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Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 CCAA Proceedings

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Reorganizations, Sales, and the Changing
Face of Restructuring in Canada:
Quantitative Outcomes of 2012 and 2013
CCAA Proceedings

This article examines quantitative data on the outcomes of proceedings under the Companies' Creditors Arrangement Act (CCAA), Canada's principal statute for resolving large, complex corporate insolvencies. In particular, this article compares the durations, direct costs, and returns to different classes of creditors generated by traditional reorganizations under the CCAA and by "liquidating CCAs"—that is, proceedings in which the insolvent debtor sells substantially all of its assets rather than reorganizing itself. The article makes a number of contributions to the existing scholarship. Firstly, quantitative data on CCAA proceedings are rare. The data examined here, collected by the author from proceedings initiated in 2012 and 2013, provide novel insights into the functioning of the CCAA. Secondly, the article questions much of the conventional wisdom surrounding liquidating CCAs based upon the data, suggesting that further study is required. Thirdly, the article proposes reforms to address the problems raised by liquidating CCAs.

Le présent article examine des données quantitatives sur l'issue des procédures intentées en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC), la principale loi canadienne visant à régler les dossiers complexes et importants d'insolvabilité des entreprises. En particulier, l'article compare les durées, les coûts directs et le rendement pour différentes catégories de créanciers générés par les réorganisations traditionnelles en vertu de la LACC et par les « liquidations en vertu de la LACC »—c'est-à-dire les procédures dans lesquelles le débiteur insolvable vend la quasi-totalité de ses actifs plutôt que de se réorganiser. L'article fait un certain nombre de contributions au bagage de connaissances existant. Premièrement, les données quantitatives sur les procédures en vertu de la LACC sont rares. Les données examinées ici, recueillies par l'auteur dans le cadre de procédures entamées en 2012 et 2013, fournissent de nouvelles perspectives sur le fonctionnement de la LACC. Deuxièmement, l'article remet en question une grande partie de la sagesse conventionnelle entourant les liquidations en vertu de la LACC fondée sur les données, ce qui donne à penser qu'une étude plus approfondie est nécessaire. Troisièmement, l'article propose des réformes pour régler les problèmes soulevés par les liquidations.

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Introduction

The *Companies' Creditors Arrangement Act*¹ is the principal legal mechanism for restructuring large, insolvent corporations in Canada.² Historically, *CCAA* restructurings involved lengthy negotiations among the creditors and other stakeholders of insolvent debtors, culminating in a formal restructuring plan on which the creditors would vote. In most

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

2. The terms "company," "corporation," and "entity" are used interchangeably throughout this article. Pursuant to section 3(1) of the Act, any "debtor company" or affiliated debtor companies having at least \$5 million in debt can apply for *CCAA* protection. Although the definition of "debtor company" in section 2(1) does not expressly include entities such as partnerships, the courts have used their inherent jurisdiction to extend protection to partnerships that are part of corporate groups in *CCAA* proceedings. See e.g. *Re Lehndorff General Partners Ltd*, [1993] OJ No 14, 9 BLR (2d) 275 (ONSC); *Re Canwest Global Communications Corp*, [2009] OJ No 4286, 2009 CanLII 55114 (ONSC) [*Re Canwest*]; *Re Calpine Energy Canada Ltd* 2006 ABQB 153.

cases, the aim was to restore the debtor to profitability and continue operating. More recently, the emphasis of most *CCAA* proceedings has shifted away from the objective of reorganizing the debtor as such toward the sale of the debtor's assets, whether piecemeal or on a going concern basis. These "liquidating *CCAAs*" are typically planned before the debtor company has applied for *CCAA* protection. Once *CCAA* protection is granted, an abridged process is carried out in which the debtor's assets are marketed and sold. Often, there is either no formal plan of arrangement or the plan simply provides for the distribution of the sale proceeds to the debtor's creditors. In this way, the *CCAA* is said to have evolved into a more flexible mechanism that permits both traditional reorganizations and sales of substantially all the assets of insolvent debtor companies.³

Somewhere amidst this evolution in *CCAA* law, important questions have been left unanswered. Proponents of liquidating *CCAAs* maintain that sales generate better returns for creditors compared with reorganizations while still preserving the debtor's underlying business in many cases, thereby saving jobs and avoiding many of the negative consequences of a liquidation in bankruptcy.⁴ Central to this view of liquidating *CCAAs* is the implication that any harm to junior creditors that might result from the abridged process is minimal and, in any event, is outweighed by the supposed benefits of the quick sale. Thus far, however, there has been no empirical evidence presented to support such assertions. The reality is that, despite years of debate over the propriety of liquidating *CCAAs*, there remains a paucity of data on the outcomes of *CCAA* proceedings. Liquidating *CCAAs* and their most recent derivative, pre-packaged sales or "pre-packs," continue to proliferate even though empirical evidence of their supposed benefits is noticeably absent from the jurisprudence and the scholarship.⁵

This article examines the quantitative outcomes of *CCAA* proceedings commenced between 1 January 2012 and 31 December 2013. Specifically, this article compares data on the duration, costs, and outcomes of *CCAA* sales and full reorganizations. Necessarily, the decision to pursue any given restructuring option consigns "all other possible outcomes...to the realm

3. *Re 8640025 Canada Inc*, 2018 BCCA 93 at para 45 [*8640025 Canada*].

4. Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015) at 614.

5. See Tushara Weerasooriya et al, "Pre-Packs under the *Companies' Creditors Arrangement Act*: Has the Push for Efficiency Undermined Fairness?" in Janis P Sarra & Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters, 2017) 347: "further empirical analysis is required in order to validate and better understand the benefits of pre-packaged transactions" (*ibid* at 349) (by way of background, in a pre-pack, the debtor negotiates the terms of the sale prior to filing for *CCAA* protection).

of the hypothetical.”⁶ Accordingly, the key data points examined in this article serve as proxies for evaluating the relative success of liquidating *CCAAs* compared with full reorganization proceedings.

Part I below provides an overview of the *CCAA* regime and discusses the emergence of liquidating *CCAAs* and their implications. Part II describes the methodology of the quantitative study undertaken here and the results, asking whether the data support assertions that liquidating *CCAAs* are indeed faster, cheaper and more likely to maximize value for creditors than full reorganizations. Part III considers the implications of the quantitative results presented here and proposes reforms of the *CCAA* regime.

I. *Overview of Canadian restructuring law*

The *CCAA* is the primary mechanism for resolving large, complex corporate insolvencies in Canada. Alternatively, insolvent corporations may file a commercial proposal under the *Bankruptcy and Insolvency Act*.⁷ While the *BIA* commercial proposal process is popular with small and mid-sized enterprises (SMEs), it is rarely used by large corporations or corporate groups. Accordingly, there are typically many more *BIA* proposals than *CCAA* proceedings annually, but the average size of the debtor corporations is much higher in *CCAA* proceedings. For example, the Office of the Superintendent of Bankruptcy Canada (OSB) reported that there were 32 *CCAA* proceedings initiated in 2013, compared with 754 commercial proposal proceedings; however, the average total value of assets in *BIA* proposals was \$875,649, compared with \$105,234,468 in *CCAA* proceedings.⁸

There are several reasons why the *CCAA* is the preferred tool for large, complex restructurings. Firstly, the *BIA* prescribes various strict deadlines that a debtor must meet in order to remain under court protection.⁹ In

6. Richard B Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law” in Janis P Sarra, ed, *Annual Review of Insolvency Law 2005* (Toronto: Carswell, 2006) 481 at 519.

7. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Part III, Division I [*BIA*].

8. See Roderick J Wood, “Receiverships in Canada: Myth and Reality” (2017) 80:1 Sask L Rev 231 at 243-245, citing Canada, Office of the Superintendent of Bankruptcy, *CCAA Statistics in Canada: Fourth Quarter of 2015* (Ottawa: Industry Canada), online: <publications.gc.ca/site/eng/9.507922/publication.html> [perma.cc/F45N-WH3C]. In fact, the average value for *CCAA* companies in 2013 was low—the average value was \$156,559,320 in 2014 and \$579,444,450 in 2015. This fluctuation may be explained, in part, by the relatively small number of cases in each year, such that a few very large insolvencies skew the average. Nonetheless, these average values show that the *CCAA* tends to be used by only the largest companies.

9. See e.g. *BIA*, *supra* note 7 s 50.4(2)(b), which requires the debtor to file a cash flow statement within 10 days of filing its notice of intention to file a proposal, and s 50.4(8), which provides that the debtor must file its proposal within 30 days from the notice date, failing which the debtor will be assigned to bankruptcy automatically.

contrast, the *CCAA* has no hard deadlines, and the *CCAA* process can be extended by court order for as long as may be necessary to facilitate the restructuring. Secondly, if the creditors vote against a commercial proposal under the *BIA*, the debtor is automatically assigned into bankruptcy.¹⁰ Under the *CCAA*, meanwhile, a debtor whose creditors have rejected its restructuring plan may remain under court protection, and may continue negotiating with its creditors with a view to revising its plan. Thirdly, the broad discretion granted to *CCAA* judges also makes the *CCAA* a more flexible restructuring tool than the *BIA*. As the Supreme Court of Canada explained in *Century Services Inc v Canada (Attorney General)*,¹¹ the *CCAA* is a relatively short statute which empowers supervising judges to grant orders approving restructuring steps that may not be specifically authorized in the explicit language of the Act:¹²

CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as “the hothouse of real-time litigation” has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs.¹³

The broad discretion granted to *CCAA* judges corresponds with the broad remedial purposes of the Act, namely, to permit insolvent debtors “to continue to carry on business and, where possible, avoid the social and economic costs of liquidating [their] assets.”¹⁴ In pursuing these objectives, courts must give “an appropriately purposive and liberal interpretation” to the Act’s provisions.¹⁵ The “broad reading of *CCAA* authority developed by the jurisprudence” has been recognized by Parliament in section 11 of the Act, which empowers the *CCAA* court to “make any order that it considers appropriate in the circumstances.”¹⁶ The structure of the *CCAA*—which “is geared towards the development of a plan of arrangement that will be presented before the creditors” for a vote—reflects the Act’s purpose of

10. *Ibid* s 61(2)(b).

11. *Century Services Inc v Canada (AG)*, 2010 SCC 60 [*Century Services*].

12. *Ibid* at para 58.

13. Jones, *supra* note 6 at 484.

14. *Century Services*, *supra* note 11 at para 16.

15. *Ibid* at para 65.

16. *Ibid* at para 68.

facilitating traditional reorganizations, in which creditors negotiate among themselves over the fate of the insolvent debtor company.¹⁷

More recently, the *CCAA* jurisprudence has shifted to recognize that, in addition to a traditional reorganization, it is also possible to preserve the value of an insolvent enterprise through a going concern sale of the underlying business. However, given the *CCAA*'s structure as a reorganization statute, the emergence of liquidating *CCAAs* has given rise to several unresolved issues. In particular, as a general matter, sales can also be carried out through court-appointed receivership proceedings and bankruptcy proceedings under the *BIA*. Accordingly, it is important to ask why many debtors seek to sell their assets through more expensive *CCAA* proceedings than through the more obvious and cost-effective alternatives. The shift toward sales and away from reorganizations is one of the more remarkable judicially-driven "evolutions" of the *CCAA* because reorganization and liquidation are fundamentally different processes.¹⁸

At the same time, the use of other mechanisms to restructure or liquidate the assets of debtor companies, such as court-appointed receivers, has all but disappeared for large companies. Several reasons may explain this shift away from receiverships, including, for example, the flexibility of the *CCAA* and the broad powers of the *CCAA* judge compared with receivers. Perhaps most importantly, however, successor employer liability is less of a concern for the debtor company carrying out a liquidating *CCAA*, whereas a similar sale through a receivership could attract successor employer liability for the receiver under provincial labour and employment laws. As such, since the Supreme Court of Canada's 2006 decision in *TCT Logistics*,¹⁹ which held that receivers could be found liable as successor employers, receiverships have seen a marked decline while *CCAA* sales have been on the rise.²⁰

17. Roderick J Wood, "Rescue and Liquidation in Restructuring Law" (2013) 53:3 Can Bus LJ 407 at 410-411. Central to the *CCAA*'s reorganization purpose was the view, prevalent at the time of its enactment, that reorganization would preserve going concern value by avoiding the loss of goodwill and other intangible assets: see *Century Services*, *supra* note 11 at para 18.

18. For a further comparison of reorganization and liquidation under the *CCAA*, see Duggan, *supra* note 4 at 612-613; and Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada?" (2013) 53:3 Can Bus LJ 382; but see *8640025 Canada*, *supra* note 3; see also *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057: "[t]he Court notes that there is nothing in any way pejorative about qualifying the *CCAA* as a liquidating *CCAA*. That is a legitimate and increasingly frequent use of *CCAA* proceedings." (*ibid* at para 174) [*Bloom Lake*].

19. *GMAC Commercial Credit Corp—Canada v TCT Logistics Inc*, 2006 SCC 35.

20. See David Bish, "The Plight of Receiverships in a *CCAA* World" (2013) 2 J Insol Inst Can 221 at 232, and Jeffrey C Carhart, "The Decision of the Supreme Court of Canada in *TCT Logistics* and the Future of Receiverships in Canada" (2007) 44:3 Can Bus LJ 376. It should be noted that the shift from receiverships to *CCAA* sales is primarily a large company phenomenon, as private and court-appointed receiverships remain popular tools for smaller companies, see Wood, *supra* note 8.

The shift to using the *CCAA* predominately for sales rather than reorganizations presents a number of issues. Firstly, although amendments to the Act in 2009 codified the court's authority to approve *CCAA* sales under section 36, as I have argued elsewhere, section 36 is deeply flawed.²¹ In adding section 36 to the Act, Parliament seems not to have fully appreciated the implications of using the *CCAA* to sell the assets of insolvent companies wholesale, a process that was previously carried out in receivership and bankruptcy proceedings. Specifically, Parliament failed to provide substantive guidance to *CCAA* judges in determining whether to approve liquidating *CCAAs* or even to specify which test courts should use—although section 36(3) sets out various factors that courts should consider when asked to approve a sale, these factors overlap significantly with the older test for receivership sales set out in *Royal Bank v Soundair*.²² The result is that courts have taken to applying both tests in many cases, apparently unsure of which one ought to govern, with some courts stating that section 36 is not determinative at all.²³ In practice, the court will rely heavily upon the monitor's opinion in deciding whether to grant the order authorizing the sale. The deference shown by courts to monitors in *CCAA* sales mirrors the deference shown to receivers:

If the court were to reject the recommendations of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.²⁴

21. The amendments were introduced in Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, 2nd Sess, 39th Parl, 2007 (assented to 14 December 2007) and subsequently became *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, SC 2007, c 36.

