# Book Review: *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* – Virginia Torrie - University of Toronto Press 2020

## Driving Forces behind the Development of Law

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## I. INTRODUCTION

The current unprecedented Covid-19 Pandemic not only causes a global health crisis but also leads to tremendous economic challenges to the world. In the United Kingdom, it is estimated that the national Gross Domestic Product will fall by eleven per cent in 2020, the biggest economic recession in the past three centuries.[1] In fact, crises tend to produce a series of social, economic and legal changes. Understanding the complex relationship between crises and legal responses is also crucial to appreciating the dynamics of the society. In this context, Professor Virginia Torrie's recent book, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act*, may be particularly relevant, since this book offers an in-depth explanation over how the economic crisis could change the course of law development.

Specifically, Torrie uses the historic trajectory of the Canadian corporate reorganization law, the Companies' Creditors Arrangement Act, in the twentieth century to vividly demonstrate how the development of this law was shaped by its social, economic and political backgrounds and how statutes could be expansively interpreted to pursue pragmatic needs.[2]

This book presents a unique angle through which the development of law can be more profoundly understood and without which the complexity of law development may be underestimated. Torrie's contribution in this book is not only remarkably valuable for legal scholars but also equally helpful for scholars in the fields of history, sociology and politics. This review considers two major arguments presented in this book.

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[1] Daniel Harari and Matthew Keep, 'Coronavirus: Economic Impact' (House of Commons Library, Briefing Paper, Number 8866, 13 November 2020).

[2] See Terence Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda' (2009) 5 *Annual Review of Law and Social Science* 263.

## II. ECONOMIC CRISES USUALLY TRIGGER THE LAW MAKING, OR RESHAPE THE LAW, TO HANDLE EMERGING URGENCY

The enactment of the Canadian Companies' Creditors Arrangement Act in 1933 was mainly a response to the Great Depression beginning from 1929 in the industrialized world including Canada.[3] This Act was made to fill a gap, since under the then national bankruptcy law, liquidating a failed company was the only option, but this Act sought a corporate rehabilitation outcome.

In the 1930s' Canada, bondholders were powerful players in the financial markets, many of them insurance or loan companies that held floating charges over borrowers' assets and businesses. As precisely pointed out by Torrie in this book, the creation of the Companies' Creditors Arrangement Act was made for the benefit of bondholders rather than for debtor companies, since this Act offered the debt compromise procedure only for companies having bondholders as creditors. For companies that did not raise funds from bond markets, this Act did not apply. This law was a remedy for bondholders.

The Companies' Creditor Arrangement Act was arguably a corporate rescue law on the grounds that it facilitated corporate reorganization over liquidation. If an arrangement/reorganization plan could be agreed by the creditors and the debtor company, the company as a going concern would remain in business and a destructive liquidation could be avoided, as a result of which creditors, especially bondholders, could reap the benefits generated by the company in the future. It was a win-win solution.

After the Companies' Creditors Arrangement Act was passed in 1933, it was frequently used by bondholders to reorganise their financially troubled but economically viable customer companies especially in the 1930s and 1940s. But since the 1950s, mainly because of the economic prosperity after the World War II, the booming economy in Canada saw the sharply declined use of this Act. Decades later, in the 1980s, the new round of economic recession reminded Canadian business communities the usefulness of the Companies' Creditors Arrangement Act, leading to its recovery.[4]

Torrie's analysis explains that the 1980s economic recession did not result in law-making, instead it interestingly found the re-interpretation of the Companies' Creditors Arrangement Act to address the consequence of mass company failures. This time, it was not the parliament enacting or amending the law to suit practical needs; by contrast, it is the Canadian law courts expansively interpreting this Act as a remedy for debtor companies, rather than for bondholders as initially designed. A great number of debtor companies strategically used the Act for reorganization in the 1980s and 1990s in Canada, since in many cases a bond issuance could be artificially created for the only purpose of accessing the reorganization procedure under this Act, and since, more important, law courts would give the green light in the consideration that it served the interests of a wide range of parties, including employees, shareholders and the society at large. Technically speaking, the judicial lenience seemed to have gone too far. But again, the emergency of economic recession demanded an extraordinary action to alleviate the impacts of the crisis. The 1980s economic crisis in Canada helped update this Act, albeit no action from the legislature was involved.

In view of this book's crisis-leading-to-law-making pathway, it is far easier to appreciate the wave of legislative reforms following the 2007-8 global financial crisis in some major

[3] See Virginia Torrie, 'Farm Debt Compromise During the Great Depression' (2018) 41 *Manitoba Law Journal* 377.
[4] See David B. Perry, 'Government Finance in the Recession' (1984) 32 *Canadian Tax Journal* 628.

jurisdictions. For example, the USA enacted the Dodd-Frank Act in 2010 in an effort to contain the ripple effects of failed financial institutions,[5] and the UK promulgated the Banking Act 2009 to respond to bank insolvencies.[6]

## III. INTEREST GROUPS HELP RESHAPE THE LAW

Although law is made by a legislative body, its implementation is probably beyond the legislature's control. Torrie's book offers a fascinating account of how the users of the Canadian Companies' Creditors Arrangement Act contributed to the dynamics of this law in the judicial practice.

