



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.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
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]

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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

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

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

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

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

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

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

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

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

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

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]

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

1. "Involuntary bankruptcy". This is where a creditor (or creditors) approaches a court with the request that, if successful, will "force" the debtor into bankruptcy proceedings under the Bankruptcy and Insolvency Act [Guidance text par 6.2.2.1 page 18].
2. "Voluntary bankruptcy". This is where a debtor decides (out of its own volition) to access the bankruptcy proceedings via an administrative process and the process is initiated when the Official Receiver admits the formal application of the debtor (this occurs once the debtor delivers the documentation constituting "an 'assignment' of its property for the benefit of its creditors" together with the necessary information on the state of its financial affairs – assets and liabilities) [Guidance text par 6.2.2.2 page 19].
3. "Failure of a BIA proposal". There are two possible scenarios that may apply here, depending on whether one is dealing with a "corporate" or a "consumer" "proposal" [Guidance text par 6.2.2.3 page 20]:

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- a. "Failure of a BIA proposal". In respect of a "corporate proposal", the negotiations with the creditors regarding a plan of payment or settlement of debt of the debtor must "fail" [Ibid]. This occurs where the debtor's plan is dismissed by the creditors [Ibid]. Once the group of creditors "reject[...]" the plan as per the provisions of the BIA, the debtor is regarded as having entered bankruptcy [Ibid].
- b. "Failure of a BIA proposal". In respect of a "consumer proposal", the debtor does not honour the provisions of the plan (thus "defaults under the terms of its proposal") and neither the creditors nor their agents are willing to tolerate the default, then the court is approached for an order which will "annul the proposal" [Ibid]. After the court order for annulment is granted, the debtor is regarded as having entered bankruptcy [Ibid].

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 requirements are as follows (and all of these requirements must be present – they are cumulative):

1. The applicant (or applicants) must show that it is (they are) a creditor (or creditors) of the debtor;
2. The applicant(s) must show the court that the debtor owe(s) the applicant(s) more than 1000 Canadian Dollars;
3. The debt referred to above in 2 must be unsecured;
4. The applicant(s) must prove that the debtor performed a section 42 (BIA) "act of insolvency"; and
5. The applicant(s) must prove that the act referred to above in 4 was carried out "within six months of the date of the filing of the application" [Guidance Text par 6.2.2.1 page 18].

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Note that the applicant(s) would probably also have to prove that the court has jurisdiction to decide on the application – jurisdiction is broadly determined according to the debtor's place of residence, business, or assets. [Guidance Text par 6.2.2.1 page 18]

Question 2.3 [maximum 3 marks]

Commented [TE5]: 3/3

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

1. "licensing and supervising of trustees" – thus the Office authorises trustees to act as such and oversees these trustees' execution of their duties [Guidance text par 4.2.4 page 11].
2. "examining a trustee's account of a bankruptcy and ensuring all the correct information is accounted for" – thus reviewing the drafted estate account and verifying that it is complete and comprehensive [Guidance text par 4.2.4 page 11].
3. "maintaining public records regarding the filing of proposals, bankruptcies, license issues and appointments of receivers under the" Bankruptcy and Insolvency Act – thus the Office has an administrative information collection, updating and availing function insofar as certain data, that should be in the public domain, is concerned [Guidance text par 4.2.4 page 11].

Question 2.4 [maximum 2 marks]

Commented [TE6]: 2/2

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?

The criteria are as follows (these requirements are cumulative, which means all the criteria must be present) [Guidance Text par 6.2.22 pages 31-32]:

1. The bankrupt must not have been declared bankrupt (been subjected to bankruptcy proceedings) before, meaning that this must be “a first bankruptcy”;
2. The bankrupt must have received formal instruction on how to deal with his finances twice, meaning that he must have “attended two financial counselling sessions”;
3. The bankrupt will not be making future payments to the estate, meaning that he is under no obligation “to pay a portion of his income into the bankruptcy estate”; and
4. There is no objection to the automatic discharge within this shortest period of time (neither one or more creditors, nor the trustee, nor the Office of the Superintendent of Bankruptcy contest the discharge).

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

Question 3.1 [maximum 8 marks]

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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.

