The Regulation of Receiverships

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A) Introduction

Although much attention has been directed towards the reform of both bankruptcy law and restructuring law in Canada, significantly less thought has been given to the place of receivership law within the overall insolvency system or the reform of the substantive rules that govern receiverships.[1] This is unfortunate. Receivership law is in many respects the least developed and least satisfactory insolvency regime in Canada. The rules and principles that govern receiverships are scattered across a variety of different sources. Many of the rules were developed from the common law and equity, but these rules often differ depending upon whether the receiver is privately appointed or court appointed. Several different federal and provincial statutes regulate receivers, but these statutes do not seek to codify the law and there is considerable overlap and duplication, which adds to the complexity of the field.

The purpose of this paper is to discuss the objectives of receivership law and to assess the current rules and principles that regulate the conduct of receiverships. In doing so, it is particularly valuable to examine the regulation of receiverships in other countries, since strikingly different approaches have been adopted. The use of receiverships in England has been so sharply limited that it has it has effectively ceased to exist as an available option in most cases. However, other commonwealth jurisdictions, such as Australia and New Zealand, have retained receiverships as an available insolvency regime but have enacted statutes that regulate their operation. A study of these varying approaches to the regulation of receiverships is helpful for at least two reasons. First, it will identify the elements of receivership law are thought to be sufficiently problematic so as to require regulation. Second, it will identify a range of solutions to these problems. The Canadian approach to the regulation of receiverships can then be assessed against the approaches that have been adopted in other jurisdictions in order to determine if underlying goals and objectives of the regulation of receivership are similar, and if so, to further evaluate if the Canadian approach to regulation is the best means of realizing these goals and objectives.

Commercial and insolvency legislation in the United States has often had a major influence on Canadian legislation. However, this does not hold true in respect of receivership law. The use of the receivership in a commercial context never developed in

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[1] Two notable exceptions are J. Ziegel, "The Privately Appointed Receiver and the Enforcement of Security Interests: Anomaly or Superior Solution?" in *Current Developments in International and Comparative Corporate Insolvency Law*, J. Ziegel ed. (Oxford, Clarendon, 1994) 450 and T. Buckwold, "The Treatment of Receivers in the Personal Property Security Acts: Conceptual and Practical Implications" (1997), 29 C.B.L.J. 277.

the United States, and it is for this reason that the law of that jurisdiction is not discussed in any detail.[2]

I will begin by summarizing the historical development of receivership law in Canada in Part B. In Parts C, D, E and F, I will analyze respectively the nature and operation of the rules regulating receiverships that have been adopted in Canada, Australia, New Zealand and the United Kingdom. In doing so, I will use the following taxonomy to organize the analysis of the statutory provisions: (1) qualifications of receivers; (2) powers of receivers; (3) duties of receivers; (4) liabilities of receivers; (5) court supervision of receiverships; (6) disclosure of information; (7) interaction between insolvency regimes. In the United Kingdom, the legislative approach to receiverships occurred in two stages. The first stage involved the regulation of receiverships. The second stage involved an abolition of receivership, and the expansion of an alternative insolvency regime to take its place. For this reason, the discussion of the U.K. approach will also contain an examination of this second stage in the reform of receivership law. Part G provides a survey of the relevant theoretical and economic literature concerning the allocation of the right to control enforcement proceedings against an insolvent debtor. This survey will provide a rational basis with which to assess the various approaches to the regulation of receiverships. Part H will discuss the availability of empirical data in Canada in order to assess whether the current data that is available provides a sufficient source of data for future empirical work that would evaluate the operation of receiverships in Canada. Part I establishes a framework to assess the effectiveness of the Canadian approach to the regulation of receiverships. Part J sets out the major conclusions of this study.

B) The Historical Development of Receivership Law in Canada

Although receivership law in the various jurisdictions is derived from English common law and equitable principles, Canadian receivership law has a number of distinctive features that are not found in other jurisdictions. These features are a product of the historical evolution of the receivership law in Canada. The major episodes in the development of this body of law are summarized below.[3]

1) Court Appointed and Privately Appointed Receivers

Receiverships date back to the sixteenth century. They were the invention of the courts of equity, and involved the appointment of a receiver by the court. Until the nineteenth century, they offered the only type of receivership remedy available to creditors. The private receivership emerged when mortgagees sought to create a device that would insulate them from the liability imposed on mortgagees who took possession of the land, and yet would provide them with a cheaper and more accessible alternative to a court

[2] See F. Buckley, "The American Stay" (1994), 3 So. Cal. Interdisciplinary L.J. 733 for a discussion as to possible reasons why the private receivership did not evolve in the United States.
[3] For a more extensive history see, R. Wood, *Bankruptcy and Insolvency Law*, (Toronto: Irwin Law, 2009) at 457-67.

appointment.[4] The solution was to include a clause in the mortgage that gave the mortgagee the power to appoint a private receiver to collect in the rents and turn them over to the mortgagee. Although the mortgagee made the appointment, the receiver was treated as the agent of the debtor. The unusual feature of this contractual arrangement was that the debtor did not have the power to direct the receiver or to dismiss the receiver. The private appointment became the most common form of receivership used by secured creditors. It was less expensive because it required less supervision by the court, and the obligations and duties of the privately appointed receiver were less onerous than those imposed on a court appointed receiver.[5] As a result, the law that governed court appointed receivers was different from the law that governed privately appointed receivers. The former was governed by equitable principles, while the latter was derived from common law contract and agency law principles.

The use of receiverships in Canada differs from the practice in other commonwealth jurisdictions in one important respect. Court appointed receivers are used more frequently in Canada than in the other jurisdictions.[6] Court appointed receivers were rarely used in Canada during the 1970s up until the 1990s[7] because of their greater cost, but were sometimes used if litigation was anticipated.[8] There was a significant growth in their use because of the perception that a court appointed receiver could be insulated from environmental liability and successor employer liability through court order.[9] This subsequently turned out to be mistaken, and the concern over liability on the part of insolvency professionals resulted in an increase in the number of restructurings that were essentially a disguised form of receivership.[10]

2) Provincial and Federal Regulation of Receiverships

Federal and provincial statutes have been enacted to regulate a number of aspects of receivership law. The increased use of receiverships in the 1970s and 1980s gave rise to a number of concerns. The other creditors had no right to information concerning the

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[4] The historical development of the privately appointed receiver is described in *Gaskell v. Gosling*, [1896] 1 Q.B. 669 at 691-2, per Rigby, L.J.

[5] See Ziegel, *supra* note 1 at 453.

[6] See P. Blanchard & M. Gedye, *Private Receivers of Companies in New Zealand* (Wellington: LexisNexis, 2008) at 33 (the power to appoint a court-appointed receiver is rarely exercised in New Zealand); M. Murray, *Keay's Insolvency: Personal and Corporate Law and Practice*, 6th ed. (Sydney: Thomson Lawbook Co., 2008) at 445 (court appointments are far less common than private appointments in Australia).

[7] F. Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at v reports that the statistics collected by the Office of the Superintendent of Bankruptcy show that in 1998 there were 57 court appointed receivers and 1,152 private appointed receivers and that from 1993 to 1998 the court appointed receiverships accounted for less than 5% of the total number of receiverships.

[8] Ziegel, *supra* note 1 at 453, note 7.

[9] See R. Davis, "The Way Forward: Policy Implications of the Supreme Court Decision in *TCT Logistics*" (2007), 44 C.B.L.J. 357.

[10] See P. Macdonald & B. Harrison, "Receivership Orders – Where Do We Go From Here?" (2004), 21 Nat. Insol. Rev. 65 at 73.

affairs of the debtor, and there was a perception that the legitimate interests of all other interested persons were liable to be sacrificed.[11] Unfortunately, the legislative response has been uncoordinated. Legislation regulating receiverships have been enacted in federal and provincial business corporation legislation, in provincial personal property security legislation and in the *Bankruptcy and Insolvency Act*[12] ("BIA"). This has produced considerable complexity because of the duplicative, overlapping and piecemeal nature of the regulatory provisions.

3) Interim Receivers and Template Receivership Orders

In 1992, the BIA introduced provisions that gave secured creditors the ability to apply to court for the appointment of an interim receiver.[13] This was implemented to offset the added risk to secured creditors that arose upon the imposition of a statutory ten-day notice that had to be given to the debtor before a security interest could be enforced against substantially all the assets of the debtor.[14] Although the secured creditor was unable to immediately appoint a receiver or enforce against the collateral, the ability to appoint an interim receiver provided a mechanism to protect the assets against dissipation of the assets during this period.

Courts began to employ the interim receiver provisions for a much broader purpose. Interim receivers were appointed to operate the business and to sell the assets.[15] The advantage of using an interim receiver was that the court appointment was national in scope and was therefore recognized throughout Canada. A serious drawback of this practice was that all of the federal provisions that were designed to regulate receivers did not apply to an interim receiver.[16]

It also became common for interim receivership orders to attempt to insulate the liability of the receiver. They did so using two devices. First, the court order that appointed the receiver would often contain a liability shield. Second, courts would use their power to stay proceedings against a receiver to prevent such actions from being commenced. These devices were tested before the courts, and in both cases these devices were found to be ineffective.[17]

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[11] *Supra* note 3 at 459-60.
[12] R.S.C. 1985, c. B-3 ("BIA").
[13] BIA, s.47(1).
[14] BIA, s.244.
[15] *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div.)
[16] *Bruce Agra Foods Inc. v. Proposal of Everfresh Beverages Inc.* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.); *Harris Trust & Savings Bank v. Anicom Multimedia Wiring Systems Inc.* (2001), 24 C.B.R. (4th) 203 (Ont. S.C.J.).
[17] *Re Big Sky Living Inc.* (2002), 37 C.B.R. (4th) 42 (Alta. Q.B.) (court lacks jurisdiction to order liability shield); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (stay of proceedings of actions against receiver only designed to protect against frivolous or vexatious actions).

Because of the uncertainty as to the appropriateness of the various provisions contained in draft court orders, several jurisdictions struck commercial committees in order to better define the proper and legitimate scope of receivership orders. This led to the drafting of template receivership orders. Such orders provided for the concurrent appointment under the interim receiver provisions of the BIA as well as under provincial legislation. This was done so that the regulatory provisions of the BIA and under provincial statute would come into operation.[18]

4) The New National Receiver

The 2009 amendments to the BIA were designed to ensure that the appointment of an interim receiver may now only be used as a temporary measure.[19] However, courts are given a new ability to appoint a national receiver that will be recognized across Canada.[20] It is likely that this will result in a discontinuance of the practice of concurrent appointments, since this device was primarily designed to ensure that interim receivers were not insulated from the statutory provisions that regulated ordinary receiverships. The application is to be made in a court having jurisdiction in the judicial district of the locality of the debtor.[21] New qualification requirements were also imposed on receivers appointed under the BIA, as well as receivers appointed pursuant to provincial statute or jurisdiction.

5) The Statutory Liability Shield

The 2009 amendments to the BIA have introduced a provision that makes it clear that insolvency professional are not liable under successor employer provisions for obligations that relate to pre-receivership liabilities.[22] It will be interesting to see if this amendment will reverse the trend that saw a marked increase in the use of court appointed receiverships in Canada.[23] If the primary driver behind the use of court appointed receiverships was a fear of liability for pre-receivership obligations under successor employer provisions, there may well be a decrease in the number of court appointments and a corresponding increase in the use of private receiverships.

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[18] Although the BIA regulatory provisions did not apply to interim receivers, they did apply to provincial appointments. A concurrent appointment was therefore effective in causing the federal provisions to be invoked.

[19] BIA, s.47(1). The 2009 amendments were enacted in 2005 and 2007, but most of these amendments came into force upon their proclamation on September 18, 2009. See S.C. 2005, c.47; S.C. 2007, c.36. The appointment cannot extend beyond thirty days after the order is made, unless the court specifies a longer period, and comes to an end if a court-appointed receiver, privately appointed receiver or trustee in bankruptcy takes possession of the debtor's property.

