The Changing Face of Restructuring in Canada: Reverse Vesting Orders and Judicial Discretion

by

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Abstract

Reverse Vesting Orders (RVOs) have emerged as a crucial restructuring tool for financially distressed companies in Canada. RVO transactions involve the sale of a debtor company's shares to a purchaser, and the bifurcation and transfer of unwanted assets and liabilities into another corporate entity. The purpose of this transaction is to ensure that the business of the debtor company is able to be restructured as a going concern operation. RVOs offer distinct advantages, particularly in preserving valuable assets of the companies, including non-transferable licenses, permits, intellectual property and tax losses.

Despite their increasing popularity, the absence of statutory regulation leaves RVOs governed solely by case law. Thus, courts have developed and administered the RVO restructuring process by exercising judicial discretion. Unfortunately, the administration of RVOs through judicial discretion has raised concerns regarding the jurisdictional authority to approve RVOs in various circumstances, the factors for courts to consider when approving RVOs and the treatment of the interests of stakeholders who could be affected by the court-granted RVO.

This thesis advocates for the codification of RVOs within the Companies' Creditors Arrangement Act (CCAA) and the Bankruptcy and Insolvency Act (BIA) to address these challenges. By providing a statutory framework, Parliament can enhance certainty, transparency, and stakeholder protection within the restructuring process.

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

Corporate businesses generally require credit to thrive. Credit can take the form of loans, debt securities, trade credit, among others. If companies are unable to pay their debts when due or their liabilities exceed their assets, they are deemed insolvent. The possibility of insolvency has created the need for the government to enact insolvency laws to protect the rights of creditors and promote the effective distribution of the assets of the financially distressed company. Insolvency laws also involve restructuring regulations. Restructuring involves the use of certain mechanisms available through the statute or courts to explore the possibility of preserving the underlying business operations of a debtor company. This thesis examines the role of discretion exercised by the court in the development and administration of one of the corporate restructuring mechanisms employed in Canada – reverse vesting orders (RVOs).

In Canada, the general corporate restructuring mechanisms are embodied in a patchwork of statutes such as the *Bankruptcy and Insolvency Act*,[1] *Companies' Creditors Arrangement Act*,[2] and in some circumstances, the *Canada Business Corporations Act*.[3] The two commercial restructuring frameworks of general application are the *CCAA* and the *BIA* (through commercial proposals under Division I, Part III of the *BIA*).[4] The *CCAA* is the principal federal restructuring

[1] Restructuring of companies is done through Division I, Part III of the *BIA* (*Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended [*BIA*]).

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

[3] *Canada Business Corporations Act*, RSC 1985, c. C-44 [*CBCA*]. Section 192 of the CBCA which governs diverse forms of arrangement has been used where complex changes must be made to the shareholding and debt structures of the company. Unlike the *BIA* and *CCAA*, section 192(3) prescribes that a precondition for the use of the arrangement provision by the court is that the company involved must be solvent. However, this provision has been widely interpreted by the court to be used for insolvent companies (see Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 12-13 [Sarra, *Rescue*]; Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 15 [Wood, *Bankruptcy*]).

[4] A Notice of Intention to Make a Proposal (NOI) is the usual procedure to commence restructuring under Division 1 of the BIA (see *BIA*, s 50.4; Wood, *Bankruptcy supra* note 3 at 14).

statute.[5] Although it is used less frequently than the *BIA*, it is currently used for restructuring large commercial enterprises; thus *CCAA* proceedings have a significant impact on the Canadian economy. The *CCAA* is often described as "skeletal in nature" due to its relatively short length.[6] In comparison with the *BIA*, which is more of a rules-based statute, the flexibility of the *CCAA* is a better fit for complex corporate restructuring.[7] Due to the flexibility of the *CCAA*, restructuring mechanisms are primarily developed through the *CCAA* and over time replicated in NOI proceedings under the *BIA*.

The core focus of this thesis is on RVOs, a restructuring mechanism in the form of an order granted by the court to authorize a reverse vesting transaction targeted at restructuring a financially distressed company. All insolvency statutes in Canada are silent on the regulation of RVOs. As a result, RVOs have been administered solely on case law basis. A typical RVO transaction involves the sale of the shares of the debtor company (the "TargetCo") to a purchaser (who may be a third-party purchaser or an existing creditor).[8] The transaction involves a bifurcation of the assets and liabilities of the company into those the purchaser intends to assume and those unwanted by the purchaser.[9] Pursuant to an RVO granted by the court, the wanted assets and liabilities are retained in the TargetCo while the unwanted assets, liabilities and encumbrances are transferred and vested in another entity solely formed for that purchase, most often a special purpose vehicle (SPV) (the "ResidualCo" or "Excludedco"), which is subsequently wound-down.[10] Following the sale of its

[5] While the WURA contains some brief restructuring provisions, its application is generally restricted to banks, insurance, trust, and loan institutions (see *Ibid* at 15; *Winding-up and Restructuring Act,* RSC 1985, c. W-11 [*WURA*]).
[6] *Canada v Canada North Group Inc*, 2021 SCC 30 at para 138 [*Canada North*].
[7] *Century Services v Canada (Attorney General),* 2010 SCC 60 at para 13 [*Century Services*].
[8] Jocelyn T Perreault, Gabriel Faure & Francois Alexandre Toupin, "Reverse Vesting Transactions: An Innovative Solution to Restructure Insolvent Cannabis Companies" (2021) at 7-8, online: (WL Can) Thomson Reuters Canada.
[9] *Ibid.*
[10] See Bradley Wiffen, "Reverse Vesting Transactions: An Innovative Approach to Restructuring", in Professor Jill Corraini & Honourable Blair Nixon, eds, *Annual Rev Insolvency L 2020* (Toronto: Thomson Reuters, 2021) 167 at 171-172.

shares, the debtor company is able to continue its business as a going concern without financial distress under new ownership and management.

RVOs, as a restructuring mechanism, are beneficial due to the possibility of restructuring insolvent businesses as going concerns while preserving valuable assets such as non-transferable licenses, permits, and intellectual property, and tax losses in the company.[11] Through an RVO, the business of an insolvent company is able to thrive as a going concern, jobs are preserved and the economy benefits from the business activities. RVOs have become progressively more popular and have been utilized to restructure insolvent companies, particularly in highly regulated industries where the licence of the company is highly valuable.[12] In 2020 and 2021, RVOs were used as the restructuring mechanism in over 20 cases, and at least 20 of those cases involved no plan of arrangement or creditor voting in any form.[13]

Despite the increasing popularity of RVOs as a restructuring mechanism for financially distressed companies, there is no statute or regulation overseeing its administration. That duty has been assumed by the judiciary who have tried to regulate the usage of RVOs through judicial discretion. Courts have relied on their discretion to develop various tests and justifications for RVOs. Unfortunately, this has led to some ambiguity and uncertainty in relation to the jurisdiction of the court to grant RVOs, in some instances, and the factors to be considered in granting RVOs. Certainty of the how the applicable restructuring mechanism works is important to applicants and stakeholders, including lenders, whose rights might be affected in the process. The transparency

[11] See *Ibid* at 170; Janis P Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions" (16 January 2022) at 2, online: <canlii.ca/t/ttpb> [perma.cc/H3UH-TDTT] [Sarra, "RVOs"].
[12] Luc Morin & Guillaume Michaud, "Guiding Principles for Distressed M&A Transactions: Choosing the Right Path and the Future of POAs an RVOs" (2021) at 15, online: (WL Can) Thomson Reuters Canada.
[13] Sarra, "RVOs", *supra* note 11 at 25.

that comes with certainty is particularly beneficial to unsophisticated stakeholders who are not familiar with the case law development of RVOs.

RVOs have been granted by the court in *CCAA*, NOI and even receivership proceedings. As will be further discussed in chapter three of this thesis, there is ambiguity on the source of the court's jurisdiction to grant RVOs in *CCAA* and NOI proceedings, and the existence of the court's jurisdiction to grant RVOs in receivership proceedings. With respect to *CCAA* proceedings, courts originally relied on both section 11 of the *CCAA*, which gives the court wide discretionary powers, and section 36(1) of the *CCAA*, the authority to approve sale of assets (also known as "liquidating CCAAs" or "*CCAA* sales").[14] Following the decision in *Harte Gold*, the position has now changed to a reliance on just section 11;[15] however, the applicability of section 36(1) is yet to be conclusively resolved. In NOI proceedings, courts originally failed to provide the basis for the court's jurisdiction to approve RVOs under the *BIA*.[16] Unlike the *CCAA*, the *BIA* does not have a similar provision to section 11 which grants the court wide discretionary powers. Recently, courts have determined that their source of jurisdiction to grant RVOs in NOI proceedings is their inherent jurisdiction under section 183 of the *BIA*.[17] Whether courts have jurisdiction to approve RVOs in receivership proceedings has not yet been resolved.[18] Uncertainty is also evident in the considerations which the court weigh when approving or rejecting RVOs. Courts have weighed

[14] See *Arrangement relatif á Nemaska Lithium inc.*, 2020 QCCS 3218 at para 71 [*Nemaska*], leave to appeal to QCCA refused, 2020 QCCA 1488 [*Nemaska Leave*]; *Re Quest University Canada*, 2020 BCSC 1883 at para 153-157 [*Quest University*], leave to appeal to BCCA refused, 2020 BCCA 364 [*Quest University Leave*].
[15] *Harte Gold Corp.* (Re), 2022 ONSC 653 at para 36 [*Harte Gold*].
[16] See *Re Junction Craft Brewing Inc* (17 December 2021), Toronto 31-2774500 (ONSC) (Approval and vesting order) [*Junction Craft Brewing*].
[17] See *Proposition de Brunswick Health Group Inc*., 2023 QCCS 4643 [*Brunswick Health*].
[18] In *Enterra*, the court relied on the joint provisions of *Judicature Act*, RSA 2000, c J-2 [*Judicature Act*], *Business Corporation Act*, RSA 2000, C B-9 [*Alberta BCA*], and the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] (see *Forage Subordinated Debt LP v Enterra Feed Corporation* (10 May 2023), Calgary 2201 012953 (ABKB) (Endorsement of the Honourable Justice B.E. Romaine at para 30) [*Enterra*]). In *Peakhill*, which is currently subject to appeal at the time this thesis was last revised, the court relied on section 183 of the *BIA* (see *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476 [*Peakhill*]).

varying considerations based on tests from judicial precedents, academic literature and even section 36(3) of the CCAA, a provision crafted by the legislature specifically for *CCAA* sales.

In addition, with the administration of RVOs, there is a need to ensure that the interests of stakeholders and creditors who do not have a strong bargaining position (e.g. unsecured creditors) are duly protected. The traditional form of restructuring in the *CCAA* provides for the development of a plan and a subsequent creditors' vote on the plan which ensures creditor democracy. However, RVOs have largely eradicated this process, given that a plan is not required to be submitted for negotiation, and there is no creditor vote. Only a few senior creditors are involved in the negotiations leading up to an RVO application. Thus, RVOs represent an avenue for certain creditors to bypass the need for negotiation and obtain more value for themselves. Creditors considered "out of money" are not consulted in the entire process and courts are willing to grant RVOs despite the dissent of creditors who believe they have been treated unfairly.[19] Further complicating the rights of stakeholders, RVOs generally involve broad releases and claim bars against the debtor company, cleansed from all unwanted liabilities, and the purchaser. These overarching implication on the rights of stakeholders calls for a more efficient and fair administration by the courts in managing the conflicting interests and wider policy concerns in the usage of RVOs.

This thesis argues that the current RVO administration lacks certainty and transparency and these shortcomings negatively impact stakeholders. The claims of stakeholders in the company are susceptible to being eliminated without due consideration and in a number of cases, without notice to the relevant stakeholders. However, at the same time, an RVO is a useful restructuring

[19] See Daniel Alievsky, "Reverse Vesting Orders: Did We Forget About Creditor Democracy?" (2023) at 3, online: (WL Can) Thomson Reuters Canada. See also *Nemaska, supra* note 14; *Quest University, supra* note 14.

tool because its can effectively restructure insolvent companies and preserve the business as a going concern. This thesis argues that the issues with the current RVO regime can be mitigated by having Parliament codify the RVO mechanism in the statutes.

1.2 Background

So far in Canada, restructuring mechanisms have been developed through judicial innovation in *CCAA* proceedings, including RVOs. Thus, understanding the *CCAA*, and its purpose as a restructuring statute, is significant to this thesis. This thesis examines the use of judicial discretion by the court to establish restructuring schemes such as RVOs in the light of the purpose of the statute. As will be further discussed in this thesis, there are differing views as to the purpose of the *CCAA*. Nevertheless, through judicial interpretation of the *CCAA* over the years, there is now a widely accepted purpose of the *CCAA.* The SCC has provided that the purpose of the *CCAA* is to: "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[20] Thus, the underlying economic intuition of this statute is that a financially distressed entity would be more valuable to stakeholders if a liquidation is avoided, a restructuring is achieved, and the business is preserved, because the creditors can be paid from the future revenue of the company.[21]

The traditional mechanism of restructuring under the *CCAA* is through a plan of compromise and arrangement between the debtor company and its creditors.[22] To commence this restructuring process, a debtor company applies to a court for an initial order. If granted, such initial order involves a broad stay on all actions against the debtor company, among others.[23] The

[20] *Century Services, supra* note 7 at para 13.
[21] Wood, *Bankruptcy supra* note 3 at 14.
[22] *CCAA*, Part 1.
[23] *CCAA*, s 11.02(1).

purpose of the stay of proceedings is to prevent a race to grab assets so as to enable the debtor company to develop a plan on how the company intends to fulfil the obligations owed to the creditors and other stakeholders.[24] The management of the company remains with the debtor company while the court is empowered to play a supervisory role to preserve the status quo in relation to the assets of the company (a Debtor-in-Possession approach).[25]

The *CCAA* plan of arrangement and compromise process is supervised by a monitor. The monitor enables the court to effectively fulfill its supervisory role.[26] The primary duties of a monitor, as a court-appointed officer, are to oversee the business operations of the company and act as an information intermediary between the company, creditors, and the court, throughout the restructuring process.[27] A monitor is required to act independently and in a fiduciary capacity in the best interest of all parties, including creditors, the debtor company and all stakeholders.[28]

Creditors are involved in the plan of arrangement process too. Before it can be implemented, creditors must accept it and they do so through a vote. If the plan is approved by the majority of creditors in number and two-thirds majority in value of each creditor class, it still must be sanctioned by the court overseeing the debtor company's *CCAA* proceedings before it becomes a binding agreement.[29]

CCAA courts have long evidenced flexibility in how they facilitate the plan process. Starting in the 1980s and 1990s, as a result of the "bare-bones" nature of the statute, there was no provision to make certain orders which the court deemed necessary to successfully restructure

[24] Wood, *Bankruptcy supra* note 3 at 166.
[25] See *CCAA*, s 11; *Chef Ready Foods Ltd. v. Hongkong Bank of Canada,* 1990 CanLII 529 (BCCA).
[26] The appointed monitor must be a trustee under the *BIA* (see *CCAA*, s 11.7(1)).
[27] *CCAA*, s 23. See Janis Sarra, *Creditor Rights and the Public Interest*, (Toronto: University of Toronto Press, 2003) at 26 [Sarra, *Creditor Rights*].
[28] *CCAA*, s 25. See Wood, *Bankruptcy* supra note 3 above at 426-428; *Winalta Inc (Re),* 2011 ABQB 399 at para 67.
[29] *CCAA*, s 6.

financially distressed companies as a going concern.[30] Thus, in making discretionary initial orders such as interim financing orders, super priority orders, pre-filing payments, among others, courts relied on their inherent jurisdiction founded in common law and statutory discretion.[31] This exercise of discretion by the court, which allows for adaptability based on the circumstance, has been lauded as an advantage of the *CCAA* over the restructuring framework in the *BIA*.[32]

Following a series of sweeping amendments to the *CCAA* in 2009, the jurisprudential flexibility which allowed courts to grant discretionary orders was expressly codified in the statute through the amendment of section 11 of the *CCAA*. Section 11 of the *CCAA* provides the court with wide discretionary powers to "make any order that it considers appropriate in the circumstances."[33] Relying on the statutory discretion in the *CCAA*, courts have continued their practice of granting orders and creating restructuring mechanisms not provided in the statute by the legislature. Some of these orders include barring voting on a plan where the court found a creditor to be acting with an improper purpose,[34] granting a super-priority charge over the Crown's deemed trust,[35] granting Key Employee Retention Plan (KERP) charges,[36] releasing claims against third parties other than directors,[37] approving the payment of pre-filing obligations to certain creditors,[38] and most recently, granting RVOs.

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[30] *Yukon (Government of) v. Yukon Zinc Corporation,* 2021 YKCA 2 at para 126 [*Yukon*], citing Georgina R Jackson & Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P Sarra, ed, *Annual Rev Insolvency L 2007*, (Toronto: Carswell, 2008) 41.

[31] See Sarra, *Rescue supra* note 3 at 119-121.

[32] See Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P Sarra, ed, *Annual Rev Insolvency L 2005* (Toronto: Carswell, 2006) 481 at 481-482.

[33] *CCAA*, s 11.

[34] See *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 [*Bluberi*].

[35] See *Canada North*, *supra* note 6.

[36] See *Re Walter Energy Canada Holdings Inc*, 2016 BCSC 107.

[37] See *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at paras 44-49. See also Michael De Lellis et al, "The Use of Third-Party Releases in Canadian Restructuring Proceedings" (2021) at 2, online: (WL Can) Thomson Reuters Canada.

[38] *Re Northstar Aerospace Inc*, 2012 ONSC 4546 at para 11.

Over time, the *CCAA* has been used by the court to grant orders which are not targeted at achieving a compromise between the debtor and the creditors through a plan.[39] An example of such is liquidating CCAAs. Liquidating CCAAs generally involve the sale of all or part of the assets of a debtor company by vesting it in another entity.[40] The consideration from the sale may be applied to paying the debt obligations owed by the debtor company or may offset the existing debt owed when purchased by an existing creditor.[41] Liquidating CCAAs can be used to sell the business of the company on a going concern basis or through a piecemeal liquidation of a company's assets.[42] Unlike the former, a piecemeal liquidation is an absolute dissolution of the debtor company's business.[43]

The advent of liquidating CCAAs in the 1990s originally led to a divergence in insolvency jurisprudence in Canada; this is evidenced by inconsistent court decisions across provinces in Canada regarding whether courts have jurisdiction to approve liquidating CCAAs.[44] However, this was resolved through the codification of the express jurisdiction of court to grant such order. In 2009, the power of the court to sanction sales of assets of companies that have commenced *CCAA*

[39] See Chris Armstrong, "Where's the Plan? The Declining Role of *CCAA* Plans in the Canadian Restructuring Landscape, and When They Still May be Needed" (2021) at 1, online: (WL Can) Thomson Reuters Canada; Roderick J Wood, "Rescue and Liquidation in Restructuring Law" (2013) 53:3 Can Bus LJ 407 at 407 [Wood, "Rescue"].

[40] See Robin B Schwill, "Proposed Statutory Reform for Liquidating CCAAs: Plugging the Holes" (2018) at 1, online: (WL Can) Thomson Reuters Canada. See also Bill Kaplan, "Liquidating CCAAs : Discretion Gone Awry?" in Janis P Sarra, ed, *Annual Rev Insolvency L 2008* (Toronto: Carswell, 2009) 79 at 87-89.

[41] See Sarra, *Rescue supra* note 3 at 167. After the sales process, the company is then liquidated under the *BIA* provisions (see Schwill, *supra* note 40 at 6-7).

[42] Kamar Dolkar, "Re-Thinking Rescue: a Critical Examination of *CCAA* Liquidating Plans" (2011) 27:1 BFLR 111 at 112-113.

[43] See *Target Canada Co* (Re), 2016 ONSC 316 [*Target Canada*].

[44] The courts in Ontario were more open to approving *CCAA* sales compared to courts in Alberta and British Columbia. Courts in Alberta and British Columbia were reluctant to approve *CCAA* sales that were not targeted at a going concern outcome for the debtor company (see Alfonso Nocilla, "Asset Sales under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52:2 Can Community LJ 226 at 233 [Nocilla, "Asset Sales"]; Kaplan, *supra* note 40 at 108.

proceedings was codified in Section 36 of the *CCAA*.[45] Following this provision, courts can approve a sale of assets, free of any charge, security or encumbrance, irrespective of whether shareholder approval was obtained or not.[46]

The amendment also provided factors for the court to consider in deciding whether to authorize a sale of assets.[47] Thus, section 36 of the *CCAA*, in conjunction with section 11, gives the court general discretionary powers, and resolves any lingering questions about the court's jurisdiction to approve liquidating CCAAs. In *Bluberi*, the SCC recognized all forms of liquidating CCAAs and held that the *CCAA* has the "simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally."[48] The court further held that supervising judges in a *CCAA* proceeding are empowered by section 11 of the *CCAA* to have a broad discretion to make any order they deem fit, including approving liquidating CCAAs that terminates the business of a debtor company.[49]

The discussion around liquidating CCAAs is relevant to this thesis because of the similarities in its initial administration with RVOs. Like RVOs, liquidating CCAAs were initially developed by the court. Interestingly, this thesis indicates that the issues with liquidating CCAAs at the time it was solely administered through judicial discretion are similar with RVOs today. The

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[45] The 2009 amendments were as a result of: Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential Amendments to other Acts,* 1st Sess, 38th Parl, 2005 (assented to 25 November 2005), SC 2005, c 47 [*Statute c 47*]; and 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 Statues of Canada, 2005,* 2nd Sess, 39th Parl, 2007 (assented to 14 December 2007), SC 2007, c 36 [*Statute c 36*].

[46] *CCAA*, ss 36(1), (5).

[47] *CCAA*, ss 36(3)-(5).

[48] *Bluberi*, *supra* note 34 at para 42, citing Sarra, *Rescue supra* note 3 at 14; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014 at para 103.

[49] *Ibid* at para 50.

issues included whether courts have jurisdiction to approve liquidating CCAAs and how to ensure stakeholders are treated fairly when approving liquidating CCAAs. As a remedy to these issues, in 2009, Parliament codified the process of liquidating CCAAs in the *CCAA* and *BIA*. This thesis analyses to what extent codification resolved these issues and explores how codification can also play a role in resolving the current issues with RVOs.

1.3 Theoretical Framework

Creditor democracy is an important feature of the *CCAA,* as a restructuring statute. Creditor democracy provides representation for all creditors of the company and ensures that the losses are distributed amongst all. The full title of the *CCAA*, "[a]n Act to facilitate compromises and arrangements between companies and their creditors," reflects the objective of the statute to provide an avenue for debtor companies and their creditors to agree on plan to fulfill the debtor company's obligations to creditors.[50] In addition, the *CCAA* also provides a voting threshold at the creditors meeting for plans to be sanctioned by the court.[51] Creditor democracy is important because of enterprise value maximization[52] and loss distribution[53] – two key attributes of an efficient restructuring framework.

Enterprise value maximization theory posits that as part of an efficient reorganization process, all interests should be given a platform to be heard regarding the possible options and possibilities of restructuring the relevant financially distressed entity. Sarra argues that increased participation from non-traditional stakeholders such as employees, suppliers, local government and customers, would be advantageous to Canada's reorganization process because it is a way to

[50] *CCAA*, Table of Provisions.
[51] *CCAA*, s 6(1).
[52] Sarra, *Creditor Rights supra* note 27 at 46.
[53] Elizabeth Warren, "Bankruptcy Policy" (1987) 54:3 U Chicago L Rev 777 [Warren, "Bankruptcy"].

get the best value out of the financially distressed entity. This is because stakeholders possess useful information about the future prospects of the company which should be considered in a proposed restructuring plan. This theory is not targeted at a particular end goal of restructuring a financially distressed company as a going concern or liquidation, but rather is focused on providing stakeholders with avenues for participation in the restructuring process. Participation includes involvement in the entire court supervised process and compromise with other creditors. This theory informed the provisions for traditional arrangement and compromise through a meeting of creditors in the *CCAA*.

Loss distribution involves "an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors."[54] In insolvency, there are insufficient assets to cover all liabilities; loss distribution in a CCAA process empowers creditors to determine how best to compromise their competing claims. Indeed, the complexity of insolvency cases results in a not-one-size-fits-all approach to loss distribution;[55] nevertheless, this rationale should be the backbone of every scheme, including restructuring of financially distressed companies. Loss distribution should be implemented alongside the policy considerations of the relevant statute. In the case of the *CCAA*, this includes fairness, reasonableness, and the consideration of the wider interests of stakeholders and the public.

The reality of the usage of RVOs in corporate restructuring shows that stakeholder participation has been limited due to the absence of creditor democracy. In the interest of effectiveness and timeliness of the restructuring process, the participation of stakeholders, particularly unsecured creditors is circumscribed. This situation favours secured creditors who act

[54] Ibid at 778. See also Elizabeth Warren, "Bankruptcy Policy Making in an Imperfect World" (1993) 92 Mich L Rev 336.
[55] Warren, "Bankruptcy", *supra* note 53 at 811, 813.

as purchasers of the debtor company or secured creditors with strong bargaining power to arrive at a compromise with the purchaser. Despite the obvious advantages of RVOs, it has the possibility of being unfair to stakeholders by robbing them of a negotiation platform, thus skewing the distribution of losses in favour of some parties. In line with Sarra's position, this thesis will argue in favour of increased participation by and consideration of the interests of unsecured creditors. A statutory amendment to the *CCAA* and *BIA* is proposed for a more efficient and comprehensive administration of RVOs in Canada.