Under the circumstances referred to in the question, both practitioners will be involved in proceedings that involve “compromises” with the debtor’s creditors [Guidance Text paras 4.1.2 and 6.5.1 pages 5 and 37]. It is also logical that the nature of their appointments and functions will echo the nature of the proceedings, and the observation that “the primary differences between a restructuring under the BIA and one under the CCAA is that the former has more procedural steps and strict timeframes, rules and guidelines, while the latter is more discretionary and judicially-driven” will also dictate expectations to the practitioners involved [Guidance Text par 4.1.2 page 6]. Both must be “licensed insolvency professionals” [Guidance Text par 4.2.3.1 page 10] subject to the “administrative oversight” and management (“regulat[ion]”) of the Office of the Superintendent of Bankruptcy [Guidance Text par 4.2.4 page 11]. As monitors are only eligible for appointment if they are also trustees (see section 11.7(1) of the CCAA), and trustees are closely regulated by the Superintendent, the provisions pertaining to licensing, etc set out in section 13 of the BIA also apply to monitors. Just like in the case of trustees (albeit that those requirements apply to licensing), there are grounds for disqualification to act as a monitor (see sections 11.7(2) of the CCAA and section 13 of the BIA).

In addition, both are “officers of the court” responsible for the sale of assets, where necessary, and payments made to creditors in accordance with the restructuring scheme [Guidance Text par 4.2.3.1 page 10]. In both instances, these schemes must be submitted to the court for endorsement and the court may provide guidance to the monitor and trustee on the handling of the debtor’s affairs as and where needed (or statutorily prescribed) [Guidance Text paras 4.2.2 and 6.5.1 pages 9 and 37]. The monitor and the trustee are both authorised to rely on the “oppression remedy” if this remedy is to be effected during insolvency proceedings [Guidance Text par 4.2.3.2. page 11].

Overall, the monitor and the trustee must execute their duties “in a fair and transparent manner and in the best interests of all stakeholders” [Guidance Text par 4.2.3.1 page 10]. They are also subjected to statutory “duties of good faith” in the course of insolvency proceedings [Guidance Text par 6.5.1(a). pages 9 and 10]. The monitor and the trustee function as overseers as the restructuring schemes are a “debtor-in-possession” processes [Guidance Text paras 6.5.7. and 6.5.9 pages 40 and 41] meaning that their functions are in

the form of “a supervisory and advisory role”, supportive in nature [Guidance Text par 6.5.11 page 42].

In both instances, the selection of the practitioner is effected by the debtor [Guidance Text paras 6.5.10 and 6.5.11 page 42]. In terms of section 11.7(1) of the CCAA, the monitor is appointed by the court. In the case where a debtor applies for the proposal process under the BIA, the debtor notes the trustee in the documentation filed with the official receiver – meaning that, in this case, the trustee is not appointed by the court (this is an administrative filing procedure – the court really only becomes involved during the approval of the scheme) (see sections 50.4(1) and 58 of the BIA). The court only “appoints” the trustee where the trustee appointed by the debtor in the notice commencing the procedure, is substituted with another based on the grounds set out in the legislation (section 57.1 of the BIA).

In the case of a CCAA monitor, the monitor may obtain the permission of the court to “manage” the debtor where the debtor’s management team is no longer present or creditors are of the opinion that the team is inadequate [Guidance Text par 6.5.10 page 42]. However, in the case of the BIA trustee, taking over the management of the debtor is not possible – under circumstances broadly similar (but there are some differences to testing the absence of the conduct required by management such as best interest considerations) to CCAA situations, the trustee does not take over management of the debtor but a receiver is retained to manage the debtor [Guidance Text par 6.5.11 page 42].

