

THE TREATMENT OF RECEIVERS IN THE PERSONAL PROPERTY SECURITY ACTS: CONCEPTUAL AND PRACTICAL IMPLICATIONS

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I. INTRODUCTION

With the relatively frequent and sometimes prolonged periods of economic recession to which the Canadian economy has in

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recent years been subject, the law and practice of receivership has taken on considerably greater importance than in less turbulent times. The burgeoning use of receivership for security realization purposes in the 1980s brought a flood of court applications and litigation which generated a body of rather ambiguous caselaw. The absence of a clear doctrinal foundation in many of those cases is perhaps explained by the existence of several sources of different legal rules and principles, which apply in varying permutations to different situations depending on the character of the receiver or receiver and manager, and the kind of property subject to his administration.¹

Receivership continues to be governed in part by the common law, though most of the non-statutory principles of receivership are in fact equitable in origin and in substance. The common law of receivership has been augmented by a variety of federal and provincial statutes. These legislative provisions are typically *ad hoc* in nature and limited in scope, with the exception of the innovative statutory scheme implemented by the Saskatchewan Personal Property Security Act, 1993² and the British Columbia Personal Property Security Act.³ In addition to the general law of receivership, receivers and the secured creditors by whom they are appointed are increasingly affected by other kinds of legislation, particularly environmental and employee protection statutes.

The absence of homogeneity in the various provincial statutory regimes makes it difficult to offer accurate generalizations of the law of receivership. However, one can say that in most provinces the particular matrix of statutory and common law principles applicable to a given receiver or receivership will depend upon whether the debtor is incorporated, whether the property subject to the receivership is real or personal, whether the receivership involves all or most of the business assets of an insolvent debtor and whether the receiver is appointed by a court or extrajudicially by a secured creditor pursuant to some form of security agreement.

In many provinces, provincial and federal corporations legislation governs receivers of the real and personal property of incorporated debtors, while personal property security statutes govern

¹ Most appointees are receiver and managers, and for the sake of brevity, the term "receiver" as used hereafter refers to a receiver and manager as well as to a receiver.

² S.S. 1993, c. P-6.2.

³ S.B.C. 1989, c. 36 [am. 1990, c. 11, c. 25; 1991, c. 13; 1992, c. 48].

receivers in their dealings with personal property collateral regardless of whether the debtor is or is not incorporated. In addition, Part XI of the Bankruptcy and Insolvency Act (the BIA)⁴ applies to receivers of a business enterprise dealing with most or all of an insolvent debtor's assets, regardless of whether the debtor is incorporated and without differentiation between real and personal property collateral. Finally, to the extent that the common law applies to a given receivership, the relevant rules and principles will depend on whether the receiver is appointed extrajudicially or by a court.

The uncertainty engendered by this legal maze may have led some secured creditors and their legal counsel to avoid the use of receivership as a security realization device. Anecdotal evidence suggests that, at least in Ontario, the use of receivership has been significantly eclipsed by the institution of proceedings under the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangements Act.⁵ However, receivership continues to offer a viable and valuable route to security enforcement in many situations in which the federal insolvency schemes are inapplicable or unsuitable. Further, the potential for rationalization of receivership law through statutory innovation of the kind represented by the Saskatchewan and British Columbia Personal Property Security Acts makes receivership an attractive remedial regime worthy of closer study.⁶

This article examines the receivership provisions of current personal property security legislation, focusing on the Saskatchewan and British Columbia Personal Property Security Acts. The objective is twofold: first, to consider the extent to which the provincial PPSAs have changed in conceptual terms the fundamental legal status of the receiver and, second, to address the practical implications of that legislation. The study is descriptive as well as analytical, designed both to highlight legislative innovations in this area and to explore their conceptual and practical consequences.

Two themes emerge from the analysis. First, it will be suggested that the PPSA redefines the status of the receiver, conferring upon private receivers independent status of the kind enjoyed by court

⁴ R.S.C. 1985, c. B-3 [am. 1992, c. 27, s. 89].

⁵ R.S.C. 1985, c. C-36.

⁶ Hereafter, the common abbreviation PPSA will be used in reference to the Personal Property Security Acts of any or all of the provinces, depending on the context. However, since the Saskatchewan Personal Property Security Act, 1993, will be the focus of much of the following discussion, the abbreviation will most often be referable to that Act.

appointed receivers at common law. This redefinition in turn qualifies the nature of the private receiver's legal relations with the creditor appointing him, the debtor and third parties. Second, the PPSA's unitary approach to court appointed and private receivers eliminates many of the practical as well as the conceptual distinctions between the two forms of receivership.

II. THE STATUS OF THE RECEIVER AT COMMON LAW

1. The Development of Receivership Law

Receivership for purposes of security enforcement is rooted in the practice of the 16th century courts of Equity, who would appoint a receiver on the application of a mortgagee to protect or realize her interest in the property of a mortgagor.⁷ The practice of extrajudicial appointment of receivers by mortgagees under the terms of their mortgage documents developed in the 19th century. Both forms of appointment are now used most frequently in the wider context of debentures or broadly based security agreements.⁸

The difference in the mode of appointment is accompanied by a corresponding difference in the status of the court appointed and the extrajudicially appointed or private receiver.⁹ That difference in status in turn engenders a divergence in governing principles that is now in most respects anomalous, in view of the current functional similarity of the two forms of receivership. A receiver operates fundamentally as a device for realization of a secured creditor's interest in her debtor's property, whether the receiver is appointed directly by that creditor under the terms of a security agreement, or by the court on her application. However, the principles determining the key issues of the receiver's duty and liability to those affected by his appointment and administration are not the same in connection with the court appointed and private receiver. The position of

⁷ This summary of the history of receivership derives from Hubert Picarda, *The Law Relating to Receivers and Managers* (London, Butterworths, 1984), pp. 2-5 and Sir Raymond Walton, *Kerr on Receivers and Administrators*, 17th ed. (London, Sweet & Maxwell, 1989), pp. 5-7.

⁸ With the English Supreme Court of Judicature Act 1873 (U.K.), 1873, c. 66, the jurisdiction to appoint a receiver was vested in the High Court of Justice. The provisions of the Judicature Act regarding the appointment of receivers are reflected in s. 48 of the Saskatchewan Queen's Bench Act, R.S.S. 1978, c. Q-1, and in the equivalent statutes of other jurisdictions.

⁹ Those so appointed will be referred to as privately appointed or private receivers, though the terms "document appointed" and "instrument appointed" are also current.

the secured creditor vis-a-vis the debtor and third parties is similarly affected by the nature of the receiver's appointment.

2. The Court Appointed Receiver

The court appointed receiver is an officer of the court and acts as principal in his own right in taking possession of and dealing with the assets subject to the receivership, under the authority and subject to the direction of the court. He is not the agent of either the secured creditor on whose application he is appointed, or the debtor.¹⁰

The court appointed receiver's status as principal is reflected in the variety of specific rules governing his relations with the debtor and others. For example, at common law, the court appointed receiver is personally liable under new contracts entered into by him after his appointment, although with a right of indemnification from the assets under his administration.¹¹ Since he is not the agent of either the secured party or the debtor, neither are responsible for debts and expenses incurred in the course of the receivership.

While the court appointed receiver acts as principal and officer of the court, his function must not be confused with that of an insolvency administrator such as a trustee in bankruptcy, who acts as a public official in getting in and distributing to recognized claimants all of a bankrupt's non-exempt property. The appointment of a receiver by the court is simply a remedy available to a person with an interest in the property of another, which enables her to realize on that interest through the receiver's seizure and sale of the property. Although he is not the agent of the secured party on whose application he is appointed, the receiver acts for the benefit of that party by selling the collateral subject to the security interest, and remitting the net proceeds to her.

¹⁰ For the classic and frequently cited definition of the court appointed receiver's status, see *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 at p. 167, 9 D.L.R. 476 (P.C.), recently quoted in *Lundrigans Ltd. (Receiver of) v. Bank of Montreal* (1996), 142 D.L.R. (4th) 100 at p. 107, 146 Nfld. & P.E.I.R. 252 (Nfld. C.A.). In *Standard Trust Co. (In liquidation) v. Lindsay Holdings Ltd.*, [1995] 3 W.W.R. 181, 100 B.C.L.R. (2d) 378 (S.C.), the British Columbia Supreme Court confirmed that the court appointed receiver is an independent legal "person" in connection with the modern question of his duties under environmental protection legislation. To similar effect, see *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107 at p. 116.

¹¹ See Frank Bennett, *Receiverships* (Toronto, Carswell, 1985), p. 225 and *Kerr on Receivers and Administrators*, *supra*, footnote 7, p. 212.

3. The Private Receiver

The private receiver's legal status derives from a debenture or security agreement, under which the secured creditor is authorized to appoint a receiver to take possession of, manage and sell the property subject to the security interest conferred by the agreement in the event of the debtor's default. In effect, the agreement recognizes that the receiver may exercise the secured creditor's rights of realization against the property constituting the collateral.¹² The private receiver is therefore primarily the agent of the secured creditor.

However, the agency clause typically found in the security agreement generally provides that the receiver is or is deemed to be the agent of the debtor for all purposes associated with his management of the debtor's business and his dealings with the debtor's property. Without the agency clause, the receiver would of course act simply as the secured creditor's surrogate in taking possession of the debtor's property and operating the debtor's business, thereby making the secured creditor vicariously liable for any misconduct on the receiver's part.¹³

The Ontario Court of Appeal captured the private receiver's dual agency roles in this well-known metaphoric description:¹⁴

When wearing one hat, he is the agent of the debtor company; when wearing the other, the agent of the debenture holder. In occupying the premises of the debtor and in carrying on the business, the receiver and manager acts as the agent of the debtor company. In realizing the security of the debenture holder, notwithstanding the language of the debenture, he acts as the agent of the debenture holder, and thus is able to confer title on a purchaser free of encumbrance.

This statement recognizes that, at common law, a receiver appointed by a secured creditor acts as agent of two parties of frequently divergent interest. He is a kind of "double agent", whose status at any given time depends upon the nature of the function he is then performing. However, the primacy of the private receiver's agency relationship with the secured creditor appointing him will

¹² Those rights arise in part from the contract between the secured party and the debtor, and in part from the common law and statutory rules relevant to her position as holder of a security interest in the collateral.

¹³ See *Deyes v. Wood*, [1911] 1 K.B. 806 (C.A.); *Robinson Printing Co. v. Chic Ltd.*, [1905] 2 Ch. 123; *Vimbos, Ltd. (Re)*, [1900] 1 Ch. 470.

¹⁴ *Peat Marwick Ltd. v. Consumers Gas Co.* (1981), 113 D.L.R. (3d) 754 at p. 762, 29 O.R. (2d) 336, 35 C.B.R. (N.S.) 1 (C.A.). See also Frank Bennett, *supra*, footnote 11, at p. 12.

supersede the contractual fiction that he acts on behalf of the debtor if the actions in question can be characterized as relating to collateral realization.¹⁵

The private receiver's status as agent of both the secured creditor and the debtor distinguishes him in a fundamental way from the court appointed receiver. While the court appointed receiver always acts as principal, the private receiver seldom if ever does so. It would seem that he may be viewed as principal acting in his own right only on the rare occasions on which he acts entirely outside the scope of both the receiver-creditor and receiver-debtor agency relationships.