As noted before, this Act was originally made as a relief for bondholders to restructure their borrowers. But in the 1930s and 1940s, due to the intrinsic ambiguity of the statute, many debtor companies applied to use this Act to avoid liquidation in the absence of bondholders' involvement, and in light of the strength of this Act in preserving going concern value, in most cases, law courts allowed companies to proceed. The court support in fact created a Chapter-11-style debtor-in-possession regime in Canada, since the debtor's management could remain in office if a Companies' Creditor Arrangement procedure could be voluntarily opened in the court.

However, for fear of the potential abuse of this debtor-in-possession scheme under the Act, many creditor groups fiercely opposed the voluntary action by debtor companies themselves. In 1952, perhaps because of this concern, the Canadian parliament amended this law and prohibited the voluntary application. The celebrated debtor-in-possession scheme unfortunately saw its abrupt end in Canada. For this reason and others, prior to its resumption in the 1980s, this Act fell largely into disuse. This is much like what happened in the USA when the debtor-in-possession control model under the Bankruptcy Code was abolished in the 1930s, leading to its dramatic decline thereafter, until its re-installation by the 1978 amendment.[7]

The drama turned to a reversal in the 1980s, a time when the new economic crisis hit Canada hard. Since a corporate reorganization law was still unavailable, insolvent companies desperately needed a debtor-friendly law for survival. In the absence of alternatives, the Companies' Creditors Arrangement Act was invoked again. For this era, debtor companies became more strategic than before. To fulfil the entry requirement of having bondholders, some instant bond issuances were made to meet the eligibility test, thereby many companies could resort to this Act to avoid the use of the bankruptcy liquidation law.

Arguably, if a company deliberately created a bond-issuance shortly before applying for a Companies' Creditors Arrangement procedure, this action might be deemed to be conducted in bad faith and substantially violated the entry requirement. Strictly speaking, at least, this strategy would be considerably vulnerable to a legal attack. In this circumstance, it was Canadian law courts that expansively interpreted the eligibility requirement and ruled in favour of a corporate rescue effort in the knowledge that a wide range of parties, including employees, suppliers and even local communities, could benefit from rehabilitating a business. This effectively meant that it was debtor companies with the support of law courts remaking the law.

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[5] 12 USC 5301, and see Thomas W. Joo, 'A Comparison of Liquidation Regimes: Dodd-Frank's Orderly Liquidation Authority and the Securities Investor Protection Act' (2011) 6 *Brooklyn Journal of Corporate, Financial & Commercial Law* 47, and Mark G. Douglas, 'The Year in Bankruptcy: 2008' (2009) 5 *Pratt's Journal of Bankruptcy Law* 113.

[6] Banking Act 2009. See also Dalvinder Singh, 'The UK Banking Act 2009, Pre-insolvency and Early Intervention: Policy and Practice' 2011 *Journal of Business Law* 20.

[7] See David A Skeel Jr, 'The Past, Present and Future of Debtor-in-Possession Financing' (2004) 25 *Cardozo Law Review* 1905, 1913-4.

The judicial open-mindedness offered to debtor companies in the 1980s and 1990s was not made in a vacuum. Torrie discusses the fact that two global trends of law development in this period might have also emboldened Canadian judges to lend their support to rescuing efforts, whoever initiated the rescue application. First, in 1978, the USA overhauled its Bankruptcy Code and re-introduced debtor-in-possession in Chapter 11, which to a certain extent might have influenced the Canadian judicial sector to adopt a pro-rescue and pro-debtor-in-possession interpretation. Like its southern neighbour, Canada also deserved a rescue-friendly insolvency law to save distressed companies. The most suitable candidate was the Companies' Creditors Arrangement Act, which could be used to fill the gap.

Second, the global debate about the choice between the shareholder primacy theory and the stakeholder theory clearly tilted in favour of the latter in the 1980s. Rescuing a failed company could see its social and economic gains in preserving jobs and in maximising the return to creditors. Supported by politicians, the Canadian judges creatively expanded the use of this Act so as to provide relief to over-indebted companies. Torrie's arguments greatly help the reader to better understand what happens beneath the vibrancy of law development in Canada and beyond.

## IV. CONCLUSION

There are more well-articulated thoughts about the interaction between law and society in Torrie's book. This review only selects the aforementioned two themes to recommend this book. To a large extent, this book is likely to be the extension of Carruthers and Halliday's masterpiece, Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States.[8] More important, it is worth emphasising that Torrie's book is not only useful for the reader to appreciate the dynamics of law development in Canada but also considerably enriches the global debate over how law development is intrinsically intertwined with political and economic priorities.

[8] Bruce G. Carruthers and Terence Charles Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Clarendon Press 1998).