Section 50 of the BIA sets out the duties of the trustee – ranging from notification and filing duties [Guidance Text 6.5.5. page 39] to investigative and analytical duties regarding the affairs of the debtor and viability of the proposal (see sections 50(5) and 50(6) of the BIA and Guidance Text 6.5.11. page 42). Some of these duties overlap with those of the monitor (such as the assessment of affairs – see section 23.1 of the CCAA and Guidance Text 6.5.10. page 42). However, while the trustee has to report on the affairs *and the proposal* etc. of the debtor because these documents are lodged with the trustee in order to commence BIA proceedings (see section 50(2) of the BIA: “Documents to be filed (2) Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate, (a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and (b) the prescribed statement of affairs”), the monitor may assist the debtor to draft these required documents (such as the proposal) because he is appointed at the beginning of the process (prior to the drafting of the proposal) and the initial application does not include the proposal (see section 10(2) of the CCAA: “Documents that must accompany initial application (2) An initial application must be accompanied by (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company; (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement”). The trustee may nevertheless “assist the debtor in the *development* of the proposal and its negotiations with creditors” (my emphasis) similar to what the monitor does [Guidance Text par 6.5.11 page 42]. The monitor also has notification duties (see section 23.1 of the CCAA) in respect of the court order whereas the duty of the trustee deals with the notice filed by the debtor (see section 50(6) of the BIA). The monitor has extensive reporting and advisory duties in respect of the court (see section 23.1 of the CCAA) whereas the BIA arguable does not provide for as much reporting to the court (see section 50.4 (7) of the BIA). This aligns with the nature of the processes, as referred to in the first paragraph of this essay.

Question 3.2 [maximum 7 marks]

Commented [TE8]: 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.

It has been observed that “[R]estructuring is largely seen as the primary goal in the Canadian insolvency regime and courts will do everything reasonably possible to ensure that businesses can continue as a going concern, even if by way of going concern sale of all or part of the business ...” [Guidance Text par 6.5.1. page 37]. The first principled aim of the insolvency framework is to enable financially challenged debtors to access procedures that will assist the debtor to return to a solvent and economically functioning entity or person [Guidance text par 6.1.1 page 15]. This focus on “rehabilitation” is seen in the variety of mechanisms available to different types of debtors in distress – such as “compromises”, “proposals”, and “plans of arrangement” available through “restructuring” and “reorganization” schemes set out in various laws [Guidance text paras 4.1.2 and 6.1.1 pages 5 and 15, see also paras 4.1.1. and 4.1.2 pages 5 and 6]. The underlying rationale for this approach is that debtor insolvency affect more than just the creditors – debtors may be employers (and the financial health or failure of the debtor employer affects the financial welfare and prospects of the employees); debtors may support other businesses within the society where it functions; and, while creditors are often concerned about receiving what is due to them, the truth is that creditors refinance debtors on more than one occasion, which generates funds for those creditors in future [Guidance text par 6.1.1 page 15]. This aim is also observed from the discharge provisions available for natural person debtors [Guidance Text par 6.2.22. page 31].

The second principled aim focuses on creditor-interests and this is observed from the manner in which property “vest” in the insolvency practitioner, which disallows the debtor from dealing with the property and potentially prejudicing creditors [Guidance text par 4.1.1 page 5]; in the respect for rights established prior to insolvency (such as security rights that entitle the secured creditor to the proceeds of the assets in satisfaction of its claim prior to those of unsecured creditors – see eg Guidance text paras 4.2.3.1 and 5.3 pages 9 and 13); and the legal provisions that provide for the ability to sell assets or parts of a business to obtain funds to settle creditors’ claims [Guidance text paras 4.1.1 and 4.1.2 page 5]. The processes and limitations that become effective during insolvency proceedings (such as staying legal proceedings, taking into account certain exceptions – see Guidance text par 6.2.5 page 21) seem to infringe on creditor rights at first glance, but “[c]reditors’ remedies are collectivized in a single proceeding to avoid the social and economic costs of a chaotic free-for-all where creditors are incentivized to enforce their rights to seize assets before other creditors do” [Guidance text par 4.2.3.1 page 9].

