



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]**

Commented [TE1]: 10/10

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]**

Commented [TE2]: 3/3

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

Three ways are available for a debtor to enter bankruptcy in Canada as set out below:

1. Involuntary- filing on an application by a creditor that the debt owing to him amount to one thousand dollars, and the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.
2. Voluntary- the debtor, an insolvent person, makes an assignment of all its assets into the bankruptcy proceedings for the general benefit of all creditors. The process does not involve court application.
3. On a failure of, or failure to perform the terms of, a BIA proposal- the debtor is deemed to have made an assignment in bankruptcy if a corporate proposal is rejected by a call of the creditors voting on the proposal or if the court does not approve the proposal. Basically, when a creditor who has started the insolvency process, has failed to meet the requirements for filing a Scheme for proposal under the BAI or has failed to adhere to the provisions and terms provided within the proposal after it has been filed and accepted by the creditors/court and such default

is not waived by the inspector or the creditors themselves a motion may be brought to the court to annul the proposal and if granted the debtor is automatically assigned into bankruptcy.

Question 2.2 [maximum 2 marks]

Commented [TE3]: 2/2

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

In order to make out an application for an involuntary bankruptcy order, the applying creditor must demonstrate that he is owed an unsecured debt in excess of CAD 1,000 and provide evidence that the debtor has committed an act of bankruptcy within six months of the date of the filing of the application by the creditor.¹ Section 42 of the BIA provide the cases in which a debtor is considered committing an act of bankruptcy, for instance the debtor makes an assignment of his property to a trustee for the benefit of his creditors generally; the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it; if he ceases to meet his liabilities generally as they become due etc.

In addition, the application must be brought to the bankruptcy court in the location the debtor ordinarily resides, does business, has assets or property, or if no assets are being held.

Notwithstanding the above, pursuant to sections 43(2), if applicant creditor is a secured creditor, the application needs either state that he is willing to give up his security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of its security, and in the latter case he may be admitted as an applicant creditor to the extent of the balance of the debt due to him after deducting the estimated value, in the same manner as if the secured creditor was an unsecured creditor.

Question 2.3 [maximum 3 marks]

Commented [TE4]: 3/3

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

The Office of the Superintendent of Bankruptcy (OSB) is a federal government office who is responsible for administratively supervising all estates and matters to which the BIA applies, as well as certain matters under the Companies' Creditors Arrangement CCAA.²

The functions of the OSB are licensing and regulating the insolvency profession and ensuring compliance through maintenance and enforcement of the regulatory framework as set out below (three of these functions):

1. licensing and supervising of trustees.
2. Inspecting or investigating estates.
3. Receiving and dealing the complaints from creditors against estates professionals during proceedings.

Question 2.4 [maximum 2 marks]

Commented [TE5]: 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?

¹ BIA, s 43(1)

² https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01852.html

The four criteria that must be met for an individual bankrupt to be automatically discharged within nine months after the bankruptcy is filed are set out below:

1. it is the individual bankrupt first bankruptcy;
2. the individual bankrupt has attended two financial counselling sessions;
3. the individual bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the OSB; and
4. the discharge is not opposed by a creditor, the Licensed Insolvency Trustee or the OSB.

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

Question 3.1 [maximum 8 marks]

Commented [TE6]: 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 Monitor in CCAA proceedings is an officer of the court, appointed by an order of the court. The Monitor is a licensed insolvency professional and generally selected by the debtor. Monitors are required to be independent from the debtor company. The Monitor's role is to supervise and advise in the proceeding. As an officer of the court and on behalf of all stakeholders, while the company is in CCAA proceedings, the Monitor supervises the steps taken by the company, assists with the preparation of the cash-flow statements and with the negotiation of the plan between the company and its stakeholders. Monitors are also statutorily mandated to act honestly and in good faith and comply with a prescribed code of ethics.

The Monitor has a duty to file periodic reports with the court and creditors, including reports indicating his views regarding any proposed disposition or arrangement of assets or any proposed debtor-in-possession (DIP) financing, also typically conducts a liquidation analysis of the debtor company and provides a report on the reasonableness and fairness of the debtor's plan of arrangement or compromise analysing whether or not such a plan treats any creditor class any worse than they would otherwise be treated in a bankruptcy. In addition to the Monitor's powers that may be provided for in the court orders pertaining to his appointment, the CCAA sets out the minimum powers of the monitor, however in appropriate circumstances, such as when the creditors have lost confidence in management or the board of directors have resigned, the Monitor's powers may be augmented to exercise more control over the debtor company and its powers can be expanded by the court to allow the Monitor to effectively manage the company during the restructuring. Subject to court approval, the Monitor may be authorised to sell assets, as well as authorized to direct certain corporate functions or engage in litigation on behalf of the company. Monitors assuming this role are colloquially referred to as "super Monitors"³.

