SASKATCHEWAN
LAW REVIEW

Receiverships in Canada: Myth and Reality

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The report of my death was an exaggeration.[1]
Mark Twain

I. INTRODUCTION

It is axiomatic in the modern academy that teaching and research are to be regarded as interdependent activities.[2] Notwithstanding this belief, the emphasis seems to be directed toward the integration of research into teaching. This presumes that it is research that shapes teaching with much less thought given to the idea that teaching may shape research. This paper is a product of this latter, less common dynamic. Moreover, it is derived from an anxiety that lurks in the minds of many legal academics. We want our teaching to be current and relevant in order to engage our students and permit them to understand current practices and controversies. Yet there is an ever-present danger of disruptive developments that can quickly render portions of the law school syllabus obsolete.

Judicial decisions that introduce major changes to the field and the enactment, repeal, and amendment of legislation are relatively easy to track. The enactment of modern personal property legislation and judgment enforcement legislation radically altered two of the courses that I taught, but I could see the change on the horizon and took appropriate steps to reconstitute the courses. More worrisome are those changes that are harder to detect—the ones that fly under the radar. This can occur when the law on the books stays the same, but some underlying shift in practice causes that law to fall out of use. It is rather like a beached ship stranded out of water. The structure remains intact, but its utility is lost.

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1 Elizabeth Knowles, ed, *Oxford Dictionary of Quotations*, 7th ed (Oxford: Oxford University Press, 2009) *sub verbo* "Mark Twain".

2 See e.g. Rosanna Breen et al, *Reshaping Teaching in Higher Education: A Guide to Linking Teaching with Research* (London: Kogan Page, 2003) at 7.

Bankruptcy and insolvency law is one of the newer additions to the law school curriculum,[3] and receivership law is a major component of the course. A discussion of receiverships usually begins with the basic distinction between the law that governs privately appointed receivers and the law that governs court appointed receivers.[4] This division is fundamental because the source of law is different, with the result that there are many important differences between the rules and principles that govern private appointments and those that govern court appointments.[5] This teaching strategy would be severely compromised if private receiverships were on the verge of extinction. Indeed, the whole exercise would be undermined if receivership proceedings were in the process of being replaced by other forms of insolvency proceedings.

Although reliance on anecdotal evidence is often of limited value, it can be useful to identify matters that might benefit from more rigorous forms of inquiry. Over the last several years, I heard two stories from a number of insolvency lawyers. The first was that the private receivership had all but disappeared.[6] The second was that the use of restructuring proceedings to undertake a going concern sale of the business had expanded dramatically.[7] For obvious reasons, I needed to get to the bottom of this. Was it really the case that the private receivership had been consigned to the ash heap of history? Were court appointed receiverships undergoing an evolutionary process that would eventually lead to their extinction? To decide if this was happening, I formulated two hypotheses to determine if evidence could be found to disprove one or both of them. The first was that the private receivership had fallen out of use. The second was that court ordered receivership proceedings were in the process of being replaced by other forms of insolvency proceedings.

II. THE DISAPPEARANCE OF THE PRIVATE RECEIVERSHIP

Testing the hypothesis that privately appointed receivers have fallen out of use in Canada seemed relatively straightforward. The Office of

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3 The first national commercially produced casebook on bankruptcy and insolvency law was published in 2003 and is now in its third edition. See Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015).

4 *Ibid* at 871-81.

5 See Roderick J Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 502-503 [Wood, *Bankruptcy and Insolvency Law*].

6 See also David FW Cohen & David S Kolesar, "Interim Receivership: Decline of the Private Receiver in Ontario?" (2002) 19:4 Nat'l Insolv Rev 37; Peter P Farkas, "Why Are There So Many Court-Appointed Receiverships?" (2003) 20:4 Nat'l Insolv Rev 37.

7 David Bish, "The Plight of Receiverships in a *CCAA* World" (2013) 2:11 J Insolvency Institute Can 221.

the Superintendent of Bankruptcy ("OSB") maintains annual receivership statistics,[8] and these distinguish between privately appointed receivers and court appointed receivers. As will be seen, the analysis is more complicated.

Table 1 displays the use of court appointed receivers in comparison to privately appointed receivers.

Table 1: Comparison of the Incidence of Court Appointed and Privately Appointed Receivers[9]

Year	Court Appointed	Privately Appointed	Total	Percentage Privately Appointed
1999	53	1093	1146	95%
2000	117	961	1078	89%
2001	104	977	1081	90%
2002	128	864	992	87%
2003	82	785	867	91%
2004	110	678	788	86%
2005	198	549	747	73%
2006	127	458	585	78%
2007	162	420	582	72%
2008	144	416	560	74%
2009	356	538	894	60%
2010	372	394	766	51%
2011	279	389	668	58%
2012	267	271	538	50%
2013	371	285	656	43%
2014	296	221	517	43%
2015	245	220	445	49%

Table 1 shows that court appointments are being more heavily utilized than in the past and that this trend has been at play for more than a decade. Although court appointments are now used more often than

8 See e.g. Office of the Superintendent in Bankruptcy, *Insolvency Statistics in Canada, 2015* (Ottawa: Industry Canada) at Table 9: Receiverships [OSB Annual Statistical Reports], online: Government of Canada Publications <http://publications.gc.ca/site/eng/9.507291/publication.html>, archived: <https://perma.cc/2XD9-VZFL>. For the years 1999-2007, information on receiverships can be found in Table 6: Receiverships (see e.g. Office of the Superintendent of Bankruptcy, *Annual Statistical Report for the 2007 Calendar Year* (Ottawa: Industry Canada) at Table 6: Receiverships, online: Government of Canada Publications <http://publications.gc.ca/site/eng/9.500675/publication.html>, archived: <https://perma.cc/924L-HN3L>).

