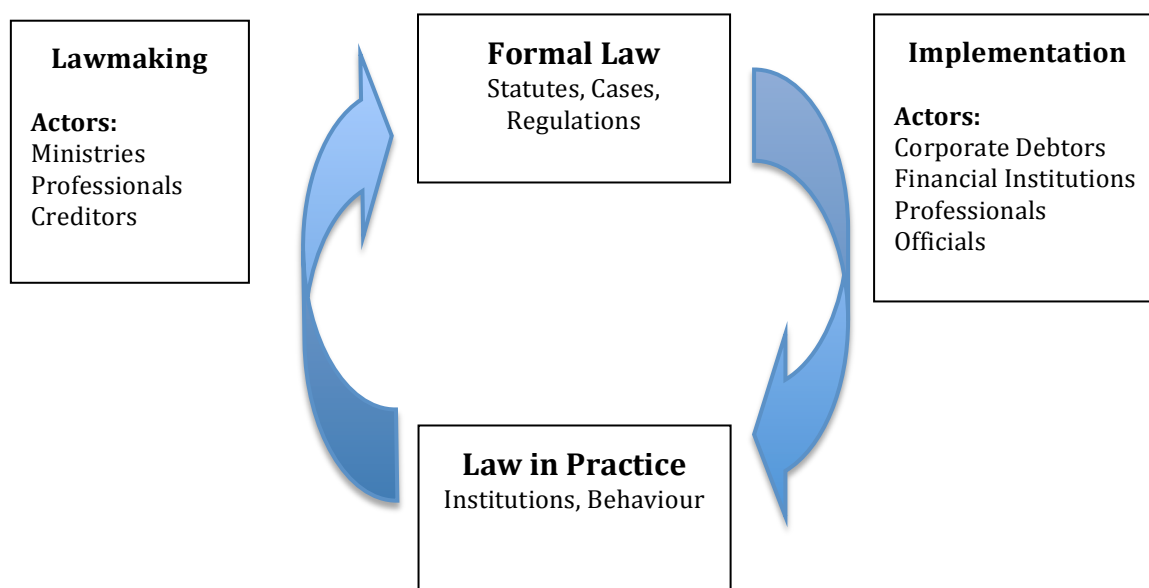
'Recursivity of law' is a socio-legal analytical framework formulated by Halliday and Carruthers³⁶ to study developments in bankruptcy and insolvency law. These authors argue that law not only flows from 'the books' to 'legal practice', but that legal practices also shape formal law, for instance through the involvement of professionals in law reform.³⁷ Furthermore, their approach takes account of the fact that formal laws, which tend to be mediated through professionals, are further shaped and interpreted in the course of being implemented into practice. Halliday and Carruthers use the term 'recursivity of law' to refer to the process of 'law on the books' influencing 'law in action' and vice versa.

In my thesis I use a fairly broad definition of 'law in practice', which captures both the interpretation and application of statutory law in the courts, as well as the practice or implementation of law by professionals outside of a courtroom setting. Due to limitations of the historical record, for certain historical periods I rely to a greater extent on case law, such as in the 1980s and 1990s when many CCAA cases were reported in law reports. For other time periods, such as the 1920s to 1940s, I rely more heavily on articles and unpublished material prepared by practitioners or government departments, which concern corporate reorganisations that were either not carried out under court supervision, or

³⁶ See eg Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business* (Oxford: Clarendon Press, 1998) [Carruthers and Halliday 1998]; Halliday and Carruthers 2009, n 6 above; Terence C. Halliday and Bruce G. Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112:4 *Am J of Sociology* 1135 [Halliday and Carruthers 2007].

³⁷ Halliday and Carruthers 2009, *ibid* 53.

Figure 1: Recursive cycles of bankruptcy lawmaking³⁸



went unreported by law reporters. While my historical sources are constrained by what documents have survived, examining different forms of ‘law in practice’ offers a nuanced view of corporate reorganisation practices at different points in time.

The theory of recursivity is one of legal change in which the ‘unit’ of change studied is the cycle that holds ‘law on the books’ and ‘law in practice’ in dynamic tension.³⁹ This cycle is illustrated in Figure 1, above. ‘Law on the books’ is defined as law that is ‘binding in form or effect, most often by a sovereign authority.’⁴⁰ ‘Law in practice’ is ‘behavior and institutions that constitute and enact law as it actually is experienced by those it regulates.’⁴¹ Hence, ‘law in

³⁸ This is a simplified version of the figure that appears in Halliday and Carruthers 2007, n 36 above, 1147.

³⁹ *ibid* 1146.

⁴⁰ *ibid.*

⁴¹ *ibid.*

practice' is effectively 'law' to those it regulates, but is understood in the context of 'law on the books.'⁴²

Cycles of law reform have both beginnings and ends. Using a recursivity of law framework and drawing on ideas from HI, Halliday and Carruthers note that law reform often proceeds in cycles in which periods of equilibrium are punctuated by periods of change. These authors draw on the concept of 'punctuated equilibrium' originated by Frank Baumgartner and Bryan D. Jones.⁴³ Halliday and Carruthers observe that years or decades may pass in which no significant changes occur in formal law or in legal practice—periods of equilibrium.⁴⁴ Cycles of law reform often begin with a build up in pressure for legal change during such periods of stasis,⁴⁵ followed by a political opportunity to effect change, and ending when 'contradictions are resolved, or consensus is reached or legal meanings settle, or an underlying cause fades away';⁴⁶ in essence, when a new equilibrium is reached.

Relying on HI scholars, Halliday and Carruthers further note that legal change can occur even though formal law remains static,⁴⁷ and thus attention to possible developments in legal practice may reveal that cycles of legal change are occurring despite the appearance of a formal equilibrium. In my thesis, I employ this recursivity of law framework to identify cycles of legal change, which I then

⁴² *ibid* 1146.

⁴³ See Frank Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993).

⁴⁴ Carruthers and Halliday 1998, n 36 above, 16-17.

⁴⁵ *ibid* citing HI scholars Streeck and Thelen 2005, n 6 above.

⁴⁶ Carruthers and Halliday 1998, *ibid*.

⁴⁷ *ibid* citing HI scholars Streeck and Thelen, n 6 above.

analyse and expound through the lens of HI ideas such as path dependence and institutional resilience. This approach allows me to discern, for instance, when and how law in action has contributed to formal law reform, as well as offer an *ex post* explanation for why things happened the way they did.

A number of HI scholars have argued that institutional change proceeds in the fashion of ‘punctuated equilibrium.’⁴⁸ Approaching the study of institutions from this vantage adds a level of nuance to HI accounts, particularly in terms of how punctuated equilibrium may relate to phenomena such as institutional resilience, institutional conversion, and layering. For instance, if institutional resilience represents a significant measure of stability, one might characterise periods of institutional change, institutional conversion and/or layering, as points at which this equilibrium is ‘punctuated’ by new developments. Hence, ‘punctuations’ in the status quo may be in the form of formal changes or even rather subtle changes in practice, provided they significantly alter institutional arrangements or operations in some way.

As a sociological theory, recursivity pays close attention to the role and influence of legal actors, such as lawyers and judges, at both the lawmaking and implementation stages.⁴⁹ In periods of formal law reform, these legal actors have often been influential⁵⁰ and, as Halliday and Carruthers note, lawyers’ creativity has sometimes appropriated formal law for purposes other than those originally

⁴⁸ See eg Thelen 1999, n 32 above; Thelen 2003, n 26 above; Krasner, n 4 above; Collier and Collier, n 3 above; all cited in Pierson, n 2 above, 134.

⁴⁹ Halliday and Carruthers 2007, n 36 above, 1142.

⁵⁰ See eg Carruthers and Halliday 1998, n 36 above, Chapter 2 ‘Professional Innovation and the Recursivity of Law’.

intended.⁵¹ This type of ‘appropriation’ has occurred several times in CCAA history; most significantly, in the co-opting of the statute by debtors’ counsel as a debtor remedy in the 1930s, and again in the 1980s.

Furthermore, formal law reform tends to institutionalise new legal concepts in statute.⁵² As a result, the subjects of the law (corporate debtors, for example) often view their problems through the lens of these (new) legal concepts.⁵³ In practice, these legal concepts may be ‘amplified, distorted, and creatively reinterpreted.’⁵⁴ For instance, by virtue of pairing corporate reorganisation with bankruptcy and insolvency law under the CCAA, corporate reorganisation came to be associated with the situation of insolvency; and specifically (that is to say, more narrowly) as a potential solution to overindebtedness. In part, it was the restrictiveness of the statutorily fabricated ‘restructuring as a solution to insolvency’ paradigm that later led the court in *Stelco* to creatively reinterpret (and broaden) the statutory definition of ‘insolvency.’⁵⁵ Interestingly, in subsequent amendments to the Act, Parliament did not disturb this aspect of the *Stelco* decision; but nor were there efforts to decouple restructuring from the situation of corporate insolvency altogether.

Halliday and Carruthers’ theory of recursivity also gives special attention to the power of various legal institutions, such as courts and professional associations,

⁵¹ Halliday and Carruthers 2007, n 36 above, 1142.

⁵² *ibid* 1142.

⁵³ *ibid*.

⁵⁴ *ibid*.

⁵⁵ *Re Stelco Inc.* (2004), 48 CBR (4th) 299 (Ont SCJ); leave to appeal to Ontario Court of Appeal refused, [2004] OJ No 1903 (Lexis); leave to appeal to SCC refused [2004] SCCA No. 336 (Lexis).

which these scholars argue can significantly shape law in practice.⁵⁶ In particular, Halliday and Carruthers note that powerful legal institutions may so modify law in practice that they effectively create their own 'law.'⁵⁷ Canadian courts, particularly the Commercial List in Ontario, have certainly had a significant role in 'fleshing out' or 'shaping' CCAA law in this regard, especially during the 1980s and 1990s.

Cycles of recursivity of law also occur in varying degrees of complexity. A rather straightforward cycle may be one in which a law is enacted to respond to a particular problem. This essentially captures the type of cycle that led to the 1953 trust deed amendment to the CCAA. Once enacted, however, new problems may arise. For example, actors try to circumvent the law, and so lawmakers may amend the law or enact a new law to respond to the new problems. This cycle may then repeat many times through numerous iterations of law.⁵⁸

In more complex cycles of recursivity of law, several patterns may be at play. For instance, ambiguities in the law may lead actors to bring matters before courts, where judges may clarify matters, a process known as 'settling.'⁵⁹ Ambiguity can therefore help drive cycles of law reform, as it did in CCAA case law developments during the 1980s and 1990s. This is further illuminated by

⁵⁶ Halliday and Carruthers 2007, n 36 above, 1142-1143.

⁵⁷ *ibid* 1143.

⁵⁸ Based on examples of 19th century English Factory Acts contained in *ibid*.

⁵⁹ *ibid* 1144, citing Ryken Grattet and Valerie Jenness, 'The Birth and Maturation of Hate Crime Policy in the United States' (2001) 45 *American Behavioural Scientists* 668; Ryken Grattet and Valerie Jenness, 'Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference' (2001) 91:3 *J of Crim L and Criminology* 11; Ryken Grattet, 'Structural Contradictions and the Production of New Legal Institutions: The Transformation of Industrial Accident Law Revised' in William J. Chambliss and Marjorie Zatz (eds), *Making Law: The State, the Law, and Structural Contradictions* (Bloomington: Indiana University Press, 1993).

contrasting how ambiguity surrounding the CCAA in the 1980s helped facilitate legal changes under that Act, while the unambiguous wording of the FCAA obviated the possibility of judges ‘reviving’ that insolvency statute along similar lines.

Alternatively, subsequent court decisions may substantially deviate from what was intended by legislators, which can lead legislatures to respond through new legislation, effectively to override the courts’ decisions.⁶⁰ Interestingly, while CCAA practice and case law has deviated from the Act’s original purposes and text in some significant ways, Parliament has not generally responded by overriding judicial decisions.

Lauren B. Edelman’s theory of endogeneity of law⁶¹ perhaps best captures the main thrust of many CCAA law developments. Endogeneity of law refers to a recursive cycle in which law arises more from the practices of private parties in carrying out broad legal policies or mandates, than from formal lawmaking bodies.⁶² Where the substance of formal law is broad or open ended, as the CCAA initially was, the substantive aspects of private attempts to implement that law in practice can become institutionalised in case law over time. Halliday and Carruthers summarise this phenomenon as follows:

⁶⁰ Halliday and Carruthers 2007, *ibid* 1144, citing John Barnes, *Overruled? Pluralism, Court-Congress Relations and Legislative Overrides in the Age of Statutes* (Palo Alto, CA: Stanford University Press, 2004).

⁶¹ Lauren B. Edelman, ‘Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law’ (1992) 97 *Am J Sociology* 1531 [Edelman 1992]; Lauren B. Edelman, ‘Legality and the Endogeneity of Law’ in R. Kagan, M. Krygier and K. Winston (eds), *Legal and Community: On the Intellectual Legacy of Philip Selznick* (Lanham, MD: Roman & Littlefield, 2002) [Edelman 2002]; Lauren B. Edelman, ‘Law at Work: An Institutional Approach to Civil Rights’ in Laura Beth Nielson and Robert L. Nelson (eds), *Handbook of Employment and Discrimination Law: Rights and Realities* (New York: Kluwer, 2005) [Edelman 2005].

⁶² Halliday and Carruthers 2007, n 36 above, 1144.

The endogeneity of law represents a special instance of recursivity with several of its hallmarks. It incorporates full cycles of change from one kind of law (statute) through creation of another kind of 'law' in practice through to its institutionalization via judicial rulings (case law). It has something of the invisibility of legalistic reform for it unfolds far from the interest-group hurly-burly of legislatures and more through the technical advances negotiated among human ... lawyers, and judges.⁶³

In the case of CCAA law—particularly from the 1980s and 1990s—much of the practical 'law' developed on a case-by-case basis. Judicial decisions later gave shape to formal statutory amendments in 1992, 1997 and 2009, for instance.

An historical perspective on Canadian corporate reorganisation reveals some interesting features that have probably influenced the way endogeneity of law has played out in respect of the CCAA. Not only have private parties had a large role in creating 'law in practice', 'law in practice' has taken decidedly different trajectories at different points in time under the same statute. Secondly, there have historically been a relatively small number of repeat players in large company restructurings, both in terms of large, secured creditors (life companies and banks) and insolvency professionals (such as trust companies, monitors, and restructuring lawyers). These features of the Canadian restructuring landscape suggest a significant role for private parties in Canadian restructuring law developments; a role that is amplified by the fact that Parliament has generally responded to these 'new' CCAA interpretations by enshrining case law precedents into legislation.

⁶³ *ibid* 1144-1145.

These ideas relate to a further feature of the recursivity of law framework, which pays special attention to the *form* of law, which influences its interpretation and signals its relative degree of authority.⁶⁴ As a federal statute, the CCAA carries much legal weight. The Act directs that applications and CCAA proceedings be carried out in the superior court of the province. So as (initially) a skeletal statute that purportedly left significant room for judicial discretion or inherent jurisdiction, the Act conveyed considerable scope and authority to Canadian courts to interpret and apply ‘the law.’ Moreover, as the theory of recursivity of law highlights, legal institutions such as courts already have considerable power to shape law at the implementation stage—a power that the CCAA of the 1980s and 1990s arguably amplified.⁶⁵ Halliday and Carruthers thus note that legal institutions such as courts have ‘adaptive capacity ... to modify law in practice, indeed to create their own law.’⁶⁶ By relying on their authority as a legal institution and the Parliamentary authority conveyed by the Act, Canadian courts in the 1980s and 1990s essentially created contemporary ‘CCAA law’ as it is now understood.

This in turn gives rise to an intriguing relationship between the endogeneity of law and the institutional resilience of the CCAA. The active role of private parties in CCAA lawmaking (facilitated by the judiciary), coupled with a cooperative Parliament has helped facilitate a high degree of formal institutional resilience in the form of the statute—something that is arguably essential for ongoing

⁶⁴ *ibid* 1143.

⁶⁵ *ibid* 1142-1143.

⁶⁶ *ibid* 1143.

'lawmaking' under this statute by private parties. At the same time, however, this dynamic has produced layering, if not institutional conversion, in terms of how the Act is deployed (as a creditor- versus debtor-remedy, for example), since Parliament has not engaged in wholesale 'reform' of the CCAA. In successive amendments Parliament has often left the Act untouched, except for those provisions singled out by case law precedents or insolvency professionals as requiring change.⁶⁷ Therefore, CCAA law exists largely by virtue of the interplay between formal institutional stability on the one hand, and informal institutional change driven by private parties, on the other hand. In other words, the dynamic 'spirit' of contemporary CCAA law exists in the space between formal institutional stability (a statute), which conveys a Parliamentary seal of approval for less formal legal changes (privately crafted restructuring plans) for which private parties apply and receive judicial approval as constituting 'law.'

Halliday and Carruthers have applied their recursivity of law framework to illuminate bankruptcy developments in several contexts. For example, in *Rescuing Business* these scholars used a recursivity of law analysis to explain periods of substantial bankruptcy reform in the US and England in the 1970s and 1980s respectively.⁶⁸ Halliday and Carruthers extend their analysis in later work to look at the recursive relationship between, for instance, American domestic bankruptcy law and global bankruptcy norms spread through international institutions like the World Bank and the IMF.⁶⁹ They then examine the ways in which these 'international' standards influenced bankruptcy reforms

⁶⁷ Eg the Act prohibits 'telegraph' companies from making an application. See *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 2(1) 'company.'

⁶⁸ Carruthers and Halliday 1998, n 36 above.

⁶⁹ Halliday and Carruthers 2009, n 6 above; Halliday and Carruthers 2007, n 36 above.

domestically in Indonesia, Korea, and China, and the role of insolvency professionals in these countries in terms of adopting or foiling efforts to bring domestic law in line with global norms.⁷⁰

The development of the CCAA along the lines of US chapter 11 and global bankruptcy norms occurred very shortly after the American and English bankruptcy reforms of the 1970s and 1980s. It also appears that much of the motivation to develop CCAA law in this fashion came from the parties to individual insolvencies (such as major creditors and debtors) as represented by legal counsel. Their ‘motivation’ was not primarily concerned with bringing Canada in line with global norms or following a certain ideology, as it was with finding practical tools to deal with firm insolvencies and (often) trying to save struggling firms. Although formal law reform efforts were already underway in Canada with a view to adding business reorganisation provisions to the *Bankruptcy Act*, reform of the CCAA as a DIP restructuring statute occurred through case law—at the urging of insolvency parties and with the cooperation of CCAA judges. While Canada ended up with a business reorganisation regime that was similar to those in the US and UK, the *process* of refashioning the CCAA came from the ground up, rather than from the top down approach of formal statutory law reform mediated through international institutions like the IMF.

Ideas and ideology were nevertheless important in CCAA law development. Ideas about the policy and purposes of corporate restructuring helped drive CCAA developments in concrete and profound ways. Without averring to broader ideas

⁷⁰ *ibid.*

about corporate reorganisation, it is difficult to imagine that Canadian judges would have approved the use of instant trust deeds, for example.⁷¹ In the absence of a (tacit) policy of promoting corporate reorganisation, this tactical device simply undermined the actual textual provisions of the Act.⁷² It was only in view of the CCAA's (supposed) broader policy mandate that instant trust deeds could conceivably be reconciled with the text of the statute itself.

The relationship between 'Canadian' ideas about CCAA law, and broader international or American norms on corporate reorganisation was probably also the product of interplay between influential Canadian practitioners and the broader restructuring community. In other words, while Canadian practitioners drew from ideas in the international arena in framing and interpreting CCAA law, they probably also influenced 'international' ideas about company restructuring. While much CCAA law development came 'from the ground up' in the sense that individual cases led to incremental changes, the ideas marshaled by counsel could come from the international or domestic sphere (or both), and the international diffusion was itself influenced by some Canadian ideas during this time period. Over time, and with the chronic reproduction of legal precedents, 'successful' ideas were built into the narrative, logic and 'law' of CCAA reorganisations.

⁷¹ *Elan Corp. v Comisky (Trustee of)* (1990), 1 OR (3d) 239, 41 OAC 282 (CA) [*Elan*], per Doherty J.A. (dissenting), 60.

⁷² See eg *Re Norm's Hauling Ltd.* (1991), 6 CBR (3d) 16, 91 Sask R 210 (QB).

Gregory C. Shaffer notes that recursivity of law is particularly helpful for explaining processes that involve cooperation and coordination problems.⁷³ Drawing broadly on Edelman's theory of endogeneity of law, I would add that recursivity is especially useful in contexts where there is a significant amount of professional 'input' at the stage of applying the law. One example of this is court-driven insolvency procedures where professionals 'craft' a tailor-made solution, such as a restructuring plan, under a fairly broad legal architecture. As described by Sgard, English business reorganisation was historically conducted outside of formal bankruptcy law or statutes, through trust deeds, for instance.⁷⁴ As a result 'law in practice' formed the basis for formal law when business reorganisation provisions were later added to English Companies Acts, and eventually to insolvency statutes. The Anglo-Canadian legal tradition bears out a similar pattern.⁷⁵ Accordingly, a recursivity of law approach is appropriate and illuminating for a study of company reorganisation in Canada, where statutory law has often taken its cue from practices first established 'on the ground.'

C. Bankruptcy theories

Carruthers and Halliday note how various constituencies in the US and UK began to take an active interest in bankruptcy policy between the 1970s and 1990s.⁷⁶ In 1986 Thomas Jackson set out the 'creditors' bargain' theory of bankruptcy,⁷⁷

⁷³ Gregory C. Shaffer, 'Transnational Recursivity Theory: Halliday and Carruthers' *Bankrupt*' University of Minnesota Law School, Legal Studies Research Paper Series – Research Paper No. 11-38 online: <<http://ssrn.com/abstract=1926830>> (accessed 11 November 2013), 4.

⁷⁴ Sgard, n 7 above, 9-11.

⁷⁵ See Clémentine Sallée and David Tournier, 'Reorganization: A Commercial Concept Juridically Defined' (2009) 88 Can Bar Rev 87.

⁷⁶ Carruthers and Halliday 1998, n 36 above.

⁷⁷ Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, MA: Harvard University Press, 1986); Thomas Jackson and Robert E. Scott, 'On the Nature of Bankruptcy: An

setting off a debate among scholars about the theoretical underpinnings of bankruptcy law. In response to Jackson's theory, scholars such as Elizabeth Warren articulated a more traditional view of bankruptcy known as the 'multiple values approach,'⁷⁸ and others proposed novel theories of bankruptcy.⁷⁹ Some of these theories, such as the multiple values approach, draw on existing law to formulate a theory about business bankruptcy. Other theorists, such as Jackson, propose normative theories about bankruptcy law based on hypothetical scenarios in which no bankruptcy law (yet) exists. Jackson also submits that his creditors' bargain theory offers an explanation for the existence of US bankruptcy law. The theoretical framework I use in this thesis illustrates some ways in which existing bankruptcy theories can benefit from incorporating an HI and recursivity of law perspective.

Although the ideas and theories I employ in my theoretical framework are principally explanatory in nature, they still relate to normative theories of bankruptcy law insofar as these theories assume, or are based on the existence of legal regimes governing credit and debt, whether or not such regimes are strictly classified as 'bankruptcy law.' Consequently, even non-bankruptcy regimes governing credit and debt tend to inform, sometimes subconsciously, normative conceptions of bankruptcy law, such as Jackson's 'creditors' bargain' theory.⁸⁰ Explanatory theories may therefore be useful for critically analysing

Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Va L Rev 155 [Jackson and Scott 1989].

⁷⁸ Elizabeth Warren, 'Bankruptcy Policy' (1987) 54:3 U Chi L Rev 775.

⁷⁹ See eg Donald Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1992-1993) 71 Tex L Rev 541; Karen Gross, *Failure and Forgiveness* (New Haven: Yale University Press, 1997); Sarra, n 14 above.

⁸⁰ Jackson and Scott 1989, n 77 above, 155, 160.

normative bankruptcy theories by shedding light on the legal regimes on which these theories are based.

Existing accounts of bankruptcy law significantly benefit from incorporating an historical dimension. As Pierson notes, explanatory theories such as rational choice encourage ‘a highly restrictive field of vision, both in space and time.’⁸¹ Writing about the 1978 US *Bankruptcy Code*, Eric Posner employed a rational choice framework to offer an explanatory account of the US bankruptcy legislation.⁸² Posner’s account improved on existing, normative explanations of the US *Bankruptcy Code* by capturing a number of non-rational, political influences in bankruptcy lawmaking.⁸³ Pierson notes, however, that quite a number of historical factors influence lawmaking which cannot be boiled down to a rational choice paradigm of strategic ‘moves’ by ‘actors.’⁸⁴ So Pierson argues rational choice theory’s ‘scope should be placed in proper perspective. Analysts should focus on establishing how insights from rational choice can be linked to other approaches, or where other approaches are simply more appropriate for addressing particular kinds of questions.’⁸⁵

Through processes such as path dependence, asset specificity and positive feedback, historical factors—even ‘accidental’ ones—can influence subsequent rounds of lawmaking. In the context of the CCAA for example, these ideas from HI

⁸¹ Pierson, n 2 above, 9.

⁸² Eric Posner, ‘The Political Economy of the Bankruptcy Reform Act of 1978’ (1997) 96:47 Mich L Rev 47, 47-48.

⁸³ *ibid* 47-48.

⁸⁴ Pierson, n 2 above, 9.

⁸⁵ *ibid* 9, citing Ronald L. Jepperson, ‘Relations between Different Theoretical Imageries (With Application to Institutionalism)’ (1996) [unpublished manuscript].

show the deep roots of the contemporary Act in a nineteenth-century bondholder remedy; a fact that rational choice theory or interest group analyses alone cannot capture. Yet this insight into the origins of the CCAA as a secured creditor remedy is very important for understanding bargaining by powerful creditors in relation to formal law reform, and individual CCAA cases. For instance, the fact that the Act may be employed as a secured creditor remedy factors into the strategic ‘moves’ of this group of ‘actors’ under a rational choice framework. An historically conscious approach can accordingly inform and bolster rational choice analyses. For example, Skeel adopts this approach in respect of public choice theory in his book on the history of US bankruptcy law.⁸⁶ Historical factors are therefore essential for fulsome explanatory accounts of ‘contemporary’ laws such as the CCAA, and can enhance other explanatory approaches.

Drawing on an HI framework, attention to the role of institutions and path dependence, for instance, offers an explanation for *why* and *how* historical factors have shaped bankruptcy law in the past. Such an account provides a more sophisticated factual and theoretical basis from which to test normative and explanatory theories of bankruptcy law, and refine these theories with a view to making them more robust. For instance, by comparing bankruptcy theories with an historical account of bankruptcy law, it is possible to test to what extent these theories are over- or underinclusive in terms of the groups supposedly involved in bankruptcy reform, such as debtors and insolvency professionals. Furthermore, to the extent that some theories suffer from indeterminacy,

⁸⁶ *ibid* 13-15.

looking at history can help illuminate how normative goals interact with political and commercial forces to produce bankruptcy law.⁸⁷

A further limitation of several normative and explanatory theories of bankruptcy is their narrow focus on formal law and formal lawmaking. As the history of the CCAA and a recursivity of law analysis bear out, many significant changes took place under this statute without formal textual amendment. Judges and courts played a significant role in the evolution of CCAA law; in some instances their role is more significant than amendments to the Act itself. Bankruptcy and rationale choice theories usually do not have a mechanism for capturing changes in practice, such as through the courts, and how these changes impact on formal statutory amendments. They also usually do not capture the role played by ideas in effecting legal changes. Furthermore, these theories generally do not offer an explanation for why they only examine formal statutory amendments. This appears to presume that law flows only from statute, which contradicts past experience as well as what one can reasonably expect to happen in future reform efforts, particularly in the area of CCAA law.

Using a recursivity of law framework I situate the centre of much CCAA lawmaking in Canadian courts, rather than in Parliament. Private actors with a stake in the debtor's insolvency tend to have a large and disproportionate influence on broad legal changes stemming from the courtroom, compared with those effected in Parliament. Furthermore, the influence of interest groups tends

⁸⁷ This argument is drawn from Posner, n 82 above, 126, discussing the indeterminacy of some normative arguments for and against bankruptcy reform.

to be significantly diminished in case-by-case lawmaking, as suggested by Halliday and Carruthers in their discussion of the theory of endogeneity of law.⁸⁸ Since it is not always obvious beforehand which CCAA cases will become important precedents, these groups may not take an interest in, or even be aware of ultimately significant CCAA cases. Moreover, outside of high profile cases,⁸⁹ these groups tend not to be directly involved in private litigation and the court has considerable discretion over granting third-parties intervener or amicus curiae standing. In case-based CCAA lawmaking, the voices of powerful creditors and, to lesser extent, insolvency professionals and powerful corporate debtors have the greatest potential input into possible legal changes.

The perpetually ad hoc and case-by-case nature of many contemporary CCAA law developments also tends to lower the stakes optically compared with formal legislative amendments, which occur rarely and obviously entail high stakes in terms of enduring impact. All that ever is certainly at stake in debates over individual CCAA cases is the case at bar, high profile cases excepted. Lawyers can advance arguments about the danger of ‘opening the floodgates,’ but this has tended not to hold sway with CCAA judges who prefer instead to construct the issues and decision at hand in terms of the present debtor and creditors only.⁹⁰

⁸⁸ Edelman 1992, n 61 above; Edelman 2002, n 61 above; Edelman 2005, n 61 above.

But note that asset specificity and positive feedback suggest that over time these groups will coordinate around the case-by-case method of CCAA law reform, see n 89 below.

⁸⁹ See eg *Re Indalex Ltd.*, 2013 SCC 6, 439 NR 235, where several groups gained intervener standing and submitted arguments to the Supreme Court of Canada, namely: Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association. See also *Re AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 SCR 443, where a number of interest groups similarly obtained intervener standing.

⁹⁰ See eg the following cases where ‘floodgate’ arguments failed to hold sway: *Re Smoky River Coal*, 1999 ABCA 179, 237 AR 326, para 76, cited in *Re Calpine Canada Energy Ltd.*, 2007 ABCA

This is notwithstanding the tendency for such narrowly construed judicial decisions (or even dissents) to be expanded on and applied by judges in subsequent CCAA decisions.⁹¹

Accordingly I submit that existing theories of bankruptcy law and explanatory theories such as rational choice are a fine starting point, but an unsatisfactory ending point for analysis. A more robust analysis must take account of practical experiences in bankruptcy lawmaking, such as recurrent trends and important parties and factors in historical accounts of bankruptcy law, which these theories do not (yet) capture. Such an analysis offers promising possibilities with respect to refining normative theories of bankruptcy law in a manner that increases their usefulness for studying and predicting bankruptcy developments, and enhancing explanatory theories such as rational choice.

D. Summary

The theoretical framework for this study is drawn from several approaches and disciplines, including social science, political science, history, and law. The goal of presenting a robust, historical account of the origins and development of CCAA law, which holds relevance for contemporary debates in this, and related areas of study guided my formulation of this tailored theoretical framework.

266, 417 AR 25, para 31; *Re Calpine Canada Energy Ltd.*, 2007 ABQB 504, 415 AR 196, para 76; *Re Stelco* (2004), 48 CBR (4th) 299, 2004 CarswellOnt 1211 (Ont SCJ [Commercial List]), para 58.

⁹¹ Eg *Elan*, n 71 above, per Doherty J.A. (dissenting), which became a touchstone case for many future CCAA decisions. And see discussion of case law precedents for ‘tactical devices’ to gain access to the CCAA in Mario Forte, ‘*Re Metcalfe: A Matter Of Fraud, Fairness, and Reasonableness. The Restructuring of the Third-Party Asset-Backed Commercial Paper Market in Canada*’ (2008) 17 Int Insolv Rev 211.

On the role of judges in making and applying ‘law’, see generally Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997), esp Chapter 2 ‘The Distinction between Adjudication and Legislation’.

In this thesis I employ a recursivity of law analysis within a broader and longer institutionalist view of history. While cycles of lawmaking have beginnings and ends, they generally do not begin with a clear slate. The factors that prompt change and even frame the issues are often influenced by historical developments that have led to existing arrangements and practices. Thus, cycles, trends and themes may emerge and even repeat themselves in successive rounds of lawmaking. The theoretical framework I adopt provides a mechanism for capturing and explaining these phenomena.

My study adopts a fairly long view (approximately 100 years) of the history of business reorganisation in Canada. Combined with a recursivity of law analysis, this allows me to identify cycles of legal change and recurrent trends over a long period of time and to track the role of the practice of law 'on the ground' in terms of its importance for formal law reform. This approach may be particularly helpful for studying the history of commercial law, where powerful private actors, such as FIs, often shape or give form to broad laws in ways that are then incorporated into formal law (such as case law), as suggested by the theory of endogeneity of law.⁹² Taking a longer view of history also allows me to test the HI ideas I employ, and observe how path dependence and institutional resilience have played out in the long run. By combining an in-depth and nuanced historical analysis with theoretical ideas such as path dependence and institutional resilience, I also demonstrate the significance and enduring relevance of key

⁹² See further Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Soc'y Rev* 95; Mark Tushnet, 'Defending the Indeterminacy Thesis' (1996-1997) 16 *QLR* 339.

historical developments. This longer view accordingly supports my theoretical analysis as well as adding much context to my historical account.

III. Conclusion

This chapter has outlined the main theories and ideas on which I rely in my historical study of CCAA law. I have also signalled some ways in which my HI and recursivity of law approach allows me to present an in-depth, historical account of the origins and development of CCAA law over time. One way I do this is by identifying and explaining cycles of legal change and periods of stasis, as well as the role played by institutional arrangements in this process. Attention to the socio-legal and political-economic context of developments affecting CCAA law further enables me to draw connections between corporate reorganisation and broader themes and trends such as Canadian federalism. This enriches my CCAA analysis by locating developments in this area of law within a bigger political-economic and sociological 'picture' of Canadian history, and highlighting points of similarity and departure from wider political and legal trends. Additionally, so situating CCAA law developments provides a platform from which I am able to offer some modest, wider generalisations based on my study, and identify promising avenues of inquiry, which may be of interest to other scholars working in law and related disciplines.

3. 1920s—1940s: company reorganisation and the CCAA

I. Introduction

This chapter provides a narrative account of the context and early history of the CCAA.¹ It challenges ‘received wisdom’ about the law and practice of early Canadian company reorganisation and the origins of the Act.² In doing so I reference bankruptcy and insolvency law developments in England and the US, which helps contextualise the 1933 enactment of the CCAA. My account highlights how the early history of the CCAA diverges from present-day preconceptions and provides insight into the origins and development of business reorganisation law in Canada. This helps set the stage for my analysis and discussion in Chapter 4 by providing an historical frame of reference for CCAA developments in the 1980s and 1990s.

First, my analysis will show that the CCAA was an extension of an established regime of bondholder reorganisations rooted in receivership law, and did not have a basis in the public interest. At the time of the CCAA’s enactment and in the following decades, business reorganisations were regarded as an aspect of company law³ and so insolvency-focused research tends to miss all mention of

¹ *Companies’ Creditors Arrangement Act*, SC 1933, c 36 [CCAA 1933.]

² See *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 [*Century Services*], paras 11, 14-18, per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell J.J., citing Janis Sarra, *Creditors Rights and the Public Interest* (Toronto: University of Toronto Press, 2003) [Sarra 2003], 12-15, *Reference re Companies’ Creditors Arrangement Act (Canada)*, [1934] SCR 659, 660-661, [1934] 4 DLR 75 [CCAA Reference], and Stanley E. Edwards, ‘Reorganizations Under the Companies’ Creditors Arrangement Act’ (1947) 25 Can Bar Rev 587 [Edwards 1947], 592.

³ See eg W.K. Fraser’s company law texts and article: *Handbook on Companies with Appendix of Forms* (Toronto: Carswell, 1st ed, 1922); *Handbook on Companies with Appendix of Forms*

the Act prior to the 1980s. Large, institutional bondholders—large, secured creditors in company insolvencies—were the major beneficiaries of the CCAA.⁴ Concern for the solvency and viability of these bondholding interests—and their importance to wider FS stability in Canada—prompted the enactment of the CCAA.

Characterising company reorganisation as ‘insolvency law’ was a break with traditional interpretations of the federal ‘bankruptcy and insolvency law power,’ as well as traditional company reorganisation under trust deeds and receivership. This characterisation provoked constitutional controversy, especially since the text of the CCAA imported the substance of trust deeds reorganisations—majority provisions—into federal insolvency law. The Act otherwise changed little about existing practices and approaches to company reorganisation as a bondholder remedy.

(Toronto: Carswell, 2nd ed, 1926); ‘Reorganization of Companies in Canada’ (1927) 27 Colum L Rev 932 [Fraser 1927]; with Hon. Mr. Justice Masten, *Company Law of Canada*, (Toronto: Carswell, 3rd ed, 1929); *Handbook on Companies with Appendix of Forms*, (Toronto: Carswell, 3rd ed, 1931); *Handbook on Canadian Company Law with Forms*, (Toronto: Carswell, 4th ed, 1945).

See also Harold Ernest Manning’s articles: ‘Company Reorganization, Part I’ (1932-1933) 2 Fortnightly LJ 139 [Manning I]; ‘Company Reorganization, Part II’ (1932-1933) 2 Fortnightly LJ 158 [Manning II]; ‘Company Reorganization, Part III’ (1932-1933) 2 Fortnightly LJ 176 [Manning III]; ‘Company Reorganization, Part IV’ (1932-1933) 2 Fortnightly LJ 192 [Manning IV]; ‘Companies Reorganization and the Judicature Amendment Act 1935’ (1935-1936) 5 Fortnightly LJ 23 [Manning V]; ‘Companies Reorganization and the Judicature Amendment Act 1935’ (1935-1936) 5 Fortnightly LJ 40 [Manning VI].

In contrast, see Lewis Duncan’s texts: *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1st ed, 1922); with William John Reilley (Superintendent of Bankruptcy), *Bankruptcy in Canada* (Toronto: Canadian Legal Authors Limited, 2nd ed, 1933); with John D. Honsberger, *Bankruptcy in Canada* (Aurora: Canada Law Book, 3rd ed, 1961).

⁴ Manning V, n 3 above, 23; W.K. Fraser [representing the Dominion Mortgage and Investments Association (DMIA)], House of Commons Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence respecting the Companies Creditors’ Arrangement Act, No. 1, 7 June 1938* (Ottawa: King’s Printer, 1938) [1938 Minutes], 18-22.

Second the ‘characteristic’ flexibility and judicial discretion associated with the CCAA are absent from 1930s case law, in which judges strictly construed the wording of the Act. Canadian courts regarded the CCAA as a «loi d'exception» (‘special law’), which was separate and distinct from the Canadian bankruptcy regime under the *Bankruptcy Act*. Accordingly, the CCAA warranted an even narrower interpretation than the latter Act.⁵

Third I identify and analyse four alleged ‘abuses’ of the CCAA in the 1930s, which are surprising in view of conventional accounts of the Act’s origins. Of these four allegations, historical evidence shows that only two had merit: the use of the CCAA by debtor companies to reorganise their unsecured debts, which led to the first concerted effort to repeal the Act in 1938;⁶ and a 1930s version of ‘vulture capitalism,’ which entailed use of the Act by small groups of individuals who purchased distressed bonds with a view to hijacking bondholder reorganisations.⁷ The latter abuse arose in both American and Canadian corporate reorganisations during the Great Depression, and was not unique to CCAA reorganisations.⁸

Fourth I demonstrate that the Act was frequently resorted to—more frequently than it is today—and in the 1930s over 200 companies in Montreal alone

⁵ See eg *Re Comptoir coopératif du combustible Ltée* (1935), 74 Que SC 119, 17 CBR 124 [*Comptoir*], paras 3, 8; *Minister of National Revenue v Roxy Frocks Manufacturing Co.* (1936), 62 Que KB 113, 18 CBR 132 (In Appeal) [*Roxy Frocks*], paras 13-14, 38-40.

⁶ See generally, 1938 Minutes, n 4 above.

⁷ ‘Protective Committees’ (1940-1941) 10 *Fortnightly LJ* 183 [‘Protective Committees’].

⁸ *ibid*; De Forest Billyou, ‘Corporate Mortgage Bonds and Majority Clauses’ (1948) 57:4 *Yale LJ* 595, esp 603.

completed CCAA restructurings.⁹ In 1938 this led Ernest Bertrand (MP, Liberal) to remark that ‘in practice the Companies’ Creditors Arrangement Act is the major bankruptcy law [in Canada],¹⁰ despite the courts’ interpretation of the Act as separate and distinct from the *Bankruptcy Act*.

This chapter is arranged as follows. Section II provides an overview of the historical development of business reorganisation in the Anglo-Canadian context from the late nineteenth- to the early twentieth-century, and outlines significant changes in the 1920s that contributed to the enactment of the CCAA. Section III discusses the legal, political and economic context behind the enactment of the CCAA and early case law using an interest group analysis. Section IV picks up this analysis with respect to alleged abuses of the statute and the 1938 bill that proposed repeal of the Act. Section V concludes.

II. Company reorganisation before the CCAA

In the nineteenth-century, trust deeds were used to facilitate reorganisations of large, important companies in England.¹¹ As described by Bowen, an English legal writer, in 1907:

The important insolvencies which had been brought about by pure mercantile misfortune were administered to a large extent under private trust deeds and voluntary compositions,

⁹ H.S.T. Piper (representing the Montreal Board of Trade), 1938 Minutes, n 4 above, 2.

¹⁰ 1938 Minutes, n 4 above, 18.

¹¹ Jérôme Sgard, ‘Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth-Nineteenth Century)’ (2009-2010) OXPO Working Paper, online: <<http://oxpo.politics.ox.ac.uk>>, esp 9-11.

which, since they might be disturbed by the caprice of malice of a single outstanding creditor, were always liable to be made the instruments of extortion.¹²

Corporate reorganisation initially evolved outside bankruptcy and insolvency law, since legislators remained suspicious of the potential abuses and frauds that could be perpetrated by debtors if business restructuring were permitted.¹³ Even after adding reorganisation provisions to bankruptcy legislation in 1825, English legislators made reorganisation so difficult to complete that these provisions were little used.¹⁴ So trust deed reorganisation was a well-established practice of company law before effective company reorganisation provisions were added to bankruptcy or insolvency statutes.

Provisions for compromises between debtor companies and their creditors were added to English companies legislation from as early as 1862. The *Companies Act, 1862* allowed companies undergoing voluntary winding-up proceedings to make binding arrangements with their creditors subject to three-fourths majority creditor approval and sanction by an extraordinary resolution of the company.¹⁵

A few years later, the English Parliament enacted the *Joint Stock Companies Arrangements Act, 1870*¹⁶ specifically 'to facilitate compromises and arrangements between creditors and shareholders of Joint Stock and other

¹² Bowen 1907 (no further bibliographic details available) cited in Sgard, *ibid* FN 31.

¹³ *ibid* 9-10.

¹⁴ *ibid* 10.

¹⁵ *Companies Act, 1862*, 25 & 26 Vict, c 89, see Part IV, esp s 136. Note that the term 'creditor' referred to both secured and unsecured creditors.

An 'extraordinary resolution' or 'special resolution' is a shareholder resolution that is passed by a high-threshold majority of shareholders (usually two-thirds or three-quarters).

¹⁶ *Joint Stock Companies Arrangements Act, 1870*, 33 & 34 Vict c 104.

Companies in Liquidation.’¹⁷ The 1870 Act expanded the possibility of creditor-debtor arrangements set out in the *Companies Act, 1862* to compromises between companies and their shareholders, and companies undergoing court-supervised winding-up, allowing the substitution of ‘a living company for a receivership and a liquidation.’¹⁸

Although I have not found any evidence that suggests the Canadian Parliament consulted this Act, the substance and framing of the statute is very similar to the CCAA, down to the clunky appellation ‘companies arrangements act.’¹⁹ Furthermore, English courts overseeing restructuring proceedings under the 1870 Act initially developed common law tests (later employed under the CCAA) for court sanction of plans of arrangement, such as compliance with all statutory requirements and the fairness and reasonableness of the plan.²⁰

The addition of reorganisation provisions to English companies legislation extended the application of trust deed-like reorganisation practices to all companies and their creditors. This not only avoided drafting inadequacies that could thwart restructuring attempts under a trust deed, it probably helped standardise English reorganisation practice, supported by a growing body of case law. These reorganisation provisions were passed down through companies legislation and eventually enumerated in section 153 of the English *Companies*

¹⁷ *ibid* long title.

¹⁸ *ibid* s 4. Also see *Companies Act, 1867*, 30 & 31 Vict, c 131, under which companies could also have recourse to the *Joint Stock Companies Arrangements Act, 1870*; *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company Limited*, [1891] 1 Ch 213, 60 LJ Ch 221 (CA) [*Re Alabama*], per Fry J.

¹⁹ See W.K. Fraser (DMIA), Minutes 1938, n 4 above, 18-19.

²⁰ See *Re Alabama*, n 18 above, per Lindley L.J.

Act, 1929.²¹ By the time the CCAA was before Parliament in the 1930s, reorganisation under the *Companies Act, 1929* was the preferred means of restructuring companies in England.²²

The 1933 CCAA bill imported the substance of section 153 of the English *Companies Act, 1929* to Canada.²³ The CCAA was characterised by Charles H. Cahan (MP, Conservative) as basically an amendment to the federal *Companies Act*,²⁴ a description that assumes new significance in light of English reorganisation practice. Thus, company reorganisation in the Anglo-Canadian context has a fairly long history and was not initially an aspect of bankruptcy or insolvency law.²⁵

A. Floating charges and receivership

In Canada the division of legislative powers between the provinces and the federal government posed challenges to wholesale adoption of the English approach to company reorganisation. Nevertheless, before the enactment of the

²¹ *Companies Act, 1929*, 19 & 20 Geo 5, c 23, s 153.

²² Fraser 1927, n 3 above, 956, citing Notes: 'The Rights and Remedies of the Bondholder under Corporate Bonds and Indentures' (1927) 27 Colum L Rev 433, 579.

²³ Hon. C.H. Cahan (Conservative), *Debates of the House of Commons of Canada*, (9 May 1933) 4th Sess, 17th Parl (Ottawa: King's Printer, 1933), 4724.

²⁴ *Companies Act*, RSC 1927, c 79.

²⁵ France has included business compositions in bankruptcy law for centuries, see Sgard, n 11 above.

On Canadian bondholders reorganisations see eg F.E.H., 'Case Note on the Ontario case of *O'Brien v British American Nickel Corporation & National Trust Co.*' (1925) 8 Can Bar Rev 498; M. J. *O'Brien Ltd. v Br. Am. Nickel Corp. Ltd.*, [1925] 4 DLR 455, 57 OLR 536 (CA) (W.K. Fraser representing the defendant trust company, National Trust Co.), citing several English decisions on point, including: *North-West Transportation Co. v Beatty* (1887), LR 12 App Cas 589, CR [9] AC 311 (PC) (appealed from the SCC); *Goodfellow v Nelson Line (Liverpool) Ltd.*, [1912] 2 Ch 324, 81 LJ Ch 564.

See also Winslow Benson, *Business Methods of Canadian Trust Companies* (Toronto: Ryerson Press, 1949); Fred R. MacKelcan, 'Canadian Bond Issues' (1952) 30:4 Can Bar Rev 325.

CCAA in 1933, legal practices existed to effect company restructurings outside of insolvency law, borrowing from English techniques.²⁶

Bondholder reorganisations conducted through the provisions of a governing trust deed were the most prevalent and important form of restructuring in this period.²⁷ Trust deeds were a financing instrument used by bondholders to secure bonds against assets of the company and the business itself through fixed and floating charges.²⁸ Modelled on English trust deeds, the Canadian versions usually provided that a stated majority of bondholders could compel the minority to accept a modification of their rights as bondholders, thereby avoiding the problem described by Bowen.²⁹ From this early date bondholders used the private architecture of a trust deeds to solve collective action problems concerning their rights and remedies as creditors.

Majority clauses gave rise to some concern that they these provisions could be used to the detriment of minority bondholders. In Canada and England practitioners regarded these provisions as necessary to prevent obstructive tactics by minority bondholders and to facilitate action by bondholders as a class

²⁶ See eg the following English texts by Paul Fredrick Simonson, *The Law Relating to the Reconstruction and Amalgamation of Joint-Stock Companies: Revised and Largely Rewritten* (London: Sweet & Maxwell, 3rd ed, 1919); *The Debenture and Debenture Stock Holders' Legal Handbook, with appendix containing forms* (London: Effingham Wilson, 1920); *The Law Relating to the Reduction of the Share Capital of Joint-Stock Companies* (London: Sweet & Maxwell, 2nd ed, 1924); *The Law Relating to the Reconstruction and Amalgamation of Joint-Stock Companies: Together with Forms and Precedents* (London: Jordan & Sons, 4th ed, 1931); *The Law Relating to the Reduction of the Share Capital of Joint-Stock Companies* (London: Jordan & Sons, 3rd ed, 1932).

²⁷ Fraser 1927, n 3 above, 933; William Kaspar Fraser and Hugh Williamson MacDonnell, *Handbook on Companies with Appendix and Forms* (Toronto: Carswell, 1922).

²⁸ Fraser 1927, *ibid* 936.

²⁹ *ibid* 934.

where holders of bonds were widely dispersed.³⁰ The contemporary English academic Jennifer Payne notes that the statutory majority provisions of the *Joint Stock Companies Arrangement Act, 1870* were enacted in part as a response to problems with small creditors derailing compromises and arrangements.³¹ Majority provisions were also useful where it was not practicable to track down all creditors for the purposes of voting on a restructuring plan. This may be because the bondholders are ‘widely dispersed’ or because the company has an outstanding issue of bearer bonds, for instance.³² Nevertheless where the majority of bondholders exercised its power unfairly or oppressively, the court could, at least theoretically, grant relief to the minority.³³

In England and Canada, the floating charge gave rise to bondholder reorganisations.³⁴ In late nineteenth- and early twentieth-century Canada, bond issues were the main form of long-term commercial financing,³⁵ and accordingly bondholder reorganisations were the primary method of business reorganisation. The key elements of bondholder floating charges under Canadian

³⁰ Fraser 1927, n 3 above, 936-937.

³¹ Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge: Cambridge University Press, 2014), 8, citing *In re Dominion of Canada Freehold Estate and Timber Co Ltd* (1886), 55 LT 347, 351 per Chitty J.

³² ‘Bearer bonds’ are unregistered debt instruments in respect of which no records are kept concerning ownership or transactions involving ownership. Payne, *ibid* 36, noting the (principally historical) importance of the form of notice of class meetings because it may be the only way to notify certain groups (eg holders of bearer bonds) about the proposed arrangement.

In the 1988 restructuring of Dome Petroleum (discussed in the next chapter) the debtor had a number of outstanding bearer bonds, see Simon B. Scott, Timothy O. Buckley and Andrew Henderson, ‘The Arrangement Procedure under Section 192 of the *Canada Business Corporation Act* and the Reorganization of Dome Petroleum Limited’ (1990) 16 CBLJ 296, 310-311.

³³ Fraser 1927, n 3 above, 937, citing an example of the court’s intervention *In re New York Taxicab Co.*, [1913] 1 Ch 1.

³⁴ MacKelcan, n 25 above, 329; G.F. Curtis, ‘The Theory of the Floating Charge’ (1941-1942) 4 UTLJ 131, 145.

³⁵ William D. Moull, ‘Security under Sections 177 and 178 of the Bank Act’ (1986) 65 Can Bar Rev 242, 242-244; Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1989), 431-432, noting the ease with which corporations could obtain capital through bond issues and comparing this with the smaller market of commercial bank loans.

trust deeds that contributed to bondholder reorganisations were the long-term nature of the credit arrangement and the charge on the business undertaking as part of the security for the loan. These features gave bondholders an interest in the long-term ‘success’ of the company, which somewhat resembles that of shareholders. As a result, the presumptive response to debtor failure by bondholders during this period was reorganisation.

The origins of the English floating charge shed light on the restructuring incentive it created for Canadian and English bondholders. According to Robert Pennington, nineteenth-century English courts recognised that the floating charge was a means of obtaining capital for companies, which faced a scarcity of *equity* investment.³⁶ By their long-term nature and charge on the business undertaking of the company, bondholders’ floating charges contemplated a situation in which there were inadequate assets to secure the loan—intrinsically a situation of undersecurity. The floating charge holder whose security included future profitability of the business undertaking took security, in part, against the anticipated success of the company—likely since this was the only security that the company had left to offer.

Since a significant portion of the ‘security’ for long-term credit issued under a floating charge included the earning power of the business, the ongoing operation of the enterprise was the ultimate creditor remedy.³⁷ In 1952, Fred MacKelcan wrote that the only cases in which bondholders would *not* attempt to

³⁶ Robert R. Pennington, ‘The Genesis of the Floating Charge’ (1960) 23 Mod L Rev 630, 630.

³⁷ Benson, n 25 above, 163-164; Curtis, n 34 above, 145.

restructure the debtor were where ‘the company’s business had ceased to be carried on or plainly could not be further continued.’³⁸ In such cases, the company usually wound up in liquidation or bankruptcy, with a receiver acting for bondholders.³⁹ According to MacKelcan, the importance of the floating charge was ‘that it enables a remedy [reorganisation] to be applied which will preserve the going concern value of the debtor company’s business and its future earning power...’⁴⁰

Shortly after recognising the floating charge, English courts recognised a new equitable remedy that responded to the particular interests of floating charge holders in restructuring debtor companies.⁴¹ Where the floating charge secured the enterprise in favour of bondholders, the courts recognised the right of the bondholders to appoint a receiver-manager⁴² under the terms of the trust deed.⁴³ Reorganisations were actions by mortgagees to enforce their security, which was made possible by the court’s characterisation of the charge over the debtor’s business as a proprietary, rather than a contractual right.⁴⁴

³⁸ MacKelcan, n 25 above, 341, cited in Jean Pierre Garant, ‘The floating charge in Canadian bond market’ (Ph.D. Thesis in Finance, University of Illinois at Urbana-Champaign, 1971) [unpublished], 69-70.

³⁹ MacKelcan, *ibid.*

⁴⁰ *ibid* 329.

⁴¹ Benson, n 25 above, 121; Curtis, n 34 above, 133-140.

⁴² Note that in case law and literature from the 1930s, the receiver-manager is usually referred to as the ‘receiver and manager.’

⁴³ Curtis, n 34 above, 145-146; Fraser 1927, n 3 above, 933.

⁴⁴ Fraser 1927, *ibid*; Curtis, *ibid* 133-140, 145-146, citing *In re Panama, New Zealand, and Australian Royal Mail Co.* (1870), LR 5 Ch App 318, 39 LJ Ch 482 [*Panama*], the foundational case upholding the floating charge, which was affirmed in *Saloman v Saloman & Co, Ltd*, [1896] UKHL 1, [1897] AC 22 [*Saloman*], 49. See judicial characterisations of the floating charge in: *Governments Stock and Other Securities Investment Co Ltd v Manila Rly Co* (1897), 66 LJ Ch 102 [1897] AC 81, 86, per Lord Macnaghten; *In re Yorkshire Woolcombers Association, Limited*, [1903] 2 Ch 284, 72 LJ Ch 635 (CA), 295, per Romer L.J.; *Illingworth v Houldsworth*, [1904] AC 355, 358, 73 LJ Ch 739 (HL), per Lord Macnaghten; *Evans v Rival Granite Quarries*, [1910] 2 KB 979, 999, 79 LJKB 970 (CA), per Buckley L.J.

In relatively rare cases where the business undertaking was not charged in favour of the bondholders, only a receiver could be appointed.⁴⁵ A receiver was responsible for taking possession of the secured assets and selling them for the benefit of bondholders, after payments to any priority creditors. A receiver-manager, however, had the additional duty of preserving the going concern value and the goodwill associated with the enterprise until the company was restructured or sold, usually with the sanction of the court.⁴⁶

It is worth briefly mentioning that Canadian chartered banks of the nineteenth- and early twentieth-centuries were mainly engaged in short-term business loans, and seasonal farm credit, and so were not 'bondholders.'⁴⁷ As described by the Canadian academic, William Moull, an initial objective of the *Bank Act of 1870* was to keep banks liquid.⁴⁸ To this end banks were generally deterred or prohibited by law from lending against fixed and non-negotiable assets.⁴⁹ Parliament relaxed these prohibitions over time and by the 1920s and 1930s section 88 of the *Bank Act* allowed banks to take charges on certain forms of security from eligible borrowers.⁵⁰ However, the *Bank Act* in force at that time still restricted banks to lending on a short-term basis and barred banks from

See also, Pennington, n 36 above; Roy Goode, *Legal Problems of Credit and Security* (London: Sweet & Maxwell, 4th ed, 2008), chapters 4 and 5; R.R. Pennington, *Company Law* (Butterworths, 8th ed, 2001), 539-541; Eilís Ferran, *Principals of Corporate Finance Law* (Oxford: Oxford University Press, 2008), 368-384.

⁴⁵ Garant, n 38 above, 66-70.

⁴⁶ *ibid* 67, citing Fraser 1927, n 3 above, 934.

⁴⁷ Graham D. Taylor and Peter A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994), 250-251.

⁴⁸ Moull, n 35 above, 242-244.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

mortgage lending until 1967.⁵¹ With a few exceptions, such as for accounts receivable financing, banks were further limited to taking security in the form of fixed charges.⁵² While banks could effectively lend against certain security, such as accounts receivable, by using floating charges,⁵³ these differed from bondholder floating charges since they were short-term, or revolving in nature, and did not amount to a charge on the undertaking, or future profitability of the business.

Under the terms of the trust deed, bondholders could appoint a receiver-manager to restructure the company if their security was in 'jeopardy.'⁵⁴ 'Jeopardy' referred to a scenario where the bondholders' security would likely be depreciated. It did not require the debtor to have actually defaulted on its obligations, violated the terms of the trust deed, or be considered insolvent.⁵⁵ Jeopardy is based on the principle that secured creditors 'need not stand by and see the assets [of the company] seized by unsecured creditors.'⁵⁶ Jeopardy was therefore the most common trigger for appointment of a receiver or receiver-manager.⁵⁷ This concept is retained in modern provincial Personal Property Security Acts, which allow for the inclusion of acceleration clauses in financing

⁵¹ E.P. Neufeld, *The Financial System of Canada: its Growth and Development* (Toronto: Macmillan of Canada, 1972), 110-111.

⁵² Moull, n 35 above, 242-244.

⁵³ Douglas R. Johnson, 'Accounts Receivable Financing in Canada: Nature of the Charge and Rights of Priority' (1981) 15 UBC Law Rev 87, 121-133.

⁵⁴ MacKelcan, n 25 above, 331-332; Curtis, n 34 above, 149; Benson, n 25 above, 165, citing Fred R. MacKelcan, 'The Position of Holders of Industrial Bonds' (no further bibliographic details available); *Dom. Iron & Steel Co. v Can. BK. Commerce*, [1928] 1 DLR 809, 1928 CarswellNS 98 (NSSC) per Mellish J.

⁵⁵ Curtis, n 34 above, 149, citing *Wallace v Universal Automatic Machines Co.*, [1894] 2 Ch 547, 554, [1891-1894] All ER Rep 1156, per Kay L.J.; Benson, *ibid* 163.

⁵⁶ J.L. Stewart and Laird Palmer (eds), *Fraser & Stewart Company Law of Canada* (Toronto: Carswell, 5th ed, 1962), 436, cited in Garant, n 38 above, 61.

⁵⁷ *ibid*.

agreements where there is reasonable cause to believe that the collateral is, or is about to be placed in jeopardy.⁵⁸ Since appointment of a receiver-manager could negatively affect a company's goodwill (and going concern value) bondholders were inclined to forgive missed interest or sinking fund payments⁵⁹ in respect of the bonds.⁶⁰

As a practical matter, technical 'insolvency' was probably not a useful benchmark for initiating receivership or reorganisation proceedings by floating charge holders. Courts recognised the floating charge over the business enterprise in the first place because companies had inadequate security to offer as collateral for long-term financing.⁶¹ A floating charge over the business enterprise of the debtor meant that the company could be balance-sheet insolvent as soon as it spent the loan on something not covered by the creditors' security, such as employee wages.

As the company's financial situation worsened bondholders could act to crystallise their floating charge, which would effectively bar unsecureds from enforcing or enhancing the priority of their claims through execution or judgment.⁶² As a general matter unsecured creditors ranked behind floating charge holders unless they could complete an execution order before

⁵⁸ See eg *Personal Property Security Act*, RSO 1990, c P.10, s 16.

⁵⁹ 'Sinking fund' payments are a means of repaying the principal amount owed under a bond issue.

⁶⁰ Garant, n 38 above, 67-68.

⁶¹ Benson, n 25 above, 121; Curtis, n 34 above, 133-140, 145-146, citing *Panama*, n 46 above; *Saloman*, n 44 above, 49.

⁶² See Roderick J. Wood, 'The Floating Charge in Canada' (1989) 27 *Alta L Rev* 191, 199-201, citing *inter alia Evans v Rival Granite Quarries, Ltd.*, n 46 above; E. Manson, 'The Reform of Company Law' (1895) 11 *LQR* 346, 352; E. Manson, 'The Growth of the Debenture' (1897) 13 *LQR* 418.

crystallisation of the floating charge. But often this was practically impossible because the financial difficulty of the company, which would prompt execution orders, usually also triggered crystallisation of bondholders' floating charge.⁶³ Since almost all assets of the company were secured under the floating charge, this left little or nothing for a bankruptcy distribution to unsecured creditors. So the crystallisation of the bondholders' floating charge provided a *de facto* stay of proceedings against all other creditors.

Jeopardy thus provided an advantageous point at which to initiate floating charge holder remedies. Once the security was in jeopardy, bondholders could pursue reorganisation or liquidation depending on which remedy was expected to result in higher recoveries.⁶⁴ Reorganising the debtor could benefit the company's equity holders as well as other stakeholders, such as employees, who otherwise would receive little or nothing in liquidation.⁶⁵ This is similar to the trickle down benefits that can accrue to junior creditors and stakeholders in a modern DIP restructuring.⁶⁶

Bondholder reorganisations relied broadly on the framework of receivership law to effect restructurings, meaning that reorganisations operated almost solely within provincial jurisdiction.⁶⁷ The CCAA, as essentially an extension of bondholder reorganisations, continues to reflect this basis in receivership by

⁶³ *ibid.*

⁶⁴ Fraser 1927, n 3 above, 943-944.

⁶⁵ MacKelcan, n 25 above, 329; Benson, n 25 above, 172.

⁶⁶ Sarra 2003, n 2 above, 42; Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business* (Oxford: Oxford University Press, 1998) [Carruthers and Halliday 1998], 244.

⁶⁷ Fraser 1927, n 3 above, 934.

looking to receivership case law for guidance on asset sales, for example.⁶⁸ Moreover, early CCAA guidance on the ‘fairness’ and ‘reasonableness’ of plans came from case law on earlier shareholder and creditor reorganisations under company law, further indicating that some restructuring mechanisms and principles already existed by the time the CCAA was enacted.⁶⁹

A further interesting parallel is the similarity between the practice of issuing receiver’s certificates in historical bondholder reorganisations, and the superpriority afforded to DIP financing under modern CCAA law. In a Ph.D. thesis on finance Jean Pierre Garant stated that a receiver-manager acting for floating charge holders had authority to raise money for carrying on the business in a bondholder reorganisation by issuing receiver’s certificates that ranked ahead of bonds.⁷⁰ According to Garant and Winslow Benson, this was an essential power for completing restructurings since most receivers were appointed in situations where there was a lack of working capital.⁷¹ Then as now, the lack of working capital could be caused by various factors. Nevertheless the effectiveness of this method of secured financing and corporate restructuring is illustrated by the fact that

⁶⁸ Eg *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 81 ACWS (3d) 932 (Ont Ct (Gen Div)) applied the ‘Soundair Factors’ from *Royal Bank of Canada v Soundair Corp.* (1991), 7 CBR (3d) 1, 83 DLR (4th) 76 (Ont CA), a receivership case. These factors were originally laid out in *Crown Trust Co. v Rosenberg* (1986), 60 OR (2d) 87, 39 DLR (4th) 526 (HCJ), also a receivership case. See Alfonso Nocilla, ‘Asset Sales Under the Companies’ Creditors Arrangement Act and the Failure of Section 36’ (2012) 52 CBLJ 226, 227-228.