In CCAA proceedings, sometimes the monitor is empowered to examine claims, filed by creditors, on a preliminary basis.

³ Rogers and Huff, *supra* note 26, p 5.

The proposal trustee in a BIA proposal is selected by the debtor. Similar to the Monitor, the proposal trustee has a supervisory and advisory role to assist the debtor in the development of the BIA proposal and assist with negotiations with creditors and other key stakeholders. As opposed to the Monitor in CCAA proceedings, in BIA proposal provisions, if it is clear that the debtor management no longer acts or capable to act in the best interests of the company or its stakeholders, a receiver may be appointed in order to take control of management of the company⁴.

The Proposal Trustee is an independent third party who is appointed by the Official Receiver. Its statutory duties include the following: giving notice of the filing of the Notice of Intention (NOI) or the proposal to all known creditors, filing a projected cash-flow statement along with a report from the trustee on its reasonableness, reporting to the Court on any major events that might impact the viability of the company and convene a creditor meeting to consider and vote on the proposal. His role at the meeting is to report on the financial situation of the debtor and the cause of its financial difficulties. If the proposal is accepted by the creditors, the proposal trustee must make the final application to the bankruptcy court for approval of the proposal.

In addition, it is noted that the BIA's transfer at undervalue transactions (TUV) and preference provisions are incorporated into the CCAA by reference.⁵ In CCAA proceedings the Monitor has the right to pursue the remedies on behalf of the estate. Monitor's and proposal trustees must report on the reasonableness of a decision to exclude the application of the TUV and preference provisions from a proposal or a CCAA plan.

In a scenario of disclaiming onerous contracts, pursuant to sections 65.11 of the BIA and 32 of the CCAA, a monitor /proposal trustee approval or, alternatively, court approval is required, and the court will consider, among other things whether the monitor or proposal trustee approved the disclaimer. Also, in a case of assigning contract, the approval of the monitor or proposal trustee is required for any assignment.

In a case of a failure of BIA proposal when a debtor defaults under the terms of its proposal and such default is not waived by inspectors or the creditors themselves, the proposal trustee must inform the creditors and the Official Receiver.

For conclusion, BIA proposal proceedings are debtor-in-possession, but a proposal trustee manages the process. Any proposal approved by the creditors of the debtor in BIA proposal must also be approved by the court. In the same manner, CCAA proceedings are also debtor in possession but mainly driven by the court. A monitor is appointed by the court for the purpose of supervising the process on the court's behalf and any plan of arrangement approved by the creditors of the debtor must also be approved by the court. The role of the monitor in CCAA proceedings can make the restructuring litigation process more efficient, eliminate or reduce the scope of disputes, obtain resolutions that avoid potentially extensive litigation and eliminate appeal risk, and facilitate the consummation of deals that otherwise would not have been made or on likely better commercial terms for the parties in interest⁶.

⁴ McElcheran, *supra note* 136, p 267.

⁵ CCAA, s 36.1.

⁶ Robin B. Schwill is a partner at Davies Ward Phillips & Vineberg LLP.
(<https://www.financierworldwide.com/the-unique-role-of-the-monitor-in-canadian-restructurings#.YHmJ7-hKiUk>)

Question 3.2 [maximum 7 marks]

Commented [TE7]: 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 Canadian insolvency regime aims to create a balance between reorganisation and liquidation. This balanced approach flows from the recognition that certain and reliable rules provide security for investors and lenders that, in turn, influences the cost and availability of credit in the Canadian marketplace⁷. For instance, attracting higher levels of investment, both domestic and foreign, while the fresh start that promotes entrepreneurship; improving Canada’s overall economic performance by ensuring that debtors’ assets can be returned to productive use quickly; equitable treatment of stakeholders and transparent processes which help to protect the integrity of the insolvency regime. When suitable, the Canadian insolvency system encourages the financial rehabilitation of businesses/ debtors given the many social benefits associate with the rehabilitation such as increases recoveries for creditors, maintains supplier relationships and protects jobs. Same time, the insolvency system recognises creditor rights and sets up clear rules for ranking of priority claims⁸.