1.4 Thesis Objectives, Method and Methodology

This thesis argues that while the development of RVOs through judge-made law has been beneficial in restructuring financially distressed companies, the administration solely through judicial discretion has resulted in issues with respect to certainty of the process and the poor treatment of stakeholders. This thesis argues that these shortcomings can be addressed through codification.

The *CCAA* is important to this thesis because it is the principal restructuring statute in Canada and much judicial innovation has occurred in *CCAA* proceedings. An examination of the history of the *CCAA* in this thesis shows that courts have exercised their discretion to innovate restructuring mechanisms under the *CCAA* in line with the remedial purpose of the statute. On the face of it, Parliament has taken a backseat in the development of Canadian restructuring law and that role has effectively been transferred to the judiciary. However, Parliament has intervened at certain instances to address the shortcomings of such judicial innovation through codification. RVOs represent another form of judicial innovation, the shortcomings of which can be rectified through codification.

To understand RVOs, chapter two of this thesis examines the history of the *CCAA* to highlight the role of the court in the development and reinterpretation of the purpose of the Act. The *CCAA* was enacted in 1933 and has now been deemed by the court to be a remedial statute; RVOs have been administered according to this purpose. Chapter two examines how the court's discretion evolved over time in granting orders outside the scope of the statute, and how that fits into the purpose of the statute. This chapter will also examine the birth of liquidating CCAA through judicial discretion and how they became a standard practice in Canadian restructuring jurisprudence post-codification in the *CCAA* by Parliament. Chapter two adopts a doctrinal and historical approach to examining how the *CCAA* has evolved since its enactment in 1933. References will be made to both primary and secondary materials, including statutes, journals, monographs, cases and government reports.

Chapter three of the thesis chapter examines the current framework of RVOs through case law and how it has been administered by the court so far in Canada. The chapter considers the jurisdiction of the court to grant RVOs, the considerations courts weigh when asked to approve RVOs, and the treatment of stakeholders in RVO proceedings. The purpose of this discussion on RVOs is determine if they have been administered in line with the remedial purpose of the CCAA and to highlight shortcomings in the current practice. The thesis identifies two shortcomings in the current administration of RVOs by the court – lack of certainty of the RVO mechanism and poor treatment of stakeholders. The academic commentary on RVOs is limited; as a result, this thesis relies primarily on case law to understand the court's approach to RVOs. References are also made to journals, online accredited academic sites and blogs.

The final chapter proposes the use of statutory codification to remedy the shortcomings currently facing the administration of RVOs through unfettered judicial discretion. This chapter of

the thesis makes an original contribution to the field by examining the problems with RVOs and arguing in favour of codification of the RVO mechanism in the *CCAA* and *BIA*. Moreover, the amendment language to the *CCAA* is proposed to Parliament to resolve the shortcomings of the current administration of RVOs and provide a more comprehensive framework. The proposed language expressly provides for the jurisdiction of the court to approve RVOs, factors for the court to consider in approving or rejecting RVO applications, which includes specific considerations to protect the interests of all creditors, stakeholders, employees, and critical suppliers who may be affected by the RVO.

CHAPTER TWO: HISTORY AND PURPOSE OF THE *CCAA*

2.1 Introduction

Understanding the history behind the development of the *CCAA* is key to the study of this thesis on judicial discretion and RVOs. RVOs were developed in *CCAA* proceedings, and courts then transplanted this mechanism to NOI and receivership proceedings. Thus, to understand the origin of RVOs and how they have been administered by the court, it is key to understand why the *CCAA* was enacted, the purpose of the *CCAA*, and how that purpose has shifted overtime. An interesting fact about RVOs, which is central to this thesis, is that the statutes are completely silent on this process and RVOs have been developed and administered solely through judicial discretion. This manner of judicial innovation is hardly unprecedented. The historical analysis of the *CCAA* reveals that courts have frequently developed and administered restructuring mechanisms in the absence of statutory direction. Moreover, the interplay between the court innovating through the exercise of judicial discretion and Parliament subsequently codifying such innovation is also an important aspect of the thesis. Understanding such dynamic will inform the main argument of the thesis for the codification of RVOs in the statutes.

As will be discussed below, the exercise of discretion by the court arose out of commercial necessity and the court tries to exercise such discretion in accordance with the purpose of the *CCAA*. The purpose of the *CCAA* vis-à-vis corporate restructuring is best understood by tracing its development over the years from its enactment in 1933. The *CCAA* has experienced moments of evolution; at each point, the purpose of the *CCAA* was affected, as well as the court's authority to carry out this purpose. The ensuing sections examine the reasons for the enactment of the *CCAA*, the legislative purpose as at enactment and effect on stakeholders of financially distressed companies, the revised purpose of the *CCAA* due to commercial pragmatism, the changes in the

court's exercise of authority in *CCAA* proceedings, and how this exercise of this authority gave rise to standardized *CCAA* practices like liquidating CCAAs and RVOs.

2.2 The Birth of the *CCAA*

This section of the thesis examines the events that led to the enactment of the *CCAA* and the changes that occurred to the *CCAA* up until its prolonged period of disuse in the 1950s to 1980s. This discussion lays important groundwork for understanding the purposes of the *CCAA*, which are explored later in this chapter.

In the early twentieth century, corporate restructuring in Canada was envisioned from the perspective of providing a remedy to distressed bondholders, due to the prevalence of bondholder reorganization.[56] Prior to the enactment of the *CCAA* in 1933, Canada's principal bankruptcy legislation was the federal *Bankruptcy Act*.[57] Parliament adopted the *Bankruptcy Act* to ensure consistency in bankruptcy administration following a widespread business failure across Canada.[58] However, the *Bankruptcy Act* left a gap; creditors (particularly bondholders) demanded a scheme that could bind all creditors through a court order further to an arrangement or compromise with the debtor company.[59]

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[56] Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 25 [Torrie, *Reinventing Bankruptcy*].

[57] See *Bankruptcy Act*, SC 1919, c 36 [*Bankruptcy Act*]. Prior to 1919, the federal bankruptcy legislations that existed in Canada were the Insolvent Act 1869, and subsequently, the Insolvent Act 1875. The Insolvent Act 1875 was repealed in 1880 due to fraud and abuse of the provisions. In addition, the discharge provision for debtors was met with opposition by creditors who believed this remedy interfered with their right of repayment. Thus, between 1880 and 1919, a federal bankruptcy regulation was inexistent. Bankruptcy in Canada was regulated by provincial statutes enacted to fill in the void of the repealed federal statute (see Sarra, *Creditor Rights supra* note 27 at 11; Jacob Ziegel, "Canada's Phased-In Bankruptcy Law Reform" (1996) 70:4 Am Bankr LJ 383 at 386).

[58] Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867–1919* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2014) at 147–50, 157–62.

[59] Sarra, *Creditor Rights supra* note 27 at 11-12.

The *Bankruptcy Act* provided for a framework for debtor companies to negotiate a proposal with creditors which would then be sanctioned by the court.[60] This early attempt at a restructuring framework however failed because secured creditors were not bound by the proposal.[61] Secured creditors who were not satisfied with the proposal could liquidate their security for their benefit.[62] This action undermined the rehabilitative process of a proposal. Further complications also arose through complaints that companies engaged in bribery of creditors and other fraudulent means to secure their consent on proposals in a bid to avoid bankruptcy.[63] As a remedy, the *Bankruptcy Act* was amended in 1923 to prohibit companies from developing a proposal before declaring bankruptcy or holding the first creditors meeting.[64] This amendment turned out to be counter-productive because the stigma of bankruptcy affected the debtor company's business activities.[65] Eventually, in practice, the focus of the *Bankruptcy Act* was on the liquidation and administration of assets of debtor companies.[66]

Because the *Bankruptcy Act* had failed as an efficient reorganization tool; the only available restructuring remedy for bondholders in the 1920s was through the negotiation of private arrangements pursuant to the terms of the relevant trust deeds between the parties.[67] The *CCAA*

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[60] *Bankruptcy Act*, s 13. See also Wood, *Bankruptcy supra* note 3 at 335.

[61] In addition, there was no provision for stay of proceedings before a commercial proposal is presented to creditors. It was only after the 1992 amendments to the BIA that secured creditors were bound by proposals under the BIA (see Jacob Ziegel, "The *BIA* and *CCAA* Interface" in Stephanie Ben-Ishai and Anthony Duggan, eds, *Canadian Bankruptcy and Insolvency Law* (Makham: LexisNexis, 2007) 308 at 309; Sarra, *Creditor Rights supra* note 27 at 12).

[62] Wood, *Bankruptcy supra* note 3 at 335.

[63] Consumer and Corporate Affairs Canada, *Report of the Study Committee on Bankruptcy and Insolvency Legislation: Canada 1970* (Ottawa: Consumer and Corporate Affairs, 1970) at para 1.2.21 ["Tassé Report"].

[64] *Ibid*. See also Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56 Can Bus LJ 73 at 76 [Nocilla, "History"].

[65] Wood, *Bankruptcy supra* note 3 at 335.

[66] Sarra, *Creditor Rights supra* note 27 at 12. See also Telfer, *supra* note 58 at 393.

[67] The private remedy for bondholders was not efficient because the issue of lack of a coordinated restructuring scheme still lingered. Creditors who intended to restructure the balance sheet of the company had to negotiate with distinct creditor parties and the arrangements were not binding on other parties with legal rights. In addition, the rights of bondholders were under the purview of the provinces by virtue of section 92(13) of the *Constitution Act,*

was enacted in 1933 out of a need to provide an alternative and efficient mechanism for restructuring financially distressed companies.[68] Torrie identifies two additional catalysts for implementing the *CCAA*. The first was that a federal restructuring legislation was key at the time to attract US investors in Canadian companies (particularly debt financing through bonds).[69] The second catalyst was the economic distress which the Canadian economy faced starting from the mid-1920s to the 1930s when the Great Depression was in full effect.[70] The combined effect of the Great Depression and the infeasibility of private bondholder reorganization led to premature cessation of the existence of businesses and loss of jobs.[71]

The *CCAA* provided a means for the court to supervise arrangements and workouts between creditors (as a group) and the debtor company.[72] The goal of the court-supervised arrangement was to explore the possibility of the debtor company avoiding bankruptcy.[73] To achieve this, the *CCAA* provided for creditors to be grouped into classes with similar interests and allowed for a plan to be enforced against all creditors in a class if there was sufficient creditor support for the plan. From the perspective of creditors, a going concern sale of the company's assets would often produce more value than a liquidation. Thus, if a plan of arrangement could allot more than the liquidation value to creditors through a restructuring scheme, it was preferable. From the perspective of other

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1867 (UK), 30 & 31 Vict, c 3; thus, for national companies, proceedings needed to be instituted in the various jurisdictions where the company's assets are held (see Torrie, *Reinventing Bankruptcy supra* note 56 at 34).

[68] Sarra, *Creditor Rights supra* note 27 at 12.

[69] *Ibid* at 35.

[70] The pulp and paper industry in Canada, Canada's most important industry at the time, started experiencing major financial setbacks in the mid-1920s. In the 1930s, several major paper companies were in receivership (see *Ibid* at 36; Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1989) at 420).

[71] Sarra, *Creditor Rights supra* note 27 at 12.

[72] The provisions of the *CCAA* were modelled after the *British Companies Act*, 1929, c 23. The *British Companies Act* imbibed the reorganization provisions of the Joint Stock Companies Arrangement Act, 1870, which was a stand-alone statute specifically focused on compromise and arrangement between creditors and shareholders (see Torrie, *Reinventing Bankruptcy supra* note 56 at 24).

[73] Sarra, *Creditor Rights supra* note 27 at 14.

stakeholders, a successful restructuring of a company as a going concern would also preserve jobs and ensure the continued operation of the business of the company.[74] To fill in the lacuna of the *Bankruptcy Act*, the restructuring mechanism under the *CCAA* would bind all creditors, secured and unsecured.

The *CCAA* however was fraught with challenges upon enactment. At the time of enactment, there was a widely held doubt in the legal community about the constitutional validity of the *CCAA* because of the binding effect on secured creditor claims, whose rights were governed by provincial law. The SCC however held that the enactment of the *CCAA* by the federal Parliament was intra vires.[75] In 1938 and 1946, there were bills to repeal the *CCAA* chiefly due to abuse by insolvent companies who used it to restructure only unsecured claims and trade debts,[76] and fraudulent practices by trustees.[77] In addition, the *CCAA* was described as an emergency measure which had outlived its utility because of Canada's improving economy.[78] However, these bills were not passed due the influence of interests groups, such as the Dominion Mortgage and Investment Association and the Toronto Board of Trade.[79] A key reason for the opposition of the repeal attempts was that the *CCAA* was necessary for the sale of debt securities in the US; US law disallowed the sale of securities without an associated statutory mechanism for reorganization.[80]

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[74] *Ibid.*

[75] See *Reference Re Companies' Creditors Arrangement Act (Canada)*, 1934 SCR 659, [1934] 4 DLR 75 (SCC); Torrie, *Reinventing Bankruptcy supra* note 56 at 55-56, 61-64).

[76] This practice was seen as abusive because of the lack of requirement to disclose accurate information to the relevant parties (see Tassé Report, *supra* note 63 at para 1.2.27; Torrie*, Reinventing Bankruptcy supra* note 56 at 81).

[77] See Bill C-26, *An Act to Repeal The Companies' Creditors Arrangement Act, 1933*, 3rd Sess, 18th Parl, 1938; "Bill F, Bankruptcy Bill", 2nd reading, *Senate Debates*, 21-1, vol 1 (6 October 1949) at 97 (Hon James Gordon Fogo). See also Tassé Report, *supra* note 63 at para 1.2.16, 1.2.25; Torrie, *Reinventing Bankruptcy supra* note 56 at 71-72; Sarra, *Creditor Rights supra* note 27 at 14; Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can Bar Rev 587 at 589-590.

[78] Torrie, *Reinventing Bankruptcy supra* note 56 at 71.

[79] Nocilla, "History", *supra* note 64 at 77-78; *Ibid* at 82.

[80] Nocilla, "History", *supra* note 64 at 77-78; Torrie, *Reinventing Bankruptcy supra* note 56 at 83.

The discussions surrounding the repeal led to the consensus that the *CCAA* should primarily be used as a secured creditor remedy between debtor companies and debenture holders.[81] Thus, in 1953, the *CCAA* was amended and the use of the restructuring scheme provided was restricted to public companies that are issuers of bonds or debentures pursuant to a trust.[82] The purpose of this amendment was to curb abuse; publicly traded companies are more scrutinized, and the relevant indenture trustee could oversee the actions of the debtor company.[83] Essentially, Parliament intended to put an end to reorganizations controlled by the debtor company.[84]

Having examined the circumstances that prompted the enactment of the *CCAA* and the hurdles it faced, the next phase of this discussion is to understand its legislative purpose.

2.3 The Legislative Purpose of the *CCAA*

Understanding the purpose of the *CCAA* is necessary to understand restructuring schemes under the Act, such as RVOs. As noted above, the purpose of the *CCAA* has been re-interpreted by the court over time; this section discusses the original purpose for the enactment of the *CCAA* by Parliament. There are two major schools of thought with respect to the purpose of the *CCAA* at the point of enactment by the legislature. The first view is that the *CCAA* was enacted by the legislature to foster going-concern reorganization which considers the wider interests of stakeholders and the public – a debtor remedy. The second view is that the *CCAA* was enacted as a reorganization scheme to primarily assist secured creditor recovery of debt. This section examines both sides of the argument and concludes on which is more plausible.

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[81] Nocilla, "History", *supra* note 64 at 79; Torrie, *Reinventing Bankruptcy supra* note 56 at 82.
[82] SC 1952-53, c 3. See also Wood, *Bankruptcy supra* note 3 at 335-336.
[83] This restriction was however abolished in the 1997 amendment of the *CCAA* because the court recognized that instant trust deed were being created to bypass the requirement for an application under the *CCAA* (see Sarra, *Creditor Rights supra* note 27 at 14).
[84] Torrie, *Reinventing Bankruptcy supra* note 56 at 130.

Legal scholar, Janis Sarra, argues that at the inception of the *CCAA*, Parliament envisaged the consideration of a wide array of interests and public policies in insolvency proceedings.[85] Sarra's view is that the *CCAA* intends to promote restructuring while recognizing the "interests of workers trade suppliers, and communities."[86] Thus, in *CCAA* proceedings, in addition to the interests of creditors, courts are obliged to consider interests of these other stakeholders, including trade suppliers, tort claimants, among others.[87] Also, during any form of negotiation, the legal rights of all participating parties in the company should be recognized to the best possible measure; this includes the impact on these rights post-reorganization.[88]

Sarra's assertion was based on the senate debates on the *CCAA* during its enactments.[89] While considering the merits of the *CCAA* bill, the legislators, among others, considered the macro effect of a company's failure, including lost job opportunities, lost investments by entrepreneurs, and credit losses. Sarra also relies on the 1947 decision of the Quebec Court of Appeal in *Feifer v. Frame Manufacturing Corporation*,[90] where the court held that the *CCAA*'s purpose is "remedial and rehabilitative, and that the court's discretionary power was aimed at helping to effect a successful restoration of the business enterprise."[91] Sarra's position aligns with a 1947 commentary by Edwards, a legal scholar, who interpreted the provisions of the *CCAA* from a

[85] Sarra, *Creditor Rights supra* note 27 at 15, 50.
[86] *Ibid* at 15.
[87] *Ibid* at 7.
[88] *Ibid* at 4, 5, 15.
[89] While presenting the *CCAA* bill, Honourable Arthur Meighen captured the need for the *CCAA* to protect the interest of the public when he said: "the depression has brought almost innumerable companies to the point where some arrangement is necessary in the interest of the company; in the interests of employees, - because the bankruptcy of the company would throw the employees on the street, - and in the interest of security holders, who may decide that it is much better to make some sacrifice than run the risk of losing all in the general debacle of bankruptcy" (see "Bill C-77, Companies' Creditors Arrangement Bill", 2nd reading, Senate Debates, 17-4 (27 May 1933) at 474 (Hon Arthur Meighen) [*Bill C-77*]). See also *Ibid* at 14.
[90] (1947) 28 CBR 124 (QCCA).
[91] Sarra, *Creditor Rights supra* note 27 at 14-15.

public interest perspective.[92] Edwards argues that public interest, especially that of workers of the organization, should be considered by the court in deciding whether or not to approve a *CCAA* plan of arrangement.[93] The court acting otherwise, and limiting the review of *CCAA* applications to the interests of creditors and equity holders would be "inauspicious."[94]

Sarra highlights the "framework for negotiation" created by the statute as a public policy objective.[95] The *CCAA* was, and is, a skeletal statute with few codified provisions. In addition, the court proceedings available in the public record do not capture most of the activities of a *CCAA* reorganization workout.[96] Parties often deliberate on plans and arrangements outside the courtroom. The *CCAA* is built on a wide array of interest groups represented in classes, coming to a consensus on the best plan for the company as a going concern.[97] Based on the aforementioned arguments, Sarra opines that the entire *CCAA* framework and the legislative history of the statute has always considered the importance of the wider community, the economic impact on the community, and stakeholders, most particularly workers, in *CCAA* plans. However, Sarra recognized that the *CCAA* offers no direction on how these interests should be considered or protected, but that they should be considered by the courts in the reorganization process.[98]

Torrie offers a different perspective on the purpose underlying the *CCAA* at its inception. She postulates that the underlying purpose of the statute was not necessarily the protection of the companies, and by extension the stakeholders, but the provision for a better remedy for creditors (characterized by institutional bondholders).[99] Thus, the purpose of the *CCAA* at the point of

[92] Edwards, *supra* note 77 at 592-593; Torrie, *Reinventing Bankruptcy supra* note 56 at 46.
[93] Torrie, *Reinventing Bankruptcy supra* note 56 at 46.
[94] Edwards, *supra* note 77 at 600.
[95] *Ibid.*
[96] Sarra, *Rescue supra* note 3 at 20.
[97] *Ibid.*
[98] Sarra, *Creditor Rights supra* note 27 at 16.
[99] Torrie, *Reinventing Bankruptcy supra* note 56 at 37, 40.

enactment in the early 1930s was not rehabilitative or stakeholder-centric, but a better avenue for creditors to recover debt from the financially distressed companies they had investments in; a creditor remedy as opposed to a debtor remedy. Thus, contrary to the position of Edwards and Sarra, stakeholders were not considered by the legislature in enacting the *CCAA* and the *CCAA*'s objective was not to protect them. The public policy aspect of the *CCAA* and the benefit accruing to debtor and stakeholders is only a by-product of the creditor remedy that it was intended to be.[100]

Torrie's assertion is based on the premise that the *CCAA* extended the rights of creditors by providing for a restructuring mechanism of the financially distressed company where that would be more advantageous in comparison with liquidation.[101] Section 7 of the *CCAA*, 1933, provided that the act was "in extension, and not in limitation, of the provisions of any instrument now or hereafter governing the rights of creditors."[102] Interpreting the words "in extension" in the *CCAA*, 1933, Torrie posits that the *CCAA*'s objective was to remedy the shortcomings of existing creditor remedies.[103] Further giving credence to this position, Torrie draws a parallel line between the *CCAA* lacking the requisite statutory guidance to restructure companies as a going concern and its purpose as a bondholder remedy. The lack of guidance was because reorganization under the *CCAA* was understood to be in conjunction with the framework of receivership as provided by the relevant trust deed.[104] Thus, there was no need for a specialized administrative framework, and the

[100] *Ibid* at 47.
[101] *Ibid* at 44.
[102] Similar language exists under the scope of the current draft of the *CCAA* which reads thus: "This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument" (see *CCAA*, s 8; Torrie, *Reinventing Bankruptcy supra* note 56 at 120-121).
[103] The *CCAA* provided for a stay of proceedings against the financially distressed companies; while this provision protects the assets of the debtor company, Torrie argues that such provision was to strengthen the position of the secured creditors versus the unsecured creditors, who now had relatively weakened rights, save for the right to vote on a plan (see Torrie, *Reinventing Bankruptcy supra* note 56 at 45).
[104] *Ibid.*

CCAA was merely a supplementary framework to the existing mechanisms for reorganization, however deficient.[105]

Torrie's view can be juxtaposed with the stakeholder rationale argued by Sarra and Edwards. Based on the evidence of the parliamentary discussions and the statute itself, the wider public interest, including that of stakeholders and employees, are not mentioned in any form except the sole commentary of Honourable Arthur Meighen.[106] In addition, the 1933 enactment of the *CCAA* excluded banks, trust companies, telegraph companies, insurance companies and railway companies from the scope and application of the statute.[107] Torrie argues that these firms were of utmost significance to the public and if the *CCAA* was indeed concerned with the public interests, these institutions would not have been so excluded.[108] The most compelling argument of the *CCAA*'s purpose as a bondholder remedy is the resulting amendment in 1953 following the failed attempts at repeal of the statute.[109] The amendment restricted the use of the *CCAA* to bondholders, which underscores the purpose of the statute at the point of enactment or at the time of the 1953 amendment at least.[110] The utilization of the *CCAA* to restructure the debt of unsecured creditor debts or other stakeholder benefits were indeed a side effect of the skeletal nature of the statute.

2.4 Repurposing the *CCAA* as a Debtor Remedy: Late 20th Century Revival of the *CCAA*

After the 1953 amendment, the *CCAA* was generally abandoned by creditors and debtor companies and until the 1980s, the insolvency framework in Canada was largely focused on

[105] *Ibid.*
[106] See ibid at 46; *Bill C-77, supra* note 89 at 474.
[107] This exclusion still exists in the current draft of the *CCAA*, however railway companies have been included into the umbrella of the statute's scope (see *CCAA*, s 2; Torrie, *Reinventing Bankruptcy supra* note 56 at 46).
[108] Torrie, *Reinventing Bankruptcy supra* note 56 at 46.
[109] *Ibid* at 82.
[110] *Ibid.*

liquidation of companies for the benefit of creditors.[111] One major reason for the abandonment of the *CCAA* was the nature of Canada's economy and financial markets. To start with, Canada's economy experienced growth and stability from the 1950s to the 1980s which limited the number of bankruptcies and liquidations of companies.[112] In addition, the prominent form of financing for Canadian corporate borrowers was through long tenure secured loans by merchant banks as opposed to bond securities.[113] Recall that the *CCAA* had been characterized as a bondholder remedy pursuant to trust deeds;[114] thus chartered banks had no reason to rely on the *CCAA* in the event of default. In addition, provincial regulation of credit, security and indebtedness became more comprehensive over that period.[115] This resulted in the regulation of financing by provincial legislation, rather than a reliance on the terms of trust deeds.