The contradictions inherent in the dual agency role are self-evident. The private receiver can hardly be construed as acting as agent of both secured creditor and debtor simultaneously, since their interests are often adverse and an action that benefits one may be to the detriment of the other. The definition of the legal relationships between the various permutations of receiver, debtor, secured creditor and third parties respectively thus depends in any given instance on the difficult question of which agency role is operative at the material time.

III. DUTY OF CARE AND LIABILITY AT COMMON LAW

1. General

The receiver's status determines the general duty of care to which he is subject in his administration of the receivership. Breach of that duty is in turn the primary source of liability potentially arising from his appointment.¹⁶ In the absence of an applicable statutory provision, the duty of care of both court appointed and private receivers is a duty in Equity. Its scope derives from the effect of the receiver's conduct on the assets and undertaking in receivership and, derivatively, upon the position of persons with an

¹⁵ See *Peat Marwick Ltd. v. Consumers Gas Co.*, *ibid.* See also *Downsview Nominees Ltd. v. First City Corporation Ltd.*, [1989] 3 N.Z.L.R. 710 (H.C.). *affd* [1990] 3 N.Z.L.R. 265 (C.A.), *revd* [1993] 1 N.Z.L.R. 513, [1993] 3 All E.R. 626, in which the Privy Council declared a private receiver subject to the common law duty of care owed the debtor by the secured creditor, in spite of a contractual agency clause purporting to cast the receiver as agent of the debtor. In *B. Johnson & Co. (Builders), Ltd. (Re)*, [1955] 2 All E.R. 775 at pp. 790-91, [1955] Ch. 634 (C.A.), Jenkins L.J. similarly confirmed that the primary duty of the receiver is to the debenture holders and not to the company.

¹⁶ Breach of contractual and statutory obligations may also give rise to liability, depending upon the nature of the appointment and the terms of the contract or statute in question.

interest in them.¹⁷ As we shall see, the Personal Property Security Acts and other legislation significantly affect the receiver's duty and thus his general liability by enacting a statutory duty of care the definition of which differs somewhat from that of the equitable duty.

2. The Court Appointed Receiver's Duty of Care

The court appointed receiver's position as officer of the court entails a duty to the court to follow its direction and observe the standard of conduct appropriate to that office. In addition, it has long been established that the court appointed receiver has a duty in Equity to do "everything reasonable and right for the protection of the property as an undertaking for the benefit of all the persons interested in it".¹⁸ In many cases, this duty has been expressed in even stronger terms, through characterization of the receiver as a fiduciary of all interested persons.¹⁹

The standard of care expected of the court appointed receiver in the exercise of his duty as officer of the court is commonly defined as follows: he has the duty to exercise the care, supervision and control that a reasonable person would exercise with respect to his own property and business.²⁰ The receiver's duty to interested persons is generally articulated in essentially the same terms.²¹

¹⁷ The authorities are divided on the question of whether a receiver, particularly a private receiver, is in addition subject to a distinct duty of care in tort. The view that he is stems primarily from the judgment of Lord Denning in *Standard Chartered Bank v. Walker*, [1982] 3 All E.R. 938, [1982] 1 W.L.R. 1420 (C.A.). The more recent case of *Parker-Tweeddale v. Dunbar Bank plc*, [1990] 2 All E.R. 577 (C.A.) supports the contrary view, though the case is directed to the duty of a mortgagee rather than that of a receiver appointed by a mortgagee. There is no doubt that the courts' early references to a duty of care were to a duty in equity, and it is the opinion of this writer that no foundation has been established for the assertion that the private receiver is also subject to a separate duty of care in tort.

¹⁸ *Newdigate Colliery Ltd. (Re); Newdigate v. The Company*, [1912] 1 Ch. 468 (C.A.).

¹⁹ *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251, [1996] 7 W.W.R. 296 (B.C.C.A.); *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 at p. 166 (S.C.); *Royal Bank of Canada v. Vista Homes* (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124 (S.C.), *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 at p. 292, [1991] 5 W.W.R. 577, 8 C.B.R. (3d) 31 (Alta. C.A.), *supp. reasons* 86 D.L.R. (4th) 567, 8 C.B.R. (3d) 31 at p. 55, *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 at p. 17 (Q.B.).

²⁰ *Deloitte & Touche Inc. v. Ursel Investments Ltd.* (1992), 89 D.L.R. (4th) 246 at p. 262, [1992] 3 W.W.R. 106, 97 Sask. R. 170, 10 C.B.R. (3d) 61 (C.A.). See also *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, *ibid.*, where the Alberta Court of Appeal described the court appointed receiver's duty as officer of the court in terms of a standard of "meticulous correctness".

²¹ See *Plisson v. Duncan* (1905), 36 S.C.R. 647; *Doncaster v. Smith* (1987), 40 D.L.R. (4th) 746, [1987] 5 W.W.R. 444, 65 C.B.R. (N.S.) 133, 15 B.C.L.R. (2d) 58 (C.A.), *Bayhold*

3. The Private Receiver's Duty of Care

We have seen that, notwithstanding the modern use of agency clauses in security agreements, the private receiver is primarily agent of the debenture holder for purposes of security realization.²² The private receiver's duties to the debtor and others are accordingly those owed by the secured creditor he represents, deriving from the terms of the security agreement and from general mortgage and secured financing law.²³

The duty of care owed by a mortgagee or secured creditor towards the debtor-mortgagor arises from the debtor's equity of redemption in the collateral. While a secured creditor may be entitled to take possession of and ultimately sell the debtor's property, she is not permitted to do so in a manner that would unfairly prejudice the debtor-mortgagor's residual interest in it.²⁴ Since the influential decision of the English Court of Appeal in *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*,²⁵ the courts have consistently required more of secured creditors than that they act honestly and without reckless disregard of the interests of the debtor-mortgagor in their dealings with the collateral. They must, at common law, take reasonable care to preserve the property and to sell it at fair market value, though in so doing they are not obliged to prejudice their own interests.²⁶

Financial Corp. v. Community Hotel Co. (Receiver of) (1991), 86 D.L.R. (4th) 127, 10 C.B.R. (3d) 159, 108 N.S.R. (2d) 198 (C.A.).

- ²² *Supra*, footnote 15. For recent expressions of the view that the private receiver's primary obligation is to protect the security of the lender see *Royal Bank of Canada v. Pace Machinery Ltd.* (1991), 83 Alta. L.R. (2d) 61 at p. 86, [1992] 1 W.W.R. 401, 123 A.R. 181 (Q.B.), affd [1995] 3 W.W.R. 607, 165 A.R. 57 (C.A.); *R. v. Coopers & Lybrand Ltd.*, [1981] 2 F.C. 169 at p. 181, 34 C.B.R. (N.S.) 97, [1980] C.T.C. 267 (C.A.).
- ²³ See *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1991), 82 D.L.R. (4th) 50 at p. 66, 4 O.R. (3d) 280 (Gen. Div.), revd 96 D.L.R. (4th) 449, 10 O.R. (3d) 120 (C.A.), leave to appeal to S.C.C. refused 101 D.L.R. (4th) vii, 154 N.R. 244n, in which Blenus Wright J. said, "Although not definitive statements, courts have implied that privately-appointed receivers are akin to mortgagees in possession and have corresponding obligations."
- ²⁴ For a discussion of the mortgagor's interest as a species of proprietary interest or ownership, see W.B. Rayner and R.H. McLaren, eds., *Falconbridge on Mortgages*, 4th ed. (Agincourt, Canada Law Book, 1977) pp. 62-65.
- ²⁵ [1971] 2 All E.R. 633, [1971] Ch. 949 (C.A.).
- ²⁶ See also *Standard Chartered Bank v. Walker*, *supra*, footnote 17; *Parker-Tweedale v. Dunbar Bank plc*, *supra*, footnote 17, *Tse Kwong Lam v. Wong Chit Sen*, [1983] 3 All E.R. 54, [1983] 1 W.L.R. 1349 (P.C.); *Palk v. Mortgage Services Funding plc*, [1993] 2 All E.R. 481, [1993] 2 W.L.R. 415 (C.A.); *Downsview Nominees Ltd. v. First City Corporation Ltd.*, *supra*, footnote 15.

Secured creditors similarly owe to third parties claiming an interest in the collateral a duty to take reasonable care in its management and sale. The right of subordinate interest holders to enforce a duty of care against the secured creditor arises, like that of the mortgagor-debtor, from their proprietary entitlement to the collateral. The duty owed interested third parties is, therefore, the same as that owed the debtor-mortgagor.²⁷

In the result, the private receiver is bound to observe substitutionally the duty, of the secured creditor appointing him, to the debtor and interested third parties; namely, to take reasonable care in his dealings with the property and undertaking in receivership, in order to ensure that the best price reasonably possible is obtained on its sale.

4. The Receiver's Liability at Common Law

Since the court appointed receiver acts as principal and is subject as such to a duty of care to the court and to interested persons, he may be held personally liable for breach of those duties. From a remedial standpoint, that liability may attach either through an action against him at the suit of persons to whom the duty of care is owed,²⁸ or through an order on the passing of his accounts denying him reimbursement from the debtor's assets for his fees or even for expenditures incurred by him in the conduct of the receivership.²⁹

The independent status of the court appointed receiver means that the secured creditor on whose application he was appointed is not liable for the receiver's failure to meet the equitable duty and standard of care.³⁰

²⁷ See *Downsview Nominees Ltd. v. First City Corporation Ltd.*, *supra*, footnote 15.

²⁸ For cases illustrating the possibility of suing a court appointed receiver for damages see, *inter alia*, *Royal Bank v. W. Got & Associates Electric Ltd.*, [1994] 5 W.W.R. 337, 17 Alta L.R. (3d) 23, 150 A.R. 93 (Q.B.), *supp* reasons 18 Alta. L.R. (3d) 140, 154 A.R. 274, *affd* 141 W.A.C. 241, 196 A.R. 241 (C.A.); *Royal Bank of Canada v. Vista Homes Ltd.* (1985), 63 B.C.L.R. 366, 57 C.B.R. (N.S.) 80 (B.C.S.C.); *Boeing Co. v. Island Jetfoil Corp.* (1990), 3 C.B.R. (3d) 41 (B.C.S.C.); *Bank of America Canada v. Willam Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Ct. (Gen. Div.)).

²⁹ See *Doncaster v. Smith*, *supra*, footnote 21; *Deloitte & Touche Inc. v. Ursel Investments Ltd.*, *supra*, footnote 20.

