



**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.

36/50

### 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 or Avenir Next 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: 202223-336.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 “studentID” 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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **8 pages**.

**ANSWER ALL THE QUESTIONS**

PLEASE NOTE: UNLESS OTHERWISE INDICATED/CITED THROUGHOUT THIS EXAM, THE SOURCE UTILIZED IN COMPLETING THIS EXAMINATION WAS: Module 4C Guidance Text - Canada

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

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

**Question 1.1**

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 of 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 **most correct** answer from the options below:

The purpose(s) and objective(s) of the BIA is / are 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 statements are correct.

**Question 1.5**

Which of the following is **not** included in the definition of an “insolvent person” under section 2 of the BIA:

- (a) A person who is not bankrupt.
- (b) A person who resides or carries on business or has property in Canada.
- (c) A person whose liabilities to creditors provable as claims under the BIA amount to at least CAD 10,000.
- (d) A person (i) who is unable to meet obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course of business as they generally become due, or (iii) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all his obligations due and accruing due.

**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**:

Insolvency proceedings in Canada are governed primarily by federal statutes.

(a) True. ✓

(b) False.

**Question 1.8**

Indicate whether the statement below is **true or false**:

The CCAA is a debtor-in-possession restructuring statute designed for the reorganisation of insolvent companies with debts under CAD 5 million.

(a) True. ✓

(b) False.

**Question 1.9**

Indicate whether the statement below is **true or false**:

In Canada, both natural persons and legal entities may be subject to bankruptcy proceedings under the BIA.

(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 in total]**

**Question 2.1 [maximum 3 marks]**

Identify three of the recognised purposes of the BIA.

The following are recognized purposes of the BIA:

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1. Sets for mechanism/procedures that allows for the financial rehabilitation of insolvent persons.
2. Sets forth a collective proceeding aimed at the orderly and fair distribution of assets on a *pari passu* basis among the debtor's unsecured creditors.
3. Allows for the investigation into the bankrupt's affairs.
4. Provides for, among other things, preference and fraudulent transfer actions and settlements in order to provide for an equal process. Funds that belong to the estate can be retrieved through these actions to allow for all creditors to equally share the value of the bankruptcy estate/assets.

At least one author summarizes the purpose of the BIA as follows: "The purpose of the bankruptcy regime is to allow the bankrupt entity protection from creditors and provide for the orderly and fair liquidation and distribution of the bankrupt's assets to creditors." See [Global-Restructuring-Insolvency-Guide-12-2016New-Logo-Canada.pdf \(bakermckenzie.com\)](#).

### 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?

In contrast to corporate debtors, an individual bankrupt might be able to keep certain assets (exempt assets), including, but not limited to, personal items, clothing, a car up to a certain value, various farm property, property the debtor needs to maintain employment, home furniture, food and other items located in the debtor's permanent residence. Notably, what property may be exempt is set by provincial legislation. These legislations may vary in what an individual bankrupt might be able to retain while in bankruptcy.

For example, in Ontario, under s. 2(1) of the Ontario Execution Act, the following exemptions apply:

#### Exemptions

2 (1) The following personal property of a debtor that is not a corporation is, at the option of the debtor, exempt from forced seizure or sale by any process at law or in equity:

1. Necessary clothing of the debtor and the debtor's dependants.
2. Household furnishings and appliances that are of a value not exceeding the prescribed amount.
3. Tools and other personal property of the debtor, not exceeding the prescribed amount in value, that are used by the debtor to earn income from the debtor's occupation.
4. One motor vehicle that is of a value not exceeding the prescribed amount.
5. Personal property prescribed by the regulations that is of a value not exceeding the prescribed amount. 2010, c. 16, Sched. 2, s. 3 (6).

Source: [90e24\\_e.doc \(live.com\)](#)

Notably, in Ontario, a limited homestead exemption applies. With respect to the principal residence of the Debtor, s. 2(2) of the Execution Act provides that "(2) The principal residence of a debtor is exempt from forced seizure or sale by any process at law or in equity if the value of the debtor's equity in the principal residence does not exceed the prescribed amount."

Source: *Id.*

Certain specific rules may apply with respect to the exemption of RRSPs which constitute certain types of tax exempt retirement plan.

**Question 2.3 [maximum 3 marks]**

Name three types of court-officers that may be appointed in insolvency proceedings.