22. *Royal Bank v Soundair*, [1991] OJ No 1137, 4 OR (3d) 1 (Ont CA) [*Soundair*].

23. See *Re White Birch Paper Holding Co*, 2010 QCCS 4915: "The elements which can be found in section 36 *CCAA* are, first of all, not limitative and secondly need not be all fulfilled in order to grant or not grant an order under this section." (*ibid* at para 48). For further discussion, see also Alfonso Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of section 36" (2012) 52:2 Can Bus LJ 226; Shelley C Fitzpatrick, "Liquidating *CCAAs*—Are We Praying to False Gods?" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) 33.

24. *Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 49 at para 52, citing *Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 at 112, 39 DLR (4th) 526 (Ont HC).

Secondly, whereas the *BIA* provides a detailed priority ranking scheme for distributing the proceeds from the sale of the bankrupt's assets among its creditors, the *CCAA* contains no such distribution scheme.²⁵ Accordingly, when a liquidating *CCAA* concludes, the debtor will either enter bankruptcy or receivership proceedings for the purposes of distributing the sale proceeds, or it will file a formal plan of arrangement under the *CCAA* for the sole purpose of proposing how to distribute the proceeds among its creditors. This state of affairs has led the Supreme Court of Canada to state, in *Indalex*, that even though a liquidating *CCAA* may achieve essentially the same result as a *BIA* liquidation—a sale of substantially all of the debtor's assets—the distribution scheme used in liquidating *CCAAs* need not be the same as the scheme set out in the *BIA*.²⁶

The Supreme Court's interpretation of the interplay between the *BIA* and *CCAA* in these regards is perplexing. In short, it is not at all clear why functionally equivalent processes under the *BIA* and *CCAA* should yield asymmetrical outcomes for stakeholders. Indeed, the foregoing statement in *Indalex* seems inconsistent with the Supreme Court's earlier statements in *Century Services*. In particular, the Supreme Court stated in *Century Services* that: (1) the *BIA* and *CCAA* form “part of an integrated body of insolvency law”; and (2) although the *BIA* and *CCAA* contain different reorganization procedures because “reorganizations of differing complexity require different legal mechanisms...only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate.”²⁷ More recently, the Quebec Superior Court's decision in *Bloom Lake* pointed out the “strange asymmetry”²⁸ that would result if the *BIA* scheme of distribution were not applied in liquidating *CCAA* proceedings:

There is no statutory scheme of distribution under the *CCAA* because the *CCAA* is not intended to be the vehicle for a liquidation of assets and distribution of the proceeds. The *CCAA* is intended as a vehicle for the restructuring of the debtor...

The bottom line is that a liquidating *CCAA* requires a scheme of distribution and the only one which makes sense is the scheme of distribution under the *BIA*. As a result, and unless there is a contradiction between the *CCAA* and the *BIA*, the *BIA* scheme of distribution should apply in a liquidating *CCAA*.²⁹

25. See *BIA*, *supra* note 7 s 136.

26. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 [*Indalex*].

27. *Century Services*, *supra* note 11 at para 78.

28. *Bloom Lake*, *supra* note 18 at para 205, citing *Century Services*, *supra* note 11 at para 47.

29. *Bloom Lake*, *supra* note 18 at paras 203-208.

Thus far, these apparently inconsistent approaches to the question of which distribution scheme ought to apply in liquidating *CCAAs* remain unresolved.³⁰

Thirdly, and more generally, important protections available to stakeholders in full *CCAA* proceedings may be absent in liquidating *CCAAs*. A traditional *CCAA* process may involve dozens of court appearances over the course of several months or even years. At each stage, the supervising judge must review the debtor's progress towards developing a viable plan of arrangement that treats all stakeholders fairly. In a liquidation, the goal is to complete the sale as quickly as possible. In contrast to full *CCAA* proceedings, many of the negotiations leading to the proposed sale may well have occurred prior to the debtor's *CCAA* filing and without the court's supervision. Those negotiations would include the senior secured creditors and perhaps a few other key stakeholders, but would necessarily exclude most of the junior and unsecured creditors, as well as many other stakeholders. In short, the structure and procedures of the *CCAA* are poorly suited to sales and the likely losers in quick sales are those stakeholders who possess the least amount of leverage vis-à-vis the debtor and senior creditors.³¹ While Parliament could certainly address these deficiencies in the structure and procedures of the *CCAA* to account for liquidating *CCAAs*, doing so would require a comprehensive approach to amending the Act for which Parliament appears to have no appetite.³²

In light of the foregoing issues, it is prudent to ask whether the *CCAA* is truly the most appropriate mechanism for liquidating *CCAAs*, and if not, what can be done to remedy the situation. The answers to these questions depend, at least in part, upon how liquidating *CCAAs* are affecting different types of stakeholders in practice compared with traditional *CCAA* proceedings. Yet, as discussed below, the available data on the outcomes of *CCAA* proceedings remain scarce.

30. For further discussion, see Alfonso Nocilla & Vern DaRe, "The Trouble with Pre-Packs," in Janis P Sarra et al, eds, *Annual Review of Insolvency Law 2018* (Toronto: Thomson Reuters, 2019) 621.

31. Wood, *supra* note 17 at 412-415.

32. Historically, such comprehensive attempts at reforming the insolvency regime have been non-starters in Ottawa. Arguably, the last major attempts at comprehensive reforms occurred in the 1980s, and all of them ended in failure. Consequently, since that time, successive governments have favoured a piecemeal approach to insolvency law reform. See Jacob S Ziegel, "The Travails of Bill C-12" (1983) 8:3 *Can Bus LJ* 374; Jacob S Ziegel, "Canada's Phased-In Bankruptcy Law Reform" (1996), 70:4 *Am Bankr LJ* 383; Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56:1 *Can Bus LJ* 73.

II. *Quantitative outcomes of 2012 and 2013 CCAA proceedings*

1. *Methodology*

The OSB maintains an online public record of all *CCAA* proceedings initiated since 18 September 2009.³³ A review of the OSB's online *CCAA* records list identified 77 separate filings between 1 January 2012 and 31 December 2013. These dates were selected for several reasons. Firstly, cases begun in 2012 and 2013 were almost all likely to have been completed by the time of this study, permitting collection of all available data on costs, returns to creditors and duration of proceedings. Secondly, although examining cases over several years would have been preferable to focusing on only two years, there were practical limitations to conducting a longer multi-year study. Although 77 *CCAA* proceedings may seem like a low number, many proceedings involved joint filings by complex corporate groups. In addition, as noted earlier, average asset values were significantly higher in *CCAA* proceedings than in other types of insolvency proceedings, such as *BIA* commercial proposals. *CCAA* filings are accordingly complex, and the 77 proceedings examined from 2012 and 2013 included hundreds of monitors' reports, court orders and motion materials, all of which were reviewed individually in order to manually record the relevant data.³⁴ Document review, manual data extraction and verifying database entries consumed over 230 hours of research time, or roughly 3 hours per *CCAA* proceeding, although actual times per case varied significantly because some cases were longer and more complex than others.

A database of *CCAA* proceedings was created in Excel based on the OSB's records. Electronic versions of records of each proceeding were

33. Office of the Superintendent of Bankruptcy Canada, "CCAA Records List," online: <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html> [perma.cc/AB8B-HW6J]. The OSB is required to collect and maintain this public record pursuant to s 26(1) of the *CCAA*, which came into force on 18 September 2009.