9 *Ibid*.

private appointments, the proportion of private appointments to total appointments has never fallen below 40%. The total number of receiverships has also been declining over this period.

Before relying on these figures, it is necessary to enquire whether there is an over-reporting of the number of privately appointed receivers. This could occur if the reporting requirements set out in the *Bankruptcy and Insolvency Act*[10] cover the exercise of enforcement remedies of secured creditors that do not involve the appointment of a receiver.

The *BIA* provides the following definition of a "receiver":

> 243(2) Subject to subsections (3) and (4), in this Part, receiver means a person who
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> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control—of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt—under
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> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.[11]

Paragraph 243(2)(a) covers a national receiver appointed under subsection 243(1).[12] Subparagraph 243(2)(b)(ii) covers a receiver appointed pursuant to a court order made under provincial statute. Subparagraph 243(2)(b)(i) covers a person who takes possession or control of the assets pursuant to a security agreement. The issue is whether the language contained in s. 243(2)(b)(i) is restricted to instances involving a privately appointed receiver or whether it extends to a situation where a secured creditor enforces its security interest against the collateral through the exercise of the ordinary remedies available to a secured creditor. A literal reading of the provision might suggest the latter, as a secured creditor who enforces

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10 RSC 1985, c B-3, ss 245-46 [*BIA*].

11 *Ibid*, s 243(2).

12 For a discussion of the new federal power to appoint a national receiver, see Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58:1 Can Bus LJ 27 at 44-46.

a security interest arguably takes possession or control of the property under a security agreement.

The Ontario Court of Justice, in *Colour Box Ltd. (Re)*,[13] held that the definition of a receiver in the *BIA* is sufficiently wide to cover secured creditors who enforce against substantially all the assets of the debtor, even in the absence of a private appointment of a receiver. A secured creditor had been given a security interest in the debtor's inventory. The debtor went into bankruptcy and the secured creditor asserted its claim against the trustee in bankruptcy. The trustee acknowledged the validity of the security interest and released it to the secured creditor. The secured creditor disposed of the inventory, but it was not enough to satisfy the secured creditor's claim.[14] The Superintendent of Bankruptcy took the position that in realizing on the inventory the secured creditor acted as a receiver and that this triggered the accounting and reporting obligations that are imposed on a receiver.[15] The Court accepted this interpretation and held that the secured creditor was required to comply with the reporting obligations.[16]

The Court referred to the decision of the Saskatchewan Court of Queen's Bench in *Farm Credit Corp. v. Corriveau*.[17] The issue in that decision was whether a secured creditor who acquired possession and title to farmlands through foreclosure proceedings fell within the *BIA*'s more expansive definition of a receiver by virtue of taking possession of the asset pursuant to a security agreement. The Court held that the secured creditor was not a receiver since the secured creditor took possession and title under the authority of the foreclosure order, rather than by virtue of the security agreement. The Court concluded that:

> A secured creditor who acquires possession of secured property is not a receiver under s. 243(2) unless: (1) he is appointed or authorized by the terms of the security agreement, or a court order, to take possession of and dispose of the secured property; and (2) he takes possession of the secured property under the authority of and by means of the security agreement, or the receivership court order, and not by some other extraneous means, such as by a foreclosure or a voluntary transfer.[18]

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13 (1995), 21 OR (3d) 746, 29 CBR (3d) 262 (Ct J (Gen Div)) [*Colour Box* cited to OR].
14 *Ibid* at 748-49.
15 *Ibid* at 749.
16 *Ibid* at 752.
17 [1993] 6 WWR 360, 20 CBR (3d) 124 (Sask QB) [*Corriveau* cited to WWR].
18 *Ibid* at para 55.

If this formulation is applied in relation to a secured creditor's enforcement against personal property, it does seem to suggest that a secured creditor should be regarded as a receiver since the right to seize and dispose of the assets arises by virtue of the security agreement. Unlike enforcement proceedings against land, a secured creditor who enforces against personal property does not typically obtain a court order that authorizes possession or that vests title. This is the view of the decision adopted in *Colour Box*.

There are other passages in *Corriveau* that suggest this interpretation may be unwarranted. It should be kept in mind that *Corriveau* only considered enforcement proceedings against land. Enforcement remedies are typically instituted through judicial proceedings. The Court may have intended to draw a distinction between ordinary enforcement proceedings, which are conferred upon secured creditors by law, and those that confer the power to act like a receiver through agreement by the parties. The Court commented that the receivership provisions of the *BIA* were not "intended to legislate into existence a wholly new concept of receivership not previously known to the law"[19] and that "Parliament could not have intended to make such sweeping and far-reaching changes to the commercial law by means of one small ambiguous 'definition' subsection."[20] These passages suggest that the Court did not think that Parliament intended to change the ordinary meaning of a receiver.