1. Private Receiver (provided for in security agreements entered into by and between a debtor and a secured creditor). Importantly, a private receiver's duties usually only run to the secured creditor, but a private receiver also has the general duties of, among other things, to act honestly and in good faith.
2. Court-appointed Receiver: When a receiver is appointed by the court upon application of a secured creditor, many of the court-appointed receiver's actions must be approved by the Court. As such, more visibility and comfort is provided to other parties-in-interest.
3. Trustee: manages liquidating bankruptcy proceedings under the BIA. In BIA proposals, although they constitute debtor-in-possession proceedings, a trustee manages the process. The trustee must, among other things, seek court-approval for the sale of assets.

**Question 2.4 [maximum 2 marks]**

What is the definition of a "person" in section 2 of the BIA?

In connection with the BIA, the term "person" is defined in section 2 of the BIA as follows:

"**person** includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person."

Source: [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://www.justice.gc.ca)

**QUESTION 3 (essay-type question) [15 marks]**

**Question 3.1 [maximum 8 marks]**

Write an essay on the difference between a private receiver and a court-appointed receiver.

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

In general, "[a] Receivership is a remedy available to secured creditors to recover amounts outstanding under a secured loan in the event the company defaults on its loan payments." Source: [What is a Receivership? | PwC Canada](http://www.pwc.ca) Under a Canadian receivership, either a private or court-appointed receiver may be appointed. *Id.*

There are similarities, but also vast differences between private and court-appointed receivers under the Canadian system.

### I. Appointments and Duties

The appointment of a private receiver is a contractual right of a secured creditor provided for in a security agreement between the secured creditor and the debtor. See [Receivership: How It Works | Business Bankruptcy Vs. Receivership \(lctaylor.com\)](#) ("Privately Appointed Receivers can only be appointed if the related loan documents specifically provide for the appointment of a Receiver in the event that certain conditions are met, including a default on the loan. This means that the borrower would have agreed to this possibility when it signed the document and received the secured loan or secured line of credit. Privately Appointed Receivers generally only act on behalf of the creditor that appointed them, within the confines of the security agreement and the applicable legislation.") In contrast, court-appointed receivers, are, as the name indicates, appointed by the court.

While both types of receivers have the duty to act, among other things, honestly, in good faith and in a reasonable manner with the aim of maximizing recovery for creditors; a private receiver's duty runs primarily to the secured creditor as provided in the underlying security agreement. see [What is a Receivership? | PwC Canada](#) ("Privately Appointed Receivers will generally only act on behalf of the secured creditor that appointed them and will realize on the assets specifically covered by the loan agreement."); a court-appointed receiver is, as the name indicates, appointed by the court (under Section 243 of the BIA), upon application of a secured creditor. Most importantly, and in contrast to the private receiver, a court-appointed receiver's duties, as an officer of the court, run to all creditors, not only to a secured creditor, of the debtor. See *id.* ("Court Appointed Receivers however, are officers of the Court and act on behalf of all creditors. The powers and rights of Court Appointed Receivers are included in the Court order that appointed them.") Other interested parties may also apply to the court for the appointment of a receiver under the Court of Justice Act in individual provinces.

Importantly, receivers must act, among other things, in good faith as prescribed by section 247 of the BIA:

#### Good faith, etc.

#### 247 A receiver shall

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Source: [Bankruptcy and Insolvency Act \(justice.gc.ca\)](#)

With respect to court-appointed receivers, section 243 of the BIA addresses their appointments. More specifically, section 243 of the BIA provides, in pertinent part, as follows:

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
  - (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
  - (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
  - (c) take any other action that the court considers advisable.



**Source:** [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://justice.gc.ca)

In contrast to a private receiver, a court-appointed receiver's powers are derived from the court order and specific legislation. Among other things, a court-appointed receiver has broad powers, including, among others, the borrowing of funds on a super-priority basis. In most cases, a standard template order is sufficient; however, such template may be modified and tailored towards the specific needs of a given case.

