



10 + 9.5 + 15 + 15 = $\frac{49.5}{50}$

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: **[studentID.assessment4C]**. An example would be something along the following lines: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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]

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

Which federal statute governs the bankruptcy regime in relation to an individual bankruptcy? Select the **correct answer** from the options below.

- (a) the Bankruptcy and Insolvency Act (BIA).
- (b) The Companies' Creditors Arrangement Act (CCAA).
- (c) The Winding-up and Restructuring Act.
- (d) The Canada Business Corporations Act (CBCA).

Question 1.3

Which of the following is **incorrect** with respect to proceedings under the CCAA?

- (a) The CCAA is a debtor-in-possession restructuring statute.
- (b) The CCAA is available to companies with debts less than CAD 5 million.
- (c) The CCAA is a federal statute.
- (d) The CCAA sets out a relatively skeletal framework, and affords broad discretion to a judge as compared to a restructuring under the BIA.

Question 1.4

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

The purpose(s) and objective(s) of the BIA is to:

- (a) provide for the financial rehabilitation of insolvent persons.
- (b) allow for an investigation to be made into the affairs of a bankrupt.
- (c) provide a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a *pari passu* basis.
- (d) All of the above. ✓

Question 1.5

Which of the following is **not** an “act of bankruptcy” listed in section 42 of the BIA?

- (a) the debtor makes an admission of his / her inability to pay debts.
- (b) the debtor ceases to meet liabilities generally as they become due.
- (c) the debtor makes an assignment of property to a trustee for the benefit of creditors.
- (d) the debtor misses a mortgage payment. ✓

Question 1.6

Indicate the **correct answer**:

Under Canadian law, when a company enters the “zone of insolvency”, the directors of a company:

- (a) continue to have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company. ✓
- (b) no longer have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.
- (c) cannot be held personally liable for any of the company's debts.
- (d) cannot consider, under any circumstances, the interests of creditors, consumers, governments, employees, or any other stakeholder in discharging their duties.

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:

Upon bankruptcy, the debtor ceases to have the legal right to deal with its property.

(a) True. ✓

(b) False.

Question 1.9

Indicate whether the statement below is True or False:

There is no automatic stay of proceedings upon entering bankruptcy proceedings.

(a) True.

(b) False. ✓

Question 1.10

Indicate whether the statement below is True or False:

Foreign creditors and Canadian creditors participate equally in a bankruptcy and no distinction is made between them.

(a) True. ✓

(b) False.

QUESTION 2 (direct questions) [10 marks]

9.5

Question 2.1 [maximum 3 marks]

Identify the conditions set out by the Supreme Court of Canada for a claim to be provable in bankruptcy under the BIA.

[The conditions set out by the Supreme Court of Canada for a claim to be provable in Bankruptcy under the BIA can be found in the case of Newfoundland and Labrador V. AbitibiBowater Inc¹, and they are as follows:

(1) The debt, liability or obligation must be owed to the Creditor;

¹ [2012] SCC 67 at para 26. See also note 87 Module 4C Guidance Text.

- (2) A debt, liability, or obligation must be incurred before the debtor becomes bankrupt; and
(3) It must be possible to attach a monetary value to the debt, liability or obligation.²]

Question 2.2 [maximum 2 marks]

Generally, in the context of an individual bankruptcy, what type of assets can a debtor keep in a bankruptcy?

[This question relates to exempt properties in bankruptcy of individuals in Canada. Bankruptcy exemptions in Canada are set out by provincial legislation, and how much of each exempt asset class a debtor can retain depends on the province or territory in which they live.³ However, generally, in the context of an individual bankruptcy, the type of assets a debtor can keep in a bankruptcy include the following;

- (a) Personal items and clothing;
(b) Household furniture, food and utensils in the debtor's permanent home;
(c) Tools necessary to a debtor's work;
(d) a motor vehicle with a value up to a certain limit; and
(e) certain farm property.⁴

In some provinces, nevertheless, there is a limited homestead exemption. For example, in the Province of Ontario, under the Execution Act,⁵ the principal residence of the debtor is exempt from forced seizure or sale if the value of the debtor's equity in the principal residence does not exceed the prescribed amount of CAD 10,000.⁶

Also, under Section 67 of the BIA, amounts held by individuals in RRSPs⁷ are exempt from seizure in bankruptcy, subject to a possible claw-back for contributions made in the 12 months preceding bankruptcy. Where Provincial Legislation exempts RRSPs from execution, the provincial legislation will apply. However, where provincial legislation is silent regarding the treatment of RRSPs, they will be exempt subject to the claw-back referred to above.⁸]

Question 2.3 [maximum 3 marks]

Name **three** methods for entering into bankruptcy.