Fundamental goals of the Canadian insolvency system include minimizing the impact of a debtor’s insolvency on all stakeholders by pursuing an equitable distribution of the debtor’s assets and, where possible, by rehabilitation of the debtor. These goals are achievable due to the appropriate legislation that focus on, *inter alia*, certainty to promote economic stability and growth; transparency and predictably of insolvency laws, asset preservation, asset value maximization, equitable treatment of similarly situated creditors, timely, efficient and impartial resolution of insolvency and rehabilitation⁹.

The above-mentioned policy goals are reflected in the way insolvency proceedings are managed. For instance, (i) through a combination of creditor control in a way of voting mechanisms, various powers in both bankruptcy and restructuring situations, ability to seek the replacement of the estate professionals in certain circumstances, the right to information and to be heard by the court overseeing the insolvency proceeding; (ii) estate professional management, i.e the ongoing overseeing of the process, which is done largely by court appointed representatives such as trustees, receivers or the CCAA monitor who owe broad duties to the court and all stakeholders and periodically report to creditors and the court; and (iii) court supervision that includes consideration of the interests of the debtor and other stakeholders.

The national insolvency system in Canada is described as “universalist” since all formal insolvency proceedings in Canada take a “universalist” approach in that they intent to affect a debtor’s assets wherever located. The Canadian insolvency law system allows to foreign creditors to participate in Canadian insolvency proceedings and foreign creditors have the same rights and priorities as similarly to creditors situated in Canada. Given that various jurisdictions have their own set of national laws which may be conflicted to the Canadian insolvency law, the Canadian system is only beneficial in states which respect the Canadian insolvency proceedings and recognize the rights of Canadian creditors in their proceedings. Canada has approached the challenges posed by cross-border insolvency in a sensible and realistic way on the basis of “modified universalism, i.e accepting that concurrent insolvency proceedings in various jurisdictions, in some cases, may be necessary, but that the best

⁷ <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00882.html#p2>

⁸ *Ibid*

⁹ *Ibid*

means for a fair and efficient outcome is for courts to coordinate their efforts and respect each other's processes and orders as much as possible. In general, Canadian judges keep a high level of discretion when using the statutory provisions on the recognition of foreign proceedings. Therefore, Canadian courts in general are managing the challenge of cross-border insolvency proceedings effectively and flexibly and have been quick to adopt the principles of comity and cross-border cooperation as well as recognition orders, court-to-court communication, the use of cross-border insolvency protocols, coordinated assets sales and coordinated restructuring plans.

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]

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

Canada has adopted a modified version of the UNCITRAL Model Law in Part XIII of the BIA201 and a new Part IV of the CCAA. My answer is based on these sections of the BIA and CCAA, which contain substantially similar provisions that provide a framework for recognition of foreign insolvency proceedings and acceptance of jurisdiction.

Pursuant to the BIA and CCAA provisions pursuant ¹⁰, in order to obtain recognition if the foreign proceedings in Canada, the Canadian court requires a formal proof of three main requirements as set out below:

1. the proceeding is a "foreign proceeding" pursuant to the statutory definition ¹¹.
2. the applicant is a "foreign representative" pursuant to the statutory definition ¹².

¹⁰ BIA, s 269-272 and CCAA, s 46-49

¹¹ BIA s 268(1), CCAA, s 45(1)

¹² *Ibid*

Commented [TE8]: 4/5

Commented [TE9]: define

Commented [TE10]: define

In our case the agent is operating under the law of the foreign jurisdiction and empowered by the legislation and the court of the foreign jurisdiction to deal with the assets of insolvent companies and the online seller in particular. It assumed that the purpose of his actions, to take control of the assets of an online seller is for the purpose of reorganization or liquidation of the online seller and therefore these two requirements are met. And:

3. classification of the "foreign proceeding" as either a "foreign main proceeding" or a "foreign non-main proceeding" based on a center of main interest (COMI) analysis¹³. In our scenario, since there is no proof to the contrary, the online seller's head office, which is registered in the foreign jurisdiction (assuming that the company is registered where its head office is registered) where senior management of the company have their offices, is sufficient to determine that the COMI is in the foreign jurisdiction and therefore the foreign proceedings are foreign main proceeding. It is noted that the court will consider the location that significant creditors recognize, location of the debtor's principal assets or operations, or headquarters, head office or "nerve centre" when determining COMI¹⁴.

In our scenario, although the physical assets/the clothing warehouse are in Canada, and there are Canadian creditors, the business sells clothing around the world and there may be creditors in the foreign jurisdiction, and therefore it is likely that the court will determine that the foreign proceedings are foreign main proceeding, although the court may consider the location which is readily ascertainable by creditors; where the debtor's principal assets and operations are found; and where the management of the debtor takes place¹⁵.