34. The monitor is an accountant and licensed trustee in bankruptcy appointed at the time of the initial *CCAA* order pursuant to section 11.7 of the Act. Although originally a judicial creation, Parliament has codified the role and duties of the monitor in the *CCAA*. As an officer of the court, the monitor is tasked with various duties under section 23 of the *CCAA*, including especially the duties to report to the court on the debtor's business and affairs, investigate the causes of the debtor's insolvency, and generally to assist the debtor in its restructuring and advise the court as to the reasonableness and fairness of any proposed arrangement between the debtor and its creditors. The monitor owes a fiduciary duty to the stakeholders of the insolvent debtor, must act independently, and must treat all parties in the *CCAA* proceedings reasonably and fairly. See *Winalta Inc (Re)*, 2011 ABQB 399 at paras 67-77 [*Re Winalta*].

then gathered from the websites of the monitors appointed in each case.³⁵ These records included court orders, notices to creditors, and monitors' reports detailing the progress of each case. The following data were manually collected and entered into the database, where available:

- a. *ID Number*: Each case was assigned a unique identification number. Corporate group filings were treated as a single case/filing because the restructurings of different entities within the same corporate groups were conducted through collective *CCAA* proceedings in each case.
- b. *Name of company*: The name(s) of the entity or entities identified in the monitor's reports.
- c. *Commencement Date*: Date on which *CCAA* proceedings were initiated, based on the court order granting *CCAA* protection.
- d. *End Date*: Date on which the *CCAA* proceedings terminated, based on the court order terminating proceedings. For the 10 cases that remained ongoing at the time that this article was written, the current date (9 May 2019) was used in order to calculate duration.³⁶
- e. *Incorporation Date*: Date on which the debtor (for corporate groups, the parent company) was incorporated, as reported by the monitor.
- f. *Industry Sector*: Business sector of the debtor, if recorded by the monitor.
- g. *Type of Proceeding*: Each case was classified based upon a review of the monitor's reports. Cases were classified as either traditional restructurings or liquidating *CCAAs*. Liquidating *CCAAs* were further divided into going-concern sales and piecemeal sales.
- h. *Secured Debt*: Total amount of secured debt at the time of filing.
- i. *Preferred Debt*: Total amount of preferred debt at the time of filing.

35. Among its other duties, the monitor in each *CCAA* proceeding must make its reports and various other materials, including court orders and motion materials, publicly available on its website. The OSB's online *CCAA* records list includes links to the monitor's website in each proceeding. However, as discussed later, monitors' websites are typically taken down after a period of time has elapsed following the conclusion of the *CCAA* process, and accordingly, the relevant documents from each proceeding are not always readily available.

36. In statistical terms, the durations of the ongoing cases are censored data—they are unknown. Various statistical methods may need to be applied in order to account for these data and avoid bias. However, the numbers of cases in the present study are likely too small to model censored observations. See generally Rizwaan Mokhal, Nigel J Balmer & Alfonso Nocilla, "United Kingdom National Findings" (14 May 2018) at 55, online (pdf): *Contractualised Distress Resolution in the Shadow of the Law* <www.codire.eu/wp-content/uploads/2018/07/National-Findings-UK-formatted-clean.pdf> [perma.cc/EZV8-YQEV].

- j. *Unsecured Debt*: Total amount of unsecured debt at the time of filing.
- k. *Secured Returns*: Total returns to secured creditors upon termination of proceedings.
- l. *Preferred Returns*: Total returns to preferred creditors upon termination.
- m. *Unsecured Returns*: Total returns to unsecured creditors upon termination.
- n. *Total Costs*: Total costs incurred by the debtor in the *CCAA* process, including monitor's fees and legal and other professional expenses.
- o. *Name of Monitor and Law Firm*: The names of the accounting firm and individual appointed as the debtor's monitor, as well as the monitor's legal counsel.
- p. *Province*: The province in which proceedings were initiated.

2. *Challenges with data collection and cautionary notes*

Manual data collection and entry was a time-consuming process. For several reasons, it was often difficult to collect the relevant data. Firstly, successive monitors' reports in each case rarely summarized the information contained in previous reports. Consequently, each successive report had to be reviewed in order to identify and manually enter the data. Secondly, many records were inconsistent both in terms of the data that they presented and the manner in which they presented it—despite their general similarities in formatting, monitors' reports were rarely uniform across different cases. Thirdly, although monitors are required to maintain all relevant reports on their websites while the *CCAA* proceedings are ongoing, many monitors' websites become inactive shortly after the proceedings have concluded. Accordingly, the relevant records could only be obtained by requesting them from individual accounting firms. Moreover, records of cases that had concluded several years ago and for which the monitors' website had become inactive were often incomplete.

Lastly, it should be noted that there are limits to what can be extrapolated from examining the data from only two years of *CCAA* proceedings. In particular, business cycles in different industries can strongly influence insolvency filings each year. Even during broad economic downturns, it is common for insolvency cases to be concentrated in only certain industry sectors. Consequently, the average size of debtors, types of assets and duration of proceedings, among things, may vary significantly depending on the time period under examination. For example, *CCAA* cases in

the early 1990s were dominated by the commercial real estate crash,³⁷ the early 2000s, meanwhile, saw the failures of major technology and telecommunications firms such as Nortel³⁸ and Canwest.³⁹ Examining only certain years in isolation may, therefore, may result in bias and limit the potential to generalize findings.⁴⁰ Nonetheless, as discussed below, the data presented here offer several useful insights.

3. Results

i. Procedures by type, year and province

Of the 33 CCAA proceedings initiated in 2013, 22 were liquidating CCAAs (67 per cent), 9 were traditional reorganizations (27 per cent), and 2 were terminated shortly after commencement and entered bankruptcy or receivership (6 per cent). Of the 44 CCAA proceedings initiated in 2012, 28 were liquidating CCAAs (64 per cent), 7 were reorganizations (16 per cent), and 9 failed and entered bankruptcy or receivership (20 per cent). Ontario had the most total filings (30) as well as the most liquidating CCAAs (22) over both years, followed by Alberta (18 and 10, respectively), British Columbia (13 and 9, respectively), and Quebec (10 and 5, respectively). Total proceedings by type, province and year of filing are shown below in Table 1.

**Table 1. CCAA Filings By Type, Province and Year:
1 January 2012 to 31 December 2013**

Province	Type of Filing	2013	2012	Total Both Years
ALTA.	Sale	3	7	10
	Bkptcy/Rec'p	1	4	5
	Reorganization	2	1	3
B.C.	Sale	4	5	9
	Bkptcy/Rec'p	0	0	0
	Reorganization	2	2	4

37. Olympia & York, for instance, was one of the largest commercial real estate developers in the world when it filed for CCAA protection in 1992. See *Re Olympia & York Developments Ltd.*, [1993] OJ No 545, 12 OR (3d) 500 (Ont Gen Div) [*Olympia*].

38. *Re Nortel Networks Corporation*, (2009) 50 CBR (5th) 77 (ONSC).

39. *Ibid*; *Olympia*, *supra* note 37; *Re Canwest*, *supra* note 2.

40. Restructuring is a cyclical business and periods of high activity are often, if not always, sparked by major downturns in specific industries. For example, given the significant differences in the assets and operations of companies in the forestry industry compared with those in real estate or technology, examining only certain years of CCAA proceedings could skew the data towards companies with specific characteristics. A much longer longitudinal study would be preferable for this reason alone, but it would require a significantly greater investment in time and resources than any quantitative studies of CCAA cases to date.

