SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4C

CANADA

This is the **summative (formal) assessment** for **Module 4C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 4C. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentnumber.assessment4C]**. An example would be something along the following lines: 202021IFU-314.assessment4C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Commented [TE1]: 1/1

Which branch of the Canadian government has the exclusive power to make laws in relation to bankruptcy and insolvency? Indicate the **correct answer** from the options below.

(a) Federal.

(b) Provincial.

(c) Municipal.

(d) The power is shared between the three levels of government.

Question 1.2

Commented [TE2]: 1/1

What features are common to all formal insolvency procedures in Canada? Select the **correct answer** from the options below.

(a) They are fragmented.

(b) They follow a "modified universalist" approach.

(c) They follow a single-proceeding model and take a universalist approach except in regard to cross-border issues.

(d) They are flexible and focused on restructuring, but they do not provide for the recognition or disposition of claims or assets held outside of Canada.

Question 1.3

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Proceedings under the CCAA and BIA are subject to the administrative oversight of:

(a) The provincial government.

(b) The municipal government.

(c) The Office of the Superintendent of Bankruptcy (the OSB).

(d) The bankruptcy court.

(e) (a) and (d).

Question 1.4

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Is the Stay of Proceedings automatic in a CCAA filing?

(a) Yes.

(b) No. It is a discretionary order granted as part of the initial order by the court.

(c) It depends on the circumstances of the proceeding.

Question 1.5

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An "insolvent person" under section 2 of the BIA means a person who is not bankrupt, resides or carries on business or has property in Canada, and whose liabilities to creditors provable as claims under the BIA amount to at least CAD 1,000, **and:**

Select the **best answer** from the options below.

(a) is unable to meet obligations as they generally become due.

(b) has ceased paying current obligations in the ordinary course of business as they generally become due.

(c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all of his obligations, due and accruing due.

(d) any or all of the above.

Question 1.6

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Which of the following is an act of bankruptcy under section 42 of the BIA?

(a) In Canada or elsewhere the bankrupt makes any transfer of the debtor's property or any part of it, or creates any charge on it, that is a fraudulent preference.

(b) The debtor defaults on a proposal.

(c) The debtor ceases to meet liabilities as they generally become due.

(d) The debtor makes an admission of his inability to pay debts.

(e) All of the above.

Question 1.7

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Indicate whether the statement below is True or False:

It is possible to fund continued operations during restructuring proceedings in Canada.

(a) True.

(b) False.

Question 1.8

Commented [TE8]: 1/1

Indicate whether the statement below is True or False:

The CCAA provides for a statutory priority over pre-filing creditors to suppliers of goods and services to the debtor after the granting of an initial order.

(a) True.

(b) False.

Question 1.9

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Indicate whether the statement below is True or False:

If a **corporate** proposal under the BIA is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy.

(a) True.

(b) False.

Question 1.10

Commented [TE10]: 1/1

Indicate whether the statement below is True or False:

Directors of a company have a fiduciary duty to act honestly and good faith with a view to the best interests of a company, even when the company is facing insolvency.

(a) True.

(b) False.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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Identify the different ways in which a debtor can enter bankruptcy in Canada.

In Canada bankruptcy is a legal status that can be applied to both individuals and legal entities, while insolvency is a financial condition i.e., failing either cash flow test or balance sheet test.

Considering the nuance between bankruptcy and insolvency there are three different ways in which a debtor can enter bankruptcy.

1. Involuntary – This is a process initiated by the creditor. The creditor must be owed more than CAD 1,000 of unsecured debt and provide evidence that the debtor has committed an act of bankruptcy within 6 months of the date of filing of application in accordance with Section 43(1) of Bankruptcy and Insolvency Act (BIA). The creditor need not prove that the debtor currently has business or resides in Canada, or currently has assets in Canada. An involuntary application must be brought to the bankruptcy court in the location

where the debtor ordinarily resides, does business, has assets or property or wherein it does not have assets at a place where it did business within previous year. The debtor has the right to object to the application. However, if the court is satisfied that the facts in the alleged application have been proven the judge can make the order for bankruptcy.

2. Voluntary – In this case the debtor voluntarily makes an assignment into bankruptcy. This may be done for number of reasons including to stay legal actions by creditors or in case of an individual to obtain a fresh start. To be eligible the debtor in Section 2 of BIA must be insolvent and at the time an "act of bankruptcy" was committed the debtor resided or carried on business in Canada.