Notably, if a secured creditor intends to enforce its security right and seek the appointment of a receiver over all or substantially all of the debtor's assets, the secured creditor must file a "244 notice" which provides for a 10-day notice under the statute. Such a notice is often filed even in cases in which the receiver will not be appointed over all or substantially all of the debtor's assets out of an abundance of caution. More specifically, such notice should include:

- **244 (1)** A secured creditor who intends to enforce a security on all or substantially all of
  - **(a)** the inventory,
  - **(b)** the accounts receivable, or
  - **(c)** the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

**Source:** [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://justice.gc.ca)

Under certain circumstances, the court may appoint an "interim receiver" if the situation warrants it (for example, if the estate contains perishable goods, among other things) to protect and/or preserve the debtor's assets during the interim period.

Once the assets of the debtor have been realized, the court-appointed receiver will make distributions in accordance with the creditors' entitlements and priorities, which the court must generally approve. Under certain circumstances, the court-appointed receiver must make an assignment of the debtor into a formal bankruptcy.

Both private and court-appointed receivers have reporting requirements. First, they must notify all known creditors of their appointment. They must further prepare interim and final reports and distribute them. These reports are made available to creditors. They must also prepare statements of accounts. Depending upon the particularities of a given case, there might also be reporting requirements as to matters involving intellectual property. See Section 246(1) 1. and 2 of the BIA. In addition, court-appointed receivers have certain reporting requirements to the court during the pendency of the proceedings.

## II. Circumstances in Which each Type of Receiver is generally Used ✓

While court-appointed receivers are appointed more often in complex cases (cases in which court involvement throughout the pendency of a case will likely be needed because of, among other things, competing creditor claims, disputes between creditors, etc.), private receivers are more common in small, less complex cases or in cases with small and/or discrete assets without, or with less of a likelihood of creditor disputes or competing creditor claims. Further, ✓ private receiverships do not require court attendances, are quicker and generally less expensive.

Importantly, the appointment of a receiver by the court oftentimes provides more comfort to all interested parties from a liability standpoint as many actions by the receiver, for example asset sales, must be approved by the court which provides less risk of challenges in the future.

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### III. Miscellaneous

Receiverships may be useful in a variety of circumstance beyond those explained above. For example, a receivership might be helpful in replacing management that is inefficient where the company, however, is profitable. It might also be helpful in resolving shareholder disputes. See [Receivership: How It Works | Business Bankruptcy Vs. Receivership \(lctaylor.com\)](#) ("There are other instances where Receivership can be a useful tool. Receivers are often appointed in situations such as disputes between shareholders, where there are competing secured claims, or when ownership of an asset is unclear. In such instances, the court may find it appropriate to appoint a Receiver to take control while the dispute is resolved so that all parties involved can be confident that the assets are in impartial hands and no party is using them to the detriment of the others. Having the assets under the control of a neutral party can sometimes allow the opposing sides to focus on a resolution of the larger issues between them.")

#### Question 3.2 [maximum 7 marks]

Write a short essay that identifies the three methods for entering into bankruptcy. In your essay, explain the meaning of an "act of bankruptcy".

Bankruptcy proceedings in Canada may be commenced involuntarily, voluntarily, or in the event of a failure or to perform under the terms of a BIA proposal.

#### Involuntary Bankruptcy

An involuntary bankruptcy may be commenced by a creditor(s) that is owed more than CAD 1,000 of unsecured debt. Such creditor(s) must provide evidence that the debtor, within 6 months of the filing, committed an "act of bankruptcy," which usually falls into two categories of conduct: (1) the debtor violated or interfered with commercial norms of morality with creditor's legitimate collection efforts or (ii) the debtor is in fact insolvent.

More specifically, section 42(1) of the BIA provides as follows regarding "acts of bankruptcy":

Acts of bankruptcy

- 42 (1) A debtor commits an act of bankruptcy in each of the following cases:
  - (a) if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;
  - (b) if in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;
  - (c) if in Canada or elsewhere the debtor makes any transfer of the debtor's property or any part of it, or creates any charge on it, that would under this Act be void or, in the Province of Quebec, null as a fraudulent preference;
  - (d) if, with intent to defeat or delay his creditors, he departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling-house or otherwise absents himself;

- (e) if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized, levied on or taken in execution to remain unsatisfied until within five days after the time fixed by the executing officer for the sale of the property or for fifteen days after the seizure, levy or taking in execution, or if any of the debtor's property has been sold by the executing officer, or if the execution or other process has been held by the executing officer for a period of fifteen days after written demand for payment without seizure, levy or taking in execution or satisfaction by payment, or if it is returned endorsed to the effect that the executing officer can find no property on which to levy or to seize or take, but if interpleader or opposition proceedings have been instituted with respect to the property seized, the time elapsing between the date at which the proceedings were instituted and the date at which the proceedings are finally disposed of, settled or abandoned shall not be taken into account in calculating the period of fifteen days;
- (f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;
- (g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;
- (h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;
- (i) if he defaults in any proposal made under this Act; and
- (j) if he ceases to meet his liabilities generally as they become due.