MAN.	Sale	1	2	3
	Bkptcy/Rec'p	0	0	0
	Reorganization	0	0	0
Province	Type of Filing	2013	2012	Total Both Years
N.B.	Sale	0	1	1
	Bkptcy/Rec'p	0	0	0
	Reorganization	0	0	0
N.S.	Sale	0	0	0
	Bkptcy/Rec'p	0	1	1
	Reorganization	0	0	0
ON.	Sale	11	11	22
	Bkptcy/Rec'p	0	2	2
	Reorganization	2	4	6
P.E.I.	Sale	0	0	0
	Bkptcy/Rec'p	0	0	0
	Reorganization	1	0	1
QUE.	Sale	3	2	5
	Bkptcy/Rec'p	1	0	1
	Reorganization	2	2	4
TOTAL	Sale	22	28	50
	Bkptcy/Rec'p	2	7	9
	Reorganization	9	9	18

ii. *Duration of proceedings*

Duration was calculated using the start date of proceedings, that is, the date on which the court granted the initial *CCAA* order, and the end date, that is, the date when the court terminated the *CCAA* proceedings. Data on duration were available for all 50 liquidating *CCAAs*. The total average duration across for these cases was 36 months, with a median duration of roughly 28 months. By comparison, the total average duration was 31 months for reorganizations, with a median duration of 21 months. For the 9 bankruptcies/receiverships, total average duration was roughly 21 months, with a median of roughly 25 months.

iii. *Total costs*

Total costs were calculated as a percentage of total returns to all classes of creditors. Full data were available for 37 of the 50 liquidating *CCAAs*. For these cases, total costs averaged roughly 13 per cent of returns. By comparison, average total costs were roughly 14 per cent for reorganizations (6 cases) and roughly 30 per cent for bankruptcies/receiverships (4 cases).

iv. *Returns by type of proceeding and class of creditor*

Returns were calculated as percentages of the debts owing to each class of creditors. For liquidating *CCAAs*, overall returns to all classes of creditors were roughly 35 per cent of debt (based on 37 cases), with average returns to secured creditors amounting to roughly 72 per cent (17 cases), compared with roughly 41 per cent for unsecured creditors (8 cases). By comparison, total returns in reorganizations were roughly 21 per cent of total debt (8 cases) with roughly 54 per cent for secureds (5 cases) and 56 per cent for unsecureds (5 cases). For the bankruptcies/receiverships, average total returns were roughly 30 per cent (4 of 9 cases).⁴¹

v. *Entity size by procedure*

Total debt was used as a proxy for entity size, with total debt of the corporate group as a whole used for measuring size in group filings. Average total debt in liquidating *CCAAs* was \$123,981,154, with a median of \$24,880,044 (for 46 of 50 available cases). By comparison, total average debt in reorganizations was \$348,752,998.31, with a median of \$153,253,000 (11 of 17 cases). For bankruptcies/receiverships, average total debt was \$55,578,414, with a median of \$26,171,027.50 (8 of 9 cases).

4. *Comments and analysis*

i. *CCAA sales are now the norm*

The foregoing data disclose that a solid majority of *CCAA* proceedings initiated in 2012 and 2013 were liquidating *CCAAs*—64 per cent and 67 per cent, respectively. By comparison, an earlier study by the author found that roughly 33 per cent of *CCAA* proceedings between 2002 and 2012 were liquidating *CCAAs*, while 31 per cent were traditional reorganizations.⁴² In addition, more recently, Janis Sarra reported that 78 per cent of *CCAA* proceedings initiated between 1 January 2014 and 1 November 2016 were liquidating *CCAAs*.⁴³ In short, the trend towards using the *CCAA* as a mechanism for selling substantially all of the assets of insolvent debtors appears to be accelerating, such that *CCAA* sales are now the dominant form of proceeding. The data also disclose that while liquidating *CCAAs*

41. The data on returns to different classes of creditors in bankruptcies/receiverships were too scarce to calculate average returns by class.

42. See Nocilla, *supra* note 18 at 388-389. It should be noted that this earlier study only examined reported decisions, whereas the present study gathered the available data on all proceedings initiated in 2012 and 2013.

43. Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" in Janis P Sarra & Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters, 2017) 9.

are still most common in Ontario, they are now routinely carried out in provinces where courts had been reluctant to approve them in past, such as Alberta, British Columbia and Quebec.

ii. *CCAA Sales took longer than reorganizations*

Interestingly, corporations that sold all or substantially all of their assets spent more time in *CCAA* protection than companies that reorganized – an average of 36 months with a median of 28, compared with an average of 33 months and a median of 23, respectively. Speed is often touted as one of the supposed benefits of liquidating *CCAAs*, but these results suggest that liquidating *CCAAs* are, in fact, significantly lengthier procedures than full reorganizations. This finding, however, should be qualified by noting that the duration of *CCAA* proceedings does not necessarily reflect the time and resources spent on the sale process itself—for example, it is possible that many companies simply remained under *CCAA* protection for extended periods of time after selling off their assets, with minimal work done by the monitor and legal counsel after the sale was completed. The reason for remaining in *CCAA* protection in many of these cases may simply have been to facilitate the distribution of the sale proceeds to the creditors.⁴⁴ Nonetheless, it is interesting to note that *CCAA* sales do not appear to be faster than traditional reorganizations.

iii. *Total costs were roughly comparable in CCAA sales and reorganizations*

Another supposed benefit of *CCAA* sales is that they are more cost-effective than full reorganizations, partly because they can be completed more quickly than reorganizations. Again, this assertion does not appear to be supported in the data collected here. In fact, it appears that overall costs, as a percentage of the returns generated by each procedure, were roughly comparable in each type of proceeding—13 per cent for liquidating *CCAAs* compared with 14 per cent for reorganizations. Of course, this study only measured the direct costs of proceedings in the form of monitors' fees, legal fees and other restructuring expenses. There may well have been significant indirect costs incurred by corporations that underwent traditional reorganizations, such as the loss of goodwill

44. This area is ripe for further investigation in future quantitative studies of *CCAA* proceedings. In order to obtain a comprehensive picture of the costs, durations and total returns of liquidating *CCAAs*, it would be necessary to review all of the relevant records from any concurrent or subsequent receivership or bankruptcy proceedings. Where less than all of the debtor's assets were sold in the *CCAA* proceedings, the remaining assets would be liquidated through bankruptcy or receivership, and the sale proceeds might then be distributed to the creditors through one of those processes rather than through the *CCAA* proceedings.

and damage to relationships with suppliers and customers, that were not borne by corporations which conducted quick sales of their assets; such indirect costs were not tracked in this study. To the extent that a sale can quickly transfer the debtor's underlying business on a going concern basis to a new solvent entity, untarnished by the insolvent debtor's troubles and with different management, then the business would not suffer the foregoing indirect costs. Accordingly, there may be additional cost savings in liquidating *CCAAs* that could not be tracked in this study. Nonetheless, these are interesting results, as we might still have expected to see lower direct costs for liquidating *CCAAs* because a quick sale would typically truncate the expensive *CCAA* process and reduce the number of court appearances required, thereby reducing direct costs significantly compared with a traditional reorganization. It seems unlikely that these results can be explained by the longer duration of *CCAA* sales proceedings that was noted above; rather, a more likely explanation may be that *CCAA* sales are "front-loaded" in the sense that most of the work by the monitors and legal counsel is being done at the outset of the process. Another explanation may be found in the fact that, as discussed below, typical candidates for liquidating *CCAAs* tended to be smaller companies than those that reorganized. In short, the *CCAA* remains an expensive process, and some costs are essentially fixed, such that smaller businesses are likely to incur higher costs as a proportion of the overall value of their assets and, therefore, of the returns to their creditors following a sale, compared with larger businesses. At all events, these data suggest that while *CCAA* sales might well be completed more quickly than traditional reorganizations, there are no significant savings in *CCAA* sales in terms of direct costs.