   Insolvent person means a person who is not bankrupt and whose liabilities to creditors under BIA amount to at least CAD 1,000 and is unable to meet cash flow test, balance sheet test or has ceased paying current obligations in ordinary course of business. The debtor executes an assignment of property for benefit of creditors and with requisite details files with Official Receiver. Once documents are accepted the bankruptcy proceedings are commenced.

3. Failure of proposals – BIA is generally used for smaller companies with less complex restructuring needs. It also includes debtor in possession proposals, a restructuring process that allows debtor companies to reach compromise with creditors under court supervision.

   The aforesaid corporate proposals must be approved by requisite majorities of creditors i.e., majority in numbers and two-thirds of proven creditors in that class by dollar value and approved by the court. If the corporate proposal is rejected by a class or is not approved by the court the debtor will be deemed to have made an assignment in bankruptcy.

   If debtor defaults under the terms of proposal and such default is not waived the proposal trustee must inform the creditors and the official receiver. Thereafter, a motion may be brought to the court to annul the proposal. If such an order is granted the debtor is automatically assigned to bankruptcy.

   A failure of consumer proposal though does not result in automatic bankruptcy and a motion must be brought to assign the individual into bankruptcy.

   Companies Creditors Arrangement Act (CCAA), applicable for insolvent companies with debt over CAD 5 million, is the vehicle for complex restructurings and sets out a skeletal framework for reorganization. It provides for plans of arrangement so debtors can reach compromises with creditors. Like BIA, in CCAA too classes of creditors should approve the plan by requisite majorities i.e., majority in numbers and two-thirds by value. Also, there must not be any unauthorized conduct and the plan must be fair and reasonable. However, if a class of creditors or the court does not approve the plan the company does not automatically go into bankruptcy, but the stay may be lifted, and it is likely that the company will be placed into bankruptcy or receivership.

   In addition, to the three methods described above, individuals can enter bankruptcy by way of summary administrative bankruptcy wherein the assets of individual do not exceed CAD 15,000.

Consumer proposals, orderly payment provisions and voluntary deposit for individuals and Canada Business Corporations Act (CBCA) for corporates are tools for restructuring outside of bankruptcy. Similarly, Winding-up and Restructuring Act is used to wind up specific federally regulated bodies, and receivership too does not strictly fall into the ambit of bankruptcy but is more of an enforcement measure, protecting assets or replacing inefficient management.

Question 2.2 [maximum 2 marks]

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What are the requirements that a creditor must demonstrate to make out an application for an involuntary bankruptcy order?

The applying creditor must demonstrate the following for an involuntary bankruptcy order:

- applying creditor must be owed more than CAD 1,000 of unsecured debt; and
- must provide evidence that the debtor has committed an "act of bankruptcy" within 6 months of date of filing of application.

An involuntary bankruptcy application must be brought to the bankruptcy court in the location where the debtor ordinarily resides, does business, has assets or property, or in the case where the debtor has no assets currently in Canada, where it did business within the previous year.

An "act of bankruptcy" involves one of two different types of conduct:

- the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of the creditor.
- debtor is insolvent.

The most common act of bankruptcy is where the debtor ceases to meet liabilities generally as they become due. "Generally," means it is not sufficient to allege that the debtor has failed to pay only the application creditor, unless the applicant creditor is either the only claimant or the debt owed is so large that the claims of other creditors are not of significance in comparison. [*Real Time Fibre Supply Ltd*]

In addition to the above there are several acts of bankruptcy listed in section 42 of BIA

- Bankrupt makes an assignment of property to trustee for benefit of creditors.
- Debtor makes a fraudulent gift, delivery or transfers its property.
- Debtors transfers property or creates charge that is fraudulent preference.
- Debtor with intent to defeat or delay departs from Canada or absents himself.
- Permitting, for certain specified times, execution wherein property is taken.
- Admission of his inability to pay debts.
- Defaulting on proposal
- Gives notice to creditors that the debtor has suspended or about to suspend debt payments.
- Debtor assigns, removes, secretes, or disposes of, or attempts, or is about to do same with his property with intent to defraud, defeat, or delay his creditors.

Question 2.3 [maximum 3 marks]

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The Office of the Superintendent of Bankruptcy has a number of functions. **Name three** of these functions.