[20] BIA, s.243(1).

[21] BIA, s.243(5).

[22] BIA, s.14.06(1.2).

[23] See P. Farkas, "Why Are There So Many Court-Appointed Receiverships?" (2003), 20 Nat. Insol. Rev. 37.

C) The Regulation of Receiverships in Canada

1) Qualifications of Receivers

There were originally no statutory qualification requirements imposed on receivers. This was changed in the 2009 amendments to the BIA. The legislation provides that only a licensed trustee may be appointed as a receiver.[24] This means that the rules that govern the licensing and qualification of trustees in bankruptcy will apply to those who act as receivers. Unless a court orders otherwise, a receiver is prohibited from acting if the receiver was a director or officer of the debtor, or was related to or in an employment relationship with the debtor or a director or officer of the debtor during the past two years; if the receiver was the auditor, accountant or solicitor or a partner or employee of the auditor, accountant or solicitor during the past two years; or if the receiver is a trustee under a trust indenture issued by the debtor or a related person.[25]

A trustee in bankruptcy is not permitted to act as a receiver of the property of the debtor unless the trustee has obtained a written opinion from independent legal counsel that the security is valid and enforceable against the estate.[26] A trustee/receiver who acts in a dual capacity must notify the Superintendent and the creditors or inspectors that the trustee is acting for the secured creditor, of the basis of any remuneration from the secured creditor, and of the legal opinion.[27]

2) Powers of Receivers

At common law, the powers of a privately appointed receiver are derived from the security agreement pursuant to which the receiver is appointed. In addition, the deemed agency provision that is typically found in the security agreement provides that a receiver acts as agent of the company. This gives a privately appointed receiver the power to carry on the business as agent of the debtor.[28] The powers of a court appointed receiver are derived from the terms of the court order pursuant to which the receiver is appointed, and the receiver risks losing the right to an indemnity for fees and expenses if the receiver exceeds this authority.[29]

Federal and provincial statutes have not attempted to enumerate or codify the powers of receivers, or confer supplemental powers on receivers. However, the legislative provisions may have the effect of modifying the common position concerning the source of these powers in relation to a privately appointed receiver. First, federal and provincial business corporation statutes provide that a privately appointed receiver may "carry on

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[24] BIA, s.243(4).
[25] BIA, s.13.3.
[26] BIA, s.13.4(1).
[27] BIA, s.13.4(1.1). A copy of the legal opinion must be provided on request. See BIA, s.13.4(2).
[28] *Peat Marwick Ltd. v. Consumers' Gas Co.* (1980), 35 C.B.R. (N.S.) 1 (Ont. C.A.).
[29] *Re Ursel Investments Ltd.* (1993), 10 C.B.R. (3d) 61 (Sask. C.A.).

any business of the corporation to protect the security interest of those on behalf of whom the receiver is appointed."[30] This would appear to supplant the need to look to a deemed agency provision as the source of a privately appointed receiver's power to carry on the business.[31] Second, provincial personal property security legislation gives receivers the power to enforce against the collateral. It is, therefore, no longer necessary to view a receiver as acting as agent of the secured creditor in the exercise of these powers. However, as these provisions are not comprehensive and do not apply to all receiverships, it will continue to be necessary to rely upon the common law in deriving the source of power of a privately appointed receiver.

3) Duties of Receivers

The duties imposed upon a court appointed receiver were more onerous than those imposed upon a privately appointed receiver at common law. A court appointed receiver was not subject to the control or direction of the secured creditor, but was under an obligation to consider the interests of all parties.[32] A privately appointed receiver was under a more limited duty. The receiver was only required to consider the interests of the secured creditor.[33] Although a privately appointed receiver also owed a duty to the debtor and to persons holding lower ranking interests in the assets to act in good faith and to obtain the best price reasonably obtainable[34], the receiver was not required to consider their interest in determining the timing of the sale. The assets could therefore be sold immediately even if a delay might greatly enhance their recovery.[35]

It is not entirely clear whether this state of the law has been altered by statute. Federal and provincial legislation has imposed an obligation on a receiver to act in good faith and in a commercially reasonable manner.[36] This obligation applies to both court appointed and privately appointed receivers. Some commentators have argued that privately appointed receivers must now adhere to the more onerous obligations required of court-appointed receivers.[37] However, Canadian courts have not extensively analyzed the nature and extent of the duty to act in a commercially reasonable manner, and there remains considerable uncertainty as to whether it requires a privately appointed receiver to consider the interests of others in determining the timing of the sale.

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[30] See *Canada Business Corporations Act*, R.S. 1985, c.C-44, s.95; *Business Corporations Act*, R.S.A. 2000, c. B-9, s.94.
[31] Buckwold, *supra* note 1 at 307-10 argues that the provisions of the PPSA might also be interpreted as conferring the power of management on a privately appointed receiver.
[32] *Ostrander v. Niagara Helicopters Ltd.* (1973), 19 C.B.R. (N.S.) 5 (Ont. H.C.J.).
[33] *In re B Johnson & Co. (Builders) Ltd.* [1955] Ch. 634.
[34] *Downsview Nominees Ltd. v. First City Corp. Ltd.*, [1993] A.C. 295.
[35] *Cuckmore Brick Co Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949; *South Sea Bank Ltd. v. Tan Soon Gin*, [1990] 1 A.C. 536.
[36] BIA, s.247; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 99; *Personal Property Security Act*, R.S.A. 2000, c. P-7, s.66(1).
[37] See Buckwold, *supra* note 1 at 296-99.

4) Liability of Receivers

Although a court appointed receiver was personally liable for post-receivership contracts[38], a privately appointed receiver contracted as agent for the debtor and therefore was not liable on such contracts.[39] The federal and provincial statutes do not appear to have altered this state of affairs. However, the BIA insulates receivers from liability for pre-receivership actions that might otherwise be imposed on the receiver under environmental and successor employer statutes. A receiver is not personally liable for any environmental damage that occurred before his or her appointment, and is only liable for post-appointment damage if it occurs because of the receiver's gross negligence or wilful misconduct.[40] A receiver who continues to operate a business or continues the employment of the debtor's employees is not personally liable for any liability, including that of a successor employer, in respect of claims arising before or upon the receiver's appointment or that are calculated by reference to a period before the receiver's appointment.[41]

5) Court Supervision of Receivers

Courts had very little ability at common law to supervise the conduct of a privately appointed receiver. This was in marked contrast with court appointed receivers who obtained their powers from the court and were subject to the direction and supervision of the court. This has been altered by federal and provincial legislation. The personal property security statutes and the business corporation statutes give courts the power to make the following orders:[42]

- An order removing, replacing or discharging a receiver.
- An order giving directions on any matter relating to the duties of the receiver.
- An order approving the accounts or fixing the remuneration of a receiver.
- An order requiring the receiver or the secured creditor to make good any default in connection with the receiver's custody or management of the property and business.
- An order relieving a receiver or secured creditor from any default on such terms as the court thinks fit.

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[38] *Re Smith & Son* (1929), 10 C.B.R. 393 (Ont. S.C.); *Re Ashk Development Corp.* (1988), 70 C.B.R. (N.S.) 72 (Alta. Q.B.).
[39] *Peat Marwick Ltd. v. Consumers' Gas Co.*, supra note 28.
[40] BIA, s.14.06(2).
[41] BIA, s.14.06(1.2). This provision was modified in the 2009 amendments so as to specifically cover successor employer liability.
[42] See, e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s.100; *Personal Property Security Act*, R.S.O. 1990, c. P.10, s.60(2).

- An order confirming any act of the receiver.

The court therefore is given the power to supervise the conduct of privately appointed receivers. In addition, the personal property security statutes provide that a court has the same power to make orders in respect of privately appointed receivers as it has in respect of court appointed receivers.[43]

The receivership provisions in the BIA, do not contain similar provisions. Therefore, the expanded supervisory powers of the court are not of general application but apply only to the extent that the matter falls within the scope of the business corporations statute or the personal property security statute.[44] The powers conferred on a court under the BIA are more limited in scope. The court does not have a general supervisory power, but may, on application of the Superintendent, the insolvent person, the trustee, the receiver or a creditor, make an order requiring a secured party, receiver, or insolvent person to carry out a statutory obligation imposed by the BIA.[45]

6) Disclosure of Information

Provincial personal property security legislation, the federal business corporation statute and several of the provincial business corporation statutes impose a number of accounting and reporting obligations on a receiver.[46] The receiver must immediately notify the corporate registrar of the receiver's appointment or discharge if the debtor is a corporation and must keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions relating to the assets. The receiver must also prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration, and must render a final account of the receiver's administration on completion of the receiver's duties, and to provide the corporate registrar with a copy if the debtor is a corporation.

The BIA provides that a receiver must prepare a statement that sets out the name of each creditor and the amount of their claim, a list of the property and its book value, and the receiver's intended plan of action to the extent that it has been established.[47] A receiver is also required to prepare interim reports at least every six months and a final report that contain a statement of receipts and disbursements.[48]

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[43] See, e.g., *Personal Property Security Act*, R.S.A. 2000, c. P-7, s.65(7)(e). The Ontario PPSA is less clear on this point. See *Personal Property Security Act,* R.S.O. 1990, c. P.10, s.60(2)(d).

[44] This may occur where the debtor is not a corporation or is not incorporated under the business corporations statute and the security interest given to the secured party only covers land.

[45] BIA, s.248. The statutory obligations that are covered by this provision are those set out in ss. 244 to 247.

[46] See, e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 101; *Personal Property Security Act*, R.S.A. 2000, c. P-7, s.65(2).

[47] BIA, s.246(1); *Bankruptcy and Insolvency General Rules*, SOR/98-240, s.125.

[48] BIA, s.246(2)-(3); *Bankruptcy and Insolvency General Rules*, SOR/98-240, s.126-7. Copies of the reports must be provided to the Superintendent of Bankruptcy, the debtor and to any creditor who requests a copy.

7) Interaction between Insolvency Regimes

A bankruptcy of the debtor terminates the effectiveness of a deemed agency provision in respect of a privately appointed receiver.[49] The debtor's property vests in the trustee in bankruptcy, and the debtor loses the capacity to deal with such property.[50] The receiver can no longer be regarded as acting as the agent of the debtor, since the debtor no longer has title to the assets or the capacity to deal with them. The receiver therefore acts in his or her own personal capacity and incurs personal liability in respect of contracts entered into with third parties following a bankruptcy.[51] A bankruptcy of the debtor does not, however, affect the receiver's right to enforce the security.

Restructuring proceedings under the commercial proposal provision of the BIA are rarely feasible if a receiver has been appointed. The automatic stay of proceedings associated with these restructuring proceedings does not apply if the property has been seized.[52] Restructuring proceedings under the *Companies' Creditors Arrangement Act*[53] ("CCAA") are not subject to a similar restriction, but a court will likely be reluctant to permit them to proceed if the affairs of the debtor have deteriorated to this point.

Canadian insolvency law requires that a debtor be given notice that a secured creditor is planning to appoint a receiver or otherwise enforce against all or a substantial portion of the debtor's assets.[54] The secured creditor must give the debtor a notice of intention to enforce the security. The secured creditor is not permitted to enforce its security interest or appoint a receiver until ten days after the notice is given unless the debtor consent to an earlier enforcement. This gives the debtor the opportunity to commence restructuring proceedings. The stay of proceedings associated with both types of restructuring proceedings prevents a secured creditor from appointing a receiver or otherwise enforcing against the collateral. Accordingly, once restructuring proceedings are commenced, a secured creditor must ask a court to lift the stay or to terminate the restructuring proceedings before a receiver can be appointed.[55]

In some instances, a receiver is used in tandem with restructuring proceedings. This can occur if the management of the debtor has resigned or if the creditors have lost confidence in management.[56] In this case, the purpose of the receiver is more limited in that it merely provides an alternative mechanism for the supervision of the business operations during the restructuring attempt.