⁶⁹ See *Re Dairy Corporation of Canada Limited*, [1934] OR 436, [1934] 3 DLR 347, concerning a shareholder restructuring under *Companies Act*, RSO 1927, c 218, s 64a, considered in early CCAA cases such as *In re Wellington Building Corporation Limited*, [1934] OR 653, [1934] 4 DLR 626 (SC) [*Wellington*], and cited in the Canadian Encyclopaedic Digest, XVIII.2.(a) on court sanction of CCAA plans; *Re Alabama*, n 18 above, per Lindley LJ.

⁷⁰ Garant, n 38 above, 68.

⁷¹ *ibid* citing Benson, n 25 above, 326.

... it is often the firm that requests receivership when working capital is lacking. Such a request, apart from allowing for working capital to be raised, protects the firm through crystallization against a rush of unsecured creditors with execution orders. At the same time, it protects shareholders' value, especially when it is recalled that bondholders may modify their rights such as to payments of interest and principal for the purpose of placing the reorganized company on a sound basis.⁷²

Therefore, the practice and outcome of bondholder reorganisations has some parallels modern DIP restructurings.

In the course of a bondholder reorganisation, junior and unsecured creditor rights were essentially a non-issue. In Canada, where unsecured creditors could petition the company into bankruptcy, there was typically nothing in the estate to satisfy their claims since all of the company's assets were secured by the bondholders' fixed and floating charges.⁷³ According to William Kaspar Fraser, a expert in company law, unsecured creditors could 'be disregarded or given only such terms as the reorganisation committee deems expedient on business grounds.'⁷⁴ The necessity and desirability of honouring junior and unsecured creditor claims in whole or in part probably arose more frequently than Fraser indicated.⁷⁵

MacKelcan noted that bondholders typically negotiated bank claims since financing from the bank was often needed to continue operating the business as

⁷² Garant, *ibid.*

⁷³ Fraser 1927, n 3 above, 936. This situation prevailed in England into the 1980s, see Kenneth Cork *et al.*, *Report of the Review Committee on Insolvency Law and Practice*, 1982 Cmnd 855; Carruthers and Halliday 1998, n 66 above, 202-203, 209-210, 339-346.

⁷⁴ Fraser 1927, *ibid.*

⁷⁵ See Curtis, n 34 above, 145-148; MacKelcan, n 25 above, 343.

a going concern during and after reorganisation.⁷⁶ From the bank's perspective, it might be impossible to collect receivables that were assigned to it by the debtor, without the ongoing operation of the plant and equipment, which was typically secured in favour of bondholders.⁷⁷ So trust deeds usually included a provision giving the company's bank priority for money lent and secured under section 88 of the *Bank Act*.⁷⁸ Therefore bondholders were inclined to forgive minor defects in payments, since otherwise the company would likely borrow from the bank to meet bond payments, thereby creating more liens on its working capital that would rank ahead of bondholder claims.⁷⁹ G.F. Curtis noted several other specific types of debt that courts ranked ahead of bondholder claims, including garnishee orders, solicitor's liens, vendor's liens, and purchase money.⁸⁰ Due to the lack of records, it is not clear to what extent the latter priorities were invoked in Canadian bondholder reorganisations of this period.

Bondholder reorganisations frequently took the form of a sale from the old company to a newly formed company for non-cash consideration in the form of new securities, a transaction that could require court approval if the province had enacted bulk sales legislation or a *Judicature Act*.⁸¹ This form of

⁷⁶ MacKelcan, *ibid* 343.

⁷⁷ *ibid*.

⁷⁸ Curtis, n 34 above, 147; Benson, n 25 above, 164-165, 169. See *Bank Act*, RSC 1927, c 12, s 88; *Bank of Montreal v Guaranty Silk Dyeing & Finishing Co.*, [1934] OR 625, [1934] 4 DLR 394 (varied [1935] OR 493, [1935] 4 DLR 483); *Dom. Iron & Steel Co. v Can. BK. Commerce*, n 56 above; Moull, n 35 above, 242-244.

⁷⁹ Benson, *ibid*.

⁸⁰ Curtis, n 34 above, 147-149, citing *Robson v Smith*, [1895] 2 Ch 118, 64 LJ Ch 457; *Brunton v Electrical Engineering Co.*, [1892] 1 Ch 434, 61 LJ Ch 256; *Biggerstaff v Rowell's Wharf Ltd.*, [1896] 2 Ch 93, [1895-1899] All ER Rep Ext 1933; *Wilson v Kelland*, [1910] 2 Ch 306, 79 LJ Ch 580; *In re Connolly Bros.*, [1912] 2 Ch 25, [1911-1913] All ER Rep Ext 1207.

⁸¹ Fraser 1927, n 3 above, 942, citing *Statute Law Amendment Act*, SO 1917, c 27, s 17, amending certain provisions of the Ontario *Judicature Act*, RSO 1917, c 56, s 106(5) pertaining to bondholders. See also *Bulk Sales Act*, SO 1917, c 33.

reorganisation eliminated unsecured claims. Where unsecured creditors were likely to attack the plan, Fraser recommended that bondholders obtain court approval, which would bind all other interested parties to the terms of the (bondholders') reorganisation plan.

Historical evidence suggests that 'court approval' probably was obtained by converting a private receivership into a court-appointed receivership, sometimes also called an equity receivership. This is as opposed to a private receivership, which arises purely from contractual provisions in a financing agreement, such as a trust deed.⁸² Writing in 1943, MacKelcan noted that the majority of receiverships in which National Trust Company, one of the largest trust companies in Canada, was involved were receiverships in which it acted as indenture trustee and had obtained court appointment as receiver.⁸³ Garant wrote that court approval was recommended in bondholder reorganisations due to the fact that floating charge security did not charge specific assets, suggesting that court-appointed receiverships were used by bondholders to obtain broader or stronger powers than those provided through private receivership alone.⁸⁴ Garant wrote that it was nevertheless legal for the trustee to seize and sell corporate assets, if such powers were conferred in the trust deed.⁸⁵

⁸² See Roderick Wood, 'The Regulation of Receiverships' 2009 ARIL 9 [Wood 2009].

⁸³ Fred MacKelcan, 'A Philosophy of Trust Management that Packs a Wallop' (1943) *Pamphlet Published by National Trust Co.* at 14 (no pagination in original pamphlet).

⁸⁴ Garant, n 38 above, 65.

⁸⁵ *ibid.*

Furthermore MacKelcan and Fraser both reported that the Ontario *Judicature Act* was used to facilitate bondholder reorganisations.⁸⁶ That Act, like its English counterpart,⁸⁷ provided for the court-appointment of a receiver as an equitable remedy.⁸⁸ It appears that over time some ‘equitable’ remedies, such as receivership, were enumerated in Canadian statutes, although these remedies may also have existed under common law. Canadian ‘equity receiverships’ resulted from the court appointment of a receiver, which could be based on statutory provisions or common law principles.⁸⁹

Under a court-appointed receivership a court could ‘approve’ the plan or compromise based on its statutory or equitable jurisdiction, which would bind non-bondholder parties to the plan. Bondholders could therefore have the best of both private and equitable receivership—using private receivership to work out a compromise that advanced their interests, and then converting the process into an equitable receivership to obtain court approval, which would bind other interested parties to the plan. Equitable receiverships were effectively used as a judicial rubber stamp for private restructuring plans. This practice parallels modern pre-packaged bankruptcies in some respects.⁹⁰

⁸⁶ See eg MacKelcan, n 25 above, 347-348; Fraser 1927, n 3 above, 942-943.

⁸⁷ Diane M. Hare and David Milman, ‘Debenture holders and judgment creditors – problems of priority’ (1982) LMCLQ 57, 66-67, FN 79, discussing ‘equitable execution’ under English Judicature Acts; *Re Shepherd* (1899), 43 ChD 131 at 137, per Bowen L.J.

⁸⁸ Ontario *Judicature Act*, RSO 1917, c 56.

⁸⁹ See *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 46, Part X ‘Secured Creditors and Receivers’. On common-law appointments see summary in *Gaskell v Gosling*, [1896] 1 QB 669, 691-692, 65 LJQB 435, rev’d [1897] AC 575, [1895-1899] All ER Rep 300 (HL), per Rigby, L.J., cited in Wood 2009, n 82 above, FN 5.

⁹⁰ A recent Canadian example is the third-party ABCP insolvency, which was a quasi prepackaged bankruptcy carried out under the CCAA, see Virginia Torrie, ‘Analyzing the Canadian Third-Party ABCP Liquidity Crisis and Restructuring Through the Lenses of Securities and Insolvency Law’ (LL.M. Thesis, Osgoode Hall Law School, York University, 2010) [unpublished]. See further Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: Cambridge

In contrast with the US, unsecured creditors in Canada could not initiate receivership proceedings, which were also a common means of reorganising American corporate bond issues in this period.⁹¹ US courts also refused to recognise a floating charge over a debtor's property.⁹² Accordingly, creditor remedies developed under the floating charge, such as the doctrine of jeopardy, majority provisions in trust deeds and private receiverships, were not used in the US, where creditors used different remedies under equity receiverships, the more rules-based *Bankruptcy Code*, and secured lending laws.⁹³ According to Canadian practitioners, Anglo-Canadian bondholder reorganisations offered a more flexible procedure for the benefit of bondholders, which they regarded as an advantage over the American approach.⁹⁴

In Canada reorganisation proceedings with respect to unsecured creditor claims were possible for companies in liquidation under the WUA where court leave was obtained. These reorganisations were also usually conducted by way of a 'sale by the liquidator to a new company in consideration of the shares and securities to be delivered under the plan.'⁹⁵ Where a three-fourths majority in

University Press, 2nd ed, 2009), Chapter 10 'Pre-packaged administrations'; Cork, n 73 above, paras 232, 914, 917, 919.

⁹¹ Fraser 1927, n 3 above, 948-949.

⁹² *Benedict v Ratner* (1925), 268 US 353, 45 SCt 566; Grant Gilmore, *Security Interests in Personal Property*, 2 vols (Boston: Little Brown, 1965) vol 1, 253-261.

⁹³ MacKelcan, n 25 above, 332-334; Curtis, n 34 above, 135; W.K. Fraser (DMIA), 1938 Minutes, n 4 above, 18-19; Benson, n 25 above, 169; for an overview of the American receivership reorganisations practices of the 1920s and 1930s, see David A. Skeel Jr., *Debt's Dominion* (Princeton: Princeton University Press, 2001) [Skeel 2001], chapters 2-4. Also see Jacob S. Ziegel, 'The Privately Appointed Receiver' in Jacob S. Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford: Clarendon Press, 1994), 466-467, noting that private receiverships were not adopted in the US.

⁹⁴ MacKelcan, *ibid*; P.J.J. Martin (Liberal), 1938 Minutes, *ibid* 20; Skeel 2001, *ibid* 73-74.

⁹⁵ Fraser 1927, n 3 above, 950, citing *Re Bailey Cobalt Mines Ltd.*, (1920) 47 OLR 13, 51 DLR 589; SC 1924, c 73, amending the *Winding-up Act*.

value of the company's creditors according to class approved a compromise or arrangement, sections 63 and 64 of that Act provided that the court could sanction the plan.⁹⁶ Fraser notes that this method of reorganisation did not apply to bondholders, whose claims could only be restructured under a trust deed.⁹⁷ Therefore this unsecured creditor remedy was rather ineffectual as a matter of practice, and the WUA was not frequently used for this purpose.⁹⁸ Although compromises under the WUA could be used to enhance the bondholder remedy of reorganisation where it was desirable (for business purposes) to effect a compromise with unsecured creditors. Fraser argued that bondholders could generally carry out a restructuring more effectively and efficiently through an action to enforce their security, than could unsecured creditors via insolvency legislation—an argument that is still made in relation to administrative receivership in England.⁹⁹ From a bondholder perspective, liquidation proceedings were best avoided in any event since they often prompted unsecureds to organise and 'attack the bond mortgage on technical grounds, such as defective registration,' which was a nuisance to bondholders.¹⁰⁰

While the *Bankruptcy Act of 1919* included provision for a company to make a composition with its unsecured creditors, it was not widely used for this purpose.¹⁰¹ Once a company was in bankruptcy, the administrative workings

⁹⁶ *Winding-up Act*, RSC 1927, c 213, ss 63-64, cited in Fraser 1927, n 3 above, 949.

⁹⁷ Fraser 1927, *ibid* 950.

⁹⁸ *ibid*.

⁹⁹ *ibid*; John Armour and Sandra Frisby, 'Rethinking Receivership' (2001) 21:1 Oxford J Leg Stud 73.

¹⁰⁰ Fraser 1927, *ibid* 950.

¹⁰¹ *Bankruptcy Act of 1919*, SC 1919, c 36, ss 2(k) (definition of corporation), 2(o) (definition of debtor), 13 (composition procedure), and discussion in, Thomas G.W. Telfer, 'The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?' (1994-1995) CBLJ 357 [Telfer 1994-1995], 391-393, citing Roger Tassé *et al.*, *Bankruptcy and Insolvency: Report of the Study*

were so slow that virtually all goodwill eroded long before meaningful restructuring negotiations could take place.¹⁰² The slow-moving statutory process was in part intended to prevent abuses by debtors because, as a debtor remedy, reorganisation gave rise to concerns that companies would use bankruptcy compositions to avoid paying debts that they were in fact able to pay.¹⁰³ The same concerns did not arise in bondholder reorganisations. As a creditor remedy in which the creditors exercised control through a receiver-manager, a solvent debtor could not effectively use the proceedings to avoid paying its debts.

The differing attitudes toward reorganisation depending on its characterisation as a debtor-, or creditor-remedy are evident in the early use of the CCAA. The Act attracted no criticism when deployed as a bondholder remedy since the receiver-manager's control of the business prevented strategic behaviour by the debtor. Use of the Act as a bondholder remedy essentially paralleled bondholder rights outside of insolvency legislation and so invoking the Act did not lead to significant changes to creditor priorities, which may have led adversely affected creditors to complain. When the company or its junior creditors used the CCAA to advance their interests, however, it gave rise to concerns that the Act was being abused.¹⁰⁴ With no provision for third-party oversight, there was no check

Committee on Bankruptcy and Insolvency Legislation (Ottawa: Information Canada, 1970) [Tassé], 19. See also Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014), 172.

¹⁰² Telfer 1994-1995, *ibid.*

¹⁰³ Sgard, n 11 above, 9-10. See also Carruthers and Halliday 1998, n 66 above, 109-110, 136, 272, 525, discussing the 'Phoenix syndrome.'

¹⁰⁴ H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above, 2-6. Also see the reasons of the court in *Wellington*, n 69 above.

on strategic behaviour by debtors or junior creditors absent the bondholders' receiver or trustee.

Shareholder reorganisations were also fairly common the 1930s. These reorganisations proceeded under the company legislation applicable to the company in question, such as the Dominion *Companies Act*, with the requisite majority approval of the shareholders and the court.¹⁰⁵ Fraser discussed several examples of shareholder restructurings, which he wrote were also usually conducted by way of a sale of the old company's assets to a newly formed company.¹⁰⁶ In extraordinary cases provincial legislatures enacted special legislation to confirm a scheme of arrangement and to make it binding on all persons affected.¹⁰⁷

Company reorganisations of this period were heavily weighted in favour of bondholder interests, and held clear advantages for other senior secured creditors, the debtor company, and its shareholders. How employees and management were likely to fare probably depended on the facts. In a pure capital restructuring, employees and management likely were unaffected. In a complete company restructuring, a number of employees might lose their jobs and some management positions probably also disappeared. If trade creditors were important to the ongoing operation of the company, they likely fared reasonably well in the restructuring. Otherwise, junior creditors could expect to recover little or nothing of whatever they were owed. In this regard junior creditors

¹⁰⁵ Fraser 1927, n 3 above. See also *Companies Act*, SC 1934, c 33, ss 122-124.

¹⁰⁶ Fraser 1927, *ibid* 953-954.

¹⁰⁷ *ibid* 955, citing SO 1921, c 138 in relation to Goodyear Tire and Rubber Company of Canada Limited.

helped 'finance' many corporate restructurings, along with bondholders who often forgave minor defects in interest payments and subordinated their claims to fresh financing. Unlike bondholders, however, the junior creditors who helped finance the restructuring often did so involuntarily and without sharing in the long-term advantages of having rehabilitated, rather than liquidated, the debtor firm.

B. Catalysts for a coordinated statutory framework

Canadian corporate reorganisation in the 1920s entailed navigating a maze of legislation, case law and business practices. Bondholder reorganisations of this period operated both outside the realm of insolvency law and the federal jurisdiction generally, based on the terms of privately drafted trust deeds and provincial legislation. To effect a 'complete' reorganisation of a company's debt and equity, a firm would need to complete different compromises with all of its debt and equity holders, with no one arrangement guaranteeing that others would follow. Furthermore, provincial jurisdiction over bondholder reorganisations meant that recourse was to the superior court in the province where the assets or company were situated. This could necessitate bringing actions in the courts of multiple provinces if corporate assets and operations were spread throughout the country. By the 1920s, the general lack of coordination in Canadian business reorganisation law frustrated some restructuring attempts and acted to undermine creditor confidence in other instances, contributing to the failure of viable restructuring plans.¹⁰⁸

¹⁰⁸ See Manning III, n 3 above; Edwards 1947, n 2 above.

The multi-pronged approach to Canadian business reorganisation up to the early 1930s largely stemmed from the division of legislative powers contained in the *British North America Act of 1867*. Section 92(13) made secured creditor rights the purview of the provinces, while section 91(21) gave the Dominion responsibility for bankruptcy and insolvency law.¹⁰⁹ The Dominion and provinces further shared legislative power with respect to company law and shareholders under sections 91(2) and the residuary clause, and 92(11), respectively.¹¹⁰ The PC generally interpreted these provisions as discrete divisions of legislative power, and held that legislation affecting secured creditor rights was outside the federal jurisdiction, even in cases of bankruptcy or insolvency.¹¹¹ Parliamentary courage in the face of the Great Depression and the constitutional references in the 1930s would change this interpretation, and with it the legal landscape of commercial reorganisation.¹¹²

During the late 1920s and early 1930s two major catalysts contributed to coordination of the legal framework governing bondholder reorganisations. First corporate reorganisation legislation was increasingly necessary by the 1930s in order to attract US finance.¹¹³ In the 1920s, Canadian firms came to rely more on American, rather than British, investment finance. Following World War I, British interest rates rose faster than Canadian rates, increasing the cost of bond

¹⁰⁹ *The British North America Act, 1867*, 30 & 31 Vict c 3, ss 91(21), 92(13). [Now titled *Constitution Act, 1867*.]

¹¹⁰ *ibid* ss 91(2), 92(11).

¹¹¹ Manning I, n 3 above.

¹¹² CCAA Reference, n 2 above; *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359 [FCAA Reference (SCC)], *aff'd* [1937] AC 391, [1937] 1 DLR 695 (PC) [FCAA Reference (PC)] reviewing *Farmers' Creditors Arrangement Act*, SC 1934, c 53 [FCAA.]

¹¹³ W.K. Fraser (DMIA), 1938 Minutes, n 4 above, 19.

financing for Canadian companies.¹¹⁴ American interest rates, while also rising, were lower than both the Canadian and British rates, and therefore Canadian corporations increasingly placed bonds with American investors.¹¹⁵ Statistical evidence collected by the Canadian economist E.P. Neufeld illustrates that by the period 1915-1920, American investment had replaced British investment as the main source of new issue bond financing for Canadian companies.¹¹⁶ By 1921-1930, American purchases of Canadian new bond issues represented 40.6 per cent of total purchases.¹¹⁷ See Table 1, below.

Table 1: Sales of Canadian corporate bond issues¹¹⁸

Period	Total Millions \$	Sold in Canada %	Sold in US %	Sold in UK %
1904-1914	2186	17.7	9.1	73.2
1915-1920	3428	67.0	29.6	3.4
1921-1930	5491	57.6	40.6	1.8
1931-1939	6314	83.3	13.5	3.2
1940-1945	16577	98.3	1.7	—
1946-1950	9031	93.2	6.8	—

American preferences as to the style and form of financing agreements pushed Canadian practices away from their British roots toward a more American

¹¹⁴ Neufeld, n 51 above, 490.

¹¹⁵ *ibid.*

¹¹⁶ *ibid* 492-493.

¹¹⁷ *ibid.*

¹¹⁸ Adopted from Table 14:4 'Foreign Investment in Canada and Domestic and Foreign Sales of Canadian Bonds 1900-1970' in Neufeld, *ibid* 492-493.

approach in certain cases.¹¹⁹ American investors were especially deterred by the majority provisions of Canadian trust deeds, which they thought negatively affected the negotiability and integrity of the securities.¹²⁰ In the US, the actions of a majority of bondholders acting under a trust deed were curtailed by legislation with a view to protecting minority bondholders.¹²¹ This apprehension is illustrated by the fact that the NYSE was very reluctant to list securities with majority clauses, which they framed as an issue of bond 'negotiability.'¹²² This deterred large issuers and underwriters from proposing and underwriting bonds with majority provisions in the American securities market.¹²³ So trust deeds governing bonds placed with American investors, which invested heavily in the Canadian forestry and mining industries, for example, usually omitted majority provisions.¹²⁴ American influence, however, should not be overstated since majority provisions, as well as floating charges, remained standard features of Canadian trust deeds well beyond the 1930s.¹²⁵

¹¹⁹ Tassé, n 101 above, 1.2.19.

¹²⁰ W.K. Fraser (DMIA), 1938 Minutes, n 4 above, 19; Billyou, n 8 above, 597. See further Francis Lynde Stetson, *Preparation of Corporate Bonds, Mortgages, Collateral Trusts, and Debenture Indentures, in Some Legal Phases of Corporate Financing, Reorganization and Regulation* (New York: Macmillan, 1917), 71; 'Effect of deeds of trust on the negotiability of corporate bonds' (1928) 42 Harvard L Rev 115; 'Corporate bonds, effect of reference to mortgage on negotiability' (1929) 29 Colum L Rev 365; 'Corporate bonds, effect of reference to mortgage on negotiability' (1929) 42 Harvard L Rev 700; 'Corporate bonds, effect of reference to mortgage on negotiability' (1929) 38 Yale LJ 825; 'Negotiability of corporate bonds, recent New York Legislation' (1930) 40 Yale LJ 261; 'Effect of tax exemption and tax refunding provisions on the negotiability of corporate bonds' (1930) 29 Mich L Rev 77; R.T. Steffen and H.E. Russell, 'The Negotiability of Corporate Bonds' (1932) 41 Yale LJ 799; S. Locker, 'Negotiability of corporate bonds' (1933) 7 St John's Rev 306.

¹²¹ MacKelcan, n 27 above, 30-31, citing eg the US *Trust Indenture Act of 1939*, ss 316(a)(1), 316(a)(2). See also Fraser (DMIA), 1938 Minutes, *ibid*.

¹²² Billyou, n 8 above, 597, FN 17, FN 18, citing Stetson, n 120 above; Steffen and Russell, n 120 above.

¹²³ Billyou, *ibid* 597, FN 19, with exceptions such as Indenture, United States Steel Corp, Art 7 (1903) and the listed bonds described in *Chalmers v Nederlandsch Amerikaansche* (1942), 36 NYS2d 717 (City Ct).

¹²⁴ Taylor and Baskerville, n 47 above, 312.

¹²⁵ Benson, n 25 above, 169.

Secondly economic downturns in the 1920s were significant catalysts for changes in Canadian corporate reorganisation practices. In the mid-1920s financial difficulties beset industries such as Canadian pulp and paper. This was the largest and most important industry in Canada at that time, and the largest of its kind in the world. It had expanded rapidly in the decade before by issuing bonds and by the late 1920s faced overcapacity and falling prices.¹²⁶ By the 1930s, Abitibi, Price Brothers, Great Lakes Paper, and Fraser Companies were all in receivership.¹²⁷

An extraordinary example of these difficulties was the receivership of Abitibi Power and Paper Limited. This receivership lasted fourteen years, from 1932 to 1946, and was a product of the post-war downturn and the onset of the Great Depression.¹²⁸ Abitibi was in financial difficulty by 1928, however, it was not until 1932, when the company defaulted on bond interest payments, that it was placed in receivership.¹²⁹ Abitibi was one of many large corporations in receivership in 1933 when Parliament passed the CCAA, and like many others this company was eventually reorganised under the Act.

¹²⁶ See Canadian Department of Trade and Commerce, *Census of Industry: The Pulp and Paper Industry, 1925* (Ottawa: King's Printer, 1927), 10.

See also Eugene A. Forsey, 'The Pulp and Paper Industry' (1935) 1:3 Can J Econ Polit Sci 501; Taylor and Baskerville, n 47 above, 305-306, 381.

¹²⁷ Bliss, n 35 above, 420.

¹²⁸ Barry E.C. Boothman, 'Night of the Longest Day: The Receivership of Abitibi Power and Paper' Paper in Proceedings of Administrative Sciences Association of Canada (1992) 22 [unpublished], 22. See also, Hon. Charles Patrick McTague *et al.*, *Report of the Royal Commission Inquiring Into the Affairs of Abitibi Power & Paper Company, Limited* (Toronto: Royal Commission Inquiring into the Affairs of Abitibi Power and Paper Company, 1941), report submitted to the Lieutenant-Governor of Ontario. Taylor and Baskerville, n 47 above, 312: Abitibi was the fourth largest non-financial company in Canada in 1929 (ranked by assets.)

¹²⁹ Boothman, *ibid* 26.

Three main factors contributed to the length of the Abitibi receivership. First Abitibi's receivership coincided with the expiration of leases for its timber concessions from the Ontario government, the renewal of which was necessary for a viable reorganisation plan.¹³⁰ Initially Premier Mitchell Hepburn (Liberal) refused to extend the leases until the receivership was over, however, he eventually agreed to restore the concessions if the courts and his cabinet approved the reorganisation plan.¹³¹ Secondly it was very difficult to garner majority bondholder support for a restructuring plan and more than 32 plans were proposed and rejected between 1932 and 1936 alone.¹³² The parties involved generally sought to advance their interests by taking hard-line positions in negotiations, such as the bondholders' insistence on receiving the full value of their claims under any proposed restructuring.¹³³ Thirdly when a plan was finally put forward for approval under newly enacted Ontario legislation in 1938, the court's division of powers analysis led it to hold that the provincial Act could not be used to restructure an insolvent company and thus the company would have to restructure under the CCAA instead.¹³⁴ It took several more years before another restructuring plan was concluded under the CCAA.

With the pulp and paper industry already in financial difficulty, the Great Depression began in 1929. Further corporate failures highlighted the fact that

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid* 24, 26, citing *Judicature Amendment Act*, SO 1935, c 32; *Montreal Trust Co. v Abitibi Power & Paper Co.*, [1938] OR 81, 19 CBR 179 (SC) per McTague J., *aff'd* in [1938] OR 589, [1938] 4 DLR 529 (CA).

corporate reorganisation practices had not yet adapted to meet the requirements of American investors and illustrated the inadequacy of existing legislation for conducting complete company reorganisations.¹³⁵ Bondholder reorganisations could not be conducted without adequate trust deed provisions since the uncoordinated legislative landscape in Canada was not equipped to handle the restructuring of secured credit.¹³⁶ Even majority provisions provided no basis for adjusting unsecured or shareholders claims, forcing difficult, sometimes futile attempts at conducting complete reorganisations of a company's debt and equity under the bondholders' trust deed and provincial or federal legislation pertaining to other creditors and shareholders.¹³⁷

While earlier recessions and depressions also led to corporate failures, and even small FI failures the Great Depression was different because the failure of private ordering (bondholder reorganisations under trust deeds) converged with the worst economic crisis in Canadian history. This plunged large Canadian concerns into receivership and threw the solvency of their largest creditors into question as well. FI failures of this magnitude would, in all likelihood, have had significant ramifications for FS stability in Canada. Moreover, straightened federal finances,¹³⁸ the near bankruptcy of several provinces, and the lack of a Canadian

¹³⁵ Eg the trust deed for Great Lakes Paper bonds did not provide for calling bondholder meetings or selling assets for non-cash consideration, see *National Trust Co. v Great Lakes Paper Co.*, [1936] 1 DLR 718, [1936] OWN 13 (HCJ).

¹³⁶ Some provinces did enact such legislation during the Depression, see eg *Judicature Amendment Act*, n 134 above, s 15(i).

¹³⁷ Manning III, n 3 above.

¹³⁸ In the early 1930s, the Canadian government came close to defaulting on its bonds, see Bliss, n 35 above, 417-418.

central bank¹³⁹ meant that 'bailouts' or direct financial backstopping of these institutions were probably not realistic options.

The spectre of large failures due to the Great Depression necessitated a legislative response to the 'restructuring crisis' facing Canadian companies and their bondholders. It is worth underscoring the fact that it was not corporate failures *per se* that led to the enactment of the CCAA, but the precarious financial position of major secured lenders (institutional bondholders such as life insurance companies) if they could not salvage their investments in viable business debtors. For example, by 1931, Sun Life, one of the largest Canadian FIs at the time, was insolvent.¹⁴⁰ Other insurance companies, trust and loan companies also faced the prospect of failing by the early 1930s. There was concern within the Canadian financial community that the large number of corporate insolvencies would trigger insurance company defaults as well, and so these FIs supported the idea of legislation like the CCAA.¹⁴¹

Despite the seriousness of the situation facing the Canadian government, the division of legislative powers challenged the adoption of reorganisation provisions into companies legislation. This was probably the main reason Canada did not earlier adopt reorganisation provisions based on the English *Companies Acts* of the nineteenth- and early twentieth-centuries. The

¹³⁹ Taylor and Baskerville, n 47 above, 378-380, noting the establishment of the Bank of Canada in 1935.

¹⁴⁰ Eg by 1931 Sun Life was insolvent, see Bliss, n 35 above, 416-417, citing Memorandum for Rt. Hon. Mr. Bennett from G.D. Finlayson, Superintendent of Insurance, 'RE: Sun Life Assurance Co. of Canada' (19 September 1931).

¹⁴¹ See eg W.K. Fraser (DMIA), 1938 Minutes, n 4 above, 10; The Dominion Mortgage and Investments Association, *Year Book 1934*, (Toronto: DMIA, 1935) [*Year Book 1934*], 13. See also Manning V, n 3 above, 23.

restructuring crisis of the 1920s and 1930s prompted Canadian lawyers and legislators to look for a new legislative approach to company reorganisation, which would provide for compromises with secured and unsecured creditors as well as shareholders—‘complete’ company reorganisation.

The English *Companies Act, 1929* provided the inspiration. As the lawyer Harold Manning wrote, ‘many schemes of compromise or arrangement which could not be worked out under the powers in the instrument creating the charge [a trust deed], [were] possible under [that] Act.’¹⁴²

As the Depression wore on it became increasingly clear that Canada needed a statutory scheme in order to deal with many large, impending corporate reorganisations.¹⁴³ Finally, in 1933, Parliament adopted the restructuring provisions of the English *Companies Act, 1929* into the CCAA bill.¹⁴⁴ By that time, despite the constitutional challenges, there was a general consensus that federal action was necessary, at least to coordinate the multiple restructuring regimes, either through a single federal statute or cooperation with the provinces.¹⁴⁵

III. The CCAA, 1933

On 20 April 1933 Charles H. Cahan (MP, Conservative) introduced Bill No. 77— an act to facilitate compromises and arrangements between companies and their creditors—in the House of Commons by stating:

¹⁴² Manning I, n 3 above, citing *Companies Act, 1929*, n 21 above, ss 153-155.

¹⁴³ Manning V, n 3 above, 23.

¹⁴⁴ *ibid.*

¹⁴⁵ See eg W.K. Fraser (DMIA), 1938 Minutes, n 4 above; Manning I, n 3 above.

At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression...¹⁴⁶

In the Senate the Right Honourable Arthur Meighen (Conservative) stated that the Depression prompted the CCAA bill:

The depression has brought almost innumerable companies to the pass where some such arrangement is necessary in the interest of the company itself, in the interest of its employees...and in the interest of the security holders...¹⁴⁷

Since the CCAA bill was based on the single provision of the English *Companies Act* concerning reorganisations,¹⁴⁸ it was quite brief—there was not even a preamble to the new Act. The CCAA provided that an insolvent company or one of its creditors could make an application under the Act to restructure the unsecured and/or secured debt of the firm.¹⁴⁹ The Act could be conjointly applied with the relevant companies legislation to restructure equity holdings in the debtor company.¹⁵⁰ Upon the application of an interested party in respect of a company that had filed under the CCAA, the court could stay all claims and proceedings against the debtor, including those under the *Bankruptcy Act* and

¹⁴⁶ Hon. C.H. Cahan (Conservative), *Debates of the House of Commons of Canada*, (20 April 1933) 4th Sess, 17th Parl (Ottawa: King's Printer, 1933), 4090-4091.

¹⁴⁷ Rt. Hon. A. Meighen (Conservative), *Debates of the Senate of Canada* (9 May 1933) 4th Sess, 17th Parl (Ottawa: King's Printer, 1933), 474.

¹⁴⁸ CCAA 1933, n 1 above, ss 3-4.

¹⁴⁹ *ibid* ss 3-4, 8-9.

¹⁵⁰ *ibid* s 19.

the WUA.¹⁵¹ The CCAA required the support of a majority of a company's secured and unsecured creditors, which were divided into classes based on the similarity of their claims. The Act required the support of three-fourths of each class of creditors, present and voting, before a plan could be put before the court for consideration.¹⁵² If the plan was 'fair and reasonable,' the court would sanction the plan for implementation.¹⁵³

A. Politicians

Debate on the new bill was limited, comprising roughly six pages of Hansard, yet the bill had the support of both the Conservative and Liberal parties.¹⁵⁴ No figures or statistics on bankruptcy or business failure were cited. Rather, it appears there was a tacit understanding of the graveness of the Depression as well as circumstances in struggling industries, such as pulp and paper. Bankruptcy and liquidation statistics for Dominion companies compiled by the Secretary of State indicate that 'business failure'¹⁵⁵ rates were very high in this period, as illustrated in Appendices 1 and 2—a fact which Parliamentarians were likely aware of, and came out in debates on other bills from that period. Another likely reason for there being so little discussion in Parliament was that the CCAA basically harmonised existing practices and legislation to the extent conceivably possible under the Canadian constitution.

¹⁵¹ *ibid* ss 10, 18, 20; *Bankruptcy Act*, RSC 1927, c 11; *Winding-up Act*, n 96 above.

¹⁵² CCAA 1933, *ibid* s 5.

¹⁵³ *ibid* s 5.

¹⁵⁴ See *Debates of the House of Commons of Canada*, (20 April 1933) 4th Sess, 17th Parl (Ottawa: King's Printer, 1933), 4090-4091, in the same volume see also: (24 April 1933), 4194-4195, (9 May 1933), 4722-4724; *Debates of the Senate of Canada*, (9 May 1933) 4th Sess, 17th Parl (Ottawa: King's Printer, 1933), 467, in the same volume see also: (10 May 1933), 4747-4745, (11 May 1933), 484.

¹⁵⁵ The term 'business failure' was not defined by the compiler of these statistics.

The personal interests of Parliamentarians may have provided impetus to reform business reorganisation practices, thus helping to garner support for the CCAA bill. For instance, Meighen (Senator, Conservative) personally held a considerable number of bonds in Ontario Power Service (OPC), a subsidiary of Abitibi.¹⁵⁶ When Abitibi and OPC defaulted in 1932, Meighen and other financiers successfully appealed for government intervention when their bonds lost over two thirds of their face value, without disclosing their interests in the distressed companies—information that only came out later.¹⁵⁷ Additionally, PM Bennett (Conservative) had already established a reputation as a ‘millionaire businessman’ when he was elected Prime Minister in 1930, so he too may have held some of the affected bonds.¹⁵⁸ The personal interests of Parliamentarians might help explain the multi-partisan support for the CCAA bill with very little discussion recorded in the House of Commons or Senate debates.

PM Bennett’s (Conservative) experiences and ideology also help illuminate the policy behind the CCAA and FCAA as insolvency statutes that promoted financial interests. Bennett possessed a driving ambition for success, which had led to him to take a partnership in a Calgary law firm in 1897 where he represented many corporate clients, including railroads, retail businesses, banks, loan and insurance companies as well as farmers and ranchers.¹⁵⁹ As a lawyer,

¹⁵⁶ Boothman, n 128 above, 26; Bliss, n 35 above, 406.

¹⁵⁷ Boothman, *ibid*

¹⁵⁸ Bliss, n 35 above, 415; Louis A. Knafla, ‘Richard ‘Bonfire’ Bennett: The Legal Practice of a Prairie Corporate Lawyer, 1898 to 1913’ in Carol Wilton (ed), *Essays in the History of Canadian Law*, vol. IV *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto: Butterworths for the Osgoode Society, 1990), 325; Taylor and Baskerville, n 47 above, 372-373.

¹⁵⁹ Knafla, *ibid* 328.

businessman and politician, Bennett was a strong advocate for large corporations and financial firms and possessed a vision of promoting capital expansion and development in Canada.¹⁶⁰ This experience and ideology fit well with the underlying purposes of both the FCAA and CCAA.

B. Bondholders

The major beneficiaries of the CCAA were large bondholding interests—namely, life insurance companies, trust companies, and loan companies.¹⁶¹ These were essentially the same financial interests that benefitted from the FCAA, which provided a similar insolvency law mechanism for restructuring secured farm debt.¹⁶² This fact is significant because provincial debt adjustment legislation of the period, specifically that enacted by the Alberta Social Credit government, was derided as fundamentally anti-capitalist by these same financial interests.¹⁶³

The fact that large financial interests supported the CCAA and FCAA indicates that this federal legislation was different—it advanced the interests of this group in a manner that the Social Credit legislation did not. Social Credit legislation concerning debt adjustment contemplated downward adjustments on capital owed to creditors as part of a fundamental shift in debtor-creditor relations,

¹⁶⁰ *ibid* 329.

¹⁶¹ Manning V, n 3 above, 23; Ian M. Drummond, 'Canadian Life Insurance Companies and the Capital Market, 1890-1914' (1962) 28:2 Can J Econ Polit Sci 204, 207-208, noting that life insurance companies held significant investments in the Canadian bond and mortgage markets.

¹⁶² On the CCAA see, Manning V, n 3 above, 23. On the FCAA see, Rt. Hon. R.B. Bennett (Conservative), *Debates of the House of Commons of Canada* (4 June 1934) 5th Sess, 17th Parl (Ottawa: King's Printer, 1934), 3638.

¹⁶³ J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954), 101, citing (19 September 1936) *Financial Post*.

which would curtail the rights of creditors.¹⁶⁴ Large secured creditors obviously did not support legislative efforts to diminish their rights as secured creditors; however, they were not opposed to the concept of debt adjustment since moderate legislative intervention could serve their long-term interests.¹⁶⁵ For instance, mortgage loan companies favoured adjustments to interest payments or time frames for repayments, which could be negotiated on a farmer-by-farmer basis, thereby preserving the creditor's bargaining power, and preventing the necessity of seizing and selling illiquid assets, such as farm land, on a mass scale.¹⁶⁶ Mortgage loan companies and other secured creditor interests such as the DMIA further supported 'emergency' legislation like the FCAA, which inherently limited farmer recourse to debt relief due to its temporary nature and allowed for case-by-case debt adjustment.¹⁶⁷ Public funding of the administration of the FCAA also reduced debt adjustment costs for creditors and farmers alike.¹⁶⁸

The CCAA similarly extended, rather than limited, bondholder rights by facilitating company reorganisations where these better advanced the interests of bondholders than liquidation. This was reaffirmed in the 1938, when groups representing bondholding interests spoke to the great usefulness of the CCAA and successfully argued against the Act's repeal.

¹⁶⁴ Mallory, *ibid* 94.

¹⁶⁵ *ibid* 95-96, citing an interview with Mr. Jules Fortin, Secretary, Dominion Mortgage and Investments Association (Toronto, 27 May 1946.)

¹⁶⁶ Mallory, *ibid* 96.

¹⁶⁷ *ibid* 96-97.

¹⁶⁸ Robert B. Bryce, *Maturing in Hard Times: Canada's Department of Finance through the Great Depression* (Kingston and Montreal: McGill-Queen's University Press, 1986), 161.

The CCAA effectively strengthened bondholder rights in certain ways by diminishing the already weak rights of unsecured creditors. CCAA applications could formally stay all proceedings against the debtor, including those under the *Bankruptcy Act*. Unsecured creditors, who already had very weak rights in the face of bondholders, effectively had no method of enforcing their claims once the CCAA was invoked. Even then, the extent of remedies for unsecured creditors under the CCAA was limited to the right to vote on a plan—if a plan was proposed with respect to unsecured claims.

The CCAA did not provide for the appointment of an official such as a bankruptcy trustee to oversee the process, which was the chief complaint by 1938, when Parliament considered repealing the Act.¹⁶⁹ In its brevity, the Act provided almost no guidance on the administration of proceedings under the statute, aside from a few notes surrounding meetings and creditor voting. This contrasted with the more rules-based restructuring procedures in the US *Bankruptcy Act*, which similarly was enacted during the Great Depression and adopted the practice of American equity receivership reorganisations into bankruptcy law.¹⁷⁰ In Canada, the reason for the lack of guidance was that as an extension of bondholder remedies, a CCAA restructuring would be worked out under the legal architecture of receivership under a trust deed—something which was expressly allowed for by the fact that the Act was ‘in extension, and not in limitation, of the provisions of any instrument now or hereafter governing the rights of

¹⁶⁹ H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above, 2-10.

¹⁷⁰ *Bankruptcy Act*, 47 Stat 1474 (1933). MacKelcan, n 25 above, 341-347. See also Skeel 2001, n 93 above, 73-74, chapters 2 and 3.

creditors.¹⁷¹ This was apparently so obvious at the time that it required no explanation.

The FCAA, by contrast, spelled out an administrative framework for farmer-creditor compromises,¹⁷² suggesting that that Act did something more novel in the Canadian context.¹⁷³ Prior to 1935, there was no federal administrative regime for facilitating compromises on farm debt,¹⁷⁴ and hence it was necessary for Parliament to establish procedures for debt adjustment under the FCAA. This was not necessary under the CCAA, since company reorganisation was already the subject of a long body of English and Canadian case law by the 1930s. The CCAA merely added specific, supplemental, harmonising provisions to overcome difficulties encountered by bondholders in conducting company reorganisations.

The fact that the CCAA was justified as federal insolvency legislation is significant, although it led to confusion about the essential character of the statute, including the question of the Act's 'original purposes.' The majority decision of the SCC in the 2010 *Century Services* case captures the conventional thinking on the CCAA:

...[T]he purpose of the CCAA—Canada's first reorganization statute—is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic

¹⁷¹ CCAA 1933, n 1 above, s 7; see also s 19. DMIA also stressed this feature of the Act in reporting on the new legislation, see The Dominion Mortgage and Investments Association, *Year Book 1933* (Toronto: DMIA, 1934) [*Year Book 1933*], 43.

¹⁷² See FCAA, n 112 above.

¹⁷³ For a discussion of the FCAA, see Stephanie Ben-Ishai and Virginia Torrie, 'Farm Insolvency in Canada' (2013) 2 IIC Journal 33.

¹⁷⁴ Bryce, n 168 above, 159-162.

costs of liquidating its assets.¹⁷⁵

Early commentary and jurisprudence also endorsed the CCAA's remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation. Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees.¹⁷⁶

Scholars such as Janis Sarra have argued that the mention of employees when the CCAA bill was introduced in Parliament demonstrates that Members of Parliament (MPs) had a broader 'public interest' in mind when enacting the CCAA.¹⁷⁷ This is unlikely in view of the broader context of the Act. Other than one remark in Parliament excerpted above, employees and public interest considerations are not mentioned in any of the CCAA materials from the 1930s that I have located. The earliest mention I have found of the 'public interest' value of CCAA reorganisations is in 1947, where Benson suggested that a bondholder reorganisation may be 'in the interest of the community, for the continuance of the enterprise concerns employees, suppliers, and the whole economy.'¹⁷⁸ But he offers no evidence to support this view. By contrast, the FCAA, which extended debt relief to distressed farmers, entailed extensive

¹⁷⁵ *Century Services*, n 2 above, para 15, per Deschamps J., McLachlin C.J. and Binnie, LeBel, Charron, Rothstein and Cromwell JJ. concurring.

¹⁷⁶ *ibid* para 18, citing Edwards 1947, n 2 above, 593.

¹⁷⁷ Sarra 2003, n 2 above, 13.

¹⁷⁸ Benson, n 25 above, 172. I discuss Edward's 1947 journal article in the next chapter.

discussions—in Parliament and the press—concerning public policy rationales for keeping farmers on their land.¹⁷⁹

It is also difficult to reconcile the CCAA's purported policy goal of advancing the public interest through restructuring large, important firms with the fact that the Act excluded from its scope the institutions that were arguably of the greatest national and public interest in the 1930s. Subsection 2(b) of the CCAA excludes banks, railway companies, telegraph companies, insurance companies, trust companies, and loan companies from the definition of 'debtor company' for the purposes of the Act.¹⁸⁰ Writing in 1932, Lewis Duncan noted that these were institutions that provided 'essential services,' and hence supervision of such private concerns was necessarily a 'feature of the modern State.'¹⁸¹ Rather than leave the fate of these firms to receivership or business insolvency legislation,¹⁸² their national and public importance warranted more direct government assistance in the face of insolvency.¹⁸³ The 'public interest' value of individual bondholder-led reorganisations under the CCAA (if any) was incidental to the use of reorganisations as a bondholder remedy for large, secured lenders. Accordingly, the significant 'public policy' aspect of the CCAA was geared toward preventing collapses of large Canadian FIs, rather than saving more labour intensive, non-financial companies.

¹⁷⁹ Ben-Ishai and Torrie, n 173 above.

¹⁸⁰ CCAA 1933, n 1 above, s 2(b); *Companies' Creditors Arrangement Act*, RSC 1985, C-36, [CCAA], s 2 'company.'

¹⁸¹ Lewis Duncan, 'The Bankruptcy Act Amendment Act of 1932 – Part II: The Creation of the Office of the Superintendent of Bankruptcy' (1932-1933) 2 *Fortnightly LJ* 101 [Duncan 1932], 102.

¹⁸² Financial institutions generally fell under the *Winding-up Act* in case of insolvency, see *Winding-up Act*, n 96 above.

¹⁸³ See discussion in subsection F. 'Economic and political context,' below.

An historical analysis shows that the CCAA was intended as a bondholder remedy to cover drafting defects in trust deeds that did not make adequate provision for reorganisations. The benefits that may have accrued to junior creditors or other stakeholders were incidental to this main purpose. Unlike bankruptcy law,¹⁸⁴ the CCAA was not designed as a collective process and did not advance the bankruptcy notion of creditor equality. The reason that the CCAA was made applicable to insolvent corporations—technically making it ‘insolvency’ law—was because it was the only (potentially) constitutionally valid method for the federal government to enact a company restructuring law that would apply throughout Canada.

Significantly, the enactment of the CCAA made restructuring insolvent companies the exclusive domain of the federal government. This was dramatically affirmed in 1938 by the *Abitibi* case, where the Ontario Court of Appeal refused to approve a judicial sale under the *Judicature Act, 1935* that would have restructured claims against the company and ended the Abitibi receivership.¹⁸⁵ The Ontario Court of Appeal upheld the lower court holding that because Abitibi was insolvent, the Ontario legislation could not be applied and any restructuring attempt would need to proceed under the CCAA.¹⁸⁶ It took four more years before Abitibi completed a plan under the CCAA.¹⁸⁷

¹⁸⁴ See Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014), Chapter 9 ‘Reform Achieved: The *Bankruptcy Act of 1919*’.

¹⁸⁵ Boothman, n 128 above, 24, 26, citing *Judicature Amendment Act*, n 134 above.

¹⁸⁶ *Montreal Trust Co. v Abitibi Power & Paper Co.*, n 134 above, 188 [19 CBR], per McTague J.

¹⁸⁷ Boothman, n 128 above, 24, 26.

The rationale for attempting to restructure under the Ontario Act in the *Abitibi* case is nevertheless noteworthy. Under the *Judicature Act, 1935*, the court could approve a judicial sale even where the plan did *not* have majority creditor approval—in essence, a minority could force a restructuring plan on the dissenting majority.¹⁸⁸ This provision was added by the Ontario legislature in 1935 specifically because of the Abitibi insolvency and the difficulty of marshalling the majority support needed to proceed under the CCAA.¹⁸⁹ As the *Judicature Act, 1935* shows, even after the enactment of the CCAA, practitioners did not regard restructuring as primarily an insolvency law matter.¹⁹⁰ From a bondholder perspective, the CCAA modestly addressed through insolvency law what was a much broader company law issue.

The relative flexibility and utility of the CCAA for completing bondholder reorganisations was further curtailed by the courts' strict interpretation of the statute. For instance, in the 1930s a judge would not have interpreted the term 'insolvency' as broadly as later cases such as *Stelco*.¹⁹¹ In contrast to recent CCAA case law, 1930s decisions held that:

¹⁸⁸ See *Judicature Amendment Act*, n 134 above.

¹⁸⁹ Boothman, n 128 above, 24, 26, citing *Judicature Amendment Act*, *ibid*; See also *National Trust Co. v Great Lakes Paper Co.*, n 135 above, where this provision of the *Judicature Act* was used to reorganise Great Lakes Paper.

¹⁹⁰ See MacKelcan, n 25 above, 347-348.

¹⁹¹ See *Re Stelco Inc.* (2004), 48 CBR (4th) 299 (Ont SCJ), see esp paras 21, 22; leave to appeal to Ontario Court of Appeal refused, [2004] OJ No 1903 (Lexis); leave to appeal to SCC refused [2004] SCCA No. 336 (Lexis).

- A debtor company could make only one CCAA application. If the plan failed, or the company ran into further financial difficulties after implementing the plan, it had no further recourse to the Act.¹⁹²
- Only one vote was held with respect to a proposed CCAA plan. There was no provision for redrafting plans and holding new votes as part of further negotiations.¹⁹³
- The Act did not bind Crown claims,¹⁹⁴ however, this did not preclude government involvement in plans. For instance, the Ontario (Liberal) government instituted a Royal Commission to inquire into the Abitibi insolvency and passed an amendment to the *Judicature Act* to help that company restructure.¹⁹⁵
- The court was not prepared to approve the use of a ‘convenience class’¹⁹⁶ for the purpose of obtaining majority creditor support for a plan.¹⁹⁷
- The debtor company had to be technically insolvent at the time of a CCAA application.¹⁹⁸

Beginning in the 1980s and 1990s, these decisions were overturned in favour of more ‘liberal’ interpretations of the Act, based on a conception of the CCAA as primarily an insolvency statute that encouraged businesses to reorganise, instead of liquidate or wind-up. The implicit reasoning is that a liberal

¹⁹² *Comptoir*, n 5 above.

¹⁹³ Boothman, n 128 above, 26; but see CCAA 1933, n 1 above, s 6; *Wellington*, n 69 above, para 20.

¹⁹⁴ *Minister of National Revenue v Cohen's Co.* (1935), 73 Que SC 291, 17 CBR 143, para 2; *Special War Revenue Act*, RSC 1927, c 179; *Roxy Frocks*, n 5 above; *R v Kussner*, [1936] Ex CR 206, [1936] 4 DLR 752.

¹⁹⁵ Boothman, n 128 above.

¹⁹⁶ A ‘convenience class’ refers to creditors with relatively small claims against the debtor, which are paid out in full as a matter of administrative convenience.

¹⁹⁷ *Wellington*, n 69 above, para 20.

¹⁹⁸ CCAA 1933, n 1 above, s 2(c) ‘debtor company.’

interpretation is necessary to achieve the Act's (purported) policy goals. For instance, in the 1993 case *Re Lehndorff General Partner Ltd.*, Farley J. held:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation.¹⁹⁹

Liberal interpretations of the CCAA facilitating reorganisations are justified on the basis that the ongoing operation of the company benefits a wider constituency of unsecured creditors and stakeholders, in addition to the major secured creditors.²⁰⁰

The early history of the Act shows, however, that the CCAA was principally a bondholder remedy, and was not based on a normative policy of encouraging company reorganisation to promote broader stakeholder interests. So the policy justification given for liberal interpretations of the CCAA finds little basis in the origins of the statute. Since business reorganisation was the presumptive response to a firm's financial difficulties where bondholders were involved, there was no need to incentivise this group of secured creditors. The general lack of interest in promoting business reorganisation—even of just unsecured creditor claims—through the *Bankruptcy Act* is more indicative of the state of

¹⁹⁹ *Re Lehndorff General Partner Ltd.* (1993), 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div), para 5, per Farley J.

²⁰⁰ Algoma Plan Sanctioning Hearing, 2001, [2001] OJ No 4630 (Ont SCJ), Court File No 01-CL-4115; Endorsement Order, 19 December 2001; *Re Algoma Steel Inc.* (2002), 30 CBR (4th) 1, [2002] OJ No 66 [Ont SCJ] (Commercial List), para 8, per LeSage, C.J.S.C., cited in Sarra 2003, n 2 above, 157.

normative policies and attitudes concerning business rehabilitation under insolvency law at this time.²⁰¹

Early CCAA case law further demonstrated strong pro-bondholder sentiments, which do not accord well with conceptions of bankruptcy as a collective process amongst different classes of creditors. In the 1934 case of *Re Wellington Building Corp.*, for example, when deciding a creditor classification issue, Kingstone J. held:

[i]t was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders [holders of first mortgages] of their right to approve as a class by the necessary majority a scheme propounded by the company which would permit the holders of junior securities to put through a scheme inimicable to this class and amounting to confiscation of the vested interest of the bondholders.²⁰²

In refusing to approve the CCAA plan, Kingstone J. further remarked:

...I do not think the statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.

...

I am of the opinion that the scheme as propounded and which this Court is asked to approve is unfair to the bondholders...²⁰³

Early business reorganisations and CCAA law allowed senior bondholders to

²⁰¹ Telfer 1994-1995, n 101 above, 391-393, citing Tassé, n 101 above, 19, on the disabling of the composition provisions of the *Bankruptcy Act 1919* in 1923.

²⁰² *Wellington*, n 69 above, para 18.

²⁰³ *ibid* paras 19, 21.

work out arrangements that effectively diminished junior creditor rights, as noted above. As expressed by Kingstone J., the judiciary was not prepared to allow lower priority creditors to use the Act to impose a plan that was to the detriment of bondholders. This essentially paralleled bondholder rights and remedies outside of the CCAA.

As discussed above, bondholder reorganisations were often conducted through a judicial sale for non-cash consideration, whereby bondholders exchanged their securities in the old company for securities in the new, 'reorganised' company. This practice continued under the CCAA, which reaffirmed the legal legitimacy of this technique to abrogate junior creditor claims.²⁰⁴ This appears somewhat draconian in the face of modern-day narratives about restructuring as a public-interest-based remedy that 'lifts all boats.' So CCAA law of the 1930s illustrates to contemporary scholars the relative strength of creditor- and stakeholder-rights in bondholder reorganisations of the early 1900s.

Case law from the 1930s also indicates that the *Bankruptcy Act* was not considered the proper place to look when determining the nature of creditor claims for CCAA purposes.²⁰⁵ As legislation that was 'separate and distinct' from the *Bankruptcy Act*, claim priorities were established with reference to provincial law when the CCAA itself was silent on the point in question.²⁰⁶ Counter to present-day conceptions of the CCAA as the first Canadian DIP restructuring

²⁰⁴ See eg *Wellington*, n 69 above.

²⁰⁵ *Roxy Frocks*, n 5 above; *R v Kussner*, n 194 above; *R v Miss Style Inc.* (1936), 61 Que KB 283, 18 CBR 20; *Parisian Cleaners & Laundry Ltd. v Blondin* (1938), 66 Que KB 456, 20 CBR 452 (In Appeal) [*Blondin*].

²⁰⁶ See eg *Blondin*, *ibid.*

statute, secured creditors were generally in control of a company undergoing reorganisation through a receiver-manager.²⁰⁷ So negotiations under the CCAA took place ‘in the shadow’ of provincial debtor-creditor laws, rather than with a view to proceedings under the *Bankruptcy Act*.

In the 1930s and 1940s companies without outstanding bond issues did resort to the Act—a fact that is reflected in the case law—and thus controlled the proceedings without the oversight of a receiver-manager.²⁰⁸ This practice was the source of many complaints that the Act was being used to further the interests of debtors, and led to repeal efforts just five years after its enactment.²⁰⁹ As a matter of history, the CCAA was not a manifestation of a policy that favoured DIP reorganisation proceedings. This was actually an unanticipated side effect of the legislation and was remedied by an amendment in 1953.²¹⁰ The CCAA permitted the debtor to initiate proceedings order to accommodate receiver-led applications under the Act, since at law private receivers were considered agents of the debtor, although secured creditors usually appointed them.

Understood primarily as a bondholder remedy, other features of CCAA law and practice make better sense. For instance, the fact that the CCAA was essentially a private bondholder remedy helps to explain why there was no formal record

²⁰⁷ See eg David Milman, ‘Receivers as Agents’ (1981) 44 Mod L Rev 658; Armour and Frisby, n 99 above. For an overview of the Canadian context see Anthony J. Duggan *et al.*, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials* (Toronto: Emond Montgomery, 2nd ed, 2009), Chapter 18 ‘Receiverships’.

²⁰⁸ See eg *Re Bilton Brothers Ltd.* (1939), 21 CBR 79, [1939] 4 DLR 223 (Ont Sup Ct); 1938 Minutes, n 4 above.

²⁰⁹ See generally, 1938 Minutes, *ibid*

²¹⁰ *An Act to Amend The Companies’ Creditors Arrangement Act, 1933*, SC 1952-1953, c 3, s 2.

keeping by the Department of the Secretary of State, which had responsibility for the Act in the 1930s and 1940s. The Department did not keep specific records on restructurings completed under the Dominion *Companies Act* either, which contained provisions that facilitated equity restructurings. Writing in 1927, Fraser makes no mention of records being kept on bondholder reorganisations, which was likely due to the multiplicity of legislation and mechanisms used to complete such reorganisations.²¹¹ Despite the institution of the Dominion Bureau of Statistics in 1918, even that organisation did not track business failures directly—relying instead on data published in *Dun's Statistical Review* or *Bradstreet's*, which it reprinted in its *Monthly Review of Business Statistics*.²¹² Additionally, the term 'business failure' was not defined for the purposes of these statistics.

A similar rationale explains the fact that judges typically did not provide written reasons when ruling on CCAA matters. Each plan was tailored to the circumstances at hand and the details were not regarded as having precedential value. As Fraser noted '[i]n Canada as elsewhere it is difficult to indicate any general principles applicable to reorganizations as the specific provision made for bondholders depends on many variable factors.'²¹³

The fact that the CCAA was enacted as a separate statute—distinct from the *Bankruptcy Act*—is also explained by the fact it was essentially a bondholder remedy. The composition provisions of the *Bankruptcy Act* only bound

²¹¹ Fraser 1927, n 3 above.

²¹² The Dominion Bureau of Statistics was established by the *Statistics Act*, SC 1918, c S-19.

²¹³ Fraser 1927 n 3 above, 943.

unsecured creditor claims, for which that Act operated as a remedy of last resort. Bondholders on the other hand had historically used different provincial laws to redress situations of debtor default, which kept bondholders, instead of a bankruptcy trustee, in control of the proceedings. In the early 1930s there were also serious ethical concerns about bankruptcy trustees. Leading up to the 1932 *Bankruptcy Act* amendments, essentially anyone could call themselves a bankruptcy trustee—there were no required qualifications or regulatory oversight—which led to much misbehaviour by these ‘professionals.’²¹⁴ Thus the notion that bondholders—or any creditors for that matter—would willingly turn over responsibility and control of fragile reorganisation proceedings to a bankruptcy trustee at this point in time was unlikely. In Canada, where new reorganisation provisions could not simply be added to the relevant Companies Acts, the result was a standalone statute, purportedly justified as insolvency law, but which operated in practice like a secured creditor remedy under receivership or company law, rather than bankruptcy proper.

C. Labour

In light of this historical background it is less surprising that vocal stakeholder groups in modern restructurings, such as labour, were not active in insolvency policy-making in the 1930s. I have not found any mention of employee claims or collective bargaining agreements in business reorganisations from this period.²¹⁵ This reflects the fact that the CCAA was a bondholder remedy, as well as the relatively weak rights of employee claims under provincial legislation of the time

²¹⁴ See eg ‘Bankruptcy Reforms’ (1932-1933) 2 Fortnightly LJ 196, 196; Duncan 1932, n 181 above, 101.

²¹⁵ But see *Blondin*, n 205 above.

and the fact that labour was not yet a strong political force in Canada.

In his study *Canadian Labour in Politics*, Gad Horowitz notes that labour movements faced numerous obstacles to political organisation in the early 1900s.²¹⁶ Among other things, the number of industrial labourers in Canada in the 1920s was still relatively small, and farmers and middle-class Canadians outnumbered labourers in the coalition that formed the CCF.²¹⁷ A political party along the lines of the British Labour Party was therefore not practicable in 1930s Canada, where a third-way political party was necessarily an alliance of farmers, labour, socialists and other Canadians, if it was to pose a challenge to the well-established and well-financed Liberal and Conservative parties.²¹⁸ Horowitz notes that it was not until the mid-1940s that labour began to wield more influence through political channels, but even then this was through the CCF, which remained more of a farmer-, than a labour-based, political party.²¹⁹

D. Non-bondholder secured creditors

While bondholders supported the new legislation, the CCAA's purported adjustment of secured creditors rights was heavily criticised by others who also appear to have represented the interests of secured creditors.²²⁰ Writers such as Manning might have had in mind non-bondholder secured creditors with relatively small stakes in a given company, who were unable to influence the

²¹⁶ Gad Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968), Chapter 2 'First Steps.'

²¹⁷ *ibid* 58-66.

²¹⁸ *ibid*.

²¹⁹ *ibid* 80-84.

²²⁰ See eg Manning V, n 3 above; Manning VI, n 3 above; Duncan and Reilley, n 3 above, 1107-1108. The two subsequent editions to this text do not mention the CCAA.

drafting of the plan of arrangement, or to veto the plan when it came time to vote. This might have included creditors with security interests in specific pieces of equipment, for instance. Duncan cited the necessity of an officer similar to a trustee in bankruptcy to look after the interests of those creditors who were not in a position to look after their own interests, either because they held small stakes in the company or were scattered throughout the country.²²¹ For this type of creditor, who otherwise enjoyed rights untouched by bankruptcy, the CCAA was a 'definite retrogression' as Duncan declared in 1933.²²² As an extension of bondholder remedies, the CCAA did not conform to the conventional view of bankruptcy as a collective process, and as bankruptcy legislation the Act left much to be desired.