Proceedings under the CCAA and BIA are subject to the administrative oversight of federal government office known as the Office of the Superintendent of Bankruptcy (the OSB). The role of the office of the OSB is to ensure bankruptcies and insolvencies are handled as fairly and efficiently as possible. The OSB is responsible for administratively supervising all estates and matters to which BIA applies as well as select matters under the CCAA.

The OSB has several functions. The three key functions are:

1. The OSB licenses and regulates the insolvency profession:
2. The OSB supervises the administration of estates in bankruptcy, commercial reorganizations, consumer proposals and receiverships:
    - Maintains public records of filings.
    - Records and investigates complaints from debtors and / or creditors.
3. Ensure compliance through maintenance and enforcement of regulatory framework:
    - Examining a trustees account of a bankruptcy and ensuring all the correct information is accounted for.
    - Inspecting and investigating estates

Question 2.4 [maximum 2 marks]

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What are the **four** criteria that must be met in order for an individual bankrupt to be automatically discharged within nine (9) months after the bankruptcy is filed?

An individual bankrupt is automatically discharged nine months after the bankruptcy is filed if:

1. It is a first bankruptcy – the trustee report would provide sufficient information, sets out causes of bankruptcy and conduct of debtor.
2. The bankrupt has attended two financial counselling sessions.
3. The bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the OSB.
4. The discharge is not opposed by a creditor, the trustee or the OSB.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 8 marks]

Commented [TE15]: 8/8

Compare and contrast the role of the "Monitor" in CCAA proceedings and the "proposal trustee" in a BIA proposal.

In your essay you should refer to at least the following:

- Whether the monitor and / or proposal trustee is court-appointed; and
- The statutory duties, if any, of the monitor and / or proposal trustee.

The role of “Monitor” in CCAA proceedings and the role of “proposal trustee” in a BIA proposal are similar in many ways. Both play an advisory and supervisory role and assist the debtor in development of proposal, including cash flows, and negotiations with creditors and key stakeholders. However, there is a difference in the *modus-operandi, vis-à-vis* their appointment as detailed below.

To initiate CCAA proceedings, a debtor or any interested person must apply to the court with jurisdiction in the province where the head office or chief place of business of debtor company is situated. If the debtor company has no business in Canada, the application is made in the province where the assets of debtor are located. The outcome of the aforesaid application is a court order, which amongst other things provides for appointment of a Monitor under section 11.7 of CCAA, who is a licensed insolvency professional and an officer of the court, generally selected by the debtor and who sees the process on behalf of the court. The person so appointed must be a trustee in accordance with subsection 2(1) of BIA.

The most common route to enter BIA proposal proceeding i.e., a voluntary bankruptcy, is filing a Notice of Intention to make a proposal (NOI) with official receiver. Alternatively, the debtor may develop a proposal prior to filing an NOI and file the proposal with a licensed trustee. The process does not involve a court application. The debtor chooses the trustee / proposal trustee; however, this selection is subject to confirmation by unsecured creditors at the first meeting of creditors. In cases where creditors initiate bankruptcy i.e., involuntary bankruptcy the application must be filed in the bankruptcy court. If the court is satisfied, after hearing objections of the debtor, if any, the judge can make an order for bankruptcy. As soon as the order is made, the property of the debtor vests in a licensed trustee appointed by the court.

Thus, in contrast to appointment of Monitor who is always appointed by the court under CCAA, the appointment of proposal trustee depends on who has initiated the bankruptcy, in case of voluntary the official receiver and in case of involuntary the courts.

CCAA and BIA each prescribes certain statutory duties for monitor and proposal trustee, respectively. Thus, the monitor while overseeing the steps taken by the company as an officer of the court on behalf of the stakeholders has the following statutory duties:

- publish in stipulated time and form the prescribed information; make the order publicly available, send notice to every creditor who has claim greater than CAD 1,000 and prepare list of creditors.
- review the company’s cash-flow statement for reasonableness.
- carry out appraisal or investigation to determine financial health of company and causes of insolvency.
- file a report with the court on the state of the company’s business and financial affairs and inform creditors of the same.
- file with the Superintendent of Bankruptcy a copy of the documents specified in the regulations and pay the prescribed fee.
- attend court proceedings and meetings of the company’s creditors, if required
- inform court if BIA proceedings will be more beneficial to the company’s creditors.
- opine on reasonableness and fairness of any compromise or arrangement.
- file periodic reports with the court and creditors including setting out the views in connection with any proposed disposition of assets or in connection with any proposed DIP financing.