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[49] *Gosling v. Gaskell*, [1897] A.C. 575 (H.L.); *Thomas v. Todd*, [1926] 2 K.B. 511.
[50] BIA, s.71.
[51] See Bennett, *supra* note 7 at 487-90.
[52] BIA, ss.69(2), 69.1(2).
[53] R.S.C. 1985, c. C-36
[54] BIA, s.244.
[55] See, *e.g.*, *Re Bargain Harold's Discount Ltd.* (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.); *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225(Ont. Gen. Div.).
[56] *Re 843504 Alberta Ltd.* (2003), 4 C.B.R. (5th) 306 (Alta. Q.B.); *General Electric Capital Canada Inc. v. Euro United Corp.* (1999), 25 C.B.R. (4th) 250 (Ont. S.C.J.).

D) The Regulation of Receiverships in Australia

The origins of the current Australian receivership provisions can be traced to the Australian Law Reform Commission's *General Insolvency Inquiry* (more commonly referred to as the *Harmer Report*).[57] The Report, which was released in 1988, made wide-ranging recommendation for the reform of both personal and corporate insolvency. In 1992, the *Corporate Law Reform Act 1992* was enacted, and the insolvency provisions came into force in June of 1993. The legislation incorporated many of the recommendations of the *Harmer Report*. Although this reform effort is most widely recognized for its creation of a corporate rescue regime known as voluntary administration, it is also notable for its inclusion of provisions regulating receiverships.[58]

Australia has chosen not to unify its corporate insolvency and personal insolvency regimes. The *Bankruptcy Act* governs personal insolvencies, whereas the *Corporations Act 2001* governs corporate insolvencies. The provisions respecting receivers are located in Part 5.2 of the *Corporations Act 2001*. The Australian law reform efforts did not attempt to completely codify the law respecting receiverships or to fundamentally alter it.[59] The aim was simply to improve upon the equitable principles and statutory rules that govern receiverships. Although court appointments of receivers are available in Australia, it is far more common for receivers to be privately appointed.[60] For the most part, the statutory provisions apply to both types of receiverships, and apply also to other persons who have control of property of the corporation for the purposes of enforcing a charge.

1) Qualifications of Receivers

The legislation imposes two types of qualification requirements on receivers. The objective of the first is to ensure that the receiver has the necessary knowledge and skills. This is accomplished by requiring that the receiver be a registered liquidator.[61] The objective of the second type of requirement is to ensure that the receiver is independent from both the secured creditor and the debtor. The legislation provides that a mortgagee, auditor, director, manager or employee of the debtor corporation is not qualified to act as a receiver.[62] Further qualification restrictions apply to directors, managers and employees of related corporations, as well as to persons who formerly occupied such position in the 12 months prior to the appointment of the receiver.[63]

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[57] Report 45 (Sydney, 1988).
[58] See A Keay, "Receiverships in Light of Recent Legislative Changes" in *Corporate Insolvency Law,* J. Lessing & J. Corkery eds. (Gold Coast, Australia: Taxation & Corporate Research Centre Law, 1995), Chapter 4.
[59] *Ibid.*, at para. 182.
[60] Murray, *supra* note 6 at 447.
[61] *Corporations Act 2001*, s.418(1)(d). Section 1282 sets out the requirements for becoming a registered liquidator.
[62] *Ibid.*, s.418(1)(a), (b) and (c).
[63] *Ibid.*, s.418(1)(e) and (f).

2) Powers of Receivers

Ordinarily, the powers of a privately appointed receiver are defined by the instrument under which the receiver is appointed, while a court-appointed receiver derives his or her powers pursuant to the court order that makes the appointment. These powers are supplemented by additional powers that are statutorily conferred on both types of receivers unless limited by the court order or by the instrument from which the receiver's powers are derived.[64] These statutory powers therefore operate as default rules that apply unless a contrary rule is specified in the court order in the case of a court-appointed receiver, or in the instrument in the case of a privately appointed receiver.

These powers include the power to enter into possession and take control of property, to borrow money on the security of property of the corporation, and to carry on the business of the corporation. The receiver is also given the right to inspect any books of the corporation, and may require the disclosure of information by certain persons connected with the corporation.[65]

3) Duties of Receivers

A privately appointed receiver did not originally owe a duty to exercise reasonable care in selling the property. So long as the receiver acted honestly, the receiver was not liable for an improvident realization.[66] The *Harmer Report* recommended that a higher standard be imposed on privately appointed receivers, and this recommendation was implemented in the corporate law reform legislation. The statute provides that a receiver must take all reasonable care to sell it at its market value, or for the best price that is reasonably obtainable if the property does not have a market value.[67] However, the courts have also held that the obligation to obtain the market value of the collateral does not detract from the common law principle that the secured party may sell at the time of its choice and does not have to wait until a time when a better price is obtainable.[68]

Although this statutory duty is also imposed in respect of a court appointed receiver, this does not appear to significantly alter the obligation owed by a court appointed receiver. Nor does it detract from the wider formulation of the obligation that requires a court-appointed receiver to act in the interests of all persons who have an interest in the assets.

4) Liabilities of Receivers

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[64] *Ibid.*, s.420.
[65] *Ibid.*, s.430.
[66] *Expo International Pty Ltd v. Chant* [1979] 2 N.S.W.L.R. 820. And see Keay, *supra* note 58 at 37-43.
[67] *Corporations Act 2001*, s.420C.
[68] *Investec Bank (Australia) Ltd. v Glodale Pty. Ltd.*, [2009] VSCA 97.

It is usual for the security agreement to provide that a privately appointed receiver is deemed to act as agent for the corporation.[69] As a result, post-receivership contracts or other obligations incurred by the receiver are obligations of the corporation as principal, and the receiver therefore is not liable in respect of these obligations. This outcome has been modified by legislation. The statute provides that a receiver is personally liable for debts incurred, services rendered, goods purchased or property hired, leased, used or occupied after the receiver's appointment.[70] A receiver cannot contract out of this liability. This rule does not have a significant impact on court appointed receivers, since they already act in their personal capacity and incur post-receivership obligations in their own right.

Receivers are not liable in respect of the pre-receivership obligations of the corporation. The *Harmer Report* argued that this produced unfairness in the case of leases of property, since it would allow a receiver to obtain the benefit of remaining in occupation of leased premises without having to pay for its use. The legislation adopted the recommended reform and imposed a statutory obligation on the receiver to pay rent under a pre-receivership lease attributable for the period that begins seven days after the receiver's appointment unless, the receiver notifies the lessors of his or her intention not to occupy the premises.[71]

5) Court Supervision of Receivers

The corporation legislation gives courts expanded supervisory powers over receivers. Some of these provisions apply only to privately appointed receivers. This is little moment as it merely reflects the fact that the court already exercises this type of supervision over court-appointed receivers. The court is given the following powers:

- On application of the receiver, the power to give directions in relation to any matter arising in connection with the performance or exercise of any of the powers or functions of the receiver.[72]
- The power to determine the validity of an appointment of a receiver.[73]
- The power to fix the remuneration of a privately-appointed receiver.[74]
- On application of the corporation, the power to remove a receiver for misconduct.[75]

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[69] Murray, *supra* note 6 at 458.
[70] *Ibid.*, s.419(1).
[71] *Ibid.*, s.419A.
[72] *Corporations Act 2001*, s.424.
[73] *Ibid.*, s.418A.
[74] *Ibid.*, s.425.
[75] *Ibid.*, s.434A.

- On application of a complainant, the power to make any order it thinks fit if it appears that a receiver is not faithfully performing his or her functions or is not observing a requirement of the instrument or court order.[76]

- On application of a liquidator, the power to remove a receiver where the objectives have been achieved.[77]

The court is also given the power to authorize the disposition by a receiver of property that is subject to a charge that has priority over the charge that is being enforced by the receiver.[78] The receiver must demonstrate that all reasonable steps were taken to obtain the consent of the secured creditor, that the sale is in the interest of the corporation and its creditors, and that it will not unreasonably prejudice the holder of the prior charge. In making the order, the court must have regard to the need to adequately protect the rights of the prior charge holder. The *Harmer Report* recommended the inclusion of this provision.[79] The concern was that a receiver might be effectively prevented from selling the business as a going concern. In the absence of such a power, the receiver would be unable to sell the property without paying out the prior charge holder in full. This would not be feasible where the amount secured by the prior charge exceeds the market value of the collateral.

6) Disclosure of Information

The *Harmer Report* stated that a major grievance of unsecured creditors was that they receive very little information about the state of affairs of the corporation or about the plan of action proposed by the receiver for the administration of the property and the operation of the business.[80] In order to remedy this deficiency, a disclosure obligation was imposed on receivers. A receiver is required to prepare a report within two months of the date of taking control.[81] There are also notification requirements that impose an obligation on a receiver to notify the federal regulator of the appointment of a receiver.[82]

7) Interaction between Insolvency Regimes

The corporation legislation contains statutory provisions that deal with the interaction between receivership proceedings and other insolvency proceedings. The statute covers situations where liquidation proceedings are commenced in connection with a corporation that is in receivership. It also covers situations where voluntary administration proceedings are commenced in respect of a corporation that is subject to receivership proceedings.

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[76] *Ibid.*, s.423.
[77] *Ibid.*, s.434B.
[78] *Ibid.*, s.420B.
[79] *Harmer Report*, paras. 210-14.
[80] *Harmer Report*, para. 206.
[81] *Corporations Act 2001*, s.421A.
[82] *Ibid.*, s.427.

The *Harmer Report* examined the effect of liquidation on the powers of a receiver. The right of a secured creditor to enforce its security interest is not affected by the occurrence of liquidation proceedings.[83] However, it does have an affect on a privately appointed receiver's power to carry on the business. Upon the occurrence of liquidation proceedings, a privately appointed receiver loses the ability to operate the business as agent of the debtor corporation. Although the receiver has the right to maintain possession and control of the assets, and to dispose of them on behalf on the secured creditor, the receiver cannot operate the business without being exposed to personal liability on any obligations that are incurred in connection with the business operation. The concern was that this might lead to the fragmentary disposition of assets that would reduce the chance of a going concern sale at a higher price.[84] The legislation alters this by giving a receiver the power to carry on the business of the corporation with the written approval of the liquidator or of the court.[85]

One of the most notable aspects of the *Harmer Report* was the proposal for the creation of voluntary administration as an alternative to liquidation of the assets of the corporation.[86] An administrator is appointed, and an independent assessment of the business is undertaken. The objective of the voluntary administration is to maximize the possibility of continuing the existence of the business, and if that is not possible, to result in a better return to the business than a liquidation.[87] The corporation legislation deals with the interaction between receivership proceedings and voluntary administration.

Secured creditors are not permitted to enforce their security while voluntary administration proceedings are underway without the written consent of the administrator or the leave of the court.[88] This prohibition does not apply if the secured creditor has enforced its remedies prior to the commencement of voluntary administration proceedings[89], or if the security interest is taken in perishable property.[90] However, a major exception to the rule is provided if the secured creditor has a security interest in the whole or substantially the whole of the property of the corporation.[91] If voluntary administration proceedings are commenced before receivership provisions are instituted, the secured creditor is given a choice whether to enforce the security interest during a thirteen-day decision period. If the secured creditor fails to enforce the security interest during this period, it is subject to the same prohibition on enforcement that governs secured creditors who have security interests in less than the whole of the debtor's property.

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[83] Murray, *supra* note 6 at 323-24.
[84] *Harmer Report*, para 221.
[85] *Corporations Act 2001*, s.420C.
[86] See A Keay, "A Comparative Analysis of Administration Regimes in Australia and the United Kingdom", in *International Insolvency Law: Themes and Perspectives,* P. Omar ed. (Aldershot, England; Burlington, VT: Ashgate, 2008), Chapter 5.
[87] *Ibid.*, s.435A.
[88] *Ibid.*, s.440B.
[89] *Ibid.*, s.441B.
[90] *Ibid.*, s.441C.
[91] *Ibid.*, s.441A.