Nevertheless, it remains questionable to what extent these non-bondholder secured creditor rights were affected in any given reorganisation. For instance, fixed charges under the *Bank Act* were often afforded priority by bondholders under the terms of the trust deed.²²³ This arrangement was the result of business negotiations and therefore the extent to which such terms were routinely included in trust deeds is not clear.²²⁴ It is also possible that business negotiations resulted in other trust deed provisions or reorganisation plans that afforded priority to other secured or unsecured creditors on business grounds.²²⁵ It is probably safe to assume that larger, more powerful creditors

²²¹ Duncan and Reilley, *ibid.*

²²² *ibid.*

²²³ MacKelcan, n 25 above, 343-344; Curtis, n 34 above, 147.

²²⁴ MacKelcan, *ibid.*

²²⁵ Fraser 1927, n 3 above, 936.

fared better than smaller, weaker ones, and that business negotiations reflected the relative bargaining power of the parties.

E. Constitutional hurdles

As a general matter, creditor rights—except in cases of bankruptcy or insolvency—were the purview of the provinces, and in 1933 there was genuine doubt about whether the federal power to legislate on bankruptcy and insolvency could validly interfere with secured creditor rights at all.²²⁶ Based on traditional interpretations of the division of powers, an early draft of the CCAA bill would have omitted any substantive provision affecting secured claims in favour of a section that would have harmonised the operation of the Act with the relevant provincial legislation, such as the Ontario *Judicature Act*. As described by Manning:

In so far as property rights of secured creditors were concerned, the draft [CCAA] bill was prepared upon the view that such rights, being property of creditors duly conveyed to them and established under Provincial law, no *ex post facto* event ... could deprive such property owners of their vested rights and those rights were not property of the debtor divisible amongst his creditors and were not subject to the legislative interference of Parliament under the head of Bankruptcy and Insolvency. [Emphasis added.]²²⁷

²²⁶ See eg Brooke Claxton, 'Social Reform and the Constitution' (1935) 1:3 Can J Econ Polit Sci 409, 411-413; Manning I, n 3 above, 139; Manning II, n 3 above, 158; Manning III, n 3 above, 176; Manning IV, n 3 above, 192; Manning V, n 3 above, 23; Manning VI, n 3 above, 40; Factum on behalf of the Attorney-General for Quebec, filed with the Supreme Court of Canada (Ottawa: King's Printer, 1934), 3-4, submitted with respect to the CCAA Reference, n 2 above.

²²⁷ Manning V, n 3 above, 23.

Parliamentarians knew that compulsorily binding secured claims under federal bankruptcy and insolvency law would likely provoke constitutional challenge, so they drafted the new bill as tightly as possible to try to fit it within the federal lawmaking power. For example, the Attorney General for Canada argued that if the CCAA was found *ultra vires* Parliament's bankruptcy and insolvency lawmaking power, it should still be found valid in respect of Dominion companies under Parliament's company law jurisdiction.²²⁸

It is worth mentioning that if constrained to using corporate law alone to effect restructurings, the Dominion government could only have provided for restructurings of federally incorporated companies. This is due to shared provincial-federal legislative authority for company law under the *BNA Act*; unlike in England, where complete company reorganisations could be carried out under the *Companies Act, 1929*.

Nevertheless constitutional controversy surrounding the CCAA persisted. When the CCAA bill was presented in Parliament, even interest groups such as DMIA that supported the new legislation thought it 'inadvisable to make representations to the Government respecting the unconstitutionality of the [CCAA] Bill.'²²⁹ The committee,²³⁰ representing life insurance companies, supported the thrust of the CCAA bill, but thought it raised serious federal-provincial jurisdictional issues.²³¹ The life company committee was concerned

²²⁸ Factum on behalf of the Attorney-General for Canada, filed with the Supreme Court of Canada (Ottawa: King's Printer, 1934), para 12.

²²⁹ *Year Book 1934*, n 141 above, 13.

²³⁰ From the context, it appears the committee in question was a subcommittee of DMIA.

²³¹ *Year Book 1934*, n 141 above, 13.

that defeat of the CCAA bill on jurisdictional grounds might close the door to further attempts to pass effective legislation.²³² Recall that the fate of some life insurance companies depended on getting new creditors' arrangement legislation of this kind.

In the Depression years several provinces enacted laws relating to debt adjustments, including Ontario, Alberta, Saskatchewan, and Manitoba.²³³ Such a piece-meal solution was considered inadequate to address the widespread economic depression. Furthermore much of the provincial legislation favoured debtors at the expense of large, secured creditors, which concerned members of DMIA and similar associations.²³⁴

When coordination attempts between the federal and provincial governments failed to make any progress, the Bennett government proceeded with its CCAA bill.²³⁵ The CCAA did not fully address the need for effective business restructuring law—it did not apply to solvent companies, and this attracted criticism.²³⁶ The Act did provide a national law for restructuring both federally and provincially incorporated companies, however, provided the company in question was insolvent. The coordinating provisions of the CCAA therefore provided an elegant solution to the problem of 'complete' company reorganisation by incorporating the relevant companies legislation governing

²³² *ibid.*

²³³ See eg, *Judicature Amendment Act*, n 134 above, s 15(i); *Debt Adjustment Act, 1923*, SA 1923, c 43; *Debt Adjustment Act*, SA 1937, c 79; *Debt Adjustment Act, 1931*, SS 1931, c 59; *Reduction and Settlement of Land Debts Act*, SA 1937, c 27; *Debt Adjustment Act*, SM 1931, c 7.

²³⁴ See *Year Book 1933*, n 171 above, 15-16.

²³⁵ Claxton, n 226 above, 411-413.

²³⁶ *Manning V*, n 3 above, 23.

shareholder restructurings, and allowing all restructurings to proceed in a single forum.

F. Economic and political context

Developments in the 1920s and early 1930s provided commercial and economic impetus for a coordinated statutory framework that would overcome inadequate provisions in trust deeds and establish a mechanism for adjusting both secured and unsecured debt. Rising federalism alongside deteriorating economic conditions and the inadequacy of existing reorganisation practices played important roles in mustering the political will to pass the CCAA. Canadian bankruptcy reform has tended to follow periods of recession or depression, and the 1930s reforms fit this pattern. A significance difference, however, is that two of the significant 'bankruptcy and insolvency' reforms of the 1930s were designed for the benefit of secured creditors—a first in Canadian history. The severity of the Great Depression prompted federal attempts to justify secured creditor remedies under insolvency law. In this context, the interests of bondholder interest groups, including life insurance companies, trust and loan companies, held particular sway with the Bennett (Conservative) government, leading to the proclamation of both the CCAA and FCAA.

Worsening economic conditions in Canada began before the Great Depression in certain significant industries. As discussed above, the pulp and paper industry was in serious financial difficulty by the late 1920s, as epitomised by the Abitibi

receivership.²³⁷ In the Canadian 'Dust Bowl' farming became unviable at some points due to drought and falling prices for staple crops such as wheat.²³⁸ In the shipping industry, Canada Steamship Company faced severe financial difficulties, and eventually restructured under the CCAA.²³⁹ The Depression also hit the Canadian steel industry particularly badly. By the 1930s the two leading iron and steel firms—Algoma and Besco—were in receivership.²⁴⁰ Stelco, the third leading iron and steel firm, fared relatively well through the Depression and did not reorganise.²⁴¹

In an era where the term 'restructuring' amounted to 'job losses' in public parlance, the Bennett government intervened directly in such notable insolvencies as Algoma Steel and the CNR.²⁴² Algoma was too important an employer in Northern Ontario, and the CNR too large an employer, to leave the fate of these firms up to their creditors to decide.²⁴³ For instance, the large number of layoffs associated with the private restructuring efforts of the CNR led the Bennett government to subsidise and then nationalise that railroad essentially as part of its public works program.²⁴⁴

The depth and length of the Depression sapped municipal and provincial resources through relief payments, and underscored the inability of these

²³⁷ See note 128 above.

²³⁸ Ben-Ishai and Torrie, n 173 above, 34, citing Gregory P. Marchildon, 'The Prairie Farm Rehabilitation Administration: Climate Crisis and Federal-Provincial Relations during the Great Depression' (2009) 90:2 *Can Hist Rev* 275, 282.

²³⁹ Department of the Secretary of State, *Sessional Paper No. 165* (3 March 1938) [unpublished], returning an order of the House of Commons, dated 28 February 1938, 12-15.

²⁴⁰ Taylor and Baskerville, n 47 above, 325-326, 381-382.

²⁴¹ Bliss, n 35 above, 421.

²⁴² *ibid* 422; Taylor and Baskerville, n 47 above, 285.

²⁴³ Taylor and Baskerville, *ibid* 325; Bliss, *ibid* 422-423.

²⁴⁴ Bliss, *ibid* 422-423.

governments to deal with a crisis of such magnitude without federal assistance.²⁴⁵ Many Canadian municipalities defaulted on their debts, which caused further financial difficulties for trust, loan and insurance companies, which were large investors in bonds issued by all levels of government.²⁴⁶ British Columbia, Alberta, Saskatchewan and Manitoba were all in danger of default by the mid-1930s.²⁴⁷ This prompted a significant shift toward greater federalism in Canada, essentially because the Dominion was the only level of government that could keep up relief payments as the Depression dragged on. This tempered earlier political and constitutional trends favouring provincial.

PM Mackenzie King (Liberal) was in office at the time of the 1929 stock market crash, but lost the 1930 election to PM Bennett (Conservative), largely due to a widespread popular perception that he did not do enough to respond to the prevailing Depression.²⁴⁸ King saw the early stages of the Depression as a natural swing in business cycles, which helps explain his inaction in the first months of the crisis.²⁴⁹ In contrast, the incoming Bennett (Conservative) government intervened to assist the struggling provinces by enacting social legislation, and channelled relief funds to the Prairie provinces in particular.²⁵⁰

²⁴⁵ *ibid* 411.

²⁴⁶ See eg Dominion Mortgage and Investments Association, *Year Book 1932* (Toronto: DMIA, 1933), 18, 48, 175-176, as well as other years in the 1920s and 1930s.

²⁴⁷ Taylor and Baskerville, n 47 above, 380-381; Joseph Sirois *et al.*, *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: King's Printer, 1940), Book I, 160, and related discussion in Mallory, n 163 above, Chapter 7, 'Public Finance and the Public Debt'.

²⁴⁸ H. Blair Neatby, *William Lyon Mackenzie King, 1924-1932: The Lonely Heights* (Toronto: University of Toronto Press, 1963), 312.

²⁴⁹ *ibid.*

²⁵⁰ Marchildon, n 238 above, 282, citing eg Jakob B. Madsen, 'Agricultural Crisis and the International Transmission of the Great Depression' (2001) 61:2 *J of Econ Hist* 327; A.E. Safarian, *The Canadian Economy in the Great Depression* (Toronto: McLelland and Stewart, 1970); E.W. Stapleford, *Report on Rural Relief due to Drought Conditions and Crop Failures in Western Canada, 1930-1937* (Ottawa: Minister of Agriculture, 1939).

Initially federal relief efforts were not a straightforward matter. PC decisions interpreting the division of powers as ‘watertight’ compartments, left little room for direct federal involvement.²⁵¹ Leading up to the 1930s, PC decisions also provided wide interpretations of ‘property and civil rights in the province,’ which expanded provincial legislative powers at the expense of federal jurisdiction.²⁵² With few exceptions the PC adhered to a narrow interpretation of the federal legislative power, holding that the Dominion could only legislate on those subjects specifically enumerated under section 91.²⁵³ The Depression, New Deal legislation and Canadian constitutional references striking down relief efforts, however, prompted renewed interest in the interpretation of the division of powers and Canadian federalism.²⁵⁴

The prospect of radical alternatives that threatened the existing capitalist order further contributed to rising federalism. The election of the Social Credit government in Alberta in 1935 led to the enactment of a series of laws which

²⁵¹ See eg W.A. Carrothers, ‘Problems with Canadian Federalism’ (1935) 1:1 Can J Econ Polit Sci 26; V.W. Bladen, ‘The Economics of Federalism’ (1935) 1:3 Can J Econ Polit Sci 348; Norman McL Rogers, ‘The Political Principles of Federalism’ (1935) 1:3 Can J Econ Polit Sci 337; R. McQueen, ‘Economic Aspects of Federalism: A Prairie View’ (1935) 1:3 Can J Econ Polit Sci 352; J.A. Corry, ‘The Federal Dilemma’ (1941) 7:2 Can J Econ Polit Sci 215; F.R. Scott, ‘The Special Nature of Canadian Federalism’ (1947) 13:1 Can J Econ Polit Sci 13 [Scott 1947]; D.C. Rowat, ‘Recent Developments in Canadian Federalism’ (1952) 18:1 Can J Econ Polit Sci 1; Donald V. Smiley, ‘Two Themes of Canadian Federalism’ (1965) 31:1 Can J Econ Polit Sci 80; F.R. Scott, ‘The Privy Council and Mr. Bennett’s ‘New Deal’ Legislation’ (1937) 3:2 Can J Polit Sci 234 [Scott 1937].

²⁵² W.J. Waines, ‘Dominion-Provincial Financial Arrangements: An Examination of Objectives’ (1953) 19:3 Can J Econ Polit Sci 304, 304-307; David Schneiderman, ‘Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century’ (1998) 48 UTLJ 521, esp 521-522. See generally, John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2004).

²⁵³ F.R. Scott, ‘The Consequences of the Privy Council Decisions’ (1937) 15 Can Bar Rev 485 [Scott 1937B], 488-489.

²⁵⁴ See eg Horowitz, n 216 above; Carrothers, n 251 above; Bladen, n 251 above; Rogers, n 251 above; McQueen, n 251 above; Corry, n 251 above; Scott 1947, n 251 above; Rowat, n 251 above; Smiley, n 251 above.

blatantly overstepped the province's legislative powers in an effort to regulate banking, finance and currency. These statutes were either refused royal assent, disallowed or struck down as unconstitutional.²⁵⁵ Both Bennett's (Conservative) and King's (Liberal) governments saw increased centralisation as the best means of preventing the spread of anti-capitalist threats, which were generally regional in their base and focus.²⁵⁶ Even more moderate political alternatives, such as the CCF and United Farmers, provided impetus for the Liberal and Conservative parties to find a way to address the worsening crisis in order to prevent electoral defeat.

Against this backdrop Bennett enacted a series of statutes to help address the growing crisis, which were dubbed the Canadian 'New Deal.'²⁵⁷ In his radio speeches introducing the legislation, Bennett asserted that the era of individualism was past and now government regulation and cooperation would carry the day.²⁵⁸ Tellingly his efforts attracted two main criticisms from the Liberal and CCF parties, as well as individual politicians, lawyers and scholars: (1) they overstepped the federal legislative power;²⁵⁹ and (2) their practical

²⁵⁵ See eg Eugene Forsey, 'Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Provincial Lieutenant-Governors since 1867' (1938) 4 Can J Econ Polit Sci 47; Eugene Forsey, 'Disallowance of Provincial Acts, Reservation of Provincial Bills, and refusal of Assent by Lieutenant-Governors, 1937-47' (1948) 14:1 Can J Econ Polit Sci 94.

²⁵⁶ See eg J.R. Mallory, 'Disallowance and the National Interest' (1948) 14:3 Can J Econ Polit Sci 342, citing, *Reference re the Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] SCR 71, [1938] 2 DLR 8.

See further W. Christian and C. Campbell, *Political Parties and Ideologies in Canada: Liberals, Conservatives, Socialists, Nationalists* (Toronto: McGraw-Hill Ryerson, 1974), 95-96.

²⁵⁷ *Natural Products Marketing Act*, SC 1934, c 57; FCAA, n 114 above; *Limitation of Hours of Work Act*, SC 1935, c 63; *Weekly Rest in Industrial Undertakings Act*, SC 1935, c 14; *Minimum Wages Act*, SC 1935, c 44; Section 498A of the *Criminal Code*, SC c 56, s 9; *Dominion Trade and Industry Commission Act*, SC 1935, c 59; *Employment and Social Insurance Act*, SC 1935, c 38.

²⁵⁸ *Winnipeg Free Press* (3 January 1935), 1 cited in Alvin Finkel, *Business and Social Reform in the Thirties* (Toronto: James Lorimer & Company, Publishers, 1979), 36.

²⁵⁹ See eg Claxton n 228 above, 409.

benefit as social legislation was minimal because they changed little about the status quo—in effect, they failed to live up to the promise of a ‘New Deal.’²⁶⁰ The fact that commentators saw the New Deal legislation as both beyond the powers of the Dominion and ineffectual underscores the difficult constitutional balance Bennett tried to strike in order to provide Depression relief at the federal level.

It was not easy to find a justification for federal statutes that appeared to step into the shoes of the provinces. For example, in passing the labour conventions acts,²⁶¹ Bennett relied on the ability of the federal government to enact legislation to discharge treaty obligations.²⁶² Nevertheless, the PC held that this was beyond the powers of the federal government acting alone.²⁶³ In other words, cooperation with the provinces was necessary to discharge treaty obligations that touched on subjects within the provincial jurisdiction.²⁶⁴

The Liberal and CCF parties criticised the New Deal legislation for effectively supporting ‘big business.’²⁶⁵ For example, the prospect of the financial failures of loan companies prompted Parliament to introduce the FCAA bill in 1934.²⁶⁶ Although the preamble to the FCAA framed the Act as a temporary Depression

²⁶⁰ See eg Christian and Campbell, n 256 above, 96; and see generally, Finkel, n 258 above; Taylor and Baskerville, n 47 above, 374.

²⁶¹ *Limitation of Hours of Work Act*, n 257 above; *Weekly Rest in Industrial Undertakings Act*, n 257 above; *Minimum Wages Act*, n 257 above.

²⁶² See discussion in V.C. MacDonald, ‘The Canadian Constitution Seventy Years After’ (1937) 15 *Can Bar Rev* 401, 401-405.

²⁶³ *ibid* 405.

²⁶⁴ *ibid* citing Lord Atkin in, *A-G for Canada v A-G for Ontario, Re Weekly Rest in Industrial Undertakings Act, Re Minimum Wages Act, Re Limitation of Hours of Work Act*, [1937] AC 326, [1937] 1 DLR 673.

²⁶⁵ Finkel, n 258 above.

²⁶⁶ Ben-Ishai and Torrie, n 173 above, 39, citing Rt. Hon. R.B. Bennett (Conservative), *Debates of the House of Commons of Canada* (3 June 1934) 5th Sess, 17th Parl (Ottawa: King’s Printer, 1934), 3638-3639.

measure and emphasised its social policy purpose of helping farmers, these outcomes were ancillary to the main purposes of the FCAA, which was to give mortgagees a means of restructuring secured debt—something that was not possible under existing federal legislation.²⁶⁷ Concern for lenders was further reflected by the fact that the bill made no provision for ‘hopelessly insolvent farmers’—who could neither make a reasonable proposal under the Act, nor discharge their debts in bankruptcy—despite the concerns raised about these farmers in the House of Commons.²⁶⁸ When the FCAA was later upheld on constitutional reference, it made the more farmer-friendly provincial debt adjustment regimes *ultra vires* insofar as they applied to insolvent farmers.²⁶⁹

The CCAA was not officially part of the New Deal legislation and had little in the way of ‘window dressing’ to support a view that it advanced a public or social policy objective.²⁷⁰ The majority provisions enshrined into the CCAA advanced the interests of large security holders without meaningful safeguards for other creditors or stakeholders.²⁷¹ Furthermore, the CCAA was enacted to help large financial interests—bondholders who wanted an effective and powerful way to reorganise faltering companies.

²⁶⁷ *Debates of the House of Commons of Canada* (14 February 1938) 3rd Sess, 18th Parl (Ottawa: King’s Printer, 1938), 395, 587; FCAA, n 112 above, Preamble. See generally Ben-Ishai and Torrie, n 173 above

²⁶⁸ W.T.L. Lucas (United Farmers of Alberta), *Debates of the House of Commons of Canada* (18 June 1934) 5th Sess, 17th Parl (Ottawa: King’s Printer, 1934), 4054-4055; *Bankruptcy Act*, RSC 1927, c 11, s 7.

²⁶⁹ Eg *Debt Adjustment Act*, SA 1923, c 43 and discussion in Mallory, n 163 above, 98-101; *Drought Area Relief Act*, SA 1922, c 43; *Debt Adjustment Act*, 1931 SM, c 7.

²⁷⁰ Rt. Hon. A. Meighen (Conservative), *Debates of the Senate of Canada* (9 May 1933) 4th Sess, 17th Parl (Ottawa: King’s Printer, 1933), 474.

²⁷¹ See eg H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above 2-6; E. Bertrand (Liberal), *Debates of the House of Commons of Canada* (22 February 1938) 3rd Sess, 18th Parl (Ottawa: King’s Printer, 1938), 680.

Academics and the media focused on the social reform aspects of the New Deal statutes, such that the changes to bankruptcy and insolvency law went nearly unnoticed.²⁷² The constitutional references that struck down most of the New Deal legislation—provoking the ire of many Canadian commentators—upheld the FCAA, and so reaffirmed the CCAA reference decision, with significant ramifications for the interpretation of the division of powers concerning bankruptcy and insolvency and property rights.

G. Constitutional references

Shortly after the New Deal was enacted, and amid much constitutional uncertainty, the incoming King government of 1935 sent all of the New Deal statutes for constitutional reference.²⁷³ The SCC had upheld the constitutional validity of the CCAA by this time, however that decision did little to reduce the uncertainty surrounding the other cases. As Brooke Claxton stated, '[i]n all this uncertainty one thing at least appeared to be certain. This was that everything proposed in Mr. Bennett's policy of social reform was beyond the powers of the Dominion.'²⁷⁴

²⁷² See the New Deal legislation, n 257 above, and academic commentary: Scott 1937, n 251 above; Claxton, n 226 above; William McConnell, 'The Judicial Review of Prime Minister Bennett's "New Deal"' (1968) 6 OHLJ 39; Finkel, n 258 above; Carrothers, n 251 above; Bladen, n 251 above; Rogers, n 251 above; McQueen, n 251 above; Corry, n 251 above; Scott 1947, n 251 above; Rowat, n 251 above; Smiley, note 251 above; Raphael Tuck, 'Social Security: An Administrative Solution to the Dominion-Provincial Problem' (1947) 13:2 Can J Econ Polit Sci 256.

Contrast with a handful of scholarly writing on the CCAA and Bankruptcy Act Amendments: Manning I, n 3 above; Manning II, n 3 above; Manning III, n 3 above; Manning IV, n 3 above; 'Protective Committees', n 7 above; Edwards 1947, n 2 above; Duncan and Reilley, n 3 above; 'Bankruptcy Act Proclaimed', (1932-1933) 2 Fortnightly LJ 118.

The FCAA 1934 received relatively widespread attention among the bankruptcy and insolvency statutes, as noted in Ben-Ishai and Torrie, n 173 above, 46, FN 75.

²⁷³ Governor-General in Council, Order of Reference to the Supreme Court (November 1935) PC, 3454.

²⁷⁴ Claxton, n 226 above, 409, referencing eg H. Guthrie (Conservative) and Rt. Hon. A. Meighen (Conservative) *Debates of the House of Commons of Canada* (18 July 1924) 3rd Sess, 14th Parl

By 1937 the PC had struck down almost all the New Deal statutes as beyond the legislative powers of the federal government. Canadian commentators greeted these decisions with widespread criticism for their narrow view of the federal legislative power.²⁷⁵ In a one critique, Frank Scott opined:

A federal government that cannot concern itself with questions of wages and hours and unemployment in industry, whose attempts at the regulation of trade and commerce are consistently thwarted, which has no power to join its sister nations in the establishment of world living standards, and which cannot even feel on sure ground when by some political miracle it is supported in a legislative scheme by all the provinces, is a government wholly unable to direct and to control our economic development.²⁷⁶

The narrow construction of the Canadian division of powers adopted by the SCC and PC made the decisions on the constitutionality of the CCAA and FCAA—both of which were held *intra vires*—all the more significant. Once the CCAA and FCAA were found to be within the federal jurisdiction, they were exclusively within that jurisdiction. The result of these two references was that for the first time in Canadian history, the provinces were barred from adjusting secured creditor rights in cases of insolvency—an area of law that was within their purview up until that point²⁷⁷—and provincial debt adjustment legislation enacted in response to the Depression became *ultra vires* insofar as it applied to insolvent

(Ottawa: King's Printer), 4763, and Rt. Hon. W.L.M. King (Liberal) *Debates of the House of Commons of Canada* (12 February 1935) 3rd Sess, 17th Parl (Ottawa: King's Printer), 808.

²⁷⁵ See eg Scott 1937, n 251 above; Scott 1937B, n 253 above.

²⁷⁶ Scott 1937B, *ibid* 491-492 [references omitted.]

²⁷⁷ See eg Scott 1937, n 251 above; Scott 1937B, *ibid*.

²⁷⁷ Scott 1937B, *ibid* 491-492. Except for reorganisations under the federal *Companies Act*.

companies or farmers.²⁷⁸ Given the narrow interpretation of the division of powers taken by the PC with respect to the other New Deal cases, it is remarkable that it and the SCC both adopted such a broad definition of ‘insolvency.’

In the 1930s the conventional view among Canadian lawyers was that secured creditor rights fell within provincial jurisdiction irrespective of the debtor’s solvency or insolvency. Manning reported that prominent lawyers initially did not suggest the CCAA as a reorganisation mechanism to their clients because of their doubts about its constitutional validity.²⁷⁹ This scepticism prompted the Bennett government to refer the CCAA to the PC to determine its constitutionality.²⁸⁰ The PC referred the matter to the SCC.²⁸¹ While the facts filed by the province of Quebec and the federal government discussed the issue of secured creditor rights, the judgment of the court did not directly touch on this issue. Instead it focused on the (less controversial) issue of whether compositions or arrangements were a valid part of bankruptcy and insolvency law.²⁸² Even after the Act was upheld, proponents of bondholder reorganisation reform remained suspicious about the constitutional validity of the CCAA because it represented such a shift in thinking about the division of powers as it related to secured credit; one which was not expressly articulated by the court.

²⁷⁸ In the case of insolvent companies, see eg *Montreal Trust Co. v Abitibi Power & Paper Co.*, n 136 above.

²⁷⁹ Manning V, n 3 above; Manning VI, n 3 above.

²⁸⁰ Factum on behalf of the Attorney-General for Canada, filed with the Supreme Court of Canada (Ottawa: King’s Printer, 1934), submitted with respect to the CCAA Reference), para 2.

²⁸¹ Clerk of the Privy Council, Minute of a meeting of the Judicial Committee of the Privy Council, approved by his Excellency the Governor General (23 January 1934) PC 117.

²⁸² CCAA Reference, n 2 above, para 1 per Duff, C.J., para 17 per Cannon J.

The reasoning of the SCC and PC in the CCAA and FCAA references is therefore worthy of particular examination.

Citing examples of composition and arrangement provisions in various bankruptcy and insolvency laws enacted before and after Confederation, the SCC unanimously upheld the CCAA as *intra vires* the legislative power of Parliament. However, the omission of any discussion of secured creditor rights led Manning to argue in 1935 that the Act may still be invalid in this respect.²⁸³ According to Stanley Edwards, it was the constitutional reference concerning the FCAA in 1937, which specifically upheld the ability of the Dominion to adjust secured creditor rights through insolvency legislation, which finally brought closure to this issue.²⁸⁴

The SCC found the FCAA constitutional by a majority of 4-1 (Cannon J. dissenting.)²⁸⁵ The majority decision written by Duff, C.J.C. acknowledged the court was bound to accept the validity of compositions or arrangements as a component part of bankruptcy and insolvency legislation based on its decision in the CCAA reference.²⁸⁶

²⁸³ Manning V, n 3 above; Manning VI, n 3 above.

²⁸⁴ Stanley E. Edwards, 'Protection of the Rights of Creditors in the Reorganization of Insolvent Canadian Companies' (LL.M. Thesis, Harvard Law School, Harvard University, 1947) [Edwards LLM], 32-33. But see *Lemare Lake Logging Ltd. v 3L Cattle Company Ltd.*, 2014 SKCA 35, 2014 CarswellSask 179. The Saskatchewan Court of Appeal's decision has since been overturned by the SCC: *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53, 391 DLR (4th) 383.

²⁸⁵ The dissent is not discussed here since it is not relevant to a study of the CCAA, see Ben-Ishai and Torrie, n 173 above, 43-44.

²⁸⁶ FCAA Reference (SCC), n 112 above, para 15.

The SCC next considered whether or not the legislation was *intra vires* the legislative power of Parliament insofar as it prevented secured creditors from exercising their ordinary remedies, and purported to adjust their claims as part of a composition or arrangement.²⁸⁷ Relying on Lord Selborne's broad characterisation of 'bankruptcy and insolvency' in the 1875 case of *L'Union St. Jacques de Montreal*, the majority held that Parliament enjoyed very wide discretion to legislate with respect to bankruptcy and insolvency, which was 'not necessarily limited in the exercise of that discretion by reference to the particular provisions of bankruptcy legislation in England prior to the date of *The B.N.A. Act.*'²⁸⁸

In determining the constitutionality of the FCAA, the court acknowledged that bankruptcy legislation had not typically deprived mortgagees of their right to resort to their security.²⁸⁹ However, this aspect of historical bankruptcy legislation did not justify the conclusion that Parliament could not exercise its discretion to adjust secured creditor rights as part of 'a system for the administration of the estates of insolvents.'²⁹⁰ It was therefore within the discretion of Parliament to adjust secured creditor rights in insolvency legislation, even in instances where the secured creditor did not assent to a compromise.²⁹¹ In effect the CCAA and FCAA decisions established that Parliament could validly enact novel legislation with a view to preventing bankruptcy.

²⁸⁷ *ibid* para 11.

²⁸⁸ *L'Union St. Jacques de Montreal v Bélisle* (1875), LR 6 PC 31, 36, CR [7] AC 154 [*L'Union St. Jacques*], per Lord Selborne.

²⁸⁹ FCAA Reference (SCC), n 112 above, para 19.

²⁹⁰ *ibid* para 25.

²⁹¹ *ibid* para 18.

These decisions thus appear to break from the rationales underpinning earlier cases such as *L-Union St. Jacques de Montreal* and *Atty-Gen of Ontario v Atty-Gen for Can.*²⁹² Despite characterizing ‘bankruptcy and insolvency’ in broad terms, the *L-Union St. Jacques de Montreal* case actually upheld Quebec legislation to prevent the ‘financial embarrassment’ (read: insolvency) of a benevolent society. In this case the PC found the provincial legislation was valid on the grounds that it related to ‘a matter merely of a local or private nature in the province’ within the meaning of section 92(16) of the *BNA Act*.²⁹³ In *Atty-Gen of Ontario v Atty-Gen for Can*, the PC upheld the validity of the *Ontario Assignments and Preferences Act* on the basis that voluntary assignments to postpone judgments and executions were ‘ancillary’ to bankruptcy and insolvency law.²⁹⁴

The provinces further challenged the legitimacy of the FCAA’s provisions adjusting the claims of a province as a creditor of the estate.²⁹⁵ In response to this argument the majority held that

it is competent to the Dominion, in legislating in relation to bankruptcy or insolvency, to deal with the privilege attaching to debts owing to the Crown in the right of a Province and to take away any priority accorded to such debts by the law of a Province.²⁹⁶

²⁹² *Atty-Gen of Ontario v Atty-Gen for Can*, [1894] AC 189 at 200, 63 LJPC 59 [*Atty-Gen of Ontario v Atty-Gen for Can*].

²⁹³ *L'Union St. Jacques*, n 288 above.

²⁹⁴ *Atty-Gen of Ontario v Atty-Gen for Can*, n 292 above.

²⁹⁵ FCAA Reference (SCC), n 112 above, para 12.

²⁹⁶ *ibid* para 28, citing *In re Silver Bros.; Atty-Gen of Que v Atty.-Gen of Can*, [1932] AC 514, 519-521, 101 LJPC 107.

Accordingly, the majority found that the FCAA, including its adjustment of secured creditor and Crown claims, was constitutionally valid as bankruptcy and insolvency legislation.²⁹⁷

The FCAA and other New Deal references were all subsequently appealed to the PC, which handed down its decisions in 1937. The SCC's decision in the FCAA reference was upheld in a unanimous decision written by Lord Thankerton, which again considered the question of whether or not secured creditor rights may be validly adjusted through Canadian bankruptcy and insolvency legislation.²⁹⁸

The reasoning of the SCC and PC in the CCAA and FCAA references was exceptional among the New Deal references for the broad interpretation of the federal power to legislate with respect to 'bankruptcy and insolvency.' These decisions held that Parliament could trench on provincial jurisdiction over property and civil rights insofar as doing so comprised a valid part of compositions or arrangements under a scheme of bankruptcy and insolvency. The meaning of 'compositions or arrangements' was also broadly conceived of, particularly under the FCAA where an administrative body could, at the request of the debtor or one of its creditors, unilaterally draft and make binding a compromise between the farmer and all of his creditors.²⁹⁹ As a result, Parliament can validly adjust secured creditor rights as part of a system of bankruptcy and insolvency.

²⁹⁷ FCAA Reference (SCC), *ibid* para 31.

²⁹⁸ FCAA Reference (PC), n 112 above, paras 14-15.

²⁹⁹ FCAA, n 114 above, s 12(4), and discussion in Ben-Ishai and Torrie, n 173 above, 43-45.

Nevertheless, J. Murray Ferron argued as late as 1986 that the FCAA—by then a dead letter—was unconstitutional for purporting to adjust property rights in the absence of a majority creditor support.³⁰⁰ Furthermore, the treatment of secured claims in bankruptcy and insolvency remains an important issue in Canada.³⁰¹ Both contentious attributes of insolvency law are areas where the federal legislative power brushes up against those of the provinces. Before bondholder reorganisations of insolvent companies were adopted into federal law, the issue of legislative competency to adjust secured creditor rights or to provide insolvency mechanisms with a view to preventing bankruptcy were not key issues, since these matters were only addressed in provincial legislation. Since the 1930s, however, the parameters of federal insolvency law in these regards have become battlegrounds of provincial and federal jurisdiction.

The CCAA and FCAA judgments ushered in a new era in insolvency law. There was little public interest in the CCAA reference, which was the subject of only a handful of journal articles and trade publications. On the other hand, the farming crisis in the Canadian prairies received international public attention, and press reports occasionally mentioned the FCAA as well.³⁰² Nevertheless legal

³⁰⁰ J. Murray Ferron, 'The Constitutional Impairment of the Rights of Secured Creditors in Canada and the United States' (1986) 60 CBR 146, 161-167, and discussion in Ben-Ishai and Torrie, n 173 above, 47.

³⁰¹ In the Canadian context, see eg R.C.C. Cuming, 'Canadian Bankruptcy Law: A Secured Creditor's Heaven' (1994-1995) 24 CBLJ 17; David B. Light, 'Involuntary Subordination of Security Interests to Charges for DIP Financing under the Companies' Creditors Arrangement Act' (2002) 30 CBR (4th) 245; Anthony Duggan, 'The Status of Unperfected Security Interests in Insolvency Proceedings' (2008) 24:1 BFLR 103; Roderick J. Wood, 'The Definition of Secured Creditor in Insolvency Law' (2010) 25:3 BFLR 341; Roderick J. Wood, 'The Structure of Secured Priorities in Insolvency Law' (2011) 27:1 BFLR 25.

³⁰² See eg C.M. Herbert, 'The month in Canada: 'New Deal' legislation - Help for the farmer' (30 July 1934) *Barron's* 20; 'Aid farmers on debts: Canadian boards seek compromises with creditors'

commentators tended to focus on the PC decisions that struck down much of the Canadian New Deal and made only passing mention of the FCAA. Those commentators that did discuss the FCAA usually approved of the court's decision.³⁰³ In defending all of the PC's New Deal decisions, the British commentator A. Berriedale Keith considered the FCAA 'unassailable' as bankruptcy and insolvency legislation, as did Canadian scholars such as Scott who criticised the other New Deal decisions.³⁰⁴

Fundamentally, critiques of the New Deal references took issue with the fact that the PC was the court of last resort for Canada. Critics considered the PC unsuitable for this role due to its lack of understanding of Canadian federalism and unfamiliarity with Canadian law and institutions.³⁰⁵

The New Deal references taken together did produce troubling results. For example, Scott noted the absurdity of the fact that the Dominion could not use marketing legislation to help farmers from falling into insolvency, but could introduce a specialised farm insolvency regime.³⁰⁶ The unpopularity of the New

(6 January 1935) *New York Times* N2; 'Canadian debt refund urged by Mr. Bennett. Lower Interest rates for Dominion holders. Reconstruction of entire system foreshadowed.' (11 September 1935) *Financial Times* 7; 'Social laws of Canada. Decision sought on validity. Powers of Parliament questioned.' (6 November 1936) *Financial Times* 10; 'Canada's relief for farmers. Last hearing begun in 'New Deal' series.' (27 November 1936) *Financial Times* 9; 'Canadian 'New Deal' appeals ended. Act to keep farmers on the land. Judgment reversed in every case.' (28 November 1936) *Financial Times* 9; 'Canada's Economic Position' (9 February 1935) *The Economist* 301; 'Canada' (18 July 1936) *The Economist* 116.

³⁰³ See eg MacDonald, n 262 above, 411, where the FCAA 1934 decision is covered in three brief paragraphs.

³⁰⁴ A. Berriedale Keith, 'The Privy Council Decisions: A Comment from Great Britain' (1937) 15 *Can Bar Rev* 428, 434; Saywell, n 252 above, 216. But see R.J. Burns, 'Recent Depression Legislation' (1934-1936) 1 *Alta LQ* 16; D. McLaws, 'The Farmers' Creditors Arrangement Act' (1936-1938) 2 *Alta LQ* 239; J.E.A. MacLeod, 'The Farmers' Creditors Arrangement Act' (1936-1938) 2 *Alta LQ* 167.

³⁰⁵ Scott 1937B, n 253 above, 493.

³⁰⁶ Scott 1937, n 251 above, 241 [references omitted.]

Deal decisions accordingly sparked scholarly interest in Canadian federalism,³⁰⁷ and contributed to the effort to end overseas appeals. A new law to end appeals to the PC was enacted in 1939 and took full effect 10 years later.³⁰⁸

IV. Bill to repeal the CCAA, 1938

By 1938 there were two chief complaints against the CCAA: it was being widely abused by insolvent companies to reorganise unsecured and trade debts only;³⁰⁹ and, the Act was an emergency measure, which was no longer warranted due to the improving economic situation. Accordingly PM King's (Liberal) government tabled a bill in 1938 to repeal the CCAA.³¹⁰ Parliamentary discussion of the repeal bill revealed a third issue: a potential loophole that could facilitate fraudulent claims. Around the same time reform efforts were also underway in the US with a view to instituting more oversight and preventing abuses in reorganisation proceedings.³¹¹ A few years later England conducted an inquiry into the actions of protective committees and trustees in bondholder reorganisations, which resulted in amendments to the *Companies Act* in 1947.³¹² Similar concerns about the actions of trustees and bondholder protective committees arose in Canada in the 1940s as well, and represented a fourth complaint about the CCAA. In all three countries, reform efforts centred on real and perceived abuses of business reorganisation legislation. Unlike the US and

³⁰⁷ See eg Carrothers, n 251 above; Bladen, n 251 above; Rogers, n 251 above; McQueen, n 251 above; Corry, n 251 above; Scott 1947, n 251 above; Rowat, n 251 above; Smiley, n 251 above.

³⁰⁸ See *An Act to Amend the Supreme Court Act, 1949*, SC 1949, c 37, s 7; Saywell, n 252 above; Bora Laskin, 'Peace, Order and Good Government Re-Examined' (1947) 25 Can Bar Rev 1054.

³⁰⁹ H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above, 2-6.

³¹⁰ Bill No. 26, *An Act to repeal The Companies' Creditors Arrangement Act, 1933*, 3rd Sess, 18th Parl, 1938.

³¹¹ Skeel 2001, n 93 above, 129-184. Benson, n 25 above, 133, citing the work of William Douglas and the SEC, which led to *inter alia* the enactment of the *Trust Indentures Act* of 1939.

³¹² Benson, n 25 above, 133-142.

England, however, Canada's initial efforts to reform insolvency legislation by repealing the CCAA did not come to fruition, and Parliament did not pass significant amendments to the Act until 1953.

Three of these four issues are discussed in this subsection. The second complaint—the assertions that the CCAA was emergency legislation and the Canadian economy had sufficiently recovered—was inaccurate. Historical evidence shows that the CCAA was not enacted as a temporary measure in response to the Depression—something that Cahan (MP, Conservative) raised in the House debates over the repeal bill³¹³—although the Depression was a catalyst for its enactment. Furthermore, by 1938, Canada was in a recession, as was the US.³¹⁴ While conditions in 1936 and part of 1937 had shown signs of rapid recovery, by mid-1937 economic activity in Canada dropped off sharply, the wheat crop failed, and in early autumn the stock market collapsed.³¹⁵ The economy did not pick up again until the onset of World War II in 1939.

A. Debtor use of the CCAA

Evidence presented at the House of Commons Standing Committee on Banking and Commerce shows that the concerns over 'abuse' of the CCAA to adjust unsecured and trade claims carried much weight. Uncontested statistics presented by the Montreal Board of Trade show that the Act was frequently resorted to, and was used to restructure over 200 companies in Montreal

³¹³ Hon. C.H. Cahan (Conservative), *Debates of the House of Commons* (8 March 1938) 3rd Sess, 18th Parl (Ottawa: King' Printer, 1938), 1139-1142.

³¹⁴ Edward J. Chambers, 'The 1937-8 Recession in Canada' (1955) 21:3 *Can J Econ Polit Sci* 293; Bryce, n 168 above, 64-66, citing Safarian, n 250 above.

³¹⁵ Chambers, *ibid* 306-308.

between 1933 and 1938.³¹⁶ Most of these reorganisations were thought not to have involved bondholders, although no evidence was offered in support of this view. Lacking any administrative structure, such as that provided under the FCAA or *Bankruptcy Act*, many complaints arose that debtors had used the Act to force unfair plans on their unsecured creditors.³¹⁷ A CCAA application effectively barred unsecureds and junior creditors from petitioning the company into bankruptcy or suing for recovery of debts.³¹⁸ They had no control over the debtor's property, no access to the company's financial statements, and no third-party to verify the debtor's representations.³¹⁹ Thus, unsecured creditors were at the mercy of debtor companies that invoked the Act.

The 'abuse' at issue was the use of the Act as a DIP restructuring mechanism. As submitted by the Montreal Board of Trade, the central issue surrounding the CCAA was 'the fact that the debtor may control both its own affairs and the machinery for considering a proposal.'³²⁰ In contrast, use of the CCAA to effect bondholder reorganisation raised no complaints, and was supported even by those who complained of the Act's use by companies to restructure unsecured debt. So the abuse in issue arose from the fact that the CCAA was designed as an extension of receivership proceedings, but lacked the safeguards needed in the absence of oversight by a trustee or receiver.

³¹⁶ H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above, 2.

³¹⁷ W.J. Reilley (Superintendent of Bankruptcy) *ibid* 28.

³¹⁸ *ibid* 3-4

³¹⁹ *ibid*; see also Duncan and Reilley, n 3 above, 1107-1108.

³²⁰ 1938 Minutes, *ibid* 6.

i. Politicians

The Conservatives and Liberals agreed on the passage of the CCAA in 1933, but had different visions of the statute by 1938. The Conservatives, who introduced the CCAA bill in 1933, had generally favoured greater federal intervention to coordinate the existing restructuring procedure. Bennett was interested in getting provincial support for the CCAA and New Deal legislation, which would test the limits of the federal legislative power.³²¹ However, when that support was not forthcoming, he proceeded with the new legislation regardless.³²² Moreover, in 1935 Bennett himself—along with King and the general concurrence of the House of Commons—favoured constitutional amendments to give Canada the power to amend its constitution in order to get around the PC's narrow interpretation of the federal legislative power.³²³ Bennett saw constitutional amendment as a means of conferring on the federal government the power to enact social legislation to deal with Depression conditions. It appears that Bennett's Conservative government itself doubted the constitutional validity of much of its New Deal reform package. Bennett's stance is perhaps explained by a combination of a Tory bent in favour of government intervention, difficult economic circumstances warranting urgent action and sparking renewed federalism, and an effort to bolster waning political support ahead of an impending election.³²⁴

The Liberal position is harder to account for because different Liberal governments adopted different positions toward the CCAA. While there was no

³²¹ Claxton, n 226 above, 409-410; Scott 1937, n 251 above.

³²² Claxton, *ibid.*

³²³ *ibid* 429-434.

³²⁴ *ibid*; Rogers, n 251 above, 339; McConnell, n 272 above.

Liberal opposition in either the House of Commons or Senate when the CCAA was enacted in 1933, PM King's Liberal government viewed the New Deal legislation, including the FCAA, as largely unconstitutional outside of a situation of a national emergency.³²⁵ While not opposed to the merits of the New Deal legislation in principle, King favoured an approach that would put the entire agenda on sounder constitutional footing. The Liberals favoured either a constitutional amendment giving the federal government authority to act, or a legislative framework that would work by coordinating with provincial legislatures.³²⁶ Thus, initial Liberal support for the 1933 CCAA bill probably stemmed from the fact it was largely harmonising legislation, which would operate alongside other provincial and federal laws.

Bennett originally approached the problem of implementing social legislation with the idea of 'legislative coordination,' however, the idea of provincial-dominion conferences to consider the problem met with a cold provincial response.³²⁷ Bennett's government also favoured constitutional amendment, but efforts in that regard were mired in provincial-federal controversy and made little progress.³²⁸ Thus, while the Liberal position on this point sounded good in theory, there is reason to doubt whether it would have worked in practice.

Part of the reason that the CCAA was not ultimately repealed in 1938 was because the issue was folded into a substantial overhaul of all Canadian bankruptcy and insolvency statutes. That project was to have taken place in

³²⁵ Claxton, *ibid* 411-413.

³²⁶ *ibid*.

³²⁷ *ibid* 409-410.

³²⁸ *ibid* 431-433.

1939 and would have incorporated a company reorganisation element into the *Bankruptcy Act*.³²⁹ In 1939, however, bankruptcy reform was not taken up, possibly due to the outbreak of World War II, and it was not until 1946 that the possible repeal of the CCAA resurfaced in Parliament.³³⁰ The 1938 Committee Minutes show that the Liberal government was not completely against the idea of a CCAA-type scheme where there was secured creditor support and abuses of unsecured creditor rights could be satisfactorily prevented.

ii. The Montreal and Toronto Boards of Trade

The Montreal and Toronto Boards of Trade³³¹ represented distinct interest groups with stakes in business reorganisations. The Montreal Board of Trade spearheaded efforts to repeal the CCAA bill, and their representative presented extensive evidence to demonstrate the abuses of that Act by companies seeking to reorganise unsecured debt only.³³² The Toronto Board of Trade's representative, however, highlighted the usefulness and necessity of retaining the Act for bondholders.³³³ The minutes of the meeting indicate that the two organisations had conferred beforehand, and agreed on a compromise that would address both positions: limit the CCAA to companies with outstanding bond issues under a trust deed and running in favour of a trustee.³³⁴ This would ensure that companies could not use the Act to take advantage of their junior and unsecured creditors, but would retain the CCAA for effecting bondholder-led

³²⁹ See 1938 Minutes, n 4 above.

³³⁰ Tassé, n 101 above, 1.2.25

³³¹ G.H. Stanford, *To Serve the Community: The Story of the Toronto Board of Trade* (Toronto: University of Toronto Press for the Toronto Board of Trade of Metropolitan Toronto, 1974).

³³² H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above, 2-10.

³³³ J. Gerard Kelley (Toronto Board of Trade), *ibid* 10-18.

³³⁴ *ibid* 7-8, 27, see also 16-18.

reorganisations of both secured and unsecured debt.

The proportion of secured and unsecured creditor interests represented by the Montreal and Toronto Boards of Trade helps explain their respective stances on the CCAA repeal bill. In the 1930s, the Montreal Board of Trade represented a significant number of companies that held unsecured claims or small non-bondholder secured claims in an insolvency scenario, such as trade creditors. Accordingly, in 1938 the concerns voiced by this interest group were generally that the CCAA facilitated fraud and abuse of unsecured creditor rights by giving distressed companies and their largest secured creditors license to implement self-serving plans. The Montreal Board of Trade believed that most instances of the Act's use involved compromises of only unsecured debt—a stance that was not disputed.³³⁵ All groups represented at the Committee meeting agreed that there was no evidence of complaints about the use of the CCAA by secured creditors.³³⁶

By the early 1900s Toronto was a large industrial, commercial and financial centre in Canada, and began to rival Montreal as the economic centre of the country.³³⁷ Toronto businesses were more heavily concentrated in financial services than those of Montreal, and were therefore more likely to be bondholders—the primary beneficiaries of CCAAs.³³⁸ Insurance companies were

³³⁵ H.S.T. Piper (Montreal Board of Trade), *ibid* 2-3.

³³⁶ J. Gerard Kelley (Toronto Board of Trade), *ibid* 10.

³³⁷ Taylor and Baskerville, n 47 above, 252-254; Bliss, n 35 above, 270-278, 393-394.

³³⁸ Taylor and Baskerville, *ibid* 253, noting that of the 10 leading financial institutions in Canada in 1929, six were headquartered in Toronto (Canadian Bank of Commerce, Bank of Nova Scotia, National Trust Co, Toronto General Trust Co, Canada Life Assurance Co, and Dominion Bank), and

key figures in CCAA reorganisations in the 1930s, as they typically had large bondholdings in Canadian-issued securities. Toronto was the headquarters of a number of large insurance companies, such as Canada Life, which invested heavily in Canadian bonds and mortgages.³³⁹ Sun Life, headquartered in Montreal, was also a large Canadian insurer and investor at this time, however, during the 1920s it invested more heavily in the US than in Canada, and in stocks as opposed to bonds.³⁴⁰ Accordingly, the CCAA was not as important to Sun Life as it was to other Canadian insurance companies, which had a larger proportion of their investments in Canadian bonds. Thus, the Toronto Board of Trade represented major Canadian bondholder interests, for which the CCAA provided a useful reorganisation tool.

iii. Dominion Mortgage and Investments Association

Fraser represented DMIA at the Committee meeting.³⁴¹ DMIA represented 'important insurance companies, loan companies and trust companies throughout Canada,' which often called on that organisation to advise and render opinions on possible reorganisation plans, including those conducted under the CCAA.³⁴² Given the membership of DMIA, it is unsurprising that the organisation favoured retaining the CCAA, which provided a valuable restructuring tool for its members.

four were headquartered in Montreal (Royal Bank of Canada, Bank of Montreal, Royal Trust Co, and Public Utility Investment Co).

³³⁹ Drummond, n 161 above, 205-206.

³⁴⁰ Bliss, n 35 above, 416-417.

³⁴¹ W.K. Fraser (DMIA), 1938 Minutes, n 4 above, 10.

³⁴² *ibid.*

According to DMIA, the CCAA filled a gap in Canadian legislation by providing a mechanism whereby a reorganisation could be effected without a traditional receivership, liquidation or a realisation sale—all of which led to a deterioration of the credit, securities and standing of the company in question.³⁴³ According to DMIA's representative, the slightest prospect of a company entering bankruptcy acted to deter security holders from pursuing reorganisation.³⁴⁴

In addition many issues of Canadian bonds did not have adequate majority provisions for effecting bondholder reorganisations under the governing trust deed. Fraser stated that this omission was necessary in order to placate investors in the US, where such provisions were not generally used.³⁴⁵ Americans adopted an alternate approach to bondholder reorganisations. Fraser provided a rough sketch of the American approach under section 77B of the US *Bankruptcy Act*, which essentially provided a CCAA-like procedure.³⁴⁶ The key differences were that section 77B only required a two-third majority, and instead of holding a meeting, creditors provided their vote in writing.³⁴⁷

Of final note, DMIA, like the other interest groups represented at the meeting, did not object to restricting the Act to companies with outstanding trust deeds as suggested by the Montreal and Toronto Boards of Trade, since this had no bearing on the use of the Act for restructuring corporate securities.³⁴⁸

³⁴³ *ibid* 19.

³⁴⁴ *ibid*; See also Benson, n 25 above, 164.

³⁴⁵ 1938 Minutes, *ibid*.

³⁴⁶ *Bankruptcy Code*, 11 USC, s 77B; Skeel 2001, n 93 above, 107-109.

³⁴⁷ W.K. Fraser (DMIA), 1938 Minutes, n 4 above, 19.

³⁴⁸ *ibid*.

iv. Labour

The concerns of labour were not represented in the early literature or government material on the CCAA, nor did the 1938 Committee consider labour-related issues. The only reference to labour is the single remark in the Debates of the Senate of Canada by Meighen (Senator, Conservative) in 1933, discussed above. I have found no other historical evidence to show that labour was consulted or involved in CCAAs, or bondholder reorganisations more broadly during this period, or that this group benefitted through ongoing employment, despite the fact that by 1937 unemployment had contributed to increasing labour disputes.³⁴⁹ While later usage of the CCAA has given rise to labour concerns and participation in negotiations, this was not part of the policy or practice of early CCAA law.

v. The Canadian Credit Men's Trust Association

The CCMTA was a national organisation that generally represented the interests of unsecured creditors.³⁵⁰ It acted both as a trustee in bankruptcy and occasionally as a representative of its members' claims in bankruptcy proceedings.³⁵¹ Accordingly, the CCMTA was concerned about the protection of unsecured creditor rights in CCAA proceedings and agreed with the Toronto Board of Trade's suggestions for amendments in this regard.³⁵² Lee Kelley, the CCMTA's representative, closed his submissions by stating, '[m]y whole position

³⁴⁹ Chambers, n 314 above, 307.

³⁵⁰ Lee A. Kelley (CCMTA), 1938 Minutes, n 4 above, 27-28.

³⁵¹ *ibid* 27.

³⁵² *ibid*.

can be summed up by saying that we are backing up the position that we have worked out with the Toronto board of trade.’³⁵³

As evidenced by the Committee minutes, the interests of bondholders represented by the Toronto Board of Trade and DMIA were successful in rallying support for maintaining the CCAA by suggesting amendments to protect the interests of unsecured creditors from debtor-led CCAAs.

vi. The Office of the Superintendent of Bankruptcy

In 1938, the Superintendent of Bankruptcy was William Reilley, and he represented a distinct point of view in insolvency law debates. Reilley noted that he had received many complaints concerning the abuses that had arisen under the CCAA as well as the WUA, both of which were out of the OSB’s jurisdiction.³⁵⁴ Accordingly, he argued that Parliament review the piecemeal approach to Canadian insolvency legislation with a view to consolidating the statutes into one Act overseen and administered by the OSB.³⁵⁵ Parliamentarians and academics have advocated for this position at various points over the last 70 years, but to little avail.³⁵⁶ Reilley’s position held sway with the Committee. Since *Bankruptcy Act* amendments were outside its remit, the Committee agreed to go back to

³⁵³ *ibid* 28.

³⁵⁴ W.J. Reilley (Superintendent of Bankruptcy), *ibid* 28.

³⁵⁵ *ibid*.

³⁵⁶ A 1946 effort to consolidate Canadian bankruptcy and insolvency law and repeal the CCAA failed, see Tassé, n 101 above, 1.2.25; Thomas G.W. Telfer, ‘Canadian Insolvency Law Reform and ‘Our Bankrupt Legislative Process’ 2010 ARIL 583; Jacob Ziegel, ‘Canada’s Dysfunctional Insolvency Reform Process and the Search for Solutions’ (2010) 26 BFLR 63 [Ziegel 2010]. Note that in the 2000s the OSB gained jurisdiction over the CCAA, see *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA 1985], ss 26-31 as am by 2005, c 47, s 131; 2007, c 36, ss 73-75.

Parliament to try to secure a general reference so that it could investigate the *Bankruptcy Act*, CCAA and WUA together.³⁵⁷

vii. Lawyers

Lawyers did not represent a united interest group with respect to stances taken on the CCAA, and they were not represented at the 1938 meeting. The interests of their clients probably influenced the stances of individual lawyers. For instance, Fraser was in favour of the CCAA, which differed little from the bondholder restructurings he wrote about, and in which he represented bondholder interests. Manning thought the Act was *ultra vires* the federal government, a view shared by other reputable lawyers, who refused to recommend the CCAA to their clients.³⁵⁸ Despite these concerns, by the time Edwards' wrote his L.L.M. on the CCAA in 1947, the Act was an established piece of the insolvency law framework in Canada.³⁵⁹ Commenting on Manning's 1935 article, Edwards stated, '[h]owever reasonable his doubts may have appeared at that time, it now clear that the Act is valid in its entirety.'³⁶⁰

³⁵⁷ 1938 Minutes, n 4 above, 28.

In 2014 Industry Canada similarly conducted a statutory review of the CCAA and BIA but excluded the *Winding-up and Restructuring Act*, RSC 1985, c W-11 and *Wage Earner Protection Program Act*, SC 2005, c 47, s 1. See Industry Canada, 'Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*' online: <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00870.html> (accessed 21 July 2015.)

³⁵⁸ Manning V, n 3 above, 23.

³⁵⁹ Edwards LLM, n 284 above, 13.

³⁶⁰ *ibid.*

Concern over American investment in Canadian bond issues was a significant issue in 1938: it helped prompt Parliament to abandon its bill to repeal the CCAA. Ironically, by 1940-1945 American investors had almost entirely abandoned the Canadian bond market, as illustrated in Table 1 above.³⁶¹

Following the corporate failures of the Great Depression—including many financed through trust deeds that contained no majority provisions, and thus encountered significant difficulty restructuring—Canadian corporations largely returned to the practice of including majority provisions in trust deeds.³⁶² It is possible that the long drawn out restructurings of companies such as Abitibi also deterred American investors from purchasing Canadian bonds in favour of investing in shares. Canadian equity investments could be restructured relatively easily under corporate law statutes, which, due to the CCAA, could be combined into a single proceeding with debt restructurings.³⁶³

By the time Parliament finally closed the DIP loophole in the CCAA in 1953—in a move to restrict the Act to bondholder-led restructurings—the most compelling rationale for retaining the Act was no longer a major issue. By including majority provisions in trust deeds, Canadian companies sacrificed access to US debt markets, in order to secure increased flexibility with respect to bondholder restructurings. This underscores the fact that the CCAA was enacted to overcome drafting deficiencies in Canadian trust deeds. Into the 1950s and beyond most

³⁶¹ Neufeld, n 51 above, 490-493.

³⁶² Benson, n 25 above, 164; MacKelcan, n 25 above, 341-348; Billyou, n 8 above, 597.

³⁶³ See eg *Companies Act*, RSC 1927, c 27, ss 144-145; CCAA 1933, n 1 above, s 19.

bondholders preferred to restructure through receiverships, which afforded greater flexibility than CCAA plans.

B. An 'open' door to fraud

Another concern about the practical operation of the CCAA had to do with subsection 11(2) of the Act, which Ernest Bertrand (MP, Liberal) argued was an open invitation for fraud by company management or the receiver-manager and a departure from English restructuring practice.³⁶⁴ Subsection 11(2) remains part of the CCAA to this day.³⁶⁵ This subsection allows debtors to 'accept any claims for the purpose of voting and reject those claims after that when they have settled with the creditors.'³⁶⁶ The possibility for 'fraud' is that it appears that a debtor can strategically admit false claims in order to secure the votes needed to for plan approval, thereby forcing a plan on its real creditors even if the majority of those creditors do not support the restructuring. After voting, the debtor can then contest the false claims to eliminate them from the plan and any distribution.

According to the Committee minutes, this provision had not arisen as an issue in the context of bondholder-led reorganisations, as represented by the Toronto Board of Trade and DMIA.³⁶⁷ Despite its presence on the statute books for 80

³⁶⁴ E. Bertrand (Liberal), 1938 Minutes, n 4 above, 19-20.

³⁶⁵ CCAA 1933, n 1 above, s 11(2). Now enumerated CCAA 1985, n 356 above, s 20(2).

³⁶⁶ E. Bertrand (Liberal), 1938 Minutes, n 4 above, 20.

³⁶⁷ W.K. Fraser (DMIA), *ibid* 19-20.

years, I have not found any examples of judicial or scholarly attention that have considered this subsection.³⁶⁸

Based on an historical analysis, I submit that this provision simply provides a distinction between voting claims and admitting them as legitimate claims, in order that the CCAA operate as a speedy method for CCAA compromises. That is, voting can go ahead even if the debtor or receiver-manager has not examined all claims in detail, and may later want to contest the legitimacy of one or more claims. If the vote is successful, contested claims can (theoretically) be submitted to the court for a ruling. Admittedly, this seems unlikely in a debtor-led CCAA of the 1930s in which there were no bondholders, and therefore no receiver-manager. The provision also appears to provide no *ex ante* safeguard against abuse. On the other hand, if the company had to scrutinise all claims before ever getting to a vote, it would probably slow down the operation of the Act to the point where it could be entirely ineffective—essentially causing the CCAA to operate like the composition provisions of the *Bankruptcy Act of 1919*.

In the 1930s and today judges are asked to re-examine CCAA plan votes in light of facts that arise later, with a view to preventing the need for a further vote.³⁶⁹ In such instances judges determine how the vote would have been decided if certain claims had, or had not, been counted as claims *ex ante*, in order to decide

³⁶⁸ Now enshrined in RSC 1985, c C-36, s 20(2). The entry for this subsection in *Houlden & Morawetz's Bankruptcy and Insolvency Analysis* contains no citations to case law or academic literature. See L.W. Houlden and G.B. Morawetz, *Houlden & Morawetz Bankruptcy & Insolvency Analysis*, N§146. In contrast, subsection 20(1) is the subject of a fairly long entry citing a number of cases, see N§145. See Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2015), 1356-1359.

³⁶⁹ See eg *Wellington*, n 69 above; *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 CBR (5th) 269, 47 BLR (4th) 74, para 22.

whether the requisite majority creditor approval has been met *ex post*. This approach offers fewer safeguards, but is arguably necessary in a non-bankruptcy statutory restructuring regime.

C. Vulture capitalism

The final issue surrounding the CCAA was the use of the statute to confirm plans that furthered the interests of vulture capitalists. The predatory practices of BPCs complained of by 1940³⁷⁰ appear to have escaped the notice of the 1938 Parliamentary Committee.³⁷¹ Bertrand's (MP, Liberal) concern over other possible abuses of the CCAA suggests that he was unaware of the practices of vulture capitalists, which he likely would have raised otherwise. This practice has echoes in current insolvency issues such as distressed debt trading, vulture capitalism and the role of creditor committees; issues with which contemporary scholars, judges and practitioners now grapple.³⁷²

Vulture capitalism in bondholder reorganisations the 1930s basically operated as follows. Small groups of individuals purchased distressed bonds with a view to hijacking the reorganisation.³⁷³ After purchasing the bonds, the vultures

³⁷⁰ 'Protective Committees', n 7 above. The details provided about the company indicate that it was likely the receivership and reorganisation of Wellington Building Corp.

³⁷¹ See Benson, n 25 above, 192, praising the CCAA and stating that abuses of reorganisation proceedings such as those uncovered in the US by the SEC had not arisen in Canada.

