



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.

47/50

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).
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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

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]

3

Identify three of the recognised purposes of the BIA.

- ✓ 1) Providing for the financial rehabilitation of insolvent persons;
- ✓ 2) Providing a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a pari passu basis; and
- ✓ 3) Allowing for an investigation to be made into the affairs of a bankrupt.

(Houlden and Morwartz, "The 2019 Annotated Bankruptcy and Insolvency Act" A §2)

Question 2.2 [maximum 2 marks]

②

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

The debtor may keep a portion of income earned to maintain a reasonable standard of living. These standards are determined by the OSB.

Certain assets of the debtor may also be retained, which generally include – (a) personal items and clothing; (b) household furniture, food and utensils the debtor's permanent home; (c) tools necessary for the debtor's work; (d) a motor vehicle with a value up to a certain limit; and (e) certain farm property. This is also subject to provincial or territorial legislation.

Question 2.3 [maximum 3 marks]

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

- 1) Monitors
- 2) Official Receiver
- 3) Trustees in Bankruptcy

③

Question 2.4 [maximum 2 marks]

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

②

"Person" under s 2 of the BIA "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".

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 this essay, the following differences between the privately-appointed receiver ("PAR") and the court-appointed receiver ("CAR") will be explained: (1) the means of appointment; (2) the duties of each receiver; (3) the nature and source of powers exercised; (4) the circumstances in which each

type of receiver is generally used; and (5) other procedural differences that arise by statute (that need not necessarily bind the PAR).

Means of Appointment

A PAR may be one appointed pursuant to a security arrangement between the debtor and the secured creditor. The contractual right of the secured creditor accrues when the debtor is unable to meet its obligations.

On the other hand, a CAR may be appointed, as the name suggests, by an application to the court. This may be made (a) by a secured creditor pursuant to s 243 of the BIA for a receiver to take control of all or substantially all of the inventory, accounts receivable etc of a company where it is "just and convenient" to do so; or (b) on the application of any "interested party" where it is "just and convenient" to do so pursuant to the relevant Courts of Justice Acts of the individual provinces (e.g., s 101(1) of the Ontario Courts of Justice Act).

Duties

The duty of the PAR is primarily to the secured creditor that appointed it (*In re B Johnson & Co Builders Ltd* [1955] Ch 634), but the PAR nonetheless has a general duty to act honestly, in good faith and in a commercially reasonable manner (*Downsview Nominees Ltd v First City Corp* [1993] AC 295). This includes attempting to maximise recoveries and to obtain the best price for the debtor's assets.

The CAR has duties to all creditors of the debtor. The CAR is also an officer of the court, and arising out of this must report to and take directions and instructions from the court (rather than the creditor that sought its appointment).

good.

Powers/Court Supervision

The key conceptual difference between the PAR and CAR is the source of the respective receivers' authority. The CAR generally has to seek the permission of court in exercising certain powers (such as in the case of major asset sales), though it is noted that "[i]n most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a [PAR]" (Guidance Text at p 40). On the other hand, the PAR's conduct of sale would be executed in a manner akin to a private power of sale.

Circumstances where each is appointed

Appointing a PAR has the advantage of expedience (since it does not involve court attendance) and cost-effectiveness. However, PARs are not often used arising from concerns over successor liability to receivers carrying on business (Guidance Text at p 39). Instead, PARs are most often used where there is a small business or discrete pool of assets such that there will be no competing creditor claims or disputes with the debtor (Guidance Text at p 39).

good.

A CAR is usually appointed in more complex cases such as where there are competing claims between the creditors or disputes between the creditor and debtor which would benefit from the oversight of an adjudicative body. CARs may also provide a greater degree of comfort for creditors from a potential liability standpoint because the court must approve the receiver's actions along the way.

Other procedural differences

The appointment of a CAR, arising out of the fact that it is an appointment premised on statute, must be made in compliance with certain procedural rules. Notably, under s 244 of the BIA, a

secured creditor must provide a 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 investor, accounts receivables or other property of an insolvency debtor. Section 244(2) further provides that the secured creditor "shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security".

8

Question 3.2 [maximum 7 marks]

6

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

The three methods for entering into bankruptcy include (a) an involuntary bankruptcy; (b) a voluntary bankruptcy; and (c) the failure to perform the terms of a BIA proposal. These will be explained in turn.