[Under the Bankruptcy and Insolvency Act (BIA) 2019 of Canada, there are three methods of entering into bankruptcy namely;

² See, R J Wood, *Bankruptcy and Insolvency Law*, (2nd Ed, Irwin Law), "Essentials of Law", p 443. See also Sections 121 and 122 of the BIA which sets out the claims provable under the Canadian Bankruptcy and Insolvency System.

³ See, Guidance Text *ibid*, p 27.

⁴ *Idem*.

⁵ See, B Macdougall, *Canadian Personal Property Security Law*, LexisNexis, 2014, p 438..

⁶ Execution Act [1990], c E24, s.2 (2).

⁷ This is a type of Tax exempt retirement savings account. See Guidance Text, note 4, *ibid*.

⁸ *Idem*.

- (1) Involuntary method⁹
- (2) Voluntary method,¹⁰
- (3) On the failure of, or failure to perform the terms of, a BIA proposal.^{11]}

2.5
↳ negative note!

Question 2.4 [maximum 2 marks]

What is the definition of “debtor” in section 2 of the BIA?

[Section 2 of the BIA defined “debtor” to include an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt.

Under the BIA, an “Insolvent person” 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 1000, and (a) is unable to meet obligations as they generally become due (the cash flow test); (b) has ceased paying current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all of his obligations, due and accruing due (the balance sheet test).¹²

A “person” is defined to include a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, as well as the successors, heirs, executors, liquidators of the succession, administrators or other legal representatives of a person.¹³ A “Corporation” is however defined to include a company or legal person that is incorporated by or under an Act of parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorised to carry on business in Canada or has an office or property in Canada or an income trust.¹⁴ The purport of this however, is that 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.^{15]}

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

Question 3.1 [maximum 8 marks]

What is the difference between a private receiver and a court-appointed receiver?

⁹ See, BIA, s. 43(1).

¹⁰ Voluntary bankruptcy occurs when the debtor voluntarily makes an assignment into bankruptcy. The debtor must however qualify as an Insolvent person under Section 2 of the BIA to qualify to file a voluntary bankruptcy. See, Guidance Text, *ibid*, p21.

¹¹ Assignment in bankruptcy on failure of BIA proposal is however automatic in certain circumstances for a corporate proposal, but not automatic for a consumer proposal. This so because under the BIA, a motion must be brought to assign the individual into bankruptcy.

¹² See, BIA s.2. See also Guidance Text, *ibid*. p19.

¹³ *Idem*.

¹⁴ *Idem*.

¹⁵ See, Guidance Text, *ibid*, p19.

In your essay you should refer to at least the following: (1) how each type of receiver is appointed, (2) the duties of each type of receiver, and (3) the circumstances in which each type of receiver is generally used.

[The difference between a private receiver and a court-appointed receiver under the Canadian bankruptcy and insolvency system can be categorised as follows;

A private receiver is a receiver appointed by a secured creditor under a contractual right where the debtor is unable to meet its obligations in a security agreement between the debtor and the secured creditor. The secured creditor appoints the private receiver by written notice and informs the debtor of the receiver's appointment. Upon the debtor's notification, the private receiver takes control to perform its responsibilities contained in its appointment. Primarily, the private receiver's duties are to the secured creditor that appointed it. However, a private receiver has a general duty to act honestly, in good faith and in a commercially reasonable manner, including to attempt to maximise recoveries and to obtain the best price for the debtor's assets in the circumstances.¹⁶ A private receiver upon appointment also has a duty to provide notice of its appointment to all known creditors and prepare and distribute interim and final reports concerning the receivership and file same with OSB and also made available to all creditors. Private receivers are mostly used where there is a small business or a discrete pool of assets and there will not be competing creditor claims or disputes with the debtor. Furthermore, private receivership generally does not involve court attendances and therefore are quick and cost effective.¹⁷