³⁷² See eg Jeffrey B. Gollob, 'Distressed Debt Lenders and their Impact on Restructurings and Workouts in Canada' 2004 ARIL 5; Janis Sarra, 'Judicial Exercise of Inherent Jurisdiction under the CCAA' (2004) 40 CBLJ 280, 290; Jason Harris, 'Enhancing the Role of Creditors' Committees in Corporate Rescue Laws' 2011 ARIL 23; Robert J. Chadwick and Derek R. Bulas, 'Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World' 2011 ARIL 5; Janis Sarra, 'Manoeuvring through the Insolvency Maze – Shifting Identities and Implications for CCAA Restructurings' (2011) 27:1 BFLR 155 [Sarra 2011], 158.

In the US context see eg Douglas G. Baird and Robert K. Rasmussen, 'Antibankruptcy' (2010) 119 Yale LJ 648.

³⁷³ 'Protective Committees', n 7 above, 183-185.

established a BPC and through advertisements convinced other bondholders to deposit their bonds with the BPC—turning over their voting rights in the bargain—rather than the ‘bondholder committee’ established by the trustee under the governing trust deed.³⁷⁴ The advertisements claimed that the bondholders would fare badly under the plan proposed by the bondholder committee, and urged them instead to support the BPC, which would secure a better plan.³⁷⁵ Ordinarily bondholders had a right to appoint a BPC to represent their interests and act as a ‘strong, organized creditor group’ in restructurings, which is how the vultures’ BPC garnered support from bondholders.³⁷⁶ In some cases the same trustee acted as depository for both committees, contributing to bondholder confusion and leading to allegations of deception and fraud.³⁷⁷ The vultures sought control of the proceedings and the firm in order to ensure they received higher-ranking, and higher-value, securities in the reorganisation than the other bondholders.³⁷⁸ As a matter of practice, the restructurings were usually completed by way of a sale under either the CCAA or the Ontario *Judicature Act*.

This phenomenon raises a crucial concern vis-à-vis creditor voting not touched on by the 1938 committee. Under the 1933 version of the CCAA, a creditor stake as small as 25 per cent³⁷⁹ in a given class amounted to a veto in a plan vote; a power that vultures or distressed-debt traders seemed more inclined to use than

³⁷⁴ *ibid.*

³⁷⁵ *ibid.*

³⁷⁶ Benson, n 25 above, 170.

³⁷⁷ ‘Protective Committees’, n 7 above.

³⁷⁸ *ibid.*

³⁷⁹ CCAA, 1933, n 1 above, s 5. In 1997 the voting provision was amended to the effect that a veto would require 33% of the claims in a given class, see CCAA 1985, n 358 above, s 6(1), as am by 1997 c 12, s 123.

the original claim-holders when their immediate interests are not advanced.³⁸⁰ Presumably this was because the vultures, which acquired bonds after the company was in financial difficulty, had less to lose if the restructuring failed. This meant that a BPC only needed to secure 25 per cent of claims of a given class in order to block a plan put forward by the bondholder committee, which occurred in the *Wellington* case, for instance.³⁸¹ The court in that case, looking narrowly at the issue of creditor classification, was apparently unaware of the different objectives of the respective committees. Without any concerted inquiry beyond the bare voting provision the court sided with the BPC over the protective committee.³⁸²

Uncovering of this 'racket' years after the fact led to criticism, especially of the professionals involved.³⁸³ This was all the more troubling because the trustee was supposed to look out for the rights of bondholders, with the court acting as a final layer of oversight.³⁸⁴ The BPCs of the 1930s illustrate that 'abuses' can take place inside and outside insolvency legislation, and that professional or judicial oversight is no panacea.

V. Conclusion

This chapter has shown that Canadian bondholder reorganisations were principally creditor remedies that grew out of commercial financing practices and receivership law, and were later enshrined and perpetuated in federal

³⁸⁰ Sarra 2011, n 372 above, 158-159.

³⁸¹ *Wellington*, n 69 above; 'Wellington Building' (6 October 1934) *Globe and Mail* 14.

³⁸² *Wellington*, *ibid.*

³⁸³ 'Protective Committees', n 7 above, 185

³⁸⁴ Benson, n 25 above, 170. Unlike in the US, where the SEC assumed a supervisory role.

insolvency law. The policy and practice of bondholder reorganisations of the 1930s were conducted with little regard for the interests of other creditors or stakeholders, which generally possessed weak rights vis-à-vis the bondholders' all-encompassing floating charge.

As a secured creditor remedy, bondholder reorganisations operated as the presumptive response to a large firm's financial distress during the early twentieth-century. Even significant procedural difficulties did not cause bondholders to shy away from restructurings. Instead large bondholding interests obtained enabling legislation, went to provincial or federal governments for political and financial assistance, and adopted (or co-opted) more costly and clunky methods of restructuring, such as court-appointed receiverships.

As matter of history the CCAA was not intended to promote the 'public interest,' as that term is now understood. The 'public interest' value of the CCAA (if any) was its design and implementation as a secured creditor remedy to prevent FI failures during the Great Depression. Accordingly the public interest value of individual CCAA reorganisations should be evaluated in light of the benefits these arrangements also convey to large creditors.

Over 200 companies restructured under the CCAA in the first few years it was on the statute books³⁸⁵—a figure that exceeds conventional accounts of its usage as

³⁸⁵ H.S.T. Piper (Montreal Board of Trade), 1938 Minutes, n 4 above, 2: 206 CCAA applications were filed in the city of Montreal up to 31 May 1938.

well as contemporary filing rates under the Act.³⁸⁶ This data in turn provides fertile ground for comparison and analysis with contemporary CCAA filing rates, which is the subject of recent scholarly writing.³⁸⁷ It also dispels the assumption that CCAA applications only took off in the late 1980s, and points to other factors that may have influenced CCAA popularisation and filing rate trends over time, such as economic and bankruptcy trends and increasingly liberal interpretations of the statute, as discussed in the next chapter.

The enactment of the CCAA represented a significant development in Canadian insolvency and restructuring law. By compulsorily adjusting secured creditor rights, this coordinating Act was the first insolvency statute capable of effecting ‘full’ company reorganisation. Like the other New Deal statutes, the CCAA represented a novel exercise and extension of Parliament’s legislative power, as it was then understood. Unlike most of the New Deal legislation, the CCAA and FCAA were both declared *intra vires*. As a result compulsory adjustment of secured creditor rights became a valid part of ‘bankruptcy and insolvency law’ based on a very broad conception of federal jurisdiction for the PC of the 1930s. This paved the way for a migration of company and debt reorganisation into the insolvency law sphere.

³⁸⁶ See Ben-Ishai and Torrie, n 173 above, 57: indicating a total of 301 filings from 2000 to 2012, citing: Keith Pritchard, ‘Analysis of Recent Cases Under the Companies’ Creditors Arrangement Act’ (2004) 40 CBLJ 116, 119; Alfonso Nocilla, ‘Is “Corporate Rescue” Working in Canada?’ (2013) 53:3 CBLJ 382 [Nocilla 2013]; Janis Sarra, ‘Development of a Model to Track Filings and Collect Data for Proceedings Under the CCAA’ (March 2006) Final Report to the OSB, online: <[http://strategis.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Sarra-2006-ENG.pdf/\\$FILE/Sarra-2006-ENG.pdf](http://strategis.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Sarra-2006-ENG.pdf/$FILE/Sarra-2006-ENG.pdf)> (accessed 31 August 2015) [Sarrra 2006]; Office of the Superintendent of Bankruptcy, online: CCAA Records List <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html> (accessed 31 August 2015.)

³⁸⁷ See eg Roderick J. Wood, ‘Rescue and Liquidation in Restructuring Law’ (2013) 53:3 CBLJ 407; Nocilla 2013, *ibid*; Sarra 2006, *ibid*.

Canadian developments came at the same time as significant changes in American bankruptcy law, which introduced chapter 11 and imported receivership practices into the US Bankruptcy Code.³⁸⁸ As in Canada, by 1938 there were concerns over the abuse of bankruptcy law in the US, which led to an investigation by the SEC. US reforms instituted an independent trustee to take a supervisory role in reorganisation proceedings.³⁸⁹ In Canada the bondholders' trustee or receiver-manager supposedly fulfilled this function in the course of CCAA reorganisations, although this was not always true in practice.

Despite achieving a consensus on CCAA reforms to address abuses of the Act raised by the lack of oversight, nothing came of the 1938 Parliamentary committee meeting and the CCAA process remained in the hands of bondholders or company management until the trust-deed amendment of 1953.³⁹⁰ This was partly due to misperceptions of the CCAA evident in Parliamentary debates. For example, by 1938 the originally disconcerting aspect of the CCAA—the power it conferred to adjust secured creditors rights—was entirely absent from the list of complaints put before the House of Commons Committee. By that time concern was for the interests of unsecured and junior creditors in debtor-led CCAAs. The adjustment of secured creditor rights was a seemingly settled point of insolvency law by 1938, even though it was widely regarded as unconstitutional just a few years prior. From 1938 onward Parliamentarians generally construed the CCAA as a debtor-remedy insolvency law geared toward rehabilitating distressed

³⁸⁸ Skeel 2001, n 93 above, 74, 112-113.

³⁸⁹ Skeel 2001, *ibid* Chapter X of the *Chandler Act of 1938*.

³⁹⁰ *An Act to Amend The Companies' Creditors Arrangement Act, 1933*, n 212 above, s 2.

firms, a purpose for which the statute was unsuited, and this accordingly provoked complaints and recurring calls for repeal.³⁹¹

The endurance of the CCAA on the statute books is related to stalled attempts at Canadian bankruptcy and insolvency law reform. Reform efforts often included repeal of the CCAA as part of amendments to the *Bankruptcy Act* adding or expanding a section on company reorganisation. The foregoing analysis reveals that the CCAA was a relatively open-ended, bondholder-controlled remedy, in contrast to the rules-based, third party-supervised processes under the *Bankruptcy Act*. From a bondholder standpoint there was no advantage to consolidating the two Acts, which would only reduce bondholder control and discretion over reorganisations. In light of the introduction of more oversight in CCAA proceedings over the past 30 years, path dependence sheds light on subsequent failed attempts to consolidate Canadian bankruptcy and insolvency statutes—sometimes resulting in duplicative amendments to the CCAA and BIA³⁹²—despite persuasive efficiency arguments for unifying these two insolvency regimes.³⁹³

The early history of the CCAA therefore brings to light several novel findings with implications for current scholarship on corporate reorganisation law in

³⁹¹ See eg 1938 Minutes, n 4 above. See also Bill A4, (1946) proposing repeal of the CCAA as part of wider bankruptcy reform. Note this was a private members bill put forward by the Hon. Sen. Raymond J. Perrault, P.C. (Liberal), cited in Tassé, n 101 above, 1.2.25 (I could not locate a surviving copy of Bill A4 or related Committee Proceedings); and, Bill C-217, *An act to amend the Bankruptcy Act (priority of claims)* (1989), 2nd Sess, 34th Parl, note this was also a private members bill put forward by Mr. John R. Rodriguez (NDP).

³⁹² RSC 1985, c B-3.

³⁹³ See eg Jacob Ziegel, 'The BIA and CCAA Interface' in Stephanie Ben-Ishai and Anthony Duggan (eds), *Canadian Bankruptcy & Insolvency Law* (Markham, ON: LexisNexis, 2007), 308-341; Ziegel 2010, n 356 above.

Canada. As a bondholder remedy based in receivership law, separate and distinct from the *Bankruptcy Act*, the CCAA relied on the fine distinction between 'insolvency' and 'bankruptcy' for both its validity and efficacy. The early history of the Act helps explain the foundation and evolution of Canadian business reorganisation under insolvency law.

4. 1980s—1990s: company reorganisation and the CCAA

I. Introduction

From roughly the 1950s up to the recession of the early 1980s, the Canadian economy enjoyed strong growth¹ and lenders seldom resorted to the CCAA.² Parliament made no substantive amendments to the CCAA except for the 1953 trust deed amendment—the overdue brainchild of the 1938 meeting of the House of Commons Standing Committee on Banking and Commerce. Despite notable efforts to modernise and reform Canada’s bankruptcy laws,³ Parliament did not pass major business bankruptcy reforms until 1992⁴—after the 1980s recession and mid-way into the 1990s recession. But limited activity in the area of bankruptcy and insolvency law during this period belies considerable commercial and legislative activity in the areas of credit and debt. From the 1950s to the 1980s, many provinces enacted legislation concerning credit, debt, and overindebtedness.⁵ Liberalisation of the federal *Bank Act* in 1967 paved the way for chartered banks to become major providers of long-term secured credit.⁶ Coupled with the introduction of Personal Property Security Acts (PPSAs) by the provinces, this led to declining use of trust deeds to secure long-

¹ Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1989), 481. See also Appendices 1 and 2.

² A notable exception is Atlantic Acceptance Corporation, see n 117 below.

³ See Roger Tassé *et al.*, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970) [Tassé].

⁴ SC 1992, c 27.

⁵ See eg *Moratorium Act*, RSS 1953, c 98 (first enacted in 1943); *Orderly Payment of Debts Act*, SA 1959, c 61; *Saskatchewan Farm Security Act*, SS 1988-1989, c S-17.1; *Family Farm Protection Act*, SM 1986-1987, c 6.

⁶ J.A. Galbraith, *Canadian Banking* (Toronto: The Ryerson Press, 1970), 226; E.P. Neufeld, *The Financial System of Canada: its Growth and Development* (Toronto: Macmillan of Canada, 1972), esp 128-131.

term corporate loans. Without trust deed financing, even banks did not have recourse to the enabling provisions of the CCAA after the 1953 trust deed amendment.

Canadian companies increasingly turned to banks, rather than capital markets, to raise long-term debt finance.⁷ The size and increased lending facilities of chartered banks made these institutions essentially ‘one-stop-shopping’ for many corporate borrowers. Unlike widely dispersed bondholders, chartered banks had no reason to concern themselves with majority provisions to coordinate internally a response to debtor default. Much like earlier bondholders, chartered banks relied on the priority and strength of their security vis-à-vis other secured and unsecured creditors, and displayed relatively little interest in coordinating with smaller creditors in cases of debtor default. In the midst of several decades of strong economic growth, it appears neither banks, nor Parliament concerned themselves with the particular issues raised by the prospect of widespread defaults associated with a general economic downturn. Bondholder reorganisations and the circumstances that gave rise to the corporate restructuring crisis of the 1920s-1930s as well as the CCAA were essentially forgotten.

These changes significantly altered the secured lending landscape with untested implications for lenders and borrowers during subsequent economic downturns. Changes to secured lending arrangements *ex ante* would prove significant for

⁷ See Thomas Walkom, ‘From profits to horrors: MPs’ bank probe a peep show on economy’ (16 June 1982) *Globe and Mail* (Nexis), noting testimony provided at the House of Commons Standing Committee on Finance, Trade and Economic Affairs.

approaches to debtor default and reorganisation *ex post*. When combined with the 1980s and 1990s recessions, these would precipitate another ‘restructuring crisis.’

The political, legal and social backdrop of the 1980s and 1990s recessions, however, was much changed from that of the 1930s. By this time, Canadian labour was an organised interest group with legal rights and a political voice through the NDP.⁸ The growth of environmental concerns similarly resulted in new legal rights, through legislation to hold firms accountable for clean up costs, for example.⁹ These constituencies did not exist as such in the 1930s, but could not be disregarded in the restructuring crisis of the 1980s and 1990s.¹⁰ Accordingly, the 1980s and 1990s would see a public relations gloss applied to Canadian corporate reorganisation law, and an antiquated secured creditor remedy would be recast in the ‘public interest.’

Some important changes within the legal profession in Canada helped to facilitate this transformation. First, Canadian courts were far more policy-conscious, imaginative, and even activist, by the 1980s and 1990s than they were in the 1930s.¹¹ This change came about gradually as a result of various factors,

⁸ Gad Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968), Chapter 7 ‘The New Party’.

⁹ This affected the structure of CCAA plans, see eg *Re Anvil Range Mining Corporation* (2001), 25 CBR (4th) 1, [2001] OJ No 1453 (Ont SCJ), appeal dismissed (2002), 34 CBR (4th) 157, [2002] OJ No 2606 (Ont CA), cited in Janis Sarra, *Creditor Rights and the Public Interest* (Toronto: University of Toronto Press, 2003) [Sarra 2003], 192-193; *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [as am 1997, c 12, s 124], s 11.8.

¹⁰ See also Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997), 113-115.

¹¹ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 2nd ed, 2012), 216, citing Carl Baar, ‘Judicial

over many years. For the purposes of this chapter, a useful touchstone for the ‘new’ approach of Canadian courts to judging is the SCC under Bora Laskin C.J.C. from 1973 to 1984. As Chief Justice, Laskin transformed the SCC into a modern, policy-conscious institution that assumed a far greater role in *developing* Canadian law, rather than merely settling disputes.¹² Due to the operation of legal precedent, this affected the way lower courts decided matters as well. In addition the 1982 proclamation of the *Canadian Charter of Rights and Freedoms* led to increased judicial review of legislation in Canada more generally.¹³

Secondly, Canadian approaches to statutory interpretation changed between the time of the CCAA’s enactment and its revival in the 1980s and 1990s. In the late 1970s and 1980s the SCC and lower courts adopted Elmer Driedger’s modern principle of statutory interpretation, first published in 1974,¹⁴ as the preferred approach to statutory interpretation. The modern principle of statutory interpretation placed greater emphasis on the policy behind legislation and the intention of Parliament than earlier approaches to statutory construction. So while the CCAA remained more or less the same for over 50 years, approaches to interpreting it and the institutions charged with doing so changed significantly.

As a result of this unique mixture of stasis and change, the CCAA was deployed in

Activism in Canada’ in Kenneth M. Holland (eds), *Judicial Activism in Comparative Perspective* (New York: St. Martin’s, 1991) [Baar 1991], 53.

¹² See Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005), Part V: The Supreme Court of Canada. Contrast with the pre-Laskin SCC, see Paul Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974), Part 1 ‘On Law in the Supreme Court: A Preliminary View’.

¹³ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; Baar 1991, n 11, above, 53, cited in Lijphart, n 11 above, 216.

¹⁴ Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) [Driedger 1974].

new ways against a different social, political, legal, economic, and financial backdrop, compared to that which existed at the time of its enactment. The stasis of the CCAA and federal bankruptcy and insolvency law during this period tends to obscure the many contextual factors that had changed dramatically since the 1930s. These contextual factors influenced the way that lawyers, courts, managers and other stakeholders approached, interpreted and understood the CCAA in the 1980s and 1990s. And this in turn led to some erroneous conclusions about the genesis of the CCAA, many of which continue to circulate as ‘received wisdom.’ This broad, contextual ‘paradigm shift’ thus helps explain *why* a secured creditor remedy from the 1930s was, 50 years later, regarded as a debtor remedy on essentially an *a priori* basis.

In this chapter I show that despite the public interest narrative that came to be associated with Canadian corporate reorganisation—particularly under the CCAA—large secured creditors played a major role in driving changes in the 1980s and 1990s. This insight is important for understanding the historical and ongoing development of CCAA law as well as the earlier practice of bondholder reorganisations. As discussed in the next chapter, understanding corporate reorganisation as a lender remedy may be helpful for understanding the interplay between macroprudential issues and bankruptcy law, for instance.

This chapter also engages in a detailed examination of *how* the CCAA was re-interpreted and deployed by courts in the 1980s and 1990s in light of earlier commercial and legal changes. Several scholars integrated a key role for public interest concerns in bankruptcy theories developed during this period,

illustrating how contextual factors like environmental issues and labour issues worked their way into legal scholarship I highlight the role of contextual factors in the outward reinterpretation and repurposing of the Act from a bondholder remedy into a DIP remedy. I also show how contextual changes informed the public interest narrative that developed around the CCAA during this period, and how this narrative was read back into the origins of the statute. Accordingly, I highlight the dissonance between conventional interpretations of the Act and its history.

The rest of this chapter is arranged as follows. Section II examines how large secured lenders turned to existing restructuring mechanisms such as the CCAA to effect reorganisations of large companies. This section highlights how large secured lenders helped drive legal reforms, which extended and advanced their remedies as creditors. This forms the backdrop for the discussion in section III, which looks at how the CCAA was subsequently re-interpreted in Canadian courts during the 1980s and 1990s. I highlight several significant ways in which the Act was characterised during this period: as primarily insolvency law; principally a debtor remedy; intended to facilitate going-concern reorganisations; and, being in the 'public interest.' Drawing on section II, I show how this outward (re)characterisation occurred with the broad support of large secured creditors, for which the Act continued to operate as a lender remedy. This section thus provides a narrative account of how courts helped transform this Depression-era bondholder remedy into a modern corporate debtor remedy, while retaining its original purpose and function as a remedy for large secured creditors. Section IV concludes.

II. The 1980s and 1990s recessions: another restructuring ‘crisis’

By the 1980s changes in legislation and commercial practices largely disconnected the CCAA from the 1930s context of secured lending laws and institutions. Chartered banks, rather than life insurance companies, were major lenders to large Canadian corporations, and often used new forms of lending under the *Bank Act* and PPSAs. By not securing corporate loans with trust deeds,¹⁵ banks effectively did not have access to the CCAA. Additionally, the detailed restructuring provisions typically contained in corporate trust deeds were apparently lost or forgotten in the transition to much shorter statute-based security agreements. This period thus marked a slow-moving, but distinct rupture in the history of Canadian corporate reorganisation practices. Bondholder reorganisations, which were ‘standard practice’ for roughly one century, fell out of use. The result was that at the onset of the recessions in the 1980s and 1990s, large secured lenders lacked effective tools to restructure corporate debtors (again).

The recessions of the 1980s and 1990s hit the Canadian economy and FIs particularly hard compared to earlier economic downturns. Many companies, including large Canadian concerns such as Dome Petroleum, Daon Development and Olympia & York encountered severe financial difficulty. This in turn led to

¹⁵ Some corporate loans were secured with trust deeds which included a charge on the undertaking, although the general trend was toward General Security Agreements, see discussion in Stephen D.A. Clark, ‘Typical Security Taken By Banks’ Paper in Proceedings of 1984 Annual Institute of Continuing Legal Education: ‘Business Law: Borrowing from Banks’ (2 February 1984) [unpublished]; James S. Hilton, ‘Receivership Clauses in Mortgages’ Paper in Proceedings of The Canadian Bar Association-Ontario, 1985 Annual Institute on Continuing Legal Education: ‘Real Property: Mortgage Matters’ (9 February 1985) [unpublished].

large losses for their creditors, the largest of which were usually chartered banks. These were the first economic recessions that Canadian chartered banks experienced as major providers of long-term secured credit. In some instances, the size of the losses incurred by Canadian FIs led to concern about the financial soundness and stability of these institutions themselves.¹⁶

A 1982 Parliamentary review revealed that several Canadian banks were overextended, and some had very large exposure to a single, large corporate borrower.¹⁷ According to testimony provided by Canadian banks to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, inflation-generated uncertainty in the early 1980s limited bond and stock financing for Canadian companies, increasing reliance on bank funds, and increasing bank exposure in the bargain.¹⁸ The size of the potential write-offs made liquidation of debtor companies an unattractive option for banks. The scale of losses to the big banks potentially placed their own solvency in jeopardy, at a time when many other Canadian financial institutions, including three chartered banks¹⁹ and three life companies,²⁰ were falling into receivership or being taken over by regulators.²¹

¹⁶ See eg 'Last week the Tories rushed to pass tough new trust company legislation' (25 December 1982) *Globe and Mail* (Nexis) ['new trust company legislation']; Walkom, n 7 above.

¹⁷ Walkom, *ibid.*

¹⁸ *ibid.*

¹⁹ Stephanie Ben-Ishai, 'Bank Bankruptcy in Canada' (2009) 25 BFLR 59, 60-61.

²⁰ The only three Canadian life company to have ever failed also did so during this period, in 1992, 1993 and 1994, see Assuris, 'Past Insolvencies' online: <http://www.assuris.ca/Client/Assuris/Assuris_LP4W_LND_WebStation.nsf/page/Past+Insolvencies!OpenDocument&audience=policyholder> (accessed 17 June 2013).

²¹ John DeMont, 'Bank collapses rock confidence in Alberta financial institutions' (21 September 1985) *Financial Post*, section 3, page B9; Tim O'Connor, 'Ontario takes over three trust companies' (7 January 1983) *United Press International* (Nexis); 'new trust company legislation', n 16 above; Emilio S. Binavince and H. Scott Fairley, 'Banking and the Constitution: Untested Limits of Federal Jurisdiction' (1986) 65 Can Bar Rev 328, 330, FN 7.

The public 'failure' of a Big Five²² bank would have been economically costly and politically undesirable. For reasons of market integrity and public confidence in FIs, states have good reasons to avoid these sorts of 'bail outs'.²³ This may be especially so in more recent recessions, as indicated by the careful characterisation of high-profile CCAAs as 'private solutions,' despite critical government funding.²⁴ Nevertheless, during the 1980s and 1990s recessions, both provincial and federal governments in Canada were prepared to assist to some extent in preventing the failure of any one of the Big Five banks, and offered funding for large restructurings to which those banks were significantly exposed. During the 1980s recession, courts, banks and the provincial and federal governments effectively (re-)affirmed corporate reorganisation through insolvency law and receivership as a commercially and politically desirable response to the insolvency of large firms.

The CCAA was an anachronism in the commercial landscape by the 1980s, which proved important. This ambiguity contributed to the possibility that the Act would be interpreted by later actors in a manner that conformed to contemporary conceptions of corporate insolvency law.²⁵ In fact, contextual

²² The Big Five banks include Royal Bank of Canada, Toronto-Dominion Bank, Canadian Imperial Bank of Commerce, Bank of Nova Scotia and Bank of Montreal.

²³ See eg William Poole, 'Moral Hazard: The Long-Lasting Legacy of Bailouts' (2009) 65:6 *Financial Analysts Journal* 17. See also Kenneth Ayotte and David A. Skeel Jr., 'Bankruptcy or Bailouts?' (2010) 35 *J Corp Stud* 469.

²⁴ Eg the third-party ABCP restructuring, see Virginia Torrie, 'Analyzing the Canadian Third-Party ABCP Liquidity Crisis and Restructuring Through the Lenses of Securities and Insolvency Law' (LL.M. Thesis, Osgoode Hall Law School, York University, 2010) [unpublished] [Torrie LLM].

²⁵ See Terence C. Halliday and Bruce G. Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' (2007) 112:4 *Am J of Sociology* 1135 [Halliday and Carruthers 2007], 1144; Mark Tushnet, 'Defending the Indeterminacy Thesis' (1996-97) 16 *QLR* 339, 345.

changes necessitated 'reinterpretation' in order to use the Act to restructure companies by the 1980s. The skeletal provisions of the statute, which courts took to confer much scope for judicial discretion, aided the CCAA's reinvention. This transformation was further prompted by the lack of another effective mechanism to facilitate 'complete' corporate restructurings (largely due to stalled bankruptcy reform efforts); and, the fact that large secured lenders (such as banks) supported reorganisation in principle as a creditor remedy in large insolvencies. With their largest creditors (banks) 'on side,' and lending their weight to the cause, there was no other organised or powerful group to oppose the idea of restructuring in principle.

Although the 1980s and 1990s ushered in a new, debtor-centred interpretation of the CCAA (borrowing from narratives surrounding US chapter 11), the Act was (and is) still used to advance the interests of large secured creditors such as banks and life companies, particularly in large insolvencies. The following subsection explores how secured lenders initially grappled with reorganising large, struggling companies during this period and illustrates how and why banks, in particular, played a major role in driving legal changes in this area.²⁶

A. Restructuring as a remedy for large secured creditors

During the 1980s and 1990s large secured lenders in Canada demonstrably supported restructurings of large corporate debtors as a potential creditor remedy, whether inside or outside insolvency law. At the outset, I must

²⁶ See Tushnet, *ibid.* See further, Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Soc'y Rev 95.

emphasise that bank support for debtor restructuring in principle does not amount to universal support for all restructurings. The important point is that in Canada, at least in principle, large secureds and large corporate debtors have a shared goal of reorganisation as a desirable commercial response to a firm's financial difficulties, where reorganisation is expected to result in higher returns than liquidation. But large secureds are generally less inclined to pursue reorganisation when they expect to realise higher returns through liquidation.

Large secured creditor (or finance creditor) support for insolvency restructurings in Canada stems in part from constitutional constraints. As discussed in the previous chapter, in the 1930s these constraints helped push Canadian capital and business restructurings under the heading of 'bankruptcy and insolvency law' in order to effect 'complete' reorganisations of insolvent firms. Court-appointed receiverships remain useful, however, since they do not require the debtor to be technically insolvent. In England, which does not have a division of powers, Westminster only added provision for company reorganisation to its insolvency laws in 1986.²⁷ If the division of powers had not been such an issue in Canada, Parliament similarly might not have added provisions for complete company reorganisations to insolvency law until the 1980s or 1990s—after ideas about corporate insolvency had started to shift toward the normative desirability of encouraging companies to reorganise. The tendency in England for legal changes to come through formal legislative reform, also contributes to somewhat greater clarity about the debtor- and lender-

²⁷ Kenneth Cork *et al.*, *Report of the Review Committee on Insolvency Law and Practice*, 1982 Cmnd 855, para 1502.

remedy functions of specific restructuring regimes in that jurisdiction.

Even outside of the CCAA, banks preferred to reorganise, rather than liquidate, a number of large companies in the 1980s and 1990s. Peter Farkas, an insolvency professional at a firm frequently retained by banks as receivers, reported that by 1992 his work consisted of approximately 80 per cent restructuring and 20 per cent liquidation; the opposite of what it was in the early 1980s.²⁸ Despite the revival of the CCAA in the 1980s²⁹ and the addition of commercial reorganisation provisions to the BIA in 1992, secured creditors continue to resort to mechanisms such as receivership to deal with debtor default, often with a view to effecting a going-concern sale of the business.³⁰ So corporate failures from the 1980s and 1990s demonstrate that large insolvencies spurred restructuring efforts on a largely commercial basis, which in turn prompted counsel to seek out effective mechanisms for conducting and implementing reorganisation plans.

i. Dome Petroleum: a case study

The 1980s insolvency of Dome Petroleum is a good case study of a large secured creditor-supported reorganisation that took place outside of insolvency law. This restructuring illuminates the interests of several creditor and stakeholder groups and illustrates their (typical) respective interests in an insolvency scenario. Some of the key themes in this restructuring were: concern for lender

²⁸ Scott Haggett, 'Salvation, not liquidation, receivers' aim' (16 June 1992) *Financial Post*, section 1, page 33.

²⁹ Richard B. Jones, 'The Evolution of Canadian Restructuring: Challenges for the Rule of Law' 2005 ARIL 481, 492.

³⁰ See eg Peter P. Farkas, 'Why are there so many court-appointed receiverships?' (2003) 20:4 Nat Insolv Rev 37; Jeffrey C. Carhart, 'Appointing a Receiver and Seizing Equipment' (2005) 22:6 Nat Insolv Rev 53.

solvency which prompted government help with restructuring; different types of creditors preferring different outcomes, which led actors to manoeuvre strategically within the legal landscape; and, a restructuring plan that was justified based on the wider 'public interest', but the outcome of which is of questionable public interest value.

Dome began to encounter severe financial difficulty in 1982, largely as a result of the collapse of world oil prices.³¹ Collectively, Bank of Montreal, Canadian Imperial Bank of Commerce, Toronto-Dominion Bank and Royal Bank held approximately C\$2 billion of Dome's C\$6.2 billion in outstanding debt.³² Management as well as the federal government and major secured creditors thought the underlying business was viable and that the company could be turned around if Dome's debt load was reduced.³³

Dome's collapse, along with other large insolvencies of the period, prompted fears that these corporate failures might bring down heavily exposed Canadian banks as well. PM Pierre Trudeau's (Liberal) government initially offered financial assistance to help keep the company afloat as part of a debt-rescheduling plan put forward by the banks.³⁴ Concern for the solvency of large Canadian lenders in the 1980s and 1990s thus provided significant impetus for secured creditors and politicians to effect reorganisations of important firms. FI

³¹ Dennis Slocum, 'Merger of Dome Petroleum felt possible' (9 October 1986) *Globe and Mail* B7; Associated Press, 'Dome Can't Meet Debt Obligations' (3 September 1982) (Nexis.)

³² 'Dome Petroleum Discloses Refinancing Proposal From Creditor' (23 September 1982) *Associated Press* (Nexis.)

³³ Jennifer Lewington, 'Ottawa guarantees: \$100 million loan to cash-poor Dome' (26 June 1982) *Globe and Mail* (Nexis); 'Dome Offered Plan to Reschedule Debt' (24 September 1982) *New York Times* D4 ['Dome Offered Plan'].

³⁴ *ibid.*

solvency concerns in the 1980s and 1990s echo the 1920s and 1930s in this regard. But by the 1980s and 1990s the notion of corporate restructurings as a debtor remedy was widely seen as 'legitimate,'³⁵ and even in the 'public interest'—a first in Canadian history—and this framed the way parties approached the issue of debtor insolvency.

In contrast to the position adopted by Canadian banks, a few European banks, with fairly small, secured positions in the Dome insolvency, threatened to put the company into bankruptcy over delays in repayment.³⁶ This demonstrates that factors such as the size of a creditor's stake may significantly influence the remedies sought. It also parallels the differing approaches of bondholders and other secured creditors in earlier CCAA restructurings. Recall that bondholders were generally inclined to forgive missed payments in order to help reorganise a struggling debtor, whereas secured creditors with smaller stakes in the company tended to favour enforcing their security.

In response to the prospect of creditor-initiated bankruptcy or receivership, Dome 'threatened' these European banks with a CCAA application, which would stay all proceedings against the company.³⁷ This threat received considerable media attention.³⁸ The Dome insolvency shows that the CCAA could be used as a 'shield' against receivership and bankruptcy. It also underscores the utility of the

³⁵ On how legal concepts may gain legitimacy see, Tushnet, n 25 above.

³⁶ See eg, Gord McIntosh, 'Dome Petroleum eyes new defence strategy against liquidation' (25 September 1986) *Globe and Mail* B7; David Hatter, 'Dome's fate on agenda in Europe' (4 October 1986) *Financial Post*, section 2, page 18; Canadian Press, 'Recalcitrant Dome lender urged to hold firm' (12 November 1986) *Globe and Mail* B16; Eric Reguly, 'Swiss put Dome back on brink' (9 February 1987) *Financial Post*, section 1, page 2.

³⁷ Slocum, n 31 above.

³⁸ *ibid*; see also Paul Brent, 'Peoples acted to head off bank' (31 December 1992) *Financial Post*, section 2, page 1.

CCAA to stay junior secured creditor claims in particular, which may stand to gain less in a restructuring than other groups³⁹ and so may oppose reorganisation efforts.

In 1988 Dome concluded a C\$5.5 billion debt compromise by way of sale of the company to Amoco Canada Limited under the CBCA alone.⁴⁰ This was within the constitutional purview of Parliament, since Dome was incorporated under the CBCA, and so fell under both the corporate law, and bankruptcy and insolvency law powers of Parliament.⁴¹ Although Dome could have qualified for CCAA protection,⁴² it opted to use the arrangement provisions of the CBCA instead. Janis Sarra noted that one of the rationales for filing under the CBCA was to preserve shareholder equity in Dome since debt for equity swaps between Dome and its bankers featured in the plan of arrangement.⁴³

Since shareholder claims rank behind unsecured claims, shareholder value is usually wiped out in a bankruptcy scenario. Therefore the preservation of

³⁹ See eg Lewis Duncan and William John Reilley (Superintendent of Bankruptcy), *Bankruptcy in Canada* (Toronto: Canadian Legal Authors Limited, 2nd ed, 1933), 1107-1108.

⁴⁰ 'Amoco Canada completes purchase of Dome' (12 September 1988) *Oil & Gas Journal* 31. See also Sarra 2003, n 9 above, 18, citing *inter alia*: *Policy Statement of Director of CBCA* (1994) 17 OSCB 4853; Simon Scott, 'The Acquisition of Dome Petroleum Limited by Amoco Corporation' in Jacob S. Ziegel and David Baird (eds), *Case Studies in Recent Canadian Insolvency Reorganizations* (Scarborough: Carswell, 1997), 300, citing unreported judgement (28 January 1988), 311, 313.

⁴¹ This interpretation of Parliamentary power with respect to bankruptcy and insolvency and federally incorporated companies may be changing, with a view to limiting use of the CBCA for debt restructurings where the CCAA may more properly apply. See *In the Matter of a Proposed Arrangement involving 9171665 Canada Ltd. and Connacher Oil and Gas Limited* (2 April 2015), Calgary 1501-00574 (Alta QB); Kevin J. Zych *et al.*, 'Case Note: Important Restrictions Placed on use of CBCA for Debt Restructurings' (2015) 32:1 BFLR 197.

⁴² Dome had outstanding issues of securities issued under a trust deed and running in favour of a trustee within the meaning of the CCAA trust deed requirement. See Simon B. Scott, Timothy O. Buckley and Andrew Harrison, 'The Arrangement Procedure under section 192 of the *Canada Business Corporations Act* and the Reorganization of Dome Petroleum Limited' (1990) 16 CBLJ 296, 310-311; *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 3, and discussion in subsection III.A.ii below.

⁴³ Sarra 2003, n 9 above, 18.

shareholder value in this case and other large reorganisations in the 1980s and 1990s poses challenges for public interest accounts of corporate restructuring and the CCAA that have to do with junior creditor and employee interests, especially where junior creditors were not made whole or employees were laid off. In cases like Dome the most senior debt was usually converted into equity, existing shareholder value was (partly) preserved, and junior debt holders took the largest write-downs in proportion to the size of their claims.⁴⁴ In other words, the weakest and most junior creditors helped 'fund' a reorganisation that tended to benefit the most senior and sophisticated creditors and equity holders.

On its face, such an arrangement seems to go against the 'public interest.' Although there is no precise definition of this term, courts have generally held that it means *inter alia* 'allowing the corporation to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates.'⁴⁵ Preserving shareholder value is not necessarily in the public interest, especially if this is accomplished by compromising claims of more vulnerable creditor or stakeholder groups. The legitimacy of preserving equity claims when shareholders are already shielded from debt liabilities through limited liability also requires justification. This not only protects equity holders from liability, but apparently acts as a check against the complete loss of their investment as well.

⁴⁴ See discussion of the Dome reorganisation in Scott, Buckley and Harrison, n 42 above, 309-318.

⁴⁵ Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2nd ed, 2013), 13, citing *inter alia* *Re Algoma Steel Inc.* (2002), 30 CBR (4th) 1 (Ont SCJ [Commercial List]), LeSage C.J.C.S., para 8; *Re Sammi Atlas Inc.* (1998), 3 CBR (4th) 171, 78 ACWS (3d) 10 (Ont Gen Div [Commercial List]), 173-174; *Re Fracmaster Ltd.* (1999), 11 CBR (4th) 204, 245 AR 102 (QB), Paperny J., *aff'd* in *Royal Bank v Fracmaster Ltd.* (1999), 11 CBR (4th) 230, 244 AR 93 (CA), paras 18-23.

ii. Public interest rationales

During the 1980s and 1990s, preserving shareholder value was often publicly characterised as being in the 'public interest.' In a *Financial Post* article that summarised a number of debtor restructurings conducted by the Royal Bank, Dunnery Best reported:

One constant theme through each of these arrangements is that the banks have left real value in the hands of shareholders, even though they rank after unsecured creditors in the event of a collapse.

The TD seems to have gone the farthest in this regard.

"We'd rather a smaller portion in something better, than a larger chunk of something weak," says TD's Perdue. "We didn't take stock as cheap as possible. That made it better for existing shareholders - and us, over the longer term." [Emphasis added.]⁴⁶

In several 1980s cases chartered banks accepted equity in exchange for their secured claims, swelling their balance sheets with shares in large companies such as Daon Development and Nu-West.⁴⁷ These debt-for-equity exchanges usually required special permission from the Inspector-General of Banks and the Minister of Finance, since they frequently gave banks more than a 10 per cent stake in the debtor company, which was ordinarily prohibited under the *Bank Act*.⁴⁸ According to John Clarke, vice-president of Royal Bank,

⁴⁶ Dunnery Best, 'Reluctant Rescuers: Banks forced to acquire shares in problem firms' (7 December 1985) *Financial Post*, section 1, page 1.

⁴⁷ Martin Mittelstaedt, 'Bailout plans swell banks' shareholdings' (19 May 1984) *Globe and Mail* (Nexis.)

⁴⁸ *ibid*; Bliss, n 1 above, 554; Galbraith, n 6 above, 18.

"[o]ur goal is not to make a huge profit" on the restructurings... Our main goal is to try to get our money back, compensate us for our risk, and still be fair to the client."⁴⁹

Banks understood that even distressed debt could be profitable, an example of enlightened self-interest in an insolvency scenario.

The business press sometimes described bank involvement in high-profile insolvencies in terms of almost benevolent concern for stakeholders such as shareholders and employees. According to an article in the *Financial Post*, instead of seizing and liquidating everything to satisfy their claims, banks sacrificed immediate recoveries so that a wider constituency of stakeholders could realise meaningful recoveries:

"The attitude of leaving something for the shareholders and management is new," says Peter Perdue, assistant general manager of corporate banking with Toronto Dominion Bank in Toronto, recently returned from several years in the work-out trenches in Calgary. "The old approach was to say 'why worry about them? We rank ahead.' Now we leave something in it for everyone - management, shareholders, and the bank." [Emphasis added.]⁵⁰

This paints a pleasing image of corporate insolvency, but the plans of arrangement advanced bank interests as well. The support of the company's largest creditors (banks) was essential for a restructuring plan to succeed. While some members of more vulnerable groups, such as employees, did benefit from certain restructurings, this was largely a by-product of a secured creditor

⁴⁹ Mittelstaedt, n 47 above.

⁵⁰ Best, n 46 above.

remedy. Sophisticated and powerful groups such as shareholders, which traditionally do not receive a distribution in bankruptcy at all, also gained by the reorganisation of insolvent firms. Setting aside the public relations gloss, the outcomes of many corporate reorganisations from the 1980s and 1990s paralleled early twentieth-century bondholder reorganisations.

Interestingly parties did not particularly emphasise the benefits accruing to employees in bank-led restructurings in the early 1980s, and reporters rarely addressed employee issues in the attendant press coverage. In the one major case from the 1980s that did discuss employee concerns, it was to justify government sponsorship of the CCAA plan. In the restructuring of United Co-operatives of Ontario (UCO),⁵¹ approximately 600 (one third) of employees were laid off in order to reduce operating expenses.⁵² The preservation of the remaining 1,300 jobs formed part of the justification for a provincial loan to assist the restructuring effort.⁵³

The few other CCAAs from the 1980s that mention employee claims contain little substantive discussion about the treatment of the employees in insolvency proceedings. Employees did not feature as the prototypical, sympathy-evoking creditors they so often are in contemporary CCAAs. In some cases, employee

⁵¹ This restructuring ultimately failed, see Arthur O. Jacques, 'United Co-operatives of Ontario' in Jacob S. Ziegel (ed), *Case Studies in Recent Canadian Insolvency Reorganizations* (Toronto: Carswell, 1998), 595 *et seq*, cited in Jones, n 29 above, 491, FN 25.

⁵² Keith Pritchard, 'Analysis of Recent Cases Under the Companies' Creditors Arrangement Act' (2004) 40 CBLJ 116.

⁵³ Oliver Bertin, 'UCO remains optimistic despite setbacks' (29 August 1984) *Globe and Mail* (Nexis.)

claims did not form part of the proposed CCAA plan at all.⁵⁴ In other instances company spokespersons simply said that employees fared better in a restructuring than they would in a liquidation, and lumped employee interests in with those of other creditors and shareholders.⁵⁵

Nevertheless by the end of the 1980s, practitioners saw the lack of statutory wage protections in corporate insolvencies as a deficiency of the CCAA, which they expected the 1992 bankruptcy reforms would address.⁵⁶ Since these amendments essentially retained the CCAA 'as is,' the practical effect of the business reorganisation provisions added to the BIA were arguably curtailed insofar as large corporations continued to file under the CCAA, and in increasing numbers.⁵⁷ The enactment of the BIA provisions on business reorganisation, however, did at least provide a benchmark other than liquidation with which to compare a proposed plan of arrangement under the CCAA. It is unclear to what extent this translated into meaningful improvements for workers in corporate insolvencies.

Wider concern for employee claims in business restructuring appears to have begun in 1990s corporate insolvencies. High profile cases such as Algoma Steel and Anvil Range Mining were among the first to deal substantively with these

⁵⁴ The Intair reorganisation is one example, see eg Ann Gibbon, 'Creditors' vote keeps Intair flying' (14 December 1990) *Globe and Mail* (Nexis); Ann Gibbon, 'Intair confident creditors will accept rescue proposal: Carrier plans to offer 20 cents on the dollar to some suppliers' (29 November 1990) *Globe and Mail* (Nexis.)

⁵⁵ Anthony McCallum, 'Ailing Nu-West Group files debt-restructuring plan' (23 March 1984) *Globe and Mail* (Nexis.)

⁵⁶ Michael Crawford, "'War Zone" of bankruptcy battles is getting bigger and more profitable: as business as shot down, insolvency cases skyrocket' (13 December 1990) *Financial Post*, section 1, page 18.

⁵⁷ Sarra 2003, n 9 above, 16.

issues under the CCAA.⁵⁸ Interestingly debtor management, instead of the company's largest secured creditors, initiated these CCAA applications. The significance of this point in terms of the use of employee interests to legitimise the CCAA as a debtor-remedy is considered further in section III below.

As a general matter, the fact that employees fare better by (at least the prospect of) keeping their jobs (through reorganisation) than by losing their jobs (through liquidation) essentially justifies any restructuring attempt based on employee interests. One could make the same argument in respect of shareholder interests in the insolvent undertaking, although it would likely not play well in the polity. Given other methods open to various levels of government to help protect employee interests, such as employment insurance, skills training, and preference to employee claims in insolvency and liquidation, employee interests alone are a rather unsatisfying justification for promoting business rehabilitation under an insolvency statute that does not substantively address labour issues. Something as simple as employee wage claim reforms could at least ensure a higher baseline for the treatment of employee claims, thereby providing this interest group a more powerful bargaining position in restructurings.⁵⁹

It is worth noting that labour interests made significant advancements in Canadian law and politics between the Great Depression and the recessions of

⁵⁸ See Sarra 2003, *ibid* Chapter 5 'Algoma Steel Corporation: Recognition of Human Capital Investments', Chapter 6 'Judicial Recognition of 'Social Stakeholders' in CCAA Proceedings: Anvil Range Mining Corporation'.

⁵⁹ But see *Wage Earner Protection Program Act*, SC 2005, c 47 [WEPPA], s 1, as am by SC 2007, c 36, s 93 [in force 7 July 2008, see SI/2008-78.] For a discussion of labour claims in business insolvencies under WEPP, see David E. Baird and Ronald B. Davis, 'Labour Issues' in Stephanie Ben-Ishai and Anthony Duggan (eds), *Canadian Bankruptcy and Insolvency Law* (Markham, ON: LexisNexis, 2007).

the 1980s and 1990s. For example, in 1940 the federal government under PM King (Liberal) enacted the *Unemployment Insurance Act*, which provided a financial cushion to laid-off workers.⁶⁰ The formation of the NDP in 1961, Canada's first labour-based political party, also gave labour interests more of a political voice than they previously enjoyed.⁶¹ In 1980 the government of Ontario Premier Davis (Progressive-Conservative) established the PBGF to guarantee pension benefits to workers whose workplace pension plans were underfunded.⁶²

The timeline of these developments suggests that labour's advancements in politics and law *outside* insolvency legislation facilitated an active voice for labour as a stakeholder in corporate reorganisations by the 1990s. For instance, Sarra credits the success of the 1991-1992 Algoma restructuring in large part to the active involvement of the Ontario government in that insolvency. In Sarra's view, Premier Rae's (NDP) political allegiance and the fact that the debtor was a large regional employer help explain his interest in seeing the company reorganise in 1991-1992.⁶³ Sarra also notes that the likely liability of the Premier Mike Harris' (Conservative) Ontario government for roughly C\$650 million in pension shortfalls through the PBGF may have been what prompted their eventual support for the 2001 Algoma reorganisation.⁶⁴ The growth of labour rights and political power outside insolvency legislation by the 1990s also helps account for the fact that Algoma's importance as a regional employer led PM

⁶⁰ *Unemployment Insurance Act*, SC 1940, c 44.

⁶¹ The NDP was formed in 1961, see Horowitz, n 8 above, Chapter 7 'The New Party'.

⁶² *Pension Benefits Amendment Act*, SO 1980, c 80, s 7. The applicable provisions are now contained in the *Pension Benefits Act*, RSO 1990, c P-8, ss 82-86.

⁶³ Sarra 2003, n 9 above, 178.

⁶⁴ See discussion of PBGF in Algoma's 2001 insolvency in Sarra 2003, *ibid* 178-179.

Bennett (Conservative) to prohibit the company from restructuring in the 1930s, but paradoxically led later NDP and Conservative Premiers to support reorganisation efforts in respect of this company. This underscores that changing ideas about corporate reorganisation were interrelated with the growth of stakeholder rights and political voice between the Great Depression and the 1980s and 1990s.

Job losses, wage issues and underfunded pensions are not *sui generis* to the field of corporate insolvency, but these issues must serve as guideposts for any restructuring plan justified on the basis of 'labour concerns.' The 'restructuring versus liquidation' (read: 'job retention versus job loss') dichotomy tends to obscure other, non-insolvency options and to imply that one need look no further than insolvency law for answers to labour issues that exist in an insolvency setting. The problem with this is that substantive insolvency law barely addresses labour concerns. Since labour's influence in an insolvency setting generally comes from outside insolvency law, it makes sense to look beyond insolvency law (and the spectre of liquidation) to gain perspective on how well, or to what extent, CCAAs advance social policy concerns relative to other policy options.

B. Summary

Rather than responding to restructuring 'incentives' established by insolvency law, large secured creditors resorted to receivership or insolvency law to effect reorganisations that were not possible through other means. Commercial

incentives drove lender-led restructuring efforts, as did lender solvency concerns in some cases. Some of the reasons bank-supported restructurings ended up under the CCAA included: the possibility of a court ordered stay which blocked other, usually junior, creditors from enforcing their claims; the ability to bind third-parties to a restructuring plan; and, the national scope of the Act, which was used to coordinate restructurings under multiple pieces of legislation. Restructuring through insolvency legislation often proved a more powerful and effective method of conducting company reorganisation for firms that fell within the Act's ambit.

This differs somewhat from developments in other countries as well as conventional narratives surrounding Canadian business reorganisation. For instance, in their discussion of bankruptcy reform in the US and England, Halliday and Carruthers note that banks' strong legal rights translated into relatively weak influence in the polity of law reform in both countries.⁶⁵ In Canada, banks proved quite successful at managing the public relations aspects of corporate insolvencies by framing the lender remedy of reorganisation as having wider public interest benefits, for example. Canadian courts picked up on this theme in their CCAA decisions. The demonstrable commitment of Canadian secured lenders to reorganising debtors through insolvency law (which usually entailed knock-on benefits for other constituencies) aided their success in the polity.

⁶⁵ Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business* (Oxford: Clarendon Press, 1998) [Carruthers and Halliday 1998], 154-157.

By the time of the 1992 reforms, banks were relatively immune from criticism that they pursued their own self-interest to the detriment of all other parties. The fact that Canadian developments primarily occurred in the courts benefitted large lenders. As repeat players, banks were better positioned than most other parties in an insolvency to influence case law developments.⁶⁶ The fact that courts are usually limited to existing legal architectures when effecting legal change⁶⁷ also helps explain why a DIP reorganisation regime was built onto an existing secured creditor remedy. So unlike American and British banks that saw their legal rights diminished by statutory reforms, Canadian banks managed to maintain fairly strong legal rights in the 1980s and 1990s cases that characterised the CCAA as a DIP reorganisation regime.

The success of Canadian banks in the polity stems in part from the fact that rather early in Canadian history, constitutional constraints forced secured lenders into the more public sphere of court-appointed receivership and insolvency law to effect 'full' corporate reorganisations. Additionally, in the 1980s and 1990s, Canadian banks spearheaded a number of high-profile restructurings in the courts. In England, the fact that bank efforts to restructure corporate debtors tended to take place in the more private space of the boardroom, may help explain why they were less successful at convincing the British public that they did not oppose restructuring in principle.⁶⁸ A public track record for reorganisations went a long way toward securing favourable reorganisation law developments for large Canadian lenders. If more

⁶⁶ See Galanter, n 26 above, esp 101-102, 137.

⁶⁷ *ibid.*

⁶⁸ See Chapter 4 'Weakening the Strong: Banks and Secured Lenders' by Bruce G. Carruthers, Terence C. Halliday and J. Scott Parrott in Carruthers and Halliday 1998, n 65 above.

streamlined enabling legislation had been possible earlier in Canadian history, as it was in England, Canadian banks may not have proved so successful in the polity.

Debtors that did not have the support of their largest secured creditors, and thus little chance of completing a restructuring, also resorted to insolvency law. In this (and later) period(s) such debtor-led efforts form the basis of conventional DIP restructuring narratives, which borrowed from American narratives surrounding chapter 11. But the CCAA itself neither created an incentive, nor forced majority secureds to accept a plan against their economic interests. In this regard, the Act remains an ‘enabling’ statute. ‘Incentives’ to restructure, which do not arise from the insolvency scenario itself—the type of incentives that may ‘tip the scales’ in favour of restructuring—may, however, come from outside of insolvency law altogether; in the form of government concessions or plan funding, for instance.⁶⁹

External factors can accordingly be very important considerations in individual reorganisations, and CCAA law more broadly. This underscores the importance of the broader social, political, legal and historic context in which restructuring takes place. It forms the (subconscious) lens through which courts, practitioners, politicians and scholars approach and interpret the CCAA. This context is dynamic. It continues to evolve and change, with implications for ideas about corporate reorganisation and this in turn influences the way various actors

⁶⁹ Eg the financial support offered by PM Pierre Trudeau’s (Liberal) government to Dome, see Lewington, n 33 above; ‘Dome Offered Plan’, n 33 above.

approach the statute. This perspective provides an explanation for why some actors, such as the government and the judiciary, have taken different views of the Act at different points in time. The federal government's hands-off approach to many CCAAs in the Great Depression is at odds with Canada's offers of plan funding for certain CCAAs during the 1980s and 1990s. The Canadian judiciary's approach to the Act follows a similar pattern. The relatively hands-off approach in the 1930s and 1940s is in marked contrast to far more activist styles of judging CCAA cases the 1980s, 1990s and beyond. Broader changes in the social, political, and legal terrain surrounding the CCAA contributed to changing ideas about corporate reorganisation, which in the 1980s and 1990s prompted greater governmental and judicial involvement. In the next section, I note some of the key contextual changes that occurred leading up to this period, and examine the mechanics of how these influenced contemporary interpretations of the Act.

III. Reinterpreting the CCAA in the 'public interest'

Even with secured lender support, reinventing the CCAA as a DIP restructuring mechanism involved overcoming some technical hurdles. Other authors have documented the progression of cases that 'fleshed out' the anaemic CCAA in terms of substantive law and procedure,⁷⁰ and have provided a chronology of the cases that transformed the CCAA into a modern DIP restructuring statute. Here I focus on the deeper influences underlying these practical and legal developments. Why did lawyers and courts view qualifying criteria such as the

⁷⁰ See eg David H. Goldman, 'Reorganizations under the Companies' Creditors Arrangement Act (Canada)' (1985) 55 CBR (NS) 36 [Goldman 1985]; David H. Goldman, David E. Baird and Michael A. Weinczok, 'Arrangements Under the Companies' Creditors Arrangement Act' (1991) 1 CBR (3d) 135; Jones, n 29 above.

trust deed requirement as ‘obstacles’? Whose interests did a corporate rehabilitation statute (purportedly) serve? Who propagated the idea that the CCAA advanced the public interest and stakeholder rights, and why? In other words, what prompted outward transformation of the CCAA from a secured creditor remedy into a DIP restructuring regime?

By way of background, commentators historically justified secured creditor remedies of seizure and receivership on the basis of the creditor’s proprietary interest in the collateral, and made relatively little effort beyond that to defend the priority of secured creditors and their powerful recovery mechanism normatively.⁷¹ As late as 1985 John R. Varley noted, for example,

[t]he legal justification for the secured creditor’s superior position is that such was bargained for, and the secured creditor should be as entitled to enforce its contractual rights under the bargain as is the borrower.⁷²

Changes in stakeholder rights that occurred between the 1930s and 1980s and 1990s, however, led to increasing concern about how junior creditors fared in insolvencies and receiverships.⁷³ In 1970 Tassé linked these concerns with Canada’s bifurcated system of dealing with secured and unsecured claims, and stalled efforts to unite these systems under a new bankruptcy law.⁷⁴ He noted

⁷¹ M.A. Springman and Eric Gertner (eds), *Debtor-Creditor Law: Practice and Doctrine* (Toronto: Butterworths, 1985), 433-439, citing some examples such as R.M. Goode, ‘Is the Law Too Favourable to Secured Creditors?’ (1983-1984) 8 CBLJ 53; C.R.B. Dunlop, *Debtor-Creditor Law in Canada* (Toronto: Carswell, 1981), 436.

⁷² Springman and Gertner (eds), *ibid* 435.

⁷³ Tamara M. Buckwold, ‘The Treatment of Receivers in the Personal Property Security Acts: Conceptual and Practical Implications’ (1998) 29 CBLJ 277, 283-90.

⁷⁴ Tassé, n 3 above, 56-57.

that even within the field of receivership, a number of potential issues arose that could act detrimentally to the interests of junior creditors.

Unfairness to junior creditor rights by large secureds in receiverships probably existed at least as far back as the 1920s. But earlier commentators recorded relatively few complaints about issues of 'fairness.' Instead practitioners such as Fraser regarded efforts by junior creditors to try to exploit opportunities to improve their priority vis-à-vis bondholders as merely a nuisance.⁷⁵ By the 1980s, however, high profile cases called attention to these issues with different results. This points to changes in other factors, such as the development of stakeholders' rights and political voice, which ultimately lent traction to fairly longstanding 'abuses' and 'unfairness' in business insolvencies.

Debtor use of the CCAA in the 1980s and 1990s as a 'shield' against secured creditor remedies in receivership or bankruptcy was also a newly acceptable phenomenon and required a fresh justification. In this regard as well, concern for stakeholder rights played an important role. The public interest narrative that developed around stakeholder rights in insolvency centred corporate reorganisation debates around sympathy-evoking stakeholder groups, instead of unsympathetic images of large secured creditors, inept or self-serving managers, or shareholders who stood only to lose their investments. This provided a convenient gloss for large creditors and large companies insofar as it helped marshal support for reforms. Had the CCAA instead been cast as a secured

⁷⁵ W.K. Fraser, 'Reorganization of Companies in Canada' (1927) 27 Colum L Rev 932, 950. For instance, junior creditors sometimes tried to challenge bondholders' security on technical grounds, such as a defect in the registration.

creditor remedy, it is doubtful that the news media and legal literature would have received its revival as warmly.⁷⁶ It is also unlikely courts would have been as keen to give a large and liberal interpretation to an essentially private secured creditor remedy. The ‘public interest’ thus provided a palatable policy rationale for expansive statutory interpretation. At the same time, widespread support for the CCAA was ‘explained’ based on the fact it advanced the wider ‘public interest.’ Courts, counsel and scholars used ‘public interest’ concerns as guideposts for reinterpreting the Act.

A. Courts and statutory (re)interpretation

Confronted with CCAA applications in the 1980s, courts approached the interpretation of the Act against a much-changed socio-political backdrop and with a new principle of statutory interpretation in hand. Relying on Driedger’s 1974 modern principle of statutory interpretation,⁷⁷ courts applied purposive statutory interpretation in CCAA cases.⁷⁸ For example, in *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd.* (1988), Forsyth J. held:

⁷⁶ See eg Anne Fletcher, ‘Little known law saves a business’ (17 September 1990) *Financial Post*, section 4, page 36; Heather D. Whyte, ‘Canada’s Chapter 11 is suddenly a hit’ (20 May 1991) *Financial Post*, section 1, page 3.

⁷⁷ Driedger 1974, n 14 above.

⁷⁸ For an overview of case law on this point see eg *Bell ExpressVu Ltd. Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*], paras 26-27, citing: Driedger 1974, *ibid*; *Stubart Investments Ltd. v R*, [1984] 1 SCR 536, 578, 10 DLR (4th) 1, per Estey J.; *Québec (Communauté urbaine) c Notre-Dame de Bonsecours (Corp.)*, [1994] 3 SCR 3, 17, 63 QAC 161; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27, 106 OAC 1, para 21 [*Rizzo & Rizzo*]; *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385, para 25; *R v Araujo*, 2000 SCC 65, [2000] 2 SCR 992, para 26; *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45, para 33, per McLachlin C.J.; *Chieu v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, para 27; *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act* 1985], s 12; John Willis, ‘Statute Interpretation in a Nutshell’ (1938) 16 Can Bar Rev 1, 6; *R v Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 SCR 867, para 52; *Murphy v Welsh*, [1993] 2 SCR 1069, 1079, 106 DLR (4th) 404; *Pointe-Claire (Ville) c S.E.P.B., Local 57*, [1997] 1 SCR 1015, para 61, 46 Admin LR (2d) 1, per Lamer C.J.

The SCC upheld this approach to interpreting the CCAA in the recent case of *Re Indalex Ltd.*, 2013 SCC 6, JE 2013-185, para 136.

In construing a statute, one must always keep in mind the objects that the piece of legislation is designed to achieve. This principle is emphasized in Driedger:

The comprehension of legislation is, in a sense, the reverse of the drafting process. The reader begins with the words of the Act as a whole and from a reading of these words in their setting, deduces the intention of Parliament as a whole, the legislative scheme, and the object of the Act, and then makes construction of the particular enactment harmoniously with the words, framework and object of the Act. [Citations omitted.]⁷⁹

In the bankruptcy case *Re Rizzo & Rizzo Shoes Ltd.* (1998), Iacobucci J. elaborated:

... [Driedger] recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [Citations omitted.]⁸⁰

The federal *Interpretation Act* complemented this approach by providing that every Act of Parliament was to be 'deemed remedial, and ... given such fair, large and liberal construction and interpretation as best ensures the attainment of its

⁷⁹ *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd.* (1988), 92 AR 81, 72 CBR (NS) 1 (QB) [*Norcen 1*], paras 58-59, citing Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 2nd ed, 1983) [Driedger 1983], 74.

⁸⁰ *Rizzo & Rizzo* n 78 above, paras 21-22, citing Driedger 1983, *ibid* 87.

objects.’⁸¹ Although the federal *Interpretation Act* has contained a provision to this effect from as early as 1927,⁸² earlier reported decisions under the CCAA did not bear out the ‘large and liberal’ interpretation now associated with Canadian statutory interpretation, and the CCAA in particular.

According to judicial decisions from the 1980s and 1990s, the use of the CCAA to address firm failures further underscored the remedial nature of the legislation itself. In *Elan Corp. v Comiskey (Trustee of)* (1990) Doherty J.A., dissenting in part, opined:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.⁸³

In *Re Lehndorff General Partner Ltd.* (1993) for instance, Farley J. held that the Act is ‘remedial legislation entitled to a liberal interpretation’ because it is meant ‘to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy’.⁸⁴

⁸¹ *Interpretation Act* 1985, n 78 above, s 12, cited in *Quintette Coal Ltd. v Nippon Steel Corp* (1990), 2 CBR (3d) 303, 51 BCLR (2d) 105 (CA) [*Quintette*], para 14, as part of the court’s interpretation of the CCAA.