iv. *Overall returns were higher in CCAA sales, but unsecured creditors were worse off*

As noted earlier, overall average returns in liquidating *CCAAs* were significantly higher than in reorganizations—35 per cent compared with 21 per cent. However, this overall number masked significant differences in terms of how different classes of creditors fared under each procedure. Specifically, in liquidating *CCAAs*, secured creditors enjoyed average returns of 72 per cent of debt, while unsecureds averaged 41 per cent. By comparison, average returns in reorganizations were 54 per cent for secureds and 56 per cent for unsecureds. Although care should be taken in interpreting these results due to the low numbers of cases for which the relevant data were available, these results suggest that any benefits obtained in liquidating *CCAAs* flowed to secured creditors, whereas unsecureds were worse off compared with how they fared in

reorganizations. Moreover, since a debtor that successfully reorganized would exit the *CCAA* process and continue to operate, it might reasonably be expected that the long-term prospects for unsecured creditors, and especially equity holders, would be much better in reorganizations than in liquidating *CCAAs*. Accordingly, although total overall returns appeared to be significantly higher in liquidating *CCAAs*, there are some important caveats to that finding. Based on the admittedly limited data here, it would seem that secured creditors fared far better in liquidating *CCAAs* than in reorganizations, and to some extent this came at the expense of unsecured creditors.

III. *Implications and reform recommendations*

1. *Comparisons to pre-packs in the U.K. and 363 sales in the U.S.*

There is an ongoing debate as to whether quick sales under section 363 of chapter 11 of the *U.S. Bankruptcy Code*⁴⁵ (363 Sales) and pre-packs under the *Insolvency Act 1986* in the U.K.,⁴⁶ both of which are functionally equivalent to liquidating *CCAAs* in many ways, generate better returns for creditors than traditional reorganizations.

Although the available data in the present study were comparatively limited, the results here disclose some broad similarities in the outcomes of liquidating *CCAAs* in Canada, pre-packs in the U.K., and 363 sales in the U.S. As with pre-packs and 363 sales, liquidating *CCAAs* have clearly grown in popularity. At the same time, the average total costs of liquidating *CCAAs* were roughly comparable to those of traditional reorganizations. By comparison, the costs of pre-packs in the U.K. were only modestly lower than those of standard administrations, averaging 69.6 per cent of total realizations, compared with 72.2 per cent for standard administrations.⁴⁷ While overall returns to creditors appeared to be higher in liquidating *CCAAs* than in traditional reorganizations, unsecured creditors ended up worse off in liquidating *CCAAs*. Likewise, pre-packs yielded particularly poor returns for preferred and unsecured creditors and marginally lower overall

45. 11 USC §§ 101 *et seq.*

46. See Alfonso Nocilla, "Asset Sales and Secured Creditor Control in Restructuring: A Comparison of the UK, US and Canadian Models" (2017) 26:1 J Int Insol Rev 60. In a standard administration under the *Insolvency Act 1986*, the insolvent debtor or the court appoints an insolvency professional known as an administrator to manage the debtor's affairs and operations. *Interim moratoria* are then imposed on enforcement actions against the debtor while the administrator attempts to rescue the debtor or its business. By contrast, in a pre-pack, the debtor's senior managers negotiate a sale of the debtor's underlying business prior to appointing the administrator. Upon appointment, the administrator quickly implements the pre-arranged deal and completes the sale.

47. Mokai, *supra* note 36 at 72, Figure 38.

returns compared with standard administrations,⁴⁸ while 363 sales yielded lower prices than Chapter 11 plan sales, even correcting for the financial health of the debtor companies examined.⁴⁹ Lastly, pre-packs were only marginally faster than going concern sale administrations, having median durations of 11.8 months compared with 12 months, respectively,⁵⁰ while liquidating *CCAAs* actually took longer than traditional reorganizations, with median durations of 28 and 23 months, respectively. The relative speed of each procedure was the only significant difference in the results for liquidating *CCAAs* and pre-packs, on the one hand, and 363 sales, on the other: it is clear that 363 sales are significantly faster than full Chapter 11 plan sales, as the latter require far more steps to be completed, such as the development of a formal plan and a creditor vote, before the sale can be completed. Consequently, a Chapter 11 plan sale could take at least 3 months to complete, compared with mean and median durations of 82 and 74 days, respectively, for 363 sales.⁵¹

In short, the typical justifications of both liquidating *CCAAs* and pre-packs—namely, that they are faster, more cost-effective and more likely to yield higher returns than traditional reorganization procedures—were not supported by the data gathered in either Canada or the U.K. This conclusion is particularly interesting given that the average sizes of debtor companies differed significantly between Canada and the U.K. In general, pre-packs in the U.K. are a SME phenomenon, while most *CCAA* proceedings involve large corporations. At the same time, although 363 sales in the U.S. are clearly faster than Chapter 11 plan sales, 363 sales—like pre-packs and liquidating *CCAAs*—tend to leave unsecured creditors worse off than full Chapter 11 plans. The primary cause of lower prices in 363 sales seems to be that the process bypasses the typical protections that preferred and unsecured creditors possess in full Chapter 11 plan proceedings.⁵² This is a common theme in 363 sales in the U.S., pre-packs in the U.K., and liquidating *CCAAs* in Canada. As Sarra notes, the shift

48. *Ibid* at 111.

49. Anne M Anderson & Yung-Yu Ma, “Acquisitions in Bankruptcy: 363 Sales Versus Plan Sales and the Existence of Fire Sales” (2014) 22:1 *Am Bankr Inst L Rev* 1 at 17. In a full Chapter 11 plan confirmation process, the creditors have an opportunity to negotiate and vote upon the terms of the proposed sale. By contrast, in a 363 sale, the terms of the sale or of the sale process are usually set by the debtor prior to filing for Chapter 11 protection, and no creditor vote occurs.

50. Mokal, *supra* note 36 at 13-14, Figure 4.

51. Commission to Study the Reform of Chapter 11, “Final Report and Recommendations” (2014) at 84-86, online (pdf): *American Bankruptcy Institute* <abiworld.app.box.com/s/vvircv5xv83aav14dp4h> [perma.cc/C7YR-AKE4]. See also Stephanie Ben-Ishai & Stephen J Lubben, “Sales or Plans: A Comparative Account of the “New” Corporate Reorganization” (2011) 56:3 *McGill LJ* 591 at 627 (commenting on the greater speed of 363 sales compared with liquidating *CCAAs*).