³⁰ The Alberta Court of Queen's Bench in *Royal Bank v. W. Got & Associates Electric Ltd.*, *supra*, footnote 28, seems not to have given effect to this principle. Despite quoting the axiom that the receiver is not the agent of any party to the proceeding (at pp. 402-403), the court held that the secured creditor on whose application the receiver was appointed was liable for conversion, on the basis of the receiver's improper taking of possession.

The private receiver is not at common law independently liable for his conduct of the receivership, since he acts on behalf of the secured creditor and is subject to the common law duty of care of a mortgagee. To the extent that the receiver's conduct is objectionable, the secured creditor is therefore potentially liable as principal for the receiver's breach of what may be regarded as the secured creditor's duty.

In theory, a private receiver appointed pursuant to a security agreement containing the usual agency clause may be personally liable to the debtor for breach of the obligation owed by him as agent of the debtor. However, in practice it appears that liability is not imposed on that basis. This may be due to the characterization of the conduct under attack as a realization activity undertaken by the receiver as agent of the secured creditor, rather than of the debtor. In any event, the supposed agency relationship between private receiver and debtor rarely if ever gives rise to personal liability on the part of the receiver.³¹

IV. THE RECEIVERSHIP PROVISIONS OF THE PERSONAL PROPERTY SECURITY ACT

1. The Legislation

The most comprehensive structure of statutory regulation of receivers is today found in provincial personal property security legislation. The most fully realized scheme is that of Saskatchewan and British Columbia. The implications of that legislation, particularly in terms of its conceptual redefinition of important principles of receivership law, have all but escaped academic or judicial comment.³² Although the regulatory structure established in Saskatchewan and British Columbia is quite recent, it in large part

³¹ By way of explanation of this result, see *B. Johnson & Co. (Builders), Ltd. (Re)*, *supra*, footnote 15. To quote Lord Jenkins (at p. 790):

The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. The whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.

³² It appears that only one published work raises the question of whether the Personal Property Security Acts affect the key concepts of receivership. See Jacob S. Ziegel, "The Privately Appointed Receiver and the Enforcement of Security Interests: Anomaly or Superior Solution?" in Jacob S. Ziegel, ed., *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford, Clarendon Press, 1994).

incorporates the provisions of older personal property security and corporations legislation.³³ Even the relatively long-established provisions of the latter have received little authoritative consideration.

The Saskatchewan and British Columbia PPSAs are not identical, but they embody the same regulatory model. They establish a basic framework of rules through what will be referred to as their "core provisions".³⁴ These provisions apply to receivers of the real and personal property of both incorporated and unincorporated debtors.³⁵ A number of additional provisions apply only to receivers of personal property collateral otherwise falling within the scope of the PPSA.

Variants of this model appear in the Personal Property Security Acts of Alberta, the Northwest Territories, New Brunswick, Manitoba, Nova Scotia and Prince Edward Island.³⁶ The Personal Property Security Act of the Yukon³⁷ contains more abbreviated and somewhat differently structured provisions resembling those of Saskatchewan's original PPSA.³⁸ The provisions of these Acts apply only to receivers of personal property collateral falling within their scope. However, they are supplemented by provisions of provincial corporations statutes applicable to receivers of the real and personal property of incorporated debtors. Those provisions are similar to the core provisions of the Saskatchewan and British Columbia PPSAs.³⁹

³³ The provisions of the Saskatchewan Business Corporations Act, R.S.S. 1978, c. B-10, and the British Columbia Company Act, R.S.B.C. 1979, c. 59, which formerly regulated receivers, were repealed upon the enactment of the current versions of the Personal Property Security Acts of those provinces.

³⁴ The core provisions of the Saskatchewan PPSA are reproduced in the Appendix.

³⁵ In Saskatchewan, s. 45 of the Queen's Bench Act, R.S.S. 1978, c. Q-1, as amended by s. 83 of the PPSA 1993, provides that ss. 64, 65(2) and (3) and 66 of the PPSA apply, with necessary modification, to "a receivership of property that is collateral under a security agreement, charge or mortgage to which the *Personal Property Security Act, 1993* does not otherwise apply". In British Columbia, s. 64 of the Law and Equity Act, R.S.B.C. 1979, c. 224, as amended by S.B.C. 1990, c. 11, s. 73 makes ss. 64, 65, 66(1) and (3), 68(2) and 69(2) and (3) applicable to receiverships of property to which the PPSA does not otherwise apply.

³⁶ S.A. 1988, c. P-4.05 [am. 1990, c. 31; 1991, c. 21]; S.N.W.T. 1994, c. 8; S.N.B. 1993, c. 36; S.M. 1993, c. 14; S.N.S. 1995-96, c. 13, and S.P.E.I. 1997, c. 33 (not yet proclaimed), respectively.

³⁷ R.S.Y.T. 1986, c. 130.

³⁸ Personal Property Security Act, S.S. 1979-80, c. P-6.1.

³⁹ See Business Corporations Act, S.A. 1981, c. B-15, ss. 89 to 96 and 240; Business Corporations Act, S.N.B. 1981, c. B-9.1, ss. 52 to 59 and 172, Corporations Act, R.S.M. 1987, c. C-225, ss. 89 to 96.1 and 240; Companies Act, R.S.N.S. 1989, c. 81, ss. 71 to 78; Business Corporations Act, R.S.Y.T. 1986, c. 15, ss. 94 to 101 and 249.

In the result, the statutory regimes in Saskatchewan, British Columbia, Alberta, the Northwest Territories, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and, to a lesser extent, the Yukon are quite comparable.⁴⁰

The Personal Property Security Act of Ontario⁴¹ also contains provisions governing receivers of personal property collateral falling within the scope of the Act. Like those of the Yukon, the Ontario provisions are less comprehensive than and structured differently from the receivership provisions of the Acts of the other provinces.⁴² Surprisingly, Ontario corporations legislation does not contain a general framework of receivership provisions comparable to that found in the corporations legislation of the provinces referred to above. In the result, the coverage of Ontario's provincial legislation governing receivers is considerably less complete than that of the western and maritime provinces.⁴³

The regulatory scheme established in these provincial statutes is complemented by the Canada Business Corporations Act⁴⁴ provisions governing receivers of corporations falling within federal jurisdiction, which provisions largely parallel the core provisions of the PPSA.⁴⁵ The scheme is also supplemented by Part XI of the Bankruptcy and Insolvency Act, which imposes minimal regulation on receivers of the business assets of an insolvent or bankrupt person, and by various provincial statutes addressing to a very limited extent receivers of specialized forms of enterprise⁴⁶ or receivers appointed for special purposes.⁴⁷

The Saskatchewan Personal Property Security Act, 1993 will be the focus of the following analysis of the statutory regulation of receivership. That Act has been chosen as representative of the regulatory model adopted by all of the provinces with Personal Property Security Acts except Ontario. It shares with the British

⁴⁰ This is subject to the qualification that the corporations legislation of Prince Edward Island does not contain general provisions governing receivers, as do the other provinces named.

⁴¹ Personal Property Security Act, R.S.O. 1990, c. P-10.

⁴² The receivership provisions of the current Ontario PPSA also resemble the provisions of Saskatchewan's first PPSA, which was superseded by the 1993 Act.

⁴³ See also *supra*, footnote 40, with respect to Prince Edward Island.

⁴⁴ R.S.C. 1985, c. C-44, ss. 94 to 101.

⁴⁵ The receivership provisions of the Canada Business Corporations Act are largely duplicated in the corporations statutes of the provinces, and were the source of many of the receivership provisions of the various Personal Property Security Acts.

⁴⁶ *E.g.*, see the Real Estate Brokers Act, 1987, R.S.C. 1978, c. R-2.1, s. 72(e).

⁴⁷ *E.g.*, see the Saskatchewan Business Corporations Act, R.S.S. 1978, c. B-10, s. 234(3)(b).

Columbia PPSA the virtue of providing the most complete statutory regulation of receivers, since its core of basic provisions applies to all receivers, regardless of whether the debtor is or is not incorporated, and regardless of whether the property subject to the receivership is real or personal. Taken together, the Personal Property Security Acts and the corporations statutes of the other provinces following the same basic model provide similar but somewhat uneven coverage of the subject area, since the former apply only to receivers of the personal property of both incorporated and unincorporated debtors, and the latter apply to receivers of both real and personal property, but only where the debtor is incorporated. The gaps in statutory coverage are filled by the common law. However, the following analysis of the Saskatchewan Act may be relevant in those provinces, in spite of their more fragmentary statutory structure.

Although the statutory structure in Ontario is significantly more limited in scope than that of Saskatchewan, the analysis is also relevant to receivers dealing with personal property collateral in that province, at least to the extent that it addresses in conceptual terms the characterization of the receiver's status as it has been modified by the legislation. That is so because the Ontario PPSA employs similar terminology and adopts in general the same approach to the regulation of receivers as do the other PPSAs.

2. The Framework of Statutory Regulation

The PPSA addresses the regulation of receivers in two ways. Of foremost interest for our purposes are the core provisions mentioned earlier. These consist primarily of provisions which apply by their terms exclusively to receivers, though they include a few provisions of general application to persons subject to the PPSA.⁴⁸ In addition, many of the provisions of Part V of the Act regulate receivers of personal property collateral by making them subject to the same rules as secured parties in the realization of security interests through seizure and sale of the collateral.

The core provisions that apply exclusively to receivers may be categorized roughly as follows:

⁴⁸ The core provisions of the Saskatchewan Personal Property Security Act are reproduced in the Appendix. References hereafter to numbered sections of the Act are directed to the identified provisions of the Saskatchewan PPSA.

(a) *Appointment, removal, replacement and discharge*: The Act endorses the appointment of a receiver either under a security agreement that defines his rights and duties,⁴⁹ or by the court on application of an interested person.⁵⁰ Any receiver may be removed from office, replaced or discharged by order of the court.⁵¹

(b) *Possession and management*: A receiver's authority and powers in connection with possession and management of the collateral, including carrying on the debtor's business, are defined by the security agreement or court order.⁵²

(c) *Accounting and reporting*: All receivers must maintain bank accounts, prepare financial records and statements and report to identified persons in the manner and on the terms prescribed.⁵³ Although provisions of this kind may be found in corporations legislation applicable to receiverships of the assets of incorporated debtors, an innovative feature of the PPSA is its conferral upon all debtors and upon other interested persons of a right to receive copies of and to inspect a receiver's financial statements and accounts.⁵⁴

(d) *Judicial supervision*: The Act confers upon the court an apparently broad jurisdiction to "give directions on any matter relating to the duties of a receiver"⁵⁵ and to "exercise with respect to receivers appointed pursuant to a security agreement the jurisdiction that it has over receivers appointed by the court".⁵⁶ The court's common law jurisdiction over receivers is preserved, except, presumably, to the extent that it is superseded or altered by the legislation.⁵⁷

(e) *Liability*: The remedial mechanism for enforcement of a receiver's duties is created in somewhat circuitous fashion by the

⁴⁹ Section 64(2).

⁵⁰ Section 64(8)(a).