Involuntary Bankruptcy

A debtor may be made bankrupt under this method through an application made to the bankruptcy court in the location where the debtor ordinarily resides, does business, has assets or property, or where the debtor did business within the previous year (where the debtor has no assets currently in Canada).

The applying creditor must show that "(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application" (s 43(1) BIA). In turn, s 42(1) of the BIA defines an "act of bankruptcy" as:

- (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.

The most common act of bankruptcy is the s 42(1)(j) ground, where the debtor ceases to meet liabilities generally as they become due. The term "generally" means that it is not sufficient to allege that the debtor has failed to pay only the application creditor (unless the applicant is the only claimant, or where the debt owed to the applicant is so large that the claims of other creditors are not commensurately significant; *Re Real Time Fibre Supply Ltd* [2007] Carswell BC 580) (Guidance Text at p 21).

The debtor may resist the application where he or she demonstrates that they have the ability to pay their debts (s 43(7) of the BIA). Pending the determination and hearing of the bankruptcy application, the court may also appoint an interim receiver over all or part of the debtor's property for the purposes of preserving and protecting the property (s 46 BIA).

↳ *What else can the court direct the interim receiver to do?*

Should the court make the bankruptcy order, the property of the debtor vests in a licensed trustee appointed by the court. The applying creditor may elect the trustee subject to the confirmation by unsecured creditors at the first creditors' meeting.

↳ *i.e. conservatory measures and ability to summarily dispose of property that is perishable, of low value, or can depreciate quickly*

Voluntary Bankruptcy

Voluntary bankruptcy may be entered into upon the voluntary assignment of the debtor into bankruptcy proceedings. The debtor must fall within the definition of an "insolvent person" pursuant to s 2 of the BIA, which provides that "".

This proceeds without a court application. Bankruptcy proceedings are instead commenced where the company or individual executes an assignment of its property for the benefit of its creditors which is accompanied by a sworn statement that discloses the debtor's property, the names and addresses of the creditors, and the amounts of the creditors' claims; followed by a filing of these documents with the Official Receiver.

The debtor may elect the trustee, but this selection is subject to confirmation by secured creditors at the first meeting of creditors.

The court, however, may annul the bankruptcy where, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed (s 181(1) BIA). The property of the bankrupt then vests in any person the court may appoint, or, in default of that, reverts to the bankrupt for all the estate subject to any order of the court (s 181(2) BIA). For such an annulment to be granted, the court must be satisfied that (a) the debtor was not an insolvent person when they made the assignment, or (b) that the debtor abused the process of the court, with the debtor's intent determining whether said abuse has occurred (*Re Wale* [1996] CanLII 8275 (ONSC) at [17]).

Failure of BIA Proposal

The BIA contains provisions for both companies and natural persons to reach compromises with their creditors by way of a proposal. The proposal only comes into effect when it is accepted by the requisite majorities of creditors and approved by the court.

For a corporate proposal to be binding on each class of creditors it purports to affect, a majority of the proven creditors in that class, by number, together with two-thirds in value of the proven creditors in that class must approve of the proposal. If a class of creditors approves the proposal, it is binding on all creditors within the class (subject to the court's approval). Where a corporate proposal is either rejected by a class of creditors voting on the proposal or not approved by the court, the debtor is automatically assigned into bankruptcy.

① Where the corporate proposal is defaulted on, this may also lead to entry into bankruptcy. Where the default occurs in the case of a corporate proposal, and where such default is not waived by the representative of the creditors (which may be the inspectors, or the creditors themselves), the proposal trustee must inform the creditors and the Official Receiver. An application for the annulment of the proposal may be made in court, and upon such order being granted the debtor is automatically assigned into bankruptcy.

② For a consumer proposal, the debtor may structure a compromise with the creditors through an offer to pay creditors a percentage of what is owed to them, or to extend the time to pay off the debts, or both. The terms of said proposal cannot exceed five years and the creditors will vote to either accept or reject the proposal by resolution carried by the majority of votes (with one vote for each dollar of debt) of the accepted claims of creditors at the meeting of creditors. If the proposal is approved by a simple majority of the creditors, the proposal is binding on all creditors (regardless of their vote). If the consumer proposal is not accepted, the debtor can make changes to the proposal and resubmit it; or declare bankruptcy.

Like in the case of a corporate proposal, defaults in consumer proposals may also lead to bankruptcy. Where the debtor fails to make three consecutive monthly payments under the proposal, the proposal is automatically be annulled. The debtor may seek to negotiate a new proposal or seek court approval to re-instate the proposal within 30 days. Creditors may then bring a motion on annulment of a failed consumer proposal to assign the debtor into bankruptcy (Guidance Text at p 34).