The outlook of the insolvency framework started experiencing a shift in the 1980s and 1990s with a renewed interest in *CCAA* restructuring proceedings by creditors and debtor companies. Radical interest rate hikes and a recession in the 1980s and 1990s severely affected the Canadian economy, and by extension Canadian large corporations and banks.[116] In particular, the economy of Alberta was impaired by the 1980s oil glut which came just after the introduction of

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[111] Sarra, *Creditor Rights supra* note 27 at 14.
[112] Bliss*, supra* note 70 at 431–432.
[113] Chartered banks became major financiers following the revision of the *Bank Act,* SC 1991, c. 46, in 1967 which removed the ceiling on the interest rate banks could charge, among others (see Edward P Neufeld, *The Financial System of Canada: Its Growth and Development* (Toronto: Macmillan of Canada, 1972) at 128-131; Torrie, *Reinventing Bankruptcy supra* note 56 at 89).
[114] See the text accompanying note 82.
[115] The first Personal Property Security Act was adopted by Ontario based on Article 9 of the American Uniform Commercial Code and following that, other provinces followed suit (see Jacob S Ziegel, "The New Provincial Chattel Security Law Regimes" (1991) 70:4 Can Bar Rev 681 at 681-682). Other provincial legislations include the *Moratorium Act*, RSS 1953, c 98; *Orderly Payment of Debts Act*, SA 1959, c 61; *Saskatchewan Farm Security Act*, SS 1988–1989, c S-17.1 (see Torrie, *Reinventing Bankruptcy supra* note 56 at 89-90, 100-101).
[116] Andrew JF Kent & Adam C Maerov, "2009 Revisited" (2023) at 2, online: (WL Can) Thomson Reuters Canada; Torrie, *Reinventing Bankruptcy supra* note 56 at 92.

the National Energy Program by the federal government in 1980.[117] These economic challenges revealed shortcomings in the corporate restructuring ecosystem in Canada.

Some other factors also contributed to the renewed interest in the CCAA. Due to the major change in commercial practice of banks acting as financiers as opposed to bondholders, generally, trust deeds were no longer utilized for financing terms, instead lenders used general security agreements.[118] This trend disconnected banks from the *CCAA* framework which was typically a bondholder remedy requiring the use of a trust deed.[119] Thus, at the start of the recession in the 1980s, banks had no effective means of restructuring the entirety of a company while binding other creditors to an agreement.[120] According to Sarra, renewed interest in the *CCAA* was borne out of a need to explore alternative options to premature liquidations of companies.[121] Moreover, the financial market had become more complex and active with increased debt financing transactions, structured debt products and competition in the global capital market. Thus, there was a need to avoid failure of companies which could have a systemic impact.[122] Another contributing factor which may have played a part in the resurgence of the *CCAA* was the development of a robust remedial reorganization framework in the US *Bankruptcy Code* through chapter 11.[123] This influenced to the need to emulate such process in Canada.

With more *CCAA* applications by debtor companies to avoid liquidation in the 1980s and 1990s, the *CCAA* was interpreted liberally as a relatively flexible statute to encourage corporate restructuring as a going concern as opposed to liquidation or winding up, in furtherance of the

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[117] Kent & Maerov, *supra* note 116 at 3.
[118] Torrie, *Reinventing Bankruptcy supra* note 56 at 90.
[119] See discussion at 26, above.
[120] *Ibid* at 104.
[121] Sarra, *Creditor Rights supra* note 27 at 14.
[122] *Ibid*.
[123] *United States Bankruptcy Code*, 11 USC (1978) [*Bankruptcy Code*]. See also Kent & Maerov, *supra* note 116 at 2-3.

remedial purpose of the statute.[124] The trust deed requirement in the *CCAA* was rendered functionally irrelevant as a result of the widespread use, and eventual judicial recognition of "instant trust deeds" by companies to make *CCAA* applications. Instant trust deeds were makeshift trust deeds between the debtor company and a financial institution for a minimal loan to fulfil the requirement of the *CCAA*.[125] In *Re Philip's Manufacturing Ltd*., the court held thus:

> 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.[126]

The judicial requirement of instant trust deeds was tantamount to a judicial elimination of the trust deed requirement for *CCAA* applications; this paved way to increasing usage of the *CCAA* and a debtor-in-possession (DIP) restructuring scheme. Instant trust deeds remained a standard *CCAA* practice until the 1997 amendment which removed such requirement.[127]

According to Torrie, part of the reasons for the liberal interpretation of the *CCAA* was due to general changes in the judicial system. Courts became more "policy-conscious" during the 1980s and 1990s in comparison with the 1930s.[128] This judicial orientation was influenced by Elmer Drieger's modern approach to statutory interpretation, which was adopted by the Supreme Court of Canada and other superior courts.[129] In addition, courts relied on the section 12 of the *Interpretation Act*,[130] and similar provincial legislation, which provides that: "[e]very enactment is

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[124] This was in direct opposite with the approach in the 1930s where the court interpreted the *CCAA* in a stricter manner (see Torrie, *Reinventing Bankruptcy supra* note 56 at 48-49).
[125] *Ibid* at 128-129.
[126] *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 at para 34, 1991 CanLII 226 (BCSC).
[127] Torrie, *Reinventing Bankruptcy supra* note 56 at 146-148.
[128] *Ibid* at 90.
[129] See Elmer A Driedger, *The Construction of Statutes*, 1st ed (Toronto: Butterworths, 1974). See also Torrie, *Reinventing Bankruptcy supra* note 56 at 90-91.
[130] RSC 1985, c. I-21.

deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[131] Other reasons for the court's liberal approach in repurposing the *CCAA* include the skeletal nature of the statute, increasing popularity of a DIP restructuring mechanism based on the US *Bankruptcy Code,* and commentary of academics who had interpreted the *CCAA* as a rehabilitative statute.[132]

In the early 1990s, Courts recognized the purpose of the *CCAA* as a statute to facilitate restructuring as a going concern considering the wider interests of stakeholders and the public.[133] In *Elan Corp. v Comiskey (Trustee of)*, Doherty J.A held that the *CCAA* "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."[134] In *Lehndorff General Partner Ltd*., Farley J. noted thus: "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."[135] These pronouncements by the court buttress the stakeholder interpretation advanced by Sarra and Edwards. Thus, through judicial interpretation, the court established a fixed purpose of the *CCAA* which was lacking in the letters of statute. Ultimately, the SCC recognized the remedial objective of the *CCAA* in *Century Services* when the court held as follows:

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[131] See *Quintette Coal Ltd. v Nippon Steel Corp*. (1990), 2 CBR (3d) 303 at para 14, 1990 CanLII 430 (BCCA).
[132] Torrie, *Reinventing Bankruptcy supra* note 56 at 115-118.
[133] Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" in Janis P Sarra & Honourable Barbara Romaine, eds, *Annual Rev Insolvency L 2016* (Toronto: Thomson Reuters, 2017) 9 at 17 [Sarra, "Oscillating Pendulum"]. See also Janis Sarra, "Examining the Insolvency Toolkit: Report on the Public Meetings on the Canadian Commercial Insolvency Law System" (July 2012) at 8, online (pdf): <insolvency.ca> [perma.cc/CV2X-EXET] [Sarra, "Toolkit"].
[134] *Elan Corp. v Comiskey (Trustee of)* (1990), 1 OR (3d) 289 at para 57, 1990 CanLII 6979 (ONCA).
[135] *Re Lehndorff General Partner Ltd.* (1993), 17 CBR (3d) 24 at para 5, 37 ACWS (3d) 847 (ONCJ) [*Lehndorff General Partner*].

> [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 costs of liquidating its assets.[136]
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> 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.[137]

Following the above pronouncement, the purpose of the *CCAA* is now settled. However, understanding the history of the *CCAA* is key to understanding contemporary *CCAA* proceedings and discretionary orders. As enunciated above, while the *CCAA* was initially enacted as a secured creditor remedy, it has been repurposed as a debtor remedy by the court. The repurposing of the *CCAA* as a debtor remedy occurred because of commercial pragmatism due to the 1980s and 1990s recession. Thus, the *CCAA*'s objective is to "avoid the devastating social and economic effects" of liquidation where possible and to enable 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 creditors, its employees and former employees and the communities in which it carries on and carried on its business operations."[138]

The repurposing of the *CCAA* as a statute to facilitate rehabilitation of companies meant that the courts had to authorize certain orders to facilitate the restructuring process. Such orders include interim financing, super priority charges (including KERP charge), releases, and vesting orders. The *CCAA* statute did not provide for the explicit authority of the court to make such orders. Once again, commercial pragmatism led to the exercise of judicial discretion in granting orders to

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[136] *Century Services*, *supra* note 7 at para 15.
[137] *Ibid* at para 18, citing Edwards, *supra* note 77 at 592.
[138] *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 CBR (3d) 312 at para 3, 86 DLR. (4th) 621 (ONCJ).

fulfil that purpose. The next section of this thesis examines how courts have exercised their discretion and the jurisdiction they have relied on in granting discretionary orders.

2.5 Judicial Discretion: Inherent Jurisdiction and Statutory Discretion

Canadian courts have generally relied on two forms of authority to exercise judicial discretion in restructuring proceedings – inherent jurisdiction and the statutory authorized discretion. Examining these dual sources of authority is crucial for comprehending how courts have wielded judicial discretion within each realm and the potential constraints associated with each source of authority.

Discretion is a vital tool of the judiciary. Discretion is "the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful".[139] Extending this definition to the court, judicial discretion is the power granted by the law to decide on varying lawful decisions.[140] A form of "legal freedom" which calls upon judges to "weigh, reflect, gain impressions, test, and study," before making a decision. Judicial freedom essentially exists to remedy the shortcomings of the law; it starts where the law ends.[141] Richard C.J. echoed this view when he held that: "To exercise discretion means to choose between two or more reasonable options. The choice must be made considering the applicable law and guiding principles and on a proper understanding of facts."[142] Sharpe J., as he then was, however gave a different perspective to discretion by arguing that judicial discretion in certain circumstances does

[139] Aharon Barak & Yadin Kaufmann*, Judicial Discretion* (New Haven: Yale University Press, 1989) at 7.
[140] *Ibid.*
[141] *Ibid* at 8. See also Nathan Isaacs, "The Limits of Judicial Discretion" (1922) 32:4 Yale LJ 339 at 340.
[142] *Doiron v. Haché*, 2005 NBCA 75 at para 57.

not connote a flexibility to choose any legal outcome.[143] The onus is on the judge to use that discretion to choose the best outcome from a wide range of options.[144]

Courts exercised juridical discretion in *CCAA* proceedings due to the skeletal nature of the statute, which lacked the required mechanisms to carry out an efficient reorganization.[145] The lack of adequate restructuring tools available to the court was more problematic as a result of the "supervisory nature" of the court in *CCAA* proceedings.[146] The *CCAA* has been described as a procedural statute for the most part, setting out a framework for developing and approving a plan; however, the courts are also tasked with making substantive decisions, such as the determination of the rights and obligations of the debtor company and stakeholders.[147] Thus, in the late 20th century, courts relied on their inherent jurisdiction founded in common law to make discretionary orders in furtherance of a restructuring process under the *CCAA*.[148] In *Westar Mining*, the court observed that: "Proceedings under the C.C.C.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."[149]

The foundation for inherent jurisdiction can be traced to common law, and it has received recognition amongst Canadian courts. The famous words of Justice Cave in *Peacock v. Bell and*

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[143] See Honourable Mr. Justice Robert J. Sharpe, "The Application and Impact of Judicial Discretion in Commercial Litigation" (1998) 17:1 Advocates' Soc J 4 at 4-5. See also Jackson & Sarra, *supra* note 30 at 59-60.
[144] Jackson & Sarra, *supra* note 30 at 60.
[145] Some of these mechanisms include the ability of the court to approve interim financing, which ranks over the rights of secured creditors, ordering pre-filing payments, and other forms of super priority court-ordered charges, barring creditors from voting on a plan, approving sale of assets, approving KERPs, among others.
[146] In *CCAA* proceedings, judges perform a bigger role than adjudicating what is right or wrong or assigning liability and rights. Judges supervise the entire restructuring process and the monitor provides the court with periodic updates (see Janis Sarra, "Judicial Exercise of Inherent Jurisdiction under the *CCAA*" (2004) 40:2 Can Bus LJ 280 at 280-281 [Sarra, "Inherent Jurisdiction"]).
[147] *Ibid* at 282.
[148] Sarra, *Rescue supra* note 3 at 119-121; *Royal Oak Mines Inc. (Re)*, 1999 CanLII 14843 at para 4 (ONSC) [*Royal Oak Mines*].
[149] *Westar Mining Ltd. (Re)* (1992), 14 C.B.R. (3d) 88 at para 23, 1992 CanLII 1863 (BCSC) [*Westar Mining*]. See also *Re Stelco Inc.*, 2005 CanLII 8671 (ONCA) at para 32 [*Stelco*].

Kendall provides a solid foundation for inherent jurisdiction: "And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so…"[150] In Canada, the SCC has described inherent jurisdiction as necessary to ensure all matters come under the jurisdiction of a superior court unless a statute says otherwise.[151] Farley J. defined inherent jurisdiction as a "residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular, to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."[152] Sarra described the use of inherent jurisdiction as a means of the court exercising its general "gap-filling power," given that court is vested with unlimited jurisdiction in substantive civil law to do all that is necessary when presented with a matter, unless the legislature has specifically provided the contrary.[153]

However, earlier *CCAA* decisions stretched the boundaries of inherent jurisdiction and improperly described it as their source of authority when they should have properly characterized their authority as arising from statutory discretion.[154] Statutory discretion is the authority granted to courts by the legislature to approve discretionary orders within the boundaries of a statute.[155] Recent cases have recharacterized the jurisdiction exercised by the court to make orders not expressly provided by the *CCAA* as emanating from the statute and not inherent jurisdiction –

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[150] *Peacock v Bell and Kendall* (1667), Wms Saund 73 at 74, 85 ER 84. See also *R v Cunningham*, 2010 SCC 10 at para 18 where the court held that inherent jurisdiction makes sure "the machinery of the court functions in an orderly and effective manner."

[151] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 32, 1998 CanLII 818 (SCC).

[152] At the time of the pronouncement, the view was that initial orders outside the scope of the *CCAA* such as priority charges were an exercise of inherent jurisdiction (see *Royal Oak Mines, supra* note 148 at para 22). See also Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" in Janis P Sarra & Honourable Barbara Romaine, eds, *Annual Rev Insolvency L 2020* (Toronto: Thomson Reuters, 2021) 429 at 432-445.

[153] Jackson & Sarra, *supra* note 30 at 54-55; *80 Wellesley St. East Ltd. v Fundy Bay Builders Ltd.* (1972), 25 DLR (3d) 386 at para 9, 1972 CanLII 535 (ONCA).

[154] Jackson & Sarra, *supra* note 30 at 44-45.

[155] See also Babe, *supra* note 152 at 448.

based on the premise that it was Parliament's intention for the court to be empowered to make a wide range of discretionary orders.[156] Blair J.A. confirmed this view when he held that in *CCAA* matters, "in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the *CCAA*."[157] In *Yukon*, the court held as follows:

> In the early 1990s, prior to substantial amendments to it, the *CCAA* was considered to be a "bare-bones" statute and the court struggled to make it an effective mechanism to achieve successful reorganizations of financially distressed companies. Judges resorted to the use of the court's inherent jurisdiction to find authority to make orders. Over time, it was recognized that judges had stretched the bounds of the doctrine of inherent jurisdiction and that the use by judges of inherent jurisdiction was a misnomer for the exercise of statutory discretion.[158]

The court is only allowed to exercise inherent jurisdiction where such discretion is not in conflict with statutory provisions. In *Royal Oak Mines*, Farley J opined that inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play."[159] In *Stelco*, the court overturned the decision of the lower court where an order was made to remove the directors of the financially distressed company. The court held that there was no statutory gap to be filled, hence inherent jurisdiction should not be exercised in the circumstance; the oppression remedy and other provisions in the *CBCA* would have been more applicable.

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[156] Prior to the 2009 amendment, the wording of section 11(3) of the *CCAA* provided that a "court may, on an initial application in respect of a company, make an order on such terms as it may impose." This language was interpreted to be the authority for the court to exercise statutory discretion in restructuring proceedings. This language has been revised as the court having the authority to "make any order that it considers appropriate in the circumstances" in in section 11 of the *CCAA* (see Babe, *supra* note 152 at 445-446; *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 at paras 45-46 [*Skeena*], aff'g 2002 BCSC 1280; Jackson & Sarra, *supra* note 30 at 84-89; Roderick J Wood, ""Come a Little Bit Closer": Convergence and its Limits in Canadian Restructuring Law" (14 December 2021) at 13, online: <ssrn.com/abstract=3983550> [perma.cc/9BM7-HZUR] [Wood, "Convergence"].

[157] *Stelco, supra* note 149 at paras 33-34.

[158] *Yukon, supra* note 30 at para 126, citing Jackson & Sarra, *supra* note 30. See also *Re United Used Auto & Truck Parts Ltd.,* 1999 CanLII 5374 (BCSC)

[159] *Royal Oak Mines, supra* note 148 at para 4. See also *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, [1976] 2 SCR 475 at para 6, 1975 CanLII 164 (SCC).

Jackson and Sarra proposed a theory of hierarchy of judicial tools whereby the court should first engage in a "broad, liberal and purposive" interpretation of the statute to determine the scope of their authority before delving into other judicial tools like inherent jurisdiction.[160] Thus, inherent jurisdiction should only be exercised when the statute has failed to provide broad authority.[161] This position was recognized by the SCC in *Century Services* where the court held that the "most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding."[162]

Through the 2009 amendment of the *CCAA*, this statutory discretion has been codified in more express words in section 11 of the *CCAA*.[163] Section 11 of the *CCAA* reads as follows:

> Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Thus, the source of courts' judicial discretion in *CCAA* proceedings has been recharacterized over time: first, inherent jurisdiction, then implied statutory discretion and now express statutory discretion.[164] This statutory discretion granted to court, which allows for adaptability based on the circumstance, has been lauded as the advantage of the *CCAA* over the

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[160] Jackson & Sarra, *supra* note 30 at 42. See also Babe, *supra* note at 152 at 455.
[161] Jackson & Sarra, *supra* note 30 at 42.
[162] *Century Services, supra* note 7 at para 65, citing Jackson & Sarra, *supra* note 30 at 42.
[163] *CCAA*, s 11 provides as follows: "Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances."
[164] Wood, "Convergence", *supra* note 156 at 12.

restructuring framework in the *BIA*.[165] The court has held that the statutory discretion embedded in section 11 of the *CCAA* "supplants" any requirement to rely on inherent jurisdiction.[166] The *CCAA* has now been amended to reflect the mechanism employed by the court through judicial discretion.[167]

Wood outlined two major implications of the codification of statutory discretion. The first is the ability of a court to override provincial laws when relying on section 11 of the *CCAA*, a federal statute.[168] With respect to the exercise of authority under inherent jurisdiction, courts could not make decisions contrary to the provision of provincial statute,[169] however this limitation does not exist for the exercise of discretion under a federal statute by virtue of the paramountcy doctrine.[170]

In addition, codified statutory discretion is subject to limits set out in the CCAA: appropriateness, good faith and due diligence. In the express language of section 11 of the *CCAA*, the court can make orders considered "appropriate in the circumstance."[171] Appropriateness has been determined by the SCC to mean an inquiry into whether or not such order advances the *CCAA*'s rehabilitative and remedial policy objectives.[172] The provision for parties to act in good

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[165] Jones, *supra* note 32 at 481.

[166] *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc) -and- Ernst & Young Inc*, 2018 QCCS 1040 at para 68, rev'd 2019 QCCA 171, aff'd 2020 SCC 10.

[167] Key amendments, codifying aspects of *CCAA* procedures, were introduced through Statute c 47 (see Janis Sarra, "Judicial Discretion" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy and Insolvency Law* (Markham: LexisNexis, 2007) 199 at 205 [Sarra, "Judicial Discretion").

[168] Wood, "Convergence", *supra* note 156 at 11.

[169] The SCC held that a court in a *CCAA* proceeding cannot make a priority order that is contrary to the express provisions of Manitoba's *Mechanics Lien Act*, RSM 1970, c. M80; at the time, it was understood for the court to be exercising authority under inherent jurisdiction (see *Baxter Student Housing, supra* note 159 at para 5).

[170] *Sun Indalex Finance LLC v. United Steelworkers; Indalex Ltd., Re*, 2013 SCC 6 at para 60; *Ibid* at paras 5-6.

[171] See *CCAA*, s 11.

[172] The court held that the question for the court to decide on is "whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company" (see *Century Services*, *supra* note 7 at para 70; *Bluberi*, *supra* note 34 at para 49).

faith is contained in section 18.6 of the *CCAA* further to the 2019 amendment of the *CCAA*.[173] Moreover, due diligence is required for the traditional stay order in an initial application for a CCAA proceeding.[174] These principles have been described by the court as "baseline considerations" in the exercise of statutory discretion under the *CCAA*.[175] In *Bluberi*, the SCC noted that "[t]he discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA" and the court must also ensure the applicant for an order demonstrates the "baseline considerations."[176]

In examining the discretion of the court in *CCAA* proceedings, Torrie argues that courts have exercised "judicial innovation" and "judicial creativity" since the renaissance of the *CCAA* in the 1980s and 1990s.[177] This is a process whereby the judges have not only played a role in developing restructuring laws and procedures, but also going beyond the limitations of the *CCAA* in certain circumstances using creative interpretation, and relying on discretion.[178] The "bare-bones" nature of the statute essentially paves the way for the court to exercise wide discretion. The major limitations to the wide power of the court in section 11 of the *CCAA* are the "restrictions" set out in the *CCAA*.[179] However, the restrictions are not particularly robust given the skeletal nature of the statute. It is however clear from the pronouncements of the SCC and other courts in

[173] 2019, c. 29, s. 140.
[174] CCAA, 11.02(3)(b).
[175] *Century Services, supra* note 7 at para 70; Wood, "Convergence", *supra* note 156 at 11; Eamonn Watson, Gray Monczka & Jordan Schultz, "Anything You Can Do, I Can Do Better: Does the *CCAA* Provide Broader Discretionary Relief than the *BIA*?" in Professor Jill Corraini & Justice Blair Nixon, eds, *Annual Rev Insolvency L* 2022 (Toronto: Thomson Reuters, 2023) 695 at 711.
[176] See *Bluberi*, *supra* note 34 at 49-51, citing *Century Services, supra* note 7 at 69-70; see also Re ENTREC Corporation, 2020 ABQB 751 at para 3-4.
[177] Torrie, *Reinventing Bankruptcy supra* note 56 at 142, 145.
[178] *Ibid*.
[179] See *CCAA*, s 11.

Canada that these wide powers must be exercised to further the established remedial purpose of the statute. Thus, all orders and mechanisms employed by the court under its statutory discretion must be targeted at this objective.

The next section provides an insight into how judicial discretion was used to develop liquidating CCAAs, a prominent restructuring mechanism in Canada. Recall that chapter one of this thesis introduced liquidating CCAAs;[180] the next section builds on that introduction. In addition, the section discusses how liquidating CCAAs have changed the understanding of the *CCAA*'s remedial purpose.

2.6 Reshaping the Remedial Purpose of the *CCAA*: The Era of Liquidating CCAAs

This section delves into the historical evolution of liquidating CCAAs in Canadian restructuring law. The discussion serves a dual purpose. Firstly, it illustrates how courts utilized their discretionary powers to authorize *CCAA* sales, a practice not explicitly outlined in the *CCAA* before 2009. Secondly, it aims to establish a clear connection between the challenges associated with discretionary decision-making of liquidating CCAAs (that is the existence of the court's jurisdiction to approve liquidating CCAAs and the treatment of stakeholders) and the issues surrounding the discretionary grant of RVOs, as explored in subsequent chapters.

Over time, courts in *CCAA* proceedings have exercised their discretion to grant orders which go beyond the traditional plan of arrangement process: whereby the debtor company and creditors must reach an agreement on how to restructure the company.[181] An example of such an order is a liquidating CCAA. In a liquidating CCAA, the debtor company's assets are sold before or without a plan of arrangement being approved. Liquidating CCAAs are sometimes used as a

[180] See the discussion at 9, above.
[181] Wood, "Rescue", *supra* note 39 at 407.

restructuring vehicle which transfers the business of the debtor company (through its valuable assets) to another corporate entity, and the business of the debtor company can continue, in line with the rehabilitation purpose of the *CCAA*, albeit under a different management and ownership.[182] Through this approach, the interest of stakeholders such as employees and some unsecured creditors are taken into consideration, the business survives, and obligations to secured creditors are fulfilled.[183] In some other cases, liquidating CCAAs have been used to facilitate pure liquidation of a debtor company which is not in any form targeted at restructuring (piecemeal liquidation of assets).[184] Courts have been willing to approve such sales where they are in the best interest of secured creditors.[185] In *1078385 Ontario*, the court approved a sale of assets plan which terminated the business of the debtor company and liquidated its assets exclusively for the benefit of the secured creditors.[186]

Liquidating CCAAs are also an avenue to bypass the statutory requirement of a vote on a plan of arrangement or compromise.[187] The sale and investment solicitation process (SISP) may occur under the supervision of a *CCAA* court or before the *CCAA* proceeding commences ("pre-pack sales" or "pre-packs").[188] The SISP process is typically managed by the monitor; the company solicits for bidders while circulating relevant information about the company and the assets to be

[182] See also Sarra, *Rescue supra* note 3 at 169.
[183] See *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ONSC) [*Canadian Red Cross*].
[184] Sarra, *Rescue supra* note 3 at 168.
[185] Target Canada was liquidated under the auspices of the *CCAA* however pursuant to a vote of creditors approving the liquidation plan (see *Target Canada*, *supra* note 43; Natasha De Cicco & Dylan Chochla, "Desperate Times Call for Desperate Measures: A Review of Notable Developments in Recent Retail Insolvencies" in Janis P Sarra & Honourable Barbara Romaine, eds, *Annual Rev Insolvency L 2017* (Toronto: Thomson Reuters, 2018) 71 at 75-76).
[186] *1078385 Ontario Ltd., Re,* 2004 CanLII 55041 (ONCA) [*1078385 Ontario*].
[187] In some cases, after a sales process has been conducted, the creditors vote on a plan regarding how to distribute the consideration from the liquidating *CCAA* sale and proceeds received from the liquidation of the company (see Schwill, *supra* note 40 at 7).
[188] See Stephanie Ben-Ishai & Stephen J Lubben, "Sales or Plans: A Comparative Account of the "New" Corporate Reorganization" (2011) 56:3 McGill LJ 591 at 600-602.

purchased.[189] Following an initial letter of intent by a prospective bidder and the submission of a qualified bid, the bid is reviewed by the debtor company in conjunction with the monitor and other financial advisers.[190] A successful bid and Asset Purchase Agreement (where applicable) is then presented to the court through an application for a vesting order.[191] With respect to pre-packs, the company engages in the process of identifying the purchaser either through a process similar to the SISP or otherwise. Once a purchaser is found, the company commences CCAA proceedings and applies to the court for a vesting order.