⁸² *Interpretation Act*, RSC 1927, c 1, s 15; *Interpretation Act*, RSC 1952, c 158, s 15. Note that this provision was shortened and renumbered in the 1967: *Interpretation Act*, SC 1967, c 7, s 11.

⁸³ *Elan Corp. v Comiskey (Trustee of)* (1990), 1 OR (3d) 289, 41 OAC 282 (CA) [*Elan*], para 57 [dissenting in part].

⁸⁴ *Re Lehndorff General Partner Ltd.* (1993), 17 CBR (3d) 24, 9 BLR (2d) 275 (Ont Gen Div), para 5, per Farley J.

In the later case *Bell ExpressVu Ltd. Partnership v Rex* (2002), the SCC specifically identified the supporting role of section 12 of the *Interpretation Act* in Driedger's interpretive approach. In this case the court noted that it frequently cited the modern principle of statutory interpretation as its preferred approach to statutory interpretation, and that this principle was 'buttressed' by section 12 of the *Interpretation Act* in the case of federal legislation.⁸⁵

Taken together, cases such as these provided a new framework for interpreting the CCAA, which differed dramatically from the 'strict and narrow' approach evident in case law from the 1930s and 1940s.

Yet the emphasis in the modern approach to statutory interpretation on the 'purposes' or 'objects' of legislation posed certain difficulties with respect to the CCAA. By the 1980s and 1990s courts and practitioners saw the CCAA as obscure and antiquated.⁸⁶ The text of the statute was skeletal, and did not contain a preamble or other statement of its purposes. Little published insolvency law writing on the CCAA existed that could shed light on the original objects of the Act,⁸⁷ and materials such as Edwards' journal article, Parliamentary debates and reported cases tended to be misleading. Material that could have helped elucidate the Act's objects often fell under non-insolvency law headings, which

⁸⁵ *Bell ExpressVu*, n 78 above, para 26. Note this was not a bankruptcy or insolvency case.

⁸⁶ See eg 'Dome Pete finds obscure law for defence against Swiss creditors' (25 September 1986) *Toronto Star* E3 ['Dome Pete finds obscure law']; Fletcher, n 76 above; Laura Ramsay, 'Troubled firms seek protection under once-forgotten 1933 law' (13 June 1991) *Financial Post* 16; Konrad Yakabuski, 'Obscure Canadian law helped O&Y' (18 May 1992) *Toronto Star* B2.

⁸⁷ Eg Stanley E. Edwards, 'Reorganizations Under the Companies' Creditors Arrangement Act' (1947) 25 *Can Bar Rev* 587 [Edwards 1947]; Tassé, n 3 above, esp 19-22, but I have not found any reported CCAA decisions which make reference to this report.

do not appear to have been consulted.⁸⁸ Yet in order to interpret the Act according to Driedger's principle, courts had to arrive at a policy underlying the CCAA. This they did, although the purposes the courts attributed to the Act differed from its original objects.

Judicial decisions in the 1980s and 1990s conceived of the CCAA as a stand-alone insolvency statute, instead of a branch of company or receivership law. Conceptually separating the CCAA from these other areas of law meant that courts were relatively free in, and reliant on, their discretion to analogise and distinguish CCAA law from other receivership and restructuring precedents. This opened up the possibility of developing unique practices and procedures under the Act according to its new objects.

The CCAA's new purposes accordingly entailed great room for the exercise of judicial discretion and inherent jurisdiction. In cases such as *Norcen*, the court, after averring to Driedger stated:

The authorities are of some assistance in arriving at a determination of the purpose of the C.C.A.A. Illustrative are the words of Wachowich J. in *Meridian Dev. Inc. v. T.D. Bank*:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent

⁸⁸ Eg W.K. Fraser, *Handbook on Canadian Company Law with Forms* (Toronto: Carswell, 4th ed, 1945), 274, 282-84, 290-292; J.L. Stewart and Laird Palmer (eds), *Fraser & Stewart Company Law of Canada* (Toronto: Carswell, 5th ed, 1962), 468-476; Winslow Benson, *Business Methods of Canadian Trust Companies* (Toronto: Ryerson Press, 1949) [Benson 1949], 163-173 esp 170; Winslow Benson, *Business Methods of Canadian Trust Companies* (Toronto: Ryerson Press, 2nd ed, 1962), 196; Fred R. MacKelcan, 'Canadian Bond Issues' (1952) 30:4 Can Bar Rev 325, esp 346-347; Stanley E. Edwards, 'Protection of the Rights of Creditors in the Reorganization of Insolvent Canadian Companies' (LL.M. Thesis, Harvard Law School, Harvard University, 1947) [Edwards LLM]; Jean Pierre Garant, 'The floating charge in Canadian bond market' (Ph.D. Thesis in Finance, University of Illinois at Urbana-Champaign, 1971) [unpublished].

company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.⁸⁹

Courts based their exercise of judicial discretion or inherent jurisdiction in part on the skeletal nature of the Act, noted in numerous decisions.⁹⁰

Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers [inherent jurisdiction] to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.⁹¹

The 'large and liberal' approach to statutory interpretation augmented misconceptions about the CCAA's purposes, as courts used section 12 of the federal *Interpretation Act* to flesh out the statute according to its 'new' objects. A growing body of case law affirmed, reaffirmed and elaborated on initial misconceptions about the CCAA. Not only did this validate the 'new' objects of the Act, it apparently contributed to the legitimacy of a normative policy of promoting business reorganisation through Canadian insolvency law.

The CCAA represented the *only* Canadian insolvency law to facilitate complete company reorganisations until 1992, which also influenced judicial decision-making during this period. The 1980s and 1990s recessions created compelling commercial reasons for debtors and secured creditors to try to use the CCAA to

⁸⁹ *Norcen 1*, n 79 above, paras 60-61, citing *Meridian Dev. Inc. v Nu-West Ltd.* (1984), 53 AR 39, 52 CBR (NS) 109 (QB) [*Nu-West*], 114.

⁹⁰ See eg *Re Westar Mining Ltd.* (1992), 70 BCLR (2d) 6, 14 CBR (3d) 88 (SC) per Macdonald J., para 23, cited *inter alia* in *Re Stelco* (2005), 75 OR (3d) 5, 253 DLR (4th) 109 (CA), para 32.

⁹¹ *ibid.*

achieve restructurings that could not be effected through other means. In *Re Philip's Manufacturing Ltd.* (1991), for instance, the British Columbia Supreme Court held:

The bankruptcy proposal procedures are quite impractical for the average company because they do not bind secured creditors ... While that deficiency appears to have been recognized, based on the bankruptcy amendments presently proposed [referring to the 1992 amendments to the *Bankruptcy Act*], the Act [CCAA] now forms the only practical means of avoiding liquidation in the event of insolvency. That means, and access to it by the greatest number of potential debtors, should be preserved. The practice of gaining access to the Act by the "entry fee" of an instant trust deed is by no means new. It has been condoned by this and other courts on numerous occasions in the past. If that is judicial legislation, so be it. [Citations omitted, emphasis added.]⁹²

The adverse impact of large corporate insolvencies on stakeholders ('public interest considerations') represented an additional rationale to attempt restructurings. Reported decisions from this period illustrate particular judicial sensitivity to this factor in reorganisation efforts.⁹³ Interestingly it seems few (if any) lawyers, courts or commentators seriously questioned the normative desirability of corporate reorganisation by this point in Canadian history. This underscores how much ideas surrounding corporate failure had changed in the decades since the Great Depression and even since the 1970s.⁹⁴ Not

⁹² See eg *Re Philip's Manufacturing Ltd.* (1991), 9 CBR (3d) 1, 60 BCLR (2d) 311 (SC) [*Philip's Manufacturing*], para 34.

⁹³ See eg Algoma Plan Sanctioning Hearing, 1992, *Algoma Steel Corporation*, Court File Doc. No. B62191-A (Ont Ct [Gen Div]); Algoma Plan Sanctioning Hearing, 2001, [2001] OJ No 4630 (Ont SCJ), Court File No 01-CL-4115; Endorsement Order, 19 December 2001; *Re Algoma Steel Inc.* (2002), 30 CBR (4th) 1, [2002] OJ No 66 [Ont SCJ] (Commercial List) [*Re Algoma*], para 8, per LeSage, C.J.S.C., cited in Sarra 2003, n 9 above, 157.

⁹⁴ See eg John D. Honsberger, 'Insolvency and the Corporate Veil in Canada' (1972) 15 CBR (NS) 89; Tassé, n 3 above, 88.

coincidentally this period also roughly coincides with the advent of theoretical inquiry into the question of corporate insolvency by legal scholars.⁹⁵ With DIP corporate reorganisation widely seen as acceptable, and even desirable, the only remaining issue facing courts, counsel and scholars was how to conceptually and practically justify debtor-led reorganisation for consumption by both the public and the legal community.

i. Characterising the CCAA as:

a. Primarily insolvency law

The few reported decisions on the CCAA that existed by the early 1980s reinforced earlier judicial characterisation of the Act as primarily insolvency law, rather than insolvency law out of necessity. Reported cases, especially the brief decisions of the 1930s and 1940s, illustrate judicial confusion about the CCAA's true objects and usually dealt narrowly with the Act as an insolvency law statute.⁹⁶ Recall that in the CCAA reference, for example, the SCC's judgement did not substantively address the main constitutional issue that the Act raised concerning secured creditor rights.⁹⁷ Nevertheless, a number of reported cases

⁹⁵ See eg Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, MA: Harvard University Press, 1986); Thomas Jackson and Robert E. Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Va L Rev 155; Elizabeth Warren, 'Bankruptcy Policy' (1987) 54(3) U Chic L Rev 775 [Warren 1987]; Donald Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1992-1993) 71 Tex L Rev 541 Karen Gross, *Failure and Forgiveness* (New Haven: Yale University Press, 1997) [Gross 1997]; Sarra 2003, n 9 above.

⁹⁶ See eg *Re Avery Construction Co.* (1942), 24 CBR 17, 1942 CarswellOnt 86 (Ont Sup Ct [in Chambers]) [*Avery Construction*]; *Re Arthur W. Flint Co.* (1944), 25 CBR 156, [1944] OWN 325 (Ont Sup Ct [in Bankr]), cited in Goldman 1985, n 70 above, cited in turn in cases such as: *Banque commerciale du Canada c Station du Mont Tremblant Inc.* (1985), JE 85-378, 1985 CarswellQue 544, para 26; *Elan*, n 83 above, para 56 [dissenting in part].

⁹⁷ Edwards LLM, n 88 above, 12-14, citing H.E. Manning, 'Company Reorganization' (1932-1933) 2 Fortnightly LJ 139, 158, 176, 192, and H.E. Manning, 'Company Reorganization' (1935-1936) 5 Fortnightly LJ 23, 40. Note that these sources are not mentioned in Edwards 1947, n 87 above.

from the 1980s cited passages from the CCAA constitutional reference as an indication of the Act's original purposes.⁹⁸ For example, in *Meridian Developments Inc. v Toronto Dominion Bank*, the Alberta Court of Queen's Bench wrote:

In the words of Duff C.J.C. who spoke for the court [*Reference re Companies' Creditors Arrangement Act*]:

... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. ... [Citations omitted.]⁹⁹

The fact that the CCAA was largely disconnected from the legislative, economic and political context that surrounded its enactment influenced how courts approached the Act. The CCAA had remained frozen in time, which contributed to its obscurity by the 1980s. Recall that the Act enshrined majority provisions into legislative form, and in so doing responded to the possibility of FI failures amid the Great Depression, but only to a limited extent due to constitutional controversy over secured creditor rights. Constitutional and corporate insolvency law discourses, on the other hand, had progressed tremendously in the decades following the 1930s.¹⁰⁰

⁹⁸ *Reference re Companies' Creditors Arrangement Act*, [1934] SCR 659, [1934] 4 DLR 75 [CCAA Reference].

⁹⁹ *Nu-West*, n 89 above. See also eg *Icor Oil & Gas Co. v Cdn. Imperial Bank of Commerce* (1989), 102 AR 161, 1989 CarswellAlta 693 (QB); *Diemaster Tool Inc. v Skvortsoff* (Trustee of) (1991), 3 CBR (3d) 133, 1991 CarswellOnt 168 (Ont CJ), para 37; *Re Norm's Hauling Ltd.* (1991), 6 CBR (3d) 16, 91 Sask R 210 (QB) [*Norm's Hauling*], para 3.

¹⁰⁰ See eg Tassé, n 3 above, Chapter 1 'Bankruptcy in a Changing Society'; David A. Skeel Jr., *Debt's Dominion* (Princeton: Princeton University Press, 2001) [Skeel 2001], Chapter 5 'Raising the Bar with the 1978 Bankruptcy Code'; Carruthers and Halliday 1998, n 65 above, 194-201, 264.

The fact that practitioners and courts in the 1980s viewed the CCAA as primarily insolvency law, rather than insolvency law out of necessity underscores the tremendous shift that took place. By extending receivership remedies for secured creditors into insolvency law, the CCAA and FCAA legitimised the adjustment of secured creditor rights as a valid part of Canadian bankruptcy and insolvency. They did this so successfully that secured creditor rights were a non-issue in the 1980s and 1990s, constitutionally speaking.¹⁰¹ Insolvency law discourses, particularly surrounding corporate reorganisation, also advanced significantly leading up to the 1980s. Most notably, a period of bankruptcy reform in the US during the 1970s culminated in the enactment of *inter alia* chapter 11 in 1978.¹⁰² Chapter 11 quickly became a popular DIP reorganisation regime among American corporations, and a model for many other countries contemplating bankruptcy reform in order to facilitate reorganisations.¹⁰³ Chapter 11 also promoted and legitimised going-concern reorganisations as a normative policy goal for corporate insolvency legislation. Canadian and American commentators and theorists picked up and promoted this idea as well, whereas this view represented just one of two competing ideals of corporate bankruptcy half a century earlier.¹⁰⁴

Historical conceptions of secured creditors as progenitors of restructuring were notably absent from Canadian restructuring discourses during the 1980s and 1990s. These were supplanted by new ‘public interest’ narratives that cast

¹⁰¹ But see J. Murray Ferron, ‘The Constitutional Impairment of the Rights of Secured Creditors in Canada and the United States’ (1986) 60 CBR 146, 161-167.

¹⁰² Skeel 2001, n 100 above, Chapter 5, ‘Raising the Bar with the 1978 Bankruptcy Code’.

¹⁰³ See eg Skeel 2001, *ibid* 241-242.

¹⁰⁴ See Roger S. Foster, ‘Conflicting Ideals for Corporate Reorganization’ (1935) 44 Yale LJ 923, cited in Edwards LLM, n 88 above, 29.

secured in a more minor, supporting role. This contrasts with the English experience, for example. English banks remained major providers of corporate financing leading up to the 1970s and 1980s, which they still secured using floating charges. In 1977 PM James Callaghan's Labour government issued a report that pushed to subject floating charge holders to a bankruptcy law-restructuring regime.¹⁰⁵ This report was followed by significant reforms to English insolvency law in the 1980s. In Canada, on the other hand, new institutions entered the corporate lending market in the 1960s and 1970s. During this period Canadian banks overtook life insurance companies as major providers of long-term corporate loans. Furthermore Canadian banks tended to take security for corporate loans under the *Bank Act* or PPSAs, rather than under trust deeds. By the 1980s and 1990s, the Canadian secured lending secured lending landscape looked quite different than it had in the 1930s when Parliament enacted the CCAA. The major lenders had changed and so had the preferred form of taking security. As a result of this, and secured creditor support in a number of high-profile CCAAs, Canadian reorganisation developments again diverged from those in England, despite similar legal origins. This in turn proved significant for Canadian corporate restructuring narratives.

In light of this new corporate insolvency law paradigm, and the near disappearance of the original political, economic and legal factors that framed the CCAA's enactment, lawyers, courts and commentators in the 1980s and 1990s regarded the Act as primarily an insolvency law statute. This reaffirmed

¹⁰⁵ Carruthers and Halliday 1998, n 65 above, 194-201.

earlier judicial mischaracterisation of the Act evident in cases such as the CCAA Reference. To contemporary eyes, the CCAA represented a stand-alone restructuring regime, instead of a part of a larger body of law and practice concerning secured financing and receivership reorganisations.

b. Principally a debtor remedy

Several factors help explain courts' characterisation of the CCAA as a debtor remedy during this period. First, debtors, not creditors, often made CCAA applications,¹⁰⁶ and media reports usually painted the Act as a debtor remedy along the lines of chapter 11¹⁰⁷ amid growing popularity and legitimisation of American chapter 11 as a DIP restructuring mechanism.¹⁰⁸ Furthermore, in 1970 the Tassé Report had recommended improving the operation of compromise or arrangements under bankruptcy and insolvency law. This showed that views on DIP reorganisation were changing within Canada as well.¹⁰⁹ Evidently debtor or manager abuse of corporate reorganisation provisions was no longer the overarching concern it once was. In view of these considerations, as well as

¹⁰⁶ See eg *Station Mont-Tremblant Inc. c Banque commerciale du Canada* (1984), 54 CBR (NS) 241, 1984 CarswellQue 37 (Que SC); *Re Victoria Mortgage Corp.* (1985), 57 CBR (NS) 157, 1985 CarswellBC 477 (BC SC); *Re Canadian Bed & Breakfast Registry Ltd.* (1986), 65 CBR (NS) 115, 1986 CarswellBC 504 (BC SC) [*Canadian Bed & Breakfast Registry*]. See further, Dow Jones Service, 'Creditors of Forex accept plan' (21 March 1985) *Globe and Mail* (Nexis); Dow Jones Service, 'Investment News: Page Petroleum' (14 March 1986) *Globe and Mail* B6; Dow Jones Service, 'Lochiel gets staying order' (16 April 1986) *Globe and Mail* B11; McIntosh, n 35 above; Dow Jones Service, 'Company receives stay of proceedings' (9 February 1987) *Globe and Mail* (Nexis), referring to Trans-Canada Resources Ltd of Calgary; Kevin Cox, 'Sale of \$50 bonds aids Principal units' (11 July 1987) *Globe and Mail* (Nexis); 'Investment News: Mux Lab' (19 November 1987) *Globe and Mail* (Nexis).

¹⁰⁷ See eg Whyte, n 76 above; Lawrence J. Crozier, 'Good Faith and the Companies' Creditors Arrangement Act' (1989) 15 CBLJ 89, 89, FN 2, citing Ronald N. Robertson, 'Legal Problems on Reorganization of Major Financial and Commercial Debtors' Canadian Bar Association Seminar: 'Mega-International Insolvencies' (1983) [unpublished]; Arthur O. Jacques, 'Creditor Arrangements' Canadian Bar Association Seminar: 'Corporate Loan Workouts' (1985) [unpublished].

¹⁰⁸ Kevin J. Delaney, *Strategic Bankruptcy* (Berkeley: University of California Press, 1992).

¹⁰⁹ Tassé, n 3 above, 81, 175.

developments in stakeholder rights and statutory interpretation, courts saw the policy of the CCAA as helping debtors and their creditors attempt restructurings in order to avoid liquidation and winding-up.

The fact that a secured creditor remedy was presumed to be debtor remedy speaks to the equivocal nature of the Act's few provisions. It also calls attention to the fact that the CCAA's 'new' purposes came from sources other than the Act itself. The skeletal CCAA of the 1980s lacked clear policy guidance, and its few substantive provisions were often ambiguous. For instance, either the debtor or one of its creditors could make an application under the Act.¹¹⁰ In other words, both debtors and creditors had unilateral recourse to the statute, producing rather indeterminate policy 'guidance.' In contrast, chapter 11, which Congress did intend principally as a remedy for corporate debtors, contains separate, little used provisions for creditor-initiated applications, known as 'involuntary petitions.'¹¹¹

Canadian interpretations of the CCAA as a debtor remedy were interrelated with several other ideas. Chief among these was the notion that secured creditors conventionally did not resort to bankruptcy or insolvency law,¹¹² and did not seek to restructure insolvent firms. This construction of secured creditor

¹¹⁰ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA 1985 (as it stood up to the 1997 amendments)], ss 4, 5.

¹¹¹ 'Voluntary petitions' are those filed by the debtor. 'Involuntary petitions' in respect of the debtor may be filed by creditors, subject to certain (more stringent) criteria, see 11 USC ss 301, 303; Charles R. Sterbach, 'Anatomy of an Involuntary Corporate Bankruptcy' (2004) 13 J Bankr L & Prac 1 Art 1, FN 2.

¹¹² Until 1992, the BIA applied only to unsecured claims, although secured creditors could 'opt in.' This reflects the Act's origins as an unsecured creditor remedy, see Tassé, n 3 above, 16; Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014), Chapter 9 'Reform Achieved: The *Bankruptcy Act of 1919*'.

preferences appears to draw implicitly on American and British experiences with enacting corporate restructuring legislation under the heading of 'insolvency law' in the 1970s and 1980s.¹¹³ But this framing of secured creditor preferences is ill-suited to the Canadian context in view of the demonstrable commitment of large secured creditors to restructuring debtors both inside and outside insolvency law. It is especially inapt with respect to secured creditor remedies such as CCAA and FCAA 1934. While large secured lenders in Canada were probably no more eager to resort to conventional insolvency legislation than their American or British counterparts, from an early date the practical outcome of the division of powers made insolvency law their best option in certain cases. Nevertheless banks may be more inclined to restructure large companies, as opposed to small ones, and in any event the restructuring must make commercial sense for the bank.

The well-publicised actions of large Canadian banks with respect to farm foreclosures in the 1980s likely contributed to the view that large secureds preferred to pursue liquidation, rather than debt restructuring.¹¹⁴ Vocal bank opposition to certain debtor-led CCAAs probably compounded this view.¹¹⁵ Due to the financial resources that are necessary to participate fully in a court-driven process, however, banks were arguably among the few stakeholders in a position

¹¹³ Carruthers and Halliday 1998, n 65 above, 206; British Bankers Association, 'The London Approach' (16 February 2004) online: <<http://www.bba.org.uk/policy/article/london-approach/fx-and-money-markets-policy>> (accessed 30 August 2013); Jay Lawrence Westbrook, *et al.*, *A Global View of Business Insolvency Systems* (Leiden: The World Bank and Brill, 2010), Chapter 5 'Informal Workouts and Restructurings', esp 175-179.

¹¹⁴ See eg Martin Mittelstaedt, 'Banks lobbying to change farm foreclosure bill' (30 April 1983) *Globe and Mail* B1; Allen Wilford, *Farm Gate Defense: The Story of the Canadian Farmers Survival Association* (Toronto: New Canada Publications, 1985), Chapter 6 'Fighting the Banks for our Farms'.

¹¹⁵ See eg *Hongkong Bank of Canada v Chef Ready Foods Ltd.* (1990), 4 CBR (3d) 311, 51 BCLR (2d) 84 (CA) [*Chef Ready*].

to challenge the interpretation or application of the CCAA, especially in 1980s cases. This probably further contributed to the (mis-)perception that large secureds generally objected to debtor reorganisation, and preferred to pursue other remedies. This flew in the face of bank support for other large reorganisations in this period.

c. Intended to facilitate going-concern reorganisations

The idea that the CCAA was intended to facilitate going-concern reorganisations is related to perceptions that the Act was a debtor remedy.¹¹⁶ While creditor remedies generally seek to maximise creditor returns, a corporate debtor remedy suggests that there is at least a chance that the debtor will continue to 'exist.' On the other hand, if going-concern reorganisations were not a possible goal of restructuring regimes such as the CCAA, they probably would not be characterised as debtor remedies.

In keeping with the impression that the CCAA was a debtor remedy, numerous reported cases from the 1980s and early 1990s articulated going-concern reorganisations as a main objective of the Act.¹¹⁷ For example, in *Northland Properties* (1989) the court stated:

¹¹⁶ But see *Montreal Trust Co. v Atlantic Acceptance Corp.* (1975), 9 OR (2d) 265, 60 DLR (3d) 193 (CA), Appendix A, para 11; Hon. S.H.S. Hughes *et al.*, *Report of the Royal Commission Appointed to Inquire into the Failure of Atlantic Acceptance Corporation, Limited* (Toronto: Queen's Printer for Ontario, 1969); Irvine Duncan Weeks, 'The Collapse of Atlantic Acceptance Corporation and its Effect on the Structure of Liabilities and Quality of Reporting of Canadian Finance Companies' (M.B.A. Thesis, Faculty of Commerce and Administration, University of British Columbia, 1968) [unpublished], 21-22.

¹¹⁷ See eg *Norcen 1*, n 79 above, para 74 per Forsyth J.; *Chef Ready*, n 115 above, para 10; *Elan*, n 83 above, para 56 [dissenting in part]; *Re United Maritime Fishermen Co-operative* (1988), 88 NBR (2d) 253, 69 CBR (NS) 161 (CA) [*UMF CA*], para 11.

... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators...¹¹⁸

Such statements of the CCAA's purposes meshed well with stakeholder-centred theories of business bankruptcy then in circulation, since they presumed a more stakeholder inclusive theory of the corporation (at least at the point of insolvency) than the shareholder primacy model, for instance. The courts' remaking of the CCAA into a more stakeholder-friendly reorganisation regime followed its reinterpretation of Canadian corporate governance along similar lines.¹¹⁹ The transformation of the CCAA occurred as academics began incorporating stakeholder interests into formal theories and accounts of business bankruptcy, and rehabilitating the debtor accordingly took on wider importance.¹²⁰

Earlier reported decisions also influenced the 'going-concern reorganisation' object of the Act. For example, in *D. W. McIntosh Ltd.* (1939) the court noted:

¹¹⁸ *Northland Properties Ltd. v Excelsior Life Insurance Co. of Canada* (1989), 34 BCLR (2d) 122, 73 CBR (NS) 195 [*Northland*], para 27.

¹¹⁹ See eg *Teck Corp. Ltd. v Millar*, (1972), 33 DLR (3d) 288, [1973] 2 WWR 385 (BCSC) [*Teck*]. See further *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*]. But see Jacob S. Ziegel, 'Creditors as Corporate Stakeholders: The Quiet Revolution - An Anglo-Canadian Perspective' (1993) 43 UTLJ 511.

¹²⁰ See eg Warren 1987, n 95 above; Donald R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91:4 Columbia L Rev 717; Karen Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Wash Univ LQ 1031; Gross 1997, n 95 above; Karen Gross, 'On the Merits: A Response to Professors Girth and White' (1999) 73 Am Bankr LJ 485; Marjorie Girth, 'Rethinking Fairness in Bankruptcy Proceedings' (1999) 73 Am Bankr LJ 449; Sarra 2003, n 9 above.

I am well aware of the fact that *The Companies' Creditors Arrangement Act* has been held to be bankruptcy legislation but the object of that Act is to keep companies going and not particularly to sell all the assets and divide the proceeds among the creditors.¹²¹

The court in *In re Avery Construction* (1942) stated:

To my mind *The Companies' Creditors Arrangement Act, 1933*, is designed to keep the company in business, and is not to be used as a means of winding up the company...¹²²

In some cases courts quoted from Stanley Edwards' 1947 article on the CCAA in support of the 'going-concern reorganisation' objective of the CCAA. In the *Quintette* (1990) case, for instance, the court excerpted and relied on several passages from Edwards' article, to expound the 'historic and continuing purposes of the Act: Its object, as one Ontario court has stated in a number of cases, is to keep a company going despite insolvency.'¹²³

Nevertheless continuation of the debtor company is better described a common feature of CCAAs, rather than the Act's main objective. At the outset of his thesis Edwards states: '[o]ne of the main features of a reorganization ... is that the business of the company is allowed to continue.'¹²⁴ (Admittedly, this issue is often moot because the debtor company continues as a going-concern after CCAA proceedings.)

¹²¹ *In re D. W. McIntosh Ltd.* (1939), 20 CBR 234, 251, 1939 CarswellOnt 68 (Ont Sup Ct [in Bankr]), para 58, per Urquhart J., cited in *Avery Construction*, n 96 above, para 7, per Urquhart J.

¹²² *Avery Construction*, *ibid* para 6, cited in *Elan*, n 83 above, para 56 [dissenting in part].

¹²³ *Quintette*, n 81 above, para 10, citing Edwards 1947, n 87 above, 592.

¹²⁴ Edwards LLM, n 88 above, 2 [emphasis added].

Recall that the CCAA (and bondholder reorganisations) facilitated going-concern reorganisations because liquidation was often unviable or suboptimal as a secured creditor remedy.¹²⁵ According to Edwards, reorganisation was primarily a commercial response to a business problem, which in some cases overlapped with a situation of firm insolvency.¹²⁶ Secured creditors pursued (and still pursue) debt restructuring because of inadequacies or failures in the market for liquidations.¹²⁷ Contemporary scholars such as Jérôme Sgard have highlighted the necessity of functioning markets for liquidation to effectively operate as a creditor remedy.¹²⁸ So one can argue in favour of company reorganisation on the basis that liquidation is an inadequate secured creditor remedy. But this is distinct from arguments that promote corporate reorganisation because it is perceived to be more politically or socially desirable than liquidation.

Edwards' thesis confronted the problem of how to facilitate reorganisations under existing Canadian legislation in order to benefit creditors and shareholders without unduly sacrificing their rights.¹²⁹ In his thesis and journal article he advocates an insolvency law-restructuring regime to facilitate corporate reorganisations, and outlines suggestions for how courts might promote this under the CCAA *without* legislative amendment. Edwards presents the possibility of wider 'public interest' benefits of reorganisation for stakeholders, such as employees, as a potential, additional rationale in support of

¹²⁵ *ibid* 1-3, 12.

¹²⁶ *ibid* 1-3, 10-13.

¹²⁷ Edwards 1947, n 87 above, 592, citing reasons for promoting reorganisation including lack of a buyer for the whole enterprise.

¹²⁸ Jérôme Sgard "Do legal origins matter?" The case of bankruptcy laws in Europe 1808-1914' (2006) 10 *European Rev of Econ Hist* 389, 394.

¹²⁹ Edwards LLM, n 88 above 4. See also Edwards 1947, n 87 above, 587, 592.

corporate restructurings,¹³⁰ but these arguments are ancillary to its purpose as a creditor remedy.

Although large portions of Edwards' thesis and article advocate for going-concern reorganisation, Canadian courts later established going-concern reorganisation as the principal object of the CCAA. In so doing, they drew from the 1933 Parliamentary debates, earlier reported decisions, and Edwards' 1947 article. The broad, 'public interest' at stake in company insolvencies informed and justified this practical objective. Edwards' arguments may have held particular sway with courts because they dovetailed with what courts could actually do in terms of effecting legal change.¹³¹ Read in their historical context, however, Edwards' parameters for effecting bold policy change in corporate reorganisations are somewhat contrived and look like an intellectual exercise. It is unclear why Edwards did not instead suggest legislative reform of Canadian bankruptcy and insolvency law.

d. Being in the 'public interest'

Incorporating public interest considerations into corporate reorganisation discourses helped legitimise and garner public approval for the judicial repurposing of the CCAA. The fact that public interest considerations came to form a key part of CCAA discourses in the 1980s and 1990s represented a substantial reframing of the constituencies (stakeholders, weaker creditors) that comprised 'the corporation.' Canadian debates about corporate reorganisation

¹³⁰ Edwards LLM, *ibid* 3; Edwards 1947, *ibid* 593.

¹³¹ Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997); Galanter, n 26 above, 137.

shifted away from concerns about potential manager or shareholder abuse,¹³² and traditional contentment with leaving large secureds to decide the fate of insolvent firms (and junior creditors) through receivership. Contemporary CCAA narratives came to centre instead on stakeholders (labour, the community, tort victims) and the public interest benefits of keeping debtor firms in operation. This helped create a positive public image for corporate reorganisation and public support for novel interpretations of the CCAA.

According to Canadian courts, the many constituencies involved in corporate insolvency meant that the 'public interest' involved in a company insolvency generally weighed in favour of attempting a restructuring.¹³³ Lawyers and courts brought this public interest paradigm to bear in their reading of the CCAA and the scant material on the enactment and history of the statute.¹³⁴ For example, the court stated in *Sklar-Peppler* (1991):

... The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization of the applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its

¹³² See eg 'Protective Committees' (1940-1941) 10 Fortnightly LJ 183; Tassé, n 3 above, 88; Honsberger, n 94 above. In the US and UK context, see Carruthers and Halliday 1998, n 65 above, 109-110.

¹³³ *Chef Ready*, n 115 above, para 24, cited in *Elan*, n 83 above, para 60 [dissenting in part]. See also Jones, n 29 above, 492.

¹³⁴ See eg *Chef Ready*, *ibid* para 22; Algoma Plan Sanctioning Hearing, 1992, n 93 above; Algoma Plan Sanctioning Hearing, 2001, n 93 above; Endorsement Order, 19 December 2001; *Re Algoma*, n 93 above, para 8, per LeSage, C.J.S.C.; all cited in Sarra 2003, n 9 above, 157.

creditors, its employees and former employees and the communities in which it carries on and carried on its business operations.¹³⁵

Courts drew on Edwards' article in spite of the quite different policy purposes underlying the CCAA and the fact that Edwards' arguments on this point were advocacy, not history.¹³⁶ In setting out his arguments in favour of a general corporate restructuring regime based on the 'public interest', Edwards drew mainly on US precedents and literature,¹³⁷ and specifically advocated that Canadian courts change course and adopt an approach more along US lines.¹³⁸ Edwards favoured the post-*Chandler Act* (1938) version of US corporate reorganisation, which incorporated significant 'public interest' safeguards. In demonstrating the 'public interest' character of this approach, Edwards noted *inter alia* that the US *Bankruptcy Act* expressly provided that the SEC play a supervisory role in company restructurings,¹³⁹ So it is noteworthy that neither the CCAA, nor its American analogue (section 77B, enacted in 1934) included such provisions.¹⁴⁰ Nevertheless, Edwards essentially argued that Canadian courts should assume the role of guardian of the public interest in CCAAs.¹⁴¹ Yet

¹³⁵ *Sklar-Peppler Furniture Corp. v Bank of Nova Scotia* (1991), 8 CBR (3d) 312, 86 DLR (4th) 621 (Ont Ct J [Gen Div]) [*Sklar-Peppler*], para 3.

¹³⁶ Edwards LLM, n 88 above, 12, 23.

¹³⁷ Edwards 1947, n 87 above, 593-594; Edwards LLM, *ibid* 32-34, FN 88-97, citing eg E. Merrick Dodd Jr., 'Fair and Equitable Recapitalizations' (1942) 55 Harv L Rev 780; Foster, n 104 above; *Case v Los Angeles Lumber Products Co.* (1939), 308 US 106, 60 SCt 1; 49 Stat 911 (1935), and 11 USC, s 205 (1946); 52 Stat 883 (1938) and 11 USC, ss 572, 665, 665(a), 575, 607 (1946); 11 USC, ss 606, 672; 11 USC, s 616 (11); 49 Stat 838 (1935) and 11 USC, s 79 (1946).

¹³⁸ Edwards LLM, *ibid* 33. See also Edwards 1947, n 87 above, 593-594, 596-597, 615, where he argues that CCAA law should also adopt the US absolute priority doctrine.

¹³⁹ Edwards LLM, *ibid* 33-34; Edwards 1947, *ibid* 593-594.

¹⁴⁰ Skeel, n 100 above, 107.

¹⁴¹ Edwards LLM, n 88 above, 33; Edwards 1947, n 87 above, 593-594.

Edwards stated elsewhere that courts have only two points at which to deal with the CCAA plan,¹⁴² so it is unclear how courts could play a role similar to the SEC.

To support a public interest view of the CCAA, commentators and the courts in the 1980s and 1990s also gave considerable weight to the brief 1933 Parliamentary debates¹⁴³ and even to the full title of the Act,¹⁴⁴ which they thought captured the purposes of the statute succinctly. In point of fact, a bondholder remedy view of the CCAA also accords with the long title of the Act, and historical sources such as Edwards' provided an incomplete picture of the CCAA even at the date of their writing.¹⁴⁵ Since the text of the CCAA stayed more or less the same for roughly 50 years, 'interpretation' of the Act as a debtor remedy actually showcases the transformation of ideas surrounding corporate reorganisation over that period.

Although the CCAA makes no mention of the public interest, it does expressly address the interests of creditors:

Scope of Act

8. This Act is in extension and not in limitation of the provisions of any instrument now or hereafter existing governing the rights of creditors or any class of them and has full force

¹⁴² Edwards 1947, *ibid* 589.

¹⁴³ As described by Edwards, see eg *Chef Ready*, n 115 above, paras 22-23, cited in eg *Re Keddy Motor Inns Ltd.* (1992), 13 CBR (3d) 245, 90 DLR (4th) 175 (NS SC [Appeal Div]), para 9, *Quintette*, n 81 above, para 9, and *Citibank Canada v Chase Manhattan Bank of Canada* (1991), 5 CBR (3d) 165, 2 PPSAC (2d) 21 (Ont Ct J [Gen Div]) [*Citibank*], para 49. See also eg Sarra 2003, n 9 above 11-14; Edwards 1947, *ibid*.

¹⁴⁴ Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Markham, ON: Carswell, 1st ed, 2007), 1, cited in *Re Long Potato Growers Ltd.*, 2008 NBQB 231, 45 CBR (5th) 29, para 40; *Re Tepper Holdings Inc.*, 2011 NBQB 211, 80 CBR (5th) 339, para 27.

¹⁴⁵ Eg Edwards does not mention of the 1938 or 1946 repeal bills in his LLM thesis and journal article.

and effect notwithstanding anything to the contrary contained in any such instrument.

[Emphasis added.]¹⁴⁶

I have not found any reported decisions that substantively address the underlined portion of this provision, despite the fact that it dates back to the CCAA's original enactment, remains in the current version of the Act, and has been little changed since 1933.¹⁴⁷ Neither Edwards' thesis, nor his article address this provision.¹⁴⁸ Remarkably the provision titled 'Scope of Act' has not figured prominently in discussions about the scope of the CCAA.¹⁴⁹

A number of cases consider the latter part of section 8 in terms of the court's power to restrain the exercise of creditors' rights under 'other instruments' in the course of CCAA proceedings.¹⁵⁰ Courts have relied on this section almost exclusively to justify the staying of creditor-initiated proceedings, such as creditor remedies under the *Bank Act*¹⁵¹ or those specified in contract.¹⁵²

On its face this appears to serve as the type of limitation that this section prohibits. Yet reported cases do not reconcile this inconsistency. Judicial reasoning in cases such as *Chef Ready* (1990) fell back on 'the broad public policy

¹⁴⁶ RSC 1970, c C-25, s 8.

¹⁴⁷ Formerly enshrined in section 7 of the Act, see SC 1932-1933, c 36, s 7; RSC 1952, c 54, s 7; RSC 1970, c C-25, s 8. Now found in RSC 1985, c C-36, s 8.

¹⁴⁸ Edwards LLM, n 88 above; Edwards 1947, n 87 above.

¹⁴⁹ See L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy Law of Canada* (Toronto: Carswell, 3rd ed, 1989), 2-102, 2-103.

¹⁵⁰ L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, N§58 — Conflict Between the Act and an Instrument (WL) (retrieved 23 July 2015); Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2015), N§58, 1243-1244.

¹⁵¹ See eg *Chef Ready*, n 115 above, concerning section 178 *Bank Act* security.

¹⁵² See eg *Citibank*, n 143 above, paras 45-46, stating that '[s]ection 8 of the CCAA provides that relief under the CCAA is available notwithstanding the terms of any agreement.'

objectives of the C.C.A.A.’ instead as a sort of counter-balance to a limitation (in the form of the stay) of creditor remedies such as seizure and receivership.¹⁵³ This seems to imply that insolvency law must curtail the rights of creditors (usually secured creditors) to some extent (if only through a delay on realisation¹⁵⁴) in order to preserve the possibility that a ‘greater good’ might be achieved through reorganisation.¹⁵⁵ In other words, it is the debtor, or a broad constituency of stakeholders, whose interests are extended, and not limited, by the Act.

On the other hand, viewing the CCAA as a bondholder remedy reconciles the two statements contained in section 8 of the Act. The CCAA *extended*, and *did not limit*, the provisions of an instrument governing the rights of bondholders by providing a statutory restructuring mechanism for their benefit that built on existing practices under majority provisions. Nevertheless, this section did not compel bondholders to utilise the Act if instead they preferred to use the majority provisions in their trust deed only, which many did.¹⁵⁶ The portion of the provision that reads ‘any instrument now or hereafter existing’ also speaks to the fact that the CCAA was enacted to address two specific problems: cover drafting defects in existing trust deeds and provide for the possibility of compliance with NYSE listing requirements on a going-forward basis.

¹⁵³ *Chef Ready*, n 115 above, paras 11, 21-22, esp para 24. See also *Elan*, n 83 above, paras 69, 92-93 [dissenting in part].

¹⁵⁴ *Chef Ready*, *ibid* para 21.

¹⁵⁵ *ibid* para 24.

¹⁵⁶ Benson 1949, n 88 above, 164; MacKelcan, n 88 above, 341-348; De Forest Billyou, ‘Corporate Mortgage Bonds and Majority Clauses’ (1948) 57:4 Yale LJ 595, 597.

According to a bondholder-remedy understanding of the CCAA, the latter half of section 8 prohibited ‘contracting out’ of the Act’s ambit, and arguably also prohibited contracting around the ‘purpose’ of the statute as expressed in the first part of the provision. Historically, the CCAA probably had to contain a provision against ‘contracting out’ of its scope in order to satisfy US listing requirements.¹⁵⁷ This was likely also necessary to underscore the fact that the Act was ‘not in limitation’ of instruments governing creditors’ rights in order to distinguish the Act from majority provisions and allay American concerns.¹⁵⁸

Section 8 was probably the most appropriate starting point for determining the purposes of the CCAA. When this provision is read in light of the trust deed provision, and the definitions of ‘company’ and ‘debtor company,’ it established that the policy behind the Act was to facilitate reorganisations of companies for the benefit of their bondholders, and could only be applied when used as such. Although Edwards presented interesting (if somewhat improbable) policy arguments in his 1947 article, the 1953 trust deed amendment (initially) frustrated the possibility of courts taking up his suggestions. Remarkably these same policy arguments later guided judicial repurposing of the Act in the 1980s and 1990s.

¹⁵⁷ *ibid.*

¹⁵⁸ W.K. Fraser (DMIA), House of Commons Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence respecting the Companies Creditors’ Arrangement Act, No. 1, 7 June 1938* (Ottawa: King’s Printer, 1938) [1938 Minutes], 19.

e. Summary

Judicial interpretations of the CCAA's underlying policy in the 1980s and 1990s incorporated a significant public policy element. Pro-DIP restructuring narratives circulating by the 1980s, particularly thanks to the popularity of chapter 11, influenced the way parties approached the skeletal CCAA. The lack of a clear written policy rationale for the CCAA compounded the Act's obscurity. In contrast to the 1930s, lawyers and courts in the 1980s approached the Act without serious reservations about the normative desirability of DIP reorganisation, or the constitutionality of restructuring secured claims through insolvency law. They regarded the Act on its face as a sort of Canadian 'chapter 11.' Accordingly they saw reorganisation as both the practical outcome and the public policy objective of the Act.

Purposive interpretations of the CCAA adopted in the 1980s and 1990s usually boiled down to a policy goal of effecting DIP company reorganisations, within the relatively few strictures of economic considerations, statutory voting requirements, and judicial approval of the plan. To do this would require removing the one barrier that made the Act the preserve of bondholders—the trust deed amendment—and I examine this in detail below. Since Parliament designed the CCAA to operate under the architecture of receivership, this brief statute would also require significant 'fleshing out' by the courts in order to function as a DIP remedy. Public interest considerations helped legitimate and 'popularise' corporate reorganisation, and so formed an important touchstone for judicial development of CCAA law.

ii. Judicial repeal of the trust deed requirement

Judicial sanction of instant trust deeds marked a pivotal point in the CCAA's transformation. An 'instant' trust deed refers to a last-minute loan obtained by the company in the form of bonds or debentures issued under a trust deed and running in favour of a trustee. The amount borrowed was usually nominal since the purpose of this loan was simply to bring a debtor company within the ambit of the CCAA. By affirming the legitimacy of 'instant' trust deeds, courts effectively 'interpreted away' the trust deed requirement. More broadly, allowing this 'tactical device' made the text of the CCAA merely instrumental to achieving its new policy objectives. Courts went on to interpret the Act's provisions in a 'large and liberal' or 'strict and narrow' fashion accordingly. The sanction of instant trust deeds thus ushered in and affirmed the relatively ad hoc, results-driven use of the Act to facilitate restructurings. Through judicial discretion or inherent jurisdiction, courts repurposed the Act and 'put flesh on bones.'¹⁵⁹

Recall that from the time of its enactment, the skeletal CCAA generated confusion among courts charged with interpreting and applying the Act and led to unintended outcomes. In both periods of legal change studied in this thesis, DIP restructuring emerged as an unintended consequence of the CCAA. Recall that in the 1930s courts' strict and narrow interpretation of the Act allowed debtor-led CCAs, which ultimately led to the 1953 trust deed amendment. In the 1980s and 1990s, characterisation of the statute as a debtor remedy led to the effective repeal of the trust deed requirement. While 'purposive' statutory interpretation

¹⁵⁹ *Nu-West*, n 89 above, 219, cited in *Quintette Coal Ltd. v Nippon Steel Corp.* (1990), 47 BCLR (2d) 193, 2 CBR (3d) 291, para 19.

in the latter period gave effect to the CCAA's 'new' objects, courts, paradoxically, tended to interpret the trust deed requirement in a 'strict and narrow' fashion. In some cases courts expressly placed more importance on commercial expediency than discerning the underlying purpose of the trust deed provision.¹⁶⁰ So even within the courts' new interpretive framework, one can critique their treatment of the trust deed requirement.

In the early 1980s the trust deed provision read as follows:

Application

3. This Act does not apply in respect of a debtor company unless

- (a) the debtor company has outstanding an issue of secured or unsecured bonds, debentures, debenture stock or other evidence of indebtedness of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee, and
- (b) the compromise or arrangement that is proposed under section 4 or section 5 in respect of the debtor company includes a compromise or arrangement between the debtor company and the holders of an issue referred to in paragraph (a).¹⁶¹

The trust deed provision thus preserved the Act as a bondholder remedy and prevented its use in cases not involving bondholders. As the 1938 Committee Minutes show, Parliament intended this provision to protect junior creditors from debtor-led reorganisations, which lacked receiver or trustee oversight.

¹⁶⁰ See eg *Philip's Manufacturing*, n 92 above, paras 33-34, referencing *Norm's Hauling*, n 99 above, and *Chef Ready*, n 115 above, 91, 92 [51 BCLR].

¹⁶¹ CCAA 1985, n 110 above, s 3.

Case law from the 1980s and 1990s illustrates that courts either did not fully apprehend this 'purpose' of the trust deed provision and its bearing on the original intent of the CCAA's framers, or else afforded it little weight. The appellate decisions in *Re United Maritime Fishermen (UMF)* (1988) and *Elan* (1990) are illustrative.

In *UMF* the New Brunswick Court of Queen's Bench heard argument from opposing counsel that drew attention to the intended impact of the 1953 trust deed amendment. Counsel stressed that although the CCAA, 1933 applied to all companies, the trust deed amendment introduced a significant change to the scope of the Act.¹⁶² The court summarised counsel's arguments as follows:

... It is submitted that "the purpose of the amendment was to prevent *any* insolvent incorporated company from making application under the *Act* and to severely restrict the operation of the *Act* by limiting the availability of the *Act* to companies which have outstanding issues of bonds, stocks or other evidences of indebtedness, issued under a trust deed and running in favour of a trustee". In favour of its submission, counsel cites from debates of the House of Commons and Senate, in 1952, when the amendment was introduced, and in particular relies on the following passage of the then Minister of Justice the Honourable Mr. Garson, who said:

With the passage of this Bill, it will leave companies that have *complex financial structures, and a large number of investor creditors*, able to use the *Companies' Creditors Arrangement Act* for the purpose of reorganization. Moreover, they will be able to use it efficiently; because, as a rule, the terms of their own trust deed

¹⁶² *Re United Maritime Fishermen Co-operative* (1988), 84 NBR (2d) 415, 67 CBR (NS) 44 [*UMF QB1*], para 15, varied on reconsideration, *Re United Maritime Fishermen Co-operative* (1988), 87 NBR (2d) 333, 68 CBR (NS) 170 [*UMF QB2*], rev'd on appeal *UMF CA*, n 117 above.

provide for a trustee of the creditors whose business it will be to look after their interests properly, a provision which is almost invariably absent in the case of mercantile creditors. (Emphasis added.)

In other words what counsel is saying is that the Act is, since 1952, only available to "companies with complex financing and which have outstanding bona fide trust deeds". [Citations omitted, emphasis in original.]¹⁶³

It seems that opposing counsel in this, and subsequent cases¹⁶⁴ conflated the 'purpose' and 'effect' of the trust deed provision. Relying on brief 1952-1953 Parliamentary debates, counsel argued that the *purpose* of the amendment was to restrict the scope of the Act to companies with complex financial structures. Historical evidence shows this was just a probable *effect* of the trust deed restriction.¹⁶⁵ The court had to decide on this basis whether to interpret the trust deed provision 'strictly and narrowly' or 'purposively' with a view to the supposed intention of Parliament.

Although the lower court in *UMF* acknowledged that Parliament meant for section 3 to serve as a restriction, it looked at the strict wording of the trust deed provision only¹⁶⁶ and noted:

¹⁶³ *UMF QB1*, *ibid* paras 15, 17-18, varied on reconsideration *UMF QB2*, *ibid* rev'd on appeal *UMF CA*, *ibid*.

¹⁶⁴ See eg *Elan*, n 83 above, para 81 [dissenting in part]; *Re Stephanie's Fashions Ltd.* (1990), 1 CBR (3d) 248, 1990 CarswellBC 373 (BC SC) [*Stephanie's Fashions*], para 4; *Philip's Manufacturing*, n 92 above, para 28; *Re Fairview Industries Ltd.* (1991), 11 CBR (3d) 43, 109 NSR (2d) 12 (Sup Ct [Trial Div]) [*Fairview*], paras 56-58.

¹⁶⁵ See Billyou, n 156 above, 597; Benson 1949, n 88 above, 164; MacKelcan, n 88 above, 341-348.

¹⁶⁶ *UMF QB1*, n 162 above, para 35; *UMF CA*, n 117 above, para 16 (but the court did not deal with this question on appeal). See further eg *Stephanie's Fashions*, n 164 above, paras 4-5; *Elan*, n 83 above, paras 23 [majority], 70, 72, 80 [dissenting in part]; *Fairview*, n 164 above, para 58.

... while the words "complex financial structures" and "a large number of investor creditors" have been used by the then Minister of Justice in debate, those words do not appear in s. 3. Nevertheless, should counsel be correct in his submission, I would then conclude, from the following abstracts from Ex. R-1, that U.M.F./Bluenose [the debtor companies] do have "complex financial structures and a large number of investor creditors". [Citations omitted.]¹⁶⁷

The New Brunswick Court of Appeal held that this provision 'severely restricted' the scope of the Act, but then undermined that restriction by allowing for the possibility of instant trust deeds.¹⁶⁸ The New Brunswick Court of Appeal noted the reasons behind the trust deed amendment, as submitted by counsel, which it described as 'mischief,' but this court ultimately limited its analysis to the actual text of the provision.¹⁶⁹ The appellate decision in *UMF* thus adopted a literal interpretation of the trust deed requirement and limited its inquiry to whether or not the debtor met the criteria set out in the provision.

This approach is somewhat surprising because even the modern principle of statutory interpretation set out by Driedger incorporates a restricted version of the former 'mischief rule.'¹⁷⁰ Driedger states '[t]he courts still look for the 'mischief' and 'remedy', but now use what they find as aids to discover the meaning of what the legislature has said rather than to change it.' Since, in the court's view, Parliament intended the trust deed amendment to remedy certain

¹⁶⁷ *UMF QB1*, *ibid* paras 15, 17-18, varied on reconsideration *UMF QB2*, n 163 above, rev'd on appeal *UMF CA*, *ibid*.

¹⁶⁸ *UMF CA*, *ibid* paras 13, 21-24 per Hoyt J.A. (Angers J.A. concurring), citing *Canadian Bed & Breakfast Registry*, n 106 above. The third appellate judge in the *Re United Maritime Fishermen* case (Ryan J.A.) would not have provided a decision on the appeal since the debtor companies were already in bankruptcy, rendering the matter moot. See paras 26-33.

¹⁶⁹ *UMF CA*, *ibid* para 13.

¹⁷⁰ Driedger 1983, n 79 above, 75.

‘mischief,’ this fact would seem to be important to interpreting and applying that provision ‘harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.’¹⁷¹

The Ontario *Elan* case affirmed the reasoning in *UMF*, but took its analysis one step further. In that case the debtors issued an instant trust deed expressly for the purpose of gaining access to the CCAA.¹⁷² Farley J. initially refused the application on the grounds that they had only one outstanding debenture, and the wording of section 3 required more than one debenture.¹⁷³ So the debtors each issued two more debentures and returned to court the same day to re-apply under the CCAA, whereupon Farley J. granted an order under the Act.¹⁷⁴ At first blush one versus three debentures seems like a pointless distinction, but this strict interpretation was probably a necessary step in the judicial repurposing of the CCAA.¹⁷⁵

In *Elan* the court based its reasons for allowing instant trust deeds on statements of the CCAA’s policy purposes in the 1933 Parliamentary debates, as filtered through judicial decisions such as *Chef Ready* and Edwards’ 1947 article.¹⁷⁶ The majority made no mention of the 1953 trust deed amendment. Doherty J.A., dissenting in part, dismissed opposing counsel’s submission concerning the 1953

¹⁷¹ *ibid* 87.

¹⁷² *Elan*, n 83 above, para 11 [majority].

¹⁷³ *ibid* paras 12-13 [majority].

¹⁷⁴ *ibid* para 14 [majority].

¹⁷⁵ See Galanter, n 26 above, 137.

¹⁷⁶ *Elan*, n 83 above, paras 22 [majority] (not citing any authorities), and paras 56-61 [dissenting in part], where Doherty J.A. cited: *Avery Construction*, n 96 above; *Chef Ready*, n 115 above, 88, 91 [51 BCLR]; Edwards 1947, n 87 above, 592-593; Goldman 1985, n 70 above, 37-39, citing *inter alia Avery Construction*, n 96 above, CCAA Reference, n 98 above, 3, and Hon. C.H. Cahan (Conservative), *Debates of the House of Commons of Canada*, (20 April 1933) 4th Sess, 17th Parl (Ottawa: King’s Printer, 1933), 4090-4091.

debates and amendment because he found them unilluminating and '[t]he interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts.'¹⁷⁷ Opposing counsel's argument from the *UMF* case is apposite:

[T]he court was misled by the presentation to it of precedents and articles which either dealt with the intent of the Act and its applicability prior to the amendment of 1952 or that these precedents and articles, if written after 1952 have all missed the significant change brought about by the introduction of s. 3.¹⁷⁸

So where were courts supposed to look to discern the policy objectives of the skeletal, preamble-less CCAA?

The lack of a clear policy rationale for why the CCAA was supposedly limited to large, complex companies was probably a key reason for the little judicial weight given to the 1952-1953 debates. In this way ambiguity helped create the possibility for legal change.¹⁷⁹ Courts and counsel averred to materials, such as the 1933 Parliamentary debates (indirectly) and Edwards' article, which they thought did get at the policy underlying the Act. Additionally, courts such as that

¹⁷⁷ *Elan*, n 83 above, para 81 [dissenting in part], citing *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 SCR 714, 123 DLR (3d) 554, 561. Doherty J.A.

¹⁷⁸ *UMF QB1*, n 162 above, para 17.

¹⁷⁹ Halliday and Carruthers 2007, n 25 above, 1144, citing Ryken Grattet and Valerie Jenness, 'The Birth and Maturation of Hate Crime Policy in the United States' (2001) 45 *American Behavioural Scientists* 668; Ryken Grattet and Valerie Jenness, 'Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference' (2001) 91:3 *J Crim L & Criminology* 11; Ryken Grattet, 'Structural Contradictions and the Production of New Legal Institutions: The Transformation of Industrial Accident Law Revised' in William J. Chambliss and Marjorie Zatz, *Making Law: The State, the Law, and Structural Contradictions* (Bloomington: Indiana University Press, 1993).

in *Elan* relied on developing practices under the CCAA to inform their interpretation of the trust deed provision.¹⁸⁰

The dissent in the Ontario Court of Appeal decision in *Elan* became an influential precedent endorsing the use of tactical devices to gain access to the Act. Yet in this decision the court restricted its analysis of the trust deed provision to the text itself.¹⁸¹ Remarkably the one substantive amendment to the CCAA up to the 1990s elicited little scrutiny, despite the fact that courts were (supposedly) interpreting the Act purposively. The lack of clarity concerning the trust deed's underlying policy seems like an unsatisfactory reason to rely instead on the policy of the CCAA *prior to* the trust deed amendment. Whatever the 'original' purposes of the CCAA were, purposive interpretation would suggest that they be interpreted in light of the changes made to the Act in 1953.

At least one court did interpret the trust deed requirement in a purposive fashion. In its reasons, the Saskatchewan Court of Queen's Bench in *Norm's Hauling* (1991) emphasised the significance of the trust deed provision in terms of its impact on the scope of the Act.¹⁸² The court noted that this 'restriction' would not in fact serve as a restriction at all if the court recognised 'instant' trust deeds:

¹⁸⁰ See eg B. O'Leary, 'A Review of the Companies' Creditors Arrangement Act' (1987) 4 Nat Insolvency Rev 38, 39; C. Ham, "'Instant' Trust Deeds Under the C.C.A.A.' (1988) 2 Comm Insol Rep 25; G.B. Morawetz, 'Emerging Trends in the Use of the Companies' Creditors Arrangement Act' Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada (1990) [unpublished], all cited in *Elan*, n 83 above, para 72 [dissenting in part].

See further, Frank J.C. Newbould, Q.C. and Geoffrey B. Morawetz, 'Developments and Trends in Companies' Creditors Arrangement Act Restructuring' Paper in Proceedings of 1991 Insight Educational Services Conference: 'How and When to Use the *Companies' Creditors Arrangement Act (CCAA)*' (4 June 1991) [unpublished], cited in *Fairview*, n 164 above, para 58, 56.

¹⁸¹ *Elan*, *ibid* para 93 [dissenting in part].

¹⁸² *Norm's Hauling*, n 99 above, para 4.

It is the duty of the court to give effect to legislation, not to emasculate it. The plain language of s. 3 offers no other conclusion than that it was enacted to exclude certain companies from the benefits of the Act. No company is excluded if all that is required is an "entrance fee" in the form of a trust deed created not to raise capital, but simply to gain access to a legal remedy not otherwise available. I cannot think that the legislation was intended to be interpreted in a way that permits this. In my opinion, s. 3 contemplates the existence of securities characterized by genuineness in the sense that they were issued to raise capital or secure existing indebtedness and not, as here, to achieve an oblique purpose. To hold otherwise would fail to give effect to the spirit and intent of the legislation.¹⁸³

The Saskatchewan Court of Queen's Bench accordingly held that instant trust deeds did not bring the debtor within the ambit of the Act. The court further held that the debtor in question was not a large, complex company of the type that Parliament ostensibly had in mind when it introduced the trust deed provision.¹⁸⁴ The court also noted the difficulty of reconciling the idea of 'instant' trust deeds as an entry fee with any reasonable Parliamentary intention behind the trust deed provision. Presumably only non-commercial creditors would be interested in purchasing such securities. In this case, as well as in *Elan* and *UMF*, relatives or managers, rather than commercial creditors, purchased the instant trust deeds that were used to gain access to the Act.¹⁸⁵

¹⁸³ *ibid* para 7.

¹⁸⁴ *ibid* para 4.

¹⁸⁵ *ibid* para 5; *Elan*, n 83 above, paras 10, 13 [majority]; *UMF CA*, n 117 above, para 6.

The courts in *UMF* and *Elan*, moreover, did not attempt to restrict the Act to large companies with complex capital structures. In the *Elan* dissent Doherty J.A. stated:

Attempts to qualify those words [of section 3] are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications or modifications should be read into the Act. ... It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.¹⁸⁶

Doherty J.A. paired a strict reading of section 3 with the ‘balancing’ function of judicial discretion. This suggested a greater role for judicial discretion based on allowing instant trust deeds than would be necessary if courts had refused to recognise such instruments by interpreting that provision ‘purposively.’

A strict interpretation of the Act probably necessitated at least the prospect of greater use of judicial discretion in order to avoid obvious problems it raised in terms the Act’s other provisions. Subsection 12(3) is a case in point. Recall that this provision provided that a debtor could admit claims for voting purposes and still retain the right to contest liability for those claims later on.¹⁸⁷ Ernest Bertrand’s (MP, Liberal) original concerns surrounding the possible fraud that

¹⁸⁶ *Elan*, *ibid* para 82 [dissenting in part].

¹⁸⁷ CCAA 1985, n 110 above, s 12(3). Formerly enshrined in SC 1933, c 36, s 11(2). Now enshrined in RSC 1985, c C-25, s 20(2).

this provision appeared to invite, which were alleviated in part by the trust deed provision, resurface under strict and narrow interpretations of the statute's provisions that eliminated the presence of a receiver or trustee.

Allowing 'properly executed' instant trust deeds also raised the question of how to classify 'instant' debt for voting purposes. Recall that subsection 3(b) specified that any compromise or arrangement *had to* include debt issued under this qualifying instrument or else the Act could not be applied at all.¹⁸⁸ I have not found any reported decisions that substantively deal with this classification issue. Perhaps counsel did not raise this issue before the court. In *Elan*, however, the majority noted that the debtor placed the 'sham' creditors in their own class, and the lower court approved this classification for voting purposes.¹⁸⁹ Doherty, J.A., however, would have put the 'sham' creditors in a class with two other secured creditors.¹⁹⁰

Putting instant debt holders in their own class potentially gives them veto over the proposed plan, effectively, which seems absurd on its face. Admittedly it is difficult to see why these debt holders would vote against a plan, since they bought securities in an insolvent undertaking without any expectation of being repaid.¹⁹¹ If their support is guaranteed, their vote is ceremonial, which is difficult to reconcile with the Parliamentary intention behind the trust deed provision.

¹⁸⁸ CCAA 1985, *ibid* s 3.

¹⁸⁹ *Elan*, n 83 above, paras 2, 19, 28 [majority].

¹⁹⁰ *ibid* para 98 [dissenting in part].

¹⁹¹ *ibid* paras 11, 13 [majority], 71 [dissenting in part].

On the other hand, grouping instant debt holders with any other creditors is problematic because these claims holders are distinct from 'genuine' debt holders.¹⁹² Their support for the plan stems from something other than their claim. So it is unclear how these creditors can be grouped with 'genuine' creditors based on having the same interests, as intended under section 4.¹⁹³ Instant debt holder support for the plan appears to 'stack the deck' of the class in which they are placed. To avoid this, and the possibility of an effective veto, these creditors would need to be placed in a class where their vote would be inconsequential, which again raises the issue of Parliamentary intention.

So the practical scenario that unfolds from recognising instant trust deeds raises further doubts about the courts' interpretation of this requirement, particularly when contrasted with the original intention of the provision, which was to limit CCAA reorganisations to those involving bondholders. By contrast, the classification issues that arise in pure capital restructurings are relatively minor.