The minimum powers of monitor are set in CCAA, however, in appropriate circumstances the monitors powers may be augmented to exercise more control over the debtor company. For instance, where the board of directors have resigned, or creditors have lost confidence in management the monitors powers can be extended by the court to effectively manage the company during restructuring. The monitor can be authorized to sell assets subject to court approval and can be authorized to direct certain corporate functions, enter-into litigation on behalf of the corporate. Monitors assuming such roles are called super monitors.

The proposal trustee too has certain prescribed statutory duties:

- giving notice of filing of NOI or the proposal to all known creditors
- filing a projected cash flow statement along with a report on its reasonableness
- calling a meeting of the creditors to vote on proposal.
- at the meeting of creditors to report on financial condition of debtor and reason for financial difficulties
- if a corporate proposal is rejected by a class of creditors inform the creditors and the official receiver
- make final application to bankruptcy court for approval.

In addition, both the monitor and proposal trustee are required to do the following:

- exercise the oppression remedy. Monitors and proposal trustees must report on reasonableness of a decision to exclude the application of the TUV and preference provisions from a proposal or CCAA plan i.e., not to challenge the preference or the TUV transaction.
- pursue remedies on behalf of the estate.
- whether process for sale of assets was reasonable, effect on creditors and interested parties was considered, consideration is fair and whether monitor or proposal trustee approved it. Section 65.13 of BIA and Section 36 of CCAA addresses sale of assets outside of ordinary course of business and while approving the sale the court is required to consider the same
- report on cash flow forecast for DIP financing.
- disclaimer of onerous contracts.
- assignment of contracts.

Question 3.2 [maximum 7 marks]

Commented [TE16]: 7/7

Write a short essay that identifies the main policy goals of the Canadian insolvency regime and provide examples of how these policy goals are reflected in different aspects of the insolvency system. In your essay, explain why the national insolvency system in Canada is described as “universalist” in the context of Canada’s approach to cross-border insolvency law.

The policy goals of Canadian insolvency regime strive to achieve a balance between reorganization and liquidation. The rationales that underlie the Canadian insolvency systems (CIS) focus on certainty, transparency, asset preservation, value maximisation and rehabilitation.

The CIS provides for and encourages debtor rehabilitation of viable but financially distressed businesses because of the perceived social benefits that flow from rehabilitation of the debtors. These include increased recoveries for the creditors, the maintenance of supplier relationships and local economic activity and the preservation of the jobs. CIS recognizes existing creditor rights, establishes clear rules for ranking of priority claims and equal treatment of similarly situated creditors.

This balanced approach flows from recognition that certain and reliable rules provide for security for investors and lenders that in turn affect the cost and availability of credit in Canadian market. The aforesaid can also be observed from the fact that under CCAA the secured creditors are generally stayed from enforcing their security, whereas in BIA the creditors are initially stayed but if debtor chooses to make proposal only to unsecured creditors the stay is lifted.

CIS endeavours to minimize impact of debtor's insolvency on all stakeholders. The systems provide for timely, efficient, and impartial resolution of insolvency, preserve the insolvency estate to allow equitable distribution to creditors and ensure transparent and predictable insolvency laws.

The aforesaid policy concerns are reflected in the way insolvency proceedings are managed through a combination of creditor control, estate professional management and court supervision that includes consideration of interests of creditor, debtor, employees, community, customers etc. The overall regulation and management is done primarily under the oversight of courts thru the trustees, receivers or CCAA monitor. Creditors exercise power through voting mechanism that includes the powers to replace insolvency professional and have right to information and be heard in court.

BIA liquidation trustee while selling the asset, proposal trustee while presenting a proposal, and the CCAA monitor for recognition of plan approved by creditors need court approval.

A restructuring under CBCA though managed by corporation is driven by court established processes. Similarly, in a court ordered receivership too the receiver draws its powers from the court and seeks courts approval for sale processes, acceptance of bids and distribution.

The Winding-up and Restructuring Act (WURA) is applicable to insolvent federal corporations. The liquidator being appointed by court on application and thereafter the complexity of liquidation of banks / insurance companies makes it largely court driven.