Liquidating CCAAs represent a departure from the *CCAA* traditional restructuring scheme of a plan of arrangement or compromise as a going concern approved at the meeting of creditors through a vote.[192] In fact, they borrow from the liquidation sale process used in receivership proceedings under the *BIA* and provincial legislation. In effect, the use of piecemeal liquidation is similar to what would occur in a receivership or *BIA* proceeding.[193] Unlike the *BIA*, the *CCAA* did

[189] See Leanne Krawchuk, Aaron Aitken & Francesco Deluca, "How to participate as a potential bidder in a sale or investor solicitation process conducted by a mining company under the *CCAA*" (28 March 2021), online (blog): <dentonsmininglaw.com> [perma.cc/5PDC-RW7Q]; Sheryl E Seigel, "Distinctions With a Difference: Comparison of Restructurings Under the *CCAA* with Chapter 11 Law and Practice" (26 September 2011), online (blog): <lexology.com> [perma.cc/DW4Z-NWGA]; Armstrong, *supra* note 39 at 2.

[190] See Krawchuk, Aitken & Deluca, *supra* note 189; Seigel, *supra* note 189.

[191] Seigel, *supra* note 189.

[192] A qualitative study by Renner and Forbes showed that between 18 September 2009 and 31 December 2020, there were 416 recorded *CCAA* filings and 146 of them incorporated the use of a plan. This represented just 35% of the total *CCAA* filings in that period. It is apposite to note that the study could not determine which of 146 *CCAA* plans were targeted at sale of assets (as opposed to restructuring the entire corporate entity as a going concern) due to lack of available data (see Natalie Renner & Katherine Forbes, "Are the Rumours True? Has There Been a Shift Away From the Use of Plans of Compromise and Arrangement under the *CCAA*? A Cross-Canada Look at the Use of *CCAA* Plans Over the Years" in Professor Jill Corraini & Justice Blair Nixon, eds, *Annual Rev Insolvency L 2021* (Toronto: Thomson Reuters, 2012) 301 at 303, 309, 337-338). *Target Canada* and *Canwest Global Communications* utilized *CCAA* plans to liquidate assets and distribute the proceeds to creditors; this implies that more than 65% of *CCAA* filings in that period did not utilize the traditional means of restructuring as provided by the *CCAA* (see *Target Canada, supra* note 43, *Re Canwest Global Communications Corp*, 2009 CanLII 55114 (ONSC) [*Canwest Global Communications*]).

[193] Wood, "Rescue", *supra* note 39 at 412.

not have provisions specifically designed for liquidation of companies until 2009. For this reason, the use of the *CCAA* to effect sale of assets before or without a plan was initially contested.

Courts have interpreted liquidating CCAAs to fall under the umbrella of the remedial purpose of the *CCAA*. In *Lehndorff General Partner*, Farley J stated that: "One of the purposes of the *CCAA* is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The *CCAA* facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors."[194] Essentially, this implies that the *CCAA* is also meant to obtain the best possible value for creditors alongside its purpose of avoiding liquidation of a company.[195] Liquidating CCAAs represent an avenue to achieve these objectives. The "hallmark object" of liquidating CCAAs is to "maximize the realizable value of the debtor's assets for distribution to its creditors."[196]

There are several arguments by legal scholars for the adoption of liquidating CCAAs as the preferred going concern restructuring scheme and the *CCAA* as the preferred mechanism for effecting liquidation of assets. With respect to the former, one argument is that liquidating CCAAs are more efficient in maximizing value compared to traditional restructuring because they avoid the costs associated with negotiating and approving a plan of arrangement.[197] Liquidating CCAAs generate a better return for creditors and, sometimes, manage to keep the business operation alive.[198] In line with this argument, Wood opines that secured creditors might have engineered

[194] *Lehndorff General Partner, supra* note 135 at para 7.
[195] Wood, "Rescue", *supra* note 39 at 407.
[196] Schwill, *supra* note 40 at 1.
[197] Wood, "Rescue", *supra* note 39 at 407.
[198] In a qualitative study of 2012 and 2013 *CCAA* filings, the average returns to creditors in a liquidating CCAAs were 35% compared to 21 percent in traditional restructuring (see Alfonso Nocilla, "Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 *CCAA* Proceedings" (2019) 42:2 Dal LJ 372 at 373 [Nocilla, "Qualitative Outcomes"]).

sale of assets as a better way to accrue more benefit to fulfil the obligations owed to them.[199] Secured creditors would generally prefer liquidation to traditional restructuring because of the cost and time associated with traditional restructuring in addition to the possibility of an unsuccessful restructuring attempt.[200]

Another reason for the shift from traditional restructuring to liquidating CCAAs is the changing nature of business operations which have more "fungible and less firm-specific" assets that can be sold for value coupled with the increased liquidity of capital markets.[201] Increased mergers and acquisition activities mean that the sale of part or the whole of the debtor company's enterprise can be engineered easily.

The *CCAA* may have become a preferred mechanism for liquidating companies as insolvency professionals became averse to using receivership proceedings. A 2006 SCC decision led insolvency professionals to have some grave concerns about their potential personal liability as receivers under successor employer laws.[202] To avoid the assumption of liability by receivers, courts had been making specific declarations that the appointed receiver should not be considered a successor employee. However, the SCC, in *TCT Logistics*,[203] held that the determination of whether a receiver is a successor employee is outside of the jurisdiction of a bankruptcy court

[199] Wood, "Rescue", *supra* note 39 at 409.
[200] *Ibid*. Based on the *CCAA* filings between 18 September 2009 and 31 December 2020, the average time it took to effect a *CCAA* plan was 472 days (see Renner and Forbes, *supra* note 192 at 311). On the other hand, based on the data available for 85 liquidating CCAA filings between 1 October 2009 and 1 May 2021, liquidating CCAAs took an average of 213 days (see Maria Konyukhova and Nicholas Avis, "Trends in *CCAA* Proceedings: A Quantitative Review of a Decade of Data" in Professor Jill Corraini & Justice Blair Nixon, eds, *Annual Rev Insolvency L 2021* (Toronto: Thomson Reuters, 2022) 509 at 537). In *Re Cinram International Inc,* 2012 ONSC 3767 the court approved the sale of assets of the debtor company 17 days after the initial order in the *CCAA* proceeding.
[201] Wood, "Rescue", *supra* note 39 at 408; Douglas G Baird, "Bankruptcy's Undiscovered Country" (2008) 25 Emory Bankr Dev J 1 at 7.
[202] *Ibid*; Wood, *Bankruptcy* supra *note* 3 at 508; Nocilla, "Qualitative Outcomes", *supra* note 198 at 376.
[203] *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc*., 2006 SCC 35 [*TCT Logistics*].

because such jurisdiction resides with the labour relations board.[204] This made the declaration by the court ineffective and as a result, caused a decrease in the use of receiverships, in favour of *CCAA* restructuring proceedings.[205]

The *CCAA* may also just be a better mechanism for effecting assets sales due to the flexibility of the *CCAA* and the wide discretionary powers of a *CCAA* judge in comparison with that of the court-appointed receiver.[206] Such discretionary flexibility includes the ability of the court to authorize third-party releases,[207] preferential payments,[208] among others.

2.6.1 The Challenges With Liquidating CCAAs

Prior to the 2009 amendment of the *CCAA*, a significant challenge concerning liquidating CCAA cases was the ambiguity surrounding the court's jurisdiction to approve such orders. This ambiguity led to varying interpretations among courts across provinces in Canada. Ontario and Quebec courts were more proactive in approving liquidating CCAAs, whereas Alberta and British Columbia courts were less likely to approve sale of assets without an underlying going concern plan.[209] Other major concerns included the circumstances in which the court could approve liquidating CCAAs, and the potential for liquidating CCAAs to prejudicially impact some stakeholders at the same time they benefitted secured creditor. Unlike the jurisdictional issue and considerations to be weighed, the impact on stakeholders received comparatively less attention

[204] The concern about the liability of receivers does not exist anymore due to the 2009 amendment. The introduction of section 14.06(1.2) in the *BIA* expressly excludes receivers or trustees from any form of liability in connection with their appointment (see Wood, *Bankruptcy supra* note 3 at 509).
[205] See Shelly C Fitzpatrick, "Liquidating CCAAs – Are We Praying to False Gods?" in Janis P Sarra, ed, *Annual Rev Insolvency L 2008* (Toronto, Carswell, 2009) 33 at 54-55; Jeffrey C Carhart, "The Decision of the Supreme Court of Canada in TCT Logistics and the Future of Receiverships in Canada" (2007) 44 Can Bus LJ 376 at 397.
[206] See Wood, "Rescue", *supra* note 39 at 413; Nocilla, "Qualitative Outcomes", *supra* note 198 at 376.
[207] See *Skeena, supra* note 156.
[208] See *Air Canada(Re)*, 2003 CanLII 64280 (ONSC).
[209] See Kaplan, *supra* note 40 at 115.

from the courts.[210] Nevertheless, the 2009 amendments aimed to address all these issues by codifying the framework of liquidating CCAAs in section 36 of the *CCAA*. While the codification effectively resolved the jurisdictional question, the criteria guiding the court's approval of *CCAA* sales were not sufficiently robust to protect stakeholders. The discussions below highlight the development and resolution of these issues in detail.

Prior to the 2009 amendments, liquidating CCAAs received a positive welcome in Ontario courts whether or not it was done pursuant to a plan. In *Re Canadian Red Cross Society*,[211] the Ontario Court of Justice approved a sale of substantially all the assets of the company in a *CCAA* proceeding before a plan was presented to the creditors for a vote. On the jurisdiction to make such order, Blair J, as he then was, held that:

> The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan."[212]

Thus, the court relied primarily on what was understood to be the inherent jurisdiction of the court in approving a liquidating CCAA despite the lack of provision for such in the statute.[213] In approving the sale, the court applied a two-part test. One part considered whether the value received from the sale was "fair and reasonable" and whether it is "close to the maximum as is

[210] See Sarra, "Oscillating Pendulum", *supra* note 133 at 24 ("The question in *CCAA* proceedings has been somewhat miscast; courts have been forced to focus on whether they have the authority to approve the liquidation sale presented to them by debtors and their secured creditors, which they do under their broad statutory authority, rather than on whether or not prejudice is occurring by approving such strategies").
[211] *Canadian Red Cross*, *supra* note 183.
[212] *Ibid* at para 43.
[213] Blair J, as he then was, further relied on the flexible state of the *CCAA* and held that "the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the *CCAA* legislation" (see *Ibid* at para 45).

reasonably likely to be obtained for such assets."[214] The second part adopted the four factors laid down in *Soundair*,[215] which courts consider when approving a sale by a court-appointed receiver (the "*Soundair* factors").[216] The factors are:

> (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) the interests of the parties;
>
> (iii) the efficacy and integrity of the process by which offers are obtained; and,
>
> (iv) whether there has been unfairness in the working out of the process.[217]

Given the absence of any explicit direction on liquidating CCAAs in the statute, the court incorporated the test from the receivership process into a *CCAA* proceeding. In *Nortel Networks*,[218] the court held that: "Although the *Soundair* and Crown Trust tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a *CCAA* proceeding." Quebec courts followed suite by either citing,[219] or applying, the *Soundair* factors when considering whether or not to approve a liquidating *CCAA*.[220]

Unlike the approach of the courts in Ontario and Quebec, courts in Alberta were reluctant to sanction a sales plan without a creditor vote. In *Fracmaster*, the Alberta Court of Appeal held

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[214] *Ibid* at para 16.
[215] *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ONCA) [*Soundair*].
[216] *Canadian Red Cross*, *supra* note 183 at para 47.
[217] In *Soundair*, Galligan J.A adopted these factors which were established by Anderson J. in *Crown Trust Co. et al. v. Rosenberg,* 1986 CanLII 2760 (ONSC). These factors were also applied by the court in *Tiger Brand Knitting Co. (Re)*, 2005 CanLII 9680 (ONSC), in considering an application for a going concern sale of the company's assets (see *Soundair, supra* note 215)
[218] *Nortel Networks Corp. (Re)* (2009), 56 CBR (5th) 224 at paras 34-36, 2009 CarswellOnt 4838 (ONSC) [*Nortel Networks*].
[219] *Re Mecachrome Canada Inc*., 2009 QCCS 6355.
[220] See *Rail Power Technologies Corp. (Arrangement relatif á),* 2009 QCCS 2885; Nocilla, "Asset Sales", *supra* note 44 at 230.

that: "Under the *CCAA* the court has no discretion to sanction a plan unless it has been approved by a vote of 2/3 majority in value of each class of creditors."[221] A distinction was made between a *CCAA* proceeding and a receivership; hence the court decided to appoint a receiver for the proposed sale. In *Re 843504 Alberta Ltd*, while refusing a liquidating CCAA application before a formal plan was presented to the creditors, the Alberta Court of Queen's Bench held that Alberta "is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed."[222] Similarly, in British Columbia, courts generally did not grant approvals of sale of substantial assets of a debtor company without an intention to file a plan with creditors in line with the *CCAA* provisions.[223]

However, liquidating CCAAs have now been recognized in the *CCAA* through the 2009 amendments which incorporated section 36 (Restriction on disposition of business assets). This codification put an end to the questions about jurisdiction amongst courts in Canada. According to the Standing Senate Committee on Banking, Trade and Finance, the codification of liquidating CCAAs in section 36 was to provide "substantive direction" to the court and "some guidance regarding minimum requirements to be met" when determining whether a sale of assets in a *CCAA* proceeding should be approved and the requirements to be met for such order.[224] Further to the codification, courts now have express jurisdiction to grant liquidating CCAA orders in varying

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[221] *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para 14 [*Fracmaster*]; Nocilla, "Asset Sales", *supra* note 44 at 231.

[222] *Re 843504 Alberta Ltd.*, 2003 ABQB 1015 at paras 14-15.

[223] See *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 [*Maple Bay*]. This position was however reversed in *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd*., 2021 BCCA 382 [*Port Capital*] (see discussion at 51, below).

[224] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Richard H Kroft) at 146-148 ["Senate Report"].

circumstances: whether a plan is filed or not, on a piecemeal or going concern basis, through pre-packs or court supervised sale process, and "even if shareholder approval was not obtained."[225]

The 2009 amendments also sought to fix the silence in the legislation regarding the circumstances in which the courts may approve *CCAA* sales. Before the 2009 amendment, *Soundair* factors represented the only available guidance on sale of assets in *CCAA* proceedings and courts relied on their discretion to approve them. Section 36(3) of the *CCAA*, added in 2009, identifies factors which the court should consider when approving *CCAA* sales. According to section 36(3) of the *CCAA*, the non-exhaustive factors to be considered by the court in deciding whether to approve a disposition of a company's assets are:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[226]

The factors in section 36(3) are non-exhaustive, but they have been helpful in guiding the courts with liquidating CCAA applications.[227] The *Soundair* factors and those in section 36(3) are similar and overlap in some respect, however the list of considerations in the CCAA is broader and tailored to sale of assets in the context of a *CCAA* proceeding.[228] *Soundair factors* however

[225] The *BIA* has also been utilized in effecting sale of assets of debtor companies. Section 65.13 of the *BIA* contains a similar provision with section 36 of the *CCAA* to authorize courts to approve sale of assets in *BIA* proceedings.
[226] See *CCAA*, s 36(3). See also *Target Canada Co. (Re)* 2015 ONSC 2066 at para 15.
[227] See *Bed Bath & Beyond Canada Ltd.* (Re), 2023 ONSC 2308 at para 10-11; *Canwest Global Communications*, *supra* note 192.
[228] *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para 13.

encourage courts to consider the efficacy, integrity and fairness of the sale process and whether the monitor receiver has tried the best possible means to obtain the best value for the company's assets while acting responsibly.[229]

In addition to the factors which the court should consider when approving *CCAA* sales, section 36 also provides guidance on other issues such as:

a) notice to creditors;[230]

b) consideration for related party transactions;[231]

c) employee considerations; and

d) intellectual property considerations.[232]

Section 36 of the *CCAA* did not address all the concerns with the use of liquidating CCAAs.[233] These concerns revolve around the inadequacy of section 36(3) in highlighting the circumstances in which the court could grant liquidating CCAAs and the inequitable treatment of stakeholders in liquidating CCAA proceedings. These issues still exist and courts have exercised their jurisdiction in dealing with them on a case-by-case basis. For this reason, despite the enactment of section 36(3), courts have typically considered the *Soundair* factors in conjunction with the factors in section 36(3).[234]

The major concern with liquidating CCAAs is the inequitable treatment of parties to the proceeding. Secured creditors have been shown to get more benefits through *CCAA* sales in

[229] *Soundair, supra* note 215.
[230] *CCAA*, s 36(2).
[231] *CCAA*, ss 36(4)-(5).
[232] *CCAA*, ss 36(7)-(8).
[233] See also Fitzpatrick, *supra* note 205 at 7.
[234] Nocilla, "Asset Sales", supra note 44 at 240-241; *Athabasca Workforce Solutions Inc v. Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 22.

comparison with unsecured creditors, including other stakeholders such as trade creditors.[235] A study of *CCAA* filings in 2012 and 2013 showed that unsecured creditors were worse off in value received in liquidating CCAAs compared to traditional restructuring.[236] This issue is even more problematic in pre-pack sales whereby the bulk of liquidating CCAA negotiations happen outside the courtroom and prior to the commencement of the *CCAA* proceeding.[237] Pre-pack sales present the issue of an "insider problem" whereby a select group of creditors are specially incentivized to support a *CCAA* sale to the exclusion of other creditors.[238] Generally, with liquidating CCAAs, creditors are not entitled to a vote, unlike the traditional restructuring framework. Hence, creditors who do not have negotiating leverage or the resources for multiple court actions in the *CCAA* proceedings lose out.[239] This creates an issue of unfairness in the process.[240] In addition to the above, the *CCAA* also lacks the provision for a detailed distribution framework and priority ranking with respect to the proceeds of the sale of assets, where there plan does not provide for such or where there is no plan. [241]

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[235] 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 Rev Insolvency L 2016* (Toronto: Thomson Reuters, 2017) 347 at 373-381.

[236] Secured creditors received 72% of debt obligations owed to them in liquidating CCAAs, and 54% in traditional restructuring proceedings under the *CCAA*. Unsecured creditors on the other hand received 41% in liquidating CCAAs, compared to 56% in traditional restructuring (see *Ibid* at 387).

[237] Matthew Nied & Natalie Levine, "Pre-Packaged Sales Transactions under the CCAA: Where Are These Packages From, What Do They Look Like and Where Are They Going?" in Janis P Sarra & Honourable Barbara Romaine, eds, *Annual Rev Insolvency L 2016* (Toronto: Thomson Reuters, 2017) 89 at 118; Nocilla, "Qualitative Outcome", *supra* note 198 at 379.

[238] Weerasooriya, *supra* note 235 at 373-376.

[239] Nocilla, "Qualitative Outcome", *supra* note 198 at 379.

[240] As Sarra noted, "[w]hile "fairness" permeates Canadian insolvency law and practice, there has been a noticeable shift away from a substantive notion of fairness to one that is largely procedural. An example is found in current sales processes" (see Sarra, "Oscillating Pendulum", *supra* note 133 at 27).

[241] Where there is no plan to cater for distribution of proceeds, the debtor company will commence a bankruptcy or receivership proceedings to utilize the distribution framework in the *BIA* (see Nocilla, "Qualitative Outcome", *supra* note 198 at 378; Schwill, *supra* note 40 at 6).

Section 36 of the *CCAA* combined with section 11 of the *CCAA* have made liquidating CCAAs a standard practice in Canada's restructuring landscape. In *Nelson Education Ltd., Re*, the court held that "[l]iquidating *CCAA* proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada." [242] Even though liquidating CCAAs primarily benefit secured creditors, they have been interpreted to align with the remedial purpose of the *CCAA*, both when the business is still in operation as a going concern under a new ownership and when the business has ceased to exist through piecemeal liquidation. In British Columbia, the courts noted that "in some instances, a liquidation may turn out to be the best way to avoid the "social and economic cost" attendant upon an insolvency."[243] A similar justification for liquidating CCAAs has been adopted by Alberta courts.[244] Thus, although the primary focus of the *CCAA* is on the survival of the business of the debtor company, they can also be used to maximize the value of the debtor company's assets, where rehabilitation of the company is not feasible.

In *Bluberi,* the SCC expanded the umbrella of the remedial purpose of the *CCAA* to include five objectives which are: a) providing for timely, efficient and impartial resolution of a debtor's insolvency; b) preserving and maximizing the value of a debtor's assets; c) ensuring fair and equitable treatment of the claims against a debtor; d) protecting the public interest; and, e) in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.[245] Furthermore, the SCC noted that the *CCAA* has evolved to permit mechanisms that result in the termination of the business the debtor company through liquidation.[246]

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[242] 2015 ONSC 5557 at para 32.
[243] *8640025 Canada Inc. (Re),* 2018 BCCA 93 at para 45.
[244] See *Sanjel Corp. (Re)*, 2016 ABQB 257.
[245] *Bluberi, supra* note 34 at para 40.
[246] The SCC held that the *CCAA* "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress…" (see *Bluberi*, *supra* note 34 at para 42, citing Sarra, *Rescue supra* note 3 at 14; *Essar Global, supra* note 48 at para 103).

Liquidating CCAAs have become the preferred strategy amongst debtor companies, largely eradicating the practice of compromise and arrangement as provided for in the statute.[247] A quantitative analysis of *CCAA* cases showed that 64 percent of *CCAA* proceedings initiated in 2012 were liquidating CCAAs while in 2013, that statistic increased to 67 per cent.[248] Another study that examined *CCAA* proceedings initiated between 1 January 2014 and 1 November 2016 showed that 78 per cent were liquidating CCAAs.[249] Thus, in most *CCAA* proceedings, the debtor never actually formulates or files a plan for the purpose of reorganisation. Instead, debtor companies use the *CCAA* proceedings as a mechanism to effect a sale of all or part of their business assets, as a going concern or otherwise. A plan is sometimes developed after the sale to effect distribution of the proceeds to creditors. In *Port Capital*,[250] the B.C. Court of Appeal, reconsidering the decision in *Maple Bay*,[251] held that in light of the broad remedial nature of the *CCAA* in restructuring financially distressed companies, the intention to propose a plan is no longer a requirement for a *CCAA* order.[252]

2.7 Conclusion

The *CCAA* has continually evolved based on commercial pragmatism. Accordingly, the *CCAA* has enabled courts to develop and grant discretionary orders to "meet contemporary business and social needs."[253] Liquidating CCAAs are one example of these pragmatic judicial innovations and they illustrate how supervising judges in *CCAA* proceedings resolve restructuring

[247]Between 1 January 2012 and 31 December 2013, across provinces in Canada, there were 50 proceeding which facilitated a sale of assets and 18 proceedings which facilitated traditional restructuring (see Nocilla, "Qualitative Outcomes", *supra* note 198 at 385).
[248] *Ibid.*
[249] Sarra, "Oscillating Pendulum", *supra* note 133 at 20.
[250] *Port Capital*, *supra* note 223.
[251] *Maple Bay*, *supra* note 223.
[252] In *Maple Bay*, the court took a restrictive interpretation to the *CCAA* stay order and held that to obtain such order, the debtor company must have the intention of proposing a plan to its creditors for a vote.
[253] Jones, *supra* note 32 at 519.

issues through a solutions-oriented model.[254] Based on the analysis in this chapter, the *CCAA* has evolved from its initial purpose at the point of enactment (for the benefit of bondholders, particularly secured creditor) to the redefined purpose of the *CCAA* in the 1980s and 1990s (remedial objective as a going concern), and now to a broad combination of the remedial objectives using a solutions-oriented model, which is the hallmark of the five objectives of the *CCAA* established in *Bluberi*.[255]

Another phase of evolution in the *CCAA* is the use of RVOs as a restructuring scheme. The use of RVOs, similar to initial practice of liquidating CCAAs, has been administered through judicial discretion towards the remedial restructuring goal of the *CCAA*. Chapter three will examine the substance of RVOs, their history, adoption in light of the established remedial purpose of the *CCAA*, and the challenges that exist due to its administration by the court's discretion.