It is ironic that in adopting a strict interpretation of the trust deed provision courts thought they were keeping matters simple by avoiding 'intractable problems as to what qualifications or modifications should be read into the Act.'¹⁹⁴ Courts actually complicated matters by introducing 'legitimate' DIP reorganisations into Canada under the auspices of an arcane bondholder remedy. This put courts, counsel, debtors, shareholders and creditors in uncharted legal and commercial territory. Instant trust deeds and the fact that

¹⁹² But see *ibid* paras 53-54, 97-98 [dissenting in part].

¹⁹³ Now enshrined in RSC 1985, c C-36, s 5 'compromises with secured creditors.'

¹⁹⁴ *Elan*, n 83 above, paras 75, 82 [dissenting in part], citing *UMF QB1*, n 162 above, 55-56, varied on reconsideration *UMF QB2*, n 162 above.

this ‘tactical device’ allowed companies and creditors to use the CCAA as a general restructuring statute gave rise to many new issues. Since the Act did not speak to any of these issues, they were left, by default, to the discretion of the court to decide, thereby amplifying judicial discretion.

It is also difficult to reconcile the court’s strict interpretive approach in cases like *UMF* and *Elan* with later cases such as *Stelco*. These later cases expressly adopted a ‘large and liberal’ approach when interpreting equally ‘straightforward’ provisions, such as the requirement that the debtor be ‘insolvent’ at the time of application.¹⁹⁵ On the other hand, in the third-party ABCP restructuring, the court again averred to a strict and narrow interpretation of ‘company’ in allowing ineligible debtors to be converted into ‘eligible’ companies on the eve of application, and for the express purpose of gaining access to the CCAA.¹⁹⁶ In the recent *Montréal, Maine & Atlantique Canada Co.* insolvency (to my knowledge, the first CCAA in respect of a railway), the Quebec Superior Court essentially qualified the exclusion of ‘railway’ companies from the scope of the Act by implying that the prohibition only applied if railway companies had access to other ‘complete’ restructuring legislation.¹⁹⁷ The result it is that the railway company restriction in section 2 of the CCAA is not a restriction at all.

¹⁹⁵ *Re Stelco Inc.* (2004), 48 CBR (4th) 299, 129 ACWS (3d) 1065 (Ont SCJ); leave to appeal to Ontario Court of Appeal refused, [2004] OJ No 1903, 2004 CarswellOnt 2936; leave to appeal to SCC refused [2004] SCCA No. 336, 338 NR 196 (note) [*Stelco* 2004].

¹⁹⁶ See Mario Forte, ‘*Re Metcalfe*: A Matter of Fraud, Fairness and Reasonableness: The Restructuring of the Third-Party Asset-Backed Commercial Paper Market in Canada’ (2008) 17 Int Insolv Rev 211, 214-215.

¹⁹⁷ See *Re Montréal, Maine & Atlantique Canada Co.*, 2013 QCCS 4039, EYB 2013-225915 [MMA], per Martin Castonguay, J.C.S., paras 1-26.

The supposed 'silence' of the Act produced by a 'strict and narrow' interpretation of a given provision often leads to the exercise of judicial discretion in a manner that appears to override one of the few matters on which the statute actually is not silent. The exercise of judicial discretion in this fashion actually sanctions the 'disabling' of statutory restrictions. In other words, courts adopt such a narrow view of the Act's prohibitions that the supposed prohibitions do not operate as prohibitions at all, and serve only as an entrée for the exercise of judicial discretion. Instant trust deeds, instant incorporation documents, and the interpretations of 'railway company' and 'insolvency' are all examples where arguments from 'silence' have eroded the boundaries of the CCAA's scope.

Reported cases vacillate between 'strict and narrow' and 'large and liberal' approaches to the interpretation of specific provisions, with the common theme of expanding the ambit of the Act to encompass debtors that would otherwise not qualify for CCAA protection. This line of cases suggests that any type of enterprise can potentially be brought within the Act's purview, notwithstanding its purported restrictions. A common thread in these decisions is a policy of ensuring wide access to the CCAA, and the tacit justification is the public interest benefits of CCAA reorganisations. These cases affirm the ability of courts to 'bend' the text of the Act to achieve these ends. A 'large and liberal' interpretation does not equate to giving the CCAA wide scope, nor is a 'wide scope' the object of the Act.

Since courts relied in part on the Act's (supposed) silence to justify arguments in favour of instant trust deeds and similar tactical devices, it is surprising that they

seem not to have considered potentially helpful insolvency materials. The Tassé Report, published in 1970, sheds light on origins and purposes of insolvency legislation such as the CCAA. Tassé's coverage of the CCAA provides more insight into the history of the Act than do the Parliamentary debates. This report identifies the statute as a bondholder remedy and describes the reasons for the trust deed amendment.¹⁹⁸ So this Parliamentary report could have shed light on the 'brief' and 'unilluminating' Parliamentary debates from 1933 and 1953. The Tassé Report also could have helped contextualise early CCAA cases by showing that, for the most part, these debtor-led restructurings were the 'abuse' that the trust deed provision was meant to prevent. But I have not found any reported CCAA cases that mention the Tassé Report.¹⁹⁹ The same is true for a 1952 practice note on the CCAA from the Canadian Bankruptcy Reports, which discussed a number of undesirable practices under the Act, many of the which the trust deed amendment effectively addressed.²⁰⁰ It is surprising that counsel did not come across this practice note when searching for CCAA case law in the Canadian Bankruptcy Reports. Yet quite a number of reported decisions reference early case law from the Canadian Bankruptcy Reports as well as Edwards' 1947 journal article.²⁰¹ Courts and opposing counsel had good reasons

¹⁹⁸ Tassé, n 3 above, 19-22.

¹⁹⁹ As of August 2015, I have only located one reported bankruptcy or insolvency case which mentions the Tassé Report: *Sam Lévy & Associés Inc. c Canada (Superintendent of Bankruptcy)* (2004), 2005 FC 702, 19 CBR (5th) 99, para 60. This research was done using both Westlaw and Quicklaw.

²⁰⁰ H.M. Goldman, Q.C., 'Practice Note on the Companies' Creditors Arrangement Act, 1933' (1952) 32 CBR 227 [Goldman 1952].

²⁰¹ Cases citing Edwards' 1947 article include eg *Chef Ready*, n 115 above, 88, 91 [51 BCLR]; *Re Northland Properties Ltd.* (1988), 73 CBR (NS) 175, 1988 CarswellBC 558 (BC SC), paras 47-48, aff'd 73 CBR (NS) 195, 34 BCLR (2d) 122, para 22 (CA); *Norcen Energy Resources Ltd. v Oakwood Petroleum Ltd.* (1988), 64 Alta LR (2d) 139, 72 CBR (NS) 20, paras 30, 40-45; *Elan*, n 84 above, paras 56, 60 [dissenting in part]; *NsC Diesel*, n 202 above, para 7.

Cases citing CCAA cases from the 1930s and 1940s include eg *Chef Ready*, n 115 above, paras 25; *Re Northland Properties Ltd.*, *ibid* paras 13-14, 49-54; *Fairview*, n 164 above, para 34; *Elan*, n 83 above, paras 34, 37 [majority], 56 [dissenting in part]; *Sklar-Pepler*, n 135 above, para 13.

to refer to Tassé and the 1952 practice note, as well as the issues these documents raise.²⁰² So it appears that counsel may not have consulted all the relevant insolvency law documents on the CCAA, which helped perpetuated misapprehensions about the Act as a standalone restructuring statute for the benefit of debtor companies. This in turn seems to have and contributed to the perception that there are ‘gaps’ in the Act that judges must ‘fill’ using their discretion or inherent jurisdiction, when in fact Parliament merely intended for the CCAA to patch over defects in trust deeds. To the extent that practitioners did not consult relevant insolvency materials on the CCAA ‘arguments from silence’ used to ‘fill gaps’ fail on their own terms.²⁰³

In the result Edwards’ 1947 article had a greater impact on the development of CCAA law post-1970s than either the 1953 trust deed amendment or the Tassé Report. Yet courts’ articulation of the potentially large role of judicial discretion under the CCAA and the flexible court-driven nature of the Act are at odds with Edwards’ writing on these points. According to Edwards, the court only had two opportunities to deal with a CCAA plan—on application and at the sanction hearing—and it had limited powers at both stages.²⁰⁴ Edwards also took issue

²⁰² A number of cases and press reports referred to the Act as ‘little used’ or ‘obscure.’ See eg *Nu-West*, n 89 above, para 20, cited in eg *Re Northland Properties Ltd.* (1988), 69 CBR (NS) 266, 29 BCLR (2d) 257 (BC SC), para 24; *Re Northland Properties Ltd.* (1988), 73 CBR (NS) 141, 1988 CarswellBC 553 (SC), para 15; *Quintette Coal Ltd. v Nippon Steel Corp.* (1990), 2 CBR (3d) 291, 47 BCLR (2d) 193 (BC SC), para 19; *Canadian Imperial Bank of Commerce v Quintette Coal Ltd.* (1991), 1 CBR (3d) 253, 53 BCLR (2d) 34 (SC), para 17. See also eg *Re NsC Diesel Power Inc.* (1990), 97 NSR (2d) 295, 79 CBR (NS) 1 (SC [Trial Div]), para 3.

See further ‘Dome Pete finds obscure law’ n 86 above; Fletcher, n 76 above; Ramsay, n 86 above; Yakabuski, n 86 above.

²⁰³ See further Richard H. McLaren, *Canadian Commercial Reorganization*, loose leaf, vol. 1 (Aurora: Canada Law Book, 1994), 1-20, cited in Andrew J.F. Kent *et al.*, ‘Canadian Business Restructuring Law: When Should a Court Say “No”?’ (2008) 24 BFLR 1, 3-4, noting that the CCAA was originally intended to only apply to restructurings of secured debt where a receiver or trustee was present to oversee the debtor.

²⁰⁴ Edwards 1947, n 87 above, 589.

with the practice of *ex parte* applications under the statute, as did other commentators,²⁰⁵ since a hearing of all interested parties at the point of application would, in Edwards' view 'aid the court in avoiding errors and will assist it in obtaining as full a knowledge as possible of the company's affairs, which will be very valuable to it in exercising its discretion.'²⁰⁶ Nevertheless contemporary courts allow *ex parte* applications by debtors under the CCAA as a matter of course, provided the applicant makes full and fair disclosure of all relevant facts.²⁰⁷ Roderick J. Wood notes that *ex parte* applications may be useful if there is a threat of creditors initiating enforcement remedies against the debtor.²⁰⁸ Earlier commentators, however, specifically identified *ex parte* orders as problematic and potentially abusive.²⁰⁹ This shift in opinion appears to be in keeping with changing ideas about the CCAA, which now suggest that the debtor needs 'protection' under the auspices of the Act.

The 'strict and narrow' approach to interpreting section 3 and other supposed 'obstacles' to using the Act is also at odds with Driedger's modern principal of statutory interpretation in some respects. This instead sounds like a partial return to the 'mischief rule' of statutory construction insofar as courts concern

²⁰⁵ H.M. Goodman, 'Practice Note on the Companies' Creditors Arrangement Act, 1933' (1952) 32 CBR 227, 227.

²⁰⁶ Edwards 1947, n 87 above, 602.

²⁰⁷ Roderick J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin law, 2009) [Wood 2009], 330, citing CCAA 1985, n 110 above, ss 11, 11.02(1) (as am 2005, c 47; 2007, c 36) [formerly enshrined in s 11]; *Re Hester Creek Estate Winery Ltd.*, 2004 BCSC 345, 50 CBR (4th) 73.

Initial orders granting a stay of one month was partly due to the lack of notice, or very short notice (eg only a few hours), given to creditors before a debtor's CCAA application, as in cases such as Olympia & York and Eaton's, see eg Rod McQueen, 'Raising the Dead: Companies like Eaton's owe their lives to a thin piece of legislation and the elite group of insolvency lawyers who manipulate it' (6 September 1997) *Financial Post*, section 1, page 8.

²⁰⁸ Wood 2009, n 207 above, 330.

²⁰⁹ Goodman, n 205 above, 227. See also Paul Joseph James Martin (Liberal), 1938 minutes, n 158 above, 3-4.

themselves more with the 'spirit' than the text of the Act. As described by Driedger:

... judges paid more attention to the "spirit" of the law than to the letter. Having found the mischief they proceeded to make mischief with the words of the statute. They remodeled the statute, by taking things out and putting things in, in order to fit the "mischief" and "defect" as they had found them²¹⁰

In CCAA case law, courts did not seek to remedy 'mischief' as such, but rather supposed 'gaps' or statutory 'silence,' which they 'filled' in view of the new policy purposes they ascribed to the Act. The focus of courts on the 'spirit' of the CCAA and reliance on judicial discretion demoted the text of the Act to a supporting role in deciding many 'boundary-pushing' CCAA cases. Courts interpreted the text strictly and narrowly if it interfered with the Act's supposed purposes, and granted it a large and liberal construction if it seemed to give effect to the 'spirit' of the legislation. Courts thereby moulded the CCAA to fit its purported policy objective. In this process they ignored (section 8) or re-imagined (section 3) provisions that did not fit with their conception of the Act. In so doing it appears courts gave relatively little weight to Driedger's guideline that 'the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act.'²¹¹ Courts replaced the Act's restrictions with judicial discretion, yet in practice judges seldom (if ever) deploy their discretion as a restriction in CCAA cases.²¹²

²¹⁰ Driedger 1974, n 14 above, 75, referring to judicial approaches to statutory construction around the time of *Heydon's Case*, [1584] 76 ER 637 3 CO REP 7a.

²¹¹ Driedger 1983, n 79 above, 87.

²¹² See generally, *Kent et al.*, n 203 above.

So although commentators lauded the judicial ‘fleshing out’ of the CCAA as an achievement of purposive statutory interpretation,²¹³ it also draws attention to the potential pitfalls of this approach to statutory construction. It is also a pyrrhic victory in the sense that it comes with certain costs in terms of compromising predictability and the rule of law. In seeking to expand the parameters of the Act, courts actually eroded those parameters without exercising their discretion to add meaningful safeguards. Parliament lent its tacit approval to this process.

a. Summary

As a tactical device, instant trust deeds became standard practice for many debtors seeking recourse to the Act until Parliament formally repealed this requirement in 1997.²¹⁴ As in the 1930s, without any effective legislative provision to bar debtor companies from accessing the Act, these soon formed the bulk of CCAA applications. Richard B. Jones records that following recognition of instant trust deeds, the CCAA ‘became a favourite of debtors’ counsel and the number of applications grew rapidly.’²¹⁵

Judicial recognition of instant trust deeds was therefore a critical development in the CCAA’s outward transformation into a debtor remedy. Recognising instant

²¹³ See eg Sarra 2003, n 9 above; Anthony J. Duggan *et al.*, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials* (Toronto: Emond Montgomery, 2nd ed, 2009), 574. But see also Jones, n 29 above, 481-482; Kent *et al.*, *ibid.*

²¹⁴ 1997 c 12, s 121, now enumerated in s 3(1) of the present version of the Act. The new C\$5 million debt requirement was intended to limit the scope of the Act to large companies. This may have been based on the misapprehended purpose of the trust deed requirement.

²¹⁵ Jones, n 29 above, 492.

trust deeds was tantamount to the repeal of this requirement because it allowed the CCAA (once again) to facilitate DIP restructurings, which did not necessarily entail trustee or receiver oversight. This conceptually separated CCAA reorganisation from receivership. Although the Act's harmonising provisions could still be used to effect receivership reorganisations, the institution of receivership proceedings was no longer necessary to the operation of the CCAA. While the CCAA can still be used as a secured creditor remedy (and probably cannot effectively be used against large secureds) it is no longer *only* a secured creditor remedy since there is nothing to prevent a CCAA compromise solely in respect of unsecured and trade debts.

While the trust deed provision originally made the Act the preserve of bondholders, and gave effect to Parliamentary intention in this regard, subsequent judicial treatment paradoxically made section 3 the keystone of the CCAA's new purposes and operation. Without judicial sanction of such 'tactical devices,' as a method by which to give effect to the 'new' policy purposes of the Act, courts probably could not have outwardly 'repurposed' the statute. In a stroke of irony 'purposive' interpretation by Canadian courts undermined and further obscured the original policy objectives of the Act, and paved the way for a new DIP reorganisation regime. Courts occupied a large role in this process of legal change and change tended to come about on a case-by-case basis.

Nevertheless interpreting away the trust deed provision also benefited large secured lenders. By the 1980s and 1990s, Canadian banks relied far less on trust deed-style financing, meaning that the trust deed provision also restricted their

access to the CCAA. As discussed in section II, banks and other large secureds had commercial incentives to restructure certain firms, and in the Canadian context they generally could not carry out full corporate reorganisation outside of bankruptcy and insolvency law. Eliminating the trust deed requirement once again gave large secured lenders (banks) full access to the CCAA as a creditor remedy.

Unlike secured lenders in the context of formal US and English bankruptcy reforms, the court-driven developments of the 1980s and 1990s did not substantially limit the (strong) legal rights of Canadian banks. The forum of the courts gave these large lenders a unique advantage to help shape legal changes vis-à-vis other parties. Several court-based developments illustrate their influence, such as the appointment of a monitor to oversee the debtor's affairs. This achieved much the same outcome for banks as having their own receiver in that secureds (and other creditors) could get the opinion of a third party on the state of the debtor's affairs.²¹⁶ In the formal statutory reforms of 1997, Parliament lowered the CCAA's majority requirement from three-fourths to two-thirds.²¹⁷ This left only the largest creditors with an effective veto, and potentially made it easier for large creditors to push through a plan against the wishes of smaller creditors. Judicial sanction of 'convenience classes' to buy off junior creditors further took small creditors out of the equation in terms of plan

²¹⁶ Note that debtors now tend to ask the court appoint their own accounting firm. See generally, Wood 2009, n 207 above, 388-394, esp 392-393.

²¹⁷ This voting provision was amended by 1997 c 12, s 123.

voting.²¹⁸ And Parliament did not add any provisions akin to involuntary proceedings or ‘cram down’ to the Act.

Although judicial rulings conceptually separated DIP insolvency under the Act from receivership, DIP reorganisations functioned like receivership reorganisations in some important ways. For instance, a debtor-remedy view characterises the Act as a ‘debtor in possession’ restructuring regime, yet being ‘in possession’ is something that large secured creditors actually want to avoid.²¹⁹ Whether a debtor company is in receivership, winding-up proceedings or under CCAA protection, it is ‘in possession’ in the sense that the assets remain vested in the debtor. In receivership or winding-up proceedings, however, large secureds generally exercise formal control through a receiver or administrator.²²⁰ In a CCAA restructuring, on the other hand, management usually has formal control of the debtor’s affairs. But to the extent that management wishes to see the company reorganised large secureds can exert considerable influence over management decisions, since their support is usually essential for a restructuring plan to succeed. For instance, in contemporary cases control is sometimes formalised when secureds negotiate a pre-packaged CCAA

²¹⁸ Convenience classes are usually made up of small claims that are paid out in full prior to voting on a plan of arrangement. In the third-party ACBP restructuring, small noteholders received compensation up to a C\$1 million limit, if they voted in favour of the plan of arrangement. These noteholders were thus not a ‘convenience class’ in a strict sense. See Torrie LLM, n 24 above.

²¹⁹ See *Gaskell v Gosling*, [1896] 1 QB 669, 691-692, 65 LJQB 435, rev’d [1897] AC 575, [1895-1899] All ER Rep 300 (HL), per Rigby L.J.

Although court appointed receivers are now more commonly used than private receivers in Canada, they were rarely used up until the 1990s, see Roderick J. Wood, ‘The Regulation of Receiverships’ 2009 ARIL 9, citing F. Bennett, *Bennett on Receiverships* (Toronto: Carswell, 2nd ed, 1999); Jacob S. Ziegel, ‘The Privately Appointed Receiver and Enforcement of Security Interests: Anomaly or Superior Solution?’ in Jacob Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford: Clarendon Press, 1994), 453, footnote 7.

²²⁰ Wood 2009, n 208, 315-316.

plan or stipulate such terms as a condition of DIP financing. So CCAA negotiations usually take place between debtor management and large secured creditors. While large secureds do not exercise formal control of a company under CCAA protection, the strength of their legal rights in- and outside of insolvency law and their commercial power give them substantial ‘soft power’²²¹ to shape and direct restructuring efforts. The strength of their influence in this regard is like an informal type of ‘control.’ Accordingly, in the shift to a primarily DIP CCAA regime, large secureds have not lost as much ‘control’ of proceedings as it might at first appear. The Act can and does still serve as a secured lender remedy, although it is no longer exclusively used as such.

IV. Conclusion

In terms of practical outcomes, modern CCAA law is not greatly different from the bondholder and CCAA reorganisations of the early twentieth-century. The key distinction is that contemporary reorganisation discourses applied a public relations gloss to large corporate restructurings under the umbrella of the ‘public interest.’ The legitimisation and normative desirability of DIP reorganisation, however, is relatively new to Canadian insolvency law policy. These developments also obscured the origins and ongoing operation of Canadian corporate restructuring as a secured creditor remedy.

²²¹ The political concept of ‘soft power’ was first set out in Joseph Nye, *Bound to Lead: The Changing Nature of American Power* (New York: Basic Books, 1990), and then elaborated on in Joseph Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004). ‘Soft power’ refers to the ability to attract and persuade, rather than to coerce.

Broader socio-political changes in Canada leading up to the 1980s informed subsequent CCAA developments, and other areas of corporate law also reflect these contextual changes.²²² Changing ideas about corporate rescue were linked to changing ideas and attitudes about the corporate form. Under a strict shareholder primacy view of the corporation, it would be difficult to justify DIP reorganisation as being in the ‘public interest’—this would essentially be a shareholder remedy. In this regard, the public interest narrative implicitly rests on a more stakeholder-friendly view of the corporation.

American bankruptcy developments and ideas in circulation by the 1980s and 1990s influenced the way parties in Canada approached the CCAA. Contemporary discourses lent legitimacy to the notion of considering the ‘public interest’ in firm insolvencies at all, as Edwards had advocated in 1947. Ideas propounded in more recent discourses on bankruptcy theory and policy also help explain the selective way in which courts applied ideas from Edwards and other early CCAA materials when interpreting the Act: counsel, courts and scholars drew from Edwards and other historical sources with a view to finding historical support for contemporary conceptions of corporate bankruptcy.

New approaches to judging and statutory interpretation played an integral role in case-driven CCAA developments. Modern, policy-conscious courts brought purposive statutory interpretation to bear on the arcane and skeletal Act. Courts incorporated contemporary socio-political concerns and bankruptcy discourses into their reading of the statute. Instead of giving voice to the original policy

²²² See eg *Teck*, n 119 above; *Peoples*, n 119 above.

purposes of the Act, courts drew on material to apply a public interest gloss to an antiquated bondholder remedy. This gloss was probably necessary to help legitimise going-concern reorganisations in the late twentieth-century—particularly those facilitated by the courts, rather than Parliament. A strict application of early twentieth-century bondholder reorganisation practices to the 1980s and 1990s context would likely have affronted modern Canadian laws and policies concerning, for example, organised labour, stakeholder concerns, and the more nebulous idea of the ‘public interest.’ This might have generated protest to the process of judicial decision-making that was ‘fleshing out’ the CCAA, and thrown the legitimacy of case-driven CCAA law developments into question. Nevertheless, despite the new legitimacy narrative surrounding the Act, the underlying architecture of the CCAA still functioned as an effective remedy for large secured creditors.

By taking matters before the courts, major insolvency parties did an end-run around stalled bankruptcy reform efforts. Courts and insolvency parties were therefore in a prime position to shape ‘law on the ground’ in response to real-time insolvency developments.²²³ Much CCAA ‘law’ developed on a case-by-case basis, away from Ottawa and the interest groups that are typically involved with formal law reform.²²⁴ Courts accordingly moulded CCAA law to fit contemporary circumstances in ways that proved quite useful for reorganising large companies on an ad hoc basis. This helped immunise the Act from further repeal attempts,

²²³ See Halliday and Carruthers 2007, n 25 above, 1143. See also Kennedy, n 10 above, esp Chapter 2 ‘The Distinction between Adjudication and Legislation’.

²²⁴ See Halliday and Carruthers 2007, *ibid* 1144-1145.

and established the 'status quo' against which any formal reform efforts would have to face off.

Parliament lent support for redevelopment of CCAA law along these lines. Far from intervening to 'rein in' courts, Ottawa and some provincial governments offered plan funding in several notable cases. Furthermore, the federal bank regulator made special concessions for banks to facilitate a number of high-profile reorganisations involving debt-for-equity swaps. In the 1992 bankruptcy reforms, Parliament retained the CCAA essentially 'as is' and took repeal off the agenda. By helping facilitate reorganisations under the CCAA in these ways, Parliament also helped advance bank interests.

This study shows that the potential 'public interest' benefits of going-concern reorganisations did not prompt large secureds, shareholders or management to attempt restructurings. These groups already had incentives to reorganise firms when there was a reasonable chance of turning around the business. Rather, debtors, lenders, counsel, courts and academics spun the public interest narrative around the interests of weaker creditor- and stakeholder-groups. This narrative included stakeholder groups that were not participants in early CCAAs, such as employees. Including these groups in contemporary CCAAs may have helped garner plan 'funding' in the form of compromising junior creditor claims in a publicly palatable way. For instance, by convincing employees to take wage cuts as part of a reorganisation attempt.²²⁵ A public interest approach to CCAA law also helped attract wider public support for reorganisations when

²²⁵ See eg Sarra 2003, n 9 above, 168-169.

disseminated through the press, for instance. So despite obscuring the operation of the Act as a secured creditor remedy, the role of the public interest narrative is important for understanding how the Act was outwardly refashioned into a DIP remedy during the 1980s and 1990s.

I do not suggest that reorganisations never benefit creditors and interest groups other than large secureds. But these benefits are usually trickle-down in nature, or have been tacked on to the CCAA. They do not stem from the original purposes or operation of the Act. In this respect, the recent history of the CCAA is a continuation of early practices under the Act and a century-old tradition of secured creditors spearheading business restructuring efforts in Canada. Specific exceptions to this phenomenon come from fairly recent legislative protections—although even contemporary commentators question whether these go far enough in protecting the interests of unsecured and involuntary creditors.²²⁶ Therefore I submit that the CCAA continues to promote the interests of large, secured creditors more than any other group.

CCAA developments in the 1980s and 1990s were the product of a unique Canadian fact pattern that made this Act ripe for change. Due to the degree of contingency surrounding these events, it is difficult to conceive of similar circumstances arising elsewhere on a spontaneous basis and leading to comparable results—although this is not impossible. Certainly US and English development of corporate reorganisation law in the 1970s and 1980s occurred along quite different trajectories. While the US and English corporate

²²⁶ See eg WEPPA, n 59 above. But see eg Baird and Davis, n 70 above, 73-76.

reorganisation regimes are functionally similar to the CCAA,²²⁷ this study reveals some of the distinct mechanisms through which CCAA law ‘developed.’ A comparison of these mechanisms across jurisdictions arguably goes a much longer way toward explaining the resulting corporate reorganisation regimes. This approach accordingly lends itself to a deeper understanding of CCAA law developments within Canada, especially vis-à-vis broadly similar regimes in countries like the US and England.

²²⁷ See eg Simon Djankov *et al.*, ‘Debt Enforcement Around the World’ (2008) 116:6 J of Polit Econ 1105.

5. Stability and Change

I. Introduction

Over roughly the last 100 years, Canadian corporate restructuring law has undergone dramatic changes in terms of form, substance and underlying ideology. Some of these developments occurred slowly with the passage of time. Others came about in relatively short timeframes, cemented in place by legislation or constitutional reference. Yet despite all that has changed, Canadian corporate reorganisation law and the CCAA still contain vestiges of nineteenth-century bondholder remedies, signalling the importance of history to understanding the development and trajectory of modern law and practice in this area. Since the CCAA remains a blend of old and new approaches to company reorganisation, 'new' features of the Act are best understood in relation to 'old' or existing arrangements for reorganising companies; the underlying 'skeleton' onto which subsequent judicial and legislative 'fleshing out' occurred. Accordingly, I use nineteenth-century bondholder reorganisation practices as a starting point for examining and interpreting the development of Canadian company reorganisation law in the twentieth-century.

In this chapter I employ the theoretical framework set out in Chapter two to provide an interpretation of the advent and development of CCAA law. My historical and interdisciplinary approach provides a robust account of the history of the CCAA, and offers insights into the origins and development of Canadian company reorganisation law during the last century. Moreover, the

theories and ideas I use in my analysis allow me to illustrate the wider significance of this study beyond the bounds of company reorganisation law.

The rest of this chapter is arranged as follows. Section II brings together the key findings of my historical study in light of my theoretical framework. This section offers a theorised interpretation of the historical development of Canadian company reorganisation law under the CCAA. Building on this theoretical discussion, section III explores the wider potential significance of this study. For instance, in terms of understanding trends in Canadian federalism, judicialisation, and FI and FS stability. Section IV concludes.

II. Stability and change in Canadian corporate reorganisation law

A. 1900s-1920s

The early part of the twentieth-century was a period of much informal change in Canadian corporate debt financing in terms of both financing sources and practices. Canadian companies increasingly relied on American, rather than British investors to purchase corporate bonds, and accordingly tailored the terms of trust deeds to reflect American preferences. A recursivity of law analysis shows that ‘law in practice’ increasingly omitted majority provisions from Canadian trust deeds—especially in industries with heavy American investment, such as pulp and paper. These changes occurred incrementally, on a company-by-company basis until a new, practical norm was established: Canadian corporate trust deeds no longer tended provide for restructuring bondholder claims.

There were no major changes in formal, statutory law on point during this period, primarily because most applicable law on company reorganisation in Canada came from private agreements (such as trust deeds) operating alongside the common law creditor remedy of receivership—secured creditor remedies that dated from the nineteenth-century. What is most significant about this period in terms of company restructuring is that the main method of effectively reorganising companies in Canada—a private, secured creditor remedy—was essentially taken off of the table by the private parties themselves. Once majority provisions were removed from Canadian trust deeds, private parties could not ‘fix’ this deficiency since majority provisions were the mechanism by which bondholders ordinarily effected amendments to trust deeds.

It seems that no Canadian trustee or corporate manager at the time realised the potentially significant problem they were creating. While companies operated at a profit, the new trust deeds produced no tangible changes in business operations. Economic downturns beginning with the pulp and paper industry in the late 1920s, however, compounded by the start of the Great Depression in 1929, called attention to the significance of this oversight. By the early 1930s, many viable Canadian companies were insolvent or in default, and were placed in receivership by their bondholders. But without majority provisions there was often no way to restructure these firms as going concerns—the preferred remedy of bondholders. Incremental changes in practice, combined with the triggering events of economic downturns (big exogenous shocks), led to a ‘critical juncture’ moment for Canadian corporate reorganisation law and

practice. This restructuring 'crisis' among Canadian corporations threatened FI solvency and necessitated significant institutional changes because traditional, private restructuring mechanisms were no longer available.

How Canada resolved this issue (facilitating corporate reorganisations for the benefit of bondholders), at this point in time (the 1930s) would have potentially long lasting implications for the law and practice of corporate restructuring. What made this juncture particularly 'critical' was that inherently problematic institutional arrangements concerning bond financing intersected with the worst economic depression in Canadian history, dramatically, and on a very large scale, calling attention to the flaws of the new trust deeds. The 'solution' would probably have to come through legislation, thereby adding a statutory, 'public' flavour to the longstanding (private) practice of bondholder reorganisations. And whatever approach was adopted to effect bondholder reorganisations was likely to generate a significant amount of positive feedback, as bondholders moved to restructure hundreds of struggling companies, including some of the largest companies in Canada. Therefore, in all likelihood, the 'solution' to this problem adopted during the Great Depression would set corporate restructuring on a new 'path' or 'trajectory' going forward.

B. 1930s-1950s

The 1930s to 1950s was a period of significant legal change and formal law reform concerning corporate restructuring in Canada. In 1933, Parliament enacted the CCAA, which was purportedly enacted under its 'bankruptcy and

insolvency' law power—an unexpected pairing that was essentially a 'marriage of convenience.' Surprisingly the SCC upheld the Act on a constitutional reference, which underscores the significant element of contingency surrounding that decision. A subsequent constitutional reference case concerning the FCAA upheld that statute's constitutionality in both the SCC and the PC—astonishing Canadian commentators, affirming and entrenching the outcome of the CCAA reference decision, and making these decisions difficult to reconcile with the other New Deal references. Therefore, at this 'critical juncture' in Canadian history, the secured creditor remedy of debt restructuring was added to insolvency law, and redrew the boundaries of provincial and federal jurisdiction pertaining to property rights.

Despite the unpredictability and unlikelihood of this outcome from a pre-1930s viewpoint, once this legislation was enacted and affirmed by constitutional reference it set debt reorganisation on a distinct path that became increasingly difficult to alter over time. Since the CCAA and FCAA were constitutional, provincial attempts to enact similar legislation were *ultra vires* by implication—due to the PC's view of the division of powers as 'watertight' compartments. To overturn the PC decisions on this point would require a constitutional amendment or a subsequent appeal to the court of last resort in which the PC would have to overturn its earlier decision. Both of these possibilities were unlikely. Furthermore, due to the nature of case law precedent, lower courts were bound to follow the PC's decision on this point, as illustrated in the 1938

Ontario Court of Appeal's decision concerning the Abitibi restructuring.¹ Accordingly, the PC's view of where debt reorganisation fell in the division of powers reproduced itself in subsequent judicial decisions, particularly concerning the constitutionality of various provincial legislation to effect debt compromises, such as *Re Orderly Payments*.² The interpretation of the division of powers from the CCAA and FCAA references on this point was thus further entrenched through case law with the passage of time.

Both the CCAA and FCAA quickly generated positive feedback in terms of hundreds and tens of thousands of debt compromises carried out in the 1930s under each Act, respectively. Whatever practitioner views of the CCAA were, these actors still coordinated the Act as a restructuring mechanism after it was upheld, essentially because it was their only viable restructuring option. When attempts were made to restructure insolvent companies under provincial legislation, as with Abitibi, the courts ruled that the new federal Act had to be used instead. Since legislation to patch over trust deed defects was rather late in coming, it is fair to assume that many companies that needed restructuring—particularly in pulp and paper—were already insolvent by the time the CCAA was enacted in 1933. Asset specificity thus led to further positive feedback, thereby contributing to path dependence of the CCAA, and federal insolvency law, as mechanisms for restructuring the debts of insolvent companies and farmers. Institutional arrangements concerning corporate reorganisations were thus formally adopted into the federal sphere of legislative power. These

¹ See *Montreal Trust Co. v Abitibi Power & Paper Co.*, [1938] OR 81, 19 CBR 179 (SC), per McTague J., aff'd in [1938] OR 589, [1938] 4 DLR 529 (CA).

² *Reference re Validity of Orderly Payment of Debts Act, 1959 (Alberta)*, [1960] SCR 571, 23 DLR (2d) 449.

decisions accordingly set in motion a centralising trend in Canadian debt reorganisation legislation—one which runs counter to a general trend of decentralisation of power among the provinces over the same period of time.

Since early federal efforts to deal with the corporate restructuring ‘crisis’ of the 1930s helped place reorganisation on a distinct trajectory going forward, it is worth briefly considering what might have happened if provincial legislation, such as the Ontario *Judicature Act Amendment Act*, 1935 had been enacted *prior to* the CCAA. Many practitioners at the time favoured a provincial approach, which would not be limited to technically insolvent companies or subject to constitutional uncertainties. Had the Ontario legislation been enacted first, it very likely would have generated positive feedback and asset specificity, just as the CCAA did, since many companies needed restructuring and were waiting for enabling legislation. Moreover, the existence of effective provincial legislation on point may have altered the outcome of the CCAA constitutional reference, as the CCAA may have appeared to be overtly trenching on an existing exercise of provincial legislative power. It is worth emphasising the fact that up until the CCAA, bondholder reorganisations were carried out under provincial law, and thus there was a fairly longstanding exercise of provincial jurisdiction in this area. In the result, however, the constitutionality of the CCAA led to the significant limitation of subsequent provincial restructuring legislation, which thereafter had to be confined to solvent companies only. Had the Ontario legislation been enacted first, however, the result may have been quite the opposite, with the CCAA being struck down in favour of a provincial approach—something which would have been more in keeping with tradition

interpretations of the division of powers. This hypothetical illustrates the importance of the sequencing of events in positive feedback processes, where the early head start of one approach (such as the CCAA) may be amplified, rather than cancelled out over time.

A further ramification of the CCAA constitutional reference and subsequent Ontario legislation on point is that it helped lay the groundwork for a 'restructuring as a solution for insolvency' paradigm by virtue of drawing 'insolvency' as the dividing line between federal and provincial jurisdiction. The solvency or insolvency of a company was not a particularly important consideration in bondholder reorganisations prior to the 1930s. Bondholders did not need to, nor did they want to wait until the company was technically insolvent in order to restructure bond repayments. Bondholders often carried out reorganisations in order to *prevent* a situation of technical insolvency. Moreover, since secured creditor remedies generally fell within provincial jurisdiction, bondholder remedies were found in provincial law irrespective of the debtor's financial picture prior to 1933. After this point, however, constitutional references, positive feedback, and path dependence helped establish restructuring parameters such that *effective* legislation for conducting 'full' company reorganisations usually *only* applied to insolvent enterprises. Taken together, these events helped to construct, by implication, a *de novo* legal concept in which restructuring was cast as a 'remedy' for company insolvency,

and this framed the way future parties interpreted their issues vis-à-vis federal insolvency legislation.³

The historical reasons for this largely arose by virtue of the fact that provincial legislation—when it existed at all—did not necessarily provide for ‘complete’ restructuring prior to 1933. And after 1933, provincial legislation effectively *could not* provide for complete restructuring of insolvent enterprises due to the CCAA and FCAA reference decisions. Hence, provincial legislation such as the Ontario *Judicature Act Amendment Act* probably had rather limited application during the Great Depression, since many companies were insolvent by the time Ontario enacted this legislation in 1935. As illustrated by the high-profile Abitibi case, the enormous cost and uncertainty created by having to ‘re-do’ a restructuring plan under federal legislation if, by the time it came to applying for judicial approval, the debtor was technically insolvent, likely deterred parties from using provincial reorganisation legislation in the first instance, or at all.

Despite the novelty of the *form* that legal reform efforts took in respect of company restructuring, the *substance* of formal law took its cue from the longstanding practice of bondholder reorganisations under majority provisions. The CCAA particularly addressed the lack of majority provisions in many Canadian trust deeds by enshrining boilerplate majority provisions into a skeletal statute, which was designed to apply alongside the governing trust deed. As recorded in Hansard, the CCAA was based on a single provision of the English

³ Terence C. Halliday and Bruce G. Carruthers, ‘The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes’ (2007) 112:4 Am J of Sociology 1135, 1142 [Halliday and Carruthers 2007].

Companies Act, 1929,⁴ which was in turn based on majority provisions in earlier English trust deeds. Large secured creditors (namely, bondholders) were key drivers of these changes; effectively seeing their preferred, private, contractual remedies enshrined into legislative form. ‘Law in practice’ therefore very much informed and gave shape to ‘law on the books.’

In this way the CCAA can be regarded as a manifestation of the institutional resilience of nineteenth-century bondholder reorganisation practices. By giving legislative form to what had long been ‘law in practice’ for bondholders, the Act facilitated and bolstered the continuation of longstanding institutional arrangements concerning restructuring and created a ‘parchment institution.’ In large part because these institutional arrangements were put in ‘parchment’ form, bondholder reorganisation ‘law’ endured and helped shape Canadian restructuring law several decades later, despite the preponderance of new forms of corporate financing and security, and recharacterisation of the Act as a debtor-remedy. It is in large part due to the endurance of parchment institutions⁵ that nineteenth-century bondholder reorganisation forms the ‘skeleton’ on which modern Canadian DIP restructuring law is based.

By enshrining majority provisions into statute, Parliament also inadvertently opened the door to early DIP restructuring attempts. Because the Act did not include any provision limiting its application to companies in receivership, debtor companies that were not subject to receiver or trustee oversight could

⁴ Hon CH Cahan (Conservative), *Debates of the House of Commons of Canada*, (9 May 1933) 4th Sess, 17th Parl (Ottawa: King’s Printer, 1933), 4724.

⁵ Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton, NJ: Princeton University Press, 2004), 143.

invoke it. As a result, many companies in the 1930s invoked the Act strategically in order to restructure trade creditor and unsecured claims only. This practice was widely regarded as an abuse of the legislation, since there was no mechanism for requiring the debtor to disclose its financial information, nor any official oversight to ensure disclosures were accurate. DIP restructurings of this nature directly led to two early repeal bills, in 1938 and 1946.

The use of the CCAA as a DIP restructuring statute in the 1930s and 1940s constitutes an unsuccessful attempt at 'layering' by debtor companies. While DIP restructurings were never the intent of the legislation, debtors exploited a loophole in order to redirect the Act for new purposes. This attempt at layering was met with much opposition by various interest groups, including those representing unsecured creditors and bankruptcy officials. It appears no organised group at that time supported the use of the Act as a debtor remedy, nor did any group oppose its use as a bondholder remedy. This in turn accounts for the fact that interest groups and Parliamentarians charged with reviewing the repeal bills both times reached a consensus that the Act should be restrictively amended in order to preserve the statute as a bondholder remedy, and prevent further DIP reorganisations.

Despite the fairly large role played by interest groups in these two CCAA repeal attempts, the resulting 1953 amendment was not primarily driven by professional self-interest, but rather by a desire to maintain the status quo concerning bondholder reorganisations. This further underscores the resilience of these nineteenth-century institutional arrangements. These efforts ultimately

led to the 1953 trust deed amendment, which limited the application of the Act to compromises involving bondholders; effectively closing the loophole contained in the original legislation and ending further layering attempts for the time being. This amendment is therefore an example of a rather straightforward recursive cycle in which law was enacted to respond to a particular problem.

The 1953 amendment thus marked the formal end of a cycle of legal change that began in roughly the 1910s with the gradual elimination of majority provisions from trust deeds governing bonds placed with US investors. This cycle of legal change saw nineteenth-century bondholder reorganisation practices enshrined into federal insolvency legislation, affirmed as constitutional by the court of last resort, and then limited to restructurings involving bondholders. In a highly recursive process, 'law' trickled up from practices employed by bondholders under private agreements into the public arena of legislation.

Even after creating significant problems for themselves—by omitting majority provisions from trust deeds—bondholders, quite successfully, availed themselves of the legislative process to patch over defects in trust deeds, demonstrating the significant influence of this creditor group in lawmaking. Bondholders accordingly played a major, driving role in this cycle of legal change, through organisations such as the DMIA and the Toronto Board of Trade. They not only saw their longstanding lender remedy of corporate reorganisation enshrined into insolvency legislation, but also prevented much later repeal of the CCAA due to concerns voiced by other creditor and professional groups. Bondholder 'success' in this regard was both significant and fairly longstanding.

Of further importance, retaining the CCAA or a similar Act on the statute books was essential after 1938 in order to allow Canadian corporate bonds to be listed on the NYSE. Pursuant to the US *Trust Indenture Act, 1938*, trust deeds governing bonds listed in the US could not contain majority provisions, and so a statutory mechanism was needed to effect any potential compromises or arrangements affecting these bondholders. The CCAA was therefore also necessary after 1938 to facilitate access to US debt markets.

Ironically, legislative efforts to facilitate reorganisations of companies with US bondholders and allow Canadian companies ongoing access to US debt finance through the CCAA were immediately followed by a dramatic and nearly universal return to the use of majority provisions in Canadian trust deeds. In the 1930s, bondholders used the CCAA to reinsert majority provisions into their governing trust deeds. The remarkable result was that Canadian companies forewent access to US debt markets, and for the next 15 years new bond issues were placed almost exclusively with Canadian investors.⁶ This is surprising and noteworthy in an historically capital importing country such as Canada. What this appears to indicate is that despite the extension of bondholder reorganisations into insolvency law, traditional bondholder reorganisations under trust deeds constituted a deeper equilibrium.

⁶ E.P. Neufeld, *The Financial System of Canada: Its Growth and Development* (Toronto: Macmillan, 1972), 490-493.

The influence of this deep equilibrium in terms of bondholder approaches to corporate reorganisation may in turn help account for why the various contingent events surrounding the enactment and endurance of the CCAA on the statute books from 1933 to 1953 came out the way they did. For instance, the early resilience of the CCAA to repeal attempts was no doubt aided by the fact that the Act itself was largely a continuation of existing practices, and hence was more resilient to repeal than an entirely new restructuring regime likely would have been. As Pierson defines institutional resilience, ‘all other things being equal, an institution will be more resilient, and any revisions more incremental in nature, the longer the institution has been in place.’⁷ The enshrining of bondholder reorganisations into insolvency law—despite altering the formal appearance of this remedy—was in effect a rather superficial change to a longstanding institution. Early efforts to repeal the CCAA—despite the changes it brought about in terms of the formal appearance of bondholder reorganisations, and the co-opting of the Act by debtors—were actually facing off against an institutional equilibrium that was 60 or 70 years old and already extended through provincial jurisdiction. The early history of the CCAA led to a ‘new’ equilibrium by entrenching the practice of bondholder reorganisations in federal insolvency law, and in that regard it—and the subsequent return to majority provisions—bear out the inflexibility of positive feedback processes, and illustrate that ‘particular courses of action, once introduced, can be virtually impossible to reverse.’⁸

⁷ Pierson, n 6 above, 147, citing Arthur Stinchcombe, ‘Social Structure and Organizations’ in James March (ed), *Handbook of Organizations* (Chicago, Rand McNally, 1965).

⁸ Pierson, *ibid* 18-19 citing Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993); Ruth Berins Collier and David Collier, *Shaping the Political Arena: Critical Junctures, The Labor Movement, and Regime Dynamics*

These theoretical approaches to studying history accordingly offer greater explanatory power than do interest group analyses alone. For instance, they help to account for the fact that the CCAA long outlasted (by over 40 years) its strongest early proponent, DMIA,⁹ which had successfully defeated repeal bills in 1938 and 1946, and proposed the only substantial amendment made to the Act in its first 59 years on the statute books. DMIA, it is worth further noting, was not even consulted about the original CCAA bill directly. When the organisation learned about the draft CCAA bill through one of its members, it thought the proposed legislation was very likely unconstitutional. For that reason, as well as the fact that debt reorganisation legislation was so desperately needed, DMIA decided against making any submission to Parliament, since doing so might jeopardise the CCAA bill and, more importantly, any future attempts to enact federal debt reorganisation legislation. Accordingly, interest group analyses, while still useful for historical accounts, do not fully illuminate the early history of the CCAA.

The new equilibrium introduced by the CCAA in 1933, and affirmed by the 1953 amendment, was one in which nineteenth-century bondholder remedies were extended into the federal jurisdiction via insolvency law, and made the exclusive purview of the Dominion when the company in question was insolvent. Positive

in Latin America (Princeton, NJ: Princeton University Press, 1991); John Ikenberry 'History's Heavy Hand: Institutions and the Politics of the State' (1994) [unpublished manuscript]; Stephen Krasner, 'Sovereignty: An Institutional Perspective' in James A. Caporaso (ed), *The Elusive State: International and Comparative Perspectives* (Newbury Park, CA: Sage, 1989).

⁹ DMIA was defunct by 1970, see Roger Tassé *et al.*, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970) [Tassé], 20-21.

feedback and institutional resilience of bondholder reorganisation practices help account for the enactment and continued endurance of this bondholder remedy on the statute books, despite a significant element of contingency in the events surrounding the enactment of the CCAA and early repeal attempts.

C. 1960s-1970s

Following 1953 amendment, during a period in which the Act was little used, significant changes occurred in the field of secured lending, while the CCAA remained substantially unchanged. New forms of long-term secured lending were increasingly provided by FIs other than those that had relied on the CCAA. The Act fell into further disuse, this time because of the increasing obscurity produced by environmental changes and actor discontinuity. So up until the 1980s a number of commentators thought the CCAA would eventually become a dead letter.

Substantial liberalisation of the *Bank Act* in 1967 allowed Canadian chartered banks to lend on a long-term, secured basis, and thus compete directly with life companies in this area. During this period most provinces also enacted PPSAs, modernising chattel security regimes and replacing floating and fixed charges with generic 'security interests.' Together, these changes significantly altered the corporate lending environment. Banks, rather than life companies, became major sources of corporate debt financing and loans were increasingly secured using fixed charges, under relatively brief security documents pursuant to the *Bank Act* or PPSAs; rather than through floating charges under trust deeds with their

longstanding, detailed and especial provision for conducting restructurings. These changes produced both ‘actor discontinuity’ and ‘reorganisation procedure discontinuity’ within the Canadian secured lending landscape.

With a single entity—a bank—as the only secured lender under a corporate loan, there was also little need for majority provisions or the restructuring practices they had facilitated in respect of bondholder claims. Additionally, since banks did not always use a trust deed to secure corporate loans, they did not necessarily have recourse to the CCAA, which could mean that they effectively had no method of compulsorily binding other creditors to a debt compromise in respect of a debtor company.¹⁰ As a result, there was (again) effectively no way to carry out full reorganisations of many Canadian companies—something that did not greatly matter while the economy was growing and few companies faced financial difficulty.

During this period of formal stasis in respect of restructuring law, ideas and discourses surrounding bankruptcy and creditor rights also evolved, particularly in the US, with ramifications for ideas and developments in this field in Canada. During this period the *US Bankruptcy Code* underwent significant reforms culminating in amendments in 1978, which introduced a DIP business restructuring mechanism under chapter 11.¹¹ Shortly thereafter, American legal

¹⁰ Court-appointed and private receiverships do not necessarily provide a mechanism for binding recalcitrant creditors to the restructuring plan, see generally Peter P. Farkas, ‘Why are there so many court-appointed receiverships?’ (2003) 20:4 Nat Insolv Rev 37.

¹¹ See Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business* (Oxford: Clarendon Press, 1998) [Carruthers and Halliday 1998]; David A. Skeel, Jr., *Debt’s Dominion* (Princeton: Princeton University Press, 2001), ‘Part Three: The Revitalization of Bankruptcy’.

scholars such as Thomas Jackson¹² and Elizabeth Warren¹³ developed and published novel theories of business bankruptcy. Bankruptcy and insolvency became a more mainstream topic in legal discourse and popular news coverage, especially as the US and Canada entered the recession of the early 1980s and chapter 11 filings increased. American companies even began to use chapter 11 ‘strategically’, in order to deal with mass tort claims or troublesome unions.¹⁴ ‘Bankruptcy’ under chapter 11 thus became a ‘tool’ for corporate management to cut costs and streamline operations; a way to improve the corporate ‘bottom line’ in a competitive marketplace.

Of further note, the American reforms were followed by bankruptcy amendments in England in 1986, which similarly included a company restructuring component.¹⁵ Several bankruptcy reform bills were also introduced in Canada in the 1970s through the 1980s, however, Canada did not enact substantial bankruptcy reforms until 1992.¹⁶

In Canada, the 1970 Tassé Report commissioned by Parliament provided the most comprehensive history of Canadian bankruptcy and insolvency law at the date of writing, as well as recommendations for substantial bankruptcy law reform. Tassé noted a growing trend among secured creditors in terms of

¹² See eg Thomas Jackson and Robert E. Scott, ‘On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors’ Bargain’ (1989) 75 VA L Rev 155, 160; Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, MA: Harvard University Press, 1986) [Jackson 1986].

¹³ See eg Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54:3 U Chic L Rev 775.

¹⁴ Kevin J. Delaney, *Strategic Bankruptcy* (Berkeley & Los Angeles: University of California Press, 1998), Chapter 3 ‘The Manville Corporation: Solving Asbestos Liability through Bankruptcy’, Chapter 4 ‘Continental Airlines: Using Bankruptcy to Abrogate Union Contracts’.

¹⁵ Carruthers and Halliday 1998, n 11 above, 3.

¹⁶ SC 1992, c 27, s 61(2).

carrying out self-help remedies outside bankruptcy and insolvency law, such as receivership, with few regulatory checks and balances.¹⁷ Tassé's recommendations that receiverships be subject to a baseline level of regulation indicate that by this point there was measurable discomfort with the practice of relying totally on secured creditors' representatives to look out for the interests junior and unsecured claims holders.¹⁸ For instance, Tassé recommended that the indenture trustee not be permitted to act also as receiver, and that all receivers be licensed trustees under the *Bankruptcy Act*.¹⁹ As my historical account shows, abrogation of junior creditor claims in bondholder reorganisations, and sharp practice (or even outright fraud) by indenture trustees acting as receivers have a history at least as long as the CCAA. It is therefore noteworthy that it was not until the 1970s that concerns about this sort of behaviour led to concrete recommendations for legislative reform.

Interestingly there is relatively less concern in the Tassé Report about potential abuses that might be carried out by debtor companies.²⁰ Recall that in Duncan's 1933 bankruptcy text, the author voiced concerns about the potential use of the CCAA by debtors to the detriment of their creditors.²¹ By 1970, however, the abuse of bankruptcy and insolvency law by debtors, while certainly something to be discouraged,²² was no longer a sufficient rationale for prohibiting corporate restructuring altogether. Tassé proposed repeal of the CCAA and recommended

¹⁷ Tassé, n 9 above, Chapter 3 'Liquidation Outside of Bankruptcy'.

¹⁸ *ibid* see 57, 63-72 'IV – Liquidation Outside Bankruptcy, Recommendations,' 181.

¹⁹ *ibid* 135.

²⁰ *ibid* 57-60.

²¹ Lewis Duncan and William John Reilley (Superintendent of Bankruptcy), *Bankruptcy in Canada* (Toronto: Canadian Legal Authors Limited, 2nd ed, 1933), 1107-1108.

²² See Tassé, n 9 above, 7-59, 87-88.

the addition of general business reorganisation provisions to the *Bankruptcy Act*.²³ This recommendation is particularly telling because Tassé recognised that the original purpose of the CCAA was to patch over defects in trust deeds and serve as a bondholder remedy, rather than a general business restructuring statute.²⁴ Accordingly, this recommendation was not merely designed to consolidate existing insolvency statutes under a single Act; it represented an effort to add a meaningful business restructuring component to Canadian insolvency law and policy.

In the space of several decades, during which time formal bankruptcy law changed very little, attitudes and outlooks concerning secured creditor remedies and business reorganisation shifted markedly. Growing concern for unsecured and junior creditors rights may be linked to the rise of new interest groups in Canada during this period, such as organised labour. Concern for the fate of the debtor company itself also appears to have risen during this period, and in many cases became entwined with the interests of other stakeholders or creditor groups, such as labour and the wider community in which the company operated. New legislation, surrounding labour and environmental claims for instance, meant that these (involuntary) creditor claims could not simply be disregarded, as in earlier bondholder reorganisations. And the advent of bankruptcy theories centred on stakeholder interests helped give voice to these 'new' constituencies in business bankruptcies. The rights of secured creditors remained powerful, but faced greater public scrutiny if exercised to the

²³ *ibid* 175, see esp 'II – Measures to Facilitate the Payment of Debts, Recommendations,' 3-4.

²⁴ *ibid* 19-22.

significant detriment of weaker constituencies. This last development was probably facilitated by the growth of the business press and increased coverage of bankruptcy and insolvency matters in the mainstream news media, particularly from the 1980s recession onward.

The 1960s and 1970s were accordingly a period of formal stasis in terms of the CCAA itself, while significant formal and informal changes occurred in related areas of law and finance on a largely incremental basis. In a similar fashion to financing changes of the 1910s and 1920s, these environmental changes helped lay the groundwork for another 'critical juncture' in Canadian business reorganisation practices. The failure of secured creditor remedies, particularly corporate restructuring, to keep up with much changed secured lending practices created conditions which were ripe for another restructuring 'crisis.'

A triggering event, such as an economic recession, would bring to light the inadequacies of existing corporate restructuring mechanisms, as in the 1930s; precipitating a new cycle of legal change in this area and punctuating the former 'equilibrium.' In the event, this 'critical juncture' in corporate reorganisation was triggered by the recessions of the 1980s and 1990s. Much like the 1930s, what made this juncture particularly 'critical' was that inadequate secured creditor remedies (the lack of effective mechanisms to carry out 'full' company reorganisations) coincided with significant economic downturns (the 1980s and 1990s recessions). Many companies, including large Canadian concerns such as Dome Petroleum, Daon Development and Olympia & York encountered financial difficulty. Echoing the 1930s, the 1980s and 1990s recessions called attention to

the inadequacy of existing statutory law and financing agreements to effect going-concern reorganisations,²⁵ especially for the benefit of large, secured lenders. These events thus converged to create another restructuring 'crisis' for Canadian companies and, more significantly, for the large FIs that supplied much of their debt financing.

In some instances, the size of the losses incurred by Canadian FIs led to serious concern about the financial soundness and stability of these institutions themselves.²⁶ Unprecedentedly, three Canadian life companies failed.²⁷ Provincial and federal regulators wound up a number of smaller FIs,²⁸ along with two chartered banks.²⁹ In terms of FI failures,³⁰ Canada appears to have fared worse during the 1980s and 1990s recessions than during the Great Depression.³¹ This underscores the importance of considering the role of lenders and lender perspectives when studying the means by which restructuring 'crises,' particularly in the 1980s and 1990s, were ultimately resolved.

²⁵ Excepting the CBCA for federal companies, see Janis Sarra, *Creditor Rights and the Public Interest* (Toronto: University of Toronto Press, 2003) [Sarrra 2003], 18, citing *inter alia*: *Policy Statement of Director of CBCA* (1994) 17 OSCB 4853.

²⁶ See eg 'Last week the Tories rushed to pass tough new trust company legislation' (25 December 1982) *Globe and Mail* (Nexis); Thomas Walkom, 'From profits to horrors: MPs' bank probe a peep show on economy' (16 June 1982) *Globe and Mail* (Nexis.)

²⁷ See Assuris, 'Past Insolvencies' online:

<http://www.assuris.ca/Client/Assuris/Assuris_LP4W_LND_WebStation.nsf/page/Past+Insolvencies!OpenDocument&audience=policyholder> (accessed 17 June 2013).

²⁸ See eg Emilio S. Binavince and H. Scott Fairley, 'Banking and the Constitution: Untested Limits of Federal Jurisdiction' (1986) 65 Can Bar Rev 328, 330, FN 7; Tim O'Connor, 'Ontario takes over three trust companies' (7 January 1983) *United Press International* (Nexis),

²⁹ Stephanie Ben-Ishai, 'Bank Bankruptcy in Canada' (2009) 25:1 BFLR 59, 59-61.

³⁰ I use the term 'failure' to indicate an instance in which a financial institution collapsed, resorted to bankruptcy legislation, or was wound-up by a regulator.

³¹ Chris C. Nicholls, *Financial Institutions: The Regulatory Framework* (Toronto: Lexis-Nexis, 2008), 16; Neufeld, n 6 above, 243.

Like life companies without majority provisions during the Great Depression, chartered banks in the 1980s and 1990s found they had, in many cases, inadequate tools with which to restructure debtor companies and this potentially put their own solvency in jeopardy. This is notwithstanding the fact that Canada had a central bank by this point in time, an institution that did not exist during the worst days of the Great Depression. It was in large part due to the FI failures of the 1980s and 1990s that the federal government subsequently established the OSFI to oversee Canadian FIs, including chartered banks and life companies.³² Solvency issues affecting FIs during this period probably also contributed to PM Chretien's (Liberal) government's refusal to allow bank mergers among Canada's Big Five banks in the 1990s and early 2000s—mergers which would have further concentrated the Canadian banking sector, where any one of the Big Five banks were arguably already 'too big to fail.'³³

The CCAA's endurance on the statute books (due to failed bankruptcy reform efforts) was an important factor in the way subsequent events unfolded. As a parchment institution, the Act provided an historical precedent for company reorganisation; an existing set institutional arrangements around which future actors could potentially coordinate. The CCAA provided a benchmark against

³² OSFI was established in 1987, see OSFI, 'Our History' online: <<http://www.osfi-bsif.gc.ca/Eng/osfi-bsif/Pages/hst.aspx>> (accessed 4 January 2014).

³³ See Letter from the Competition Bureau to the Royal Bank and the Bank of Montreal (11 December 1998) online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01612.html>>; Letter from the Competition Bureau to the CIBC and TD Bank (11 December 1998), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01601.html>>; Statement by the Honourable Paul Martin, Minister of Finance, on the Bank Merger Proposals (14 December 1998), online: <<http://www.collectionscanada.gc.ca/webarchives/20071122063125/http://www.fin.gc.ca/news98/98-124e.html>>, all cited in Mark Katz, Anita Banicevic and Jim Dinning, 'Antitrust in a Financial Crisis—A Canadian Perspective' (April 2009) online: <http://www.dwpv.com/~media/Files/PDF/Antitrust_in_a_Financial_Crisis_-_A_Canadian_Perspective.ashx> FN 10, 11 (accessed 4 January 2013.)

which other business restructuring provisions, such as the 1992 BIA amendments, would ultimately be evaluated.

As in the 1930s, how Canada resolved this issue (facilitating corporate reorganisations for the benefit of FIs), at this point in time (the 1980s and 1990s) would have potentially long lasting implications for the law and practice of corporate restructuring. Whatever approach was adopted to effect corporate reorganisations was likely to generate a significant amount of positive feedback, as companies and some of their major creditors moved to effect large reorganisations. Unlike in the 1930s, however, at this 'critical juncture' moment a legislative solution in the form of enabling legislation or bankruptcy amendments was not immediately forthcoming. Moreover, as illustrated by bankruptcy developments in the US and by the Tassé Report in Canada, a number of new ideas about bankruptcy and restructuring were circulating among Parliamentarians, scholars and practitioners by the time of the 1980s and 1990s recessions. These ideas would accordingly influence responses to the present restructuring crisis. Therefore the 'solution' to the 1980s and 1990s restructuring crisis was likely to look rather different from the approach taken in the 1930s, and put corporate restructuring on a new trajectory.

D. 1980s-1990s

The 1980s to 1990s marked another period of significant legal change in Canadian corporate restructuring law and practice. These changes primarily took place in Canadian courts in direct response to attempts to restructure

specific companies. Accordingly, these developments may be described as (initially) semi-formal in nature, as they lacked the formality of legislative reform, and yet were not as informal as purely private arrangements. Moreover, since CCAA law largely 'developed' on a case-by-case basis, these changes came about incrementally. Restructuring practice, and 'law' 'trickled up' from ad hoc restructuring attempts in a given case, to the court of first instance, and occasionally to appellate courts. The precedential value and formality of the 'law' increased with each advancement. Ultimately, many of these case law developments were enshrined in legislation through later statutory amendments. Taken together over roughly two decades, case law developments revived and fundamentally changed judicial interpretations and applications of the CCAA, and in so doing reshaped the law and practice of Canadian corporate reorganisation.

There were several main reasons why large secured creditors and corporate debtors turned to the CCAA in the 1980s and 1990s recessions. First, FI solvency issues were a key driver of restructuring efforts in respect of large corporate debtors. The 1980s and 1990s recessions were the first significant economic downturns chartered banks faced in the role of major long-term secured lenders. Canadian banks found traditional remedies such as seizure and liquidation were not necessarily adequate or optimal in the context of a general market downturn when many corporate clients, including some of their largest clients, encountered serious financial difficulty. Facing large and widespread losses, FIs including chartered banks actively supported a number of the largest, and often ad hoc, corporate restructurings during the 1980s and 1990s, through the CCAA

and other mechanisms. The support of these large secured creditors was usually essential for carrying out successful reorganisations due to the majority voting requirements contained in the CCAA, for instance. In some cases banks sought and obtained special permission from regulatory authorities to implement debt-for-equity exchanges as part of restructuring plans.