Apart from giving a pre-eminent voice to creditors and an involvement of courts as described above in all processes, another important element of CIS is the wide judicial discretion embodied in the common law (barring Quebec). This enables the judges to fill in the gaps of legislation and create remedies where a particular statute or rule does not provide for one, but circumstances and policy imperatives call for one i.e., the spirit of the law is followed as against the letter of the law. The courts will do everything reasonably possible to ensure that business can continue as a going concern even by way of going concern sale of all or part of business to a third-party purchaser. The recent amendments of November 1, 2019, to BIA as well as CCAA, buttress the policy goals. The amendments include all parties to act in good faith (mostly directed at creditors as others already had this duty) and allow the courts to inquire into certain payments. The changes to "act in good faith" give the court broad discretion to craft a remedy where this obligation is breached. The judicial guidance for amendment was provided in *Bluberi* case where the court held that a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that a creditor is acting for an improper purpose.

The national insolvency system in Canada is described as universalist because it purports to extend to debtor's assets wherever located. This is because CIS strives for a single insolvency proceeding covering all the debtor's assets and debts

worldwide. However, universalism in its true form requires a high level of trust in a foreign legal system and foreign insolvency proceeding. This isn't truly in consonance with CIS, as CIS has not adopted 12 of the clauses of model law; however, several provisions of the model law are substantially similar to the provisions enacted in the BIA and CCAA i.e., recognition, appointment of insolvency professionals, COMI, etc. Additionally, CIS does not mandate reciprocal obligations; irrespective of whether the other jurisdictions insolvency laws grant reciprocal obligations, the CIS is reciprocal, in that it permits foreign creditors to participate in Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors (hotchpot rule). Also, since Canada cannot impose its will on other countries, Canada has pragmatically adapted modified universalism, accepting that concurrent insolvency proceedings in multiple jurisdictions will be necessary.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Question 4.1 [maximum 15 marks]

You are a lawyer in Canada. You are consulted by counsel in a foreign jurisdiction who is representing an agent operating under the law of the foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. The online seller has a fulfilment office and warehouse in Canada. The foreign agent has taken control of the assets of an online seller of clothing with a head office that is registered in the foreign jurisdiction where senior management of the company have their offices. The business sells clothing around the world, including to customers in Canada. Due to currency exchange- and supply-related issues, the company has been unable to maintain liquidity and has defaulted on various loans to its foreign-based secured lenders who are owed in excess of CAD 200 million and, as a result, has stopped fulfilling orders in process, including to Canadian customers. As a result, a class action lawsuit has been filed by a Canadian law firm seeking damages on behalf of customers for monies paid in respect of unfulfilled orders in the amount of CAD 2 million. That lawsuit in Canada is still in the pleadings phase. It also appears that the Canadian resident in charge of the fulfilment office and warehouse in Canada may have been diverting funds improperly. The foreign agent wants to further investigate. The foreign agent consults you about seeking recognition of the foreign proceeding in Canada in order to maximise recoveries and provide for an equitable distribution of value among all creditors.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks]

Commented [TE17]: 5/5

The foreign agent wants to understand the formal proof requirements to obtain recognition of the foreign proceeding in Canada. What is your advice?

One of the key principles of Model Law is mandatory recognition of foreign insolvency proceedings. This is intended to facilitate judicial cooperation between countries and provide access to domestic courts for foreign representatives. Canada adopted a modified version of the UNCITRAL Model Law in Part XIII of the BIA and a new Part IV of CCAA. These sections contain provisions that provide a framework for recognition of foreign insolvency proceedings and acceptance of jurisdiction. Further, there are 12 provisions of the Model Law Canada chose not to adopt and recognition is not one of them.

The foreign registered debtor has a fulfilment centre and warehouse in Canada and thus will fall under the definition of debtor in Canada. The provisions of BIA and

CCAA of foreign insolvency proceedings require Canadian courts to recognize foreign proceedings on "formal proof" of three main requirements:

- the proceeding is a foreign proceeding in accordance with statutory definition – in the current case counsel of foreign jurisdiction is representing an agent operating under the law of foreign jurisdiction and who is empowered by legislation and courts of that foreign jurisdiction to deal with assets of insolvent companies. The focus of Canadian law is on substance of foreign law and not nomenclature. Thus, the advice to counsel would be to file sufficient evidence of foreign law to enable Canadian court to conclude that this is a foreign proceeding. In *Centaur Litigation SPC*, a proceeding under Caymans Companies Act, which permits restructuring, was recognized as foreign main proceeding.
- the applicant is a foreign representative in accordance with statutory definition – in the current case the foreign agent has taken control of the assets of the debtor. Again, the advice to counsel would be to file sufficient evidence of foreign law to allow Canadian court to determine that agent is a foreign representative.
- whether the foreign proceeding is main or non-main based on COMI – the related documentation should be provided.