⁵¹ Section 64(8)(b).

⁵² Section 64(2) and (3).

⁵³ Section 64(3)(c), (d), (e) and (g).

⁵⁴ Section 64(4), (5), (6) and (7). At common law, the private receiver has a very limited obligation to report to anyone other than the secured creditor appointing him. In *Gomba Holdings UK Ltd. v. Homan*, [1986] 3 All E.R. 94 (Ch. D.) at p. 98, the court concluded that the receiver's obligation to account as agent of the debtor was subject to his primary duty to the debenture holder. On that basis, the court said that a receiver is entitled to withhold information from the debtor if he considers its disclosure to be contrary to the interests of the debenture holder.

⁵⁵ Section 64(8)(c).

⁵⁶ Section 64(8)(f). See also s. 64(9).

⁵⁷ Section 64(9).

provision that the court may make an order requiring a receiver to "make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor".⁵⁸ This presumably encompasses an order awarding financial compensation in the nature of damages at the suit of an interested person who can establish that she has been injured by such default. The "default" referred to must be a default in the performance of a legal obligation or duty, which we may expect would most often be the general duty of care described hereafter, but might also include obligations created by other statutory provisions, the terms of the security agreement or the direction of the court.⁵⁹

The monetary remedy contemplated by this provision is supplemented by the additional provision that the court may approve the accounts and fix the remuneration of a receiver,⁶⁰ a jurisdiction that at common law has been exercised in penal fashion against court appointed receivers.⁶¹

The remedial provision further empowers the court to make an order requiring a person "by or on behalf of whom the receiver is appointed" to make good a default in connection with the receiver's administration of the collateral, notwithstanding anything in a security agreement pursuant to which the receiver may be appointed. The court may also make an order relieving such persons from any default.

The regulatory framework of the Act is completed by three additional provisions that are not directed by their terms to receivers, but that apply to them as well as to persons otherwise subject to the PPSA, both within and outside the context of receivership.

⁵⁸ Section 64(8)(e).

⁵⁹ The British Columbia PPSA contains a similar provision. However, it addresses the question of remedy more directly in the following additional provisions:

69(2) A person to whom a duty or obligation is owed under this Act has a cause of action against any person who, without reasonable excuse, fails to discharge the duty or perform the obligation.

(3) Subject to subsection (5) in an action under subsection (2), the plaintiff is entitled to recover damages from the defendant for losses that are reasonably foreseeable as being liable to result from the failure to discharge the duty or perform the obligation.

The B.C. Act also explicitly provides for an order of the court directing a defaulting receiver to correct any failure to comply with Part V of the Act, which contains the core provisions with the exception of that creating the general duty of care. The wording of the equivalent Saskatchewan provision appears to be sufficiently broad to permit the court to make such an order, though it is not specifically provided for.

⁶⁰ Section 64(8)(e).

⁶¹ See *supra*, footnote 29.

The most important of these is the provision, familiar to commercial lawyers, that:

65(3) All rights, duties or obligations that arise pursuant to a security agreement, this Act or any other applicable law are to be exercised or discharged in good faith and in a commercially reasonable manner.

This imposes upon both court appointed and private receivers a duty to act in good faith and in a commercially reasonable manner in the exercise of all of their authority and powers, whether deriving from the security agreement, an order of the court, or any other relevant law. In other words, a receiver must meet the statutory standard throughout his administration of a receivership.

Another of the general sections of the Act supplements the provisions previously mentioned regarding the court's jurisdiction over receivers. It provides that the court may, on the application of an interested person, make orders determining questions of priority or entitlement to the collateral, or directing trial of an action or issue.⁶²

Taken together, these provisions establish a comprehensive if rather loose framework of rules regulating receivers from their appointment through to their discharge. Two features of this regulatory structure are of particular significance. That which is superficially most obvious but apparently accompanied by the most obscure consequence in conceptual terms is the identification of a "receiver" as a person in his own right. A second important feature of the Act is its general lack of differentiation between a receiver appointed by the court and one appointed privately under a security agreement.

3. The Status of the Receiver under the PPSA

The courts have not addressed the question of whether the PPSA affects the legal status of the receiver. Nor has the issue generated much academic comment.⁶³ It is, accordingly, to this question that the analysis in this article is primarily directed. Underlying this undertaking is the writer's belief that a clearly articulated and understood definition of the legal status and role of the receiver offers a basis for principled and conceptually consistent decision-making in the conduct and judicial supervision of receivership. This may in

⁶² Section 66(1). Such orders may be appealed to the Court of Appeal: s. 66(2).

⁶³ The exception already identified is Ziegel, *supra*, footnote 32.

turn help to overcome the ambiguity which has to varying degrees infected receivership and receivership law in the past.

Three possibilities present themselves in this connection. It may be that the legislation leaves the common law definition of the status of both court appointed and private receivers essentially unchanged. However, as the following discussion indicates, it is much more likely that the Act either characterizes the receiver as agent of the secured creditor, or as a functionary independent of both the secured creditor and the debtor. Of those alternatives, the latter represents the better view of the statute's effect.

The terminology of the PPSA suggests that the receiver is an independent principal actor, whether appointed by the court, or extrajudicially by a secured creditor. Two approaches to interpretation support this conclusion. First, the core provisions of the Act may be extrapolated from the rest of its provisions and read as a separate, stand-alone statute. As such, the Act imposes upon a "receiver" a defined set of obligations of an administrative nature (record-keeping and reporting) and a general duty of care. In addition, it subjects a "receiver" to the direction of a court, and imposes liability upon him personally through the remedial orders the court is authorized to make against him. Those obligations and liabilities are clearly imposed upon a receiver in his personal capacity, not in a representative one as agent of some other party.

A contextual reading of the core provisions of the Act also offers some guidance in determining the receiver's status. They are located in Part V of the Act, which in general governs the realization of security interests in personal property collateral. The suggestion that the PPSA may constitute the private receiver exclusively the agent of the secured party, thereby eliminating the effect of a contractual agency clause, has been advanced in the context of that Part of the Ontario Act.⁶⁴ If I understand the argument correctly, it is that this is accomplished by subjection of the receiver to the Part V security realization regime on the same terms as the secured creditor through the general definitional provision that "secured party . . . includes a receiver or receiver and manager" for the purpose of the primary provisions of that Part.⁶⁵ In other

⁶⁴ Ziegel, *ibid.*

⁶⁵ Ontario Personal Property Security Act, s. 1(1). Since the provisions of Part V of the Ontario Act apply exclusively to receivers dealing with personal property collateral, they could only affect the status of the receiver by constituting the private receiver agent of the secured party in connection with his disposition of personal property collateral. In Ontario, the common law would continue to determine his role in his disposition of real property.

words, by imposing on the receiver the obligations of the secured creditor in connection with realization of the collateral, the Act implicitly treats the receiver as the secured creditor's agent. On this view, the extended definition operates primarily to ensure that a debtor not be deprived of the procedural protections of Part V through the appointment of a receiver who has been contractually designated agent of the debtor.

That argument may be extended to provinces other than Ontario, despite a slightly different approach to the drafting of their Part V provisions. Rather than enacting a general extended definition that includes a listing of the sections to which it applies, the Acts of Saskatchewan and other provinces make certain provisions of Part V applicable to receivers by the separate designation in each pertinent section that "In this section, "secured party" includes a receiver."⁶⁶

However, the alternative view that the private receiver is treated by the Act as an independent functionary analogous to a court appointed receiver represents a more convincing vision of the effect of the extended definition in either form. While that definition makes the regulatory provisions to which the secured party is subject applicable to a receiver of personal property collateral, it does not impose upon the receiver the secured party's statutory obligations. In other words, the receiver has the *same* obligations as the secured creditor, not the obligations *of* the secured creditor.

This view is supported by the fact that a number of the provisions of Part V are by their terms directed exclusively to the receiver or the secured party respectively.⁶⁷ This choice of language reflects a decision to distinguish between secured creditors and receivers, whether appointed privately or by the court. In the absence of this kind of semantic scheme, a private receiver acting as agent of the secured creditor might simply be required to observe the requirements imposed by the Act upon his principal. That this is not

⁶⁶ These provisions are, like Ontario's, only applicable to receivers of personal property collateral. They are not included in the core provisions which apply to all receivers.

⁶⁷ A partial review of that Part will help to elucidate this point. Section 59 of the Saskatchewan Act, for example, prescribes the procedure to be followed in connection with a sale of collateral. It provides in subsec. (1) that "In subsections (2),(5),(14) and (16), "secured party" includes a receiver." The effect of that provision is that, like a secured creditor, a receiver who is selling personal property collateral may, for example, sell collateral on deferred payment terms (subsec. (4)), or delay disposition of the collateral (subsec. (5)). By way of contrast, subsecs. (6) and (7) determine the notices of sale to be given by a secured creditor, while subsecs. (10) and (11) determine those to be given by a receiver.

the course adopted by the legislation implies that as a matter of policy and principle, security realization in the context of receivership is viewed as being different from direct realization by a secured party. Receivers are accordingly subject to a distinct scheme of regulation appropriate to their function.

As a matter of policy, the recognition of receivership as a distinct variant of security realization is a good choice. Direct realizations by secured creditors generally involve relatively straightforward sales of limited kinds and quantities of collateral. The process of realization may be monitored reasonably effectively in the case of personal property security through the provisions of the PPSA, and in the case of real property through judicially supervised foreclosure proceedings. Receiverships, on the other hand, frequently involve management of the debtor's business as well as disposition of a significant quantity and range of assets, often to a number of prospective purchasers. The complexity and length of a receivership make it much more difficult for the debtor and others who have an interest in the collateral or who are contractually related to the debtor to monitor the receiver's conduct and to protect their interests in administration of the estate than is the case in most creditor realizations. Imposition of direct and independent personal obligations and liability upon a receiver is likely to increase his incentive to conduct the receivership in a careful and fair manner. In addition, the receiver may, under the PPSA structure, avail himself of judicial advice in the resolution of issues of procedure and entitlement. For both these reasons, the receiver is less likely under the new regime to consider himself allied with the secured creditor and subject entirely to her control than he may previously have been.

4. Court Appointed and Private Receivers: A Unitary Approach

A second significant feature of the PPSA is that it subjects both private and court appointed receivers to the same regulatory regime without differentiation. Section 64(2) affirms that a security agreement may provide for the appointment of a receiver and for his rights and duties, while subsec. (8) authorizes appointment of a receiver by the court. However, the term "receiver" is otherwise used throughout the Act without qualification.

The effect of this usage is to subject both kinds of receiver to the provisions of the Act applicable to a "receiver". In view of the statutory recognition of the established dual meaning of the term through endorsement of the two modes of appointment, use of the word without differentiation in any other connection clearly indicates that it is referable to any receiver, regardless of the manner of his appointment.⁶⁸

The unitary treatment of private and court appointed receivers is consistent with the implicit statutory characterization of all receivers as possessed of an independent legal status. The statutory reconceptualization of the private receiver's status means that he is now very much like the court appointed receiver, who has always been viewed as a principal actor. In addition, the specific requirements of the Act create a structure that incorporates the protective and resolute functions of a receivership administered under the authority of the court. In other words, the statutory regime is both conceptually and functionally similar to the substantive and procedural common law rules associated with receivership under court appointment.