A court-appointed receiver on the other hand, is a receiver which the BIA¹⁸ authorises a secured creditor to apply to the court for its appointment. This receiver upon appointment has a national authority to take control of the business of the debtor when the debtor is unable to meet its obligations under the security agreement between the debtor and the creditor. The Courts of Justice Acts of the individual provinces in Canada also allow the court to appoint a receiver on application by any interested party (including shareholders or unsecured creditors) where it is "just and convenient" to do (called an "equitable receiver").¹⁹

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers. In practice, the appointing court typically issues a broad stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court, rendering ipso facto clauses inoperable, prohibiting all parties including utilities from terminating contracts for pre-filing breaches, and providing for a super-priority charge for the receiver's professional fees and that of its counsel and the appointing creditor over the assets. The court-appointed receiver is also permitted to borrow on a super-priority basis, akin to DIP financing. In appropriate cases the court may order critical suppliers to provide continued supply on fair market cash on delivery items.²⁰

By Section 244 of the BIA, a secured creditor must provide a statutory 10-day notice of its intention to enforce its security and appoint a receiver, if such receiver is to be appointed over all or substantially all of the inventory accounts receivables or other property of an insolvent

¹⁶ See, L A Rogers and P L J Huff, "Commercial Restructuring and Insolvency in Canada", The Insolvency Law Institute, p18. See also Guidance Text *ibid*, p39. See also BIA s.247 2019 current to March 22, 2022.

¹⁷ See, Guidance Text, *idem*.

¹⁸ See BIA, s.243.

¹⁹ See, Guidance Text *ibid*.

²⁰ See, *idem*.

debtor.²¹ As a practical matter, secured lenders typically issue a “section 244 notice” whenever enforcing security, out of an abundance of caution.²² However, an interim receiver may be appointed prior to the expiration of the 10-day notice period where it is necessary to protect or preserve assets on an interim basis.²³

The court-appointed receiver is an officer of the court and has duties to all creditors of the debtor, unlike the private receiver that has a duty to the secured creditor that appointed it. The court-appointed receiver reports to and takes directions and instructions from the court, not the creditor that first sought its appointment. Most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement; although certain actions such as major assets sales, usually require court approval. On sale of the assets the court will provide an order that vests title in the property to the purchaser free and clear of prior encumbrances and claims, which thereafter “attach” to the sales proceeds without change to their priority. In this way, receivership is said to provide for “clean” title to the assets of a business.²⁴ Also, once a court-appointed receiver has realised on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, which generally requires court approval. If the only recovery is to secure creditors, there maybe no need for a claim process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court’s approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceeding.²⁵ In addition to the general reporting requirements of receivers, the court-appointed receiver must also report to the court itself as and when necessary or required about how its mandate is being carried out. The court-appointed receiver also has a duty under Section 247 of the BIA to act honestly and in good faith; and deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Court-appointed receiver is usually used in more complex cases, especially where there are competing claims between creditors or disputes between the creditor and the debtor, or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis. Court-appointed receiver is also used where a greater degree of comfort for creditors and professionals from potential liability standpoint is required. This is so, because the court must approve many of the receiver’s decisions along the way. For example, a sale process for the business may be approved by the court as fair and reasonable, allowing the receiver and any potential purchaser to be less concerned about sale process decisions being scrutinised by the courts later.]

Question 3.2 [maximum 7 marks]

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 following a “single proceeding” model.

²¹ Idem.

²² Idem.

²³ Idem.

²⁴ Idem.

²⁵ Idem.

[The main policy goals of the Canadian Insolvency regime can be said to focus on certainty, transparency asset preservation, value maximization and rehabilitation.²⁶ These policy goals are reflected in different aspects of the Insolvency system as follows;