Similar to the aim to balance (although there is some tilting to the side of restoration of an entity as indicated earlier) rehabilitation and liquidation [Guidance Text par 5.3 page 14] there is also the objective of balancing the interests of those involved [Guidance Text paras 4.2.3.1 and 6.1.2. pages 10 and 15]. The second balancing act is effected by the practitioners involved in the process: “All such estate professionals are licensed insolvency professionals, generally from accounting or financial advisory firms, and are officers of the court responsible for acting in a fair and transparent manner and in the best interests of all stakeholders” [Guidance Text par 4.2.3.1 page 10, see also Guidance Text par 6.1.2. page 15]. Although “stakeholders” exceed the boundaries of the main players, so to speak, this approach includes the consideration of the interests of the debtor vis-à-vis those of the creditor(s) [Guidance Text par 6.1.2. page 15]. Notwithstanding the above, the rights of the creditors are mainly dealt with in terms of legislation when one considers the “equitable treatment of similarly situated creditors” and features such as priority payment of certain claims [Guidance Text par 6.1.1. page 15]. Creditors are privy to the management of the process through majority-led decision-making that can affect the directions taken by the practitioner and must be kept well-informed [Guidance Text par 6.1.2. page 15]. Although this feature is criticised, the involuntary concession of unsecured rights, when it comes to admitting a restructuring proposal ,does not occur as the Canadian system does not allow

for a “cram-down” of a plan by the court in the absence of full consent by creditor classes [Guidance Text par 6.1.2. page 16].

The third principled aim is the upkeep of desirable characteristics of a legal framework, which includes (but is not limited to) certainty regarding the workings of the system – the value lies in the knowledge that “certain and reliable rules provide security for investors and lenders that, in turn, influences the cost and availability of creditor in the Canadian marketplace” [Guidance Text par 6.1.1. page 15]. It is clear that the overarching policy is to ensure the welfare of the marketplace – whether by encouraging debtors to return as economic participants, protecting creditor interests where this is not possible, and encouraging pre-insolvency lending and investment against the background of a well-functioning system that sets certain rules in place to demonstrate to prospective lenders that there is some protection for them if a debtor’s business fails [Ibid]. A feature that further demonstrates commitment to these policy outcomes is oversight and recourse to courts: court are heavily involved in bankruptcy proceedings [Guidance Text par 6.1.2. page 15] creditors may refer matters to court [Guidance Text par 6.1.2. page 15]; the court ensures that the application to court by creditors to institute bankruptcy proceedings against the debtor is sound [Guidance Text par 4.2.2. page 9]; etc. There is also administrative oversight over insolvency practitioners in the style of the Office of the Superintendent of Bankruptcy [Guidance Text par 4.2.4. page 11].

The domestic approach to insolvency in Canada is a so-called “universalist” approach [Guidance Text par 4.1.1. page 5]. This means that a court order that puts the debtor in a formal bankruptcy process, will have a bearing on all the debtor’s assets irrespective of location [Ibid]. It also extends to creditors in that creditors, irrespective of their jurisdiction or location, are considered during Canadian proceedings [Guidance Text par 7.1. page 51]. The jurisdiction where the order was given should ideally be the point of departure for the administration of the estate and determine the rights of creditors from various jurisdictions [Guidance Text par 7.1. page 51]. This is not always practically possible, as multiple bankruptcy orders in multiple jurisdictions will result in multiple bankruptcy proceedings pertaining to a single debtor [Ibid]. The notion of strict universalism may be relaxed in instances where multiple proceedings are taking place and the modified approach is to streamline the process (which will result in the objectives of a universalist approach being obtained as far as is possible) using not only Canadian law but referring to provisions that deal with cross-border insolvency law (which may require the use of other jurisdictions’ laws pertaining to eg asset liquidation, but is *coordinated*) [Guidance Text par 7.1. pages 51 and 52]. This also requires the formal recognition of court orders granted by the Canadian courts in foreign jurisdictions and the formal recognition of foreign court orders granted in other jurisdictions by the Canadian courts [Guidance Text par 7.1. and 7.2 pages 51 and 52; see also Guidance Text par 7.8.1 page 56 on “comity” and the outcomes that it seeks to prevent]. In this regard, the provisions of section 267(c) of the BIA in respect of cross-border matters echo the larger Canadian policies: “The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors.”

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 [TE9]: 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?