Source: [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://justice.gc.ca).

At least one author noted that the "bankruptcy application can be disputed, in which case an expedited trial of the issues is set to decide whether an act of bankruptcy has been committed." Source: [Global-Restructuring-Insolvency-Guide-12-2016New-Logo-Canada.pdf \(bakermckenzie.com\)](http://Global-Restructuring-Insolvency-Guide-12-2016New-Logo-Canada.pdf). Depending upon whether the Court is satisfied with the proof submitted, it will either grant or not grant the application.

See s. 43(6) and (7) of the BIA:

**Proof of facts, etc.**

**(6)** At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

**Marginal note: Dismissal of application**

**(7)** If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Source: [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://justice.gc.ca)

### **Voluntary Bankruptcy**

Generally, in a voluntary bankruptcy, the debtor itself commences the proceeding. A debtor may decide to initiate the proceeding for various reasons, including, among others, to stay litigation.

At least one author summarizes the procedure for the commencement of a voluntary proceeding as follows: "The most common way for an individual or company to become bankrupt is by making a voluntary assignment into bankruptcy. A voluntary assignment requires an application to the official receiver on a prescribed form which nominates a trustee to administer and distribute the assets of the bankrupt to creditors. Bankruptcy comes into effect on the date of acceptance by the official receiver. No application needs to be made to a court." Source: [Global-Restructuring-Insolvency-Guide-12-2016New-Logo-Canada.pdf \(bakermckenzie.com\)](#)

The application must be accompanied by a sworn statement by the Debtor setting for the Debtor's assets. Further, although the Debtor may choose the trustee (in contrast to an involuntary proceeding), unsecured creditors must approve such selection at the first meeting of creditors.

Importantly, the Court may annul a bankruptcy if it is not convinced that the requirements for its commencement had been met.

### **Failure of or perform under a BIA Proposal**

In general terms, a proposal allows a debtor to reach certain settlements and compromises with its creditors. The proposal mechanism appears similar to a chapter 11 plan under US insolvency law. To be approved by the court, a proposal must be accepted by a majority of creditors in a class by number and two-thirds by dollar value in order to bind the entire class.

At least one commentator notes that "[a] proposal is a relatively flexible method available to an individual or company to restructure financial obligations rather than simply filing for bankruptcy. Once approved by the requisite majority of creditors and then by the court, the proposal becomes a contract binding both the debtor and all creditors whether they voted in its favour or not. . . . If the proposal is approved, the company will enjoy its benefits so long as all its terms are implemented as promised. If the company defaults in its performance of the proposal terms, a bankruptcy can result." Source: [Global-Restructuring-Insolvency-Guide-12-2016New-Logo-Canada.pdf \(bakermckenzie.com\)](#)

As indicated, however, if the debtor fails to perform under the approved, binding proposal, an annulment by the Court might follow upon motion which might lead to the Debtor being automatically assigned into bankruptcy. Similarly, if the proposal is not approved by the required creditor majorities, the debtor will be deemed to have made an assignment into bankruptcy.

Slightly different rules apply in connection with proposals in consumer bankruptcy cases.

### **QUESTION 4 (fact-based application-type question) [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 that foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. An 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. This 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.

**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 in this regard?

I would advise the foreign agent as follows:

Both, the BIA and the CCAA, contain provisions regarding the recognition of foreign proceedings. More specifically, sections 269-272 of the BIA and sections 46-49 of the CCAA are applicable. The foreign agent may commence a recognition proceeding by filing an application for recognition of the foreign proceeding along with sufficient evidence (discussed below) of the foreign law evidencing that the applicant is indeed a foreign representative and that the proceeding at issue is indeed a foreign proceeding. Such evidence will aid the Canadian court in its determination as to whether the requirements for recognition have been met. Importantly, developed case law mandates that both terms (foreign representative and foreign proceeding) are to be given a broad meaning resulting in applicants generally meeting the requirements for recognition. Canadian courts will recognize (they are required to do so ("shall") – see s. 270(1) of the BIA and s. 47(1) of the CCAA below) the foreign proceeding upon submission of sufficient formal proof that the proceeding is a "foreign proceeding," and that the applicant is a "foreign representative." Importantly, once the Canadian court is satisfied that all requirements have been met, the recognition of the foreign proceeding is automatic.