1. The Canadian Insolvency regime policy goal relating to focus on certainty can be found in the nature of Statutory frame-work for the regulation of Insolvency in Canada which aimed at promoting economic stability and growth. The Statutory frame-work sets out definite procedures to adopt or follow in any aspect of the Insolvency system. In Canada, the federal legislature and the 10 provincial legislature of the ten (10) provinces in Canada are empowered with legislative jurisdiction in Insolvency matters; while the federal legislature deals with issues relating to Bankruptcy and Insolvency, which is a matter of federal jurisdiction, the provincial legislature deals with issues relating to property and civil rights, which includes the areas of real and personal property and the creation and realization of security, which are matters within provincial jurisdiction. Though, laws in the area of property and civil rights differ from province to province.²⁷ The two main federal statutes regulating Insolvency proceedings are the Bankruptcy and Insolvency Act (BIA) last amended 2019 and the Companies Creditors Arrangement Act (CCAA) last amended on November 1, 2019. The BIA sets out the Canada's bankruptcy regime for both individuals and for the liquidation of a business. It also includes provisions governing debtor in possession "proposal", a restructuring process that allow debtor companies to reach compromises with their creditors, including the sale of all or part of the business, under court supervision.²⁸ While, the CCAA, is a debtor-in-possession restructuring statute that sets out a relatively skeletal frame-work for the reorganization of Insolvent companies with debts over CAD 5Million, etc²⁹
2. The Canadian Insolvency regime policy goal focus on transparency can be found in the overall regulation and management of insolvency proceedings which is primarily done through the oversight of the court.³⁰The day-to-day process is largely overseen by court appointed representatives such as trustees, receivers of the CCAA Monitor, who owe broad duties to the court and all stakeholders and periodically report to creditors and the court. Creditors are provided a degree of control over insolvency proceedings through voting mechanisms and other powers in both bankruptcy and restructuring situations and may seek to replace estate professionals in certain circumstances. Creditors also have the right to information and to be heard by the court overseeing the insolvency proceeding.³¹
3. The policy of the Canadian Insolvency regime relating to asset preservation can be found in the BIA debtor-in-possession proposal proceedings and the CCAA debtor-in-possession restructuring statute that sets out a relatively skeletal framework for the reorganization of insolvent companies with debts over CAD 5Million. The CCAA provides for "plans of arrangement" so debtors can reach compromises with their creditors 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 to a third party purchaser.³² The CCAA also allow for

²⁶ See, Guidance Text *ibid*, p17.

²⁷ See, The Canadian Insolvency System, "A Brief Overview", International Insolvency Insitute- www.iiiglobal.org, p1.

²⁸ See, Guidance Text *ibid*, p6.

²⁹ *Idem*.

³⁰ See, Guidance Text *ibid*, p17.

³¹ *Idem*. See also R. J. Wood on the objectives of Insolvency Law; R. J. Wood, Bankruptcy and Insolvency Law (Toronto: Irwin Law Book, 2009) at p4 (referring to UNCITRAL Legislative Guide on Insolvency Law at p14).

³² See, Guidance Text, p41.

the sale of all or part of the business under court supervision, even without a formal plan of reorganization.³³ These laws offer security for investors and lenders in both consumer and commercial borrowing transactions in Canada.

4. The policy goal of the Canadian insolvency system relating to value maximization can be found in one of the recognised purposes of the BIA which provide for the setting aside transfers under value, preferences, settlements and other fraudulent transactions aimed at maximizing the value of the insolvent estate and to enable all creditors to share equally in the value of the bankrupt's assets. These impeachable pre-bankruptcy transactions are provided for in sections 95 and 96 of the BIA and section 36.1 of the CCAA respectively. The value maximization policy goal through impeachable pre-bankruptcy transactions above is also provided for under the Provincial Fraudulent Conveyances Act Legislation and/ or Assignments and Preferences Acts (FCA Legislation).³⁴
5. Similarly, the Canadian policy goal relating to rehabilitation can also be found in the recognised purpose of the BIA which also provide for the financial rehabilitation of the insolvent persons. Under the BIA, an individual bankrupt can only be automatically discharged nine months after the bankruptcy is filed if among other conditions set out by the BIA, the bankrupt has attended two financial counselling sessions.³⁵ This counselling sessions are aimed at rehabilitating the individual bankrupt and prepare him for a new life of financial responsibility management.³⁶ There is however no such requirement under the CCAA relating to corporate insolvency.