One should not too readily concede the proposition that a literal reading of the federal definition of a receiver in s. 243(2) of the *BIA* leads to the conclusion that the definition of a receiver covers a secured creditor who seizes the property pursuant to its usual secured creditor enforcement remedies. In order to fall within the definition of a receiver, the secured creditor must take possession or control under a security agreement. The usual enforcement remedies of a secured creditor are not conferred under the terms of a security agreement, but are given to a secured creditor by statute.[21] This stands in stark contrast to a secured creditor's power to appoint a receiver, which must be granted to a secured creditor through a contractual provision in the security agreement.[22] A legitimate argument can be made that the exercise of a secured creditor's enforcement remedies does not fall within the *BIA*'s definition of a receiver because, except in the case of the power to privately appoint a receiver, enforcement powers are derived from a statute rather than from a security agreement.

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19 *Ibid* at para 52.
20 *Ibid* at para 54.
21 See e.g. *The Personal Property Security Act, 1993*, SS 1993, c P-6.2, s 56(2).
22 *Ibid*, s 64(2).

Subsequent legislative amendments to the *BIA* also suggest that a less expansive interpretation of the definition of "receiver" was intended. The 2009 amendments to the *BIA* introduced a major change to the law by stipulating that only a trustee may be appointed as a receiver.[23] An expansive interpretation of the definition would mean that the services of a licensed trustee would be required whenever a secured creditor sought to enforce against substantially all of the inventory, accounts receivable, or other property of the debtor. This is no longer simply a matter of imposing a reporting requirement on a secured creditor. It would effectively prevent a secured creditor from exercising their right to seize and sell the collateral. This is quite simply an absurd result that would greatly increase realization costs.

The existence of this controversy concerning the definition of a receiver under the receivership provisions of the *BIA* makes it necessary to determine if the number of private appointments are inflated by the inclusion of enforcement proceedings by secured creditors that do not involve the appointment of a licensed trustee as a receiver. Regardless of which view of the matter will ultimately prevail, the fact that there is uncertainty on this question means that it is possible that secured creditors who have not appointed a receiver are nevertheless choosing to report under the *BIA* as a precautionary measure in the event that the view taken in *Colour Box* is correct.

As a consequence, it is necessary to look more closely into the OSB statistics to assess whether they relate to a privately appointed receiver or to a secured creditor who has simply enforced against the collateral without having appointed a receiver pursuant to the security agreement. To make this determination, a list of all the receiverships that involved a private receivership was obtained from the OSB. The names of the receivers were cross-referenced against the register of licensed trustees that is maintained by the OSB.[24]

A random sample of 309 files was drawn from 2010 to 2014, from a total population of 1,560 files listed as private appointments.[25] This produced 131 different names (many individuals were named as receiver in several different receiverships). A match between the name of the receiver and the OSB list of licensed trustees was obtained in all but five cases. In respect of three of these, it was possible to

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23 *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007, c 36, s 58(3), amending *BIA*, *supra* note 10, s 243(4).

24 The OSB maintains a registry of the main office coordinates of all licensed insolvency trustees (see "Find a Licensed Insolvency Trustee" (22 June 2016), online: <http://www.ic.gc.ca/app/osb/tds/search.html>, archived: <https://perma.cc/3ECH-PXNX>).

25 This results in a confidence level of 95% with a margin of error of 5%.

confirm that the individual was a licensed trustee at the time (but had since retired or changed employment). Therefore, more than 99% of the cases recorded by the OSB as private receiverships involved licensed trustees.

This demonstrates two things. First, it shows that the OSB statistics about privately appointed receivers are not inflated to any significant degree through the reporting of non-receivership enforcement measures of secured creditors. Second, it shows that *Colour Box* is largely being ignored by secured creditors as they are not registering their enforcement measures with the OSB.

From this we may further conclude that although the use of the privately appointed receiver no longer dominates, it is still widespread. For the past five years, the percentage of private appointments has never dropped below 43%. However, it must be kept in mind that this involves counting the number of proceedings rather than the monetary value of the assets. A different measure would be to look at the value of assets administered in court appointed receivership proceedings in comparison with the assets administered in private appointments.

In order to make an assessment along this dimension, the statistics collected by the OSB were again examined. The OSB Annual Statistical Reports provide the declared value of the assets in respect of receivership proceedings.[26] This permits a comparison between the values of the assets in respect of court appointed and privately appointed receivers. Table 2 displays the average value of assets in court appointments compared to the average value of assets in private appointments. The data indicates that private appointments are more often used in proceedings with smaller asset values. This is not surprising as court appointments are more costly due to the greater expenses involved in the necessary court applications, and therefore are more likely to be used where greater asset values are involved.

Table 3 displays the percentage of the total declared assets in respect of receivership proceedings that were administered through private appointments. The sharp decrease in 2015 can be attributed to the economic shock that has been experienced in Alberta because of the depressed oil prices. During that year, court appointed receiverships in Alberta accounted for $8,072 million (93%) out of a total of $8,675 million in declared assets under court appointment proceedings throughout Canada. This should be compared with 2014, in which court appointed receiverships in Alberta accounted for $524 million (40%) out of a total of $1,297 million in declared assets under court appointment proceedings throughout Canada, and $312 million (31%) out of a total of $1,016 million in 2013.

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26 *Supra* note 8 at Table 9: Receiverships.