Pursuant to section 269 of the BIA, the recognition application of the foreign proceedings is commenced by a foreign representative in respect of which he is a foreign representative. The application must be accompanied with certified copies of the instrument that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. The sufficient evidence of the foreign law is to allow the Canadian court to determine that they are a foreign representative, and the proceeding is a foreign proceeding.

In addition, the BIA is broad enough to support a filing by a foreign-registered company with assets or property in Canada, although principles of COMI may come into play if the appropriateness of the filing is challenged. Hence the foreign registered company via its agent would be able to file for voluntary bankruptcy in Canada. The definition of "debtor" in section 2 of the BIA includes an insolvent person who, at the time an act of bankruptcy was committed by the company, resided or carried on business in Canada. Since a "person" includes a company and an "insolvent person" extends to companies with property in Canada, the online seller company which has a fulfilment office and warehouse in Canada, means property and assets in Canada as well as customers who are now creditors, and its liability are exceed of CAD 1,000 would meet the definition of debtor in section 2 of the BIA. This means the BIA is broad enough to support a filing by a foreign registered company with assets or property in Canada.

¹³ BIA s 268(2), CCAA, s 45(2)

¹⁴ Re Mt Gox [2014], ONSC 5811.

¹⁵ Re MtGox Co

Question 4.2 [maximum 5 marks]

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?

Pursuant to Section 270 of the BIA/ 47 (1) of the CCAA once the requirements mentioned in answer 4.1 have been met and the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the agent is a foreign, the court will make an order recognizing the foreign proceeding.

In my opinion, and as demonstrated above, the court will recognize the foreign proceeding as foreign main proceeding. Hence, if the court determines the foreign proceeding is a foreign main proceeding, it will automatically issue a stay of proceedings. (in a case of a foreign non-main proceeding a stay may be requested, but the court exercises discretion to make any order necessary for the protection of the debtor's property or the interests of creditors).

Pursuant to section 271 of the BIA (48 of the CCAA) if the foreign main proceeding is recognized, an automatic stay occurs and all proceedings in the recognizing jurisdiction (i.e. Canada) must be stayed and therefore the Canadian law firm shall not continue any action, in particular the class action lawsuit or any, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations.

It is noted that subject to the public policy exception and ensuring that the recognition order is consistent with orders made in any concurrent proceedings (if there were any) under the BIA or CAA, the court can exercise his discretion and only providing the same or similar remedies as are available under Canadian insolvency law. In our case there is no indication as to the law in the foreign jurisdiction and whether there is asymmetrical or unfair treatment of Canadian creditors specifically.

Question 4.3 [maximum 5 marks]

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?

Pursuant to 272 (1) of the BIA, once the Canadian court has recognised that foreign proceedings and order was made, the Canadian court may, on application by the foreign agent, 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 that respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations. Subject to public policy exception, the court can exercise his discretion and only providing the same or similar remedies as are available under Canadian insolvency law¹⁶.

In Nishiyama (2020 BCSC 224) the court said that "the statute does not specify the jurisdiction in which these orders may apply. The court also noted that s 272(1) of the BIA had not been judicially considered prior to this case. Note that the "necessity" element was clearly made

¹⁶ Re Hartford Computer Hardware Inc, 2012 ONSC 964.

Commented [TE11]: 4/5 no mention of the opposing counsel and their possible arguments that this should be a foreign non-main proceeding

Commented [TE12]: 4/5

Commented [TE13]: the court is not restricted in exercising this discretion to only to providing the 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 ordinarily be available in Canadian proceedings

out in this case, as the target of the examination order was legally prohibited from leaving Japan and therefore could only be examined there".

Pursuant to 275 (1) once the recognition order has been made, the Canadian court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding, hence the Canadian court shall assist with any civil procedure of the foreign jurisdiction. Sections 275 (3) provides for cooperation including the communication of information by any means considered appropriate by the court.

It is noted that in Canadian procedure creditors have the right by the BIA to instruct the trustee to seek examination under oath of the bankrupt or any person having knowledge of the conduct or affairs of the bankrupt to aid in the recovery of assets for the benefit of the estate. The Court can order the examination of the Canadian resident for instance for the purpose of investigating the administration of the bankrupt estate. The court may also order delivery of documents relating to the bankrupt, its dealings or property.

*** End of Assessment ***

Commented [TE14]: 47/50

Commented [gf15R14]: Great showing!