Meanwhile, the National Insolvency system in Canada is described as following a "single proceeding" model because in Canada, a creditor's action to recover debts against a debtor by initiating an insolvency proceeding is regarded as a proceeding for all creditors of the debtor. There is no separate filing of insolvency proceeding by a creditor against a debtor, once one creditor had already filed such proceedings. "The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceeding to recover its debts. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with Creditors because it places them all on an equal footing rather than exposing them to the risk that a more aggressive creditor will realise its claims against the debtor's limited assets..."³⁷ It is one creditor's proceeding against a debtor for all creditors of the debtor that is described as a single proceeding model. This is the foundational model of the Canadian Insolvency system.³⁸

³³ Note that both the CCAA and the BIA permit creditors to apply to the court to terminate the restructuring proceedings if they believe they are being materially prejudiced. For example, (1) debtor's lack of due diligence (2) bad faith by the debtor, (3) unlikelihood of a viable proposal being made, and (4) material prejudice to creditors. See, BIA, ss. 50(12), 50.4(9) and 50.4(11); CCAA, s.11.02(3). See also, Guidance Text, p44.

³⁴ See, eg, GSBC 1996, c163. See also note 105 Guidance Text at p29.

³⁵ See, Guidance Text, p35.

³⁶ This key objective of the BIA to enable an honest but unfortunate debtor to obtain a discharge from his or her debts subject to the conditions as may be imposed by the court, is referred to as the "fresh start" principle. See, Discussion Paper, Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, Corporate, Insolvency and Competition Law Policy, Industry Canada.

³⁷ See, *Century Services Inc. v. Canada (Attorney General)* 2020 SCC 60 at para 22. See also, R. J. Wood and David J. Bryan, "Creeping Statutory Obsolescence in Bankruptcy Law, p4.

³⁸ See *Century Services Inc. v. Canada (Attorney General)* (supra).

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 process to commence a recognition application and obtain recognition of the foreign proceeding in Canada. What is your advice?

[My advice is that the foreign agent should initiate the process to commence a recognition application and obtain recognition of the foreign proceeding in Canada by filing a suit in a Canadian court for that purpose. Under the provisions of the BIA and CCAA, Canadian courts require the formal proof of three main requirements to recognise a foreign proceeding. These main requirements are;

- (1) That the proceeding is a “foreign proceeding” in accordance with the statutory definition;
- (2) That the applicant is a “foreign representative” in accordance with the statutory definition; and
- (3) Whether the “foreign proceeding” is a “foreign main proceeding” or a “foreign non-main proceeding” based on a centre of main interest (COMI) analysis.³⁹

Under Section 268(1) of the BIA, a foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors’ 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. The relevant facts reveal that the agent represented by the Counsel in the foreign jurisdiction operates under the law of the foreign jurisdiction and he is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. This represents a judicial or administrative proceeding

³⁹ See, BIA, s269-272 and CCAA, s46-49. See also, Guidance Text *ibid*, p59.

requirement of the statutory definition of a foreign proceeding in accordance to section 268(1) of the BIA.

Secondly, by Section 268(1) of the BIA, foreign representative means a person or body, including one appointed on an interim basis, who is authorised, 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 foreign proceeding. Again, the relevant facts reveal that the Counsel in the foreign jurisdiction is a person representing an agent, appointed by the agent under the law of the foreign jurisdiction and empowered in the foreign proceeding to deal with assets of insolvent companies. "Assets of insolvent companies" can however be dealt with only through reorganization or liquidation. By the relevant facts the Counsel appointment is to act as a representative in the foreign proceeding to administer the debtor's property or affairs for the purpose of reorganization or liquidation in accordance to the statutory definition of section 268(1) of the BIA.

On the requirement whether the " foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" based on a centre of main interest (COMI) analysis, section 268(2) of the BIA, stated that, for the purposes of this part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interest. By the relevant facts, the online seller is a company with head office registered in the foreign jurisdiction where senior management of the company have their offices. Under the BIA provision, foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests. In this regard, since the debtor's centre of main interest is in the jurisdiction of the foreign jurisdiction, the proceeding is regarded as foreign main proceeding and qualify as a requirement to be proved for the Canadian court to recognize the foreign proceeding.

Furthermore, upon proving the three main requirements above, the Counsel, being the foreign representative will accompany the application for the recognition of the proceeding with the following documents set out in Section 46 (2) of the CCAA⁴⁰, which are;

- (a) A certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b) A certified copy of the instrument, however designated, authorising 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
- (c) A statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

The Court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) of section 46 of the CCAA as evidence of the existence of the foreign proceeding and of the foreign representatives' authority that it considers appropriate.⁴¹ However, in the absence of the documents referred to in paragraphs (2)(a) and (b) above, the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.⁴² The court may also require a translation of any document

⁴⁰ See also, the BIA, s269(2).