A secured creditor who has a security interest over all or substantially all of the assets of the corporation therefore is able to circumvent voluntary administration. The reason for this exception appears to flow from a concern over piecemeal liquidation of the business assets. Secured creditors who have a security interest in particular assets are not permitted to enforce their security interests as this would result in the dismemberment of the business and result in a lower price being obtained. However, a secured creditor who has a security interest in the entire undertaking is in a position to conclude a sale of the business as a going concern to a buyer. This has led to the practice of secured creditors taking "featherweight" floating charges on all of the property of the corporation that are subordinate to pre-existing floating charge holders in order to maintain their right to enforce despite the initiation of voluntary administration proceedings.[92] Despite this practice, it appears that secured creditors in Australia have embraced the merits of voluntary administration, and that the ability of a secured creditor to override the proceedings has not undermined it through a flood of exiting secured creditors.[93]

E) The Regulation of Receiverships in New Zealand

The insolvency regimes in New Zealand in many respects parallel those in Australia. Like Australia, the insolvencies regimes are not unified in a single statute. Personal insolvencies are governed by bankruptcy legislation, while commercial insolvencies are governed by their own separate statutes. On November 1, 2007 New Zealand introduced a voluntary administration procedure[94] similar to that used in Australia. Unlike in Australia, the corporate law insolvency regimes are not found in a single statute. The receivership provisions are located in the *Receivership Act 1993*, while the corporate liquidation regime and the voluntary administration regime are located in the *Companies Act 1993*. Unlike the Australian legislation, the *Receivership Act 1993* is not limited to companies, but applies to non-corporate debtors as well. Although the New Zealand statute covers both privately appointed receivers and court appointed receivers, the latter are only rarely appointed.[95] The New Zealand statute also contains a number of provisions that deal with the enforcement sales by receivers. These provisions are very similar to provisions found in Canadian personal property security legislation.[96]

1) Qualifications

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[92] Murray, *supra* note 6 at 551.
[93] *Ibid.*
[94] Part 15A of the *Companies Act 1993*, enacted by the *Companies Amendment Act 2006.*
[95] Blanchard & Gedye, *supra* note 6 at 33.
[96] Section 30A provides that a sale of the property by a receiver has the effect of extinguishing all security interests in the property and their proceeds that are subordinate to the security interest of the person whose interests the receiver was appointed. Section 30B provides that a surplus must be paid to subordinate secured creditors and other persons who have an interest in the property. Compare with *Personal Property Security Act*, R.S.A. 2000, c. P-7, s.60(12) and s.61(1)); *Personal Property Security Act,* R.S.O. 1990, c. P.10, s.63(9) and 64(1).

Unlike many other jurisdictions, New Zealand does not provide any licensing or registration requirements for qualified insolvency practitioners. The qualification requirements simply provide a set of disqualifications that include certain types of persons, such as the secured creditor and directors or former directors of the debtor company.[97]

2) Powers of Receivers

The New Zealand statute sets out the powers of a receiver. These powers include the power to manage the business and to bring actions to recover money,[98] as well as the power to execute documents in the name of the debtor.[99] These powers supplement the powers conferred in the security agreement or court order, and may be modified by provisions in the agreement or order. The receiver is given the right to inspect any books of the corporation, and may require the disclosure of information by the debtor.[100]

The New Zealand statute provides that a privately appointed receiver acts as agent for the debtor unless it is expressly provided otherwise under the agreement or instrument of appointment.[101] This operates as a default rule that applies in the absence of an express provision to the contrary. In the absence of this statutory provision, it was necessary for a deemed agency provision to be included in the security agreement in order to produce this result.[102]

3) Duties of Receivers

The New Zealand statute sets out the duties of a receiver. A receiver must exercise his or her powers in good faith and for a proper purpose, and must act in the best interests of the person in whose interest he or she was appointed.[103] This appears simply to codify the equitable position. However, the provision goes on to create a further duty. A receiver must exercise his or her powers with reasonable regard for the interests of the debtor, of other secured creditors and of the unsecured creditors.[104] Prior to this, a receiver was not under a duty to consider the interests of anyone other than the person for whose benefit the receiver was appointed, and was not under a general duty to exercise reasonable care when dealing with the assets.[105] A receiver in exercising a power of sale is also under a duty to obtain the best price reasonably obtainable at the time of the sale. This duty is owed to debtor as well as to other secured creditors and the unsecured creditors.[106]

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[97] *Receivership Act 1993*, s.5.
[98] *Ibid.*, s.14.
[99] *Ibid.*, s.13.
[100] *Ibid.*, s.12.
[101] *Ibid.*, s.6.
[102] Blanchard & Gedye, *supra* note 6 at 36.
[103] *Receivership Act 1993*, s.18(1) and (2).
[104] *Ibid.*, s.18(3).
[105] *First City Corporation Ltd. v. Downsview Nominees Ltd.* [1990] A.C. 295 (P.C.).
[106] *Receivership Act 1993*, s.19.

4) Liabilities of Receivers

Although the New Zealand statute provides that a receiver acts as agent of the debtor, a further provision imposes personal liability on the receiver for new contracts that are entered into by the receiver after the commencement of receivership proceedings, unless the contract excludes the personal liability of the receiver.[107] A receiver is also personally liable for rent or other payments that become due under a pre-existing agreement that relate to the use, possession or occupation of the property.[108] This liability is limited to rent or other payments that accrue in the period beginning 14 days after the date of the appointment and ending at the date that the receivership ends or the debtor ceases to use, possess or occupy the property.[109]

A court is given the power to relieve a receiver from liability if the liability was due solely to a defect in the appointment of the receiver or under the agreement or court order by or under which the receiver was appointed and the receiver acted honestly and reasonably and ought to be excused.[110]

5) Court Supervision of Receivers

The New Zealand statute provides a set of powers that allows a court to supervise the activities of a receiver. These apply to both privately appointed and court appointed receivers, but they are particularly significant in respect of the former, since courts do not possess supervisory powers over privately appointed receivers in the absence of statutory authority. The court is given the following powers:

- On application of the receiver, the power to give directions relation to any matter arising in connection with the performance of the functions of a receiver.[111]
- The power to fix the remuneration of a receiver.[112]
- The power to order a receiver to comply with a duty, and the power to remove a receiver from office for failure to comply with such an order.[113]
- The power to relieve a receiver from a duty to comply.[114]

[107] *Ibid.*, s.32(1) and (2).
[108] *Ibid.*, s.32(5).
[109] *Ibid.*, s.32(6).
[110] *Ibid.*, s.33.
[111] *Ibid.*, s.34(1).
[112] *Ibid.*, s.34(2).
[113] *Ibid.*, s.37(4) and (5).
[114] *Ibid.*, s.37(4).

- The power to issue a prohibition order if it is shown that the receiver is unfit by reason of persistent failures to comply or the seriousness of a failure to comply.[115]

- The power to terminate or limit a receivership if the purpose of the receivership has been satisfied or if circumstances no longer justify its continuation.[116]

6) Disclosure of Information

A number of statutory reporting duties are imposed on a receiver. A receiver must prepare a report on the state of affairs of the property of the corporation not later than two months after his or her appointment.[117] The report must give particulars of the assets, debts, liabilities, and encumbrances, and must also include details of the events leading up to the receivership, the property disposed of by the receiver, and the amounts owing to the various categories of creditors. Further reports must be made at the end of each 6-month period following the appointment of the receiver.[118] The report must be sent to the debtor and to the secured creditor for whose benefit the receiver was appointed.[119] A creditor, a director of the debtor corporation, a surety, and anyone who has an interest in any property in the receivership is given a right to receive the report upon request.[120]

A receiver must also give public notice of his or her appointment.[121] If the debtor is a corporation must also send a copy of the public notice to the Registrar of Companies[122], and at the end of the receivership must notify the Registrar when the receivership has ceased.[123] Following the appointment of a receiver, any agreement that is entered by or on behalf of the debtor must disclose the name of the receiver.[124]

7) Interaction between Insolvency Regimes

As is the case in Australia, an appointment of a liquidator of a debtor company in New Zealand will invalidate the effectiveness of a deemed agency provision.[125] A privately appointed receiver will therefore lose the ability to manage the business, although the receiver will retain the right to sell the property as agent of the secured creditor.[126] This outcome has been modified by statute. A receiver may be appointed or may continue to

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[115] *Ibid.*, s.37(6).
[116] *Ibid.*, s.35.
[117] *Ibid.*, s.23.
[118] *Ibid.*, s.24.
[119] *Ibid.*, s.26(1).
[120] *Ibid.*, s.26(2).
[121] *Ibid.*, s.8(1)
[122] *Ibid.*, s.8(3).
[123] *Ibid.*, s.29.
[124] *Ibid.*, s.10.
[125] Blanchard & Gedye, supra note 6 at 348.
[126] *Ibid.*, at 343-46.

act as receiver after a company has been put into liquidation unless a court orders otherwise.[127] However, the receiver may only act as agent of the company with the approval of the court or the written approval of the liquidator.[128] A receiver who does not obtain this approval does not by reason of that fact alone become agent of the secured creditor.[129] Rather, the receiver would contract personally with the third parties in much the same way as a court appointed receiver.

Part 15A of the New Zealand *Companies Act 1993* was added in 2006 and came into force in November 2007. It creates a new rescue regime referred to as voluntary administration. The approach to the interaction between receivership and voluntary administration is the same as that adopted in Australia. A secured creditor is prevented from enforcing its security interest while the voluntary administration proceedings are underway. A secured creditor is not subject to this prohibition on enforcement if the secured creditor has seized or enforced its remedies prior to the commencement of voluntary administration proceedings[130], or if the security interest is taken in perishable property.[131] A major exception to the rule is provided if the secured creditor has a security interest in the whole or substantially the whole of the property of the corporation.[132] If voluntary administration proceedings are commenced before receivership provisions are instituted, the secured creditor is given a choice whether to enforce the security interest during a ten-day decision period. If the secured creditor fails to enforce the security interest during this period, it is subject to the same prohibition on enforcement that governs secured creditors who have security interests in less than the whole of the debtor's property.

F) The Regulation of Receiverships in the United Kingdom

The approach to the regulation of receiverships in the United Kingdom has undergone a profound change in the past decade. The *Report of the Review Committee of Insolvency Law and Practice*[133], more commonly referred to as the *Cork Report*, was published in 1982. It provided a blueprint for the insolvency law reform that culminated in the enactment of the *Insolvency Act, 1986*.[134] The Report devoted a chapter to the discussion of receiverships and Part III of the *Insolvency Act, 1986* deals with this topic. The recommended approach to regulation was relatively benign. Receivers of the whole or substantially the whole of the company's property were renamed as "administrative receivers", but the legislation did not radically change the nature of the office. The legislation provided for greater disclosure of information, and dealt with issues such as the liability of receivers on post-receivership contracts.

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[127] *Receivership Act 1993*, s.31(1).
[128] *Ibid.*, s.31(2).
[129] *Ibid.*, s.31(3).
[130] *Companies Act 1993*, s.239ABM.
[131] *Ibid.*, s.239ABN.
[132] *Ibid.*, s.239ABL.
[133] Cmnd 8558 (London: HMSO, 1982).
[134] Chapter 45.

The legislation also created a new insolvency regime, referred to as administration. This permitted the appointment of an independent person (the administrator) who could take control of the company and manage it for the benefit of all the creditors. The administrator originally could only be appointed through court order. Administration was not itself a restructuring regime. Instead, it operates as a "holding mechanism"[135] that maintains the status quo until a decision can be made as to the most efficacious response to the problem. This may involve an arrangement under which the creditors agree to a compromise of their claims, but it might also involve a going concern sale of the business.

The *Enterprise Act 2002*[136] fundamentally altered and reshaped insolvency law in the United Kingdom. The legislation effectively abolished administrative receiverships in all but exceptional cases. The administration regime was also streamlined and improved in order to make it more efficient and effective.