At common law, receivership under a court appointed receiver has a number of advantages over receivership under a private receiver. The interests of the debtor, subordinate creditors and others affected by the receivership are offered a measure of protection by the engagement of the court in the administration of the receivership. That engagement includes judicial endorsement of the person appointed receiver, ongoing supervision of his administration, the ultimate passing of his accounts and the review of his activities accompanying discharge. The public filing of financial statements and reports by the receiver provides a means whereby interested persons may access information about his management and disposition of the collateral. The court's intervention at any stage may be invoked on application by persons involved in the proceedings.

The ability of the debtor and third parties to enforce the court appointed receiver's common law duty of care through proceedings in which he may be made personally liable also protects their position. The high standard of care combined with the fact that the

⁶⁸ For a different view, see Jacob S. Ziegel and David L. Denomme, *The Ontario Personal Property Security Act — Commentary and Analysis* (Aurora, Canada Law Book, 1994), pp. 444-45.

duty is owed to all those with an interest in the collateral is a strong inducement to the receiver to act responsibly and with due regard for persons other than the creditor whose security is being realized.

Finally, the presence of the court accommodates the resolution of disputes between those with standing in the proceedings. This can often be accomplished in a summary manner through the hearing of an interlocutory application.

A survey of the provisions of the PPSA demonstrates that it offers similar protections and advantages, but extends them to a receivership under the administration of a private receiver. Although the court is not, under the Act, necessarily present at any stage of a private receivership, judicial involvement may be engaged on the application of persons affected by the receiver's conduct. The debtor and other interested persons are afforded access to information about the receiver's management and disposition of the collateral through the record keeping and reporting requirements of the Act. This information may in turn support an application for judicial intervention. On such application, the court can examine the capacity of the receiver, give directions on any matter relating to his duties and examine his accounts. Further, the Act enables the court generally to exercise with respect to private receivers the same jurisdiction that it has over receivers appointed by the court.⁶⁹

Similarly, the statutory duty to act in good faith and in a commercially reasonable manner subjects private as well as court appointed receivers to personal liability at the instance of the "interested persons" to whom the duty is owed. While that formulation of the standard of care may be slightly lower than the standard imposed at common law upon a court appointed receiver, it is unlikely that its observance in practice offers appreciably less protection than does the common law standard.

The private receiver's statutory obligation under the general duty of care represents a significant departure from his position at common law, in both conceptual and practical terms. It was suggested earlier that the private receiver's dual roles at common law as agent of the secured creditor and the debtor put him in a difficult position when the interests of his two supposed principals are opposed. The adoption of a course of action in such circumstances requires a choice to subordinate one of the agency relationships to

⁶⁹ Section 64(8)(f).

the other. Typically, the private receiver will act to promote the interests of the secured creditor who is his true principal.

Under the statutory duty of care, the receiver must balance the interests of the secured party and the debtor, both of whom are "interested persons", when their interests diverge. Subordination of the interests of one to the other could, if it amounts to breach of the duty of care owed the disadvantaged party, subject the receiver to liability for loss caused by that breach.

The balancing of interests required of both court appointed and private receivers under the Act parallels that demanded at common law of the court appointed receiver. In either context, the tipping of the balance in favour of the secured creditor will generally be justified by her entitlement to the collateral under the terms of the security agreement giving rise to the appointment. In other words, the obligation to observe debtor and third party rights cannot defeat the secured creditor's rights in and to the collateral. It can, however, qualify the manner in which those rights are enforced.

Finally, the Act accommodates the summary resolution of disputes between parties involved in the receivership at least as effectively as do the interlocutory proceedings accompanying receivership under court appointment. This is accomplished both through the provision allowing the court on application to "give directions on any matter relating to the duties of a receiver",⁷⁰ and through the more specific provision for an order determining questions of priority or entitlement to collateral, or directing an issue to be tried.⁷¹ An action need not be commenced as a preliminary to such application.

From a practical standpoint, the PPSA offers the benefits of court appointment in the context of a private receivership, without the significant procedural disadvantages and economic disincentives which accompany it. In the result, the PPSA marries the flexibility, speed and efficiency of private receivership with the procedural and substantive safeguards of receivership under court appointment.

⁷⁰ Section 64(8)(c).

⁷¹ Section 66(1).

5. The Position of the Secured Creditor under the PPSA

Reference has already been made to the following provision:⁷²

64(8) On application by an interested person, the court may:

- (e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver, or a person by or on behalf of whom the receiver is appointed, to make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve the person from any default or failure to comply with this Part;

This section on its face creates a disjunction between the liability of the receiver and that of the secured creditor, placing a secured creditor who appoints a receiver privately in the same position in terms of liability as a secured creditor on whose behalf an appointment is granted by the court. This interpretation is consistent with the twin themes running through the core provisions; namely, the identification of the receiver as a person of independent legal status and the abridgement of the conceptual and practical distinction between court appointed and private receivers.

Assuming that a receiver subject to the PPSA acts as principal and bears identified obligations in his personal capacity, he must incur liability as principal for his non-fulfilment of those obligations. It follows that since the receiver's obligations are not those of the secured creditor, the secured creditor is not liable for the receiver's misfeasance. However, the close working relationship between a receiver and the secured party appointing him, along with the receiver's frequent identification with the interests of the secured creditor, may mean that in practice the receiver will follow or be highly influenced by the views and directives of the secured creditor. It may therefore be appropriate to make the secured creditor liable for the receiver's misconduct in circumstances in which such influence is evident, while preserving the general separation of liability appropriate to the observance of a structure of separate obligations. Accordingly, the Act contemplates an order imposing liability on the receiver *or* upon the secured creditor by or on whose behalf he is appointed (or, presumably, upon both).

The Act's differentiation of the liability of the secured creditor from that of the receiver mimics the common law's treatment of a

⁷² Similar provisions appear in the Personal Property Security Acts and the corporations legislation governing receivers in other provinces.

secured creditor on whose behalf a receiver is appointed by the court. However, the liability provision appears to alter significantly the position of the latter in an important respect, in its provision for the discretionary imposition of liability on a person "on behalf of whom" a receiver is appointed. Although this might have been worded in such a way as to include more clearly the secured creditor on whose application a receiver is appointed by the court (for example, by including the words "on the application of whom"), a court appointed receiver can properly be said to be appointed to act "on behalf of" the secured creditor who applies for his appointment. The appointment is after all simply a remedy designed to facilitate realization of the applicant's interest in the property of the debtor.

As a matter of policy, the discretionary imposition of liability on a secured creditor for the conduct of a court appointed receiver is entirely sound. The propensity of court appointed receivers to identify with and preferentially promote the interests of the secured creditor has been noted with regret by the courts.⁷³ The practice of court appointed receivers in this regard in fact appears in many cases to differ little from that of private receivers. The Act responds to this concern by granting the court a discretionary jurisdiction to impose liability on a secured creditor in such circumstances.

There appear to be no cases in which a court has relied on this provision, or its equivalent, to make an order directly imposing liability on a secured creditor for the conduct of a court appointed receiver. However, in *Canadian Commercial Bank v. Simmons Drilling Ltd.*,⁷⁴ the Saskatchewan Court of Appeal endorsed an order the effect of which was to penalize a secured creditor for a court appointed receiver's breach of his general duty of care. In that case, the receiver was ordered to pay certain funds out to third party subcontractors, where his failure to act promptly on their claims had caused them to lose their entitlement to share in the trust established by the Builders' Lien Act. The order deprived the bank, on whose application the receiver was appointed, of the priority it would otherwise have had with respect to those funds. In reaching its

⁷³ See *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 62 D.L.R. (4th) 243 at pp. 251-52, 76 C.B.R. (N.S.) 241, 78 Sask. R. 87 (C.A.); *Royal Bank of Canada v. Vista Homes*, *supra*, footnote 19, at pp. 125-126 C.B.R.; *Canadian Commercial Bank v. Pilum Investments Ltd.* (1987), 62 C.B.R. (N.S.) 319 (Ont. S.C.), leave to appeal to S.C.C. refused 79 N.R. 319n.

⁷⁴ *Ibid.*

decision, the court referred to s. 95(d) of the Saskatchewan Business Corporations Act in terms which suggested that the secured party could be required to “make good” any default in respect of the conduct of the court appointed receiver.⁷⁵ The wording of s. 95(d) is virtually identical to that of s. 64(8)(e) of the PPSA.

A notable feature of s. 64(8)(e) is that, like its precursor in the Business Corporations Act, it provides for a remedial order on the application of an “interested person”. This extends to persons other than the debtor whose interest in the property subject to the receivership may be affected by the receiver’s conduct. However, the definition of who qualifies as an “interested person” within the meaning of the Act has yet to be authoritatively determined.

6. Statutory Protection of “Interested Persons”

The remedies created by s. 64(8) of the PPSA are available to “an interested person” on application of the court. In the absence of a statutory definition of the word “interested”, the class of persons who are able to protect themselves through this provision must be defined by the courts. Three possibilities present themselves. An interested person may be: (1) a person who has a proprietary interest in the collateral subject to the receivership; (2) a person who has a legally recognized claim or entitlement to the collateral including but not restricted to a claim arising from a proprietary interest in it, or (3) a person who is affected by the management and disposition of the collateral, regardless of whether he or she has a proprietary interest in it or a direct legal entitlement to it.

The scope of the first category is self-evident. The second would include persons in the first category, and extend to those whose claim to the collateral does not qualify as a present proprietary interest, but does entail a direct, legally recognized entitlement to it. Execution and post-judgment garnishee creditors as well as guarantors of the secured debt would fall within this category, but unsecured creditors who have not taken judgment enforcement measures would not. The third category would incorporate the first two, and would in addition encompass unsecured creditors.

Although the PPSA departs in important respects from the common law of receivership, most features of the statutory structure are built upon common law principles. Moreover, receivership as

⁷⁵ *Supra*, footnote 73 at p. 251.

a legal device serves the same function under the statutory regime as it did at common law; it continues to be a remedial tool for the enforcement or realization of the interest of a creditor in her debtor's property. The common law principles determining the classes of persons owed legal duties by a receiver are therefore relevant to the interpretation of the phrase "interested person" as it is used in the Act. The statutory context of the provision in which that phrase is found is also pertinent. Read in the light of these considerations, the words "interested person" are best interpreted as referable to persons falling within category two.

A full elaboration of the analysis supporting this conclusion must, for reasons of length, be reserved for another occasion. However, the suggested inclusion of guarantors and enforcing judgment creditors in, and the exclusion of other unsecured creditors from, the scope of the word "interested" requires a brief explanation.