Table 2: Average Asset Values in Court Appointments and Private Appointments[27]

Court Appointed	Average Value of Assets - Court Appointed	Average Value of Assets - Privately Appointed
2010	$6,877,709	$950,635
2011	$5,762,964	$1,131,905
2012	$9,814,400	$937,974
2013	$2,739,263	$914,140[28]
2014	$4,380,524	$619,866
2015	$35,408,258	$1,189,262

Table 3: Percentage of Total Asset Value in Receiverships Administered by Private Appointments[29]

Year	Percentage of Total Assets - Private Appointments
2010	12.8%
2011	21.5%
2012	8.8%
2013	15.2%
2014	9.6%
2015	2.9%

One further dimension that should be considered is geographic. It is possible that the decrease in the use of privately appointed receivers is not uniform across Canada. At the outset, one must exclude the civil law jurisdiction of Quebec, since their civil law system does not

27 *Ibid*.
28 The statistics for 2013 have been adjusted by removing a single outlier that was almost certainly a reporting error.
29 OSB Annual Statistical Reports, *supra* note 8 at Table 9: Receiverships.

have a counterpart to the privately appointed receiver.[30] An analysis of the OSB statistics reveals that the frequency of use of private appointments in the common law jurisdictions varies considerably by region. Private appointments are more frequently encountered in Atlantic Canada. They were used in 83% of the receivership proceedings brought in Atlantic Canada during the period from 2010 to 2015. During the same period, private appointments were used in 49% of the receiverships proceedings brought across Canada. This may be a reflection that the economies of Atlantic Canada are smaller and that the associated asset values tend to be lower.

The lower asset values in Atlantic Canada may not fully account for the higher percentage of private appointments in those provinces. There also appears to be a correlation between the use of court appointments and the existence of a commercial court (whether formally or informally constituted).[31] The private appointment of receivers is more common in provinces and territories that do not have a commercial court. Table 4 displays the proportion of court appointments and private appointments in jurisdictions that have a formal or informal commercial court. During the period from 2010 to 2015, court appointments were used in 20% of the receivership proceedings in jurisdictions that do not have a commercial court. During the same period, court appointments were used in 52% of the receivership proceedings in jurisdictions that have a commercial court.

As the larger provinces are the ones that have established commercial courts, it may be that this is simply reflecting larger asset values in those jurisdictions. In order to determine if the presence of a commercial court makes it more likely that a court appointment will be used rather than a private appointment, the average value of assets in common law provinces with commercial lists was compared with the average value of assets in common law provinces without a commercial list for the period from 2010 to 2015. The average asset value in respect of private appointments in jurisdictions with a commercial list was $935,000. The average asset value in respect of private appointments in jurisdictions without a commercial list was $1,132,760. This suggests

30 Notwithstanding this absence, the OSB statistics indicate that there are a handful of private appointments reported in Quebec: 3 in 2015, 2 in 2014, 13 in 2013, 7 in 2012, 12 in 2011, and 15 in 2010. It is unclear what type of proceedings are involved in respect of these reports.

31 Ontario Superior Court of Justice Commercial List and the Quebec Superior Court Commercial Division are the two formally created commercial courts. Alberta, British Columbia, and Saskatchewan have informal arrangements in which a small group of experienced judges are assigned bankruptcy and insolvency matters. Each of these provinces has also approved template orders for a variety of court supervised insolvency proceedings.

that a secured creditor is more likely to use a private appointment rather than a court appointment in jurisdictions that do not have a commercial list. This is not a surprising conclusion. The existence of a commercial court and the use of template orders makes it quicker and less costly to use a court appointed receiver.

Table 4: Court Appointments and Private Appointments—Common Law Jurisdictions with a Commercial Court[32]

Year	Common Law Jurisdictions - No Commercial List		Common Law Jurisdictions - Commercial List	
	Court Appointed	Privately Appointed	Court Appointed	Privately Appointed
2010	27 (28%)	69 (72%)	272 (47%)	310 (53%)
2011	18 (21%)	67 (79%)	228 (42%)	310 (58%)
2012	8 (13%)	56 (87%)	227 (52%)	208 (48%)
2013	8 (13%)	52 (87%)	342 (61%)	220 (39%)
2014	12 (24%)	37 (76%)	249 (58%)	182 (42%)
2015	10 (15%)	55 (85%)	214 (57%)	162 (43%)

The upshot of the analysis is the following: the hypothesis concerning the disappearance of the private receivership must be rejected. Although the privately appointed receiver no longer dominates as the most widely used form of receivership proceedings, it is still used in more than 40% of receivership proceedings. It continues to be used when the value of the debtor's assets is smaller. It is more frequently used in jurisdictions that do not have a commercial court that deals with insolvency matters.

How then does this square with the anecdotal observation of many insolvency lawyers that the private receivership is seldom encountered? The likely answer is that because of the smaller size of the estate, the insolvency professionals who act as receivers are not retaining lawyers in respect of these matters. Private receiverships are still being used; it is simply that insolvency lawyers are not involved in these files.

III. THE REPLACEMENT OF COURT APPOINTED RECEIVERSHIPS BY LIQUIDATING *CCAAs* OR COMMERCIAL PROPOSALS

The second hypothesis to be tested is that court appointed receiverships are in the process of being replaced by the use of liquidation proceedings under the *Companies' Creditors Arrangement Act*[33] or commercial

32 OSB Annual Statistical Reports, *supra* note 8 at Table 9: Receiverships.
33 RSC 1985, c C-36 [*CCAA*].

proposal provisions under the *BIA*.[34] Clearly, court appointed receivership proceedings have not disappeared. The many recent judicial decisions that relate to court appointed receivers attest to this. The question is whether court appointments are undergoing a persistent loss of market share relative to other commercial insolvency proceedings such that their survival over the long run is threatened.