For example, s. 270(1) of the BIA provides:

**Order recognizing foreign proceeding**

- 270 (1) 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.

Source: [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://www.justice.gc.ca)

Similarly, s. 47(1) of the CCAA provides:

**Order recognizing foreign proceeding**

- 47 (1) 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.

Source: [Companies' Creditors Arrangement Act \(justice.gc.ca\)](http://www.justice.gc.ca)

With respect to what kind of evidence the foreign representative should submit in support of its application for recognition of the foreign proceeding, I would refer the foreign representative to s. 46 of the CCAA and s. 269 of the BIA:

#### CCAA s. 46

##### Application for recognition of a foreign proceeding

- **46 (1)** A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.
- **Marginal note: Documents that must accompany application**
  - (2)** Subject to subsection (3), the application must be accompanied by
    - **(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, 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
    - **(c)** a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.
  - **Marginal note: Documents may be considered as proof**
    - (3)** The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.
  - **Marginal note: Other evidence**
    - (4)** In the absence of the documents referred to in paragraphs (2)(a) and (b), 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.
  - **Marginal note: Translation**
    - (5)** The court may require a translation of any document accompanying the application.

Source: Companies' Creditors Arrangement Act (justice.gc.ca)

#### s. 269 of the BIA

##### Application for recognition of a foreign proceeding

- **269 (1)** A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.
- **Marginal note: Documents that must accompany application**
  - (2)** Subject to subsection (3), the application must be accompanied by

- (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, 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
- (c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

- **Marginal note: Documents may be considered as proof**

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

- **Marginal note: Other evidence**

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), 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.

- **Marginal note: Translation**

(5) The court may require a translation of any document accompanying the application.

②

Source: Bankruptcy and Insolvency Act (justice.gc.ca)

Once the foreign proceeding is recognized as a foreign proceeding in Canada, the Court must then determine whether the foreign proceeding constitutes a "main" or "non-main" proceeding which requires the Canadian court to conduct a full "COMI" analysis which will be addressed in more detail under Question 4.2 below.

↳ could your answer have been more consistent by using content from the textbook?

**Question 4.2 [maximum 5 marks]**

The foreign agent wants to understand the factors considered by a court in determining whether a jurisdiction is a "centre of main interest" in respect of a foreign proceeding. What would you inform the foreign agent in this regard?

Neither the BIA nor the CCAA provides a definition of "COMI." However, both statutes provide for a rebuttable presumption that, in cases in which a company is the debtor, COMI is where the company's registered office is located unless there is evidence to the contrary. The determination where the COMI is located is critical as the result will matter for the Canadian Court's determination as to whether a certain proceeding can be classified as a foreign "main" or "non-main" proceeding which has important implications as discussed below.

The following three factors have been identified by the courts in various cases as being factors/questions that must be considered:

For example, in *Re Massachusetts Elephant & Castle Group Inc.* (2011), 81 CBR (5<sup>th</sup>) 102 (Ont SCJ), the Canadian Court addressed "the issue [of] whether there is sufficient evidence to rebut the s. 45(2) [of the CCAA] presumption that the COMI is the registered office of the debtor company." The debtor in that case was a company registered under the laws of Massachusetts in the United States. The Debtor argued that COMI is in the United States while others argued the contrary, namely that the COMI was in Canada. The Court addressed various factors that have to be considered, namely:

"in interpreting COMI, the following factors are usually significant:

- (a) the location of the debtor's headquarters or head office functions or nerve centre;
- (b) the location of the debtor's management; and
- (c) the location which significant creditors recognize as being the centre of the company's operations. [31] While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors." *Re Massachusetts Elephant & Castle Group Inc.* (2011), 81 CBR (5<sup>th</sup>) 102 (Ont SCJ) at 6.