[254] Virginia Torrie, "Implications of the Bluberi Decision: An Affirmation of Broad Judicial Discretion in *CCAA* and a "Green Light" for Litigation Funding in Canada" (2021) 36:2 BFLR 270 at 290 [Torrie, "Bluberi Decision"].
[255] See the text accompanying note 245.

CHAPTER 3: REVERSE VESTING ORDERS: THE NEW DAWN OF RESTRUCTURING FINANCIALLY DISTRESSED COMPANIES IN CANADA

3.1 Introduction

The wide acceptance of diverse forms of liquidating CCAAs marked an evolution in Canadian corporate restructuring which is now concerned with the survival of the business of the debtor company, as opposed to the survival of the corporate form of the debtor company.[256] In *Metcalfe & Mansfied*,[257] Justice Campbell held that "restructuring may take any number of forms, limited only by the creativity of those proposing the restructuring." This evolution furthers the remedial objectives of the *CCAA* using a solutions-oriented approach.[258] Thus, courts are able to develop and implement "new and creative remedies" to restructure financially distressed corporations to further the remedial objective.[259] Following the "paradigm shift" of *CCAA* sales without approval of a plan as a dominant means of restructuring in Canada, RVOs have evolved to be potentially another new and creative remedy to for financially distressed companies.[260]

Positioned as a potentially groundbreaking tool for corporate reorganization, RVOs have garnered considerable attention since 2020.[261] RVOs represent an alternative to liquidating CCAAs. A potential drawback of a *CCAA* sales process is the requirement for a transfer of valuable assets from the debtor company to the purchaser and the subsequent liquidation of the debtor

[256] *Bluberi*, *supra* note 34 at paras 41-43, 45-46; Sarra, "Toolkit", *supra* note 133 at 8.
[257] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 42 C.B.R. (5th) 90 at para 43, 2008 CarswellOnt 2652 (ONSC) [*Metcalfe & Mansfied*].
[258] *Century Services, supra* note 7 at para 60.
[259] *Metcalfe & Mansfied*, *supra* note 257 at para 43.
[260] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at paras 25-27 [*Third Eye*]; see also Perreault, Faure & Toupin, *supra* note 8 at 1.
[261] A data study showed a surge in RVO transactions in 2020, and an increasing usage in 2021 (see Konyukhova & Avis, *supra* note 200 at 539).

company.[262] A liquidating CCAA sale typically entails the assignment of contracts, transfer of various types of assets alongside the embedded rights and liabilities, payment of transfer taxes, and eradication of tax attributes in the debtor company and non-transferable licenses and permits (in the event the debtor company operated in a regulated industry such as cannabis, telecom, energy, among others).[263] The loss of licenses is usually a significant drawback for debtor companies in regulated industries, where the license is one of the most valuable assets to a potential purchaser. Such industries include cannabis, telecommunications, mining, among others,

In contrast, RVO transactions involve the purchaser acquiring the shares of the debtor company instead of its assets.[264] In this scenario, all desired assets for acquisition remain with the distressed company as part of the restructured entity. Assets, liabilities, and encumbrances that the purchaser cannot assume are vested in and transferred to a newly established company, which becomes the applicant under the *CCAA* and undergoes winding down procedures. Essentially, the reverse vesting transaction enables an acquirer to obtain purchased assets free and clear of responsibilities, except assumed commitments, mirroring the benefits usually only available in an asset sale transaction.[265] RVOs address the aforementioned drawback of a *CCAA* sales process. While that drawback could be avoided through a *CCAA* plan of arrangement, secure creditors and the company would be required to engage junior creditors to meet the required statutory threshold for a successful plan.[266] RVOs are a means to cut out the requirement for a *CCAA* plan while maintaining the corporate structure of the debtor company.[267]

[262] Armstrong, *supra* note 39 at 2.
[263] *Ibid*.
[264] Wiffen, *supra* note 10 at 170-171.
[265] *Ibid*.
[266] Armstrong, *supra* note 39 at 5.
[267] *Ibid.*

The analysis of RVOs in this chapter advances the central argument of this thesis, which is that RVOs are an important restructuring tool, but their current use is plagued by issues that could be ameliorated by codifying the RVO process into the *CCAA* and *BIA*. This chapter elucidates the origin of RVOs as well as their nature, benefits, typical structure, and components. After discussing the process of an RVO transaction and the origin of RVOs in Canada, this chapter analyses RVOs in three parts: the first part examines the jurisdiction of the court to grant RVOs in *CCAA*, NOI and receivership proceedings; the second part discusses the considerations the court has made to approve or reject RVO applications in each of these distinct proceedings; and the third looks into the challenge of treatment of stakeholders and contractual counterparties in a RVO proceedings. The analysis in these sections heavily relies on case law to draw out the reasoning of the court with respect to RVOs in different circumstances.

RVOs have been approved by courts, relying on their discretionary power to go beyond the remedies specifically contemplated in the *CCAA* and *BIA*. Recall that judicial discretion can either be based on inherent jurisdiction or statutory discretion.[268] Courts have held that statutory discretion in *CCAA* proceedings should be exercised in accordance with the remedial purpose of the Act.[269] Courts have also held that NOI proceedings have a similar remedial objective.[270] Inherent jurisdiction on the other hand should be used by the court to fill in a "functional gap or vacuum" in the statutes.[271] As will be further discussed below, the form of proceeding, whether *CCAA*, NOI or receivership, has an impact on the source of discretionary authority to grant RVOs.

[268] For more discussion on statutory discretion and inherent jurisdiction, see Section 2.5, above.
[269] *Bluberi*, *supra* note 34 at 49, citing *Century Services, supra* note 7 at 69-70.
[270] In *Century Services*, the court held "[p]roposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility" (see *Century Services*, supra note 7 at para 15).
[271] See *Royal Oak Mines, supra* note 148 at para 4.

While courts have provided the basis for their exercise of discretion to grant RVOs in these various proceedings, the reasons for some are more sufficient than others.

Courts have also relied on diverse considerations and factors in the determination of whether or not to grant RVOs. This inconsistency has played a part in the unfair and inequitable treatment of stakeholders who may be affected by the RVO with respect to a debtor company. The inconsistencies and challenges with RVOs highlighted in this chapter set up the argument for codification of the RVO framework in the *CCAA* and *BIA* in chapter four.

3.2 Overview of the RVO Transaction Process

At the heart of an RVO transaction is the purchaser's acquisition of shares in the debtor company and the cleansing of the debtor company from some or all liabilities to ensure the debtor company is able to thrive as a going concern. Like *CCAA* sales, RVO transactions can be completed by a prepack agreement or through a court supervised SISP. The debtor company and the purchaser (in many cases, an existing secured creditor) must reach an agreement to initiate the transaction. Customization is integral to each RVO-based sale, tailoring it to the specific transaction requirements. A restructuring transaction utilizing an RVO involves the signing of a definitive agreement by the buyer, seller of acquired shares, and affected debtor firms.[272] This agreement outlines essential specifics, including the entity whose shares will be acquired, share volume, retained assets, excluded assets, retained liabilities, excluded liabilities, among others.[273] The debtor company then applies to the court for an RVO to authorize the share transfer agreement and the necessary vesting and restructuring procedures.

[272] Michelle Pickett and Linc Rogers, "The Business Side of Reverse Vesting Orders" in Professor Jill Corraini & Honourable Blair Nixon, eds, *Annual Rev Insolvency L 2021* (Toronto: Carswell, 2022) 415 at 419-420.
[273] *Ibid*.

As soon as the order is granted by the court, the involvement of an entity, often termed "Excludedco" or “Residualco” comes into play. The excluded assets and liabilities of the debtor company are transferred and vested in the Excludedco which then becomes an applicant in the *CCAA* proceedings.[274] Simultaneously, the acquired entity (the debtor company) is released from the excluded liabilities and encumbrances. Upon completion, the debtor company exits the *CCAA* proceedings in a restructured form, and the acquirer assumes ownership of its shares. The debtor company is relieved of obligations and encumbrances, except those designated as “Retained Liabilities” in the agreement. Ultimately, after the RVO transaction, the debtor company emerges unburdened from distressful liabilities that led to its insolvency, while the Excludedco remains an applicant in the *CCAA* proceedings, and undergoes a winding up and liquidation process.

The implications of RVOs are multifaceted. Generally, courts have exercised their discretion to approve RVOs because they preserve the business of the debtor company as a going concern in accordance with the remedial objective of the *CCAA* and *BIA*. An RVO transaction optimizes the value of the debtor company’s assets by retaining the corporate structure, and valuable assets which are inextricably tied to the corporate structure. Through this process, RVOs contribute to the continuity of business operations, serving to preserve jobs and sustain economic activity.[275] Another notable advantage of RVOs is the efficiency of restructuring by limiting the procedural steps, time and money required in contrast with a plan of arrangement.[276] Pursuant to the RVO granted by the court, the transaction can be implemented without any further input from stakeholders or creditors. A *CCAA* plan is comparatively more expensive due to the cost of

[274] Wiffen, *supra* note 10 at 171-172.
[275] *Ibid.*
[276] *Ibid* at 185.

professional services required to prepare a plan and present it to creditors for a vote.[277] Moreover, the RVO process preserves non-transferable licenses, permits, intellectual property, and tax features, all of which retain value for the debtor.[278] This benefit of RVOs is particularly relevant for debtor companies operating in highly regulated environments. Perhaps the most enticing attribute of an RVO transaction is it enables the purchaser to "cherry pick" asset and assumed liabilities in the debtor company while disposing the unwanted assets and liabilities to another entity.[279]

Secured creditors are often pivotal in initiating RVOs as the proposed purchasers of the debtor company. The RVO transaction mitigates risks to the purchaser associated with inherited liabilities.[280] Secured creditors are also able to negotiate with the debtor company and other creditors from a position of strength to determine what assets or liabilities will be excluded and what will be retained.[281] This out-of-court workout procedure effectively replaces the meeting of creditors provided by the CCAA; unfortunately to the detriment of junior creditors. The debt interest of junior creditors considered "out of money" may be wiped out given their non-participation in the negotiation process, receiving zero cents on the dollar. This is contrary to what would typically occur during a traditional *CCAA* plan of arrangement which encourages a

[277] In *Beleave*, an RVO was sought because the debtor company did not have sufficient money to fund a CCAA plan (see *Re Beleave Inc* et al (17 September 2020), Toronto CV-20-00642097-00CL (ONSC) (Fourth Report of the Monitor at paras 13-14) [*Beleave*]). See also *Green Relief Inc. (Re)* 2020 ONSC 6837 at para 44 [*Green Relief*].
[278] Pickett and Rogers, *supra* note 272 at 415.
[279] This feature also trickles down to subsidiaries of the parent company which can be cleansed from any unwanted assets and liabilities prior to acquisition (see *Re Comark Holdings Inc et al* (8 July 2020), Toronto CV-20-00642013-00CL (ONSC) (Second report of the monitor at para 5.11) [*Comark*]; Wiffen, *supra* note 10 at 190).
[280] Sarra, "RVOs", *supra* note 11 at 2.
[281] This is usually because of their large interest in the company's indebtedness coupled with their financial capability and willingness to acquire the company in comparison with other limited or zero options available to the company at the point of insolvency.

distribution of some form of value in the debtor company to all classes of creditors to secure their votes.

Monitors in a *CCAA*-based RVO proceedings are important given the extensive amount of negotiations than occur out of the court room. Monitors serve as the eyes of the court throughout the proceedings, and are tasked with providing the court with periodic updates and assessment of the proceeding as well as advice in their professional capacity. RVOs typically entail complex forms of restructuring, with multiple agreements with counterparties, the complexity of which depends on the size of the company, level of indebtedness, among other factors. Courts thus require Monitors to provide a bird's eye view of the entire state of the debtor company's financial distress.

3.3 Origin of RVOs in Canadian Restructuring Jurisprudence

The historical development of RVOs can be traced by examining preceding cases; this historical perspective provides insight into the foundational principles, judicial rationale, and surrounding circumstances that shaped the courts' acceptance of RVOs as an effective tool for corporate restructuring. The origins of RVOs can be identified in significant court rulings where legal experts navigated the complexities of corporate reorganization during times of economic hardship. Though each case may present unique details, recurring themes arise, including the necessity of safeguarding the value of struggling businesses, reconciling the competing interests of various stakeholders, and devising sustainable strategies for moving forward.

Some authors have referred to the restructuring proceedings of T. Eaton Company Limited, in 2000, as the birth of RVO transactions in Canada's corporate restructuring history. In the case of *Eaton*, a *CCAA* proceeding, the debtor company entered into a share purchase agreement with Sears Canada Inc, whereby the latter would acquire all issued and outstanding shares of the debtor

company.[282] Further to this agreement, a *CCAA* plan of arrangement was filed by the debtor company which involved the transfer of all unwanted assets to a newly incorporated company, "Distributionco", the liquidation of Distributionco, and the distribution of the proceeds to the unsecured creditors – a typical RVO transaction structure.[283] Farley J however refused to approve the plan without a *CCAA* vote by the creditors to make the process "fair, reasonable and objective in the circumstance."[284] Thus, the transaction was approved and effected through a *CCAA* creditors' meeting with the required voting threshold.

The first adoption of an RVO in Canada was in 2015 in the case of *Plasco Energy*.[285] In this case, Plasco was unable to propose a plan of arrangement due to shortage of funds, and lack of interim financing; hence, the RVO transaction structure. After a failed SISP, there was a global settlement agreement between the debtor company and the secured creditors whereby all the shares of Plasco were transferred to an acquisition company collectively owned by the secured creditors.[286] Plasco, now acquired by the secured creditors, retained certain assets, including the intellectual property and tax losses, while the other unwanted assets were transferred to another newly incorporated entity called "New Plasco" which became an applicant in the *CCAA* proceeding.[287] Through the RVO structure, Plasco was owned and controlled by the secured creditor, free from any unwanted asset or liability and able to continue business operations as a going concern.

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[282] *Re T. Eaton Co*., 2000 CarswellOnt 4502, 26 CCPB. 295 (ONSC) (Appendix A at paras 2-5) [*Eaton*].
[283] *Ibid* at paras 5-6.
[284] *T. Eaton Co., Re*, 1999 CanLII 15025 (ONSC) at para 5.
[285] *Re Plasco Energy Group Inc et al* (17 July 2015), Toronto CV-15-10869-00CL (ONSC) (Settlement Approval Order) [*Plasco Energy*].
[286] *Re Plasco Energy Group Inc.* (14 July 2015), Toronto CV-15-10869-00CL (ONSC) (Affidavit of Randall Benson at paras 6-7) [*Benson affidavit*].
[287] *Ibid* at para 28.

The next use of an RVO transaction happened in 2019 in the restructuring of Stornoway Group. The SISP produced only one offer, the sum of which was insufficient to pay the obligations owed to certain secured creditors.[288] The secured creditors then made a bid for the purchase of assets of the debtor company using an RVO transaction.[289] This bid offered better consideration than the SISP offer and the court was satisfied that the transaction was in the best interest for the stakeholders.[290] Through the implementation of the RVO, Stornoway was able to continue operation of its mine as a going concern, preserve jobs, pay the assumed liabilities of certain creditors and preserve its tax attributes.[291] Subsequently after the use of RVO in this case, there was an increased interest in the use of RVOs in restructuring proceedings. The numerous advantages of RVOs became recognized by debtor companies and insolvency practitioners and courts were willing to approve the order.[292] RVOs were subsequently obtained to preserve and efficiently acquire tax attributes and intangible assets,[293] transfer cannabis licenses,[294] and to complete restructuring transactions on an expedited basis.[295]

3.4 Jurisdiction of the Court to Approve RVOs

This section examines how courts have exercised judicial discretion when interpreting their authority to grant RVOs. Certainty of the court's authority when approving a particular order is

[288] *Re Stornoway Diamond Corp*. (30 September 2019), Montréal 500-11-057094- 191 (QCCS) (Motion seeking: (I) extension of the stay of proceedings; (II) amendment and restatement of the initial order; and (iii) leave to enter into the participating Streamers/Diaquem transaction with issuance of an approval and vesting order and ancillary relief at paras 1-2) [*Stornoway Motion*].
[289] *Re Stornoway Diamond Corp.* (September 30, 2019), Montréal 500-11-057094-191 (QCCS) (Joint memorandum of argument at paras 12-13).
[290] *Ibid*.
[291] *Stornoway Motion*, *supra* note 288 at para 38.
[292] Perreault, Faure & Toupin, *supra* note 8 at 9.
[293] *Comark, supra* note 279.
[294] *Re Wayland Group Corp.* (21 April 2020), Toronto CV-19-00632079-00CL (ONSC); *Green Relief, supra* note 277; *Re Tidal Health Solutions Ltd* (20 November 2020), Montréal 500-11-058600-202 (QCCS); *Beleave, supra* note 277.
[295] *Re Salt Bush Energy Ltd et al* (19 May 2021), Calgary 2101-06512 (ABQB).

necessary for the benefit of the Canada's restructuring jurisprudence and also stakeholders and players in restructuring proceedings. The source of authority the court is relying on, whether statutory discretion or inherent jurisdiction, determines the extent to which the court can exercise its discretion. Thus, in approving any order, including RVOs, it must be clear to all parties, including the judge that the court has jurisdiction to make such order and where that jurisdiction emanates from.[296] To provide a robust RVO framework, any form of inconsistency or ambiguity with respect to the court's jurisdiction is problematic and must be resolved.

RVOs have been granted in *CCAA*, NOI and receivership proceedings; three distinct forms of proceedings in Canadian insolvency law. The courts have also provided varying reasonings for their jurisdiction in these proceedings. In a large number of RVO applications, the courts have failed to provide any reasoning on their jurisdiction, but approved the RVO applications based on precedential approval. Although the reasoning provided by the courts so far have not been sufficient, this thesis examines the few major pronouncements to draw out the issues with respect to the jurisdiction of the court in granting RVOs.

3.4.1 Jurisdiction Under the *CCAA*

There is no statutory provision in Canada that specifically grants courts authority to grant RVOs. The increasing usage of RVOs has prompted inquiries about whether courts have such authority. In *Plasco Energy*, the first case of RVO usage, the court did not provide much commentary on its jurisdiction to grant an RVO other than stating that it has "authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement

[296] See Jackson & Sarra, *supra* note 30 at 42.

or compromise."[297] Following the decision in *Plasco Energy* and *Stornoway*, courts consistently approved RVOs without any analysis as to their jurisdiction to grant them. This lack of analysis of jurisdiction may be attributable to the fact that the RVO applications were uncontested, or at least, were uncontested until the restructuring proceeding of *Nemaska*.

In *Nemaska*, an unsecured creditor and certain shareholders challenged the jurisdiction of the court to grant RVOs without a vote of creditors on a plan of arrangement.[298] Despite the objection, the court granted the RVO, and found jurisdiction to do so in section 36(1) of the *CCAA* and the broad statutory discretion under section 11 of the *CCAA*.[299] The court took a broad interpretation of section 36(1) by holding that the phrase "sell or otherwise dispose of assets outside the ordinary course of business" involves a wide range of methods in disposing assets including by way of an RVO transaction.[300] The court further held that the creditors do not have a right to vote on the RVO agreement, because it is an application under section 36.[301] Thus, only the approval of the court is required, and before granting such approval, courts should consider the discretionary non-exhaustive factors in section 36(3) of the *CCAA*.

Following *Nemaska,* Justice Fitzpatrick of the British Columbia Supreme Court ruled in *Quest University* that the *CCAA* gives considerable authority to grant RVOs under sections 11 and 36 of the *CCAA*, even in the face of creditor opposition.[302] In addition, the court noted that there

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[297] *Re Plasco Energy Group Inc et al* (17 July 2015), Toronto CV-15-10869-00CL (ONSC) (Endorsement of Wilton-Siegel J at para 5) [*Plasco Energy Endorsement*].
[298] *Nemaska, supra* note 14.
[299] The Quebec Court of Appeal denied the application for leave to appeal and noted that section 11 of the CCAA grants the court with wide discretionary powers to implement innovative solutions in restructuring proceedings on a case-by-case basis (see *Nemaska Leave*, *supra* note 14 at para 15, 19, citing *Bluberi*, *supra* note 34 at paras 38-52, 67-68).
[300] *Nemaska, supra* note 14 at para 71. The Quebec Court of Appeal also confirmed this position in denying leave to appeal (see *Nemaska Leave, supra* note 14 at para 19).
[301] *Nemaska, supra* note 14 at para 85.
[302] *Quest University*, *supra* note 14 at paras 153-157, 168, 170 and 172. See also *Clearbeach Resources Inc. (Re)*, 2021 ONSC 5564 at para 24 [*Clearbeach*] (The Ontario Superior Court of Justice also gave credence to the view that RVOs can be approved pursuant to sections 11 and 36 of the *CCAA*).

is no provision is the *CCAA* restricting it from approving RVOs.[303] In *Quest University*, the debtor company intended to implement the acquisition of shares by the purchaser through a *CCAA* plan of arrangement. Acquisition of the entire corporate structure was important because the authority granted to the debtor company to award degrees was an integral part of its business model. However, pursing a plan of arrangement process would have given a particular aggrieved creditor, Southern Star, veto power during the creditor vote, making creditor approval unattainable.[304] To avoid a creditor vote, the debtor company applied for an RVO to implement the acquisition. Justice Fitzpatrick approved the RVO application noting that the *CCAA* supports broad statutory discretion for "innovative solutions" in line with the overarching remedial purpose of the *CCAA* to avoid the "social and economic losses resulting from liquidation of an insolvent company."[305]

Despite the supposed consensus amongst courts on the jurisdiction to grant RVOs in earlier *CCAA* proceedings, it is inappropriate for courts to ground their jurisdiction for approving RVOs in section 36 of the *CCAA* (a statutory amendment specifically crafted to ensure courts has jurisdiction to approve *CCAA* sales). This is because RVOs are fundamentally different from CCAA sales. The key aspect of an RVO transaction is the acquisition of shares for consideration and the transfer of unwanted assets or liabilities to another entity is a byproduct of such acquisition. Thus, grounding jurisdiction in section 36 to approve RVOs is equivalent to the court acting out of jurisdiction. The adoption of section 36 as a jurisdictional basis seems to be a makeshift adoption by the court in approving RVO applications.

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[303] *Quest University*, *supra* note 14 at para 157.
[304] *Ibid* at paras 118–120, 124–125.
[305] *Ibid* at paras 66, 153, citing *Century Services, supra* note 7 at para 70. In rejecting the leave to appeal, the British Columbia Court of Appeal stated that the RVO approval "reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings" (see *Quest University Leave, supra* note 14 at para 32).

Not all courts are satisfied that section 36 of the *CCAA* gives them the authority to grant RVOs. In *Harte Gold,* the court distinguished a *CCAA* sale of assets from an RVO transaction.[306] Justice Penny held that: "the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities".[307] Whilst determining that section 36(1) may not be an appropriate foundation for the court's jurisdiction in RVO proceedings (contrary to the position in *Nemaska*, *Quest University* and *Clearbeach*), Justice Penny concluded that section 11 provides the court with the requisite jurisdiction to grant RVOs.[308] Unfortunately, a conclusive determination was not made about the jurisdiction of section 36(1) of the *CCAA* for RVOs. Justice Penny held as follows: "I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day…" and that "s. 36 may not support a standalone basis for jurisdiction in an RVO situation."[309]

The statutory discretion provided by section 11 of the *CCAA* has been established as a valid basis for the court's jurisdiction in approving RVOs in *CCAA* proceedings. The implication of reliance on statutory discretion is that RVOs must be in accordance with the remedial objectives of the *CCAA*.[310] In addition, such discretion must be exercised with the "baseline considerations" of appropriateness, good faith and due diligence.[311] Unfortunately, the ambiguity regarding the

[306] *Harte Gold* is a significant case in RVO jurisprudence in Canada because of the guidance provided on the appropriateness of RVOs and the specific considerations for the court to assess before approving RVOs, even in uncontested applications (see *Harte Gold, supra* note 15).
[307] *Ibid* at para 36.
[308] *Ibid* at para 37.
[309] *Ibid*.
[310] *Harte Gold*, *supra* note 15 at para 32.
[311] *Ibid*; *Bluberi*, *supra* note 34 at para 49-51, citing *Century Services*, *supra* note 7 at para 69-70.

applicability of section 36(1) as a valid jurisdictional basis for RVOs remains a grey area in Canadian restructuring jurisprudence.[312] Interestingly, even though courts that have expressed sentiment against section 36 as a jurisdictional basis, they have consistently adopted the considerations set out in section 36(3) of the *CCAA* in determining whether or not to grant an RVO. This issue is further discussed section 3.5 below.