52. Anderson, *supra* note 49.

towards sales can be explained, at least in part, by changes in debt markets that have strengthened the position of secured creditors at the expense of weaker stakeholders:

In Canada, a result of changes to debt markets has been that the *CCAA* has become largely a senior creditors' statute, with increasing liquidations driven not by the local creditors of early bankruptcy legislation, but often by foreign creditors, resulting, in some instances, in diminution of economic activity and exit of assets. Rather than a race to assets by horse and buggy, the rapidity of distressed debt trading and the rush to litigation or threat of litigation is now pushing the pendulum back to a new kind of race to the assets. Many policies that facilitated trade and the movement of capital across borders, policies that underpinned Canada's economic growth, set the stage for what is occurring now. Courts are confronted with *fait accompli* applications before them, in effect bypassing many of the checks and balances of the system. Sales under these conditions often do not have the protections built into a *CCAA* plan that prevent misconduct.⁵³

A variety of other factors help to explain the shift towards sales. Firstly, Canada—like the U.S. and U.K.—has clearly shifted from a manufacturing-based to a services-based economy over the past three decades.⁵⁴ In general, the shift towards a services-based economy means that more businesses are comprised of intangible assets and highly fungible hard assets than in the past, making going concern sales an increasingly viable alternative to full-scale reorganizations.⁵⁵ Secondly, as alluded to above, globalisation and changes in lending practices have significantly altered the restructuring playing field in Canada, with securitization and collateralization having “profoundly altered the nature of debt.”⁵⁶

53. Sarra, *supra* note 43 at 23-24.

54. Businesses in the services industry now comprise roughly 70% of Canadian GDP and employ 93% of the nation's workforce, compared with 80% of GDP and 95% of employment in the UK and 78% of GDP and 86% of employment in the U.S. See “Value Added by Activity” (accessed 26 August 2019), online: *OECD Data* <data.oecd.org/natincome/value-added-by-activity.htm> [perma.cc/T4UJ-DQK6]; See also Statistics Canada, “Gross Domestic Product (GDP) at Basic Prices, By Industry, Annual Average” (accessed 26 August 2019), online *Statistics Canada* <www150.statcan.gc.ca/t1/tb11/en/tvaction?pid=3610043403> [perma.cc/XL2N-YGGM] and “Five Facts About...The UK Service Sector,” online: *Office for National Statistics* <www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/fivefactsabouttheukservicesector/2016-09-29> [perma.cc/2QQT-QGWW]; see also Jasmine Girgis, “The Evolution of Corporate Rescue in Canada and the United States” in Jennifer LL Gant & Paul J Omar, eds, *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing, 2019) [forthcoming].

55. That said, the fact that a company is comprised largely of intangible assets and highly fungible hard assets does not necessarily entail a loss of going concern value: see Harvey R Miller & Shai Y Waisman, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” (2004) 78:2 *Am Bankr LJ* 153 at 192.

56. Sarra, *supra* note 43 at 22.

Whereas lenders traditionally had an interest in the preservation of the distressed debtor and its business, and were therefore more likely to support reorganization efforts, many lenders today only “want one thing: to get paid.”⁵⁷ For lenders who are primarily interested in a quick return, quick sales processes such as liquidating *CCAAs*, 363 sales and pre-packs are attractive alternatives to full reorganizations. At the same time, securitization and collateralization have contributed to the fragmenting of many debtors’ financing structures, making negotiated workouts more complex and challenging than in the past. Baird and Rasmussen have suggested, for example, that it may be impossible to formulate viable reorganization plans for some businesses because there is simply no common ground among the different stakeholders. In other words, there is an “empty core.”⁵⁸ Quick sales, driven by the incumbent managers of distressed debtors and supported by the senior secured creditors, may be one solution to such deadlocks. Forcing a quick sale minimizes the time spent negotiating with disparate stakeholder groups and provides certainty as to the outcome of the insolvency process if negotiations fail, effectively “putting a gun to the parties’ heads.”⁵⁹

Meanwhile, debtor-in-possession (DIP) financing practices have significantly strengthened the position of pre-existing secured creditors, effectively giving them a “stranglehold over debtors” by permitting them to obtain priority over all of a distressed debtor’s assets in exchange for agreeing to finance the restructuring.⁶⁰ Once a DIP lender is in control, it can impose various positive and negative covenants on a distressed debtor, limiting the debtor’s cash flow and establishing a strict timeframe for the restructuring.⁶¹ The DIP lender may also insist that the debtor retain the lender’s preferred monitor,⁶² change the composition of the debtor’s board of directors, or alter the compensation and terms of employment of the

57. Jonathan C Lipson, “Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy” (2016) 6:2 Harv Bus L Rev 239 at 289.

58. Douglas G Baird & Robert K Rasmussen, “Antibankruptcy” (2010) 119 Yale LJ 648 at 687-694: “An “empty core” exists when three or more parties cannot reach a stable agreement with each other because some other agreement always exists that at least one party prefers. In other words, at least one person will always defect from any tentative agreement that might be made and, hence, none ever is reached.” (*ibid* at 690 n 190).

59. *Ibid* 697.

60. Bish, *supra* note 20.

61. Wood, *supra* note 17 at 409-410.

62. *Re Winalta*, *supra* note 34 at para 11.

debtor's senior managers through key employee retention plans (KERPs).⁶³ To be clear, there may be legitimate reasons for implementing KERPs. In particular, KERPs can reduce a distressed debtor's risk of losing key employees to competitors during the restructuring process, which may be helpful in the "chaotic" early stages of restructuring.⁶⁴ However, it is clear that KERPs may also be used to align the interests of a debtor's senior managers with those of the secured creditors. Powerful managers may be able to negotiate substantial bonuses for themselves on the basis that their continued employment is essential to the debtor, while the senior lenders may be willing to support management knowing full well that ultimately, the costs of the KERP will be borne primarily by the debtor's unsecured creditors.⁶⁵ Notably, in deciding whether or not to approve a KERP, the court will typically rely heavily upon the monitor's opinion as to the appropriateness of the KERP.⁶⁶ Again, this points up the level of influence that the senior secured creditors and incumbent managers of distressed debtors will be able to exercise in some cases. Particularly where the debtor is also pursuing a quick sale, thereby limiting the ability of most stakeholders to participate in the process, the court may have little else on which to base its decision than the monitor's opinion. In such cases, careful scrutiny of the terms of the deal may be lacking when it is needed most.⁶⁷

63. See Wood, *supra* note 17 at 410, identifying the Crystallex restructuring as a prominent example: *Crystallex (Re)*, 2012 ONCA 404 at para 24, add'l reasons 2012 ONCA 527, leave to appeal to SCC refused, 2012 CarswellOnt 11931 (SCC). The tactics of Canadian DIP lenders in these regards mirror those of DIP lenders in the US: see Douglas G Baird, "The New Face of Chapter 11" (2004) 12:1 Am Bankr Inst L Rev 69 at 81 and George W Kuney, "Hijacking Chapter 11" (2004) 21:1 Emory Bankr Dev J 19 at 89.

64. *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980. It is now well established that CCAA courts can approve KERPs using their general power under section 11 of the Act to make any order that the court "considers appropriate in the circumstances" (*ibid* at para 24) [*Re Aralez*]; See also *Cinram International Inc (Re)*, 2012 ONSC 3767; *Grant Forest Products Inc (Re)*, 2009 CanLII 42046, 57 CBR (5th) 128 (ON SC).

65. Wood, *supra* note 17 at 410. It is also worth noting that the value in retaining the same managers who may have been complicit in the debtor's insolvency may be dubious, at best.

66. *Re Aralez*, *supra* note 64 at paras 26-28.

67. In extreme cases, courts have gone so far as to replace the monitor because its ability to advise the court impartially came into question. See *Nelson Education Limited (Re)*, 2015 ONSC 3580: "There is no suggestion that A&M are not professional or not aware of their responsibilities to act independently in the role of a monitor. A&M is frequently involved in CCAA matters and is understandably proud of its high standard of professionalism. However, that is not the issue. In my view, A&M should not be put in the position of being required to step back and give advice to the Court on the essential issue before the Court in light of its central role in the whole process that will be considered" (*ibid* at para 31).