It is therefore necessary to examine the United Kingdom reforms in two stages. The first wave of reforms will be examined. These legislative measures are still in place, but the reality is that there are so few instances involving administrative receiverships that they are practically of little relevance. For this reason, the primary focus will be directed towards the fundamental second wave reforms of the *Enterprise Act 2002*, and upon the reasons why it was thought to be desirable to effectively do away with administrative receiverships.

1) Qualifications of Receivers

The *Insolvency Act, 1986* imposes a professional qualification requirement for receivers. Only a qualified insolvency practitioner can act as a receiver.[137] The legislation also disqualifies undischarged bankrupts and bankrupts from acting as a receiver.[138]

2) Powers of Receivers

The statute provides that the powers that are conferred on an administrative receiver by virtue of the security agreement by which he or she is appointed is to include the powers listed in Schedule 1.[139] Schedule 1 lists a wide range of powers, including the power to carry on the business of the company, the power to sell the assets by public or private sale, and the power to borrow money and grant security over the property of the company. These powers operate as default rules that can be modified or suspended by

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[135] R. Goode, *Principles of Corporate Insolvency Law*, 3rd ed. (London: Sweet & Maxwell, 2005) at 316.
[136] Chapter 40.
[137] *Insolvency Act, 1986*, s.230(2).
[138] *Ibid.*, ss. 30-31.
[139] *Ibid.*, s.42(1).

express wording in the agreement. An administrative receiver also has the right to require the disclosure of information by certain persons connected with the corporation.[140]

3) Duties of Receivers

Unlike the Australian and New Zealand statutes, the U.K. statute did not purport to modify the basic duty that is owed by a privately appointed receiver. Accordingly, the primary duty of a receiver is owed solely to the secured creditor for whose interest the receiver was appointed, and a receiver is not under a duty to consider the interest of other creditors. The *Cork Report* recommended against any extension of the duty in favour of other creditors on the basis that it would produce delay and expense, and would undermine the usefulness of a receivership without producing corresponding gains for the unsecured creditors.[141]

4) Liabilities of Receivers

An administrative receiver is personally liable on post-receivership and on any contract of employment adopted by the administrative receiver[142], and is entitled to an indemnity out of those assets of the company in respect of that liability. An administrative receiver may contract out of this liability by including an appropriate provision in the contract with the third party.

5) Court Supervision of Receivers

The *Insolvency Act, 1986* provides a more limited set of supervisory powers over privately appointed receiver than those found in the other jurisdictions. The court is given the following powers: [143]

- On application of the receiver, the power to give directions relation to any matter arising in connection with the performance of the functions of a receiver.[144]
- On application of a liquidator or the secured creditor on whose behalf the appointment was made, the power to fix the remuneration of a receiver.[145]
- The power to order a receiver to comply with a duty to file or deliver documents or to give notice.[146]

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[140] *Ibid.*, s.47.
[141] *Cork Report*, at p. 107.
[142] *Insolvency Act, 1986*, s.44(1)(b).
[143] *Ibid.*, s.34.
[144] *Ibid.*, s.35.
[145] *Ibid.*, s.36.
[146] *Ibid.*, s.41.

- The power to order the secured creditor on whose behalf the appointment was made to indemnify the person appointed against any liability that arises solely by reason of an invalidity of the appointment.

The court is also given the power to authorize the disposition by an administrative receiver of property that is subject to a security that is entitled to priority if it would result in a more advantageous realization of the company's assets.[147] If such an order is made, the secured creditor must receive the net amount that would be realized on a sale of the property in the open market by a willing vendor. This permits an administrative receiver to conduct a going concern sale of the assets, while ensuring that a secured creditor who is entitled to priority does not suffer prejudice by virtue of this sale.

6) Disclosure of Information

When an administrative receiver is appointed, he or she must publish a notice of appointment[148], and must include a statement that a receiver or manager has been appointed in every invoice, order for goods or business letter issued by or on behalf of the company.[149] An administrative receiver must prepare a report within three months of the appointment that gives particulars of the disposal or proposed disposal by him of any property of the company, details of the events leading up to the receivership, and amounts payable to the various categories of creditors.[150] The creditors are given a right of access to this report.

7) The Interaction between the Insolvency Regimes

Upon the commencement of liquidation proceedings, the receiver can no longer act as agent of the company pursuant to a deemed agency clause in the security agreement.[151] Although this prevents a receiver from acting as agent so as to bind the company, it does not prevent a receiver from exercising the secured creditor's power to sell the property.[152] The receiver therefore acts in his or her own personal capacity and incurs personal liability in respect of contracts entered into with third parties following the commencement of liquidation proceedings.

The interaction between administrative receivership proceedings and administration proceedings has been fundamentally altered by the *Enterprise Act, 2002*. Prior to this, a secured creditor who had the ability to appoint an administrative receiver could usually block an administration order from being made by appointing an administrative receiver.

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[147] *Ibid.*, s.43.
[148] *Ibid.*, s.46.
[149] *Ibid.*, s.39.
[150] *Ibid.*, s.48.
[151] *Ibid.*, s.44.
[152] *Sowman v. David Samuel Trust Ltd.*, [1978] 1 All E.R. 616.

If that were done, a court was required to dismiss a petition for an administration order.[153] A secured creditor was generally given notice of the application, and therefore was in a position to preclude the administration proceedings if it wished to do so.[154]

The *Enterprise Act, 2002* radically changed the insolvency laws of the United Kingdom. A new provision added to the *Insolvency Act 1986* provided that, subject to a number of limited exceptions, a secured creditor may not appoint an administrative receiver of the company.[155] The prohibition applies to all secured charges taken on or after September 15, 2003. As a result, the use of administrative receivership has effectively been precluded, and the formal insolvency proceedings will be through administration or one of the other insolvency proceedings. The next section will discuss why such a revolutionary change was thought to be desirable in the United Kingdom.

8) The Abolition of Administrative Receiverships

Receivership law was first developed in England, and virtually all the foundational principles of receivership law can be traced to the early judicial decisions of English courts. This body of law remains crucially important to the commonwealth countries, including Canada, that continue to utilize receiverships. Yet in the birthplace of the receivership, the institution of the receivership has almost disappeared as a legal response to the insolvency of a debtor. In order to understand why this monumental step was executed, it is necessary to trace the insolvency reforms that were put in place in the United Kingdom.

The *Cork Report* took a favourable view of receiverships. Although it proposed some changes in the law, the major attributes of the receivership law were left unchanged. In the view of the committee, the major problem was not with receivership law. Rather, the problem was that the ability to appoint a receiver was limited to those creditors who had taken a floating charge on the assets of the company. This view is revealed in the following passage of the report:[156]

> There is, however, one aspect of the floating charge which we believe to have been of outstanding benefit to the general public and to society as a whole; we refer to the power to appoint a receiver and manager of the whole property and undertaking of a company. This power is enjoyed by the holder of any well-drawn floating charge, but by no other creditor. Such receivers and managers are normally given extensive powers to manage and carry on the business of the company. In some cases, they have been able to restore an ailing enterprise to profitability, and return it to its former owners. In others, they have been able to dispose of the whole part of the business as a going concern. In either case, the preservation of the profitable part of the enterprise

[153] *Insolvency Act, 1986*, s.9(3).
[154] Goode, *supra* note 135 at 265.
[155] *Insolvency Act, 1986*, s.72A, as amended by the *Enterprise Act, 2002*, s.250.
[156] *Cork Report*, p.117.

has been of advantage to the employees, the commercial community, and the general public.

The Report proposed that creation of a new insolvency regime known as administration. The idea was very simple. The insolvency legislation should permit the appointment of an administrator who would have the same powers as a receiver and manager. A court could appoint an administrator whether or not the company had granted a floating charge. The application could be brought by any creditor, secured or unsecured, or by the company. These recommendations were implemented in the *Insolvency Act, 1986.*

Administration was not itself regarded as an insolvency rescue regime. Instead, it was seen as a means of imposing a moratorium on the enforcements efforts of the creditors in order to permit an insolvency professional to take control of the enterprise and assess the available options.[157] Liquidation of the company was one option, but the administrator would also consider the possibility of a company voluntary arrangement (CVA) in which the company and its creditors would enter into an agreement in which the creditors compromised their claims and the company was thereby permitted to continue to carry on its business.[158] This constituted the rescue regime, and it was implemented at the same time as the creation of the new administration regime. The hope was that the creation of the CVA regime in tandem with administration would result in the preservation of a greater number of businesses.

These hopes were later found to be unrealized. Although there had been increased employment of administration and CVAs, their use was dwarfed in number when compared to companies that had gone into administrative receivership.[159] It was thought that one of the major reasons for this was that a secured creditor who held a floating charge had a virtual veto by virtue of being able to appoint an administrative receiver.[160] This was compounded by the fact that an administrative receiver was only required to consider the interests of the floating charge holder and did not owe a duty to all the creditors.

The government ultimately concluded that administrative receiverships did not provide adequate incentives to maximize recoveries and to minimize costs, and did not provide parties with an acceptable level of transparency.[161] It proposed a package that contained the following reforms:[162]

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[157] See R. Parry, "England and Wales: Administration Orders" in K. Broc and R. Parry, *Corporate Rescue: An Overview of Recent Developments* (Aspen: Kluwer, 2006) 57.
[158] See G. Broc, "England and Wales: The Impact of the Revised Company Voluntary Arrangement Procedure" in K. Broc and R. Parry, *Corporate Rescue: An Overview of Recent Developments* (Aspen: Kluwer, 2006) 93.
[159] *A Review of Company Rescue and Business Reconstruction Mechanisms*, The Insolvency Service (London: HMSO, 1999) at 14.
[160] *Ibid.*, at 11. The other two reasons that were given were the complexity of the law and the lack of an effective financing mechanisms that would fund the rescue attempt.
[161] *Productivity and Enterprise: Insolvency – A Second Chance,* The Insolvency Service, Cm 5234 (London: HMSO, 1999) at 9.
[162] *Ibid.,* at 10-12. And see S. Frisby, "In Search of a Rescue Regime: The Enterprise Act 2002" (2004), 67 Mod. L. Rev. 247.

1. The streamlining of the administration procedure.
2. The abolition of administrative receiverships.
3. The abolition of Crown preferences.
4. The creation of a "ring-fenced" fund for unsecured creditors.

These proposals were implemented in the *Enterprise Act, 2002*. The streamlining of the administration procedure was accomplished in part by permitting the process to be initiated without a court order by the company[163] or by the floating charge holder.[164] In addition, the wishes of the floating charge holder trump those of the company in the selection of the administrator.[165] The administrator is required to place before the body of creditors a statement setting out proposals for achieving the purpose of the administration and obtain their consent to it. However, the administrator is not required to do so if the administrator thinks that the company has the resources to enable a distribution to be made to unsecured creditors.[166] This ensures that unsecured creditors who have no tangible interest in the insolvency proceedings lose their say as to the direction of the administration.

Administrative receiverships were effectively abolished for most types of commercial insolvencies, but the restriction was only applied to cases where the floating charge was given after September 15, 2003.

G) The Theoretical and Economic Literature

Although much has been written on bankruptcy law and restructuring law from a theoretical and economic perspective, far less has been written in respect of receiverships. There are three major strands of thought in the existing literature. The first strand differentiates between priority rights and control rights that are conferred upon a secured creditor. The second strand discusses the exercise of control rights as a manager-displacing mechanism. The third strand examines the allocation of control rights and considers whether a collective proceeding or one that is directed by a dominant secured creditor is preferable. Almost invariably, the discussion is concerned only with an analysis of the privately appointed receiver. This reflects the fact that, outside of Canada, court appointed receiverships are a rarity and privately appointed receiverships are the norm.