There is no doubt that at common law, the duty owed by a private receiver to third party secured creditors arose from their interest in the collateral subject to the receivership, which interest was derived from that of the debtor-owner.⁷⁶ Similarly, the court appointed receiver has a duty to do "everything reasonable and right for the protection of the property as an undertaking for the benefit of all the persons interested in it".⁷⁷ This statement clearly identifies as the beneficiaries of the court appointed receiver's duty of care persons who have an interest in the property subject to the receivership. Although modern courts and commentators have frequently abbreviated this principle in the assertion that the court appointed receiver owes a duty to "interested persons", the truncation of its formulation should not be permitted incidentally to change its content. The imprecision inherent in the phrase "interested person" may have led to some confusion about the scope of the receiver's duty of care. However, the view that at common law only persons with an interest in or at least a direct claim against or entitlement to the property subject to the receivership have rights against a receiver is buttressed by the principle that standing in the proceedings relating to court appointment is assigned to those who have an interest in the equity of redemption.⁷⁸

⁷⁶ See *Downsview Nominees Ltd. v. First City Corporation Ltd.*, *supra*, footnote 15.

⁷⁷ *Newdigate Colliery Ltd. (Re); Newdigate v. The Company*, *supra*, footnote 18.

⁷⁸ See James O'Donovan, *Company Receivers and Managers* (Sydney, The Law Book Company Limited, 1981), p. 248, *Kerr on Receivers and Administrators*, *supra* footnote 7, p. 115. But see *contra. Alma College v. United Church of Canada* (1996), 40 C.B.R.

The limitation of the class of persons who enjoy rights against a receiver to those with an interest in or a direct claim against the property subject to the receivership is consistent with the fact that receivership is simply a remedial device for the enforcement of one person's interest in the property of another. Third parties with an interest in that property are thus entitled to a remedy for misconduct by a receiver, to the extent that such misconduct prejudices their interest. Receivership should not be identified with the very different regime of bankruptcy, in which a broad range of claims are recognized, and under which the trustee has an obligation to act for the benefit of unsecured creditors.

The extension of the class of "interested persons" to guarantors and unsecured creditors who have taken post-judgment enforcement proceedings (*e.g.*, execution or garnishment) is warranted by the fact that those persons have a recognized claim to the collateral, distinguishing them from unsecured creditors whose claim is against the debtor personally.

While a guarantor does not have a present proprietary interest in the collateral before payment,⁷⁹ she does have what might for lack of a better adjective be called an inchoate right against or to it, which right may be realized by assignment of the collateral upon payment of the debt.⁸⁰ The recognition of a guarantor's right to the collateral underlies the established principles that a mortgagee owes the guarantor a duty in equity to preserve the security,⁸¹ and to take reasonable steps to obtain a good price on sale of the mortgaged property.⁸² A guarantor thus has more than merely personal rights

(3d) 78 (Ont. Ct. (Gen. Div.)), in which the alumni association of the debtor college was granted standing in spite of an apparent absence of any proprietary or other direct claim to the collateral.

⁷⁹ The Mercantile Law Amendment Act, 1856 (19 & 20 Vict.), c. 97, s. 5 confers on a guarantor a proprietary interest in the collateral upon payment of the secured debt.

⁸⁰ See Cozens-Hardy J. in *Dixon v. Steel*, [1901] 2 Ch. 602 and Ritchie C.J. in *Merchants' Bank of Canada v. McKay* (1888), 15 S.C.R. 672 at p. 677.

⁸¹ See *China and South Sea Bank Ltd. v. Tan Soon Gin*, [1990] 1 A.C. 536, [1989] 3 All E.R. 839 at pp. 841-42 (P.C.); *Pax Management Ltd. v. Canadian Imperial Bank of Commerce* (1992), 95 D.L.R. (4th) 1 at pp. 13 and 15, [1992] 2 S.C.R. 998, [1992] 6 W.W.R. 289; *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424 at pp. 426-27, [1980] 2 S.C.R. 102, 33 C.B.R. (N.S.) 291; *Roynat Ltd. v. Denis*, [1982] 5 W.W.R. 509 at pp. 524-25 (Sask. C.A.).

⁸² *Bank of Montreal v. Wilder* (1986), 32 D.L.R. (4th) 1, [1986] 2 S.C.R. 551, [1987] 1 W.W.R. 289; *Hoskin v. Price Waterhouse Ltd.* (1982), 35 O.R. (2d) 350 (H.C.J.); *MacDonald v. Hirsch*, [1932] 4 D.L.R. 121, 5 M.P.R. 469 (N.S.C.A.); Kevin Patrick McGuinness, *The Law of Guarantee* (Toronto, Carswell, 1986), pp. 209-10.

against the debtor; she has in addition an interest, albeit not necessarily a proprietary interest, in the collateral itself.

An unsecured creditor has no direct interest in or right of recourse against her debtor's assets. However, the issuance of judgment followed by exercise of judgment enforcement measures by an unsecured creditor confers upon the creditor a form of entitlement to the debtor's property.⁸³ While that entitlement is not a proprietary interest in the collateral, it does entail rights to property that are enforceable against third parties. The invocation of such measures therefore establishes a legally recognized connection between the creditor's claim and the debtor's property, placing the execution or garnishing creditor in a position comparable to that of a guarantor.

It is the relation of a guarantor's or enforcing judgment creditor's claim to the collateral subject to a receivership that qualifies them as "interested" as that term is used in the PPSA. Their position is analogous to that of persons with a proprietary interest in the property. Characterization of unsecured creditors who have not invoked judgment enforcement measures as "interested persons" would entail significant extension of the term to include a potentially broad and ill-defined class of persons whose general financial, social or personal interests may be affected by a receivership.

There is no clear case authority on the question of whether unsecured creditors are owed a duty of care by a receiver, or otherwise have rights in a receivership. Use by courts and commentators of the general word "creditors" in reference to the duty of secured creditors and receivers to use reasonable care when dealing with collateral might be taken to imply that unsecured creditors are the beneficiary of that duty at common law. However, there appears to be no authoritative holding clearly endorsing that view. On the contrary, the conclusion that unsecured creditors do not enjoy rights against a receiver is consistent with the fact that receivership is a property-based remedy.⁸⁴

⁸³ The author is indebted to the comprehensive analysis of judgment enforcement measures offered in C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto, Carswell, 1995), to which reference may be had for a more detailed discussion of this subject.

⁸⁴ For confirmation of this view, see Bennett, *supra*, footnote 11, at p. 230:

(A)n unsecured trade creditor of the debtor has no direct cause of action against the security holder invoking the receivership or against the receiver for a negligent or improvident realization. The creditor has no legal interest in the debtor's assets or in the manner in which the assets were diminished. However, upon obtaining judgment and filing execution, the creditor then obtains a legal interest in the debtor's assets and becomes "an interested person" in the enforcement and realization.

The interpretation of "interested person" here proposed is also consistent with the general approach adopted by the Personal Property Security Act, within which the receivership provisions are located. The Act governs the enforcement and priority of interests in personal property. In so doing, it recognizes the claims of judgment creditors who have instituted judgment enforcement measures through seizure of collateral.⁸⁵ The entitlement of guarantors to the collateral and their interest in the realization process is, at least in the western and maritime provinces, implicitly acknowledged in the conferral upon them of certain statutory rights through the definition of "debtors".⁸⁶ In contrast, unsecured creditors who have not taken judgment enforcement measures are not protected under the Act, except in so far as they are represented by the trustee in bankruptcy or a liquidator appointed pursuant to the Winding-up Act (Canada).⁸⁷

Taken together, the common law principles bearing on this issue and the principles generally represented by the PPSA support the definition of "interested persons" as those falling within the second category described earlier. However, the generality of the statutory phrase, unaccompanied by a definitional provision, does present an opportunity for judicial extension of the protections offered at common law to a broader class of persons affected by a receiver's management and sale of the property subject to the receivership, including unsecured creditors. Judicial innovation in that direction

The source of the phrase "an interested person" is not identified by the author. While the same view appears earlier in the text in connection with the question of standing on an application to a court (at p. 141), an element of confusion is introduced by the accompanying unsupported suggestion that "Landlords, tenants and utilities in the proper case are affected by the order and may be directed to do something or otherwise refrain from taking steps. They would be 'interested persons'."

⁸⁵ *E.g.*, s. 20(1).

⁸⁶ Section 2(1)(m) provides that "debtor" means (i) a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral. See Ronald C.C. Cuming and Roderick J. Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Toronto, Carswell, 1994), p. 21; Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act* (New Brunswick Geographic Information Corporation, 1995), p. 13. The position of guarantors under the Ontario PPSA is different. *Lewinsky v. Toronto Dominion Bank* (1995), 19 B.L.R. (2d) 67, 9 P.P.S.A.C. (2d) 169 (Ont. Ct. (Gen. Div.)) represents what appears to be the prevailing view in that province that a guarantor is not a debtor within the meaning of the Ontario Act. See also Ziegel and Denomme, *supra*, footnote 68, pp. 10-11.

⁸⁷ R.S.C. 1985, c. W-11 (renamed the Winding-up and Restructuring Act 1996, c. 6, s. 133) See also s. 20(2) of the PPSA.

may well be appropriate, but only if supported by principled analysis and thoughtful definition of what qualifies as an "interest" entitling a person to a remedy against a receiver or the secured creditor on whose behalf he is appointed.⁸⁸ The class of persons who may be *affected* by a receivership is virtually limitless. Surely, more is required.

7. The Effect of the PPSA on the Agency Clause

Reference has been made to the standard contractual provision that a receiver appointed by the secured party shall be or shall be deemed to be for all purposes the agent of the debtor. It has been suggested that even at common law the agency clause will not, however, preclude a claim arising from improper conduct on the part of a private receiver if that conduct is directed towards realization of the secured creditor's interest in the collateral. This is undoubtedly true under the PPSA. The question remaining undetermined is whether the contractual agency clause retains any operative effect at all under the PPSA regime.

Unfortunately, the Act does not offer a clear answer. Some guidance may, however, be found in the following core provisions:

64(2) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, for the rights and duties of a receiver.

(3) Subject to any other Act or an Act of the Parliament of Canada, a receiver shall:

- (a) take custody and control of the collateral in accordance with the security agreement or order pursuant to which the receiver is appointed, but unless appointed as a receiver-manager or unless the court orders otherwise, shall not carry on the business of the debtor;

The Act in these provisions recognizes the security agreement as the source of the private receiver's appointment and thus his general authority to act, and of his right to take possession of the collateral and carry on the debtor's business. It also adopts the definition of the receiver's rights and duties found in the security

⁸⁸ In *Royal Bank of Canada v. Soundair* (1991), 83 D.L.R. (4th) 76, 4 O.R. (3d) 1 at p. 12, the Ontario Court of Appeal took a very broad view of who is "interested" in a court appointed receiver's proposal for sale of the debtor's assets, but without any doctrinal analysis of the question.

agreement. The contractual definition of rights and duties, including those of possession and management is, however, explicitly subject to statutory qualification.