Here, in the fact pattern, it seems that based on these factors, a Court would likely find that the online seller's COMI is in the foreign jurisdiction, because, (i) the location of the online seller's head office is in the foreign jurisdiction, (ii) its senior management is located and has offices there, and (iii) significant foreign based creditors whom are owed more than CAD 200 million (assuming the secured lenders mentioned in the fact pattern are located in the same foreign jurisdiction) are also located there (the fact pattern is a little unclear with respect to this fact).

On the other hand, especially the class action plaintiffs, could argue that the COMI should be in Canada as the class action litigation is pending there and because the company, therefore, as many creditors in Canada whose online orders had not been fulfilled. They might therefore argue that the COMI presumption can be rebutted. However, the secured lenders located in the foreign jurisdiction are probably considered to be more "significant" than individual creditors in determining the COMI. In addition, the litigation has not yet advanced and is still in the pleadings phase. Plaintiffs' possible argument that an investigation into whether the Canadian resident in charge of the Canadian warehouse diverted funds could better be done in Canada should also not weigh heavily against a finding that COMI should be in the foreign jurisdiction. Such an investigation can easily be undertaken by the foreign representative in hiring the proper professional in Canada.

The determination as to whether the COMI is in the foreign jurisdiction or in Canada is critical because if the determination results in a Court's finding that the COMI is in the foreign jurisdiction, the proceeding will be classified as a foreign "main" proceeding. This would result in the application of an automatic stay in Canada which would stay, among other things, the class action. In contrast, were the Court to determine that the COMI is in Canada, and the foreign proceeding is a non-main proceeding, the stay would not be automatic. Indeed, the stay would have to be separately requested by the foreign representative. Because the foreign representative would like to further investigate the issues in Canada (i.e., whether the resident in charge of the warehouse diverted funds, etc.) it would be in his or her interest for the automatic stay to automatically apply without any further delay or necessary application procedures.

#### 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 that they can provide. Advise the foreign agent in this respect.

In short, the Canadian courts are not limited to Canadian entitlements and remedies in the relief they can provide. See s. 272(1) of the BIA and s. 49(1) of the CCAA.

Section 272(1) of the BIA  
Orders



- 272 (1) 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
  - (a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;
  - (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;
  - (c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and
  - (d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,
    - (i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and
    - (ii) to take any other action that the court considers appropriate.

Source: [Bankruptcy and Insolvency Act \(justice.gc.ca\)](http://justice.gc.ca)

#### **Section 49(1) of the CCAA**

##### **Other orders**

- 49 (1) 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 company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
  - (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
  - (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
  - (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Source: [Companies' Creditors Arrangement Act \(justice.gc.ca\)](http://justice.gc.ca)

Indeed, courts have recognized, absent certain public policy exceptions, that the relief granted in a foreign main proceeding can be recognized in Canada. For example, in *Re Hartford Computer Hardware Inc.*, 2012 ONSC 964, the Court was tasked with determining whether to recognize and implement certain orders the United States Bankruptcy Court had entered (i.e, DIP Order, Utilities Order and Bid Procedures Order). The foreign representative in that case had argued that the recognition of these orders in Canada "is necessary for the protection of the Chapter-11 Debtors'

property and the interest of their creditors." *Re Hartford Computer Hardware Inc.*, 2012 ONSC 964 at page 2. In granting the relief requested, the Canadian Court made the following remarks and observations:

[14] A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

[15] Based on the foregoing, I have concluded that recognition of the Final DIP Facility Order is necessary for the protection of the debtor company's property and for the interests of the creditors.

[16] In making this determination, I have also taken into account the provisions of s. 61(2) of the CCAA which is the public policy exception. This section reads: "Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy".

[17] The public policy exception has its origins in the UNCITRAL Model Law on CrossBorder Insolvency. Article 6 of the Model Law provides: 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State'. It is also important to note that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (paragraphs 86-89) makes specific reference to the fact that the public policy exceptions should be interpreted restrictively.

[18] I am in agreement with the commentary in the Guide to Enactment to the effect that s. 61(2) should be interpreted restrictively. The Final DIP Facility Order does not, in my view, raise any public policies issues.

[19] I am satisfied that it is appropriate to grant the requested relief."

*Id.* at page 4. Source: [CAN\\_150212\\_FT.pdf \(uncitral.org\)](#)

As such, in the case at hand, I would advise the foreign representative, that, absent any public policy exceptions, the Canadian courts are not limited to the Canadian relief and entitlements.

**\* End of Assessment \***

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