1) Secured Credit, Priority Rights, and Control Rights

[163] *Insolvency Act, 1986*, Schedule B1, para 22.
[164] *Ibid.*, para 14.
[165] See J. Armour and R. Mokal, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" [2005] L.M.C.L.Q. 28 at 32-34.
[166] *Insolvency Act, 1986*, Schedule B1, para. 52(1). And see Armour & Mokal, *ibid.* at 37-38.

A security agreement gives a secured creditor three kinds of rights.[167] First, the secured creditor obtains a priority right. This gives the secured creditor the right to have the proceeds of the collateral used to pay down the secured creditor's obligation, and thereby bypasses the usual requirement that requires *pro rata* sharing among the ordinary unsecured creditors. Second, the secured creditor obtains the right to follow. This gives the secured creditor the right to follow the asset into the hands of a third party who has acquired the asset from the debtor. This right is valuable in part because it gives the secured creditor the right to effectively constrain the use of the assets by the debtor.[168] Third, the secured creditor obtains an enforcement right that gives it superior rights of enforcement against the collateral in the event of default. Because the right of enforcement gives the secured creditor the right to control the disposition of the collateral, it is also referred to as a control right.

Much of the earlier theoretical literature on secured credit law has focused upon the significance of the secured creditor's priority right. The central issue concerned the efficiency of secured credit. Although the institution of secured credit rendered the secured creditors loan less risky, it had the effect of making the claims of the unsecured creditors more risky. A number of theories were developed in an attempt to show that secured credit was efficient.[169] For example, monitoring theories argued that secured credit was efficient because it reduces the costs to secured creditors of monitoring negative covenants that prevent the debtor from selling assets to third parties or entering into subsequent loans that rank ahead or *pari passu* with the creditor,[170] or that it eliminates the need for duplicative monitoring by every creditor by giving only the higher ranking creditor a strong incentive to monitor.[171] The contrary view was that secured credit was not efficient and that it resulted in a redistribution of wealth from unsophisticated or involuntary creditors who are unable to adjust the terms of their credit.[172]

More recently scholars have departed from a singular interest in the priority right and have given greater thought to the significance of the control right of the secured creditor.[173] The failure to do so from the outset was in part due to the fact that a secured creditor is not able to exercise this right in insolvency proceedings under United States bankruptcy law. Later it was recognized that secured creditors in the United States can

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[167] R.C.C. Cuming, C. Walsh & R.J. Wood, *Personal Property Security Law* (Toronto: Irwin, 2005) at 1.
[168] J. Westbrook, "The Control of Wealth in Bankruptcy" (2004), 82 Texas L. Rev. 795 at 807-10.
[169] For a comprehensive survey of the various theories, see N. Siebrasse, "A Review of Secured Lending Theory" (1997) http://law.unb.ca/Siebrasse/Download/Secured%20%20Lending%20Theory.PDF. See also J Armour, 'The Law and Economics Debate About Secured Lending: Lessons for European Lawmaking?' (2008) 5 European Company and Financial Law Review 3.
[170] A secured creditor could exercise its right to follow the asset into the hands of a third party if the debtor entered into an unauthorized sale of the collateral. See C.W. Smith and J.B. Warner, "On Financial Contracting: An Analysis of Bond Covenants (1979), 7 J. Fin. Econ. 117.
[171] S. Levmore, "Monitors and Freerider in Commercial and Corporate Settings" (1992) Yale L. J. 49.
[172] See L. LoPucki, "The Unsecured Creditor's Bargain" (1994), 80 Va. L. Rev. 1887; L.A. Bebchuk and J.M. Fried, "The Uneasy Case for the Priority of Secured Claims in Bankruptcy" (1996), 105 Yale L.J. 857.
[173] D.G. Baird & R. Rasmussen (2001), "Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations" (2001), 87 Va. L. Rev. 921; Westbrook, *supra* note 168 at 806-20; J. Armour and S. Frisby, "Rethinking Receivership" (2001) 21 Oxford Journal of Legal Studies 73 at 86-91.

indirectly exercise control rights in insolvency proceedings[174], and that creditors in other countries enjoy a very powerful control right in the ability to appoint a receiver that trumps insolvency proceedings brought by other creditors.[175]

2) The Removal of Inefficient Managers

A number of commentators have examined the role of debt in ensuring that the managers of a firm maximize the value of the firm.[176] The work of John Armour and Sandra Frisby is useful in that it discusses the theoretical and economic literature specifically in the context of receivership law.[177]

Debt imposes discipline on a firm's managers by creating an incentive for them to direct their efforts to maximize the value of the firm instead of using their position to further their own self-interest.[178] It does so by giving the creditors the power to remove inefficient managers.[179] Although creditors may structure their agreements so as to give themselves the power to take control away from the managers of the firm, this will be effective only if the creditors are able to effectively monitor the activities of the debtor in order to determine if there has been a default under the terms of the agreement. Debt can also impose post-default discipline on the managers of a firm. The creditor must choose between the sale of the assets and the negotiation of a compromise with the debtor. If the managers are underperforming or if the assets are not currently being employed in their highest-valued use, the creditor will not agree to a compromise.

There are, however, a number of constraints on a creditor's ability to exercise the right to remove the managers of a firm.[180] First, information is costly to obtain, and enforcement will often produce a loss of value in the assets of the firm. When there are multiple creditors involved, a collective action problem arises. Each creditor will have a tendency to underinvest in the information gathering and free ride on the efforts of other creditors. As well, it becomes more difficult to negotiate a voluntary arrangement when multiple parties are involved.[181]

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[174] D.G. Baird & R. Rasmussen, "The End of Bankruptcy" (2002), 55 Stan. L. Rev. 751; D.G. Baird & R. Rasmussen, "Private Debt and the Missing Lever of Corporate Governance" (2005), 154 U. Pa. L. Rev. 1209.

[175] Armour & Frisby, *supra* note 173 at 86-91.

[176] See M. Jensen & W. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure" 91976) J. Fin. Econ. 305; G. Triantis, "The Interplay Between Liquidation and Reorganization in Bankruptcy: The Role of Screens, Gatekeepers and Guillotines" (1997), 16 Int'l Rev. Law & Econ. 101; G. Triantis & R Daniels, "The Role of Debt in Interactive Corporate Governance" (1995), 83 Calif. L. Rev. 1073.

[177] Armour & Frisby, *supra* note 173.

[178] *Ibid.*, at 79-82.

[179] See F.H. Buckley, "The Canadian Private Receivership", in *Current Developments in International and Comparative Corporate Insolvency Law*, J. Ziegel ed. (Oxford, Clarendon, 1994) 473.

[180] Armour & Frisby, *supra* note 173 at 82-86.

[181] See Wood, *supra* note 3 at 308-9.

Insolvency law puts into place measures that reduce these problems following default. Insolvency proceedings are collective. This avoids duplication in the enforcement costs where there are multiple creditors and prevents the value-reducing rush to grab assets that can arise on default. Restructuring law creates an environment in which it less difficult to negotiate an arrangement with multiple creditors. Although these measures reduce the cost of post-default enforcement by creditors, they do not ameliorate the pre-default difficulties in obtaining information.

The cost of information gathering can be reduced where a dominant creditor is involved. A bank that provides the operating credit that permits the firm to pay its other creditors has a stronger incentive to monitor and the means to trigger a default if the managers are unable or unwilling to maximize the value of the firm.[182] This timely intervention by the dominant creditor will operate for the benefit of all the creditors.

The ability of a secured creditor to appoint a receiver in many respects operates as a "privatized" insolvency regime that can be obtained by a dominant creditor who is granted a security agreement with the requisite control rights.[183] A stay of proceedings is not needed because of the priority right that is afforded to the secured creditor makes it pointless for the unsecured creditors to seek to enforce against the assets. The cost of enforcement is also reduced because the secured creditor has a security interest in all the assets so that the receiver is able to sell the assets as a going concern.[184] Furthermore, the fact that the receiver acts as agent of the company in respect of post-appointment contracts means that the company may continue to operate as a going concern prior to the sale.

3) Pre-emption of Control Rights by Insolvency Regimes

Receivership law operates as a privatized insolvency regime. It gives the secured creditor a powerful control right that reduces the cost of enforcement by permitting going concern sales. The priority right of the secured creditor deters the value reducing race to enforce amongst the creditors. In doing so, it addresses many of the same issues that are central to insolvency law.[185] However, it differs in one key respect. Whereas insolvency law provides a collective regime for the enforcement of the claims of creditors, receivership law provides a private enforcement regime that is designed primarily for the benefit of the secured party. The privately appointed receiver acts in the interests of the secured creditor and not in the interests of the creditors as a whole.

This gives rise to a fundamental issue. What is the effect of conventional insolvency proceedings on the ability of the secured creditor to exercise this control right? The answer to this question varies greatly across the various jurisdictions. The classic English

[182] See also D.G. Baird & R. Rasmussen, "Private Debt and the Missing Lever of Corporate Governance" (2005), 154 U. Pa. L. Rev. 1209.
[183] Armour & Frisby, *supra* note 173 at 87.
[184] Westbrook, *supra* note 168 at 810-13.
[185] See Wood, *supra* note 3 at 2-4.

position before the abolition of administrative receiverships was that the secured creditor's control right trumped collective insolvency proceedings. This is also the position adopted in Australia and New Zealand. This gives the secured creditor the ability to veto liquidation or restructuring proceedings through the appointment of a receiver. This may be contrasted with the position in the United States where the secured creditor lost its control right but maintained its priority right in bankruptcy proceedings.[186]

The Canadian position falls between these two extremes. The control right may be exercised in bankruptcy proceedings. However, the control right cannot be exercised in restructuring proceedings. The secured creditor therefore has an effective veto over bankruptcy liquidation, but not over restructuring proceedings. In the case of a restructuring under the commercial proposal provisions of the *BIA*, the secured creditor will not lose its control right if enforcement steps are taken before the restructuring proceedings are commenced.[187]

The central issue is whether insolvency proceedings should pre-empt the secured creditor's control right. If it does not, the secured creditor will be entitled to exercise a veto over the insolvency proceedings, and may enforce its security interest against the collateral in its own interests.

Professor Mokal argues that administrative receiverships were harmful and that the decision to abolish them in England was the correct one.[188] Because the receiver need only consider the interests of the secured creditor who made the appointment, the receiver may decide to liquidate companies that might have been successfully rescued. A going concern sale of the assets of the company may be an inferior choice when the market lacks liquidity or when the existing owners possess firm-specific expertise. This problem is most pronounced when the secured creditor is oversecured. The secured creditor will want to get its money out as quickly as possible. This may occur even when the secured creditor is undersecured, as the secured creditor may have resort to personal guarantees given by the directors or by related companies. Mokal also argues that the costs of enforcement by receivers are relatively high, and in cases where the secured creditor recovers in full, the costs are borne by the junior creditors. He concludes:[189]

> Administrative receivership was exploitive since it moved the costs of corporate distress on those least able to protect their interests, was designed so as to destroy social value by closing down troubled but essentially viable companies and businesses, was wasteful in allowing unnecessary inflation of costs, and was oppressive in not allowing any meaningful right to hold the receiver to account to most of those whose interests and property were under the receiver's control. The legal system is therefore better rid of it.

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[186] However, even in the United States a secured creditor who has a security interest in all the debtor's assets may exercise a measure of control because the lack of unencumbered assets makes it more difficult for the debtor to obtain the necessary interim financing to undertake restructuring proceedings. See Westbrook, *supra* note 168 at 816.

[187] BIA, ss. 69(2) and 69.1(2).

[188] R.J. Mokal, *Corporate Insolvency Law* (Oxford: OUP, 2005) at 208-24.

[189] *Ibid.*, at 224.

H) The Availability of Empirical Data in Canada

1. The OSB Data

The BIA imposes a number of reporting obligations on both court appointed and privately appointed receivers. A receiver must prepare a statement that sets out the following information:[190]

- The name of the receiver and the date of the appointment.
- A description of the property and its book value broken down into the categories of inventory, accounts receivable and other assets.
- The date that the receiver took possession and control of the property.
- The particulars of security agreement or court order pursuant to which receiver was appointed.
- The address of the debtor and principal line of business of the debtor.
- The name of each creditor and the amount of their claim.
- The receiver's intended plan of action to the extent that it has been established.
- Contact person for receiver.