⁴¹ See *ibid*, s269(3).

⁴² See *ibid*, s269(4).

accompanying the application,⁴³ especially where the document produced in the foreign proceeding is in a language different from the language of the court in Canada.

However, upon satisfaction that the application for the recognition of the 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 recognising the foreign proceeding,⁴⁴ in Canada. In the case of Centaur litigation SPC, Re,⁴⁵ a Cayman's liquidator successfully brought an application for an order that proceedings commenced in the Cayman Island be recognised as a foreign main proceeding. In concluding that the definition of "foreign proceeding" was met, the Court held that "the Cayman proceeding is a judicial proceeding in a jurisdiction outside Canada dealing with the creditor's collective interests generally under the Cayman Island Companies Law, which permits insolvent companies to restructure under the supervision of the court."⁴⁶ The facts at hand, reveal that the Counsel in the foreign jurisdiction has the judicial and legislative authority in the foreign jurisdiction to deal with the assets of insolvent companies which usually involve creditors' collective interests and therefore meets the requirement to commence a recognition application and obtain recognition of the foreign proceeding in Canada.
]

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?

[Yes, I believed the foreign agent can obtain a stay of the Canadian litigation. The reasons are as follows;

5
By the provision of section 47(2) of the CCAA,⁴⁷ the court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. Once the court determines the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of the Canadian litigation. But if it determines that the proceeding is a foreign non-main proceeding, a stay of the Canadian litigation may be requested by the foreign agent, however the court will exercise the discretion to make any order necessary for the protection of the online seller debtor's property or the interests of creditors. Section 45(1) of the CCAA⁴⁸ defined foreign main proceeding to mean foreign proceeding in a jurisdiction where the debtor company has the Centre of its Main Interests (COMI) and a foreign non-main proceeding to mean a foreign proceeding, other than a foreign main proceeding. There is however no statutory definition of COMI in either the CCAA or the BIA, however each statute contains a rebuttable presumption.⁴⁹ In the case of an individual, the COMI, in the absence of proof to the contrary, is the debtor's ordinary place of residence. In the case of a Company, the COMI, in absence of proof to the contrary, is the company's registered office.⁵⁰ The courts have however

⁴³ See *ibid*, s269(5): CCAA, s46(5).

⁴⁴ See *ibid*, s270(1): CCAA, s47(1).

⁴⁵ [2016] BCSC 1224.

⁴⁶ See also the case of *Re Syncreon Group BV*, 2019 ONSC 5774 [Commercial list]. See also, Guidance Text, p62.

⁴⁷ See also, BIA s270(2).

⁴⁸ See also, BIA s268(1).

⁴⁹ See Guidance Text *ibid*, p60.

⁵⁰ See BIA, s268(2): CCAA, s45(2). See also Guidance Text, p60.

identified the following three considerations considered as a whole, are of primary importance for determining COMI;⁵¹

- (1) The location that significant creditors recognise as being the centre of the company's operations;
- (2) The location in which the debtor's principal asset or operations are found; and
- (3) The location of the debtor's headquarters, head office or "nerve centre".⁵²

Once the COMI is determined the foreign proceeding is either classified as the foreign main proceeding, if it is where the COMI is located, or the foreign non-main proceeding, if it is not where the COMI is located.⁵³ In either case, there are effect that stem from such recognition.⁵⁴