The *CCAA* and the commercial proposal provisions were originally envisaged as proceedings that permitted an insolvent company to negotiate and present a plan of arrangement or commercial proposal to its creditors, who would then vote on whether to accept or reject it.[35] If accepted, the proposal results in the survival of the business entity with a new and viable capital structure. More recently, the *CCAA* has been used to undertake a going concern sale of the business to a third party.[36] It has even been used to effect a pure liquidation that did not involve a going concern sale.[37]

Since liquidating *CCAA* proceedings, liquidating commercial proposal proceedings, and court appointed receiverships can all be used to effect a going concern sale or liquidation of the assets, it is necessary to compare the relative use of these three insolvency systems. The OSB Annual Statistical Reports set out the number of court appointed receivership proceedings and the number of commercial proposals under the *BIA*.[38] The number of *CCAA* proceedings is separately reported and the annual statistics are set out in the fourth-quarter report for each year.[39] The *CCAA* statistics are complicated by the fact that many *CCAA* proceedings involve the restructuring of businesses that are composed of a number of affiliated corporations. The statistics that are set out below treat the group of affiliated corporations as single insolvency proceedings.

The OSB Annual Statistical Reports do not distinguish between commercial proposals that are instituted by individuals and commercial proposals that are brought by corporate entities. As receiverships are almost always used in connection with corporations and other artificial entities, it was necessary to eliminate commercial proposals

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34 *Supra* note 10, ss 50-66.

35 See Wood, *Bankruptcy and Insolvency Law*, *supra* note 5 at 338.

36 See Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada?" (2013) 53:3 Can Bus LJ 382.

37 See *Target Canada Co. (Re)*, 2015 ONSC 303, 22 CBR (6th) 323.

38 See *supra* note 8 at Table 3: Insolvencies Filed by Businesses and Table 9: Receiverships.

39 See e.g. Office of the Superintendent in Bankruptcy, *CCAA Statistics in Canada: Fourth Quarter of 2015* (Ottawa: Industry Canada) at Table 1: Total CCAA Proceedings—Domestic [OSB *CCAA* Statistics], online: Government of Canada Publications <http://publications.gc.ca/site/eng/9.507922/publication.html>, archived: <https://perma.cc/6Q4X-WAMX>.

that related to individuals from the survey. This information was obtained through a request to the OSB.[40] The results are set out in Table 5. This indicates the total number of commercial proposal and *CCAA* proceedings, but does not identify how many of these represent liquidation proceedings. It therefore represents the maximum number of potential liquidation proceedings, and the true figure will almost certainly be a smaller number.[41]

Table 5: Commercial Proposal, *CCAA*, and Court Appointed Receivership Proceedings (Canada)[42]

Year	Commercial Proposal - Number (%)	*CCAA* - Number (%)	Court Appointed Receiver - Number (%)
2010	715 (64%)	35 (3%)	372 (33%)
2011	694 (69%)	40 (4%)	279 (28%)
2012	710 (70%)	39 (4%)	267 (26%)
2013	754 (65%)	32 (3%)	371 (32%)
2014	855 (73%)	25 (2%)	296 (25%)
2015	757 (73%)	40 (4%)	245 (24%)

Table 5 indicates that the *BIA* commercial proposal is the most commonly used commercial insolvency proceeding in Canada. This paints a misleading picture, in that it masks a highly significant difference between the civil law jurisdiction of Quebec and the common law provinces and territories. Tables 6 and 7 present the same figures but draw a distinction between the common law jurisdictions and Quebec. Table 6 sets out the number of *BIA* commercial proposals, *CCAA* proceedings, and court appointed receivership proceedings in the common law jurisdictions. Table 7 sets out the same information for the civil law jurisdiction of Quebec.

40 On file with the author.

41 On the methodology used to determine whether or not *CCAA* proceedings are liquidating proceedings see Nocilla, *supra* note 36 at 386-87. See also Stephanie Ben-Ishai, "The American Bankruptcy Institute's Proposed Chapter 11 Reforms: Some Canadian Thoughts" (2016) 57:3 Can Bus LJ 343 at 364, n 121.

42 OSB *CCAA* Statistics, *supra* note 39 at Table 1: Total CCAA Proceedings—Domestic; OSB Annual Statistical Reports, *supra* note 8 at Table 3: Insolvencies Filed by Businesses and Table 9: Receiverships. See also *supra* note 40 and accompanying text. Some years total to more than 100% due to rounding.