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?

My advice to the foreign agent will be set in the following terms: (a) what substantive requirements must be met for the application to succeed; and (b) what evidence must accompany the application?

Substantive Requirements

Under s 270(1) BIA and s 47 CCAA, the court shall make an order recognizing a foreign proceeding if "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". Recognition gives foreign representatives standing to appear and be heard in Canadian courts (s 49(1) CCAA).

Foreign Representative

1. Pursuant to s 269(1) of the BIA/ s 46 of the CCAA, a "foreign representative" may apply to the court for recognition of the foreign proceedings "in respect of which he or she is a foreign representative". This, in turn, is defined in s 268(1) of the BIA and s 45(1) of the CCAA as "a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or (b) act as a representative in respect of the foreign proceeding".

In this case, it is likely that the foreign agent meets this definition given that he or she is "an agent operating under the law of [the] foreign jurisdiction and... is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies".

Foreign Proceeding

2. A "foreign proceeding" includes "a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation" (s 268(1) BIA; s 45(1) CCAA). The Canadian courts take a broad view of the term and take a purpose approach in so doing, looking at the *substance* of the foreign law rather than its form. To illustrate, in *Centaur Litigation SPC* [2016] BCSC 1224, a Cayman's liquidator successfully brought an application for an order that proceedings commenced in the Cayman Islands be recognized as foreign main proceeding. The Court recognized here that "the Cayman proceeding is a judicial proceeding in a jurisdiction outside Canada dealing with the creditors' collective interests generally under the Cayman Islands Companies law, which permits insolvent companies to restructure under the supervision of the court".

On the facts of the present case, there is nothing to suggest that the proceedings to which the foreign agent is appointed to helm do not fall within this definition.

Foreign Main or Foreign Non-Main

3. In the course of the recognition application, the court will also have to determine if the foreign proceeding is a foreign main proceeding ("FMP") or a foreign non-main proceeding ("FNMP"). This is significant as if the court determines that the proceedings is an FMP, it will automatically issue a stay of proceedings (s 271(1) BIA; s 48(1) CCAA). If it is an FNMP, then the court may still grant a stay in its

discretion, while making any order necessary for the protection of the debtor's property or the interests of the creditors.

Evidentiary requirements

good inclusion.

The application of the foreign agent must be accompanied by (s 269(2) BIA; s 46(2) CCAA):

- (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.

The requirements in ss 269(2)(a) and (b) of the BIA and s 46(2)(a) and (b) of the CCAA are, respectively, subject to s 269(3) BIA and s 46(3) CCAA. These latter sub-sections provide that "[t]he 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." Generally, both these terms are "given a broad and purposive interpretation, thereby allowing an application to meet the requirements for recognition of a foreign proceeding without difficulty" (Guidance Text at p 60).

The court may also accept any other evidence of the existence of the foreign proceedings and of the foreign representatives authority as it considers appropriate (s 269(4) BIA; s 46(4) CCAA).

Once these requirements have been met, the recognition is automatic and compulsory (per use of the word "shall" in s 270(1) BIA and s 47 CCAA).

→ But how can this company utilize this advice?
i.e. apply this to the fact set.

3

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?

While the "centre of main interest" (or "COMI") is not statutorily defined, ss 268(2) of the BIA and 45(2) of the CCAA provide that "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 interests". The starting point is therefore to consider this rebuttable presumption.

The courts have also identified the following considerations as paramount in determining COMI:

- (a) the location that significant creditors recognize as being the centre of the company's operations;
- (b) the location in which the debtor's principal assets or operations are found; and
- (c) the location of the debtor's headquarters or "nerve centre" (*In the Matter of MtGox Co., Ltd.* [2014] ONSC 5811 ("*MtGox*") at [21]).

good.