The full implication of these provisions is not clear. A persuasive argument can be made that, having recognized the private receiver as a functionary independent of either secured creditor or debtor, the Act simply substitutes for a detailed statutory definition of his rights and duties whatever rights and duties might be prescribed in the security agreement, subject to statutory qualification. That is, the receiver's status and authority derive not from the agreement itself but from the Act, although the terms of the agreement are adopted in an instrumental way as a device to supplement the general provisions of the Act by assigning to the receiver specified rights and duties in a particular case.

Under this interpretation, the private receiver does not act as agent of the secured party or the debtor in performing either realization or management functions. He exercises neither the secured party's rights of realization, nor the debtor's rights of management, but rather his own rights, conferred by the Act, though defined in part by the security agreement. If this is so, the agency clause simply has no effect. The receiver does not, for example, borrow operating funds as agent of the debtor company. Nor does he sell collateral as agent of the secured creditor.

On this construction the private receiver is virtually the court appointed receiver's conceptual twin, and the consequences of his appointment closely parallel those accompanying judicial appointment. In effect, the security agreement operates with respect to a private receiver as a substitute for the judicial definition of a court appointed receiver's powers and authority through the order of appointment.

This construction is accommodated, if not particularly advanced, by the one remaining provision of the Saskatchewan Business Corporations Act directed towards receivers. That provision contemplates the substitutional exercise by a receiver-manager of the management functions otherwise ascribed to the directors of an incorporated debtor in these terms:

91. If a receiver-manager is appointed by a court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

Under this provision, the private receiver might assume those powers of the directors that he is authorized by the security agreement to exercise either as principal, in the same manner as does the court appointed receiver, or as agent of the debtor.⁸⁹

Although the idea that the PPSA implicitly suspends the operation of the agency clause is on first encounter rather unsettling, it should be considered in light of the fact that a court appointed receiver's managerial function is not seriously impeded by the absence of an agency relationship with the debtor. The sort of agency such a clause creates is, in fact, highly artificial, since the debtor has no control over his nominal agent. One might also recall that at common law, the agency clause does little other than shelter the secured creditor and receiver from liability and preserve the continuity of contractual relations between the debtor and third parties. The Act has overcome the sheltering effect of the agency clause through its remedial provisions, limiting the potential function of the clause to the maintenance of contractual relations between the debtor and others. The disruption of continuity in such relations may affect the exercise by third parties of rights of set-off arising from dealings with the debtor both before and after the receivership. However, judicial appointment of a receiver may lead to the loss of rights of set-off, and there appears to be no functional or policy reason for discriminating in favour of third parties asserting such rights in the context of a private receivership. The termination of contractual relations resulting from evisceration of the agency clause does not appear to be otherwise accompanied by significantly undesirable consequences.⁹⁰

An alternative view of the material provisions of the Act is, admittedly, more consistent with the traditional understanding of receivership. That is, that the provisions affirm the operation of the security agreement according to its terms in connection with the private receiver's appointment, his right to take possession of

⁸⁹ There may be an intermediate position, under which the private receiver, though not acting as agent of the debtor pursuant to the agency clause, acts *as* the debtor for purposes of his managerial dealings with third parties, in the way that the directors of a corporation act as the corporation, not as its agents. On this view, contractual relationships between the debtor and third parties might survive the appointment of the receiver in spite of the absence of an effective contractual agency provision.

⁹⁰ Although evisceration of the agency clause would also mean that the extrajudicial appointment of a receiver would, like a court appointment, terminate contracts of employment, the successor employer provisions found in most provincial employment legislation would operate in favour of the debtor's employees.

the collateral, and the definition of his rights and duties. Since the agency provision is part of the contractual definition of the private receiver's rights and duties, it would on this view be effective except to the extent that its operation is superseded by the Act. Approached in this way, the Act constitutes the receiver an independent party in connection with the exercise of statutorily defined rights and duties, but accommodates his appointment as agent of the debtor for other purposes.

This conclusion, if accepted, preserves a significant conceptual and functional difference between private and court appointed receivers. It perpetuates the problem of deciding whether a particular action or course of conduct on the part of the receiver represents the exercise of a realization or a management function, since that issue will determine whether the receiver was acting as principal or as agent at the material time. It also means that the contractual rights of third parties affected by the judicial appointment of a receiver will continue to differ from those of third parties affected by a private appointment.

Lawyers and judges may well be reluctant to embrace the rather radical view that the agency clause is implicitly rendered ineffective by the PPSA. As the foregoing discussion demonstrates, that conclusion demands a close reading of the Act, supported by a novel conceptual theory of receivership. Moreover, the argument may be less persuasive in Ontario, where the statutory regulation of receivership under the PPSA is limited to personal property collateral, than in those provinces that enjoy a more comprehensive structure of statutory regulation. It is, however, supportable both on principle and for reasons of policy, and merits serious consideration.

8. The Choice of Judicial or Private Appointment

Saskatchewan courts have already initiated a movement away from appointment of a receiver where a private receiver can function effectively under the terms of a security agreement with the support of the provisions of the PPSA. They have taken the position that a receiver should not be appointed by the court in the absence of some demonstrated need for the appointment arising from an identified deficiency in extrajudicial enforcement.⁹¹

⁹¹ *Royal Bank v. White Cross Properties Ltd.* (1984), 34 Sask. R. 315, 53 C.B.R. (N.S.) 96 (Q.B.); *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.); *Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18, 36

The refusal to engage public resources in the management of a fundamentally private contractual arrangement is fully justified, if adequate protections are built into the private process of realization. The comprehensive regulatory regime of the Saskatchewan and British Columbia Personal Property Security Acts appears largely to fill that need. In Alberta, the Northwest Territories, New Brunswick, Manitoba, Nova Scotia and Prince Edward Island, the PPSAs govern private and court appointed receivers in their dealings with personal property collateral in much the same way as the Saskatchewan and British Columbia Acts govern receivers in their administration of all forms of collateral. The provisions of corporations legislation in those provinces imposes a conceptually and functionally similar regime on receivers dealing with real property collateral, provided that the debtor is incorporated. Since relatively few receiverships involve unincorporated debtors, the personal property security legislation and the corporations legislation in those provinces together comprise a statutory structure of regulation which should in general lead to the same results as does the unitary structure represented by the Saskatchewan and B.C. PPSAs.⁹² However, the absence of a unitary statutory structure may make court appointment attractive in complex receiverships, even in those cases in which a complete statutory structure of regulation is provided by the PPSA and corporations legislation in combination.

In Ontario, the position of a receiver is difficult in virtually all contexts, since provincial corporations legislation does not contain provisions governing receivers. The Ontario receiver is therefore governed by the PPSA's receivership provisions in his dealings with personal property collateral, but by the common law in his dealings with real property collateral, regardless of whether the debtor is or is not incorporated.⁹³ The court appointed receiver is in a less

Sask. R. 84 (Q.B.). In Alberta, see *Macotta Co. of Canada v. Condor Metal Fabricators Ltd.* (1979), 40 A.R. 408, 35 C.B.R. (N.S.) 144 (Q.B.).

⁹² Court appointed and private receivers in these jurisdictions are subject to essentially the same statutory regime, except in connection with the general duty of care. Corporations legislation typically provides that a receiver appointed under an instrument shall act honestly and in good faith, and deal with the property of the corporation in a commercially reasonable manner. The absence of any reference to court appointed receivers in relation to the statutory duty and standard of care presumably leaves them subject to the common law duty. However, in their dealings with personal property collateral court appointed as well as private receivers are subject to the general statutory duty to act in good faith and in a commercially reasonable manner.

⁹³ This author is of the opinion that court appointed receivers are subject to the receivership provisions of the Ontario PPSA to the same extent as are private receivers. This view is supported by essentially the same arguments as to terminology as those presented in support of the conclusion that the Saskatchewan Act applies equally to court appointed

conflicted position than is the private receiver, since he will be regarded at common law as well as under the Act as having independent legal status. The supposition that court appointment would be granted more readily in this legal regime than in provinces in which the law of receivership is less complex appears to be borne out by the cases.

In general, however, the statutory innovations in this field leave little reason in principle or in practice to prefer court appointment to private appointment, at least in provinces other than those whose statutory scheme of regulation remains relatively undeveloped.

The traditional preference for court appointment over private appointment rests largely upon the view that it better protects all parties involved; both the receiver and the secured creditor on the one hand, and the debtor and other persons affected by the receivership on the other. While this may be true at common law, court appointment under a PPSA regime is in most cases not likely to offer a material advantage on either side.

Court appointment does prevent the institution of frivolous litigation against the receiver, since the order of appointment typically includes the stipulation that no action may be commenced against him without leave of the court. However, judicial approval of a court appointed receiver's administration does not render him immune from liability. Leave to sue will be granted if a strong *prima facie* case of breach of duty, acting beyond the scope of his authority or other cause of action is established against the receiver.⁹⁴ Moreover, the fact that the court has approved the course of conduct upon which the cause of action is based does not necessarily shield the receiver from liability, at least where the issues raised have not been and could not reasonably have been directly addressed in the prior proceedings.⁹⁵ Judicial appointment thus offers the receiver limited protection against liability. In any event, a private receiver may apply under the PPSA for judicial approval of a sale or

and private receivers. Observance of the provisions of the Act imposes little additional burden on the court appointed receiver. Should such observance prove to be too onerous or superfluous in a particular case, the court no doubt has the jurisdiction by order to waive the performance of identified provisions. For the contrary view, see Ziegel and Denomme, *supra*, footnote 68.

⁹⁴ See *Royal Bank of Canada v. Vista Homes Ltd.*; *Boeing Co. v. Island Jetfoil Corp.*, *RoyNat v. Allan and Bank of America Canada v. Willann Investments Ltd.*, all *supra*, footnote 28.

⁹⁵ See *Royal Bank of Canada v. Vista Homes Ltd.*; *Boeing Co. v. Island Jetfoil Corp.*; *Bank of Canada v. Willann Investments Ltd.*, *ibid.*

other course of action if he is in any doubt as to the propriety of the conduct contemplated, thereby securing protection equal to that extended to a court appointed receiver through an order of that kind.

It has already been established that a secured creditor under the PPSA is in the same position regarding her potential liability for the conduct of either a private or a court appointed receiver. In both contexts, a court may on the application of an interested person make an order requiring the secured creditor to make good the receiver's default, or relieving her of such default.⁹⁶

The remaining question is whether the interests of the debtor and others are better protected by a court appointed than a private receiver. The substantive obligations of the private receiver to the debtor and others in a PPSA regime parallel those of a court appointed receiver. Only the automatic engagement of the court in supervision of a court appointed receivership, accompanied by the requirement that notice of the proceedings be given to the debtor and others with standing, would appear to work to the advantage of those parties.