3.4.2 Jurisdiction in NOI Proceedings Under the *BIA*

RVOs have not been restricted to *CCAA* proceedings but have been granted under the *BIA* in NOI proceedings. While there is no equivalent of section 11 of the *CCAA* in the *BIA*, section 183(1) of the *BIA* has been interpreted by the court to grant the court with discretionary authority based on inherent jurisdiction.[313] Section 183(1) of the *BIA* governs the jurisdiction of the court and it provides that courts are "invested with such jurisdiction at law and in equity as will enable them to exercise original, *auxiliary and ancillary jurisdiction* in bankruptcy and in other proceedings authorized by this Act" [emphasis added]. Based on this interpretation, in NOI proceedings, courts can rely on their inherent jurisdiction make orders to "control its own process in order to promote the objects of the *BIA*."[314]

Earlier RVO cases in NOI proceedings did not identify any basis for the court's jurisdiction to approve RVOs. The first case in which an RVO was approved in an NOI proceeding was in

[312] Immediately after *Harte Gold*, the Superior Court of Quebec followed similar reasoning to ground jurisdiction in only section 11 of the *CCAA*. However, the court also failed to provide substantial commentary on the applicability of section 36 of the *CCAA*. According to the court, "[e]ven if this type of transaction was not contemplated by section 36 of the *CCAA*, section 11 could clearly step in as a basis for the Court's jurisdiction" (see *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at paras 35-36, 94 [*Blackrock Metals*]).

[313] *Re Pope & Talbot Ltd*, 2009 BCSC 1552 at para 123-126 [*Pope & Talbot*]; *Canada (Attorney General) v. Richter Advisory Group Inc.*, 2023 QCCA 1295 at para 57 [*Chronometriq*]; Watson, Monczka & Schultz, *supra* note 175 at 723-724.

[314] *Pope & Talbot, supra* note 313 at para 126.

Junction Craft Brewing.[315] The court found that the debtor company did not meet the $5,000,000 in claims threshold of the *CCAA* and an RVO was necessary to continue business as a going concern. While the court did not rely on any specific provision in the *BIA*, the court noted that: "[A]lthough an RVO has not been issued in the context of NOI proceeding before, I am satisfied that I have the jurisdiction to approve one."[316] In the subsequent NOI Proceeding of *Ayanda Cannabis Corporation*, the court granted an RVO but made no comments on its jurisdiction to grant such order under the *BIA*.[317] It did consider the *Harte Gold* test (discussed below) and determined that it was satisfied.[318]

In the NOI proceeding of *Payslate*, the court recognized the jurisdiction of courts to grant RVOs under the *BIA* in section 183, albeit without an exhaustive explanation.[319] Justice Walker cited the recognition of the court's inherent jurisdiction in *BIA* proceedings in *Olympia & York*,[320] where the court held that the court in NOI proceedings "has inherent jurisdiction to deal with any vacuum in the legislation so as to give purpose to the bankruptcy regime." Justice Walker noted that this purpose "includes those applying to proposals such as s. 65.13(4)" (Section 65.13(4) of the *BIA* is a mirror provision of section 36(3) of the CCAA).[321]

Following the decision in *Payslate*, the Quebec Superior Court released the court's first analysis of its jurisdiction to approve RVOs in NOI proceedings in *Brunswick Health*.[322] In *Brunswick Health,* the court acknowledged that section 65.13(1) of the *BIA* (which is a mirror

[315] *Junction Craft Brewing, supra* note 16.
[316] *Ibid* at 5.
[317] *Re Ayanda Cannabis Corporation* (1 March 2022), London BK-22-02802344-0035 (ONSC) (Endorsement of Conway J at para 1).
[318] See Section 3.5, below.
[319] *PaySlate Inc. (Re),* 2023 BCSC 608 at para 85-86 [*Payslate]*.
[320] *Re Olympia & York Developments Ltd*., 1997 CanLII 12400 (ONSC) at paras 7, 10.
[321] *Payslate, supra* note 319 at 85.
[322] *Brunswick Health*, *supra* note 17.

provision of section 36(1) of the *CCAA*) is an insufficient basis of jurisdiction for the court to grant RVOs in a *BIA* proceeding. This acknowledgment relied on the previous negative commentary from courts, rejecting section 36(1) as an appropriate basis for granting RVOs in *CCAA* proceedings.[323] According to the court, reference has to be made to an authority in the *BIA* which is comparable to the wide powers granted to courts under section 11 of the *CCAA*. Relying on the decision of Justice Schrager in *Chronometriq*,[324] the court found that the inherent jurisdiction of the court pursuant to section 183 of the *BIA* is similar to section 11 of the *CCAA*.[325] In addition, the court in *Brunswick Health* noted the observation of Justice Schrager that "[t]he proposal provisions in the *BIA* serve, inter alia, the same remedial purpose as those in the CCCA – i.e., the financial rehabilitation of an insolvent corporate debtor" and that "to the extent possible, the two statutes should be treated in a harmonized fashion."[326] Based on the pronouncement in *Payslate*, *Chronometriq* and "the similarity between s. 65.13 *BIA* and s. 36 *CCAA*," the court came to the conclusion that judicial discretion can be exercised to approve RVOs in NOI proceedings pursuant to section 183 of the *BIA*.[327]

Based on the reasoning of the court in *Brunswick Health*, there's a similarity between the reasoning for the jurisdiction for RVOs in NOI matters and the approach of the courts in earlier *CCAA* proceedings which conflated inherent jurisdiction with statutory discretion.[328] Recall that judges in earlier *CCAA* proceedings claimed to have exercised inherent jurisdiction in granting orders not provided for in the *CCAA*. This position was later interpreted to be statutory discretion

[323] See *Harte Gold,* supra note 15 at para 36; *Blackrock Metals,* supra note 312 at para 94.
[324] *Chronometriq, supra* note 313 at paras 56-57.
[325] *Brunswick Health*, *supra* note 17 at para 48.
[326] *Ibid* at para 48; *Chronometriq*, *supra* note 313 at para 46.
[327] *Brunswick Health*, *supra* note 17 at para 51.
[328] See the discussion at 33, above.

because Parliament must have intended the courts to exercise such authority.[329] It sems like such is the situation with RVOs in NOI proceedings. If indeed the phrase "auxiliary and ancillary jurisdiction in bankruptcy" grants discretion to make orders beyond the statute, then the legislature must have intended it and such would be equivalent to statutory discretion, and not inherent discretion.

As discussed above, clarity with respect to the jurisdiction of the court, whether inherent jurisdiction or statutory discretion, is important because of its resulting implications. RVOs are relatively nascent and can be granted by the court in varying circumstances. If RVOs are exercised pursuant to the statutory discretion in NOI proceedings, then such must be in accordance with and subject to the limitations in the *BIA*. In addition, given that NOI proceedings under the *BIA* have been established to have a remedial purpose, then RVOs should be implemented to preserve the business of financially distressed companies. However, the current position with the courts is that the jurisdictional basis for RVOs in NOI proceedings is inherent jurisdiction. Accordingly, the limitations of inherent jurisdiction apply.[330]

3.4.3 RVOs in Receivership Proceedings

The use of RVOs in receivership proceedings illustrates that judicial discretion has been exercised without any substantial foundation. RVOs in receivership raise the question of appropriateness; as such, courts are not yet approving RVOs in receivership proceedings with any frequency. According to Wood, receivership proceedings have three objectives: to replace inefficient management of the debtor company; enforce the security interest of a secured creditor; and to

[329] *Skeena, supra* note 156 at para 45-46.
[330] See discussion at 34, above.

facilitate the sale of the business as a going concern.[331] It is apposite to note that the third objective, sale as a going concern, is not the same as the remedial objective established with the *CCAA*. While receivership is targeted at solely maximizing the value of the debtor company for creditors, the CCAA's remedial objective is aimed at avoiding the termination of business where feasible.

The reasons provided by courts for granting RVOs have been limited. The first use of an RVO transaction in a receivership proceeding was in *Vert Infrastructure* .[332] The court did not delve into the basis for its jurisdiction to grant an RVO in a receivership proceeding. In a one-paged endorsement, the court summarily noted as follows: "The transaction has been designed in a practical manner that uses judicial tools available to this court – a vesting order, channelling claims, and creation of a common law trust. I am satisfied that I can grant the order."[333]

In the recent judgment of *Enterra*,[334] Honourable Justice Romaine of the Court of King's Bench of Alberta provided commentary on the jurisdiction of the court to approve an RVO in a receivership. The court found statutory authority to approve RVO applications in receivership proceedings in the combination of section 13(2) of the *Judicature Act*, section 192(1) of the *Alberta BCA*, and section 64 of the *PPSA*, pursuant to which the receiver was appointed.[335] Specifically, the court found that section 13(2) of the Judicature Act provided the court with "wide-ranging authority" synonymous with section 243(1)(c) of the *BIA*.[336] Although there has not been any pronouncement to this effect, it can be implied that 243(1)(c) also provides jurisdiction for the

[331] Wood, *Bankruptcy supra* note 3 at 312-314.
[332] *Re Vert Infrastructure Ltd* (8 June 2021), Toronto CV-20-00642256-00CL (ONSC) (Endorsement of Madam Justice Conway) [*Vert Infrastructure*].
[333] *Ibid*.
[334] *Enterra, supra* note 18.
[335] *Ibid* at para 30.
[336] *Ibid* at para 32-33.

court to approve RVOs in receivership proceedings. Section 243(1)(c) provides that the court may appoint a receiver to "take any other action that the court considers advisable."

Interestingly, in *Peakhill,* another receivership proceeding, pursuant to section 243 of the *BIA*, an RVO was granted for the sole purpose of avoiding an obligation to pay property transfer tax (PTT).[337] The prospective purchasers aimed to obtain the debtor company's real estate by purchasing its shares through an RVO transaction. Acquiring the real property directly via a conventional vesting order would have triggered PPT obligations. Justice Loo found jurisdiction to grant the RVO in section 183 of the *BIA*, relying on the earlier decision granting an RVO in NOI proceedings, *Payslate*.[338] In addition, Justice Loo noted that courts have approved RVOs which conferred tax benefits to the purchaser, among other factors.[339]

The differentiating factor with *Peakhill* is that the tax benefit was the only reason for implementing the extraordinary measure of an RVO, to the detriment of the Province of British Columbia. In supporting his decision, Justice Loo indicated that the use of an RVO in this instance did not constitute unlawful tax avoidance because it is an accepted practice outside an insolvency context.[340] According to Justice Loo, "it may well be true that the granting of an RVO in this context will cause them to be sought more often, I have been advised of no reason why this would be undesirable from a policy perspective or from the perspective of any stakeholder, other than the taxing authority." As at the date of the last revision of this chapter, this decision is still subject to an upcoming appeal. On the basis of horizontal stare decisis, the British Columbia Supreme Court

[337] *Peakhill, supra* note 18 at para 14.
[338] *Ibid* at para 22.
[339] The court made specific reference to Justice Shelley Fitzpatrick's decision in *Port Capital Development (EV) Inc. (Re),* 2022 BCSC 1464 where an RVO was granted to avoid "payment of substantial property transfer tax" among others (see *Ibid* at para 32).
[340] *Peakhill*, *supra* note 18 at para 77.

however upheld a similar position that the court has jurisdiction to grant RVOs in receivership proceedings.[341]

3.5 Considerations for the Court in RVO Applications

Since the courts believe they have the jurisdiction to grant discretionary RVOs, it is necessary to understand how courts are exercising their discretion with respect to RVO applications. The considerations of the court in assessing RVO applications show whether the courts are administering RVOs according to the purpose of the statutes. In addition, these considerations have a direct impact on the interests of creditors, trade suppliers, employees and other stakeholders who may be affected by such order in a restructuring proceeding. One of the arguments of this thesis is that the RVO process should be codified to rectify the problem of inequitable treatment of stakeholders. The analysis of all the major considerations which the courts have adopted in RVO proceedings in this section gives an insight to how the court administers RVO proceedings which will inform the discussion in section 3.6 on the treatment of stakeholders.

Courts have adopted varying considerations and tests to assess RVO applications. This is because of the lack of guidance from in any statute or regulation on the appropriate factors to consider. The current position of RVOs is similar to how courts administered liquidating CCAAs before the 2009 amendments provided courts with guidance on factors to consider in approving liquidating CCAAs. The adoption of varying tests for RVO applications leads to inconsistency and uncertainty which is a problem for Canada's insolvency jurisprudence and interested stakeholders. This inconsistency is a detriment because RVOs have a huge impact on the rights of stakeholders given the broad releases of claim against the debtor company. It is better for parties interested in a

[341] *Royal Bank of Canada v. Canwest Aerospace Inc.*, 2024 BCSC 585 at paras 1, 17 [*Canwest Aerospace*].

restructuring proceeding to be aware of how their rights may be treated in the relevant circumstance.

Prior to the decision in *Harte Gold*, which introduced considerations specifically tailored to RVOs, courts generally relied on section 36(3) of the *CCAA* alone or section 36(3) in conjunction with the *Soundair* factors, among other considerations. This is notwithstanding the fact that the former is specifically tailored to *CCAA* sale of assets, and the latter originally established for receivership proceedings. Another common consideration among courts is the outcome of the proposed RVO transaction, and specifically whether the debtor company would continue to be operated. RVOs have generally been approved by the court in furtherance of the remedial objective of the *CCAA* to allow the "debtor to continue to carry on business and… avoid the social and economic costs of liquidating its assets.[342] However, with the consideration of more RVO cases, courts have gradually adopted additional considerations to deal with the complexities of RVO applications. Hence, in a number of RVO cases, courts rely on a broad range of considerations to guide the discretion of the judge.

The court in *Nemaska* found that the RVO transaction satisfied the criteria set out in section 36(3) based on the report of the Monitor.[343] In addition, the RVO agreement furthered the remedial objective of the *CCAA* because it would maximize creditors recoveries and enable the debtor company to continue operating as a going concern.[344] The court noted that in assessing RVO applications, the court should look at the "global picture" as opposed to nitpicking aspects of the transaction.[345] According to the court, such granular scrutiny would unduly restrict the

[342] See *Century Services*, *supra* note 7 at para 15. The exception however is RVOs in receivership proceedings where they have been approved without a going concern objective.
[343] *Nemaska*, *supra* note 14 at paras 64-65.
[344] *Ibid* at para 53; *Nemaska Leave*, *supra* note 14 at para 14.
[345] *Nemaska, supra* note 14 at paras 80-81.

ability of the court to innovatively solve increasingly complex commercial restructuring problems.[346]

In *Plasco Energy* and *Quest University*, the courts applied the section 36(3) factors alongside the *Soundair* factors to grant RVOs.[347] In *Plasco Energy*, the court also placed emphasis on the fact that there was sufficient consultation between all creditor parties, and approximately 95% of the unsecured creditors supported the transaction.[348] The court further held that: "[t]he test for approval requires demonstration that: (1) the settlement is fair and reasonable; (2) the settlement will be beneficial to the debtor and its stakeholders generally; and (3) that the settlement is consistent with the purpose and spirit of the *CCAA*."[349]

In *Quest University,* in addition to section 36(3) and *Soundair* factors, Justice Fitzpatrick noted that the debtor company sought the RVO order in good faith and has acted with "due diligence to promote the best outcome for all stakeholders."[350] Furthermore, the court concluded that the RVO agreement represented the "fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group."[351] In *Quest University,* it can be deduced from the court's pronouncement that the most compelling reason for approval of the RVO was to save the university from liquidation to fulfil the remedial objective of the *CCAA*. Whilst approving the RVO application, Justice Fitzpatrick sounded a note of warning that debtor

[346] In considering the factors in section 36(3) for an RVO application, Justice Gouin held that the courts must ensure and verify: "whether sufficient efforts to obtain the best price have been made and whether the parties acted providently; the efficacy and integrity of the process followed; the interests of the parties; and whether any unfairness resulted from the process" (see *Ibid* at paras 50, 82-83).
[347] See *Plasco Energy Endorsement*, *supra* note 297 at para 2; *Quest University*, *supra* note 14 at paras 175-178. In *Blackrock Metals*, the court also noted that the criteria in section 36(3) of the CCAA should be applied in conjunction with the *Soundair* factors (see *Blackrock Metals, supra* note 312 at para 95; *Beleave*, *supra* note 277).
[348] *Plasco Energy Endorsement*, *supra* note 297 at para 4.
[349] *Ibid* at para 3.
[350] *Quest University, supra* note 14 at para 172.
[351] Ibid.

companies "should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA" and that RVOs should not be granted just to get rid of a creditor attempting to exercise leverage through a creditor vote.[352]

In *Harte Gold*, the court provided further guidance to parties (Monitors, debtor companies and purchasers) seeking RVOs. The court established a set of considerations specifically for RVO applications. Justice Penny held that parties must be ready to furnish the court with sufficient responses to the following (the "*Harte Gold* test"):[353]

> (a) Why is the RVO necessary in this case?
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

In addition to the *Harte Gold* test, despite expressing concerns about the application of section 36(1) as jurisdictional basis for approving RVOs, Justice Penny also extensively applied the factors in section 36(3) in deciding whether to approve the RVO application in the circumstance.[354]

Recognizing the gap in the *BIA* and *CCAA* to provide guidance on RVO proceedings, and the limited commentary by judicial authorities, Justice Penny warned against RVOs becoming the "norm" of restructuring proceedings in Canda.[355] Justice Penny noted that RVOs have "positive and negative implications" and as such, it must be an "unusual or extraordinary measure" which

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[352] *Quest University, supra* note 14 at para 171.
[353] *Harte Gold, supra* note 15 at para 38.
[354] *Ibid* at paras 37, 39. See also *Blackrock Metals, supra* note 312 at paras 95, 100.
[355] *Harte Gold, supra* note 15 at para 38. See also *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354 at para 33; *Blackrock Metals, supra* note 312 at paras 95-97.

the court should employ in the appropriate circumstance and not just the convenience of the purchaser.[356]

In *Just Energy,* Justice McEwen summarized the types of extraordinary circumstances in which an RVO may be granted. This list includes where the debtor company: a) operates in highly-regulated environment and the licences are difficult to reassign to the purchaser; b) is a party to key contracts that cannot be easily assigned to the purchaser; and c) would be able to benefit from certain tax attributes that would not be possible through a liquidating CCAA.[357]

In addition to the considerations above, the court in *Just Energy* advised that the court (alongside the Monitor) "must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the *CCAA*."[358] This is particularly relevant in unopposed RVO applications.[359] In applying these considerations, the court approved the RVO application and held as follows:

> I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.[360]

The *Harte Gold* test partially overlaps with the factors in section 36(3) of the *CCAA*, although it is specifically tailored to RVO proceedings. The need for the court to provide guidance beyond section 36(3) gives credence to the argument that the factors in section 36(3) are not

[356] *Harte Gold, supra* note 15 at para 38.
[357] *Just Energy, supra* note 355 at para 34.
[358] *Harte Gold, supra* note 15 at para 38.
[359] *Ibid*.
[360] *Ibid* at para 77.

sufficient for RVO proceedings, but only a makeshift attempt by the court to plug in the statutory lacuna.[361] This view is further supported by the fact that the courts have questioned the jurisdiction of section 36(1) to approve RVOs and distinguished a sale of assets from an RVO transaction. The language in section 36(3) as well relates to "sale or disposition" of assets as opposed to shares in the instance of an RVO transaction. The absence of guidance from Parliament and appellate courts has resulted in the wide acceptance of section 36(3) as the test for approving RVOs. Although the application of this test is subject to the discretion of the court, alongside any other tests that the court deems fit in the circumstance such as the *Harte Gold* test, *Soundair* factors, the considerations in *Just Energy,* among others. In the context of NOI and receivership proceedings, courts have adopted similar factors.[362] Section 65.13(4) of the *BIA* closely mirrors the provisions of section 36(3) of the *CCAA* as the factors ideally crafted for sale or disposition of assets.[363]

RVO applications have been rejected by the court in a limited number of cases and it is important to examine the reasoning of the court in those cases to respond to the following issues: Did the court employ the same tests as enunciated above? Did the court identify new considerations when refusing the applications? Are there any distinguishing factors between these cases and those in which RVOs have been approved?

In *CannaPiece*,[364] the RVO application was rejected; the reasoning of the court shows a further expansion of the considerations highlighted above. In this case, the RVO agreement before the court contemplated the assumption of the purchaser's liabilities in the debtor company and

[361] In *Harte Gold*, Justice Penny noted that the factors in section 36(3) should be applied "making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction" (see *Harte Gold, supra* note 15 at para 23).
[362] See *Brunswick Health, supra* note 17 at para 54*; Enterra*, *supra* note 18 at paras 12, 13 18; *Peakhill, supra* note 18 at paras 76-77; *Canwest Aerospace, supra* note 341 at paras 24, 26.
[363] Courts have held that in effect, an RVO application is akin to a proposal, and thus the factors in section 65.13(4) apply (see *Payslate, supra* note 319 at para 135).
[364] *CannaPiece Group Inc. (Re)*, 2023 ONSC 841 [*CannaPiece*]

vesting out of the debt interest of another secured creditor, 212, to the Residualco. Prior to the application, a SISP was conducted and the stalking horse bid provided for the assumption of the liability of 212's liabilities, to the exclusion of the purchaser's liabilities.[365] The court refused to approve an RVO even though the Monitor recommended it on the basis that the purchaser provided the highest cash consideration.[366] In coming to this conclusion, the court considered the tests in section 36(3) of the *CCAA*,[367] the *Soundair* factors,[368] the *Harte Gold* test,[369] and the "cascading analysis" set out in *Third Eye* (the "*Third Eye* test").[370] The factors in the *Third Eye* test are:

> (a) first, the nature and strength of the interest that is proposed to be extinguished;
> (b) second, whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency; and
> (c) third, if the first two steps proved to be ambiguous or inconclusive, a consideration of the equities to determine if a vesting order is appropriate in the circumstances.[371]

The *Third Eye* test laid out a non-exhaustive list of factors for the court to consider in determining an application to grant a vesting order that extinguishes a third-party interest in land in the context of a receivership proceeding. However, Justice Osbourne applied the factors in the context of an RVO transaction vesting out security interest in personal property.[372] The court noted that there was no evidence of the assets that would be available for distribution in the

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[365] *Ibid* at para 81.
[366] *Ibid* at paras 47-50.
[367] *Ibid* at para 53.
[368] *Ibid* at para 54.
[369] *Ibid* at para 58.
[370] *Third Eye, supra* note 260.
[371] *CannaPiece, supra* note 364 at 55; *Ibid* at para 109-110. The third arm of the *Third Eye* test includes the "consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith" (see *Ibid* at para 110).
[372] Justice Osbourne held that "the same analysis applies since a third party interest is being extinguished. It cannot be that the Third Eye factors apply only to an interest in land or another proprietary right: the nature and quality of the right sought to be extinguished is exactly the first of the three factors to be considered" (see *CannaPiece, supra* note 364 at para 68).

Residualco.[373] Thus, as a practical matter, the rights of 212 were being extinguished, without consent, as opposed to being transferred to another entity.[374] Specifically considering section 36(3)(e), the third *Harte Gold* test ("Is any stakeholder worse off under the RVO structure then they would have been under any other viable alternative?") and the *Third Eye* test, the court held that 212 was prejudiced.[375] A few days after the rejection of the RVO application, the parties presented a revised agreement before the court which assumed the liabilities of both the Purchaser and the previously aggrieved secured creditor, 212; the court then granted the RVO.[376]

The court has also rejected an RVO application in the circumstance where the unsecured stakeholders would have been prejudiced by the order. This was the case in the *Payslate*[377] NOI proceeding. In rejecting the application, the court incorporated further considerations not previously considered in other RVO proceedings. The RVO transaction structure contemplated broad waiver and release provisions to protect the debtor company and the purchaser post-transaction.[378] The court took particular issue with the lack of appropriate service of notice to the opposing unsecured creditor (with $2.2 million in damages claims) and other counterparties whose contractual rights were to be affected by the RVO.[379] The court found that granting the RVO in the circumstance would not be fair and reasonable given the lack of proper service of notice to the affected unsecured creditors.[380] The court held that the service of notice should have been effected

[373] *CannaPiece, supra* note 364 at para 61.
[374] *Ibid* at paras 69-70.
[375] *Ibid* at para 89.
[376] See *CannaPiece Group Inc. (Re),* 2023 ONSC 3291 at paras 8, 13, 19 ("I am satisfied that the transaction reflected in the SPA represents the best outcome for all stakeholders in very challenging circumstances" and "section 36 factors, the Soundair Principles, and the factors applicable to proposed approval of an RVO, are all satisfied here").
[377] *PaySlate, supra* note 319 at paras 84-85.
[378] *Ibid* at paras 32, 37, 49.
[379] *Ibid* at paras 44, 62-68.
[380] *Ibid* at paras 77, 143.

whether or not the purchaser deemed them out of money.[381] Other reasons for refusal were the finding of insufficient evidence of value,[382] and that the court was unable to determine whether the RVO structure was targeted at keeping the company's business as a going concern.[383]

In *Payslate,* the court applied the *CCAA, Harte Gold* test, the *Soundair* factors, as well as the principles considered in *Quest University* and *Nemaska*.[384] The court held that "[a]lthough many of the case authorities discussing the circumstances in which RVOs may be issued are in the context of the *CCAA*, RVOs are available tools in other insolvency cases as well. Similar considerations apply in the context of the *BIA*".[385] Citing Sarra,[386] the court further noted other considerations in deciding whether or not to approve an RVO application; such as the ability of creditors to negotiate and contribute to the restructuring plan,[387] the availability of an "evidence-based rationale" as to whether the outcome of an RVO transaction is at least as favourable for the creditors as a statutory plan,[388] and the effect of proposed third-party releases on creditors with no opportunity to vote.[389]

Similar to *Cannapiece*, the BCSC in *Payslate* subsequently approved the RVO structure (now unopposed further to a settlement between the debtor company and the previously disgruntled creditor) holding that the parties have addressed all the concerns in the initial judgment,[390] and that the debtor has provided an evidence-based rationale" alongside the "fulsome

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[381] *Ibid* at para 77. In the recent *CCAA* proceeding of *Validus Power Corp. (Re)*, 2024 ONSC 250 at para 57 [*Validus Power*], Justice Osborne, citing *Payslate, supra* note 319, considered the due service of notice to the affected creditors to approve the RVO application.
[382] *Payslate, supra* note 319 at para 142.
[383] *Ibid* at para 124.
[384] *Ibid* at paras 103-108.
[385] *Ibid* at paras 84, 108.
[386] Sarra, "RVOs", *supra* note 11.
[387] *Payslate, supra* note 319 at paras 96-97.
[388] *Ibid* at para 98.
[389] *Ibid* at para 99.
[390] *PaySlate Inc. (Re),* 2023 BCSC 977 at para 3.

and most helpful information and analysis of value provided by the Proposal Trustee."[391] In *Cannapiece* and *Payslate*, a major reason for the initial rejection was the protection of creditors; secured creditor in the former and unsecured creditors in the latter.