Once the aforesaid requirements are met with requisite proof, the recognition is automatic and compulsory and the Canadian court must make an order recognizing the foreign proceeding. Case laws demonstrate that both the terms foreign proceeding and foreign representative have been given a broad and purposive interpretation, thereby allowing an applicant to meet the requirements for foreign recognition without difficulty.

I would also substantiate my opinion by referring to key case-laws to enable the counsel to have better understanding of Canadian courts. In *Morguard Investments Ltd vs De Savoye* the court concluded that comity is an idea based not only on respect between sovereign states but is also necessary for the reciprocal flow of communication and skill in the modern world; meaning that courts are likely to implement foreign recognition orders on the basis that they would also like Canadian judgements to be enforced abroad. It added foreign judgements may be presumptively enforced in Canada provided there is real and substantial connection between foreign court and (i) defendant (ii) the cause of action or (iii) the subject matter of action. In *Hollander Sleep Products*, recently, the court described comity as central principle of CCAA. The aforesaid judgements hold true for all jurisdictions However, foreign judgement can also be enforced by way of reciprocal enforcement when judgement is issued by jurisdiction governed by reciprocal legislation. Quebec governed by civil law has the principles enshrined in the code itself.

Question 4.2 [maximum 5 marks]

Commented [TE18]: 5/5

The foreign agent wants to understand whether or not you believe the foreign agent can obtain a stay of the Canadian litigation and why. What do you tell the foreign agent?

Based on the facts of the case the foreign agent should be able to get a stay. The facts state that the foreign agent has taken control of assets at head office that is registered in foreign jurisdiction where the senior management of the company have their offices.

To explain the reason for my opinion, I would expound upon the third condition of recognition mentioned in Question 4.1. i.e., whether the foreign proceeding is a

foreign main proceeding or a foreign non-main proceeding based on COMI analysis. If the court determines the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of litigation. If it determines that the proceeding is a foreign non-main proceeding a stay may be requested but the court exercises discretion.

Furthermore, there is no statutory definition of COMI in either the CCAA or BIA. However, each statute contains a rebuttable presumption, that in case of company, in absence of proof to the contrary, the COMI is company's registered office. In addition, the courts in various judgement (*Mt Gox, Massachusetts Elephant & Castle Group Inc, Lightsquared LP, Caessars Entertainment Operating Co*) have identified following three considerations for determining COMI:

- location that significant creditors recognize as being the centre.
- location in which debtors' principal assets or operations are found.
- locations of debtor's headquarters/head office

Thus, in this instance the foreign jurisdiction is not only the registered office but also the head office and thus would be foreign main proceeding resulting in automatic stay on recognition.

Question 4.3 [maximum 5 marks]

Commented [TE19]: 5/5

The foreign agent wants to know whether they can compel the Canadian resident who was in charge of the fulfilment office and warehouse in Canada to submit to an examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction (for example, following that jurisdiction's procedure rather than Canadian procedure). What is your advice?

The foreign agent can compel Canadian resident to submit to examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction provided it does not fall under the purview of public policy exception and is consistent with orders made in any concurrent proceedings under BIA or CCAA.

The consequence of recognition is that it imposes an obligation on Canadian officials to cooperate with foreign representatives and foreign court. The court may on application by the foreign representative, if it is satisfied that it is necessary for the protection of debtor companies' property or the interests of a creditor or creditors, make any order that it considers appropriate. This includes, but is not limited to, orders respecting the examination of witnesses and the taking of evidence, and provision of information on the debtor's property and affairs. This is subject to public policy exception and ensuring that the orders are consistent with those of BIA and CCAA. The court is not restricted in exercising this discretion to only providing same or similar remedies as are available under Canadian insolvency law and has in fact ordered relief in foreign main proceedings where there are ancillary Canadian proceedings that would not be available in Canadian proceedings. This was demonstrated in *Hartford Computer Hardware Inc* where court approved a final DIP facility containing a partial roll up that effectively paid off prepetition secured debt. It is likely that this would be prohibited under CCAA, nevertheless the court allowed it.

Commented [TE20]: 50/50 - Perfect!

*** End of Assessment ***

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