The success of large secureds in this regard, and in the court cases that repurposed the CCAA, bears out the idea that sophisticated repeat players (such as banks) are better able to advance their interests through lawmaking and adjudication than one-time players (such as debtors or labour unions) and so help shape law in a manner favourable to their interests.³⁴ Debtors, on the other hand, predictably turned to restructuring—particularly a stay of proceedings under the Act—as an attempt at self-preservation or to minimise large, impending liabilities. It is worth noting that within the context of insolvency, debtors are not usually an organised interest group.

A second factor that contributed to the revival of the CCAA relates to changing ideas about company reorganisation. In large part due to the influence of US ideas about bankruptcy law, the concept of DIP going concern reorganisation had gained greater acceptance, and even some popularity, in the press and among practitioners by the 1980s and 1990s. Unlike the attitudes of the 1930s, DIP reorganisations were not regarded as necessarily abusive of creditor rights. Rather, facilitating DIP reorganisation was increasingly seen as a desirable

³⁴ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Soc'y Rev* 95.

normative goal of bankruptcy and insolvency legislation.³⁵ In the context of the 1980s and 1990s, corporate restructuring was generally seen as an alternative to liquidation and winding-up, and had a role in saving jobs, with knock-on benefits for the wider community. This appears to be the first time company restructuring was broadly associated with job retention in Canada. During the Great Depression, restructuring was so associated with job losses that important employers, like the CNR and Algoma Steel, were not allowed to restructure, either privately or under the CCAA. Instead the federal government nationalised or subsidised such corporations to ensure ongoing employment for workers.³⁶ The Algoma Steel reorganisations under the CCAA in the 1990s and 2000s, for instance, were both justified in part on the grounds that restructuring would help *save* jobs and different levels of government contributed funding to both restructurings on primarily these grounds.³⁷

This points to changes in the 'public relations' surrounding large firm reorganisations (restructuring results in jobs 'lost' or 'saved') as well as approaches to dealing with firm insolvencies (nationalisation versus government supported 'private' reorganisation), rather than changes in the *outcome* (fate of the firm), which in both periods was to preserve important enterprises as going concerns. The other notable constant has been the support of large secured lenders for such reorganisations and their influence in terms of 'shaping' law. So the practical outcome (for workers and large secured lenders) of bondholder

³⁵ See Tassé, n 9 above, 175-176.

³⁶ Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1987), 420-22.

³⁷ See discussion in Sarra 2003, n 25 above, Chapter 5 'Algoma Steel Corporation: Recognition of Human Capital Investments'.

reorganisations or the nationalisation of important firms in the 1930s is probably little different from the contemporary CCAA reorganisation of important companies such as Algoma Steel. The most significant, broad point of distinction between the two periods is that the 1980s and 1990s witnessed the application of a public interest ‘gloss’ to a century-old bondholder remedy.

Changing ideas around reorganisation influenced responses to situations of corporate insolvency. Borrowing from ideas surrounding chapter 11, restructuring came to be regarded as a possible solution to firm insolvency in Canada as well. In a highly recursive fashion, this *de novo* legal concept helped frame the way parties and judges approached the issue of firm insolvency. Most notably, this new paradigm influenced how the skeletal CCAA was read and interpreted. Going-concern reorganisations, for the wider public good, were regarded as the main policy purpose of the Act, which lacked a preamble or other policy statement. What little of the legislative and historical context of the Act was apprehended—enacted during the Great Depression; purportedly to save jobs according to Hansard; limited in application to insolvent companies with outstanding trust deeds—was seen to affirm the policy goal of going concern reorganisations of large companies.³⁸ Much subsequent case law, including exercises of judicial discretion and inherent jurisdiction, was decided in view of this implicit policy goal. This view of CCAA law lined up much better with a number of American theories of business bankruptcy then in circulation. Reported cases, news coverage and academic literature from this period give

³⁸ On how (new) legal propositions can gain acceptance, see further Mark Tushnet, ‘Defending the Indeterminacy Thesis’ (1996-1997) 16 QLR 339.

comparatively less attention to the use of the CCAA as a remedy for large creditors, although it was still employed as such. Much changed ideas about company reorganisation helped shape practical and conceptual approaches to dealing with firm insolvency during the 1980s and 1990s, including those carried out under the CCAA.

New ideas in respect of company insolvency and reorganisation were also influenced by stakeholder groups, which were not major factors in early twentieth-century company reorganisations. Concern for employees, the environment, and wider communities in which companies operated assumed significant roles in corporate insolvencies and wider academic debates in the 1980s and 1990s.³⁹ Bankruptcy theorists, and even judges, justified going-concern reorganisations in part on the basis of the benefits that would accrue to such stakeholders. Accordingly, stakeholders that previously had no say in corporate restructuring matters assumed central roles in both theoretical discussions and actual corporate reorganisations. Interestingly, although probably not accidentally, these groups provided a publicly appealing ‘face’ for corporate reorganisations, which also advanced the interest of less sympathy-evoking constituencies, such as large secured creditors, debtor management, and shareholders. Later Canadian judges accordingly received as dictum the ancillary, and somewhat radical (for their time) policy arguments suggested by Stanley Edwards in 1947 (concerning the benefits of going concern-reorganisations for workers). Edwards’ recommendations for a novel policy

³⁹ See eg Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven: Yale University Press, 1997); Karen Gross, ‘Taking Community Interests Into Account in Bankruptcy: An Essay’ (1994) 72 Wash ULQ 1031; Marjorie Girth, ‘Rethinking Fairness in Bankruptcy Proceedings’ (1999) 73 Am Bankr LJ 449; Sarra 2003, n 25 above.

approach to company reorganisation to be largely overseen by judges (rather than Parliament)—which appears to have held no sway in 1947, and which were mooted in any event by the 1953 trust deed amendment—effectively became guide posts for the contemporary development of CCAA law and policy. Although large secured creditors essentially dropped out of the legal and public justification for effecting reorganisations at this point, they remained major drivers and beneficiaries of large corporate restructurings.

A significant measure of contingency surrounded this process. From a 1940s vantage point, these developments were unpredictable and unlikely. Had any one of a number of events unfolded otherwise, the results may have been very different. For example, had the Canadian Bar Review gone out of print, as the Fortnightly Law Journal did, it is unlikely that lawyers or scholars in the 1980s and 1990s would have come across Edwards' 1947 article, just as they failed to find Harold Ernest Manning's CCAA articles in the latter journal. Or had contemporary actors looked instead to the more recent Tassé Report to illuminate the history of the CCAA, opposing counsel may well have persuaded judges to reject instant trust deeds on the grounds that they were antithetical to the underlying policy purposes of the Act. In the event, however, neither of these alternatives materialised.

Another major factor that contributed to the revival of the CCAA during this period was the fact that there was not yet a general business restructuring law that could facilitate full company reorganisations. In other words, there was no obvious legal mechanism to deal with the restructuring crisis at hand. For largely

constitutional reasons, an effective federal statute of this nature would need to come through bankruptcy and insolvency legislation. Until 1992, however, the *Bankruptcy Act* did not provide for complete company reorganisation. Its biggest defect was that it did not compulsorily bind secured claims—the type of claims usually held by banks and other large secured creditors. Due to the 1930s constitutional references, provincial legislative responses were powerless to effect arrangements when the company in question was insolvent. With pressure on (and from) large secureds, debtors, and even governments in some instances, to reorganise large, insolvent companies on a going-concern basis, the CCAA was ‘rediscovered’ and pressed into service because it was essentially the only piece of existing legislation that could facilitate such reorganisations. A secured creditor remedy rooted in receivership thus formed the basis for Canadian ‘DIP’ reorganisation law and practice.

The resilience of the CCAA to formal change (such as repeal) thus contributed to the possibility of less formal changes to CCAA law in the form of institutional conversion or layering. In other words, the CCAA’s endurance on the statute books during a period of formal stasis contributed to the possibility that it could be reinterpreted and repurposed as a debtor-, rather than a bondholder-remedy. By the 1980s, since the CCAA was still the only corporate insolvency statute that could bind secured creditors to a plan of arrangement, banks and other actors coordinated around the institutional arrangements enshrined in that Act. Asset specificity and positive feedback from CCAA case law accordingly affirmed and

reaffirmed a few early judicial interpretations of the Act as a general corporate restructuring law,⁴⁰ thereby contributing to path dependence.

This in turn underscores the importance of sequencing in the way events unfolded. For example, had Parliament added general business reorganisation provisions to bankruptcy and insolvency law *prior to* the 1980s recession, that approach to reorganising debtor companies would likely have taken hold and the CCAA left to become a dead letter. Positive feedback through successful reorganisations and case law precedent—particularly during an economic downturn—meant that whatever approach to corporate reorganisation was initially adopted in the 1980s was likely to generate a lot of positive feedback as many companies attempted restructurings. Early approaches to restructuring companies under the stand-alone, skeletal CCAA thus became entrenched rather quickly. By the time similar provisions were added to the BIA in 1992, the CCAA was already the preferred means—by both debtors and large secureds—of restructuring large enterprises in Canada. Thus sequencing and positive feedback help account for the path dependence of CCAA reorganisations from the 1980s onward, including its resilience to repeal efforts as well as attempts to unify the CCAA and BIA under a single Act.

When the CCAA was initially ‘rediscovered,’ ambiguity surrounding some of its provisions and underlying policy purposes helped drive the new cycle of legal

⁴⁰ On judicial interpretation, see generally Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997). In the Canadian context (up to the early 1970s), see further Paul Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974), esp Chapter 1 ‘The Supreme Court of Canada: Its Structure and Capacities’, and Chapter 2 ‘Legal Reasoning in our Highest Court’.

change. Seeking clarity on ambiguous or vague aspects of CCAA law, actors brought these queries before the courts for judicial rulings, in a process known as ‘settling.’⁴¹ By the 1980s and 1990s, the original policy purposes of the trust deed provision did not even feature in reported CCAA decisions, indicating a significant degree of obscurity around that provision in particular, and the CCAA more generally. Ambiguity thus facilitated ‘new’ judicial interpretations of the Act’s underlying policy purposes, which were influenced to a considerable extent by relatively new ideas about corporate reorganisation then in circulation. Had the policy behind the Act and trust deed provision been clear, it is doubtful that the CCAA could have been refashioned by the courts into a DIP restructuring statute. In marked contrast to the way ambiguity facilitated a CCAA ‘renaissance,’ the unambiguous restrictive provision of the FCAA prevented a similar revival of that Act through novel judicial interpretations. Ambiguity created the possibility, and the courts the legal mechanism, for effecting substantive legal change.

i. Judges and courts

Briefly, it is worth flagging the fact that Canadian courts also underwent significant changes during the period in which the CCAA was little used. As a result, courts were well-placed by the 1980s and 1990s to ‘revive’ the CCAA using their inherent jurisdiction and/or judicial discretion. First, overseas appeals ended in 1949, making the SCC the court of last resort and freeing it from the obligation to follow PC precedents. Secondly, during the 1960s to 1980s

⁴¹ Halliday and Carruthers 2007, n 3 above, 1144, citing Ryken Grattet and Valerie Jenness, ‘The Birth and Maturation of Hate Crime Policy in the United States’ (2001) 45 *Am Behavioural Scientists* 668; Ryken Grattet and Valerie Jenness, ‘Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference’ (2001) 91:3 *J Crim L & Criminology* 11; Ryken Grattet, ‘Structural Contradictions and the Production of New Legal Institutions: The Transformation of Industrial Accident Law Revised’ in William J. Chambliss and Marjorie Zatz, *Making Law: The State, the Law, and Structural Contradictions* (Bloomington: Indiana University Press, 1993).

the SCC, especially due to the influence of Bora Laskin, was transformed into a modern, policy-conscious institution. The SCC assumed a far greater role in developing Canadian law, rather than merely settling disputes.⁴² The *Canadian Charter of Rights and Freedoms* also came into effect in the early 1980s, which led to a notable increase in judicial review in Canada.⁴³

On a related note, legal education, especially in Ontario, similarly underwent a dramatic transformation leading up to this point. Preparation for a career as a lawyer went from being essentially an apprenticeship-type program under the Law Society of Upper Canada with a heavy practical bent, to being primarily an academic university-based degree program followed by a period of practical training (articling or clerking).⁴⁴ This influenced how future lawyers approached legal issues they confronted in their practice. It also directly impacted on judicial decision making, particularly in the SCC, which under Laskin C.J.C. significantly grew its law student clerking program. Through their law clerks, SCC judges had their finger on the pulse of many of the newest ideas from academia, and these increasingly made their way into judicial decisions.

The Canadian bench of the 1980s and 1990s, even at the lower court level, was therefore far more imaginative and policy-conscious—even ‘activist’ in some

⁴² See Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005), ‘Part V: The Supreme Court of Canada.’

⁴³ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Carl Baar, ‘Judicial Activism in Canada’ in Kenneth M. Holland (eds), *Judicial Activism in Comparative Perspective* (New York: St. Martin’s, 1991), 53, cited in Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), 216.

⁴⁴ See eg Girard, n 42 above; on the development of legal education, see more generally, C. Ian Kyer and Jerome E. Bickenbach, *The Fiercest Debate: Cecil A Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: University of Toronto Press for the Osgoode Society, 1987).

instances—than that of the 1920s and 1930s. This proved significant in subsequent CCAA law developments. A less imaginative bench that was unconcerned with policy would have been an unlikely institution to breathe new life into a dead letter Act. This accordingly highlights the significant role of legal institutions such as courts in mediating the interpretation and application of ‘law on the books’ into ‘law in practice.’ It illustrates that in the regensis of the CCAA, courts have not just mediated law, but exerted such influence as to create substantive new law in many instances. In this context and capacity, Canadian courts have had an even greater role than Parliament in many respects.

A significant element of contingency also characterised court-driven CCAA developments in 1980s and 1990s. The very fact that the Act was largely converted into a debtor-remedy was not a predictable development from a pre-1980s vantage. Early on in this period, reported decisions reflected different approaches to the validity of instant trust deeds issued to gain access to the CCAA, as judges grappled with how to resolve the obscurity and ambiguity around this provision. Ultimately, Doherty J.A.’s dissent in the 1990 *Elan* decision became (and remains) a touchstone authority for the use of instant trust deeds and other tactical devices to gain access to the Act. Recognising the validity of instant trust deeds in turn ensured that the Act could not operate as a bondholder remedy as intended, and was a critical factor in the outward conversion of the Act into a debtor-remedy. From the vantage of 1953, however, future judicial sanction of such instruments was evidently not foreseeable, as

these would have completely undermined the trust deed restriction added to the statute in that year. Moreover, while dissents can and do occasionally become influential over time, which ones will and when is not usually predictable. The *Elan* dissent rather quickly became a very influential authority in the interpretation of trust deeds, but Doherty J.A.'s interpretation of the trust deed provision was (initially) one of several possible interpretations of that section. As Doherty J.A.'s reasoning was increasingly adopted, however, it became harder to shift to another interpretation, even a better one.⁴⁵ Self-reinforcement through the use of precedent, positive feedback and path dependence 'locked in' Doherty J.A.'s interpretation of section 3, with ongoing ramifications for judicial analyses of other tactical devices in the CCAA context. Accordingly this line of cases marked a major shift in approaches to Canadian corporate reorganisation under insolvency law.

Unlike earlier bondholder reorganisations, in the 1980s and 1990s parties often exclusively relied upon the skeletal Act to effect full company reorganisations, usually in a very ad hoc fashion. This effectively made contemporary CCAA reorganisations even more court-driven than those carried out by bondholders in the 1930s. Earlier receivership reorganisations relied to a great extent on the trustee's or receiver's power under the governing trust deed—documents which commonly reached 300 or more pages in length—and accordingly the court-driven processes under the CCAA or similar provincial legislation were merely supplemental. Without a similar private architecture for effecting reorganisations, however, later parties turned to the CCAA as the core

⁴⁵ *Re Norm's Hauling Ltd.* (1991), 6 CBR (3d) 16, 91 Sask R 210 (QB).

framework for reorganising companies. This development necessitated a much greater role for judges in CCAA ‘lawmaking’ since the Act, by design, did not contain much in the way of restructuring guidelines.

Over time, positive feedback and asset specificity have also contributed to path dependency in terms of the ad hoc, court-driven approach to CCAA reorganisations. It is probably no coincidence that large secureds—as one of the few groups of sophisticated repeat players in business insolvencies—are content to keep the locus of legal change in the courts, a forum in which they are relatively better-placed to influence legal change as compared with other parties. This phenomenon has been further bolstered by chronic reproduction of case law precedents. Restructuring ‘guidelines’ provided by courts have tended to respond to restructurings on a case-by-case (or ad hoc) basis as well as reinforce the court-driven nature of CCAA proceedings (for example, by granting orders that require parties to report back: ‘come back’ clauses). For instance, the appointment of a receiver or monitor was initially at the discretion of the court, as it was a concept found nowhere in the statute itself. This process accordingly involved a hearing before the supervising judge. Despite subsequent statutory amendments, which have made the appointment of a monitor an essential component of CCAA proceedings⁴⁶ (formalising arrangements that had by that time become standard practice), the appointment process itself still takes place through the court, rather than through a summary or administrative procedure.

⁴⁶ *Companies’ Creditors Arrangement Act*, RSC 1985 c C-36, s 11.7.

The creation of a new 'official role' in CCAAs also created, or even necessitated, the assembling of a new group of professionals (CCAA receivers/monitors), which have a professional interest in ongoing court-driven proceedings under the Act. Accordingly, interest groups can spring up around institutional arrangements, like court driven CCAA proceedings, which may make those arrangements even more resilient to change in the future. This in turn helps explain the chronic reproduction of ad hoc and court-driven approaches to CCAA restructurings. Such an approach was initially adopted because the parties were attempting to use an antiquated and skeletal statute to restructure insolvent companies in the midst of an economic downturn. However, subsequent events have perpetuated this approach to CCAA reorganisations, despite substantial amendments to the Act and a large body of case law, even during periods of economic growth. Thus, the 'effect created by causes at some previous period [appears to have become] ... *a cause of that same effect in succeeding periods,*' as described by Arthur Stinchcombe.⁴⁷ In other words, the ad hoc, court-driven nature of many CCAAs was originally an *effect* of an economic downturn and lack of restructuring mechanisms in the 1980s and 1990s. Over time, however, through positive feedback and the self-reinforcement of case law precedents, this *effect* has assumed a self-perpetuating quality; the ad hocery of CCAA restructurings has itself become a path dependent characteristic of this area of law.

⁴⁷ Arthur Stinchcombe, *Constructing Social Theories* (New York: Harcourt, Brace, 1968) cited in Pierson, n 5 above, 46 [emphasis in original].

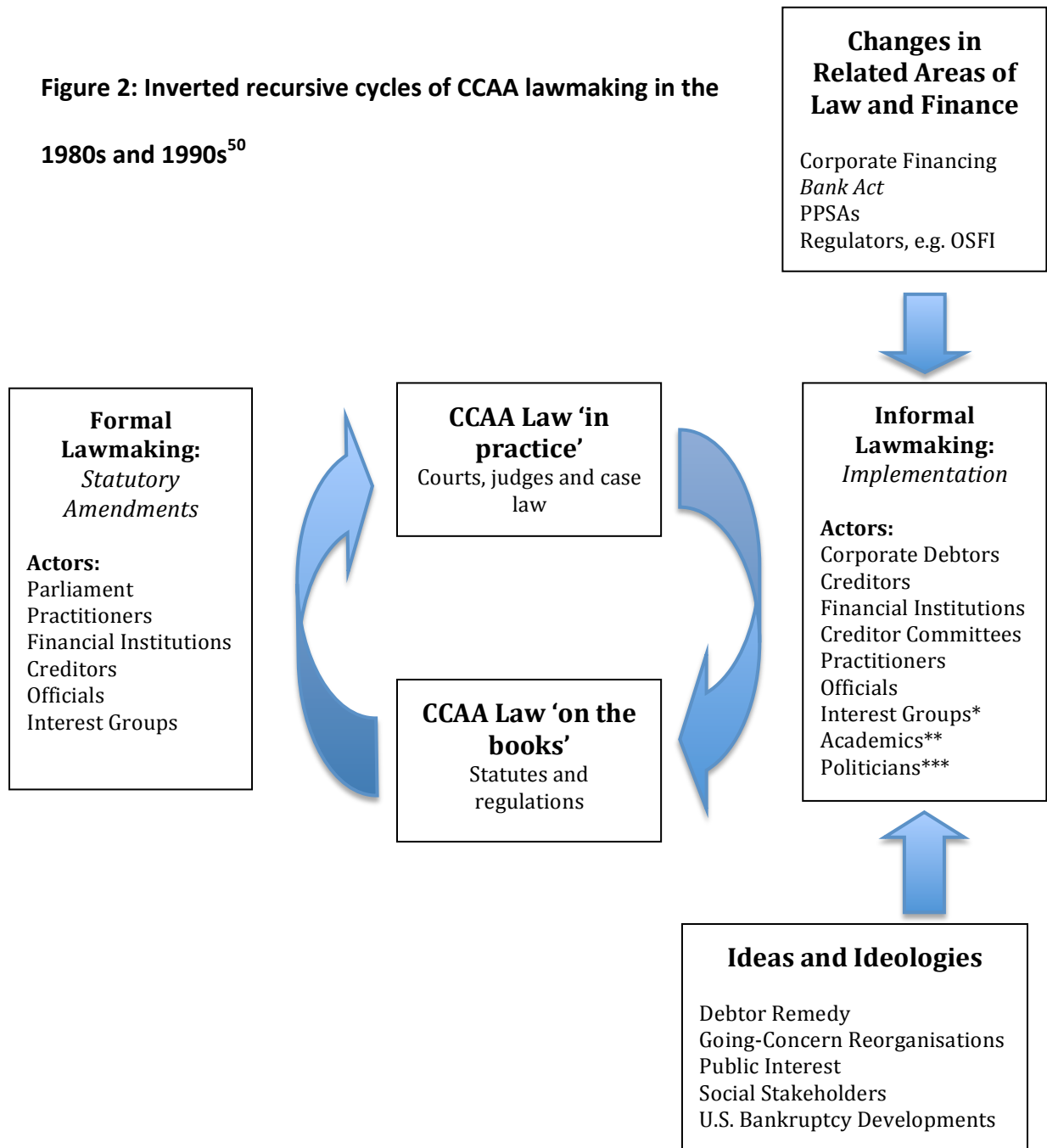
Actors and interest groups that have formed around, and have a professional interest in heavily court-driven restructuring proceedings help to explain the path dependency and resilience of this approach to corporate reorganisation, as well as the endurance of the CCAA to more recent repeal efforts. Where actors such as insolvency professionals have coordinated around institutional arrangements like the CCAA, asset specificity suggests that they will be inclined to oppose institutional change, since they have developed ‘assets’ that are specific to the existing set of institutional arrangements. In the context of the CCAA, this has been born out in both the ongoing ad hoc, court-driven approach to individual insolvencies, as well as the preservation of the CCAA on the statute books after its regeneration in the 1980s. Repeal of the CCAA has not seriously been considered since 1992, when it was taken off the Parliamentary agenda due to how useful the Act had proven in practice. It is further worth noting that insolvency professionals have played a large and influential role in bankruptcy amendments from 1992 onward. As insolvency scholars have noted, the most recent round of bankruptcy reform has resulted in duplicative amendments to the CCAA and the BIA, despite persuasive efficiency arguments for consolidating both statutes into a single Act.⁴⁸ The specificity of actor and interest group ‘assets’ in restructurings under the CCAA accordingly helps account for the ongoing resilience of this stand-alone, corporate restructuring statute, despite parallel business restructuring provisions under the BIA.

⁴⁸ Jacob S. Ziegel, ‘Canada’s Dysfunctional Insolvency Reform Process and the Search for Solutions’ (2010) 26:1 BFLR 63; Jacob S. Ziegel, Chapter 12 ‘The BIA and CCAA Interface’, in Anthony Duggan and Stephanie Ben-Ishai (eds), *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (Toronto: LexisNexis, 2007) [Ziegel 2007], 316-318.

The formal institutional resilience of the CCAA statute itself, combined with less formal, ongoing changes to CCAA law through case law produces an interesting dynamic in terms of CCAA law developments. The CCAA provides strong, formal authority for judicial lawmaking due to its status as a federal statute, express provision empowering courts to decide CCAA matters, and (until recently) its brevity. In other words, it was in part the lack of regular or lengthy formal amendments to the Act that provided considerable scope for judicial lawmaking. In contrast, a more lengthy, codified or frequently updated statute, such as the BIA, is generally seen to convey commensurately less judicial authority in this regard.⁴⁹ So the more codified and specific the ‘law’, the less room or need for substantive judicial ‘interpretation.’ The strength and legitimacy of judge-made law depends to some extent on the source of its authority, such as a statute or precedent on which a judge can draw in terms of establishing new interpretations, tests or rules. In the case of the CCAA, formal institutional resilience and even stasis in respect of a skeletal Act—which by virtue of its brevity did more to empower, than constrain judicial lawmaking—effectively provided the means (namely, through judges) for effecting less

⁴⁹ See eg Ziegel 2007, *ibid*.

Figure 2: Inverted recursive cycles of CCA lawmaking in the 1980s and 1990s⁵⁰



⁵⁰ Adapted from Halliday and Carruthers 2007, n 3 above, 1147, and Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009) [Halliday and Carruthers 2009], 17.

* Interest groups tend not to be involved in individual CCAs, however, some interest groups have sought and obtained intervener standing in high-profile reorganisations, see eg *Re Indalex Ltd.*, 2013 SCC 6, 96 CBR (5th) 171, in which the following groups were interveners: Insolvency Institute of Canada; Canadian Labour Congress; Canadian Federation of Pensioners; Canadian Association of Insolvency and Restructuring Professionals; Canadian Bankers Association.

** The courts have sometimes turned to academic literature in the course of deciding CCA matters, see esp, Georgina R. Jackson and Janis Sarra, 'Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters' 2007 ARIL 41 cited *inter alia* in *Re Indalex Ltd.*, *ibid.*

*** Governments (federal, provincial, etc.) sometimes provide financing for a restructuring.

formal, timely changes to ‘law in practice,’ which could accordingly be highly responsive to changing conditions on the ground, such as those concerning corporate financing practices.

Much like Halliday and Carruthers’ recursivity of law theory in respect of formal bankruptcy law reform, CCAA law thus has two poles that hold a recursive loop in dynamic tension. At one end is the statute (‘law on the books’), which is subject to relatively infrequent change through formal statutory amendments. At the other pole is CCAA law ‘in practice’, largely overseen by provincial superior courts. CCAA ‘law’ accordingly represents a microcosm of the recursive loop of formal bankruptcy reform set out by Halliday and Carruthers. See Figure 1, above.

Since the CCAA is a rather open-ended restructuring statute—and was especially so in the 1980s and 1990s—the parties to corporate insolvencies under the Act are relatively free to craft a tailor-made restructuring plan in respect of the debtor company. CCAA case law affirms that arrangements under the Act can include anything that can be included in a valid contract.⁵¹ In point of fact, the CCAA provides even greater scope for creativity than conventional contracts, since judicial approval of a plan also serves to bind a minority of dissenters and third-parties. Private parties accordingly have a fairly large ‘say’ in the case-by-case development of corporate reorganisation law. Third parties, on the other hand, may not even have standing in a CCAA court. Since case law developments

⁵¹ See eg discussion in Fred Myers and Alexa Abiscott, ‘Asset Backed Commercial Paper: Why the Courts Got It Right’ (2009) 25 BFLR 5, 19, FN49, citing *inter alia* *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 OR (3d) 513, leave to appeal refused (2008), 2008 CarswellOnt 5433, 2008 CarswellOnt 5432 (SCC), para 62.

tend to 'trickle up' into statutory amendments, to effect a change or expansion of CCAA law in the courts can result in potentially significant, overarching legal change at the level of formal law reform as well.

Lauren B. Edelman's recursive theory of endogeneity of law⁵² is accordingly quite useful for understanding many significant CCAA law developments from the 1980s onward. This theory captures the ways in which private parties create practical, substantive 'law' in the process of carrying out broad legal policies or mandates. In the case of a skeletal Act like the CCAA, the parameters and mechanics of judicially approved restructuring plans serve as tangible examples of 'law' for subsequent restructuring efforts under the Act. By virtue of judicial sanction, the 'law' made by private parties in the course of implementing the Act tends to be institutionalised in case law over time.

A prime example relates to first-day orders under the Act. The statute itself does not provide a detailed procedural framework in respect of carrying out CCAA proceedings, including what are now known as initial, or first-day orders: the initial application made under the Act. Section 10 of the CCAA simply provides that applications may be made by 'petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.'⁵³ Furthermore, section 11 gives the court authority to stay any other proceedings against the debtor company, if and as it sees fit.⁵⁴

⁵² Lauren B. Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law' (1992) 97 Am J Sociology 1531.

⁵³ *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 10 [now in force].

⁵⁴ *ibid* s 11.

Accordingly, it was largely left to CCAA applicants to decide what to put into their first-day order request and when to put that application before the court.

Debtor's counsel in Canada typically requested a general stay of proceedings against the debtor company as part of its initial application.⁵⁵ Note that while the Act expressly authorised courts to grant such stays of proceedings, this was not an automatic or compulsory part of restructuring proceedings. Over time, various other 'requests' were added to initial orders, such as that the debtor maintain possession of the business, that a monitor be appointed (usually the debtor's accounting firm),⁵⁶ and that provision be made for DIP financing. None of these concepts originated from the text of the CCAA. Rather, they were suggested by counsel and then approved by judges through numerous (often ad hoc) CCAA decisions, particularly during the 1980s and 1990s.

This is a striking example of Edelman's endogeneity of law theory in action. In their efforts to implement CCAA 'law,' sophisticated private parties formulated various practical measures to carry out reorganisations under the Act. In a highly recursive fashion, these practical measures became institutionalised in case law and model CCAA orders⁵⁷ over time, such that they now constitute practical CCAA 'law' to many actors involved in corporate reorganisations, as well as scholars and commentators. Statutory amendments in 2005 added some

⁵⁵ See Richard B. Jones, 'The Evolution of Canadian Restructuring: Challenges for the Rule of Law' 2005 ARIL 481, esp 490-497.

⁵⁶ David Mann and Neil Narfason, 'The Changing Role of the Monitor' (2008) 24 BFLR 131.

⁵⁷ See eg 'Amended Explanatory Notes for Long Form CCAA Order dated November 18, 2008 and Short Form CCAA Order dated September 12, 2006' online: <<http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/explanatory-notes/>> (accessed 7 January 2013.)

direction as to the material that must accompany initial orders.⁵⁸ The latest substantive round of CCAA amendments in 2009 further enshrined some of these practical measures into legislative form, such as the appointment of a monitor.⁵⁹ These statutory amendments accordingly complete a recursive cycle that began in the 1980s with private parties grappling with how to effectively carry out reorganisations under the skeletal CCAA.

Despite notable differences between the restructuring crises of the 1920s-1930s and 1980s-1990s, one recurring pattern leading to these crises was secured creditor remedies not keeping pace with earlier changes in corporate financing practices. With the onset of economic downturns, large secured lenders in both periods wanted to restructure a number of large corporate reorganisations, but lacked an effective means of carrying out such restructurings. And in both instances, large secured lenders got new 'law' through Parliament or the courts to meet this need. This seems to indicate that corporate restructuring may be a particularly necessary or desirable remedy for large secured lenders in times of economic downturn; either because of the size of the losses at stake when a major company defaults and/or the fact that economic downturns tend to lead to widespread losses as many borrowers face financial difficulty.

It is slightly surprising that life companies and chartered banks, which are large, sophisticated and powerful actors in the Canadian lending environment, were

⁵⁸ See *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, 10(2), as am by 2005, c 47, s 127.

⁵⁹ See *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, 11.7(1) [now in force]; Stephanie Ben-Ishai, *Bankruptcy Reforms 2008* (Toronto: Thomson Carswell, 2008), 61-66, and eg 41-42 noting the codification of the CCAA stay of proceedings, now enshrined in *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 11.02.

each caught without effective lender remedies in successive recessions, to their own detriment. Interestingly these large lenders were also the architects of their own problems in the sense that it was their omission of majority provisions, and then the switch to non-trust deed based financing that left them without recourse to bondholder reorganisations and the CCAA, respectively.

These 'lapses' are surprising. Perhaps they are due to the fact that the lending agreements and lender remedies in question were both times largely drawn up in periods of economic growth, with little or no attention paid to how things might unfold in a mass default scenario, such as in an economic downturn. After all, what is a desirable lender remedy in a strong economy is not necessarily adequate or desirable in a weaker economy. This explanation would certainly fit to the extent that secured creditors favour traditional seizure and liquidation of collateral, for instance, since their effectiveness as a lender remedies are tied to market demand and prices—both of which tend to drop in a weak economy when the market may be flooded with similar receivership sales. This phenomenon was recently born out in the US residential property market, as a result of mass foreclosures stemming from the subprime mortgage crisis. Illiquidity and poor market conditions in turn precipitated the Canadian third-party ACBP crisis, when no new investors could be found for the maturing paper. The failure of 'traditional' secured creditor remedies appears to have prompted reorganisation efforts in these instances.

A further factor might be linked to the demonstrable and particular success of these large secured creditors in seeing new 'law' introduced to address

restructuring crises when they occur. In other words, these institutions can fairly reliably get ad hoc legislation or case law precedents to facilitate their preferred lender remedy as the need arises. They do not need to plan for this well in advance. This may be interrelated with conventional moral hazard concerns. One can legitimately question whether the failure and liquidation of large, important FIs such as Canada Life, Sun Life, Canadian Imperial Bank of Commerce or Caisse de dépôt et placement du Québec were ever really ‘on the table’ in the sense that the Canadian and provincial governments would allow these FIs to fail the way they did smaller banks and life companies. Certainly, the federal and provincial governments have a track record for coming to the aid of large FIs as well as much smaller, yet regionally important firms, to prevent failures of ‘important’ Canadian companies.

E. The influence of ideas

My historical study shows that ideas have the potential to influence legal developments, and accordingly factor into explanatory accounts of legal change. In the context of CCAA law, Edwards’ 1947 journal article, which proposed going-concern reorganisation as a normative goal for insolvency law, as well as a large role for judicial discretion in CCAAs, was a latent, but ultimately successful piece of advocacy. Despite a restrictive amendment in 1953, which (in the short term) precluded the possibility of judicial implementation of Edwards’ suggestions, in the 1980s and 1990s judges cited policy arguments made by Edwards to justify novel interpretations of the Act—including the interpreting away of the 1953 amendment. Furthermore, part of the reason that Canadian

judges were prepared to adapt the CCAA in this manner by the 1980s and 1990s was due to changing ideas and attitudes about business bankruptcy in the US and Canada following enactment of the 1978 US *Bankruptcy Code*. Edwards' proposed conception of CCAA law also formed a foundation for further Canadian theoretical work in this area, notably Janis Sarra's public interest theory of CCAA law. Sarra's theory in turn influenced later case law and substantive legislative amendments to bring the CCAA into greater conformity with these normative theoretical ideas.

Normative ideas about the CCAA propounded by academics like Edwards and Sarra have thus produced tangible and profound changes in the way the Act is applied by judges, and influenced substantive statutory amendments.⁶⁰ Accordingly, normative theories and ideas about business bankruptcy law are important for understanding stability and change in CCAA law over time. The role of ideas from academia in CCAA law development underscores the influence of legal concepts (such as going-concern reorganisation), including those which are adopted from other jurisdictions. This relates to a recursivity of law framework, which highlights the important role of legal concepts and legal actors, including academics, on both the implementation and lawmaking sides of the recursive loop.⁶¹ Drawing on ideas from HI and a recursivity of law framework, my thesis offers an explanatory account of how and why these ideas about business bankruptcy law influenced and shaped legal developments.

⁶⁰ The influence of academics on the Canadian bench is a fairly recent phenomenon, which was facilitated in large part by changes that occurred during the 1970s and 1980s in the Supreme Court of Canada under Chief Justice Bora Laskin. See Girard, n 42 above. See also Weiler, n 40 above, Postscript dated January 1974.

⁶¹ Halliday and Carruthers 2007, n 3 above, 1142.

The process by which ideas have influenced CCAA law displays a high degree of recursivity. Ideas often percolated upwards from the minds of academics and practitioners, to judges, and ultimately to Parliament, whereupon they were sometimes enshrined into legislation. Instances in which novel changes in CCAA law flowed from ‘the books’ into practice are relatively few. The ‘recursive loop’ of CCAA developments entails a significant degree of ‘judicialisation,’ where judges, through their decisions, assumed a prominent role in lawmaking ‘on the ground.’ The operation of *stare decisis* in Canadian case law generated positive feedback for this process, such that judicialisation of CCAA law—left to its own devices—essentially became a self-reaffirming concept; an axiom of Canadian corporate reorganisation under the Act.

Interestingly Parliament often ‘responded’ to ‘judicial legislation’ under the CCAA by enshrining case law precedents into statute; passing over the opportunity to ‘rein in’ judge-made law. This generated further positive feedback for the phenomenon of judicialisation. The traditional lawmaking process was largely inverted in a recursive loop that is consistently reaffirmed by Canadian judges and Parliament. It is therefore not only the institution of the CCAA which has proven resilient to change over time; the inverted process of CCAA lawmaking has proven to be a resilient set of institution arrangements in and of itself.

Situating the main centre of CCAA lawmaking in the courts considerably alters the dynamics at play, with some important ramifications for the role of

normative ideas about business bankruptcy law in terms of legal change. Using individual restructuring cases as the basis for effecting legal change provides multiple opportunities and points of entry for novel and evolving ideas of business bankruptcy.⁶² Arguments that do not hold sway under one set of facts may be successfully marshalled in a subsequent case; there is no prejudice for unsuccessful ideas. This is pointedly demonstrated by the ultimate and profound influence of Edwards' 1947 journal article more than 40 years after its publication date.

Once an idea 'succeeds' it has the potential to revamp CCAA law such that it applies even in those types of cases where it previously failed to hold sway. One way this can occur is through appellate decisions, which may usher in new interpretations and ideas around business reorganisation that become binding or persuasive precedent for lower courts. Thus, chronic reproduction, positive feedback and path dependence may reinforce and entrench certain ideas in CCAA law—even if the initial adoption of these ideas is random, suboptimal, or incongruous with existing precedents or practices. To block a new idea from taking hold it must be dismissed in essentially every case in which it is argued. In contrast, an idea need only succeed once—presumably at the appellate level—to transform CCAA law and practice along new lines.⁶³ Accordingly, CCAA 'law' is perpetually dynamic in the sense that new cases continually create possibilities for legal change that may throw existing interpretations of the Act back into flux.

⁶² Contrast with opportunities to effect formal bankruptcy reform, which occur rather infrequently, see Jacob S. Ziegel, 'Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions' (2010) 26:1 BFLR 63; Stephanie Ben-Ishai, Saul Schwartz and Thomas G.W. Telfer, 'A Retrospective on the Canadian Consumer Bankruptcy System: 40 Years after the Tassé Report' (2011) 50 CBLJ 236.

⁶³ See eg Kennedy, n 40 above, 114.

Although existing interpretations of CCAA law constitute institutional equilibria at certain points in time, these interpretations are susceptible to changing conditions.⁶⁴

There is significant scope for new ideas to infiltrate and influence CCAA law developments via case law, as opposed to through the relative rare instances of formal insolvency law reform in Canada. Normative views of corporate bankruptcy expressed in case law are accordingly quite important for historical and explanatory accounts of CCAA law developments.

F. Summary

An historical account of the CCAA bears out the theory that institutions—particularly ‘parchment’ institutions—tend to be highly resilient to change or abolishment.⁶⁵ The CCAA survived at least three repeal bills introduced between 1933 and 1992, in addition to other, unrelated recommendations for repeal by practitioners and at least one Parliamentary committee.⁶⁶ A socio-legal and recursivity of law analysis demonstrates that the Act itself was a continuation of the longstanding practice of bondholder reorganisations in Canada and England, which developed under floating charges in the mid-nineteenth-century. The enshrining into legislation of a secured creditor remedy developed under nineteenth-century trust deeds has effectively ‘preserved’ a bondholder remedy from a period when trust deeds were a primary method of securing long-term

⁶⁴ Contrast with ‘deep’ equilibria, see Pierson, n 5 above, 157-158, citing H. Peyton Young, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* (Princeton: Princeton University Press, 1998).

⁶⁵ Pierson, *ibid* 143.

⁶⁶ Tassé, n 9 above, 81, 175.

financing, despite the significant expansion and development of new forms of lending and secured creditor remedies in the latter half of the twentieth-century. Interestingly, the trust deed restriction was done away with in the 1980s and 1990s, once large secureds shifted to other methods of taking security. Accordingly, this development is consistent with the central argument of this thesis that large, long-term secured creditors have been major drivers of corporate reorganisation law developments in Canada—inside and outside insolvency law—from the late nineteenth-century to the present day.

In the result, institutional resilience, path dependence and the process of statutory reinterpretation led to substantial (outward) institutional conversion of the CCAA in the 1980s and 1990s rather than outright repeal. In this process, historical and institutional factors played a large, and arguably more significant role than the interest group politics surrounding specific instances of law reform or amendment. One particular difficulty that this transformation raises in the legal context, especially in view of large role of judges in expanding the Act on a case-by-case basis, is the fact that it seems to go against the idea that statutes convey clear expectations, as well as the operation of the rule of law in the commercial restructuring context. ‘Flexibility’ appears to be inherently and overtly more important to both normative and functional conceptions about CCAA law than legal certainty or the rule of law.

The most recent and comprehensive series of amendments to the Act, the last of which came into force in 2009, enshrined much of the preceding 30 years of case law into legislative form. These amendments have accordingly been taken as a

signal of Parliamentary affirmation of the ‘re-purposing’ of the statute, and probably demarcate the end of this cycle of change in terms of introducing a formal (if temporary) equilibrium in CCAA law and practice.⁶⁷ Perhaps judges will take these amendments as encouragement to continue developing ‘judicial legislation,’ under the Act, possibly even circumventing the new statutory provisions if they think the circumstances so warrant. Alternatively, the amendments could usher in a more restrained approach to judicial discretion and inherent jurisdiction on points of law or procedure that the Act now addresses.

In at least one recent case it appears that judges are following the former approach.⁶⁸ Given the history of the Act, especially over the past 30 years, path dependence and institutional resilience suggest that this is the more likely outcome. At this point, I doubt that any textual provision of the CCAA—whether it is an anachronism or a recent addition by Parliament—will substantially rein in the use of judicial discretion or inherent jurisdiction. To reverse this trend Parliament would probably need to send the courts a much stronger signal, such as repealing the CCAA and replacing it with a new Act. The fact that courts have, in some instances, averred to older case law tests instead of new legislation on

⁶⁷ ‘Probably’ because there are some cases which appear to indicate that judges may still be pushing out/determining the boundaries of CCAA law, without reference to the new, relevant provisions of the Act, see eg Alfonso Nocilla, ‘Asset Sales Under the Companies’ Creditors Arrangement Act and the Failure of Section 36’ (2012) 52 CBLJ 226.

⁶⁸ See eg the following recent Quebec Superior Court order which holds that a corporation operating a railway is not a ‘railway company’ under the CCAA, and hence is not prohibited from restructuring under the Act: *Re Montréal, Maine & Atlantique Canada Co.*, 2013 QCCS 4039, EYB 2013-225915, per Castonguay, J.C.S., paras 1-26.

See also Alfonso Nocilla, ‘Is “Corporate Rescue” Working in Canada?’ paper presented at Annual Commercial and Consumer Law Workshop in Halifax, Nova Scotia (October 2012) [Nocilla Working Paper], concerning liquidating CCAAs.

point appears to highlight how the inverted process of lawmaking under the Act has itself become entrenched over the past 30 years.

The start of the newest cycle of change in CCAA law appears to be the recent trend toward 'liquidating plans.' The public interest aspects of the going-concern reorganisation object of the Act still exist, but does not really account for or justify the use of the CCAA to effect liquidations. It is possible that the increase in liquidating plans may lead to 'layering' within CCAA law, whereby the Act may be deployed to effect company liquidations in addition to going-concern restructurings. The legitimacy narrative surrounding the CCAA may be modified to account for this new 'purpose,' or liquidating CCAAs may represent a parallel and potentially subversive institutional track within CCAA law.⁶⁹

Recent discussions on liquidating plans highlight the role of vulture funds, distressed debt traders and hedge funds in corporate insolvencies.⁷⁰ While the identity and interests of claimholders in a given CCAA case are undoubtedly important, and may go some way to explaining the supposed rise of liquidating plans, my historical study demonstrates that vulture funds and the like were active in CCAAs and bondholder reorganisations in the early twentieth-century

⁶⁹ One reason for the rise in liquidating CCAAs may have to do with US law or the preferences of US claims-holders in terms of having proceedings overseen by a court-appointed or judicially recognised 'official.' In a similar vein, Peter P. Farkas has suggested that US preferences for a court-recognised 'official' in this regard may be part of the reason that court-appointed receiverships are more common than private receiverships in Canada, see Farkas, n 10 above.

⁷⁰ See eg Jeffrey B. Gollob, 'Distressed Debt Lenders and their Impact on Restructurings and Workouts in Canada' 2004 ARIL 5; Janis Sarra, 'Judicial Exercise of Inherent Jurisdiction under the CCAA' (2004) 40 CBLJ 280, 290; Jason Harris, 'Enhancing the Role of Creditors' Committees in Corporate Rescue Laws' 2011 ARIL 23; Robert J. Chadwick and Derek R. Bulas, 'Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World' 2011 ARIL 5; Janis Sarra, 'Manoeuvring through the Insolvency Maze – Shifting Identities and Implications for CCAA Restructurings' (2011) 27:1 BFLR 155, 158.

as well. Since no formal records were kept on CCAAs until 2009, it is also difficult to say whether liquidating plans are actually on the rise, or whether they are now merely attracting more scholarly and practitioner attention. It may be that the lending landscape and use of the CCAA is fundamentally changing. One must be cautious, however, about drawing such a conclusion based on the limited available data. In any event, the phenomenon of liquidating plans—which expressly utilise the Act as a lender-, rather than a debtor-remedy—is consistent with the view set out in this thesis that large lenders remain major drivers of contemporary CCAA law reforms.

III. Wider significance

A. Canadian corporate reorganisation law

My thesis presents an historical study of CCAA law and accordingly sheds light on the origins of the Act as a lender remedy, its relationship to earlier reorganisation practices under trust deeds, and its importance for FI solvency during the Great Depression. This historical account of the CCAA differs from conventional assumptions about the origins and policy purposes behind the statute in some significant respects. These accounts have usually interpreted the Act as a debtor remedy, which was primarily motivated by concerns about unemployment. Some of these accounts have also interpreted the enactment of the CCAA in 1933 as signifying the addition of business reorganisation as a normative goal of Canadian bankruptcy and insolvency law.

By situating the CCAA within the legal, political, economic and social context of the 1930s, my study provides an historical vantage from which to analyse the development of CCAA law and contemporary business reorganisation practices. For example, the Act's historic and ongoing role as a lender remedy gives rise to interesting lines of inquiry and argument with respect to lender solvency issues in contemporary cases, particularly liquidating CCAAs. If the Act was intended as a lender remedy (rather than to facilitate going-concern reorganisations) there may be less reason to object to liquidating CCAAs on normative or policy grounds.

B. Approaches to studying commercial law history

This study also holds significance for studying commercial law history more broadly. My historical, interdisciplinary and theoretical research approach provides a useful framework for working with a broad and long view of history. It allows me to identify a number of political-economic and socio-legal factors with particular significance for practices and developments in Canadian corporate reorganisation over time, and accordingly provides a textured context for this study.

This contextual backdrop illustrates the particular importance of certain non-commercial law factors. For example, constitutional issues were major factors in the early history of Canadian business reorganisation. Developments in this area of law cannot be fully understood without an appreciation of the tensions surrounding existing and evolving interpretations of the division of powers.

Changing constitutional interpretations meant some subjects that were formerly within the provincial sphere migrated to the federal sphere, despite the general trend toward decentralisation in the Canadian federation. Such constitutional issues may similarly be of significance when studying other topics in Canadian commercial law history, as well as those in other federations, such as Australia and the US.

Accordingly, a broad historical approach is helpful for studying Canadian commercial law; one that is attuned to both provincial and federal bodies of law and practice. A related facet of conducting historical research of this nature is the desirability of adopting an issue-focused, rather than solution-focused, approach since issues in commercial matters may have prompted various 'solutions,' at different points in time, by different levels of government and/or private parties.

In the context of the CCAA, for example, research by bankruptcy scholars has often tacitly equated the history of the Act with the history of corporate reorganisation in Canada, rather than regarding the CCAA as one of several possible methods of reorganising companies. By focusing on the CCAA (the 'solution' to the problem of corporate reorganisation), instead of the problem itself, bankruptcy scholars overlook other 'solutions' to this issue that were popular at earlier points in time, such as bondholder reorganisations, and restructuring provisions in provincial legislation. This view accordingly cannot capture the long traditions of corporate reorganisation in the Anglo-Canadian context. This may be helpfully remedied by incorporating an issue-focused, historical approach to bankruptcy research.

Adopting a socio-legal perspective is a useful means of assessing how actors in company reorganisations, tackled the issues at hand. It also provides a broader context for examining legislative or judicial approaches to corporate reorganisation. As a recursivity of law approach demonstrates, in the Anglo-Canadian legal traditional, case law and legislation have tended to be highly responsive to changing commercial practices, usually with a view toward facilitating company restructurings that could not be effected privately for the benefit of large secured lenders. An endogeneity of law analysis then illuminates how sophisticated private parties, such as life companies or banks, help shape substantive law, both 'in practice' and 'on the books,' in the process of implementing broad legal policies or mandates, such as the enabling provisions of the CCAA. This socio-legal perspective may similarly be useful for studying other commercial law topics to the extent that legislation and judge-made laws tend to respond to changing commercial practices. In the Canadian context, for instance, large banks have likely also been major drivers of legal change in other areas of commercial law.

My thesis engages in a systematic study of some of the mechanisms through which commercial practices influenced lawmaking in the context of corporate reorganisation. For example, through the theories of recursivity of law and endogeneity of law, I illustrate some of the ways in which sophisticated actors in the corporate restructuring landscape (such as life companies and banks) influenced and even shaped the development CCAA law at different points in time. Accordingly, my thesis offers a useful framework for identifying and

analysing the influence of commercial practices on commercial lawmaking in a specific sense. In this regard, my approach may be useful for examining developments in other areas of commercial law, by providing a practical and theorised means of tracking and analysing the influence of commercial practices and sophisticated private parties on lawmaking.

The ideas and theories discussed above provide a few different approaches to conducting what Pierson refers to as ‘genuine’ historical research. This type of historical research—arguably something to be strived for in any event—is foundational for historical institutionalist analyses. By focusing on temporal dimensions, an historical institutionalist approach provides a robust explanatory account of how laws and policies develop over time, as well as a degree of portability in terms of the generalisations that may be drawn from a given case study. Several of the following subsections are cases in point of such generalisations, based on my study of Canadian corporation reorganisation. I submit that similar attention to temporal issues, such as timing and sequence, in other areas of commercial law may likewise allow researchers to make some generalisations which will be of interest to a broader community of scholars.

The significant element of contingency and the fact that relatively small factors led to large effects limit the extent to which broad generalisations can be made based this study. Nevertheless, my analysis does produce some insights that may be of interest to scholars outside of commercial law.

C. Federalism

My historical study of corporate reorganisation gives rise to some interesting ramifications for studying developments in Canadian federalism. Political scientists such as Ronald L. Watts have noted a general trend of decentralisation within the Canadian federation since Confederation, to the point where Canada is now less centralised than the US.⁷¹ As Watts records, this is largely due to the increasing importance of social policies in the latter part of the twentieth-century such as public healthcare, which fall within the jurisdiction of the provinces.⁷² Legal scholars such as Bruce Ryder have also noted a more recent centralising trend in the constitutional case law and the fact that the SCC has often been in consensus in its decisions concerning division of powers issues.⁷³ My study reveals that the trend in terms of corporate reorganisation has been toward greater centralisation under the federal bankruptcy and insolvency law power since the enactment of the CCAA and FCAA in the 1930s.

The treatment of these two statutes—the only two to be upheld without qualification—is singular within the context of the constitutional references that struck down most of Bennett’s New Deal legislation. Bennett’s New Deal attempted to institute rather modest social policy measures at the federal level,⁷⁴

⁷¹ Ronald L. Watts, ‘The American Constitution in Comparative Perspective: A Comparison of Canada and the United States’ (1987) 74 *J of Am Hist* 769, cited in Pierson, n 6 above, 120.

⁷² *ibid.* See also Jacob Hacker, ‘The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian, and U.S. Medical Policy’ (1998) 12 *Stud in Am Polit Development* 57, 11.

⁷³ Bruce Ryder, ‘Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers’ (2011) 54 *SCLR* (2d) 566.

⁷⁴ See eg W. Christian and C. Campbell, *Political Parties and Ideologies in Canada: Liberals, Conservatives, Socialists, Nationalists* (Toronto: McGraw-Hill Ryerson, 1974), 96; Alvin Finkel,

sometimes with the unanimous support of the provinces,⁷⁵ and yet the PC found these Acts trenched on provincial powers, particularly those relating to ‘property and civil rights.’ Incongruously, both the CCAA and FCAA were upheld, although they expressly provided for the adjustment of the secured creditor rights, which had been exclusively in the purview of the provinces under their ‘property and civil rights’ power. These decisions astonished many Canadian commentators at the time, and remain difficult to reconcile with the other New Deal cases.

The FCAA even provided for the *unilateral* adjustment of secured creditor rights by an administrative official. The purported distinction that was drawn in the FCAA references⁷⁶ was that while secured creditor rights fell under the provincial power in general, upon insolvency the federal government could validly adjust these rights under its ‘bankruptcy and insolvency law’ power. These constitutional references led to a new interpretation of the division of legislative power concerning property rights. Those powers that were in respect of an insolvent undertaking or farmer were exclusively within the power of Parliament to regulate as part of bankruptcy and insolvency law—a first in Canadian history; and, those that were in respect of a solvent enterprise or farmer were solely within the jurisdiction of the provinces. ‘Insolvency’ accordingly became an important dividing line between federal and provincial jurisdiction.

Business and Social Reform in the Thirties (Toronto: James Lorimer & Company, Publishers, 1979); Graham D. Taylor and Peter A. Baskerville, *A Concise History of Business in Canada* (Toronto: Oxford University Press, 1994), 374.

⁷⁵ *Re Natural Products Marketing Act*, [1937] AC 389, [1937] 1 DLR 695, cited in F.R. Scott, ‘The Consequences of the Privy Council Decisions’ (1937) 15 Can Bar Rev 485, 490-491.

⁷⁶ See eg F.R. Scott, ‘The Privy Council and Bennett’s “New Deal” Legislation’ (1936) 3 Can J Econ & Poli Sci 234, 238-239, discussing *inter alia* the striking down of the *Employment and Social Insurance Act*, SC 1935, c 38.

The pairing of reorganisation with insolvency legislation was mainly for reasons of constitutional convenience; it was not a manifestation of a new, normative goal for Canadian bankruptcy and insolvency law. Note that the 1932 amendments to the *Bankruptcy Act* revived the business compromise provisions of the 1919 Act, but could only be applied compulsorily in respect of unsecured debts—secured creditor participation remained optional. Rather, the main policy rationale behind both the CCAA and FCAA was to extend or facilitate secured creditor remedies of reorganisation with a view to preventing FI failures. The only practical (or conceivable) way to affect secured creditor rights at the federal level was through bankruptcy and insolvency law. As a secured creditor remedy within the provincial sphere, debt reorganisation was not premised on or linked to insolvency *per se* until the CCAA, and this prerequisite was viewed as a major drawback in terms of the effectiveness and utility of the new legislation. Pairing debt reorganisation with insolvency legislation extended secured creditor remedies into the federal sphere, but limited the application of these remedies to instances of debtor insolvency.

Later developments in CCAA law in the 1980s and 1990s expanded the ambit of the Act and allowed it be used as a debtor remedy, which led to a dramatic increase in CCAA filings. As federal insolvency law, the CCAA can effect plans that are not possible under corporation statutes (and provincial legislation) alone, which makes the Act an attractive remedy for insolvent companies as well as large secured creditors. A large part of the reason that provincial legislation is less powerful than federal statutes for effecting reorganisation stems from the

CCAA and FCAA legislation itself, as the constitutional references for these Acts established that reorganisations of debts in respect of insolvent persons were the exclusive purview of Parliament.

More recent case law under the CCAA appears to have redrawn the boundary lines established in the 1930s references and expanded the federal power in so doing. The 2004 *Stelco* decision allowed a solvent enterprise that was nearing the prospect of insolvency to file under the CCAA.⁷⁷ If insolvency is no longer a dividing line, however, the rationale for federal adjustment of secured creditor rights set out in the 1930s references no longer holds up. How can one justify the use of federal legislation to adjust secured creditor rights outside of insolvency? And, how can one characterise the CCAA as insolvency law if it is applied to solvent companies? The insolvency criterion is similarly employed in other Canadian bankruptcy and insolvency law statutes. If these Acts are not limited to insolvent entities, are they still insolvency law in 'pith and substance'?⁷⁸

Some commentators, as well as the court in *Stelco*,⁷⁹ have implicitly justified such preemptive filing on the grounds that it increases the chances of a successful, going-concern restructuring, which in turn produces trickle down benefits for various stakeholders. In addition to the fact that this does not address the constitutional issue at stake, it seems problematic to justify federal incursions

⁷⁷ *Re Stelco Inc.* (2004), 48 CBR (4th) 299, 129 ACWS (3d) 1065 (Ont SCJ); leave to appeal to Ontario Court of Appeal refused, [2004] OJ No 1903, 2004 CarswellOnt 2936; leave to appeal to SCC refused [2004] SCCA No. 336, 338 NR 196 (note) [*Stelco* 2004].

⁷⁸ It is possible that this could be justified as 'incidental effects' under the pith and substance doctrine, or by reference to ancillary powers doctrine to support federal jurisdiction in provincial areas of power. See generally *Ryder*, n 73 above. The court in *Stelco*, however, did not engage in a constitutional law analysis.

⁷⁹ *Stelco* 2004, n 77 above, esp paras 21, 22.

into provincial jurisdiction based on their social policy benefits, since provincial power over social policies have in fact been the reasons for much decentralisation. It is also not clear how one can justify a federal insolvency law regime based on its indirect regulation of social policy activities, which the provinces, and not the federal government, are empowered to regulate under the division of powers.

A further surprising aspect of the *Stelco* decision is that in its wake there has not been strong push back from the provinces. This lack of resistance to the expansion of federal jurisdiction in business reorganisations in recent decades may help account for the trend toward greater centralisation in this area.

It is also surprising from an historical perspective that receivership provisions were added to the BIA in 1992 without much, if any constitutional controversy.⁸⁰ This shows the great extent to which Canadian constitutional debates around secured credit, bankruptcy and insolvency have shifted since the 1930s. Such an addition would have been unfathomable from a 1930s perspective—as illustrated by the controversy of the CCAA and the FCAA. Nevertheless, constitutional concerns surrounding receivership and insolvency remain ‘live’ issues, and for good reason. Despite, or perhaps because of, ongoing development and evolution of the division of powers in this area, new constitutional questions are bound to arise.

⁸⁰ See Jacob S. Ziegel, ‘Modernization of Canada’s Bankruptcy Law in a Comparative Context’ (1998) 33:1 *Tex Int’l LJ* 1, 10-11.

An additional nuance of the trend toward greater centralisation within corporate reorganisation is that it does not extend to other areas of commercial law. This is evident, for instance, in the debates over a national Canadian securities regulator, and the SCC's decision that securities regulation still essentially falls within a provincial head of power—'property and civil rights.'⁸¹ Similarly, regulation of secured credit largely occurs at the provincial level under PPSAs.⁸² Yet the provinces have little room to use their legislative power over property rights to reorganise corporate or personal debts, since insolvency puts the matter into the federal jurisdiction over bankruptcy and insolvency; and, insolvency is generally the impetus for corporate reorganisation, especially 'full' reorganisations. The impotence of provincial power in regards to corporate reorganisation (especially 'full' reorganisation) probably compounds the trend toward greater centralisation in this area.⁸³

D. Judicialisation

In view of the prominent role occupied by Canadian courts in CCAAs since the 1980s, it is worthwhile also considering the role of judicialisation in this area of law. 'Judicialisation' in a given area of law indicates that courts occupy a powerful position relative to other applicable institutional arrangements in that area.⁸⁴ In discussing institutional development, Pierson suggests that

⁸¹ *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837, esp para 116, see also paras 4, 6, 100-101, 126.

⁸² Excepting eg *Bank Act* security, which falls under the federal jurisdiction in relation to banking matters.

⁸³ A notable exception is *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53, 391 DLR (4th) 383. See discussion in Virginia Torrie, 'Case Comment: *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53' (2016) 31:2 BFLR [forthcoming].

⁸⁴ Adapted from Pierson's definition of 'judicialisation' in respect of sectors of the polity, Pierson, n 5 above, 158-159.

'judicialisation' may represent a deep institutional equilibrium; that is, an institutional equilibrium that is particularly deeply entrenched and resilient to change. In support of this argument, Pierson relies on Arend Lijphart's 1999 study that indicates that judicialisation appears to be a one-way street (where it occurs at all), and identifies Canada as one of only five countries in the study that moved toward greater judicialisation.⁸⁵ None of the 36 countries studied moved toward less judicial review.⁸⁶

Pierson suggests several reasons for why judicialisation itself may constitute a deep equilibrium. First,

[t]he emergence of courts as the site of political and legal dispute resolution generates a rapid expansion of law-centered actors who have a considerable stake in preserving and expanding the use of these procedures, as well as substantial resources (the authority to make binding decisions) that greatly facilitate their pursuit of these goals.⁸⁷

Therefore, these and other actors tend to coordinate around judicial arrangements, adding to the self-reinforcing character of such arrangements. In so doing, they put pressure on other affected actors to do so also. Second, judicialisation entails a number of path dependent factors, such as continuing self-reinforcement and chronic reproduction (through case law precedents) that generate positive feedback and help to entrench the role of courts.

⁸⁵ Lijphart, n 43 above, cited in Pierson, *ibid.*

⁸⁶ Lijphart, *ibid.*

⁸⁷ Pierson, n 5 above, 159, citing Charles R. Epps, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, University of Chicago Press, 1998).

Viewing judicialisation as a deep equilibrium may be useful in accounting for the role of judges in CCAA law. My historical study shows that while courts have long been involved in bondholder reorganisations and early CCAs, their involvement during the 1980s and 1990s significantly increased their role and (quasi-legislative) power in business restructurings. The increased judicial role in CCAs was initially (in the 1980s) justified based on the lack of legislative guidance in the Act, but despite subsequent amendments fleshing out the statute the (large) role for courts in CCAs shows no signs of waning. Rather, judicial decisions since the 1980s appear to have reinforced and expanded the role of judges in CCAs, making the Act even more court-driven. The growth of law reporting of CCA cases from the 1930s (when there was very little) to the 1980s onward (when most decisions were reported) probably played an important role in the process of self-reinforcement. As a deep institutional equilibrium, it seems unlikely that the role of judges in this area of law can or will be easily diminished in the future.

In contrast, the FCA and its successor statutes have maintained a primarily administrative process for the compromise of farm debts. The estates involved tend to be much smaller. Restructuring costs are also much lower, and there are (to my knowledge) no private interest groups (such as insolvency professionals) that have sprung up around this restructuring regime.