In addition, regarding the point made earlier on the grant of an automatic stay of the Canadian litigation, if the foreign proceeding is recognised as foreign main proceeding, and the application for grant of a stay subject to the Court's discretion, if the foreign proceeding is recognised as foreign non-main proceeding, if a foreign proceeding is recognised, as either main or non-main, it gives the foreign representative standing to appear and be heard in Canadian Courts.⁵⁵ Furthermore, the recognition imposes an obligation on the Canadian officials to cooperate with the foreign representative and the foreign court. Both the BIA and the CCAA contain broadly worded, discretionary provisions that provide that where an Order recognising a foreign proceeding has been made the court may, on application by the foreign representative, if it is satisfied that it is necessary for the protection of the debtor companies property or the interests of a creditor or creditors, make "any order that it considers appropriate.⁵⁶ Applying the relevant facts that "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 Canadian Court may recognise the foreign proceeding as a foreign main proceeding wherein the will automatically issue a stay of the Canadian legislation. But where the court determines the foreign proceeding as a foreign non-main proceeding, then the foreign agent will have to apply and request for the stay of the Canadian litigation. While the former recognition is automatic, the latter recognition is subject to the court's discretion. In *Re Mt Gox Co*,⁵⁷ the Ontario Court applied the provisions of Part XIII of the BIA to recognise Japanese Bankruptcy proceedings for Mt Gox Co Ltd in Canada as a foreign main proceeding. Mt Gox was one of the largest Bitcoin exchanges in the World. At the beginning of 2014, Mt Gox halted all withdrawals of Bitcoins, claiming that it lost 850,000 Bitcoins in a hacking attack. Mt Gox subsequently filed a petition for a civil rehabilitation proceeding in Tokyo, which is analogous to restructuring proceedings available to debtors in Canada. The Tokyo District Court dismissed the civil rehabilitation petition and commenced bankruptcy proceedings, appointing a bankruptcy trustee. Following the bankruptcy, Canadian investors launched a CAD 500 Million class action against Mt Gox's alleging negligence, breach of contract and fraud. In response, Mt Gox's bankruptcy trustee sought recognition of the Japanese bankruptcy proceeding in Ontario as a foreign main proceeding. The court's recognition of the Japanese bankruptcy proceeding in

⁵¹ See in *Re Mt Gox* [2014], ONSC 5811. See also *Re Massachusetts Elephant & Castle Group Inc.* (2011), 81 CBR (5th) 102 (Ont SCJ) and *Re Lightsquared LP*, 2012 CaeswellOnt 8614 (Ont SCJ [Commercial List]) and *Re Caesars Entertainment Operating Co*, 2015 Carswell Ont 3284 (Ont SCJ) for application of the same principles under the CCAA. See also Guidance Text *ibid*, n217, p60.

⁵² See, Guidance Text, *idem*.

⁵³ *Idem*.

⁵⁴ *Idem*.

⁵⁵ See BIA, s272(1): CCAA s49(1).

⁵⁶ *Idem*. See also Guidance Text *ibid*, p60.

⁵⁷ *Supra*.

Ontario as a foreign main proceeding resulted in a stay of all actions brought against the company in Canada, including the class action. The same position is applicable to the present scenario and relevant facts.]

Question 4.3 [maximum 5 marks]

The foreign agent wants to know whether the Canadian court is limited to Canadian entitlements and remedies in the relief they can provide? What do you tell the foreign agent?

[The Canadian Court is not limited to Canadian entitlements and remedies in the relief they can provide. This is so because, under section 272(1) of the BIA and section 49(1) of the CCAA, the court, due to the broadly worded, discretionary provisions that provide that where an order recognising a foreign proceeding has been made, the court may on the application by the foreign representative, if it is satisfied that it is necessary for the protection of the debtor company's property or the interest of a creditor or creditors, make "any order that it considers appropriate." This include, but is not limited to, orders respecting the examination of witnesses and the taking of evidence, and provision of information and the taking of evidence, and provision of information on the debtor's property and affairs. Subject to the public policy exception, and ensuring that any such order is consistent with orders made in any concurrent proceedings under the BIA or CCAA,⁵⁸ the court is not restricted in exercising this discretion to only to providing the same or similar remedies as are available under the 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.⁵⁹]

5

*** End of Assessment ***

⁵⁸ In *Nishiyama* (2020) BCSC 224, the court that the order-making powers under section 272(2) grant the court jurisdiction to make the enumerated kinds of orders in the jurisdiction of the foreign main proceeding where "necessary" and "appropriate" to do so once a foreign proceeding is recognised (here, the Japanese proceedings were recognised as foreign main proceedings) – See para 48. This is a novel case because the statute does not specify the jurisdiction in which these orders may apply. The court noted that s.272(1) of the BIA had not been judicially considered prior to this case. Not that the "necessity" element was clearly made out in this case, as the target of the examination order was legally prohibited from leaving Japan and therefore could only be examined there. See para 51. See also Guidance Text *ibid*, note 221, p61.

⁵⁹ See, *Re Hartford Computer Hardware Inc*, 2012 ONSC 964. See also Guidance Text *idem*.