A receiver is also required to prepare interim reports at least every six months and a final report that contain a statement of receipts and disbursements.[191] The data collected by the Office of the Superintendent of Bankruptcy (OSB) can be used to track the total number of receivership, and the percentage of receiverships that are court appointments rather than private appointments.

2. Empirical Studies of Receiverships

No recent empirical studies on receiverships have been carried out in Canada. In England, there are a number of empirical studies that have examined the effect of the abolition of the administrative receiver and its replacement with administration on the returns to various classes of creditors. It was found that secured creditors fared at least as well under the new administration regime as they did under administrative receivership regime[192], and that in many instances they voluntarily chose administration even though they likely could have blocked it by virtue of having a floating charge that was grandfathered in by virtue of being granted before September 15, 2003.[193]

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[190] BIA, s.246(1); *Bankruptcy and Insolvency General Rules*, SOR/98-240, s.125.
[191] BIA, s.246(2)-(3); *Bankruptcy and Insolvency General Rules*, SOR/98-240, s.126-7.
[192] S. Frisby, *Interim Report on Returns to Creditors from Pre- and Post-Enterprise Act Procedures*, Insolvency Service (July 24, 2007) Available at: http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/returntocreditors.pdf ; J Armour, A. Hsu and A.J. Walters, "Corporate Insolvency in the United Kingdom: the Impact of the Enterprise Act 2002" (2008), 5 European Company and Financial Law Review 135.
[193] Frisby, *ibid.*

3. The Data Required for Future Empirical Research

One of the key research questions in this field concerns the extent to which the claims of secured creditors are fully satisfied following the appointment of a privately appointed receiver. The de facto abolition of receiverships in the United Kingdom was based upon the belief that receiverships tended to destroy value that might otherwise be available to unsecured creditors. A review of the theoretical literature also indicates that this is a crucial consideration in the design of insolvency law regimes. This risk is greatly lessened if the secured party is undersecured, since any loss is borne solely by the secured party. The secured party has a strong incentive to maximize recovery on enforcement by maximizing the proceeds of sale and minimizing the costs of enforcement, since the secured party will be the sole beneficiary of these efforts. The secured creditor will not have this incentive when the secured party is oversecured. An oversecured secured creditor may attempt to use its control of the enforcement process to obtain a quick sale and immediate recovery, and will not be overly concerned in containing the costs of enforcement, as these will be effectively borne by unsecured creditors.

In order to measure the extent of this problem it would be necessary to gather data concerning the distributions made to secured creditors in respect of privately appointed receivers. It appears that this data is presently available from the information gathered OSB. The receiver must provide the name of each creditor and the amount of their claim. The receiver must also provide a final report that sets out the receipts and disbursements. From this it is possible to determine if the claim of a secured creditor was fully satisfied. It would also be possible to compare these with results with recoveries in connection with court appointed receiverships. This could be used to shed some insight on whether this type of receivership is more likely to generate recoveries in favour of other creditors.

I) A Framework for the Regulation of Receiverships in Canada

1) The Goals and Objectives of Receivership Law

The traditional objective of the receiver was to preserve and protect the interests of persons who have taken a security interest in the assets of the debtor. This objective was accomplished in three ways.[194] First, the appointment of a receiver terminates the power of the directors or other managers to supervise the affairs of the corporate debtor. The receiver takes possession and control of the business. The appointment of a receiver therefore provides a speedy method of replacing the managers of an insolvent business with more competent management. The secured creditor does not thereby obtain the right to control the business operations of the debtor. The managerial power resides in the receiver, and attempts by a secured creditor to interfere with the receiver's decision-making may result in the secured creditor being rendered liable for the actions of the

[194] See Wood, *supra* note 3 at 467-69.

receiver.[195] Second, the receiver has the power to realize on the secured creditor's collateral through the sale of assets and the collection of accounts. Third, the appointment of a receiver provides a method through which a going-concern sale of the business can be achieved. This will produce a higher realization than would the piecemeal sale of the assets on a liquidation basis.

2) The Rationale for Statutory Intervention

When one examines the regulation of receivership from a comparative perspective across a number of commonwealth jurisdictions, it becomes apparent that there is a common thread in the regulatory approaches. One of the primary concerns is that a privately appointed receiver will not give sufficient regard to other parties whose interests are affected by the receivership. Most jurisdictions have attempted to address this by modifying the obligations owed by the receiver, although there is little consistency in the precise manner through which this is put into effect. The United Kingdom has adopted a more radical approach to the problem by effectively abolishing receiverships. Instead of using receivership, the administration process is used under which an insolvency practitioner takes control of the business and assesses whether a business rescue is feasible. If it is not, the administrator will attempt to maximize the recovery for all the creditors.

These regulatory approaches, in varying degrees, put measures into place that provide creditors and other interested parties with information concerning the financial affairs of the business and the actions of the receiver. They also give these other parties the right to bring their concerns before a court, and empower a court to exercise a supervisory jurisdiction over the conduct of receiverships. These reforms were primarily directed towards the privately appointed receiver, since a court appointed receiver was already an officer of the court and under the direction of the court. Another type of concern relates to the efficiency of receiverships. Measures have been introduced in order to ensure that persons who act as receivers have the appropriate training and qualifications, and that they do not place themselves in situations where there is the possibility of self-dealing or conflict in interest. A further aspect of the regulatory approach concerns dealings between the receiver and third parties following the commencement of the receivership. The objective here is to ensure that receivership proceedings do not adversely affect third parties who deal with the receiver following the commencement of the receivership.

3) Problems Associated with Secured Creditor Control of the Insolvency Process

Receiverships provide an effective mechanism through which secured creditors can replace inefficient managers of a business. However, by giving a secured creditor control of the insolvency process it creates the risk of quick sales, suboptimal recoveries, and inflated costs when the secured creditor is fully secured. The abolition of receiverships

[195] *American Express International Banking Corp. v. Hurley*, [1985] 3 All E.R. 564 (Q.B.D.).

and their replacement by the administration regime in the United Kingdom was a direct response to this concern.

It is unlikely that the radical approach adopted in the United Kingdom can be successfully transplanted into Canada. The solution in the United Kingdom was to replace administrative receivers with the administration process under which insolvency professionals would take control of the business and conduct an independent assessment of the financially distressed business. Administration operates as a single gateway in which the insolvency professional, after consultation with the creditors, chooses either a going concern sale or an arrangement with the creditors depending upon which is the more appropriate response. Unlike the other commonwealth countries, the Canadian restructuring system is premised on a "debtor in possession" concept, rather than an "insolvency professional in possession" concept. This makes it very difficult to adopt the United Kingdom model in which the insolvency professional is in control and chooses among the options.

This is not to say that the reforms in the United Kingdom are not of interest or significance. They were directly aimed at the perceived inadequacies of private receiverships. A regime that gave secured creditor control of the insolvency process was replaced with a regime in which the insolvency professional was required to act in the interests of all the creditors. Although it is highly unlikely that Canadian legislators would have any interest in replacing the current "debtor in possession" regime for business rescue with an "insolvency professional in possession" regime of administration, a less radical approach is available.

The obligation that is owed by the administrator to the unsecured creditors is not unlike that imposed on a court appointed receiver. Both are required to consider the interests of all the creditors and are not permitted to give single-minded devotion to the interests of the secured party. Although one might simply abolish the private appointment of receivers, this solution goes too far. Court appointed receiverships are more expensive, and this would drive up costs without producing any benefits in those cases where there is no reasonable prospect of a surplus available to unsecured creditors. The increased costs would make it less likely to be used where smaller businesses are involved, and this could result in an inability to achieve going concern sales of the business.

A better approach is to modify the obligation that is owed by a privately appointed receiver so as to require the receiver to consider the interests of all the creditors, and to obtain the best return even if this might involve a delay in the timing of the sale. Of course, if the receiver concluded that there was no reasonable prospect of recovery by the unsecured creditors, the receiver would not be required to consider their interests. This approach has been adopted in New Zealand.[196] It is also consistent with the direction of Canadian reforms, which increasingly apply the same rules to both types of receiverships. This would dispel the present uncertainty in the law in Canada by making it clear that the duties of privately appointed receivers are essentially the same as those that apply to court appointed receivers.

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[196] See *Receivership Act 1993*, s.18(3).

It is possible that courts in Canada could arrive at this position in the absence of legislative amendment. It could be argued that the imposition of the obligation on the receiver to act in a commercially reasonable manner has given rise to a duty on the part of a receiver to consider the interests of other creditors or claimants.[197] As well, the fact that a court may make the same kinds of orders that it can make in respect of court appointed receivers might be thought to create the mechanism through which this wider duty could more easily be enforced. On the other hand, no Canadian case has yet reached this conclusion, and cases that endorse the differing obligations of receivers under the two types of appointments continue to be cited. The matter is uncertain, and it would be preferable to spell out the obligations of the receiver in unambiguous language.

The reformulation of the duty owed by the privately appointed receiver is one means of ensuring accountability to all the interested parties, but it is by no means the only one that is available. A privately appointed receiver is appointed by the secured party, and the prospect of repeat dealing with the secured party (usually a financial institution) may also result in an alignment of the receiver's interests with those of the secured party. Although the unsecured creditors may have the right to bring an action against the receiver for breach of duty, to apply to court to have the receiver replaced, or to have the decision of the receiver reviewed by a court, these are expensive options. Some consideration should be given to building in a governance process in which the receiver is required to present the proposal before the body of creditors and obtain their consent to it.[198]

4) The Division between Private Appointments and Court Appointments

The traditional division between court appointed receivers and privately appointed receivers has been increasingly eroded by statute. This phenomenon is not unique to Canada – it can be seen in the statutes of other common law jurisdictions. In many instances the statutory regulation of receiverships does not distinguish between the two different types, and as a result the same obligation or rule applies to both. This is not to suggest that there are no longer any major differences. Despite the statutory modification, there remain many important legal differences between court appointed receivers and privately appointed receivers.

Two points should be observed about the application of the statutory provisions to the two types of receiverships. First, the effect of these reforms has been directed primarily towards regulation of the privately appointed receiver. In jurisdictions outside of Canada, the reason for this may simply be that appointment of court appointed receivers is a relatively rare practice. In Canada, where the practice of court appointments is more pervasive, the focus is attributable to the fact that the problems have been primarily associated with private appointments – in particular, the single-minded devotion of the privately appointed receiver to the interests of the secured creditor in respect of whom he or she was appointed. Second, the effect of these reforms has more often than not been to

[197] See Buckwold, *supra* note 1 at 296-300.
[198] See the discussion in Armour & Mokal, *supra* note 165 at 63.

elevate the duties of the privately appointed receiver or the rights given to creditors so that they more closely resemble those that pertain in relation to a court appointed receiver. For example, the creditors are given the right to apply to court for an order replacing a receiver or giving directions to a receiver. This remedy has always been available in respect of a court appointed receiver, but was not available in respect of privately appointed receivers until mandated by statute.

A strong case can be made for the proposition that the two streams of law should be directed into a single stream. The historical differences between privately appointed receivers and court appointed receivers has been eroded. The final step in this process may be to create a single body of law that codifies the rules that govern receiverships. Of course, there will remain some differences that are attributable to the fact that the appointment process is different. However, the basic rules that govern the common issues that arise in connection with receiverships should be the same.

By way of example, consider the position of third parties who enter into post-receivership contracts. The contracting party will have a personal right of action against a court appointed receiver in the event that this claim is not paid. However, a privately appointed receiver acts as agent of the debtor company and therefore bears no personal liability on post-receivership contracts. This difference in treatment is undesirable. It is unrealistic to expect that the third party will recognize and understand the difference between a court appointed receiver and a privately appointed receiver when contracting with the receiver. The same rule should govern both. This is the approach that is taken in the United Kingdom, Australia and New Zealand. In those jurisdictions, a privately appointed receiver is made personally liable on such contracts.