As jurisdiction is not an issue (the debtor has assets in Canada – see Guidance Text par 7.3 page 53], the foreign agent will have to prove that the bankruptcy proceedings in the foreign jurisdiction whose order the agent wishes the Canadian courts to recognise, constitutes a “foreign proceeding” and that he qualifies as a “foreign representative” [Guidance Text par 7.4. page 54; see section 270(1) of the BIA: “If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding]. The definitions in the BIA and the CCAA are the same and for sake of brevity (see sections 268(1) of the BIA 45(1) of the CCAA; see also Guidance Text par 7.2 page 52; these are clearly an attempt at liquidation, so the use of the CCAA as reference would also be misplaced – see Guidance Text par 4.1.2 page 5), only the definitions set out in the BIA will be referred to here. Section 268(1) of the BIA determines the following: “*foreign proceeding* means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor’s collective interests generally under any law relating to bankruptcy or insolvency in which a debtor’s property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation” and “*foreign representative* means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to (a) administer the debtor’s property or affairs for the purpose of reorganization or liquidation; or (b) act as a representative in respect of the foreign proceeding”. As such, the foreign agent will have to show that he is from a jurisdiction other than Canada (the facts mention that he operates under the law of a “foreign jurisdiction”), and that he is allowed to deal with the debtor’s property (the facts mention that he is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies). Alternatively he can prove to the court that he may act as agent regarding the proceedings taking place in the foreign jurisdiction. The facts allude to the use of the former, as opposed to the latter (unless the use of the term “agent” is to mean “representative”). The foreign agent must also provide evidence to the court that “foreign proceedings” were opened in the foreign jurisdiction as the Canadian courts may only recognised proceedings in cross-border matters that comply with the definition set out in the legislation quoted above [Guidance Text par 7.4 page 54]. Although the facts state that the agent has the ability to deal with the insolvent companies’ property as per the provisions of legislation and by virtue of court authority, there is no indication that this is due to bankruptcy proceedings that were opened (although the Canadian courts support substance over form – see Guidance Text 7.8.2 par 56 regarding *Centaur Litigation SPC*). The agent will thus have to prove to the court that, even though he is acting in a manner that considers the “creditor’s collective interests” (see the last sentence of the facts) and he may deal with the “debtor’s

property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation”, there is no indication that he is doing so by virtue of “a judicial or an administrative proceeding ... under any law relating to bankruptcy or insolvency” (see section 286 of the BIA above). As his classification as a “foreign representative” is dependent on the developments in the foreign jurisdiction being “foreign proceedings”, he will have to convince the court of the latter [Guidance Text par 7.4 page 54]. He would also have to provide documentary proof in accordance with section 269(2)(a) and (b) of the BIA, that foreign proceedings were initiated and that he has been duly authorised to act as representative, in order to be successful.

After the above has been determined (if at all), there must be a classification of the foreign proceeding as a “main” or “non-main” proceeding [Guidance Text par 7.4. page 54]. The determining factor is whether the debtor’s “centre of main interests” are located in the jurisdiction whose order the applicant seeks to have recognised in Canada [Guidance Text par 7.5. page 54]. If this is the case, then the proceedings in the foreign jurisdiction will be deemed a foreign main proceeding; if not, the proceeding will be a foreign non-main proceeding [Guidance Text par 7.5 page 55]. A corporate debtor’s centre of main interest is deemed to be where its registered office is located [Guidance Text par 7.5 page 54 – see also the importance of the location of management in Guidance Text par 7.8.5 page 59]. The facts state that the address of the company’s registered head office is in the foreign jurisdictions – thus proof to this effect must be provided to the court [Ibid; see also Guidance Text par 7.4 page 54]. Where no facts are forwarded to dispute that the foreign jurisdiction is the COMI of the debtor, the proceedings will be evidenced as foreign main proceedings [Guidance Text par 7.5 pages 54 and 55]. There is no evidence to the contrary in the facts (regarding creditor perspectives, etc.) and the fact that the company functions online and has a global market, would render considerations such as the place of “principal assets or operations” difficult to prove to counter the “rebuttable presumption” of the debtor’s centre of main interests [Guidance Text par 7.5 pages 54].

Question 4.2 [maximum 5 marks]

Commented [TE10]: 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?