Comparable protections are offered by the PPSA in the context of private receiverships and those administered under court appointment. The Act provides a default system of notice requirements under which a receiver must give notice of the intended sale of personal property collateral to the debtor or any other person who is owner of the collateral,⁹⁷ subordinate secured creditors⁹⁸ and other persons who have given notice of their interest in the collateral.⁹⁹ As a practical matter, it is unlikely in most receiverships that any residual value will be available for distribution to claimants other than those named. In any event, anyone qualifying as an "interested" person may apply to the court for direction where their interests are threatened by the receiver's conduct. Though this presumes either legal representation or a significant degree of legal sophistication on the part of such persons, there must be few instances in which an unrepresented party would in any event be in a position to effectively promote their interests in the court proceedings associated with court appointment. In addition, where such claimants exist a private receiver would be well advised to avoid potential liability by himself invoking the supervision of the court

⁹⁶ Section 64(8)(e).

⁹⁷ Section 59(10)(a) and (b).

⁹⁸ Section 59(10)(c).

⁹⁹ Section 59(10)(d).

on application. The statutory subjection of private receivers to a general duty of care along with the specific administrative and reporting requirements discussed earlier thus compensates at least in part for the absence of ongoing judicial involvement in the receivership.

In sum, receivership under court appointment does offer a degree of automatic protection to the debtor and other claimants that is available to them only on application under the Act in connection with a private receiver. However, the practical value of that protection will in most cases not be significantly greater than that built into the PPSA system itself.

The question of whether judicial appointment of a receiver should be invoked in a particular case may, however, be complicated by legal considerations external to the general law of receivership. Employee and environmental protection legislation, as well as statutes imposing liability for unremitted taxes and similar payments, may be viewed as having differential application to court appointed and private receivers. Review and analysis of the problems associated with such legislation is a substantial project in itself and one well beyond the scope of this article. Any generalization about the position of secured creditors and private and court appointed receivers respectively in connection with such legislation is impossible, due to the variety of statutes involved, the intraprovincial differences in their terms and the differing approaches to interpretation and application adopted by different courts.

There is no doubt that the mode of appointment of receivers will continue to be influenced by local considerations relating to various statute-based liabilities in a receivership. However, where such considerations are neutral, the practice of private appointment of a receiver should prevail over that of court appointment, at least in those provinces that follow the regulatory model embodied in the Saskatchewan PPSA.

V. THE EFFECT OF PART XI OF THE BANKRUPTCY AND INSOLVENCY ACT

Part XI of the Bankruptcy and Insolvency Act contains provisions governing all receivers, both court appointed and private, but only where: (a) the debtor is insolvent or bankrupt and (b) the property subject to the receivership is all or substantially all of the

inventory, accounts receivable or other property acquired for or used by the debtor in relation to a business carried out by him. In spite of those limitations on the scope of Part XI, it is obvious that the BIA provisions will apply to most receiverships. However, they supplement rather than supplant the receivership provisions of the Personal Property Security Acts and corporations legislation discussed above.¹⁰⁰

The net result of the application of Part XI to a receiver is to impose upon him a system of notice and reporting requirements additional to those contained in the PPSA. The statutory duty of care created by s. 247 simply duplicates that to which the receiver is in any event subject under provincial legislation.¹⁰¹ The judicial jurisdiction established by ss. 248 and 249 adds nothing of consequence to the jurisdiction conferred by the PPSA.¹⁰²

The provisions of Part XI clearly do not detract from the theory that the PPSA confers upon both private and court appointed receivers an independent legal status, accompanied by identified obligations and liabilities. They in fact support that theory, by similarly identifying a "receiver" as a person subject to a statutory duty of care, and a set of identified reporting and accounting obligations. Like the PPSA, the BIA recognizes that a receiver may be appointed by the court or pursuant to a security agreement, but otherwise treats all receivers in the same way.

In Saskatchewan and the other provinces following its statutory model, Part XI of the BIA is therefore largely superfluous from a

¹⁰⁰ The provisions of the federal statute do not raise an issue of constitutional paramountcy, since there is no conflict in the operation of the federal and provincial legislation. See *NN Life Insurance Co. of Canada v. 568554 Saskatchewan Ltd.* (1993), 115 Sask. R. 136, 23 C.B.R. (3d) 209, 6 P.P.S.A.C. (2d) 66 (Q.B.).

¹⁰¹ The BIA does not create a cause of action for breach by the receiver or secured creditor of a statutory duty owed the debtor or any other person. It does, however, provide for compensatory orders against a person who has been found guilty on summary conviction of failure to comply with the Act, where that failure has caused loss or damage to property.

¹⁰² The BIA in ss. 204.3, 248 and 249 authorizes the court to:

- (a) direct a secured creditor, receiver or debtor to carry out the duties imposed by the Part XI provisions;
- (b) restrain the secured creditor or receiver from dealing with the debtor's property until such duties have been carried out;
- (c) review the receiver's accounts and adjust the receiver's fees and charges as therein set out in such manner as it considers proper, and
- (d) give directions in relation to the provisions of Part XI on application by the receiver.

conceptual point of view. It may, however, be of greater significance in Ontario and the other provinces in which statutory regulation of receivers is incomplete. Since the BIA applies to receivers dealing with all kinds of property regardless of whether the debtor is incorporated, it offers a regulatory structure applicable to all receivers in those provinces, which structure shares the conceptual approach of the PPSA.¹⁰³

VI. CONCLUSION

This article presents a theory of receivership law that is intended to provide guidance in the resolution of the multitude of legal problems arising in the context of receiverships. It suggests that the Personal Property Security Act, alone or in combination with other legislation, creates a consolidated structure of receivership law under which the private receiver, like his court appointed counterpart, is governed as a person whose rights and obligations are independent of both the secured creditor appointing him and the debtor. This redefinition of the private receiver's status, combined with the PPSA's unitary approach to the statutory regulation of court appointed and private receivers, significantly diminishes the practical and conceptual distinction between the two kinds of receiver. While the private receiver may not be in all respects identical to the court appointed receiver, their conceptual similarity and the unified system of regulation created by the Act should in general support similar outcomes in the resolution of problems arising in both kinds of receivership. Further, the statutory incorporation of substantive and procedural rights paralleling those associated with receivership under court appointment at common law significantly diminishes the incentives that might otherwise mandate judicial rather than private appointment of a receiver.

The theory is functionally driven. The appointment of a receiver, whether by the court or by a secured creditor, has one functional imperative; namely, the orderly seizure and sale of the collateral and the remission of the proceeds of its sale to the secured creditor in accordance with a legally established scheme of priorities. Receivership is, as has been said before, merely a remedial device. A receiver is appointed to fulfil that remedial function on the premise

¹⁰³ This assumes, of course, that the other definitional requirements outlined are met; *i.e.*, that the debtor is bankrupt or insolvent and that the receivership encompasses all or virtually all of his or her inventory, accounts receivable or business assets in general.

that he has the financial and management skills that qualify him to do so efficiently and effectively. The invocation of judicial supervision is necessary only to ensure that persons with an interest in the collateral are protected, to resolve legal disputes and uncertainties, and to facilitate the transfer of title if necessary. Functionally, however, judicial intervention adds nothing to the realization process. That being so, there is no justification for the maintenance of disparities in the legal position of receivers, secured creditors, debtors and interested third parties on the basis solely of the form of the receiver's appointment. Moreover, the interposition of a receiver should generally not alter the relative position of the secured creditor, the debtor and others with an interest in the collateral.

Modern personal property security legislation offers a simple and practically sound framework of basic receivership principles. Particularly in Saskatchewan and British Columbia, the consolidation of receivership law under the Personal Property Security Act represents an enormous advance from the previous multiplicity of governing principles. It offers judges, lawyers and their client community an opportunity to emerge from the thicket of unnecessary distinctions and ambiguities inherent in traditional receivership law, an opportunity which one can only hope will be seized.

APPENDIX

**Saskatchewan *Personal Property Security Act, 1993*
Core Provisions**

64(1) In this section, "Director" means the Director appointed pursuant to *The Business Corporations Act*.

(2) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, for the rights and duties of a receiver.

(3) Subject to any other Act or an Act of the Parliament of Canada, a receiver shall:

- (a) take custody and control of the collateral in accordance with the security agreement or order pursuant to which the receiver is appointed, but unless appointed as a receiver-manager or unless the court orders otherwise, shall not carry on the business of the debtor;
- (b) where the debtor is a corporation, immediately notify the Director of the appointment or discharge;
- (c) open and maintain, in the receiver's name as receiver, one or more accounts at a bank, credit union or other institution licensed to accept deposits in Saskatchewan for the deposit of all money that comes under the receiver's control as receiver;
- (d) keep records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions that involve collateral or other property of the debtor;
- (e) prepare, at least once in every six-month period after the date of the appointment, financial statements of the receivership in the prescribed form;
- (f) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that the receiver is acting as a receiver; and
- (g) on completion of the receiver's duties, prepare a final account of the administration in the prescribed form and, where the debtor is a corporation, send a copy of the final account to the debtor, to a director of the debtor and to the Director.

(4) The debtor and, where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to make available for inspection the records mentioned in clause (3)(d) during regular business hours at the place of business of the receiver in Saskatchewan.

(5) The debtor and, where the debtor is a corporation, a director of the debtor, a sheriff, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to provide copies of the financial statements mentioned in clause (3)(e) or the final accounts mentioned in clause (3)(g) or to make them available for

inspection during regular business hours at the place of business of the receiver in Saskatchewan.

(6) The receiver shall comply with the demand mentioned in subsection (4) or (5) not later than 10 days after the day of receipt of the demand.

(7) The receiver may require the payment in advance of a fee in the prescribed amount for each demand, but the sheriff and the debtor or, in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(8) On application by an interested person, the court may:

- (a) appoint a receiver;
- (b) remove, replace or discharge a receiver, whether appointed by a court or pursuant to a security agreement;
- (c) give directions on any matter relating to the duties of a receiver;
- (d) approve the accounts and fix the remuneration of a receiver;
- (e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver, or a person by or on behalf of whom the receiver is appointed, to make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve the person from any default or failure to comply with this Part;
- (f) exercise with respect to receivers appointed pursuant to a security agreement the jurisdiction that it has over receivers appointed by the court.

(9) The powers mentioned in subsection (8) and in section 63 are in addition to any other powers the court may exercise in its jurisdiction over receivers.

(10) Unless the court orders otherwise, a receiver is required to comply with sections 59 and 60 only where the receiver disposes of collateral other than in the course of operating the business of a debtor.

PART VI

General

65(1) In this section, "secured party" includes a receiver.

(2) The principles of the common law, equity and the law merchant, except to the extent that they are inconsistent with this Act, supplement this Act and continue to apply.

(3) All rights, duties or obligations that arise pursuant to a security agreement, this Act or any other applicable law are to be exercised or discharged in good faith and in a commercially reasonable manner.

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66(1) On an application of an interested person, the court may:

- (a) make an order determining questions of priority or entitlement to collateral; or
- (b) direct an action to be brought or an issue to be tried.

(2) An appeal lies to the Court of Appeal from an order, judgment or direction of a court made pursuant to this Act.