



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.

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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

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.

To (a) provide for the financial rehabilitation of insolvent persons; (b) provide a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured

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creditors on a *pari passu* basis; and (c) allow for an investigation to be made into the affairs of a bankrupt.

Question 2.2 [maximum 2 marks]

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

The types of assets that a debtor can keep include (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. With the exception of trust property held for another and RRSPs, bankruptcy exemptions are set by provincial legislation, and how much of each exempt asset class the debtor can retain will therefore depend on provincial legislation. Some provinces have a limited homestead exemption, eg, in Ontario, 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.

Individual bankrupts are also entitled to keep a portion of income earned to maintain a reasonable standard of living, in accordance with the standards set by the Superintendent of Bankruptcy. Any income in surplus of such a standard must be paid to the trustee in bankruptcy.

Question 2.3 [maximum 3 marks]

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

Trustees in bankruptcy, court-appointed receivers and monitors in CCAA proceedings. 3

Question 2.4 [maximum 2 marks]

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

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

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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.

How each type of receiver is appointed

A private receiver can be appointed if such an arrangement is provided in the security arrangement between the debtor and the secured creditor. The secured creditor will have a contractual right to appoint a receiver if the debtor is unable to meet its obligations.

By contrast, a court-appointed receiver may be appointed if the secured creditor makes an application under s 243 of the Bankruptcy and Insolvency Act ("BIA"), for the appointment of a receiver with national authority to take control of the business when the debtor is unable to meet its obligations under the security agreement. The Courts of Justice Acts of the individual provinces also allow the court to appoint a receiver where it is "just and convenient" to do so.

Section 244 of the BIA requires a secured creditor to provide a statutory 10-day notice of its intention to enforce its security and to appoint a receiver, if such a receiver is to be appointed over all or substantially all of the inventory, accounts receivables or other property of an insolvent debtor. Under ss 46 and 47 of the BIA, an interim receiver may be appointed prior to the expiry of the 10-day period where necessary to protect or preserve assets on an interim basis.

Duties of each type of receiver

A private receiver's duties are primarily to the secured creditor that appointed it, though the 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.

On the other hand, a court-appointed receiver is an officer of the court and has duties to *all* creditors of the debtor. It reports to and takes directions from the court, not the creditor that first sought its appointment. A court-appointed receiver derives his/her powers from the court order and any specific legislation governing his/her powers. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to privately appointed receivers, although certain actions (eg, the sale of major assets) will still require court approval. The appointing court will typically also issue a broad stay of proceedings that, *inter alia*, restricts creditors from exercising any rights or remedies without first obtaining the court's permission and provides for a super-priority charge for the receiver's professional fees and that of its counsel and the appointing creditor over the assets.

Where an interim receiver is appointed, the interim receiver may take possession of the debtor's property, and exercise such control over the debtor's property and business as the court deems appropriate. However, interim receivers are only permitted to take conservation measures and summarily dispose of perishable or rapidly depreciable property of the debtor. The appointment of the interim receiver expires on the earlier of: (a) the taking of possession by a receiver or a trustee in bankruptcy of the debtor's property; (b) the expiry of 30 days following the day on which the interim receiver was appointed or any period specified by the court, on in the case that the interim receivership concludes with a proposal, upon court approval of the proposal.

Once a court-appointed receiver has realised 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 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 proceedings.

Both private and court appointed receivers have reporting obligations mandated by their appointment. They must provide notice of their appointment to all known creditors and prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of Superintendent of Bankruptcy (OSB) and made available to all creditors. Court-appointed receivers must also report to the court itself as and when necessary or required about how its mandate is being carried out.

Circumstances in which each type of receiver is generally used

Court-appointed receivers are usually seen in more complex cases, especially when 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. A court-appointed receiver may also be used where a greater degree of comfort for creditors and professionals is desired, because the court must approve many of the receiver's decisions along the way.