2. *Reform recommendations*

Although the data set out in this article shed important light on liquidating *CCAA*s, further study is needed in order to confirm whether the results discussed here are statistically significant and broadly representative. In particular, although pre-packaged sales under the *CCAA* are only just emerging now, it seems likely that they will ultimately become the dominant form of liquidating *CCAA* in the future. Accordingly, future quantitative studies should examine the outcomes of *CCAA* pre-packs once a sufficient number of these cases have been completed, so as to provide a fuller picture of how the *CCAA* regime is operating. Having said this, several reform recommendations can be made based upon these results and the broader theoretical concerns with liquidating *CCAA*s raised here.

Firstly, the OSB should establish an online repository for *CCAA* records similar to the one maintained by Companies House in the U.K.⁶⁸ Although the OSB's website currently provides basic information on *CCAA* proceedings such as the dates of initiation of proceedings and the names of the monitors, there is no central repository for records, nor are the monitors' websites, which contain the records, maintained after the proceedings have concluded. As a result, it is often challenging to obtain full records of *CCAA* cases after they have concluded, complicating attempts to discern what is occurring in *CCAA* cases and to determine whether changes are needed.

Secondly, along the same lines, the OSB should establish clearer standards for monitors in reporting the outcomes of *CCAA* proceedings. In a typical *CCAA* proceeding, the monitor may issue a dozen reports or more, such that gathering useful data involves reviewing hundreds of pages of materials. In short, regular, comprehensive data collection for the purposes of informing policymakers would be prohibitively expensive in terms of the time and resources required. A simple solution to facilitate data collection would be to require the monitor to include, in its final report, a summary of all of the actions taken over the course of the *CCAA* proceedings and the key results of the proceedings. To the extent that this approach might raise privacy and confidentiality issues, the OSB could maintain the confidentiality of the monitor's reports, or the relevant portions thereof, and merely report on the anonymized aggregate data. Alternatively, the OSB could provide access to the relevant reports or redacted portions thereof to researchers who would be bound by

68. Companies House is the UK's registrar of companies. Its online database of company records includes, among other things, all documents filed in formal insolvency proceedings: "Companies House," online: <<https://beta.companieshouse.gov.uk/>> [perma.cc/N2HJ-4QHB].

confidentiality and non-disclosure obligations. In either case, the OSB would have a single, central repository with easily accessible information on the outcomes of all CCAA proceedings, significantly reducing the costs and complications of data collection. The foregoing database would permit larger, more detailed and likely more accurate quantitative studies of the outcomes of different types of CCAA proceedings that would aid policymakers in understanding how this area of the law is functioning and evolving. At the same time, participants in CCAA proceedings will benefit from a better understanding of how the regime typically affects similarly situated stakeholders, enhancing the certainty and predictability of the regime.

Thirdly, Parliament should consider comprehensively amending the CCAA to address the growing trend toward liquidating CCAs, and more recently, pre-packs under the CCAA. Only comprehensive amendments to the Act can properly address the issues with CCAA sales because, as discussed earlier, the Act in its current form is still geared towards traditional reorganisations. For example, the CCAA does not contain any priority scheme for distributing the proceeds from liquidating CCAs. Parliament must consider whether to introduce a distinct distribution scheme for the CCAA or whether to import the scheme from the BIA—the latter would be the better approach because, as discussed earlier, a strange asymmetry would result from imposing different schemes in functionally equivalent processes, whereas Parliament and the courts have clearly stated that the goal of recent reform efforts has been to harmonize common aspects of the BIA and CCAA.⁶⁹ In addition, it is unclear which test courts should apply when they are asked to approve liquidating CCAs. Typically, courts will apply both section 36 of the Act and the *Soundair* test, suggesting that neither test is determinative.⁷⁰ Parliament should provide needed clarity here by incorporating the relevant factors of the *Soundair* test into section 36, eliminating the need for courts to apply two distinct, though very similar, tests. Furthermore, Parliament should consider whether further changes are needed to section 36 so as to ensure that the basic protections for unsecured creditors and other vulnerable stakeholders in full reorganisations remain available in liquidating CCAs. In particular, the condensed timelines of CCAA sales make it especially difficult for objecting creditors to successfully oppose the planned sales. One solution would be to require prior disclosure to the relevant parties of the terms of the proposed sale, so that those parties could seek professional

69. *Century Services*, *supra* note 11 at para 24.

70. *Soundair*, *supra* note 22.

advice regarding possible alternatives, as a precondition for seeking court approval of the sale. Another option would be for the court to appoint an independent accounting firm, other than the monitor, to review and provide its opinion to the court and all stakeholders on the terms of the proposed deal. This would provide the unsecured creditors, in particular, with an impartial expert opinion other than that of the monitor.⁷¹

Conclusion

The quantitative results set out in this article suggest that much of the conventional wisdom about liquidating *CCAAs* may be mistaken. In particular, the data examined thus far do not support assertions that liquidating *CCAAs* are significantly faster and more cost-effective than traditional reorganizations. Although more work is needed to gain a full picture of what is transpiring in liquidating *CCAAs*, the results thus far are concerning in light of the continued trend towards using the *CCAA* as a mechanism to sell substantially all of the assets of insolvent debtor companies, a procedure for which the *CCAA* was never designed.

As noted earlier, the structure of the *CCAA* still reflects its original purpose of facilitating compromises between insolvent companies and their creditors, i.e., reorganizations. Rather than address the inconsistency between current *CCAA* practice and the history and structure of the Act, much of the jurisprudence approving liquidating *CCAAs* has contributed to an “intentional confusing of realization and restructuring.”⁷² At the same time, proponents of liquidating *CCAAs* have offered no evidence that these processes are generating better results for creditors as a whole than traditional reorganizations; on the contrary, the results disclosed here suggest that secured creditors are benefitting from liquidating *CCAAs* while unsecureds are worse off compared with reorganizations. Again, while more data will need to be gathered, these preliminary results lend weight to the concern that liquidating *CCAAs* may have become “a creditor’s tool of choice for realizing on its security” rather than a true restructuring mechanism.⁷³ In short, proponents of *CCAA* sales have “conflate[d] the objects of the Act with the wishes of the principal economic actor,” and the

71. In the UK, for example, pre-packs can be submitted to the Pre-pack Pool, which reviews and opines on the terms of the proposed sale. Since such reviews are voluntary, the Pool has seen only limited use, see: “Pre-Pack Pool Annual Review 2017” (May 2018), online (pdf): *Pre Pack Pool* <www.prepackpool.co.uk/uploads/files/documents/Pre-pack-Pool-Annual-Review-2017.pdf> [perma.cc/4E2D-2GJE]. However, it would be open to *CCAA* courts to order similar reviews of the terms of proposed *CCAA* sales, so as to provide the court and the creditors with a second opinion.

72. Bish, *supra* note 20 at 223-224.

73. *Ibid* at 232.

cost of this may be worse outcomes for other stakeholders.⁷⁴ As with pre-packs in the U.K. and 363 sales in the U.S., there is a risk that in at least some cases, the incumbent managers and secured creditors of insolvent debtors will find ways of controlling the liquidating *CCAA* process, maximizing outcomes for themselves at the expense of the stakeholders as a group. As incumbent management may have been complicit in a debtor's insolvency in the first place, and secured creditors already possess various other tools for realizing upon the assets of their insolvent debtors, this seems a wholly inappropriate use of the *CCAA* process. Until Parliament legislates clearer, more comprehensive rules governing *CCAA* sales, the task of curbing such potential abuses of the regime will fall, as usual, on the judiciary.

74. *Ibid.* For further discussion, see Nocilla & DaRe, *supra* note 30.