5) Harmonization of Provincial and Federal Regulation

Canadian receivership law is characterized by a highly fractured legislative approach. In contrast to other jurisdictions where a single statute sets out the legislative rules, the statutory provisions that regulate receiverships are scattered across a variety of different statutes. This produces greater complexity in the law. The statutory provisions overlap to a considerable degree, but the wording of the provisions is not identical.

The business corporation legislation in some, but not all, of the provinces and the federal business corporation statute contain a set of provisions that regulate receiverships of corporations governed by those statutes. Personal property security legislation also contains provisions regulating receiverships. This was included because the limited scope of the receivership provisions in the business corporations statute, which did not apply to non-corporate business entities or to corporations that were not incorporated under the business corporations statute. The receivership provisions of the BIA add another layer. The federal regulation of receiverships ensures that receiverships are regulated throughout Canada. However, the federal provisions are limited in scope in that they only apply to debtors who are insolvent. This limitation was undoubtedly added to ensure that the federal regulation of receiverships in the BIA was within the constitutional powers of

Parliament to enact statutes concerning bankruptcy and insolvency. As well, there are a number of other statutes that concern receiverships. For example, provincial securities legislation provide for the appointment of a receiver in respect of a securities firm,[199] and federal and provincial business corporations legislation give courts the power to appoint a receiver pursuant to the oppression remedy.[200]

The difficulties associated with this overlapping regulatory approach are illustrated in the following examples. Where the receivership is in respect of an insolvent corporation that is incorporated under the Ontario Business Corporations Act[201] (OBCA) and the collateral is personal property, the receivership provisions of the OBCA, the PPSA and the BIA apply. If the debtor is not an OCBA corporation, the receivership provisions of the PPSA and the BIA apply. If the debtor is not insolvent, the receivership provisions of the OBCA and PPSA apply. If the collateral is land, the OCBA and the BIA apply. And if the debtor is not insolvent, not an OCBA corporation, and the collateral is land, none of the statutory provisions apply.

To a certain extent, this overlapping and duplicative approach is a product of Canada's federal system. However, there are steps that can be taken to reduce the overlap and the complexity of the law. In Saskatchewan, this has been accomplished to a degree. The Saskatchewan Law Reform Commission in its *Tentative Proposals for a New Personal Property Security Act*[202] expressed the view that the goal is to have "a single, integrated set of rules dealing with receiverships." This was implemented in the *Personal Property Security Act, 1993*.[203] The receivership provisions of the Saskatchewan *Business Corporations Act* were repealed. The scope of the receivership provisions in the PPSA were extended by consequential amendment so that the PPSA provisions regulating receiverships apply to receiverships that would not otherwise fall within the scope of the PPSA (such as receiverships covering only land or receivers appointed by the court under the oppression remedy).[204]

6) The Relationship with other Insolvency Regimes

A highly controversial issue in Canadian insolvency law concerns the use of liquidating plans or commercial proposals. Restructuring law was originally viewed as a process through which a financially distressed business could seek to avoid liquidation in bankruptcy or receivership proceedings. The debtor would attempt to do so by proposing a compromise or arrangement to its creditors. Restructuring law was designed to create an environment that facilitated this type of negotiation.[205] Creditors were prevented from exercising their enforcement remedies while the debtor was developing the plan, and

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[199] See e.g., *Securities Act*, R.S.O. 1990, c.S.5, s.129.
[200] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s.241(3)(b); *Business Corporations Act* R.S.A. 2000, c. B-9, s.242(3)(b).
[201] R.S.O. 1990, c. B.16.
[202] (December, 1990) at 234.
[203] S.S. 1993, c. P-6.2, s.64.
[204] *Queen's Bench Act*, 1998, S.S. 1998, c.Q-1.01, s.76.
[205] See *Re Lehndorff General Partner Ltd* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.).

dissenting creditors could be bound by the vote of a majority of creditors which held similar rights.[206]

Increasingly, restructuring law has been used to effectuate a sale of the business as a going concern.[207] There are a number of reasons why this practice has emerged. To a large extent it was driven out of a concern that liability under successor employer legislation would be imposed on the receiver. The use of restructuring proceedings insulated the insolvency professional from liability, since the monitor or trustee under a commercial proposal did not take possession or control of the business. It is quite possible that the use of restructuring proceedings for this purpose will diminish upon the coming into force of the BIA amendments. These amendments greatly reduce the exposure of insolvency professionals to obligations incurred by the debtor before the commencement of insolvency proceedings.

The use of liquidating CCAAs may also arise because of a desire to obtain some beneficial feature available under the CCAA. The choice may be motivated by a difference in priority rules. For example, suppliers who have recently supplied goods are given the right to repossess the goods pursuant to the thirty-day goods provision in the BIA. This right is not available in respect of restructuring proceedings. Alternatively, CCAA proceedings may be invoked in order to invoke the wider judicial discretion available under the CCAA to make orders that alter the property rights or contractual rights of third parties who have dealt with the debtor. For example, the CCAA has been invoked in order to seek an order for the assignment of contracts that ordinarily would require the consent of the counterparty.[208]

The end result is that a choice of insolvency regimes is made on the basis of some difference in the substantive rules that gives a creditor an advantage over the other claimants in the insolvency. In principle, the rules that affect the contracts and property rights of third parties should not differ across insolvency regimes unless there is some overriding reason that justifies special treatment. Too often, the difference in the rules is simply the product of their historical origins and is not based on an assessment of the modern context in which they operate. Insolvency law should seek to minimize these differences so far as possible so that there is no incentive on the part of the parties to invoke a CCAA liquidation in order to gain the benefit of different rules.[209] Unless a difference in treatment can be justified on the basis of the underlying objectives of the particular insolvency regime, the priority rules should be the same. Furthermore, if a court is accorded certain powers in respect of CCAA liquidation, there is no reason in

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[206] See Wood, *supra* note 3 at 315-19.

[207] See B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?" in *Annual Review of Insolvency Law, 2008* (Toronto, Carswell, 2009) 79. See also *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) and *Re Nortel Networks Corp.* 2009 CarswellOnt 4467 (Ont. S.C.J.).

[208] See S. Fitzpatrick, "Liquidating CCAAs – Are We Praying to False Gods?" in *Annual Review of Insolvency Law, 2008* (Toronto, Carswell, 2009) 33.

[209] See T. Buckwold and R. Wood, "Priorities" in *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond*, S. Ben-Ishai and A Duggan eds. (Markham, Lexis Nexis Canada, 2007) 101 at 142-43.

principle why that power should not be available to a court in respect of a court appointed receivership.

J) Conclusions

When one compares the regulation of receiverships in Canada with that in other commonwealth countries, it becomes readily apparent that they are motivated by a common set of concerns. The underlying purpose is to ensure that insolvency professionals are properly accountable to the creditors, and to promote going concern sales that maximize recoveries by creditors. In certain areas, the Canadian approach to the regulation of receiverships either meets or exceeds the level of protection afforded in other commonwealth jurisdictions. In particular, the qualification requirements of receivers, the disclosure of information requirements, and the supervisory powers that may be exercised by courts over private receiverships are equal or stronger than the equivalent provisions in other jurisdictions.

In other areas, the statutory regulation of receiverships in Canada appears to be lacking. This is most true in respect of the powers of receivers. There are three specific matters on which the Canadian provisions are less than satisfactory. The first issue concerns the scope of the duty of the privately appointed receiver and the identity of whose interests the receiver must protect. Under the common law, a privately appointed receiver was only required to consider the interests of the secured creditor who was responsible for the appointment of the receiver. In Canada, there is considerable uncertainty whether this position continues to hold true. Canadian insolvency legislation should make it clear that the receiver owes an obligation to all the creditors and cannot give sole regard to the interest of the secured creditor who made the appointment.

A second issue concerns the legal position of a privately appointed receiver in respect of post-receivership contracts. The traditional view was that a privately appointed receiver acts as agent of the debtor, and therefore liability on post-receivership contracts is owed by the debtor and not by the privately appointed receiver. There are two problems with this rule. First, the rule can easily cause confusion on the part of third parties. If a court appointed receiver is involved, the third party has a right of action against the receiver. But if a privately appointed receiver is involved, the risk of loss is borne by the third party. Second, it gives the receiver the ability to enhance the security interest of the secured creditor at the expense of third parties who deal with the receiver. The position has been reversed by statute in the United Kingdom, Australia and New Zealand. A similar rule should be legislated in Canada. The end result would be that both types of receivers would be liable on post-receivership contracts.

The third issue concerns the effect of bankruptcy proceedings on the powers of privately appointed receivers. A privately appointed receiver's power to operate the business and to enforce existing contracts is derived from the deemed agency clause in the security agreement. However, all the assets of the debtor vest in the trustee on bankruptcy, and the debtor no longer enjoys the power to deal with those assets. This means that a privately

appointed receiver is personally liable on new contracts and is unable to enforce any existing contracts without the assistance of the trustee in bankruptcy. It is possible that this situation has been partly modified in Canada. Federal and provincial business corporation legislation provides that a receiver has the right to carry on the business of the debtor. However, it is not entirely clear whether these provisions will be interpreted as preserving this power on the commencement of bankruptcy proceedings. Moreover, the statutory provisions only cover receiverships of corporations that are governed by the business corporations statute, and do not extend to any other entity. One possible solution to this difficulty is for federal insolvency legislation to specifically provide for a set of statutory powers in relation to receivers.

These changes could be achieved through limited statutory amendment without altering the basic structure of receivership law. The other problems that have been identified are not as easily addressed. The creation of a single body of receivership law that would apply to both court appointed and privately appointed receivers would most likely require the enactment of codifying statute. Legislation in Australia and New Zealand could provide a model for this type of approach.[210] A solution to the problems associated with the overlapping and duplicative federal and provincial legislative regimes might be solved through law reform efforts of the Uniform Law Conference of Canada. The goal would be to produce a single statute that contains a complete and comprehensive statement of the legal rules and principles that govern receiverships.

In formulating these rules, care must be taken to ensure that they are not inconsistent with the rules pertaining to other available insolvency regimes. The basic principle should be that the rules that affect the contracts and property rights of third parties should not differ across insolvency regimes unless there is some overriding reason that justifies special treatment. Differences in these rules across insolvency regimes promote regime shopping in an attempt to procure some special advantage for that party.[211] This would mean that the powers given to receivers should be expanded so that a court is able to make the same kinds of orders as can be made in connection with restructuring proceedings that result in a going concern sale of the business. For example, a court in receivership proceedings should be able to make the same kinds of orders for the assignment of rights that are subject to a non-assignment provision as it can make in bankruptcy proceedings or restructuring proceedings.[212]

It has come time to think carefully about the goals and objectives of Canadian receivership law, and how it fits in with our other commercial insolvency regimes. We should not be content with the current muddle of ad hoc and piecemeal statutory reforms. The historical dichotomy between privately appointed receivers and court appointed receivers should no longer dictate the differing rules that apply to these two types of receiverships. We should recognize that receiverships operate as a kind of insolvency regime, and that insolvency professionals who take on the role of receiver should be

[210] Although these statutes do no provide a complete code, they are more comprehensive in their scope that the Canadian statutes.
[211] See Buckwold & Wood, *supra* note 209 at 134.
[212] See CCAA, s.11.3; BIA, s.84.1.

expected to act in the interests of all the creditors. The ability to appoint a receiver should no longer be viewed as merely an enforcement remedy of the secured creditor. Receiverships provide an efficient mechanism through which the going concern value of insolvent businesses can be unlocked and made available to satisfy the claims of the creditors. We should not seek to abolish the receivership. Rather, we should seek to properly harness its power and obtain the full benefits and potential of this institution.