E. Financial institution and financial system stability

My study of Canadian corporate reorganisation and the CCAA offers insight for researchers and policymakers in the areas of FI and FS stability. As a lender remedy, the CCAA was one of several tools used by secured creditors and the federal and provincial governments during the Great Depression to prevent the possibility of large FI failures. The collapse of large, Canadian FIs such as Sun Life would likely have had a destabilising effect on the wider FS. In later economic recessions, the CCAA has similarly, although relatively rarely, been used as a remedy for large FIs. For example, the Canadian Imperial Bank of Commerce in respect of the Olympia & York restructuring in the 1990s, and Caisse de dépôt et placement du Québec in respect of the third-party ACBP restructuring of the 2000s.

The CCAA is an elegant political and economic solution to certain types of problems that may lead to FI insolvency. First, it helps keep public focus off of the (struggling) FI, by centering discussion around the insolvent debtor company. This is probably particularly helpful when dealing with FI solvency, since solvency concerns around a bank, for instance, may exacerbate matters by eroding public confidence and leading to a bank run.

Second, lender interest in restructuring the debtor company tends to cast a positive public and political light on reorganisation discussions. Various stakeholders in the debtor company (such as employees, the community, and suppliers) may be inclined to support restructuring, at least in principle, if they have little or nothing to lose. As a result, when the CCAA is deployed as a remedy

for large secured creditors (such as a FI), virtually any major political party in Canada can support such reorganisations, and Liberal, Conservative and NDP governments have all lent support to CCAAs in the past. This allows governments to provide financial support for restructurings—usually with the support of public opinion—under the guise of the ‘public interest’. However, government support is often a last resort; it is provided for restructurings that would be unviable if left completely to the private market. Therefore, using the CCAA allows a government to help a (struggling) FI to pursue its preferred lender remedy, without directly backstopping or ‘bailing out’ that FI. Whereas a direct government cash infusion into an institution like Caisse de dépôt et placement du Québec would likely raise public concern about the financial picture of that institution, government contingency funding for the third-party ABCP restructuring—funding which was essential to implement the CCAA plan and which could not be obtained in the private market—achieved a similar outcome with respect to the financial position of Caisse de dépôt et placement du Québec, and PM Stephen Harper’s (Conservative) government and legal commentators praised the restructuring plan as a successful ‘private’ effort.⁸⁸

The role of lender-supported restructurings in terms of FI solvency (especially during economic downturns) may be especially important in the Canadian context. In Canada, there appears to be a longer-standing tradition of using the CCAA or bondholder reorganisations to address FI solvency than of using certain other monetary policy tools. For example, the CCAA (1933) predates the

⁸⁸ See eg ‘Minister of Finance Welcomes Implementation of ABCP Restructuring Plan’ (21 January 2009) online: <<http://www.fin.gc.ca/n08/09-008-eng.asp>> (accessed 22 October 2013), noting ‘In December [2008]; William A. Scott and Philip J. Henderson, ‘A unique, successful, private restructuring’ (2009) 28:4 Int’l Fin L Rev.

establishment of the Bank of Canada (1935) by nearly two years. In contrast, the US already had a central bank at the start of the Great Depression;⁸⁹ and, the Bank of England was established in the seventeenth-century, before the advent of general incorporation statutes or statutory corporate reorganisation provisions, both of which were introduced in the nineteenth-century. Even the comparative young country of Australia—the Commonwealth of Australia was founded in 1901—had a central bank of sorts by the start of the Great Depression.⁹⁰

Canada, in contrast, had a professional association of large chartered banks organised under the auspices of the CBA. Although the CBA had not altogether prevented banking crises, or the failures of small or troubled institutions, it had a track record of successfully stamping out bank runs on ‘sound’ banks when they did arise on an essentially private basis.⁹¹ Interestingly, government backstopping of banks in the early twentieth-century, when it did occur, seems to have come through the provinces.⁹² Furthermore, through the *Finance Act*, the Canadian Department of Finance had many of the powers of a central bank; powers which were greatly expanded in the 1930s leading up to the establishment of the Bank of Canada.⁹³

⁸⁹ The US Federal Reserve Bank was established in 1913 in direct response to a banking crisis – the panic of 1907. See Robert F. Bruner and Sean D. Carr, *The Panic of 1907: Lessons Learned from the Market's Perfect Storm* (Hoboken, NJ: John Wiley & Sons, 2009).

⁹⁰ See Reserve Bank of Australia, ‘A Brief History’ online: <<http://www.rba.gov.au/about-rba/history/index.html>> (accessed 15 February 2014).

⁹¹ See Bliss, n 36 above, 385-388.

⁹² For instance, in the 1920s the Quebec government guaranteed the solvency of Banque Nationale in order to facilitate that institution’s absorption by Banque d’Hochelaga, see Bliss, *ibid* 386-387.

⁹³ See Robert B. Bryce, *Maturing in Hard Times: Canada’s Department of Finance through the Great Depression* (Montreal and Kingston: McGill-Queens University Press, 1986); Bliss, *ibid* 429.

There was accordingly significant resistance to the idea of a Canadian central bank in the 1930s, for two main reasons. First, it did not seem that a central bank was necessary to deal with banking crises in Canada, least of all during the Great Depression, which in Canada did not entail a banking panic. Second, in the 1930s there was a widely held Canadian view that central banking did not do much to counteract economic depressions or banking crises. This was based on what Canadians saw happening in the US, where, despite the US Federal Reserve Bank, the country experienced an economic depression worse than that of Canada, as well as a full-scale banking crisis.

The sequence of these events—establishment of a central bank vis-à-vis other techniques for helping ensure FI solvency—may be significant where institutional arrangement generate positive feedback and path dependence. This is because the early ‘head start’ of one technique and the actors it involves, such as corporate reorganisation provisions, may be amplified, rather than dampened over time. For example, by the time the Bank of Canada began operations in spring of 1935, institutional bondholders (mostly life companies) had already restructured many companies using the CCAA.

The use of the CCAA as a lender remedy also raises some interesting issues concerning the public and private dimensions of FI and FS stability. So-called ‘private’ Canadian FIs, such as large life companies or chartered banks, are significant subjects of public economic management because these institutions are generally regarded as too big, or systemically important to fail. Canadian economic management in this regard tends to be quasi-private in character, as

some aspects of FI (and by extension, FS) stability are undergirded by mechanisms or policies such as debtor- or creditor-led corporate restructuring under the CCAA. In particular, prior to the establishment of the Bank of Canada, it appears that a substantial portion of the prevailing policy of Canadian economic management was to rely on private or quasi-private, versus public approaches to the issue, such as bondholder reorganisations and the CBA, and later the more 'public' statutory reorganisation regime under the CCAA. Private and public lines were again blurred in economic management matters through recourse to mechanisms such as Royal Commissions to assist in restructuring attempts of systemically important companies, such as Abitibi.⁹⁴

Within the context of individual restructurings, government participation can be a critical factor. This is well-illustrated by the concessions regarding timber leases granted by Ontario Premier Hepburn's (Liberal) government in the 1930s to 1940s Abitibi restructuring, for example. Despite 'public' regulatory institutions such as the Bank of Canada (nationalised in 1938) and OSFI, private or quasi-private mechanisms such as corporate reorganisations arguably still play an important role in 'public' economic management. This is evident in multi-party (Conservative, Liberal and Progressive Conservative) government support for the reorganisation of the third-party ABCP market,⁹⁵ among a number of other notable examples of government supported CCAAs in the past few decades,

⁹⁴ Hon. Charles Patrick McTague *et al.*, 'Report of the Royal Commission Inquiring Into the Affairs of Abitibi Power & Paper Company, Limited' *Report of the Royal Commission Inquiring Into the Affairs of Abitibi Power & Paper Company, Limited* (Toronto: Royal Commission Inquiring into the Affairs of Abitibi Power and Paper Company, 1941), reported submitted to the Lieutenant-Governor of Ontario.

⁹⁵ Senior funding facilities for the third-party ABCP restructuring were provided by the governments of: Canadian PM Harper (Conservative), Ontario Premier McGuinty (Liberal), Alberta Premier Stelmach (Progressive Conservative), and Quebec Premier Charest (Liberal).

such as Ontario Premier Rae's (NDP) support for the 1991-92 Algoma Steel reorganisation.

F. Theorising corporate bankruptcy law

The importance of bondholder reorganisations and the CCAA as secured lender remedies—particularly for FIs—offers a promising basis from which to develop a normative theory of corporate reorganisation law. First, justifying a business reorganisation regime as remedy for large secured lenders allows scholars to tap into a much larger theoretical literature in the area of property rights. This has two particular advantages: it offers the possibility of substantively enriching debates about bankruptcy theory; and, it overcomes largely artificial distinctions between secured creditor remedies and bankruptcy and insolvency law, by conceptually linking both under the broad umbrella of 'secured creditor remedies.' Although, in the Canadian setting, the division of powers is likely to be a key issue in the development of such a theory, since secured creditor rights generally fall under provincial jurisdiction, while the federal government has authority to legislate concerning bankruptcy and insolvency law.

Secondly, constructing the issue of corporate reorganisation in terms of the solvency of its major lenders (FIs) fundamentally shifts the debate from being primarily about 'everyday' corporate failures, to matters of potential importance to FS stability. 'Private' corporate reorganisation thus intersects with the more 'public' sphere of economic regulation. These sorts of FI and FS stability concerns have helped drive bankruptcy convergence efforts by the IMF, World Bank and

UNCITRAL, for example.⁹⁶ Bankruptcy theories, however, have not generally focused on the role of the corporate reorganisation in relation to FI and FS stability. Based on my historical study, I submit that these issues should be front and centre in a theory of business bankruptcy—particularly in the Canadian context.

The significance of constructing business reorganisation in terms of economic issues primarily stems from the different approach taken toward regulating FIs versus other types of companies. As a general matter, FIs are more closely regulated than ‘ordinary’ corporations because the costs of FI failure are much higher. As a result, it may be possible to justify extraordinary or ad hoc approaches to corporate reorganisation for the benefit of FIs on the grounds that such preventative measures are far less costly—economically, politically, publically, socially—than the collapse of a large FI itself. While large FI collapses have been relatively rare in Canada, such a collapse could cause such large losses as to push affected consumers or businesses into bankruptcy or insolvency. In other words, the collapse of a FI could lead to further, smaller insolvencies among businesses and consumers. The significance of a large FI failure in Canada may warrant compromising (to some extent) predictability and the rule of law in order to help prevent instability in the FS.

⁹⁶ See eg Legal Department, International Monetary Fund, ‘Orderly & Effective Insolvency Procedures: Key Issues’ (1999) online: <<http://www.imf.org/external/pubs/ft/orderly/>> (accessed 18 February 2014), esp 5-8, see also Preface acknowledging comments from the World Bank, OECD, EBRD and International Finance Corporation; UNCITRAL Working Group V, ‘Possible Future Work on Insolvency Law’ 22nd Session, Vienna, A/CN.9/WG.V.WP.50 (6-17 December 1999) online: <http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html> (accessed 18 February 2014); Halliday and Carruthers 2009, n 50 above, Chapter 3 ‘Constructing Global Norms for National Insolvency Systems’, Chapter 4 ‘Attaining the Global Standard’.

A more optimal scenario is one in which FIs are never in danger of failing, and this is largely the territory of *ex ante* regulation of FIs. Nevertheless, FIs are sometimes in danger of failing, and when this happens the question is how to deal with the issue at hand. As a growing literature of government bailouts during the GFC illustrates, a major drawback of ad hoc approaches to ensuring FI solvency *ex post* is the possible moral hazard it creates with respect to FI risk-taking in the future.⁹⁷ One mitigating factor is that that FIs—especially commercial banks—generally want to be regarded publicly as financially sound institutions, and thus safe places to invest or deposit money. A further mitigating factor in Canada is that there is an element of ad hocery in the regulation of FIs by the OSFI. OSFI, through its letter writing power, for example, has a degree of flexibility to regulate individual FIs such as banks and life insurers on a case-by-case basis, and in a manner that responds to individual concerns with respect to a given institution’s financial picture.⁹⁸ This is a power that OSFI does exercise (when it believes it is warranted), and which Canadian FIs take seriously.⁹⁹ Due to its confidential nature, this aspect of Canadian FI regulation has very low public visibility. Thus, to the extent that there is rather diligent, although confidential and sometimes ad hoc, regulation of Canadian FIs, it is questionable to what extent government support for lender remedies, such as the CCAA, may contribute to moral hazard within these institutions. It is possible that the

⁹⁷ See eg Kenneth Ayotte and David Skeel Jr., ‘Bankruptcy or Bailouts’ (2009-2010) 35 J Corp L 469.

⁹⁸ See eg OSFI, ‘Supervisory Framework’ online: <http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/practices/supervisory/framew_e.pdf> (accessed 22 October 2013), 10.

⁹⁹ See eg Theresa Tedesco, ‘Manulife’s regulatory balancing act’ (30 January 2010) *National Post* online: <<http://www.nationalpost.com/news/story.html?id=2501881>> (accessed 22 October 2013).

Canadian approach to FI regulation and corporate reorganisations for the benefit of large lenders counter-balance each other to some extent.

Accordingly, I submit that theorising about Canadian business reorganisation from the standpoint of large lenders offers promising possibilities with respect to crafting a robust, normative theory of business bankruptcy.

G. Policy development and triggers for a legislative approach to ‘private’ resolutions

Explanatory accounts of how corporate reorganisation developed in Canada over the past 80 years may also be useful for understanding how policy develops more broadly. The role of ideas and the tendency of these ideas to ‘trickle up’ through professionals and case law in a recursive process underscores the importance of practices ‘on the ground’ in commercial law policy development. It further suggests that commercial and legal practices will probably be important drivers of future changes in corporate reorganisation law. The manner of, and rationale for judicial handling of ‘liquidating CCAAs’, for example, is likely to significantly influence any future legislative reform on point.

Historical explanations for significant periods of change in corporate reorganisation practices may also provide important insights in terms of policy and legal developments in other areas of law. It may be possible to generalise to some extent concerning those factors which led to the enactment of the CCAA, and use these factors as indicia in terms of what set of circumstances might

similarly prompt a substantial move from largely 'private' legal resolutions to less private approaches under a legislative architecture.

ADR for commercial matters is one area where it may be possible to analogise from the history of corporate reorganisation. Much like pre-1930s attitudes toward (private) bondholder reorganisations,¹⁰⁰ contemporary ADR for commercial matters is conducted on a case-by-case basis, with each resolution having effectively no bearing on other resolutions. Additionally, both historic bondholder reorganisations and current ADR practices resulted (or result) in private compromises or resolutions, and the private aspect of resolutions contributes to the efficacy of the result. The history of the CCAA highlights how changing practices and conditions might force established forms of private resolutions into a more public sphere; for instance, where the efficacy of private resolutions is compromised by their impotence to compel cooperation from minor, recalcitrant parties and/or where there is an overriding need to bind third-parties to a private resolution. Where these needs are both widespread and overwhelmingly necessary to effect satisfactory resolutions with respect to a certain type of matter, they could prompt a turn to legislation to achieve what cannot be achieved through purely private processes. These factors, in other words, could lead to a 'critical juncture' moment for ADR practices used to settle certain types of commercial matters.

¹⁰⁰ William Kaspar Fraser, 'Reorganization of Companies in Canada' (1927) 27 Colum L Rev 932, 943.

As occurred in the context of CCAA history, the more public character of legislative approaches to resolutions could—through positive feedback and path dependence—in turn inform evolving views on commercial ADR, and contribute to the growth in importance of precedents or record keeping. I do not suggest that a shift to more public methods of carrying out ADR is necessarily likely; I merely highlight some of the factors that could contribute to such a shift, and how these could set ADR practices on a trajectory toward less private forms of dispute resolution for commercial matters. Accordingly, this brief analysis illustrates the potential portability of theoretical insights from CCAA history to other contexts, and underscores the broader significance of this study for studying legal change.

IV. Conclusion

In this chapter I have presented a theorised explanation for the advent and development of Canadian corporate reorganisation law under the CCAA. Using a tailored theoretical framework drawn from HI and the socio-legal theory of recursivity of law, I have expounded periods of stability and change within corporate reorganisation over approximately the last 100 years. In so doing I have highlighted various historical, institutional, political, financial, economic and legal factors that have significantly influenced the development of CCAA law in particular, and set it on different trajectories at different points in time. By identifying cycles of legal change within a long and broad view of history, this chapter has offered a nuanced historical account of periods of equilibrium and

legal change. This approach has also allowed me to make some broader generalisations, which may be of interest to scholars outside commercial law.

My historical study shows that the public relations and outward policy rationale behind the CCAA shifted from being primarily a secured lender remedy, to a corporate debtor remedy. Path dependency and institutional resilience accordingly demonstrate, and help account for the fact, that bondholder reorganisations have been used as a basis on which to develop a modern, DIP restructuring regime in Canada under federal insolvency legislation. Significantly, however, this socio-legal analysis shows that the lender and debtor remedy functions of the Act were not mutually exclusive. While the Act has always provided a potential remedy for large secured creditors, only during the period between 1953 and the early 1980s has it effectively been ‘off limits’ to debtors. In other words, although public and practitioner views on the Act have tilted one way or the other at different points in time, this has not precluded alternative, potentially subversive tracks within this set of institutional arrangements. The CCAA remains ‘enabling’ legislation. From the outset, the elasticity of the Act obscured the original intention of the framers, leading to calls for repeal. Later in CCAA history, ambiguity surrounding its purposes facilitated substantial reinterpretation and (re)development of CCAA law as a debtor remedy along the lines of US chapter 11.

The intermingling of different policy purposes in the historical development of the CCAA as an institution—largely due to the infrequency of formal law reform—distinguishes it from the US and UK experiences, which have been

characterised to a greater extent by formal repeal and reform efforts and thus more overt and formal policy debates over corporate restructuring. Formal law reform invites the participation of interest groups in a fairly public and open policy discussion, to a much greater extent than case law-driven reforms. ‘Adding’ DIP reorganisation to an existing secured creditor remedy through case law—as opposed to repealing a creditor-friendly regime in favour of a new debtor-friendly one, for instance—has nonetheless produced a Canadian restructuring landscape that is outwardly and functionally similar to that of the US and UK. Accordingly, the Act operates as a ‘catch all’ statute for a variety of purposes. It may be employed to effect liquidations, restructurings, or going-concern sales, and advance the interests of secured creditors, unsecured creditors, shareholders, management, and/or other stakeholder groups. In other words, the battleground between different groups or parties in large corporate insolvencies does not usually manifest as between formal legal regimes (CCAA versus BIA, WURA or receivership, for example), in either individual cases or relatively rare instances of formal bankruptcy reform efforts.

My study also brings to light the processes by which the CCAA’s transformation came about in the 1980s and 1990s. This aspect of CCAA law history sheds light on the case-law driven nature of CCAA reforms from the 1980s onward, underscores the importance of broad commercial and economic factors in precipitating cycles of legal change, and the significant role of Canadian courts in facilitating commercially desirable resolutions. These processes accordingly provide some indication as to how one can expect CCAA law to develop in the future.

FI solvency was a common driver of CCAA law developments in both cycles of legal change studied in this thesis: the 1920s to 1930s, and 1980s to 1990s. Periods in which Canadian FIs did not face significant solvency issues also correspond with a period of relative stasis under the CCAA.¹⁰¹ This fact, and the historical role of the Act as a secured lender remedy, highlight the importance of considering CCAA law from lender viewpoints, and paying attention to the identity of major lenders in individual CCAA cases. This is particularly the case in liquidating CCAAs, where the identity and role of the major lenders is arguably more important than that of the debtor in any event. The historical processes and factors that have brought about substantive legal change accordingly provide some insight into how liquidating CCAAs will most probably be dealt with by judges and Parliament. From a theoretical standpoint, the role of major lenders and use of the Act as a lender remedy provide a potential way to reconcile this recent turn in CCAA reorganisations with existing case law. The importance of FI and FS stability for Canada and Canadians suggest it may even be possible to incorporate aspects of existing public interest narratives into a theoretical, normative justification for CCAA law. The theoretical possibilities in respect of this area of law look promising.

¹⁰¹ The failure of Atlantic Acceptance Corporation in the 1960s and 1970s is a notable exception.

6. Conclusion

I. Original contribution of this study within the literature

In many ways the history of the CCAA has been a study in contrasts. On the surface the origins and early history of the statute stand juxtaposed to developments in the 1980s and beyond. A «loi d'exception» become an entry point for judicial discretion. A bondholder remedy justified on the strength of property rights and creditor priorities gave way to a debtor remedy justified based on wider 'public interest' concerns. A circumscribed and fairly discrete private remedy became a malleable and nebulous 'catch all' for various public and private issues that happen to intersect with insolvency. Anxiety about the constitutionality of adjusting secured creditor rights in cases of company insolvency gave way to application of the Act to even technically 'solvent' companies. So although Parliament originally made the scope of the CCAA 'too narrow,' later courts held the Act was 'intended to have wide scope.' Contemporary corporate reorganisation has thus proven such an elastic concept¹ that it can be hard to tell where CCAA law may go next under 'large and liberal' interpretations of its provisions.²

¹ See eg W.K. Fraser, 'Reorganization of Companies in Canada' (1927) 27 Colum L Rev 932, 943 [Fraser 1927]; Clémentine Sallée and David Tournier, 'Reorganization: A Commercial Concept Juridically Defined' (2009) 88 Can Bar Rev 97.

² See eg *Re Montréal, Maine & Atlantique Canada Co.*, 2013 QCCS 4039, EYB 2013-225915, per Castonguay, J.C.S., paras 1-26.

Yet despite all that has changed, some aspects of CCAA law and practice have remained largely the same. The prominent role of large secureds as protagonists of much corporate reorganisation remained consistent over the period under study. Although the identity of the major secureds changed (from life companies to banks), their need for corporate restructuring as a creditor remedy, particularly in economic downturns, did not change. My study has thus brought to light the origins of the CCAA as a remedy for large secured creditors, and shown that modern CCAAs continue to advance the interests of this creditor group. It demonstrates that large secured creditors have been major drivers of corporate restructuring developments under this Act over the past 80 years. These findings are an original contribution to CCAA literature because they refute conventional views of the Act as a debtor remedy inspired by concern for stakeholder groups, such as labour. They are significant contributions to bankruptcy literature more broadly because they illustrate the major role of large secureds in corporate restructurings.

My thesis has provided a theorised interpretation of CCAA history and contextualised this narrative within the evolving social, economic, political and legal landscape in Canada from the 1930s-1940s to the 1980s-1990s. This period witnessed changes in many areas of Canadian society. The Act's roughly 40-year dormancy in the middle of this 80-year timeframe calls attention to the importance of these contextual changes in terms of evolving ideas about corporate reorganisation and the CCAA. This has enabled me to show how the Act came to be regarded as a debtor remedy that advanced the broader 'public interest,' despite its original purpose as a bondholder-led receivership regime.

This insight showcases how changing views of the CCAA were interrelated with many other changes in Canadian society, such as evolving views of federalism, stakeholder rights, judicial review, and statutory interpretation. Although the text of the CCAA was essentially untouched for roughly 40 years, the broad, contextual 'paradigm shift' that took place in Canadian society during that period formed a new 'lens' through which later actors approached the statute. Thus the possibility of the public conceiving of the CCAA as primarily a bondholder receivership remedy in the 1980s-1990s seems just as unlikely as viewing the Act as a debtor remedy for the benefit of stakeholder groups in the 1930s. In other words, actors' understandings of the CCAA at a given point in time have been significantly shaped by the broader context of their respective moment in history. The prolonged disuse of the Act during a period of much societal change makes CCAA history a good example of how important contextual factors can be to understanding evolving perceptions of law and accounts of legal change.

Additionally this history has brought to light key mechanisms of legal change that have helped me to answer the research questions for this study. In 1933 Parliament enshrined boilerplate majority provisions into statute, thereby intervening only to the limited extent necessary so that bondholders (FIs) could carry on essentially private, self-help remedies. Bondholders, through their trustee or receiver, were key drivers of restructuring developments in this period. On the other hand, strong judicial review and purposive statutory interpretation reflect the legal landscape in Canada by the 1980s-1990s, which helped make courts key agents of more recent changes. Nevertheless, large secureds were well placed to advance their interests through the courts relative

to other insolvency parties, and they were primary beneficiaries of these changes. Through progressive interpretations of the Act, courts facilitated access to Canada's only insolvency regime capable of facilitating 'complete' company reorganisations, and so assumed a prominent role in policy making and lawmaking in this area.

These mechanisms of legal change were also products of their respective historical contexts. It is hard to imagine contemporary policy- and results-oriented judging, or the reliance on 'judge-made law,' in the 1930s when bankruptcy statutes were interpreted strictly and narrowly and cases were rarely reported. Furthermore, this sort of reliance on judges would have been unnecessary, since bondholders were able to reorganise companies with little regard for junior creditors or stakeholders and only required the occasional judicial 'rubber stamp' to give their arrangements the force of law. On the other hand, 1930s approaches to judging and interpreting the CCAA would have been out of place in the 1980s-1990s, not only due to marked changes in those two specific areas, but also because contemporary judges had to interpret the CCAA in light of a much-changed legal, political, economic and social backdrop. For instance, contemporary judges have been confronted with the issue of whether or not environmental liability should be considered a 'claim' under the CCAA.³ Yet the concept of environmental liability, the provincial statute, and even the province in question all post-date the CCAA by one or more decades.

³ See eg *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 SCR 443; *Environmental Protection Act*, SNL 2002, c. E-14.2.

In the periods of legal change examined in this thesis, changes tended to come ‘from the ground up,’ rather than flowing from statute into practice. Expansive judicial interpretations of the Act now raise concerns about perpetual ad hocery and compromising the rule of law,⁴ although historical evidence suggests that bondholder reorganisations were also ad hoc. But unlike contemporary CCAA decisions, historical bondholder reorganisations did not generally have precedential value. Echoing Fraser’s comment from 1927, perhaps the ad hoc nature of corporate reorganisation stems from the fact that it is (still) difficult to distil this concept down to a set of general principles.⁵ Contemporary commentators and courts tend to convey this by emphasising the uniqueness of individual (boundary-pushing cases), for example, which in turn justifies the case-by-case nature of many CCAA developments.⁶ Maybe this means that effective ‘law’ on corporate reorganisation must be merely ‘enabling.’ In other words, the more facilitatory, rather than prescriptive, that reorganisation law is, the more useful and relied upon it is likely to be in practice. This might help explain why enabling legislation like the CCAA (and earlier majority provisions) have proven flexible and useful to cover a wide range of circumstances, in marked contrast with certain other Canadian bankruptcy and insolvency statutes.⁷ The discretion or inherent jurisdiction of contemporary CCAA judges augments the statute’s flexibility, especially when coupled with the tendency of progressive judicial interpretation to disable the Act’s few restrictive provisions.

⁴ See eg discussion in Andrew J.F. Kent *et al.*, ‘Canadian Business Restructuring Law: When Should a Court Say “No”?’ (2008) 24 BFLR 1.

⁵ Fraser 1927, n 1 above.

⁶ See eg W.A. Scott and P.J. Henderson, ‘Restructuring Canada’s ABCP: A Unique, Successful, Private Restructuring’ (2009) *Int’l Fin L Rev*; Fred Myers and Alexa Abiscott, ‘Asset Backed Commercial Paper: Why the Courts Got It Right’ (2009) 25 BFLR 5, 5, 13, 28-29; *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 CBR (5th) 269, 47 BLR (4th) 74 (Ont SCJ [Comm List]); *aff’d* 2008 ONCA 587, 92 OR (3d) 513, paras 19, 30, 59, 98, 138-139, 145.

⁷ Eg *Farmers’ Creditors Arrangement Act*, RSC 1952, c 111.

As a result, the 'boundaries' of CCAA law tend to be fluid and difficult to discern (and predict). Nevertheless modern CCAA law, and historic bondholder reorganisations, have been efficacious precisely because they facilitate reorganisations that make commercial and political sense by taking their cue from practices 'on the ground,' rather than relying on Parliament to prescribe restructuring principles or policies to actors. The 'elasticity' of corporate restructuring under majority provisions, and now the CCAA, has benefits as well as drawbacks, and is a hallmark of this area of law.

This raises an interesting question about whether the essence of these restructuring regimes has less to do with their practical outcomes, than the way these outcomes are brought about. This interpretation would fit with the broad character of both regimes in that it is hard to distil general principles of restructuring that are common to all bondholder reorganisations or CCAAs when one focuses on outcomes. But one does find some consistency when examining methods or means of restructuring under each. For example, consider common descriptions of the CCAA such as it is 'intended to have wide scope' and gives judges much room to exercise their discretion. On their own these two statements convey little about what the Act is intended to achieve, but they say a fair amount about the mechanisms by which resolutions will be brought about (even though they have little predictive power.) The same is true for the utilitarian majority provisions of historical trust deeds. In point of fact, these could be taken as 'general principles' of how CCAA law is conducted insofar as they appear to be common to most (if not all) CCAAs. Focusing on the means, rather than the outcome, of CCAAs may therefore be specific enough to offer a

useful, common framework for analysing and theorising this area of law, and still be broad enough to encompass the wide variety of (sometimes conflicting) policy objectives and practical functions of the Act (debtor remedy, creditor remedy, going-concern reorganisation, liquidations, mass tort resolution, saving jobs, and so on). Despite the dynamic nature of CCAA law since the 1980s-1990s, broad policies of giving the statute a wide scope and relying on judicial discretion have been rather consistent over this period.

This interpretation of bondholder reorganisations and CCAA law would still accord with my central argument about the prominent role of large secureds, since they are usually the most powerful parties in an insolvency context and in the best position to influence individual outcomes. Large creditors have an incentive to keep the locus of legal change in the courts. The wide range of possible outcomes in case-driven developments can work to their advantage, since they can often pursue the outcome that best advances their interest in a given case, without having to make the sort of *ex ante* trade-offs that picking one outcome over another (as it applies in all cases) would entail (liquidation over reorganisation, for instance.) In other words, lenders can advocate a specific outcome in one case, but 'leave their options open' about how potential future cases might be resolved. This gives them a good chance at achieving an optimal resolution in most cases in which they are involved. They may still 'lose' in an individual case, but they are unlikely to be on the losing side of a sweeping legal rule change.⁸

⁸ See eg Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Soc'y Rev 95.

The process of legal change at play in modern CCAA law is also an interesting illustration of Arthur Stinchcombe's observation that 'an effect created by causes at some previous period [can become] ... a cause of that same effect in succeeding periods.'⁹ The exercise of judicial discretion went from being just a means carrying out restructurings under an antiquated Act, to a *de facto* policy objective for how CCAA reorganisations should be conducted. This in turn might help account for the tendency of courts to exercise judicial discretion in a way that breaks down statutory restrictions and broadens the Act's scope, as well as Parliament's relatively 'hands-off' approach to CCAA lawmaking. One effect of the way courts deploy judicial discretion in CCAAs is that one instance of judicial discretion tends to beget another. As discussed in Chapter four, allowing instant trust deeds led to further exercises of judicial discretion in order to 'flesh out'¹⁰ majority provisions into a DIP restructuring regime. Commentators (including myself) may voice concerns about the implications this raises for the rule of law and the notion that statutes should convey clear expectations,¹¹ but maybe these critiques miss the more significant point. Perhaps the key issue is that judicial discretion has itself become a policy objective for conducting CCAA law. So broadening the Act's scope—by recognising instant trust deeds, applying the Act to a solvent company, and so on—is a manifestation of this objective. This phenomenon—as well as the typical (but often vague) policy statements that the

⁹ Arthur Stinchcombe, *Constructing Social Theories* (New York: Harcourt, Brace, 1968), cited in Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton, NJ: Princeton University Press, 2004), 46.

¹⁰ See eg *Re Westar Mining Ltd.* (1992), 70 BCLR (2d) 6, 14 CBR (3d) 88 (SC), per Macdonald J., para 23, cited *inter alia* in *Re Stelco* (2005), 75 OR (3d) 5, 253 DLR (4th) 109 (CA), para 32.

¹¹ *Kent et al.*, n 4 above.

Act is ‘intended to have wide scope’¹²—has the quality of a self-fulfilling prophecy because the means of ‘giving life’ to the Act’s ‘dead’ provisions (judicial discretion) has essentially become the reason for doing so (to exercise judicial discretion). This flows from roughly 20 years of case law that has interpreted the court’s order making power under section 11 as if that provision was the guiding policy of the Act. A better critique might be to query *whether* and *why* it is necessary, as a matter of normative policy, to continue to rely so heavily on judicial discretion in CCAAs.

The role of judicial discretion in CCAA law relates to studying cycles of legal change more broadly because of the particular way it affects reform efforts. Usually the political impetus to reform or repeal bankruptcy law arises during or after economic recessions, when many debtors avail themselves of insolvency law, and so may highlight deficiencies or drawbacks of existing legislation. In the Canadian setting bankruptcy reform has historically been a relatively rare event. At one point this led to a situation where ‘the very old and tottery’¹³ *Bankruptcy Act* from the 1930s was being relied on to address overindebtedness problems arising as late as the 1980s and early 1990s.¹⁴ (Amendments to the BIA in 2005

¹² See eg *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd.* (1988), 92 AR 81, 72 CBR (NS) 1 (QB), paras 60-61, citing *Meridian Dev. Inc. v Nu-West Ltd.* (1984), 53 AR 39, 52 CBR (NS) 109 (QB), 114. See also L.W. Houlden and Geoffrey B. Morawetz, *Bankruptcy Law of Canada* (Toronto: Carswell, 3rd ed, 1989), 2-102, 2-103, ‘The legislation [CCAA] is intended to have wide scope...’ and referencing section 11 of the Act, cited eg in *Elan Corp. v Comiskey (Trustee of)* (1990), 1 OR (3d) 289, 41 OAC 282 (CA), para 102 [dissenting in part.]

¹³ See remarks of Mr. Vic Althouse (NDP), *Debates of the House of Commons of Canada* (20 June 1986) 1st Sess, 33rd Parl, 14793-14794. See also Roger Tassé *et al.*, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Ottawa: Information Canada, 1970).

¹⁴ Jacob S. Ziegel, ‘Modernization of Canada’s Bankruptcy Law in Comparative Context’ (1998) 33:1 *Tex Int’l LJ* 1 [Ziegel 1998], 6-7. See also Stephanie Ben-Ishai, Saul Schwartz and Thomas G.W. Telfer, ‘A Retrospective on the Canadian Consumer Bankruptcy System: 40 Years after the Tassé Report’ (2011) 50 *CBLJ* 236.

added a requirement that that statute at least be reviewed again in five years' time.¹⁵) Stalled bankruptcy reform efforts were accordingly a significant factor in CCAA developments in the 1980s-1990s.¹⁶ Since that time courts have consciously and consistently adopted progressive interpretations of the Act in order to provide satisfactory outcomes in individual CCAA cases. One by-product of this approach is that courts avoid contributing to the sort of dissatisfaction that could help create political impetus for formal legal reforms. Put differently, it is hard to see how the political impetus for formal and fundamental changes to CCAA law can ever build to a 'critical juncture' moment in a way that punctuates the current equilibrium of broad judicial discretion and expansive statutory interpretation. Rather, the body of modern CCAA case law demonstrates how courts can pre-empt the need for legislative reforms. This is in keeping with the general tendency of judicial review to be a 'one-way street.'¹⁷

Another facet of the phenomenon of judicialisation relates to debates over *ex ante* versus *ex post* approaches to theorising bankruptcy law. Perpetual ad hocery under a more codified bankruptcy statute or an *ex ante* structuring vision of bankruptcy would lend more gravitas to concerns about predictability and the rule of law. But these seem like far less important concerns under a regime like the CCAA that is seen as expressly more concerned with effecting satisfactory *ex*

¹⁵ SC 2005, c 47, s 122, adding Part XIV to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. See also discussion in Jacob Ziegel, 'Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions' (2010) 26:1. BFLR 63 [Ziegel 2010]; Stephanie Ben-Ishai and Anthony Duggan, *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (Markham, ON: LexisNexis, 2007).

¹⁶ Ziegel 1998, n 14 above, 6-7.

¹⁷ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 2nd ed, 2012), 216, citing Carl Baar, 'Judicial Activism in Canada' in Kenneth M. Holland (eds), *Judicial Activism in Comparative Perspective* (New York: St. Martin's, 1991), 53.

post solutions on a case-by-case basis.¹⁸ Provided the CCAA achieves this main objective (satisfactory *ex post* solutions) and judicial interpretation is seen as 'progressive' rather than 'arbitrary,' this legal regime will likely remain relatively immune to calls for repeal or to 'rein in' judges on broad policy grounds. *Ex ante* approaches to theorising bankruptcy, and the usual criteria for evaluating these approaches, accordingly do not fit with modern CCAA law, which is decidedly *ex post* and ad hoc in its policy and practical orientation.

An interesting corollary is that the *ex post* approach of CCAA law shines in response to the unanticipated events that tend to expose the deficiencies and 'outmodeness' of more codified bankruptcy laws. Flurries of restructuring activity (economic downturns) generate satisfaction with, and justify progressive interpretations of CCAA law. Conversely, these same events tend to produce dissatisfaction with rigid interpretations of more codified bankruptcy regimes, and so underscore the need for formal legal reforms. This occurred with respect to the Canadian *Bankruptcy Act* and FCAA in the 1980s-1990s, for instance. So how a bankruptcy regime is perceived to respond to these sorts of situations (flurries of activity or significant, unanticipated failures) can help create either inertia against, or momentum for formal legal reforms.

As an example, consider how the CCAA escaped repeal in the 1980s-1990s precisely because of how useful and satisfactory the Act proved for resolving large corporate insolvencies in practice. In contrast, the CCAA has been most

¹⁸ Floodgates arguments tend not to hold sway in CCAA matters. See eg *Re Calpine Canada Energy Ltd.*, 2007 ABQB 504, 415 AR 196, para 76, aff'd 2007 ABCA 266, 417 AR 25, para 31. See also *Re Philip's Manufacturing Ltd.* (1991), 60 BCLR (2d) 311, 9 CBR (3d) 1 (SC), para 41.

vulnerable to repeal or substantive reform during periods of economic prosperity when there was very little bankruptcy activity. The Act escaped early repeal efforts because key interest groups presented evidence to Parliament that attested to the need for and utility of the Act as a ‘backup’ bondholder remedy. But even when the Act did not have many defenders (in the 1970s, for instance), there was still not enough momentum in reform efforts to overcome the inertia of ‘being on the statute books.’ These later bills—which included reforms of the *Bankruptcy Act* as well—never made their way into law.

So the longevity and ‘success’ of contemporary CCAA law—and the bondholder reorganisations that it was based on—are also tied to the fact that it excels when other bankruptcy laws tend to come up short, thanks in large part to progressive judging. As a result CCAA law runs counter to typical cycles of legal change in bankruptcy law by stymieing the usual impetuses (deficiencies in existing law) and mechanisms (Parliamentary action) for legislative reform. Instead the factors that tend to prompt formal bankruptcy reform efforts tend to affirm, justify and reinforce CCAA approaches to corporate reorganisation generating ongoing positive feedback. Since reform efforts seldom arise during periods of stasis, it is hard to imagine how this pattern could be broken in a way that would lead to fundamental reform of CCAA law. Modern approaches to CCAA law appear to represent a deep equilibrium¹⁹ in this respect. These mechanisms seem resistant to change in such a way that change appears quite unlikely. But of course ‘unlikely’ is not the same as ‘impossible.’

¹⁹ Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton, NJ: Princeton University Press, 2004), 157-158, citing H. Peyton Young, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* (Princeton: Princeton University Press, 1998).

From the perspective of the 1920s looking forward, very little of this historical narrative unfolded the way one might have expected. The history of CCAA law includes a sequence of unpredictable events and unintended consequences. But despite their unpredictability and unlikelihood looking forward, these events proved very important for an explanatory account of CCAA history and legal change. For instance, twice over the course of the CCAA's history debtor-led reorganisations emerged as an unintended consequence of the legislation. In the 1930s and 1940s, this 'abuse' of the legislation led to calls to repeal the Act and eventually prompted Parliament to enact the trust deed restriction. In the 1980s and 1990s, however, courts, counsel and Parliament regarded debtor-led restructurings as the intended purpose of the statute and minimised the restrictiveness of the trust deed provision to facilitate debtor access to the Act. So a much-changed societal landscape in Canada by the 1980s and 1990s finally lent traction to earlier ideas about the normative desirability of corporate restructuring as a debtor remedy. This illustrates the power of ideas and unintended consequences for accounts of legal change. The ideas from HI and the recursivity of law analysis used in this thesis help explain how and why these events unfolded the way they did, and illustrate the power of ideas to refashion and breathe new life into old institutions.

Despite these contextual changes the major role of large secureds in corporate restructurings has remained a consistent feature of developments under this Act. This in turn helps account for the CCAA's resilience to repeated repeal efforts. The intended beneficiaries of the Act are relatively strong and systemically

important actors in the Canadian setting. Although approaches to the Act and interpretations of the CCAA have evolved over time, they have continued to meaningfully advance the interests of large secureds relative to other groups.

This historical account of the CCAA complements research on contemporary CCAA law by scholars such as Janis Sarra as well as the historical scholarship of Thomas G.W. Telfer on the *Bankruptcy Act*. My historical account of the Act provides a new point of reference for contemporary insolvency scholarship and so throws into relief many CCAA law developments from the 1980s onward. By fleshing out the historical picture that underlies modern CCAA law, I show where recent developments represent a break from past practices as well as where they remain largely continuous with historical approaches to company insolvency. Accordingly I am able to highlight the importance of the Act as a remedy for large creditors, which may help explain some more recent trends, such as liquidating CCAAs.

This thesis further illuminates the early twentieth-century context of corporate insolvency in Canada, and underscores the importance of ideas concerning potential abuses of the legislation by debtors that surrounded the enactment of both the CCAA and the *Bankruptcy Act of 1919*. Just as Telfer describes the *Bankruptcy Act of 1919* as advancing unsecured creditor interests in many respects²⁰ the CCAA was (and is) also primarily a remedy for (large secured) creditors. This in turn is informative for understanding historical approaches to

²⁰ Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014) [Telfer 2014], 172-173.

insolvency. For instance, it helps account for the negative reactions to the CCAA from early bankruptcy commentators such as Lewis Duncan, who naturally looked to the Act, rather than a trust deed, to find safeguards against debtor abuse—safeguards that the CCAA lacked.

The historical use of separate statutory remedies for large secureds versus unsecured creditors in cases of debtor insolvency also helps to fill in the bigger historical picture of Canadian bankruptcy and insolvency law, and its relationship to receivership. For example, this may help explain why the CCAA continues to exist separately from the BIA, with little support outside academia²¹ for combining these statutes into a single Act. The fact that the first insolvency statute to facilitate ‘complete’ company restructuring was grounded in receivership is also enlightening in other respects. It demonstrates that binding secured claims was necessary for a company reorganisation statute to be effective. As this study shows, Parliament *adopted* secured creditor remedies into federal law, rather than using bankruptcy and insolvency law merely to *limit* secured creditor rights (as those existed under provincial legislation.) As discussed below, Parliament later went on to add receivership provisions to bankruptcy and insolvency legislation, for example, which suggests that the CCAA may be part of a broader, long-term trend of transitioning some secured creditor rights from provincial to federal law. Note, however, that federal legislation does not necessarily imply greater power for secureds. Recall that a significant drawback of the CCAA, 1933 was that it only applied to insolvent

²¹ See eg discussion in Ziegel 2010, n 15 above; Jacob S. Ziegel, Chapter 12 ‘The BIA and CCAA Interface’, in Anthony Duggan and Stephanie Ben-Ishai (eds), *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (Toronto: LexisNexis, 2007), 316-318.

companies, whereas majority provisions applied to solvent and insolvent companies. Along similar lines, the federal receivership provisions in the BIA restrict receivers in some ways.²² Nevertheless, it is possible that there is now a growing commercial need for more uniformity concerning secured claims in insolvency,²³ much as Telfer notes that there was an increasing commercial need for a federal bankruptcy statute to deal with unsecured claims by 1919.²⁴

II. Study limitations and areas for further research

Although I have endeavoured to provide as robust an account of CCAA law as possible, a few main factors limited what I could accomplish in this project. As noted in Chapter one, the lack of comprehensive records on company reorganisation under the CCAA until autumn 2009 makes my historical picture incomplete in certain respects. Similarly, while the early commentary on the CCAA does provide enough information to craft this historical narrative, it too is limited in the sense that it is comprised of only a handful of articles written by a few commentators. Although the (usually brief) articles answer a number of questions about company reorganisation, they also raise more questions about how these reorganisations were conducted. No doubt further research on historical British company reorganisation, for which there are many more historical materials, would help provide a fuller picture of company

²² See *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Part XI 'Secured Creditors and Receivers.'

²³ PPSAs significantly harmonised provincial secured credit laws in the twentieth-century. See generally, Ronald C.C. Cuming, Catherine Walsh and Roderick Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2nd ed, 2012).

²⁴ Telfer 2014, n 20 above, 147-150, 157-162. See also discussion in Virginia Torrie, 'Book Review: Thomas G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2014)' [forthcoming in (2016) 31:2 BFLR].

restructuring practices in late nineteenth- and early twentieth-century. In-depth research on specific Canadian restructurings of this period, such as the Abitibi receivership and other pulp and paper company insolvencies of the 1920s-1940s, would probably also shed light on this historic period for Canadian company reorganisation law.

Considering more recent CCAA law developments, while my research brings to light a number of the drivers for, and mechanisms of legal change in the 1980s and beyond it also raises further questions about the 'purposive interpretation' of this statute. As discussed in Chapter four, although courts interpreted some sections of the CCAA purposively, they read other provisions 'strictly and narrowly.' Due to limitations of time and space, I could not probe the broader issues of statutory interpretation that this raises. Nor could I systematically compare and contrast judicial approaches to interpreting the CCAA versus other federal bankruptcy and insolvency statutes, for instance. Although purposive interpretation explains to some extent the way that courts breathed new life into this dead-letter Act, it alone does not seem to fully capture the phenomenon of CCAA interpretation.

The limitations of this study thus raise a few further avenues for research, in addition to those already noted. Here I will touch on a few of these areas.

First, the 'large and liberal' way in which courts interpreted the CCAA in the 1980s-1990s causes one to question at what point 'purposive' statutory

interpretation becomes something more than purposive interpretation?²⁵ One theme of contemporary CCAA law is ensuring access to the (antiquated) Act—statutory restrictions notwithstanding—and so courts engaged in an ongoing exercise in ‘modernising’ CCAA law (diminishing the need for amendments) alongside broader societal changes. What are the natural limits of CCAA law? Why cut down some of the Act’s provisions (trust deed provision, prohibition against filings by trust companies and railway companies) by a narrow and technical construction, while giving others wide scope (insolvency criterion, discretion of the court to make orders)? The CCAA is interpreted more liberally than other bankruptcy and insolvency statutes, and more broadly than the modern principle of statutory interpretation would suggest. Studying ‘progressive’ interpretations of the CCAA presents an area for further research in order to understand this approach to statutory construction more fully.

Second, one cannot help but wonder to what extent ideas from other academic disciplines concerned with media, technology and communication might add to explanatory accounts of CCAA developments in the 1980s-1990s. These technologies advanced tremendously between the 1930s-1940s and the 1980s-1990s, which, among other things, facilitated a marked increase in the pace and frequency of law reporting. The specific way in which Stinchcombe’s observation played out in modern CCAA law calls to mind Marshall McLuhan’s phrase ‘the

²⁵ This relates to a number of jurisprudential issues, such as the role of judges in a democracy, which is the subject of much academic literature. See eg the work of Ronald Dworkin: *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978); *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986); *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006). See also Duncan Kennedy, *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997).

medium is the message.’²⁶ This concept gets at the idea that people tend to focus on content, which can cause them to miss larger structural changes in technology, for instance, especially if those changes occur gradually over long periods of time. Yet the medium itself affects one’s understanding of the content. These sorts of concepts may provide a novel way to critically probe the role of law reporting technologies in contemporary CCAA law developments in facilitating much positive feedback for progressive interpretations of the Act. The interplay between the medium (case-driven developments disseminated through law reports and online services) and the message (CCAAs carried out under broad judicial discretion) presents a potential avenue for further study in the CCAA context, and perhaps in other case-driven areas of law as well.

A third avenue for further research concerns the constitutional dimensions of CCAA law. As noted in Chapter five, insolvency law bears out a centralising trend since the 1930s. A further example of this is the way that Parliament added receivership provisions in respect of insolvent entities to the BIA in the 1990s²⁷ with little (if any) protest on constitutional grounds. According to the doctrine of federal paramountcy, the federal law applies over any provincial receivership provisions in cases of insolvency.²⁸ The slow migration of receivership (and other matters now considered part of ‘insolvency’ law) from the provincial to the federal sphere potentially alters the landscape of politics and pressure groups surrounding legislation and law reform. National (federal) treatment of

²⁶ Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: Mentor, 1964).

²⁷ 1992, c 27, s 89 adding Part XI ‘Secured Creditors and Receivers.’

²⁸ But see *Lemare Lake Logging Ltd. v 3L Cattle Company Ltd.*, 2014 SKCA 35, 2014 CarswellSask 179. The Saskatchewan Court of Appeal’s decision has since been overturned by the SCC: *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53, 391 DLR (4th) 383.

bankruptcy and insolvency matters usually helps large creditors that operate nationally (such as FIs), which are able to lobby and exert political pressure at the federal level.²⁹ Hence another area for research would be to consider the way that this centralising trend in the area of insolvency affects the relative ability of different interest groups to organise and exert political pressure on lawmaking. The significance of this trend could be further considered in light of current scholarship on the division of powers³⁰ and constitutional concepts such as ‘jurisdictional justice.’³¹

In 1933 Parliament could, for the first time, bind secured creditor claims through insolvency law by effectively enshrining receivership provisions into the CCAA. Now a much-changed landscape of federalism seems to signal we may be reaching another landmark moment in Canadian legal history: the provinces may no longer be able regulate secured creditor rights (through receivership) in cases of insolvency. Accordingly the constitutional dimensions of secured creditor remedies of receivership and reorganisation—and their political and policy ramifications—represent an interesting and dynamic factor when studying changes in Canadian insolvency law over time. Much like the enactment of the CCAA carried untested and unanticipated consequences for interpreting the division of powers, in all probability so too will the gradual expansion of the federal bankruptcy and insolvency law power vis-à-vis the provincial property and civil rights power concerning receivership more broadly.

²⁹ See Torrie, n 24 above.

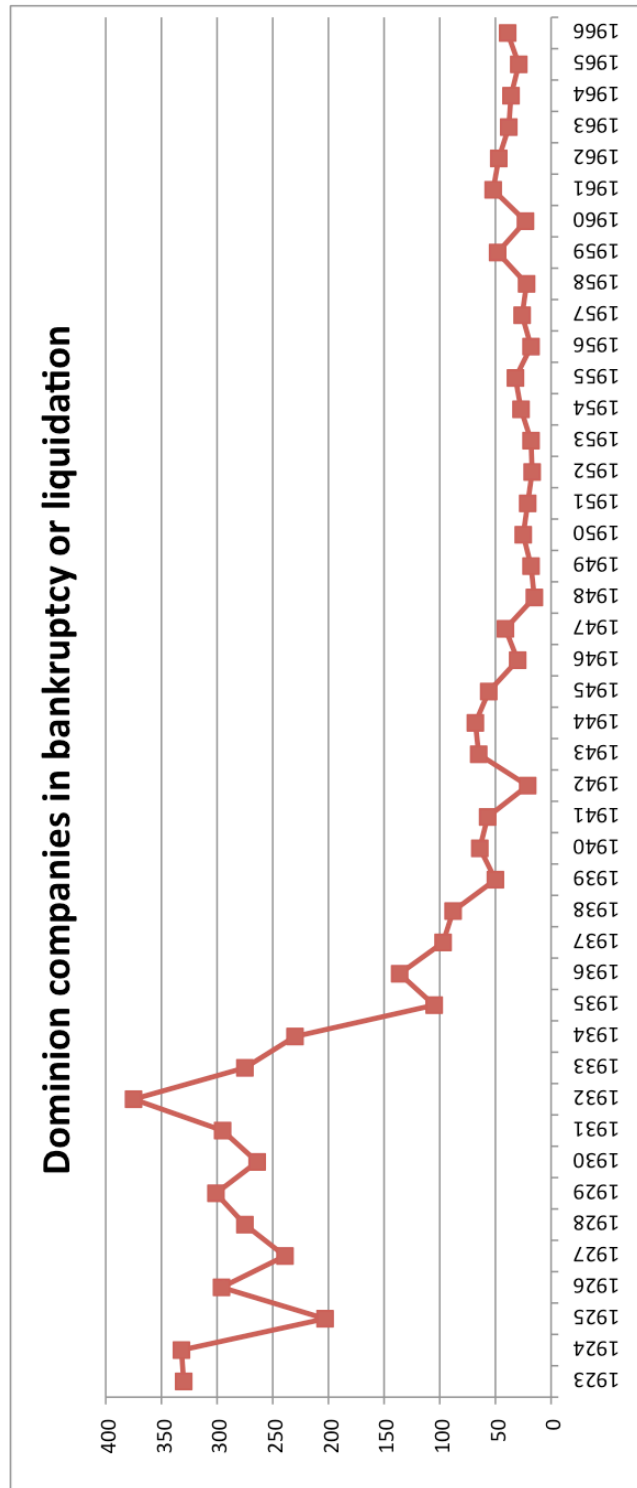
³⁰ See eg Bruce Ryder, ‘Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers’ (2011) 54 SCLR (2d) 566.

³¹ Hester Lessard, ‘Jurisdictional Justice, Democracy and the Story of Insight’ (2010-2011) 19 Const F 93.

Over the past 80 years, evolving understandings of Canadian federalism alongside many other societal changes have facilitated novel and progressive interpretations of the CCAA, such that contemporary interpretations of the Act now extend far beyond the expectations its framers. One cannot help but wonder how earlier commentators would have reacted to modern CCAA law. In 1935 Harold Ernest Manning declared the CCAA unconstitutional for purporting to adjust secured creditor claims in cases of insolvency.³² What would he think of its application to secured claims when the debtor is still solvent? Formal stasis of federal insolvency law and significant changes in many other areas of Canadian law and society help explain how receivership was added to the purview of Parliament in cases of corporate insolvency (or near-insolvency.) The active role of large secured creditors as protagonists of corporate reorganisation provides a common thread and a reason for these gradual yet rather spectacular changes.

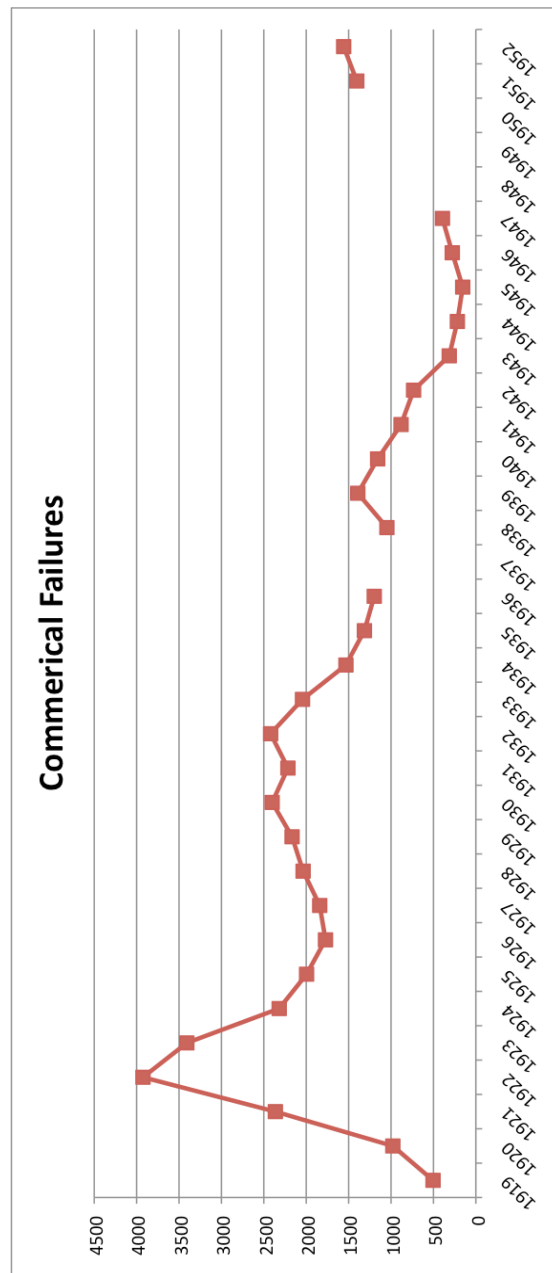
³² See eg H.E. Manning, 'Companies Reorganization and the Judicature Amendments Act 1935' (1935-1936) 5 Fortnightly LJ 23; H.E. Manning, 'Companies Reorganization and the Judicature Amendment Act 1935' (1935-1936) 5 Fortnightly LJ 40.

Appendix 1¹



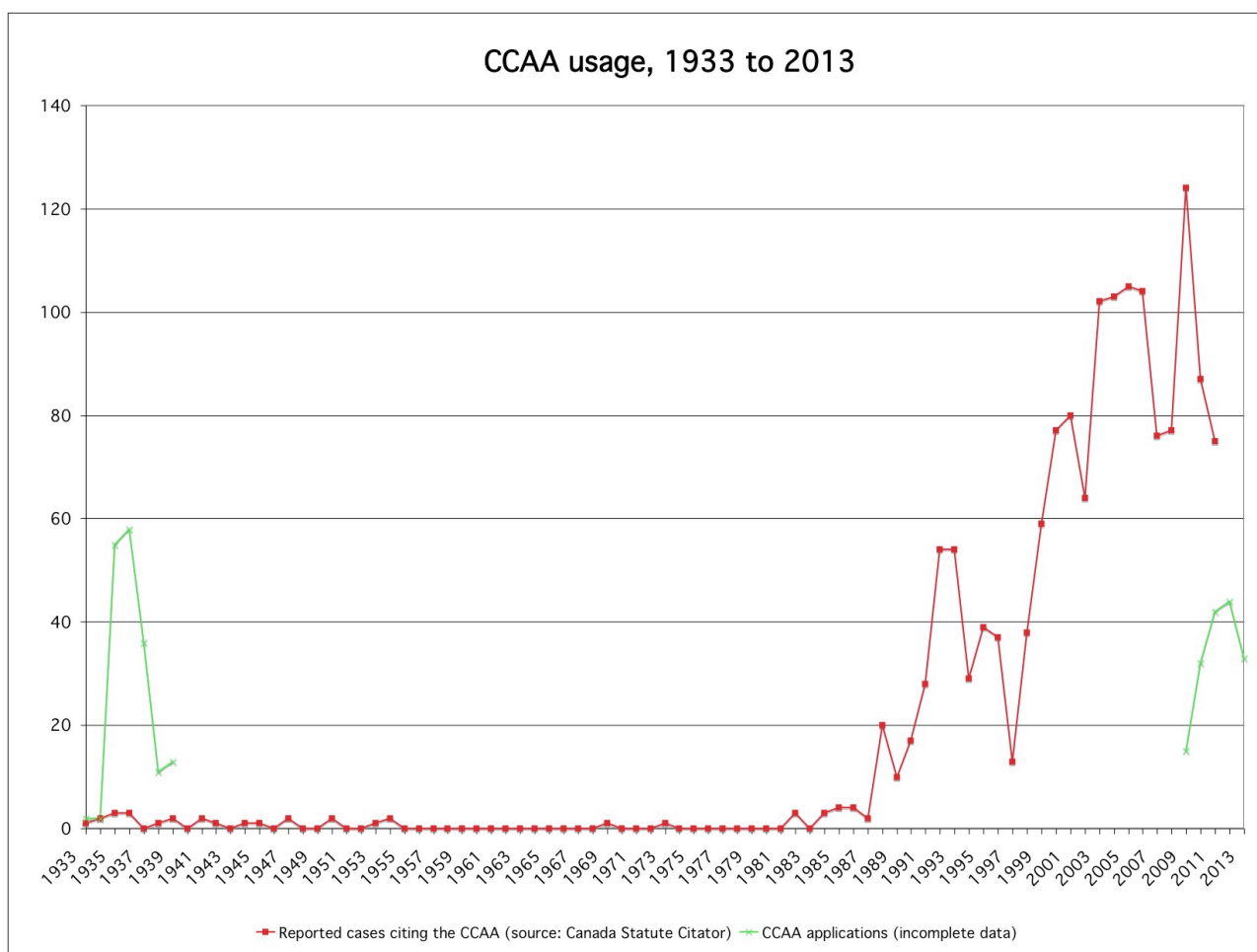
¹ Chart data is compiled from the Department of the Secretary of State, Annual Reports of the Secretary of State of Canada (Ottawa: King's Printer, 1924-1967.)

Appendix 2²



² Data gathered from Reports of the Dominion Bureau of Statistics: *Twelve Years of the Economic Statistics of Canada By Month and Years, 1919–1930* (Issued as a Supplement to the *Monthly Review of Business Statistics*, November 1931) (Ottawa: King's Printer, 1931), 12-13 (Commercial Failures as reported by Bradstreets); *Recent Economic Tendencies in Canada, 1919–1934* (Issued as a Supplement to the *Monthly Review of Business Statistics* June, 1935) (Ottawa: King's Printer, 1935), 39-40; *Monthly Review of Business Statistics*, vols. 9–21 (Ottawa: King's Printer, 1934–1946), data set describes as: 'Commercial Failures as reported by Bradstreets until 1930, simply 'Commercial Failures' until 1937, and thereafter 'Canadian Failures' as Reported by Dun's Statistical Review; *Canadian Statistical Review, January and February 1953* (Ottawa: Queen's Printer, 1954). None of these terms were defined.

Appendix 3³



³ Data for cases citing the CCAA comes from the print version of the Canadian Statute Citator and Supplements up to the end of 2011. See Canadian Statute Citator up to September 2006, [2006] CSC/RLC, 507-567. October 2006 to September 2011 Supplement, [2011] CSC/RLC, 193-228. October 2011 to December 2011 Supplement, [2011] CSC/RLC, 33-35.

Data for CCAA applications is not complete for the years prior to 2010. The Office of the Superintendent of Bankruptcy began tracking CCAA filings from mid-September 2009, so statistics were taken from the OSB website from this point to the end of 2013, see Office of the Superintendent of Bankruptcy Canada, 'CCAA Records List' online: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html> (accessed 13 March 2014). Filing data for the 1930s only concerns CCAA applications filed in Montreal, and comes from data compiled by the Montreal Board of Trade from trade publications and presented to a Parliamentary committee, where the figures were uncontested, see H.S.T. Piper (Montreal Board of Trade), House of Commons Standing Committee on Banking and Commerce, *Minutes of Proceedings and Evidence respecting the Companies Creditors' Arrangement Act, No. 1, 7 June 1938* (Ottawa: King's Printer, 1938), 2.

In the 1990s there was briefly a rule under the CCAA that facilitated record keeping. Whenever the court made an order under section 4 or 5 of the Act the party that requested the order was required to send a copy of the order to the Superintendent of Bankruptcy, see SOR/92-580, s 3. This rule was repealed, ostensibly due to constitutional concerns. The specifics of the constitutional concerns were not noted. See Jacob S. Ziegel, 'Repeal of the Companies' Creditors Arrangement Act Rule PC 1999-1072' (1999) 10 CBR 222.

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