No, I do not (as per the court’s interpretation discussed below) although it is an automatic result once the foreign proceedings are recognised as foreign main proceedings (the latter due to the reasons set out above). The agent will first have to be successful with the recognition application although the courts have approached the definitions of foreign proceedings and representatives leniently – “both terms are to be given a broad and purposive interpretation, thereby allowing an applicant to meet the requirements for recognition without difficulty” [Guidance Text par 7.4 pages 54]. As indicated above, the proceedings in the foreign jurisdiction will be recognised by the Canadian court as foreign main proceedings [Guidance Text par 7.5 pages 55]. As such, a moratorium on legal action comes into effect as a matter of course (see section 271(1)(a) of the BIA: “...on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, ... no person shall commence or continue any action, execution or other proceedings concerning the debtor’s property, debts, liabilities or obligations”) [see also Guidance Text par 7.6 page 55]. On face value, it would thus seem that the class action litigation would be stayed because it relates to the furthering of an action that involves the company’s liabilities.

However, the provisions of section 284(2) of the BIA determine as follows: “Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.” The legislation thus provides that the court may refuse the application for recognition outright based on public policy considerations [see Guidance Text paras 7.6 and 7.7 page 55]. This may be subject to the representative being able to show that the stay would not result in the “unfair treatment of Canadian creditors specifically” [Guidance Text paras 7.7. and 7.8.4 pages 55 and 58]. The facts allude to the prejudicial effect on the Canadian

creditors forming part of the class action as they would probably be unsecured creditors whereas the debtor is indebted in the amount of CAD 200 million plus to foreign creditors who hold security for their debts (and who may “wipe out” the assets available to pay creditors of the estate). If the court is concerned about the effect of the recognition-stay compilation on Canadian creditors, I would think that the Court would refuse the application based on the inequities that such a stay would generate as was done in the *Canadian Imperial Bank of Commerce v ECE Group Ltd* case because then the Canadian creditors would at least have access to the assets located in Canada, should they want to enforce the judgment individually or in terms of a concurrent bankruptcy procedure (concurrent to the one taking place in the foreign jurisdiction) [Ibid].

Question 4.3 [maximum 5 marks]

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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 would need the Canadian court to include this as part of the recognition order and will thus have to approach the court with a request to specifically include this order as part of the court's ability to make orders that it finds “appropriate” [Guidance Text par 7.6 page 55; see section 272(1)(c) and (e) of the BIA: “If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order ... respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations ...”]. The agent would have to show that using the foreign jurisdiction's civil procedural law, as opposed to the Canadian law, would be imperative for the resolution of the matter insofar as assets and creditor interests are concerned [Ibid]. A case would have to be made that the use of the foreign procedure would be able, and essential, to effect this outcome as opposed to the use of the Canadian procedure [Guidance Text par 7.6 page 55]. There is precedent in the Canadian law for this type of order [see the reference to the Nishiyama-case in footnote 221 of the Guidance Text par 7.6 page 55]. In the Nishiyama-case, the court set out the elements of an order of this nature (one where proceedings are dealt with in terms of foreign law): The court would have to be convinced of the suitability of such an order; and the court would have to be convinced of the “necessity” of the order [Guidance Text par 7.6 page 55]. In light of the fact that the Canadian law makes specific provision for insolvency-specific examinations under the BIA [Guidance Text par 6.2.18 page 29], the agent would have to show the benefit of the civil procedural law of the foreign jurisdiction that requires an order to this effect – applicable to examinations and obtaining information (see s 272 above). In this regard, “[t]he court is not restricted in exercising [its] discretion to only providing the same or similar remedies as available under Canadian insolvency law [and] [i]n the past, the court has ordered relief in foreign-main proceedings that would not ordinarily be available in a Canadian proceeding” but a case needs to be made out before the court will grant such an order.

Bibliography: INSOL International *Module 4C Guidance Text Canada 2020/2021* INSOL International: London (“Guidance Text”); Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), available at <https://www.laws-lois.justice.gc.ca/eng/acts/B-3/> (accessed 30 July 2021) (“Bankruptcy and Insolvency Act” or “BIA”); Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36), available at <https://laws.justice.gc.ca/eng/acts/C-36/index.html> (accessed 30 July 2021) (“Companies' Creditors Arrangement Act” or “CCAA”).

*** End of Assessment ***

Commented [TE12]: 49/50 Very well done!