Table 6: Commercial Proposal, *CCAA*, and Court Appointed Receivership Proceedings (Common Law)[43]

Year	Commercial Proposal - Number (%)	*CCAA* - Number (%)	Court Appointed Receiver - Number (%)
2010	214 (38%)	27 (5%)	321 (57%)
2011	211 (43%)	29 (5%)	246 (51%)
2012	231 (46%)	35 (7%)	232 (47%)
2013	234 (38%)	26 (4%)	350 (57%)
2014	250 (47%)	19 (4%)	261 (49%)
2015	253 (50%)	29 (6%)	224 (44%)

Table 7: Commercial Proposal, *CCAA*, and Court Appointed Receivership Proceedings (Quebec)[44]

Year	Commercial Proposal - Number (%)	*CCAA* - Number (%)	Court Appointed Receiver - Number (%)
2010	501 (92%)	8 (1%)	35 (6%)
2011	483 (94%)	11 (2%)	21 (4%)
2012	479 (93%)	4 (1%)	32 (6%)
2013	520 (93%)	6 (1%)	33 (6%)
2014	605 (94%)	6 (1%)	35 (5%)
2015	504 (94%)	11 (2%)	21 (4%)

When this distinction is drawn, it becomes apparent that commercial proposals are used less frequently than court appointed receivership proceedings in the common law jurisdictions. In Quebec, it appears that commercial proposal proceedings are being heavily employed. This strongly suggests that they are being used in place of receivership proceedings to liquidate businesses. Their availability also appears to have resulted in a smaller incidence of *CCAA* proceedings in Quebec in comparison to the common law provinces and territories.

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43 OSB *CCAA* Statistics, *ibid* at Table 3: Total CCAA Proceedings Filed by Province; OSB Annual Statistical Reports, *ibid*. See also *supra* note 40 and accompanying text. Some years total to less than 100% due to rounding.

44 OSB *CCAA* Statistics, *ibid*; OSB Annual Statistical Reports, *ibid*. See also *supra* note 40 and accompanying text. Some years total to less than 100% due to rounding.

Although *CCAA*, commercial proposal, and court appointed receivership proceedings can all be used to effect a going concern asset sale or liquidation, there is a marked difference in the average asset value associated with these proceedings. Table 8 sets out a comparison of the asset values associated with these three types of insolvency proceedings.

Table 8: Average Value of Assets in Commercial Proposal, *CCAA*, and Court Appointed Receivership Proceedings[45]

Year	Average Value of Assets - Commercial Proposal	Average Value of Assets - *CCAA*	Average Value of Assets - Court Appointed Receiver
2010	$988,804	Not available	$6,877,709
2011	$787,106	$165,583,850	$5,762,964
2012	$598,511	$226,638,487	$9,814,400
2013	$875,649	$105,234,468	$2,739,263
2014	$754,980	$156,559,320	$4,380,524
2015	$670,516	$579,444,450	$35,408,258

As one might expect, the *CCAA* is used in very large corporate insolvencies. David Bish has discussed the reasons why the liquidating *CCAA* has replaced court appointed receiverships in large corporate insolvencies.[46] It is important to recognize that this change is not widespread, but is restricted to a relatively small number of very large corporations or corporate groups. Although the number of *CCAA* proceedings is relatively small, the value of the assets subject to these proceedings is much greater than in other insolvency proceedings. Commercial proposals are located on the other end of the pole. The average asset values associated with commercial proposal proceedings are closer to the average asset values associated with privately appointed receivership proceedings.

The upshot is this: the hypothesis concerning the replacement of court appointed receivership proceedings by liquidating *CCAA*s and commercial proposal proceedings must be rejected. The use of the liquidating *CCAA* has replaced court appointed receivership proceedings in very large corporations or corporate groups. Commercial proposal proceedings also appear to be the preferred

45 OSB *CCAA* Statistics, *ibid* at Table 1: Total CCAA Proceedings Domestic; OSB Annual Statistical Reports, *ibid*. See also *supra* note 40 and accompanying text.

46 *Supra* note 7.

vehicle for effecting asset sales in Quebec. However, outside these two contexts the court appointed receivership is alive and well and its future survival is not threatened. Indeed, in Alberta, where receiverships are presently being employed to liquidate the assets of oil and oil field service companies, it appears to be the insolvency vehicle of choice.

IV. IMPLICATIONS FOR INSOLVENCY LAW REFORM

This paper has demonstrated that private receivership proceedings have not disappeared and that court appointed receivership proceedings are unlikely to be replaced by other insolvency proceedings other than in two specific contexts: insolvency proceedings in respect of the very largest companies (in which *CCAA* proceedings are more often used), and insolvency proceedings in Quebec (in which commercial proposals are more often used). Receivership law remains relevant today and for the foreseeable future.

This in no way implies that the existing state of the law is adequate for the task at hand. Indeed, the findings in this study support the view that it is time to undertake a major renovation of the law of receiverships. Three difficulties associated with the present state of receivership law in Canada can be identified: (1) it is overly complex, (2) it is inconsistent, and (3) it is inadequate as a national insolvency system.

A. UNNECESSARY COMPLEXITY

Over a wide range of different issues, the rules and principles that govern private appointments differ from those that govern court appointments. The reasons for these differences are largely historical in that they are derived from differences in legal sources. Courts used contract law and agency law principles to resolve issues arising out of private appointments of receivers. They drew upon the law of equity when dealing with court appointed receivers.