To illustrate the application of these factors (as well as others that the court may deem relevant) by way of example, in *MtGox*, the applicant successfully argued that the COMI of the corporate debtor was Japan and not Canada, since (at [22]):

- (1) MtGox had no offices in Canada, there are no Canadian subsidiaries and no assets in located in Canada;
- (2) MtGox was and has always been organized under the laws of Japan;
- (3) MtGox's registered office and corporate headquarters are, and have always been, located in Japan, and its books and records are located at its head office in Japan;
- (4) the debtor's sole director and representative director, Mr. Karpeles, resides, and at all relevant times has resided, in Japan;
- (5) most of the MtGox's bank accounts are located in Japan, including the primary account for operating its business;
- (6) MtGox's parent company, Tibanne, provided operational and administrative services to it, including the provision of its primary workforce, in Japan;
- (7) MtGox's website clearly disclosed to customers and other third parties that it is a Japanese corporation that is located in Japan;
- (8) upon the filing of the Japan petition, MtGox commenced an investigation in Japan with regard to the circumstances that led to the Japan civil rehabilitation, which investigation was subject to the oversight of the Tokyo Court.

In the present case, it is noteworthy that the debtor company has "a head office that is registered" in the jurisdiction where the foreign agent has been appointed. This invokes the rebuttable presumptions in ss 268(2) of the BIA and 45(2) of the CCAA. The fact that this office is "where senior management of the company have their offices" also supports the view that this is the company's 'nerve centre', and, notably, was a relevant and similar feature in *MtGox*. Absent other factors pointing to the contrary, that foreign jurisdiction may well be recognised as the debtor company's COMI.

Good.

5

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.

No. Notably, both the BIA and the CCAA state that nothing prevents the court, on application of a foreign representative or another interested party, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not "inconsistent with the provisions of the BIA or CCAA". Section 272(1) of the BIA further provides that, "[i]f 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".

This accords the Canadian courts with broad discretionary power to fashion a remedy not strictly "Canadian" in the sense that such powers may not be explicitly contained in a separate provision in the BIA or CCAA.

For instance, in *Re Hartford Computer Hardware Inc* [2012] ONSC 964 ("*Hartford Computer*"), the court ordered relief in foreign main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings. The Ontario Superior Court of Justice granted a recognition order pursuant to the CCAA which approved a "Final DIP Facility" containing a partial "roll up" provision where the pre-petition lenders provided DIP financing that effectively paid off the pre-petition secured debt. This order would likely have been prohibited in the domestic CCAA.

context, since s 11.2 of the CCAA provides that an interim financing charge in favour of a DIP lender may not secure an obligation that exists before the initial order is made.

The court's discretion in this regard is also subject to considerations of public policy. Both s 284(2) BIA and s 61(2) CCAA provides that the court may "refuse to do something that would be contrary to public policy" in relation to the cross-border insolvency provisions. It is noted, however, that "Canadian courts are inclined to recognize foreign insolvency proceedings, especially those that are initiated in common law jurisdictions... and are generally reluctant to employ the public policy exception absent clear circumstances that offend Canadian public policy" (Guidance Text at p 62). In terms of the underlying philosophy guiding the exercise of the court's powers, it is also noteworthy that the courts of Canada recognise the principle of comity and have described it as a "central principle governing Part IV of the CCAA" (*Hollander Sleep Products* [2019] ONSC 3238 at [41]). This is especially so in the context of globalisation (see *Morguard Investments v De Savoye* [1990] 3 SCR 1077), which the present facts amply demonstrate given the online and global reach of the debtor-company. In practical terms, this means that the "courts are likely to implement foreign recognition orders on the basis that they would also be enforced abroad and generally prefer not to exercise the public policy exemption" (Guidance Text at p 62). This it did in the *Hartford Computer* case, where the court remarked that the public policy exemption should be applied in a restrictive manner, granting a recognition order in terms that recognised the orders made in the foreign US proceedings, but that would likely not have been permitted under the CCAA.

good reference.

On the facts of the present case, however, it may well be that the court would refuse to grant a recognition order on the grounds of public policy where the effect of doing so would be to occasion injustice on Canadian citizens. This is what the court did in *Canadian Imperial Bank of Commerce v ECE Group* [2001] CarswellOnt 463, where the court refused to implement a recognition order of a liquidation proceeding commenced in the US by insurance companies attempting to escape liability arising in Ontario. The judge determined that granting the stay would be unfairly prejudicial to the Canadian insurance companies, since at the time the motion for the stay was brought, it was unclear as to the amount of insurance proceeds which were available in the dispute and it would thus be premature to grant a stay. In this case, given that the class action law suit filed domestically is still in its early stages, and that there are potential civil and perhaps criminal liability concerns in relation to the Canadian resident in charge of the Canadian fulfilment office and warehouse, it may be prejudicial for a stay to be ordered such that these investigations may be stymied.

good analysis.

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* End of Assessment *