The factors which the court will consider in approving or rejecting an RVO application have a direct impact on parties to the proceedings and affected stakeholders. Although the various tests employed by the courts are targeted at guiding the exercise of the court's jurisdiction in the relevant circumstance, the inconsistency is problematic. It is apposite to note that in both *Cannapiece* and *Payslate*, the RVO applications were contested. So far in Canada, based on reported decisions, there has been no refusal of unopposed RVO applications. Courts' application of sufficiently robust considerations is even more important in uncontested RVO applications due to the lack of creditor democracy and the fast-paced nature of the transaction. The next section goes into further detail on the treatment of stakeholders in RVO proceedings.

3.6 Treatment of Stakeholders in RVO Proceedings

Of particular interest in RVO proceedings is the treatment of stakeholders like creditors, trade suppliers and employees. A key feature of insolvency law in general is the distribution of losses amongst creditors.[392] One might infer from the inclusion of a framework for a creditor's meeting and a vote in the *CCAA* that the legislature intended a loss distribution scheme negotiated by the creditors. An attempt to obliterate creditor democracy and distribute the assets of a debtor company without consideration of all claims and interests in the company would be contrary to that intention and risks further empowering already powerful stakeholders. As discussed earlier, RVO

[391] *Ibid* at para 5.
[392] Warren, "Bankruptcy", *supra* note 53.

transactions can be implemented through a *CCAA* plan followed by a creditors' vote.[393] However, in most proceedings, this is not the practice.[394] In most RVO proceedings, there is no creditor vote; as such creditors considered "out of the money" (mostly unsecured creditors) have little chance to participate in the RVO transaction process (they can always oppose the proposed RVO in court).

The inequitable treatment of creditors is a common theme in RVO transactions. In *Canada Fluorspar*,[395] the Supreme Court of Newfoundland and Labrador approved an RVO which returned zero cents on the dollar to unsecured creditors with a total claim of $32 million. In *Nemaska*, a creditor raised an issue with the unequal treatment of creditors in the RVO agreement presented to the court for approval. The court stated that "it is not for the Court to ensure that all of the Debtors' creditors are treated equally" in the RVO agreement and the purchasers are able to make such agreement for "their own commercial reasons."[396] In *Quest University*, an RVO transaction was utilized specifically to avoid a creditor's veto power in a traditional plan of arrangement. The unsecured creditors objected to the transfer of their claims to the Residualco. The court in this case justified overriding of the creditors' right to a vote on the basis that they would be entitled to vote on the plan for distribution presented by the Residualco.[397] The court however failed to consider the assets present in the Residualco and whether the value would be sufficient to satisfy the claims of the unsecured creditors. In *Groupe Financier Chok*,[398] a party sought to enforce a right that had

[393] See *Redrock Camps Inc. (Re)* (18 February 2021), Calgary 2001-06194 (ABQB) (Order re: Plan Sanction); *Eaton,* supra note 282.
[394] In 2020 and 2021, over 20 cases granted RVOs without a plan of arrangement and creditor vote (Sarra, "RVOs", *supra* note 11 at 5).
[395] *Canada Fluorspar (NL) Inc. and Canada Fluorspar Inc.* (7 June 2023), St. John's 2022 01G 0709 (NLSC) (Approval and reverse vesting order).
[396] Despite the inconsistency in the treatment of creditors, the court ruled that the transaction in that case was "fair and reasonable" and to refuse the RVO application would be "catastrophic " (see *Nemaska*, *supra* note 14 at paras 112-115, 117).
[397] *Quest University, supra* note 14 at para 156.
[398] *Groupe Financier Chok Inc. v. 9497706 Canada Inc. et al*., 2023 QCCS 4482.

been exterminated pursuant to the broad liability releases in an RVO. The court applied the doctrine of res judicata and noted that creditors must exercise extra diligence and vigilance in RVO proceedings to "ensure that their debts will not be transferred against their will to a new company doomed to bankruptcy, and this, to the full exoneration of the original insolvent debtor."[399]

Some of the advantages of the current usage of the RVO mechanism are its flexibility and relatively low-cost, in comparison with negotiating and voting on a plan. This efficiency however comes at the expense of the private legal rights of junior creditors and parties with contractual obligations to the debtor company.[400] In effect, this introduces a "cramdown" process of securing approval of a plan/agreement on the restructuring proceedings without the need to garner the support of all or dissenting creditors with veto powers.[401] The practice of approving RVOs without a creditor vote evolved from the practice of approving liquidating CCAAs without a plan as well.

In addition to the above issues, RVOs involve the intrusion into the legal rights of creditors and contractual counterparties through broad releases and claim bars in favour of the debtor company and purchaser.[402] This intrusion is of concern because the affected parties are often not represented in the proceedings. For example, in *Payslate*, the purchaser in an RVO transaction, alongside the debtor company and the monitor, sought broad releases and claim bars against a large number of unsecured creditors and contractual parties, deemed to be critical suppliers.[403] The counterparties were required to continue providing services to the debtor company despite the

[399] *Ibid* at para 96.
[400] Alievsky, *supra* note 19 at 3-4.
[401] A "cramdown" is a process in US bankruptcy law whereby a plan, supported by just one class of creditors, is approved and implemented by the court if it is deemed to be fair and equitable, irrespective of dissent from creditors or shareholders (see Walter W Miller Jr., "Bankruptcy Code Cramdown under Chapter 11: New Threat to Shareholder Interests" (1982) 62:5 BU L Rev 1059 at 1063; Pickett & Rogers, *supra* note 272 at 418).
[402] Sarra, "RVOs", *supra* note 11 at 12.
[403] *Payslate*, *supra* note 319 at para 65.

restriction of their rights and the limitation of their claims to a set amount.[404] In addition, they were not provided with appropriate notice of the proposed RVO transaction.[405] Recognizing the prejudice against the unsecured creditors, Justice Walker refused the RVO application. He rejected the argument by the debtor company that service of notice would be affect their business management.[406] Service of notice should be a basic requirement in all RVO proceedings. Moreover, further attention must be paid to the treatment of critical suppliers vis-à-vis the broad release of claims and the recovery of their post-filing obligations based on the assets available to satisfy those claims in the relevant Residualco.[407]

There is a possibility that secured creditors who are "repeat players" in insolvency proceedings are able to influence the outcome of judicial discretion to their benefit.[408] One overarching reason for the diminution of the rights of unsecured creditors to approve RVOs has been to fulfil the remedial objective of the *CCAA* in avoiding liquidation of the debtor company. Courts have decided that the approval of the RVO transaction, irrespective of the rights of dissenting creditors, is sometimes the only way to save debtor companies. While adherence to this objective is laudable, courts must be careful to ensure that they are not swayed by the argument of sophisticated lenders or "repeat players" who are notorious for influencing the development of insolvency law for their primary benefit.[409] Interest groups have a long history of influencing Canada's insolvency law due to proximity with the development process and the complexity of the subject matter of insolvency.[410] In restructuring proceedings, the constant interaction between

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[404] *Ibid.*
[405] *Ibid* at para 63.
[406] *Ibid* at para 64.
[407] Sarra, "RVO", *supra* note 11 at 12.
[408] See Torrie, *Reinventing Bankruptcy supra* note 56 at 106, 124.
[409] *Ibid*.
[410] See the text accompanying note 79. For more details on the interest group theory, see David A Skeel, *Debt's Dominion* (Princeton, New Jersey, Princeton University Press, 2001) at 87.

the judiciary and repeat players can lead to more favourable decisions and influence in the exercise of judicial discretion.[411]

Secured creditors who act as purchasers in RVO transactions benefit from the future value created by the debtor's operations, while also satisfying all or part of their existing claims through credit bids or payment from the sale proceeds.[412] The advantage of an RVO transaction is therefore skewed towards secured creditors. Given that the approval of RVOs essentially rob certain creditors of an ability to negotiate a better outcome, the court must be willing to step into the shoes of those creditors to protect them.

The treatment of creditors and contractual counterparties by the debtor company and potential purchaser effectively boils down to commercial negotiations. Sarra noted that in restructuring proceedings, when the court rules against commercial parties unwilling to compromise with the opposing creditor(s), further negotiations are conducted to reach a settlement amongst all parties.[413] This is evident with the two cases discussed above (*CannaPiece* and *Payslate*) where the court initially rejected the RVO application. In both cases the court subsequently approved the orders after the objections were addressed. Thus, the court should ensure that particularly vulnerable unsecured creditors and contractual parties who may not be able to object in a legal proceeding are protected. Failure to do so and a continuation of the current practice of granting RVOs without a careful consideration of the effect on stakeholders would deem RVOs to effectively be a remedy available for secured creditors, to the exclusion of other parties, contrary to the purpose of the *CCAA*.

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[411] This position is in tandem with Ramsay's view of bankruptcy regulators being more receptive and biased towards particular interest groups in the development of bankruptcy law due to the constant interaction between the parties (see Iain Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003), 53 UTLJ 379 at 385, 395 & 419).

[412] Sarra, "RVOs", supra note 11 at 9.

[413] *Ibid* at 10.

3.7 Conclusion

Based on the cases examined so far in *CCAA* and NOI proceedings, the remedial objective in preserving the business of the debtor corporation has been a constant element in employing the usage of RVOs. This fits well into the established purpose of the *CCAA* as described in chapter two. Coincidentally, this justification has also been used by secured creditors to get approval for transactions which allow them to recover all or a part of their liabilities to the detriment of other unsecured creditors. In receivership proceedings on the other hand, as discussed above, there is no alignment between the use of RVOs and the objectives of receivership proceedings, because preserving a business is not a recognized aim of a receivership. The usage of RVOs in receivership proceedings has simply been from a commercially pragmatic perspective to derive more value for the purchaser or the secured creditors. Clarification is needed whether RVOs, as an "unusual or extraordinary measure," should still be granted in receivership proceedings for this purpose.

In conclusion, while an RVO is definitely an advantageous and innovative tool in restructuring financially distressed companies, the fact that it has ultimately been left to the court to develop a framework and administer its usage has led to inconsistencies and drawbacks. The next chapter highlights how the inconsistencies, ambiguity, and issues with the treatment of stakeholders can be remedied through codification of the RVO mechanism by an amendment of the *CCAA* and *BIA*.

CHAPTER FOUR: REFORMING THE APPROACH TO REVERSE VESTING ORDERS IN CANADIAN RESTRUCTURING LAW

4.1 Introduction

Building on the discussions in the chapters above, this chapter explores why and how the problems identified with RVOs in the third chapter can be resolved through the codification of a framework in the statutes. RVOs have primarily been developed by innovative courts, relying on judicial discretion, and as discussed, there is space to reform the current approach to RVOs to make it work better for restructuring financially distressed companies. The central argument of this chapter is for the codification to be used as a remedy to fix these issues through the amendment of the *CCAA* and *BIA*. To justify this approach, the discussions below shed light on the long history of codification being used as a remedy by Parliament to refine the mechanisms that originate through judicial discretion.

Of particular note are the changes that resulted from the 2009 amendments of the *CCAA*. The problems identified with RVOs in the third chapter are similar to the problems of liquidating CCAAs discussed in the second chapter. The 2009 amendments provided a remedy to some of the issues with liquidating CCAAs by codifying a sales framework in both the *CCAA* and the *BIA*. RVOs present another case where judicial innovations could be improved by legislative codification. There is ambiguity with respect to the source of jurisdiction of the court to approve RVOs in certain proceedings, inconsistency in the factors which the court should consider when asked to approve an RVO, and inequitable treatment of stakeholders in the RVO proceedings. To support the argument for codification of the RVO process, this chapter shows that codification has been an important aspect of the development of Canadian restructuring law, whereby courts innovate new restructuring processes and Parliament codifies such processes, while attempting to

fix issues that have arisen in practice. This chapter proposes statutory language which Parliament could implement to provide more certainty and transparency on one hand while also affording more protection to the interests of stakeholders.

4.2 Judicial Discretion as an Anchor of Corporate Restructuring in Canada

Restructuring law, like other forms of legal rules contain elements of uncertainty.[414] While the laws are enacted to be proactive, in fact, it is not feasible to cater for all forms of developments which occur in the business world. The nature of restructuring proceedings typically reflect the nature of business and the world of commerce. Businesses now are highly dynamic, and the means of indebtedness and leverage have become sophisticated. RVOs, for instance, have been implemented to permit the easy transfer of liabilities to other entities to aid the survival of key businesses while preserving the licenses, tax attributes, and other non-transferrable assets of the companies. Thus, restructuring law, no matter how codified, cannot possibly cater for every contingency.[415] Further contributing to the short-coming of statutory provisions, the nature of insolvency proceedings is unlike other forms of right-based adjudication.[416] In restructuring proceedings, the court is required to actively manage the outcome of the debtor company's indebtedness in real time by balancing the interests of all parties and dealing with the multifaceted issues that arise.[417]

For this reason, Canadian restructuring law is "open-textured in nature."[418] This allows the court to step in and exercise its discretion to fill in the gap of the statutory language and make

[414] Stephen Waddams, "Judicial Discretion" (2001) 1 OUCLJ 59 at 59-60.
[415] Sarra, "Judicial Discretion", *supra* note 167 at 202.
[416] *Ibid*.
[417] *Ibid* at 203.
[418] Waddams, *supra* note 414 at 59.

certain orders where appropriate. This flexibility is important to deal with circumstances which are not envisaged by the statute.[419] As demonstrated in the cases discussed above, in exercising judicial discretion, courts evaluate the reasonableness and fairness of the decision while balancing the equities and prejudice on each party.[420] According to the court, "'[f]airness' is the quintessential expression of the court's equitable jurisdiction – although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity – and 'reasonableness' is what lends objectivity to the process."[421] Ultimately, the courts have examined each proposed decision through the lens of the remedial objective of the statutes. In *Canadian Airlines*, Paperny J. noted that "the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons."[422]

Historically, Parliament has largely taken a reactionary approach towards the development of Canadian corporate restructuring law. In essence, the duty to innovate in response to changing commercial demands has been delegated to the courts to be carried out on through judicial discretion. While the usage of the *CCAA* had evolved in practice, the letters of the statute did not reflect these changes until the 2009 amendment of the *CCAA*. As part of the 2009 amendment, section 11 of the *CCAA* codified the discretion of the court to "make any order that it considers appropriate in the circumstances." As will be discussed in the next section, the amendments of the *CCAA* essentially codify the practice of restructuring developed through the court's discretion. RVO transactions present another case of development in Canadian restructuring wherein judges

[419] Sarra, "Judicial Discretion", *supra* note 167 at 203.
[420] *Ibid* at 200, 203.
[421] *Olympia & York Developments Ltd. (Re)*, 1993 CanLII 8492 (ONSC) at para 28.
[422] *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para 95 [*Canadian Airlines*].

have relied on their statutory and inherent discretion to grant RVOs, employing varying tests and analysis in the process. Yet, despite their growing popularity in practice, Parliament has not acted and the insolvency statutes are completely silent on this mechanism.

Judicial discretion provides for flexibility, yet there is a need for greater transparency and certainty in insolvency jurisprudence; this can be achieved by codifying existing practices in the statute. While courts have tried to develop Canadian insolvency law on a rational and consistent basis, such approach is generally not perfect at addressing some issues that arise in restructuring proceedings.[423] For this reason, Parliament has, at several junctures, stepped in to codify the innovations in corporate restructuring that developed through judicial discretion. Unlike Parliament, when making laws, courts restrict the consideration of issues and applications to the circumstances of the relevant case. Parliament considers the ripple effect of the law on several interest bodies, stakeholders and the larger legislative scheme.[424] Careful consideration is provided through series of reading and a committee review; due to this scope of analysis, Parliament provides a more ideal law-making process.

It is evident that the 2009 amendments when taken together were informed by the remedial purpose of the *CCAA*, as pronounced by the courts. Through these amendments to authorize the court to make certain orders, and provide guidance to how such orders should be carried out, Parliament signaled a need for increased transparency and certainty in insolvency jurisprudence.[425] Transparency and certainty are valuable for all stakeholders, but especially for parties outside the insolvency practice industry who are not familiar with the case law development.[426] Prior to the

[423] See Sarra, "Judicial Discretion" *supra* note 167 at 204; Waddams, *supra* note 414 at 61.
[424] Jassmine Girgis & Robyn Gurofsky, "Pushing the Boundaries of *Redwater*: How Qualex Expands the "Protective Umbrella" for Environmental Reclamation Obligations" (2023) at 39, online: (WL Can) Thomson Reuters Canada.
[425] Sarra, "Judicial Discretion", *supra* note 167 at 205.
[426] *Ibid*.

2009 amendment, an examination of the *CCAA* did not accurately reflect the nature of restructuring proceedings in Canada or the orders the courts were likely to make. This created a space for repeat players or insolvency insiders (particularly sophisticated lenders such as banks) to thrive at the expense of other parties.[427] Codification promotes accessibility to all stakeholders in the restructuring process. Without codification, only repeat players who consistently engage with the judiciary in restructuring proceedings are knowledgeable about the process. Other than acting as a remedy for the defects in the exercise of judicial discretion, codification also promotes the findability and accessibility of the law for the benefit of non-repeat players and laypeople.

The section below highlights the approach of Parliament over time towards the amendment of the *CCAA* in a bid to codify the discretionary practices of the court. Specific discretionary practices which then became codified in 2009 are examined to shed light on the advantages of the subsequent codification to the court and administration of restructuring proceedings in general. In addition, this section of the thesis draws a parallel line between the challenges of liquidating CCAA prior to the 2009 amendments (when it was solely administered through judicial discretion) and the current challenges of RVOs as a discretionary restructuring mechanism. Parliament codified the liquidating CCAA process to resolve those challenges; the extent to which codification resolved those issues are discussed to show how codification can also resolve the challenges with RVOs.

4.3 Statutory Codification of Discretionary Restructuring Measures by the Court

While the *CCAA* has been amended a number of times by Parliament, the significant amendments have been in 1997 and 2009. In 1992, there were minor amendments to the *CCAA* through the

[427] *Ibid*.

recommendations from the Colter Committee which was formed to identify gaps in Canada's insolvency legal system and propose reforms.[428] The Colter Report recommended certain amendments to the *BIA* with minimal reference to the *CCAA*.[429] Most of the amendments proposed in the Colter report were enacted in 1992, but they reflected the focus of the report and the 1992 amendments which was on the *BIA*.[430]

Pursuant to the recommendations of the Bankruptcy and Insolvency Act Advisory Committee, established in 1993, the *CCAA* was amended in 1997.[431] The 1997 amendments introduced cross border insolvency sections to the *CCAA*,[432] the appointment of a monitor by the court during the restructuring process,[433] threshold requirement of 5 million CAD for companies seeking *CCAA* protection,[434] among others.[435] Unfortunately, as timely and constructive as the 1992 and 1997 amendments were, they did not reflect the developments in Canadian restructuring law through case law at the time.[436] The 1980s and 1990s saw the redeployment of the *CCAA* as a debtor remedy to enable debtor companies to avoid liquidation and cater for the wider public interest and affected stakeholders. The 1992 and 1997 amendments did not make express provision for the court's authority to make certain orders to fulfil this purpose, neither did they contain any

[428] Kent & Maerov, *supra* note 116 at 2.
[429] See Consumer and Corporate Affairs Canada, *Proposed Bankruptcy Act amendments: report of the Advisory Committee on Bankruptcy and Insolvency* (Ottawa: Consumer and Corporate Affairs,1986) [Colter Report]; *Ibid* at 2-3.
[430] S.C. 1992, c. 27.
[431] S.C. 1997, c. 12.
[432] *CCAA*, Part IV.
[433] *CCAA*, s 11.7.
[434] *CCAA*, s 3.
[435] See Jacob S Ziegel, Anthony J Duggan & Thomas GW Telfer, *Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials* (Toronto: Emond Montgomery Publications Limited, 2003) at 17-20.
[436] See Kent & Maerov, *supra* note 116 at 2-3. See also Industry Canada, *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act,* online (pdf): <ised-isde.canada.ca> [perma.cc/GQ9A-BWSJ].

section regulating the administration of these orders; thus throughout this period and until the 2009 amendment, courts relied on their inherent and statutory discretion as a source of authority.

The 1997 amendment provided for a parliamentary review of the *CCAA* after five years.[437] To inform Parliament, between 2001 and 2005, the Insolvency Institute of Canada (IIC) and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) formed a Joint Task Force to prepare a report advising on commercial insolvency reforms, particularly in the *BIA* and *CCAA*.[438] The JTF Report was relied on by the Standing Senate Committee on Banking, Trade and Commerce, which was charged with carrying out the mandatory review of the *CCAA*. The Senate Report contained extensive recommendations for the amendment of Canada's insolvency legislation and *Statute c 47* was introduced in 2005 to implement these recommendations.[439]

Unfortunately, *Statute c 47* was poorly drafted, and rushed towards enactment by Parliament without a debate, due to an impending change in government; this led to widespread criticism by stakeholders.[440] *Statute c 36* was subsequently enacted in 2007 to remedy the shortcomings of *Statute c 47*.[441] *Statute c 47* and *Statute c 36* then resulted in the 2009 amendment of the *CCAA*. Thus, the 2009 amendments of the *CCAA* essentially implement the JTF report recommendations, codifying elements of the insolvency practice which developed in the 1980, 1990s and early 2000s.

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[437] See Anthony Duggan & Stephanie Ben-Ishai, "Introduction" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy and Insolvency Law* (Markham: LexisNexis, 2007) 1 at 5.

[438] The Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals, "Joint Task Force on Business Insolvency Law Reform Report" (15 March 2002), online (pdf): <insolvency.ca> [perma.cc/AE22-378Q] [JTF Report].

[439] See Senate Report, *supra* note 224; *Statute c 47*, *supra* note 45.

[440] Duggan & Ben-Ishai, *supra* note 437 at 5-6.

[441] *Statute c 36* was originally Bill C-62; the latter died when the Parliament was prorogued and then reintroduced as Bill C-12 (See *Statute c 36*, *supra* note 45 at 3).

Succinctly, the 2009 amendments of the *CCAA* codified the discretionary practices developed by the Canadian courts, with additional protection to promote transparency, certainty and the purpose of the *CCAA*. The 2009 amendments enacted the current provision of section 11 which put to bed the legal doubt about the jurisdiction of the court to grant discretionary orders not explicitly provided for in the *CCAA*. In addition, the 2009 amendments codified the following:[442]

a) burden of proof for application for a stay order;[443]
b) conditions for which the court may approve assignment of rights and obligations;[444]
c) *CCAA* sales process and factors for approval;[445]
d) the court's express authority to approve interim financing and super-priority charges;[446] and
e) factors for approval of classes for the purpose of voting on a *CCAA* plan.[447]

The perfect example of codification being used as a remedy for the shortcomings of judicial discretion in Canada's restructuring jurisprudence is with the treatment of liquidating CCAAs. As discussed in chapter two of this thesis, liquidating CCAAs developed primarily through case law.[448] Issues arose with respect to the jurisdiction of the court to grant CCAAs, the circumstances in which to approve CCAAs, and also the inequitable treatment of stakeholders in liquidating CCAA proceedings. These problems bear resemblance to the issues of certainty and treatment of stakeholders with RVOs.[449] To provide a remedy to the issues with liquidating CCAAs, Parliament

[442] Sarra, "Judicial Discretion", *supra* note 167 at 205.
[443] *CCAA,* s 11.02(3).
[444] *CCAA,* s 11.3.
[445] *CCAA,* s 36(3).
[446] *CCAA,* s 11.2.
[447] *CCAA,* s 22(2).
[448] See *Canadian Red Cross Society*, *supra* note 183.
[449] For more details, see Section 4.4, below.

codified the framework in section 36 of the *CCAA* through the 2009 amendments.[450] The codification expressly provided courts with the authority to approve sales,[451] and highlighted the considerations for the court when faced with a liquidating CCAA application.[452] The codification also spelled out new procedural safeguards. The amendments mandated notice requirements,[453] required that the monitor provide their position on the proposed sale,[454] and enshrined protections for employees and intellectual property.[455] Moreover, added protections were imposed where the sale is to a related party.[456] These protections were introduced to make the process fair to stakeholders and reduce prejudice.[457]

Through codification, the ambiguity regarding the court's authority to approve liquidating CCAAs was settled. Commenting on 2009 amendments, Justice Fitzpatrick noted that "[t]he amendment will no doubt resolve the question of jurisdiction regarding asset sales, but will not resolve how the court ought to exercise its discretion."[458] Following the codification of the court's authority to approve *CCAA* sales, courts have recognized their jurisdiction to approve liquidating CCAAs in varying circumstances, including when a plan of arrangement is not being proposed. Unfortunately, while the goal of the factors in section 36(3) of the *CCAA* was to provide the court with guidance with respect to liquidating CCAAs, that goal was not fully achieved. The factors in section 36(3) of the CCAA are not comprehensive enough as to settle all the questions surrounding how liquidating CCAAs should be administered. For this reason, courts still consider the *Soundair*

[450] Sarra, "Judicial Discretion", *supra* note 167 at 220-222.
[451] *CCAA*, s 36(1).
[452] *CCAA*, s 36(3).
[453] *CCAA*, s 36(2).
[454] *CCAA*, s 36(3)(b)-(c).
[455] *CCAA*, s 36(7)-(8).
[456] *CCAA*, s 36(4). See also *McEwan Enterprises Inc.*, 2021 ONSC 6878.
[457] Sarra, "Judicial Discretion", *supra* note 167 at 221.
[458] Fitzpatrick, *supra* note 205 at 44.

factors that developed in receivership law, among other considerations, in conjunction with section 36(3) for guidance. While applying the criteria in section 36(3), Mongeon J stated that:

> The elements which can be found in Section 36 *CCAA* are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order… In other words, the Court could grant the process for reasons other… than those mentioned in Section 36 *CCAA* or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.[459]

The shortcoming of section 36(3) is however not an indictment on the codification approach by Parliament, but rather the process in which such codification was carried out. The response from judges showed that while they appreciated such guidance from the statutes, it was not sufficient. The fact that section 36(3) did not provide guidance on all relevant issues with respect to liquidating CCAAs is no surprise given the inefficiency in Parliament's process of codifying the 2009 amendments.[460] Nevertheless, section 36(3) is not an absolute failure as some writers have put it out to be.[461] These criteria filled a lacuna in Canada's insolvency jurisprudence and courts have resorted to them as the standard test a myriad of cases.[462] In fact, due to Parliament's slowness to provide statutory guidelines on RVOs, the same criteria in section 36(3) have been adopted as a makeshift guidance for RVOs today. Thus, the codification of the liquidating CCAA process was a necessary and positive development in Canada's insolvency jurisprudence. Likewise, an amendment of the statutes to provide a framework for RVOs is necessary.