This structure has an overlay of legislative provisions that create additional regulatory requirements and that also alter some attributes of the substantive law governing receiverships. Private receiverships were in the ascendancy when the legislative provisions that govern receiverships were enacted in business corporation statutes and the *BIA*. The provisions were intended to remedy problems associated with private appointments, namely the relatively low standard of care expected of the receiver and the lack of information available to other creditors.[47] In many respects, the legislative amendments ensured

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47 See Canada, Advisory Committee on Bankruptcy and Insolvency, *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (Ottawa: Minister of Supply and Services Canada, 1986) at 37-39.

that privately appointed receivers would be subject to obligations that were closer to those imposed on court appointed receivers.[48]

The difficulty with this legislative overlay is that it is fractured and incomplete. Instead of a single legislative response, several different statutes enact similar but not identical rules. Many of the business corporation statutes contain legislative provisions pertaining to receiverships, but these only apply to corporations that are constituted under those statutes. Personal property security statutes also contain provisions that regulate receivers, but these do not apply where the collateral is real property. The *BIA* contains provisions that govern receiverships of insolvent persons, but these are less comprehensive than most of the provincial statutes that regulate receiverships.

This has produced a body of law that is extraordinarily complex. There are two fundamentally different sources of law, and there are several different overlapping statutes that alter specific aspects of some of the rules and principles, none of which purport to provide a comprehensive restatement of the law. Matters are further complicated by the use of joint appointments in which a receiver is appointed pursuant to both the federal power of court appointment in the *BIA* and the provincial power of appointment. This can lead to a number of difficulties, including inconsistent time periods for appeal.[49]

B. INCONSISTENT RULES

The rules and principles that govern private appointments are different from those that govern court appointments. It is true that some of these differences have been chipped away by statute, but the two bodies of law have never been assimilated. One such difference concerns the obligations of receivers. The traditional view is that a privately appointed receiver owes a duty only to the secured creditor who made the appointment, whereas a court appointed receiver owes a duty to consider the interests of all creditors.[50]

Maintaining this difference in treatment leads to several problems. First, there would appear to be a conflict with the code of ethics that governs licensed trustees. The *BIA* provides that only a licensed

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48 See Tamara M Buckwold, "The Treatment of Receivers in the Personal Property Security Acts: Conceptual and Practical Implications" (1997) 29:2 Can Bus LJ 277 at 296-99.

49 See e.g. Alberta Template Order Committee, "Alberta Template Receivership Order Explanatory Notes" (December 2012) at 2, online: <https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/receivership-order-explanatory-notes-(pdf).pdf>, archived: <https://perma.cc/7UE9-A9NX>.

50 *Ostrander v Niagara Helicopters Ltd.* (1973), 40 DLR (3d) 161 at 166-69, 1 OR (2d) 281 (H Ct J).

trustee can be appointed as a receiver.[51] The code of ethics that governs licensed trustees is found in the *Bankruptcy and Insolvency General Rules*.[52] These rules provide that a licensed trustee is under an obligation to be impartial.[53] The duty to act impartially requires a licensed trustee to consider the interests of all parties and not simply the interests of the secured creditor who appointed the receiver. Indeed, the website of the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP") recognizes that a licensed trustee "offers an impartial view, acting in the best interests of all parties."[54] Nevertheless, courts continue to espouse the traditional view that a privately appointed receiver is required to consider only the interests of the secured creditor.[55]

Licensed trustees were given a monopoly on receivership engagements, and this was presumably done in order to ensure that the receiver would be under the same obligations as those imposed on a trustee in bankruptcy or monitor. Any adherence to the traditional rule can only cause confusion. Persons who deal with a licensed trustee should be entitled to assume that they are acting impartially in the interests of all the parties. They should not be obliged to enquire into the manner of the receiver's appointment in order to determine whether or not this obligation is in effect.

One inconsistency concerns the legal position of a receiver in respect of post-receivership contracts. The traditional view is 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.[56] In contrast, a court appointed receiver is personally liable on post-receivership contracts.[57] This difference in treatment is a source of confusion and can prejudice third parties who enter into contracts with privately appointed receivers. The United Kingdom,[58] Australia,[59] and New Zealand[60]

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51 *BIA*, *supra* note 10, s 243(4). This restriction applies to both court appointments and private appointments.

52 CRC, c 368, ss 34-53.

53 *Ibid*, s 39.

54 Canadian Association of Insolvency and Restructuring Professionals, "Role of the Licensed Insolvency Trustee", online: <http://www.cairp.ca/general-public/role-of-the-licensed-insolvency-trustee/>, archived: <https://perma.cc/Q5Q9-4R74>.

55 *Hibbs v Murphy*, 2015 NSSC 48 at para 41, 356 NSR (2d) 166; *Canadian Pork v Westoba Credit Union*, 2013 MBQB 211 at para 29, 298 Man R (2d) 40.

56 See *Peat Marwick Ltd. v Consumers' Gas Co.* (1980), 113 DLR (3d) 754 at 762-63, 29 OR (2d) 336 (CA).

57 See e.g. *In re J.H. Smith & Son* (1929), 10 CBR 393 (Ont SC); *Ashk Development Corp., Re* (1988), 70 CBR (NS) 72, 61 Alta LR (2d) 375 (QB).

58 *Insolvency Act 1986* (UK), c 45, s 44(1)(b).

59 *Corporations Act 2001* (Cth), s 419(1).

60 *Receiverships Act 1993* (NZ), 1993/122, s 32(1).

have all addressed this problem by imposing personal liability on a privately appointed receiver in respect of post-receivership contracts.

Another inconsistency concerns the effect of bankruptcy on receivership proceedings. In the case of a private appointment, the bankruptcy of the debtor results in a loss of the receiver's power to operate the business as agent of the company.[61] The receiver's authority to operate the business is derived from the deemed agency clause that is contained in the security agreement pursuant to which the receiver is appointed. Upon bankruptcy, the property of the bankrupt vests in the trustee in bankruptcy and the debtor loses the capacity to deal with the assets. The deemed agency comes to an end as the debtor no longer has the capacity to deal with the property. In contrast, a bankruptcy has no effect on a court appointed receiver's power to operate the business.

C. THE USE OF RECEIVERSHIPS IN QUEBEC

The receivership provisions in the *BIA* are quite unlike the provisions that govern the other insolvency systems. The *BIA* gives a court the power to appoint a national receiver, but it does not specify the rules or principles that should govern the receivership. The legislation is truly skeletal in nature. This does not present an intractable problem for the common law jurisdictions because they are able to apply background or interstitial rules of the common law and equity to fill gaps in the statute. This strategy does not work in a civil law jurisdiction that does not have a counterpart to receivership law. As a result, one would anticipate that the use of liquidating commercial proposals will continue to be used in Quebec as a substitute for the national court appointed receiver.

This tendency is likely to be reinforced in the aftermath of the Supreme Court of Canada's decision in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*.[62] Prior to this decision, it was widely assumed that the federal receivership provisions operated as a code, in the sense that, if the federal receivership route was chosen, then the provisions in the *Civil Code of Québéc*[63] that related to enforcement by a secured creditor would not apply.[64] The possibility that provincial notice periods may now be applicable will almost certainly dampen the use of court appointments in Quebec.

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61 *Gaskell v Gosling*, [1897] AC 575 (HL); *Thomas v Todd*, [1926] 2 KB 511.

62 2015 SCC 53, [2015] 3 SCR 419.

63 Arts 2757-58 CCQ.

64 *9113-7521 Québec Inc. (Syndic de)*, 2011 QCCS 3429, 83 CBR (5th) 66. See also Christian Lachance & Hugo Babos-Marchand, "The 'Impractical Effect' of *Lemare Lake Logging Ltd.* in the Enforcement of Security in Quebec" (2016) 28:3 Commercial Insolvency Reporter 25.

D. A UNIFIED APPROACH TO RECEIVERSHIP LAW

There is a relatively simple solution that would remedy these difficulties. Receivership proceedings should be afforded recognition as an insolvency system on par with bankruptcy proceedings, *CCAA* proceedings, and commercial proposal proceedings. Part XI of the *BIA*, which contains the federal provisions relating to receiverships,[65] should be given a complete overhaul. In place of the piecemeal approach of the present provisions, the statute should seek to codify the fundamental principles of receivership law.[66] Australia[67] and New Zealand[68] have enacted statutes that govern receiverships. Although these statutes do not attempt to codify all elements of the law respecting receiverships, they provide a useful menu of some of the matters that might be included in a more comprehensive statute.

A division between the two types of receivers should be maintained. The availability of private appointments is desirable in the case of small estates, in which high administrative expenses can wipe out any return to creditors. However, the availability of private appointments should not result in the application of an entirely different body of law that governs receivers. The basic rules governing these two types of receiverships should be unified, except to the extent that differences in treatment are justified by virtue of the appointment mechanism or the supervisory role of the court. The power of a receiver to manage the business should be set out in the statute (subject to variation by a court), and this power should be unaffected by the debtor's bankruptcy. All receivers should be personally liable on post-receivership contracts. The obligation of a receiver to act impartially and in the best interests of all the parties should also be codified in the statute.

V. CONCLUSION

Receivership in Canada is alive and well, but the law governing it is in need of reform. Since the 2009 amendments to the *BIA*, courts are able to appoint a national receiver who is authorized to carry on business throughout Canada. However, the legislative framework that governs a national receiver is fragmentary. The statutory provisions are contained in overlapping federal and provincial statutes. For the most part, these statutory provisions were devised when the private

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65 *Supra* note 10, ss 243-52.

66 For a more detailed description of what this regulation might involve, see Roderick J Wood, "The Regulation of Receiverships" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 243.

67 *Corporations Act 2001* (Cth), Part 5.2.

68 *Receiverships Act 1993*, *supra* note 60. See also The Right Honourable Peter Blanchard & Michael Gedye, *The Law of Private Receivers of Companies in New Zealand*, 3rd ed (Wellington: LexisNexis, 2008).

receivership predominated, but have become increasingly irrelevant with the increased use of court appointments.

The statutes do not set out the fundamental rules and principles that govern receiverships. Instead, the common law and equity are left to supply most of the details. This strategy of looking to the interstitial law of the province is wholly inadequate in the civil law jurisdiction of Quebec. The best course of action is to recognize that receivership law has fully emerged as an insolvency system that should be treated in the same manner as other insolvency systems.

The fundamental rules and principles that govern receiverships should be set out in the *BIA*. The governing law should be unified so that a common set of principles applies to both private appointments and court appointments, except to the extent that differences in treatment are justified by virtue of the appointment mechanism or the supervisory role of the court. The extension of the reporting requirements in relation to secured creditors who enforce otherwise than through the appointment of a receiver should also be abandoned. The reporting requirements serve no useful purpose in relation to enforcing secured creditors and, despite the decision in *Colour Box*, are being routinely ignored in cases that do not involve the appointment of a licensed trustee.