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[459] *White Birch Paper Holding Co. (Proposition de) (Re)*, 2010 QCCS 4915 at para 48-49, leave to appeal to C.A. refused, 2010 QCCA 1950.

[460] Recall that *Statute c 47* suffered from poor drafting and was hastily enacted, leading to the subsequent enactment of *Statute c 36* to rectify its flaws. Furthermore, the 2009 amendments were informed by the JTF Report issued in 2002, seven years before (see the discussion at 93, above).

[461] See Nocilla, "Asset sales", *supra* note 44; Nocilla, "History", *supra* note 64.

[462] See Jason Dolman & Gabriel Faure, "PrePlan Sales under Section 65.13 *BIA* and Section 36 CCAA" (2017) 59:3 Can Bus LJ 332 at 335; Fitzpatrick, *supra* note 205 at 7 ("Section 36(e) will no doubt assist the court in focussing on the effect on and potential prejudice to creditors arising from such sales or dispositions").

Codification does not necessarily mean Parliament would adopt exactly the same practice or precedent set by the court through its exercise of its jurisdiction. After debates and careful consideration, Parliament may decide to expand or limit the court's existing practice. For example, in the 2009 amendment, Parliament expanded the scope of the court's authority by providing for the removal directors in restructuring proceedings.[463] The court in *Stelco* had determined that the court had no authority under the *CCAA* to remove the directors of a debtor company, and rather the exercise of such powers were available under the oppression remedy provided in corporate law statutes.[464] The 2009 amendments in the *CCAA* however provided that during restructuring proceedings, a court may remove a director of a debtor company "if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."[465]

Also consider how the 2009 amendments limited the powers of the courts with respect to interim financing. Prior to the 2009 amendments, interim financings were approved by courts based on their discretionary authority granted by inherent jurisdiction (or, as discussed in section 2.5 of this thesis, statutory discretion).[466] In addition to codifying the framework, the statutory reforms also introduced: a) a notice requirement to secured creditors; b) an appropriateness and need-basis test to be carried out by the court in the circumstance; and c) a restriction in the use of interim financing charge to secure pre-existing debt owed by the debtor company.[467] These restrictions prevent court from approving practices they had allowed prior to 2009.

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[463] Sarra, "Judicial Discretion", *supra* note 167 at 214-215.
[464] *Stelco*, *supra* note 149.
[465] *CCAA*, s 11.5.
[466] See *Re Dylex Ltd*, 1995 CanLII 7370 (ONSC). See also Kent & Maerov, *supra* note 116 at 9; Sarra, "Judicial Discretion", *supra* note 167 at 210.
[467] *CCAA*, s 11.2(1); *BIA* s 50.6(1). See also Wood, *Bankruptcy supra* note 3 at 388-389.

The above analysis of certain aspects of the 2009 amendment shows that codification has been consistently used by Parliament to resolve issues that arise through the exercise of the court's discretion. Codification not only affirms the prior practice of the courts, but also rectifies and provides further guidance for a more efficient restructuring regime. However, codification of a restructuring process must be conducted painstakingly to consider all the relevant issues and provide the court with the necessary guidance. Having established that codification is a necessary step to resolve the issues that arise through the exercise of judicial discretion, the following sections of the thesis examine the primary issues which codification will resolve and provide a language proposal for Parliament to consider to codify the RVO framework in the *CCAA* and *BIA*.

4.4 Statutory Approach to RVOs

All insolvency statutes in Canada are silent on the regulation of RVOs. Courts have taken responsibility for developing and administering RVOs in restructuring proceedings either under *CCAA*, NOI or receivership proceedings. Chapter three of this thesis analysed the issues with the administration of RVO by the courts under three subjects: the jurisdiction of the court to approve RVOs, the considerations courts use to decide whether to grant RVOs, and the treatment of stakeholders by the court. As a solution to the issues raised, this thesis proposes the codification of the RVO process through an amendment of the *CCAA* and *BIA*. The codification is to solve two primary issues: certainty and transparency of Canadian restructuring jurisprudence, and the consideration of the interests of stakeholders. As will be further discussed in this section, to prevent abuse of the process, this thesis argues against the continued use of RVOs in receivership proceedings, emphasizing that their remedial nature doesn't align with the objectives of receivership proceedings, which lack a similar remedial goal.

4.4.1 Certainty and Transparency

Codification of the RVO process can clarify the basis of jurisdiction of courts to approve RVOs and standardize the factors courts consider when approving RVOs. The problem of certainty and its resulting impact on fairness was acknowledged in the Senate Report when the committee noted that "the flexibility that is inherent in the *CCAA* is probably inconsistent with consistency and predictability, and may not result in fairness."[468] This approach is not ideal and statutory codification is required to fix it; this started with the codification of judicial discretion in the 2009 amendments. Fairness has been described to be the backbone of Canada's bankruptcy law.[469] In addition, courts have recognized that all insolvency processes should be "reliable, transparent, efficient, fair and one which guards the parties' interests."[470]

In *CCAA* proceedings, the current consensus amongst courts is that the appropriate basis for jurisdiction to approve RVOs is section 11 of the *CCAA* which grants courts with wide discretionary powers.[471] Prior to this consensus, courts relied on both section 11 and section 36(1) of the CCAA; the latter which authorizes courts to approve *CCAA* sale of assets.[472] While the courts have declined to rely on section 36(1) for authority to approve RVOs, there is yet to be an express determination as to the sole and specific authority of the court to make such order, to the exclusion of other provisions. Although courts now have a shared understanding of the source of their jurisdiction to grant RVOs in *CCAA* proceedings, an explicit provision in the *CCAA* for the jurisdiction of the court to approve RVOs would provide clarity by ending the conflation of the

[468] Senate Report, *supra* note 224.
[469] Sarra, "Oscillating Pendulums", *supra* note 133 at 15.
[470] *Bank of Montreal v. Calgary West Hospitality Inc*., 2011 ABQB 293 at para 45. See also *Bluberi, supra* note 34 at para 40.
[471] See *Harte Gold*, *supra* note 15; *Blackrock Metals*, *supra* note 312.
[472] See *Nemaska*, *supra* note 14.

sale of assets process in section 36 of the *CCAA* with RVOs. In addition, this amendment will complement the general framework of RVOs as demonstrated in the proposed amendment language in section 4.5 below. Just as the codification of the *CCAA* sales process put to bed questions on the jurisdiction of the court to approve such, codification of RVOs will have the same effect.

As discussed in the third chapter of this thesis, RVOs have been granted in NOI and receivership proceedings. These raise legitimate questions about the jurisdiction of the court to grant approve such order. The *BIA*, unlike the *CCAA*, has no provision equivalent to section 11 of the *CCAA* which grants the court with wide discretionary powers. The current position, based on case law, is that courts have the authority to grant RVOs in NOI proceedings based on their inherent jurisdiction pursuant to section 183 of the *BIA*.[473] Following the reasoning of the court in *Skeena Cellulose,* as discussed in section 2.5 of this thesis, the appropriate jurisdiction should be termed statutory discretion pursuant to section 183 of the *BIA*.[474] Codification of the RVO process in the *BIA* will end any form of speculation regarding the source of authority for the court to approve RVOs in NOI proceedings.

In receivership proceedings on the other hand, courts have also relied on the inherent jurisdiction of the court to grant RVOs pursuant to 183 of the *BIA* and section 13(2) of the Judicature Act.[475] Recall from chapter three of this thesis that the reason why RVOs have been implemented in receivership proceedings is different from the reasons that RVOs have been granted in *BIA* and *CCAA* proceedings.[476] In *CCAA* and NOI proceedings, RVOs, as an "unusual or extraordinary measure" have been granted with the objective of protecting the business of the

[473] See *Payslate*, *supra* note 319; *Brunswick Health*, *supra* note 17.
[474] See the discussion at 33, above.
[475] See *Peakhill*, supra note 18; *Enterra*, *supra* note 18.
[476] See Section 3.4.3 above.

debtor company from liquidation and the consideration of the wider interest of the public and stakeholders, such as employees. Thus, the reliance on section 183 of the *BIA* to approve RVO applications in receivership proceedings is indeed a stretch of the exercise of judicial discretion by the court because RVOs, as a remedial tool, do not fit easily with the underlying purpose of receiverships. On the other hand, *CCAA* proceedings have an established remedial purpose, and NOI proceedings have been interpreted to have a similar purpose.[477] As such, companies with an appointed receiver who wish to implement an RVO transaction to preserve the business of the entity should do so in *CCAA* or NOI proceedings.

The lack of clarity with respect to jurisdictions has led to forum shopping in restructuring proceedings. A recent trend by debtor companies in receivership proceedings is to file for *CCAA* protection for the sole purpose of applying for an RVO.[478] It is still unclear whether courts have the authority to approve RVOs in receivership proceedings. The decision in *Peakhill*, where section 183 of the *BIA* was invoked on the basis of precedential usage to ground jurisdiction, is under appeal. Thus, the British Columbia Court of Appeal may address the question of jurisdiction of the court, but even if it does, there is no guarantee that courts in other provinces will follow suit. However, codification could resolve this question with finality.

There should also be certainty with respect to what the court will consider when determining whether to grant an RVO. This would enable stakeholders, particularly unsecured creditors, be aware of the extent of their legal rights in RVO proceedings and the appropriate relief to seek from the court when there is a possibly of their claim being wiped out. In *Harte Gold*, the court stated that RVOs should be an "unusual or extraordinary measure," granted only in the

[477] See *Century Services*, *supra* note 7 at para 15 ("Proposals to creditors under the *BIA* serve the same remedial purpose…").
[478] See *Validus Power, supra* note 381.

appropriate circumstances.[479] The court further went on to articulate the *Harte Gold* test, which courts consider when faced with RVO application. However, RVOs have become increasingly popular in usage and by no means an unusual measure by the court in restructuring proceedings. In addition to the *Harte Gold* test, courts have employed other tests such as the factors in section 36(3) of the *CCAA* (section 65.13(4) in NOI proceedings), *Soundair* factors,[480] the considerations advised by Sarra,[481] and additional reasons borrowed from courts in previous cases. These tests have been utilized by courts to justify the approval of RVOs in varying circumstances. RVOs have also been rejected for varying reasons, including lack of appropriate notice and unfair treatment of creditors. In a number of cases, the courts do not give reasons for granting the RVO, but appear to be approving them on the basis of precedent or because there is no opposition. The uncertainty and inconsistency of the existing situation benefits repeat players in restructuring proceedings who are well experienced and can litigate without worrying about the consistency of the court's process. The more dynamic and flexible the court is, the better for repeat players.

It is pertinent for insolvency practitioners, industry players, particularly credit providers to have clarity about the treatment of their claims in insolvency proceedings. Prior to RVOs, the legal rights of creditors in a debtor company could not be extinguished without the consent of each creditor or consent of creditors as a class through a plan of arrangement.[482] With RVOs, having the effect of a cramdown, the rights of creditors can be extinguished through a court order. Unfortunately, the conditions for granting an RVO are not certain and ultimately subject to the discretion of the court. The continuation of this uncertain practice can lead to aversion on the part of junior creditors and critical suppliers in credit practices due to uncertainty of their claims in the

[479] *Harte Gold, supra* note 15 at para 38.
[480] See *Soundair*, *supra* note 215.
[481] Sarra, "RVOs", *supra* note 11.
[482] Kent & Maerov, *supra* note 116 at 8.

event of insolvency.[483] The only constant factor in how courts are evaluating RVOs is their willingness to support the going concern outcome of the relevant debtor company. Unfortunately, this factor does not provide enough clarity given the competing interests at stake.

The statute needs to be amended to provide certain and clear guidelines on when an RVO application would be approved or rejected by the court. Parliament is in the best position to establish the law while considering the wide effects and implications of such law. Thus, if RVOs are going to be recognized as a restructuring mechanism, the *CCAA* and the *BIA* should be amended to reflect this.

4.4.2 Treatment of Stakeholders

Another important reason for the codification of the RVO process as opposed to reliance on judicial discretion is that there needs to be a careful consideration of the impact of RVOs on stakeholders. The stakeholders that are vulnerable in RVO proceedings are unsecured creditors, critical suppliers and employees of the debtor company. RVO transactions primarily benefit the creditor (mostly an existing secured creditor) acting as the purchaser of the debtor company. In a good number of cases, all or part of the claims of the purchaser are satisfied as part of the RVO agreement. In addition, the purchaser benefits from the future value of the debtor company.[484]

Codification is required so that RVOs do not unduly benefit secured creditors. Courts have consistently granted RVOs because they allow for the going concern to be preserved and avoid liquidation of the company. This justification for RVO is in line with the established purpose of the *CCAA*. However, courts have failed to examine whether the purchaser plans to sustain the company as a long-term going concern. In effect, the survival of the company might be the quickest

[483] *Ibid*.
[484] Sarra, "RVOs", *supra* note 11 at 10.

approach by major creditors to obtain value for their claims, and then subsequently file for liquidation or sell the assets of the company through piecemeal sale. In such circumstances, the employees of the company are at risk, the claims of unsecured creditors are sacrificed for nothing, and ultimately the justification premised on preserving the going concern objective ends up being a sham.

The amendments to the *CCAA* and *BIA* must provide for special consideration by the court where creditors (whether secured or unsecured) or stakeholders, such as employees and contractual counterparties, oppose the RVO application. Justice Walker, in *Payslate*, considered the unfair impact of the broad releases and bar to claims sought through the RVO application on affected unsecured creditors, some with contractual obligations to the debtor company. Perhaps even more care has to be taken by the court when the RVO application is unopposed. To date, there is no record of the court rejecting an unopposed RVO application. The statute needs to impose the duty to protect vulnerable stakeholders when considering RVO application, regardless of whether it is being opposed by any party. The reality of restructuring proceedings is that the speed at which they are conducted makes it difficult for all parties to file an objection in due time. Sometimes, the individual claims of each unsecured creditor might not be worth the expenses of litigation, however as a class, such claims might be substantial.

One of the objectives of the *CCAA* is to balance the rights of creditors.[485] The stay in the initial order and the voting thresholds for approving a plan strike this balance. Now that *CCAA* plans are seldom used, the statute needs to be amended to retain some form of creditor democracy whereby the interests of all stakeholders are considered. On the need for equilibrium, Sarra noted that "[i]t may be that there is need for express statutory language that rebalances fairness

[485] Sarra, *Creditor Rights supra* note 27 at 28.

considerations in insolvency proceedings and reinstates some of the restructuring goals of the legislation, providing some new tools to the courts and the parties."[486] Until *Payslate*, there was no requirement to provide unsecured creditors with due notice of the impact of the proposed RVO application. In the codification process, Parliament should enshrine notice provisions and require courts to consider the impact of RVOs on affected parties including critical suppliers and employees, in accordance with the policy objectives of the *CCAA*.[487]

Another policy objective of the *CCAA* is the distribution of losses amongst creditors. The codification of RVOs in the *CCAA* needs to reflect this. The current practice leads to the extinguishment of claims of unsecured creditors in a number of cases by the transfer of their claims to the ResidualCo. Courts have held that there is no harm against such creditors because they can proceed against the ResidualCo for enforcement. However, the court fails to consider how much recovery if any can be gotten from the assets left in the ResidualCo. The essential purpose of the RVOs is to retain the valuable assets in the debtor company while populating the ResidualCo with liabilities. Thus, the outcome for secured creditors or unsecured creditors with a strong bargaining power is much better than that of unsecured creditors. Unsecured creditors sometimes receive nothing because they are considered out of money. Unlike what occurs with a plan of arrangement where unsecured creditors receive a portion of the available assets to guarantee their support of the plan. This was the objective of the *CCAA* and same should occur in RVO proceedings.

4.5 Proposed Statutory Amendments to the *CCAA*

This thesis proposes amending the *CCAA* to regulate the RVO process. This amendment would provide certainty and transparency in the process of RVO approvals, protect stakeholders,

[486] Sarra, "Oscillating Pendulum", *supra* note 133 at 10.
[487] Sarra, *Creditors Rights supra* note 27 at 6.

and ultimately, provide the court with more guidance when considering applications. For so long, the *BIA* has mimicked the restructuring provisions of the *CCAA*. If Parliament intends to keep the status quo of allowing both statutes regulate restructuring proceedings, then whatever amendment made in the *CCAA* with respect to RVOs should be replicated in the *BIA* for NOI proceedings.[488] RVOs on the other hand should not be permitted in receivership proceedings because of the absence of a going concern objective for the benefit of the debtor company.

A) Consider adding the following definition to subsection 2(1) of the CCAA:

"reverse vesting transaction" *means an agreement or series of agreements in a proceeding under this Act wherein the shares of a debtor company are transferred to a purchaser for consideration, and the certain rights or obligations of the debtor company are transferred to another entity which is a party to the proceeding.*

This provision in the definition section defines what a reverse vesting transaction is for easy interpretation of the sections regulating the approval of RVOs. The definition describes the restructuring scheme in the manner which it has been implemented by the courts.

B) Consider adding a new section to the *CCAA* as section 36.01 after section 36, as follows:

Reverse vesting order
36.01 (1) *On application by a debtor company and following the completion of a sale and investment solicitation process, a court may make an order approving a reverse vesting transaction despite any requirement for shareholder approval, including one under federal or provincial law, if the court is satisfied that such application will result in the preservation of the business of the company.*

This sub-section grants the court with express jurisdiction to grant RVOs. In addition, there are two conditions which must exist before the court may grant an RVO. The first is that a SISP must be conducted to ascertain the best consideration that can be received for the

[488] This approach was used in the 2009 amendments which provided identical provisions to regulate sale of assets in section 36 of the *CCAA* and section 65.13 of the *BIA*.

assets of the debtor company. A SISP also promotes fairness and transparency,[489] and this will fulfil the condition in 36.01(3)(g) below. A SISP can be conducted under the supervision of the court when the *CCAA* process has commenced or on an out-of-court basis, pre-filing. Where the pre-filing SISP route is taken, courts should ensure that it is modelled after the standard SISP process under the court's supervision.[490] This consideration will be made by the court under 36.01(3)(g) below. The second condition is that the court must be satisfied that the RVO is being requested to preserve the business of the debtor company. Considering the impact of RVOs on the rights of creditors, this condition restricts the usage of RVOs to fulfil the remedial goal of the *CCAA* which protects the interest of the public and employees. In addition, it prevents the RVO process from being hijacked as a mechanism to solely to maximize values for creditors.

Notice to creditors

(2) *A company that applies to the court for the approval of a reverse vesting transaction is to give notice of the application to all creditors, contractual parties, and employees who are likely to be affected by the release, waiver, or transfer of claims of the debtor company.*

With respect to liquidating CCAAs, the debtor company is only required to give notice to the secured creditors.[491] This practice was initially adopted in RVO proceedings, and unsecured creditors would not receive any notice until the order has been granted. However, after *Payslate*, the requirement to give notice to all creditors who may be affected by the RVO requested seems to be a practice amongst courts to promote fairness.[492] This proposed sub-section codifies that requirement with more clarity as to the parties who should receive notice of the RVO application, whether contested or not.

Factors to be considered

[489] Nied & Levine, *supra* note 237 at 122.
[490] *Ibid* at 14.
[491] *CCAA*, s 36(2).
[492] See *Payslate*, *supra* note 319; *Validus Power*, *supra* note 381.

(3) *In deciding whether to grant the authorization, the court is to consider, among other things,*

> ***(a)*** *whether the process leading to the application for a reverse vesting transaction was fair and reasonable in the circumstance;*
> ***(b)*** *the efficacy and integrity of the sale and investment solicitation process to obtain the best possible consideration for the reverse vesting transaction;*
> ***(c)*** *whether the monitor approved the process leading to the proposed sale or disposition;*
> ***(d)*** *the extent to which the creditors were consulted;*
> ***(e)*** *the fair and equitable treatment of the claims of unsecured creditors and critical suppliers in the reverse vesting transaction;*
> ***(f)*** *whether any stakeholder is in a worse state under the reverse vesting transaction than they would have been under any other viable alternative; and*
> ***(g)*** *whether the consideration to be received as part of the reverse vesting transaction is reasonable and fair, reflects the market value of the business, assets, and licenses of the company.*

As discussed, there is inconsistency with respect to the tests which the courts should consider to grant RVOs. This section harmonizes the major tests which have been adopted by the courts: section 36(3) of the *CCAA*, *Soundair* factors, *Harte Gold* test, and the *Just Energy* considerations. In addition, the considerations are tailored specifically for RVOs. While the factors are not exhaustive, they consider all the relevant issues and will provide the appropriate protection to stakeholders, and guidance to courts when considering RVO applications.

Additional factors – related persons

(4) *If the proposed purchaser in the reverse vesting transaction is a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the approval only if it is satisfied that*

> *(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and*
> *(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the sale and investment solicitation process.*

Related persons

(5) *For the purpose of subsection (4), a person who is related to the company includes*

> ***(a)*** *a director or officer of the company;*
> ***(b)*** *a person who has or has had, directly or indirectly, control in fact of the company; and*

(c) *a person who is related to a person described in paragraph (a) or (b).*

Restriction — employers
(6) *The court may grant the approval of the reverse vesting transaction only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.*

The proposed sub-sections 36.01(4)-(6) are a replication of sub-sections 36(4)-(5), (7) of the *CCAA*. The proposed sub-sections 36.01(4)-(5) provide for fairness of the RVO process with respect to related party transactions, while sub-sections 36.01(6) offers protections to employees affected the RVO.

4.6 Conclusion

The proposed amendments to the *CCAA* above promote certainty and transparency in the RVO transaction process, and greater fairness for stakeholders in such restructuring proceedings. Restructuring under the *CCAA* is founded upon certain policy goals which were established by the court in the 1980s and 1990s to facilitate restructuring of financially distressed entities.[493] The *CCAA* needs to be reviewed periodically to facilitate such goals and objectives. Given the fact that the *BIA* has the same remedial objectives of the *CCAA*, similar provisions as proposed above should be codified in the *BIA* as well.

RVOs are an advantageous tool to restructure financially distressed companies. They should be implemented to fulfil the objectives of the *CCAA* which is its remedial goal of avoiding liquidation of the debtor company while balancing the interest of stakeholders and the wider pubic. Judicial discretion has been utilized to govern this process so far, however, it is necessary for Parliament to step up to assume their legislative duty of providing comprehensive guidance to the

[493] Schwill, *supra* note 40 at 11.

RVO process. The suggested amendments to the *CCAA* provide language to that effect. Given the complexity of insolvency proceedings, the statutes, no matter how codified cannot possibly cater for all circumstances.[494] The *CCAA* is not meant to codify all aspects of restructuring proceedings under the statute.[495] Judicial discretion is necessary to deal with the complex restructuring issues that arise in "real-time."[496] Judicial discretion will still play a part but it will not be unfettered; it will be exercised appropriately in accordance with the statute, just as the legislature intended.

[494] Jackson & Sarra, *supra* note 30 at 55.
[495] Andrew JF Kent, et al, "Canadian Business Restructuring Law: When Should a Court Say 'No'?" (2008) 24:1 BFLR 1 at 25.
[496] *Ibid*; Jones, *supra* note 32 at 484.

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