Private receiverships generally do not involve court attendance and may be used where a quick and cost-effective procedure is preferred. Concerns over successor liability to a receiver carrying on business may sometimes deter the use of private receivers. Private receivers are most often used where there is a small business or discrete pool of assets and there will not be competing creditor claims or disputes with the debtor.

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".

There are three methods for entering into bankruptcy, (a) involuntary, (b) voluntary and (c) on the failure of, or failure to perform the terms of, a BIA proposal.

Involuntary bankruptcy

Under s 43(1) of the BIA, to successfully apply for an involuntary bankruptcy order, the applying creditor(s) must (a) be owed in excess of CAD 1,000 of unsecured debt and (b) provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application. "Debtor" is defined under s 2 of the BIA to include a person who, at the time an "act of bankruptcy" was committed by him, resided or carried on business in Canada. There is therefore no requirement that the debtor carries on business or resides in Canada *at the time of the bankruptcy application*. An involuntary bankruptcy application must be brought to the bankruptcy court in the location where the debtor ordinarily resides, does business, has assets or property, or in the case where the debtor currently has no assets in Canada, where it did business within the previous year.

An "act of bankruptcy" involves one of two types of conduct. First, an act of bankruptcy may refer to conduct that shows that the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of the creditor. Second, an act of bankruptcy may refer to conduct that shows that the debtor is insolvent.

Pursuant to s 42 of the BIA, the following are acts of bankruptcy:

- (a) In Canada or elsewhere the bankrupt makes an assignment of property to a trustee for the benefit of creditors;
- (b) In Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or any part of it;
- (c) 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 is a fraudulent preference;
- (d) The debtor, with intent to defeat or delay his creditors, departs out of Canada or remains out of Canada or departs from his dwelling or otherwise absents himself;
- (e) Permitting, for certain specified periods of time, execution under which the debtor's property is taken;
- (f) An admission of the debtor's inability to pay debts;
- (g) The debtor assigns, removes, secretes or disposes of or attempts or is about to do the same with any of his property with the intent to defraud or delay his creditors or any of them;
- (h) The debtor gives notice to creditors that he has suspended or is about to suspend payment of debts;
- (i) The debtor defaults on a proposal; or
- (j) 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 creditor is the only claimant or the debt owed is so large that the claims of other creditors are insignificant in comparison (*Re Real Time Fibre Supply Ltd 2007 CarswellBC 580*).

The debtor has a right to object to the involuntary bankruptcy application, in which case the court will determine whether the bankruptcy order will be issued. Even if the applicant proves the existence of the debt and that an act of bankruptcy has occurred, the court may still dismiss the application if the debtor demonstrates that it has the ability to pay its debts. If the court is satisfied that the facts in the alleged application have been proven, the court can make the order of bankruptcy. The applying creditor will be able to select the trustee in bankruptcy, though this selection is subject to confirmation at the first creditor's meeting.

Voluntary bankruptcy

This occurs where the debtor voluntarily makes an assignment into bankruptcy proceedings. To be eligible to do so, the debtor must fall under the definition of an "insolvent person" set out in s 2 of the BIA, namely that the debtor is a person who is not bankrupt, and who resides or carries on business or has property in Canada, whose liabilities to creditors provable as claims under the BIA amount to at least CAD 1,000, and:

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

A voluntary bankruptcy does not involve a court application. 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 creditors, and the amounts of the creditor's claims. These documents are filed with the Official Receiver, and bankruptcy proceedings commence once these documents are accepted.

The debtor will be able to choose the trustee in bankruptcy, but this selection will be subject to confirmation by unsecured creditors at the first meeting of creditors.

Failure of BIA proposal

The BIA contains provisions for corporate and consumer proposals to allow debtors to reach compromises with their creditors. Proposals must be accepted by the requisite majorities of creditors and be approved by the court. For a corporate proposal to be binding on each class of creditors it affects, there must be approval from a majority in number of the proven creditors of that class, and who hold at least two-thirds of the value of the claims. If a corporate proposal is rejected by a class of creditors or is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy. If a debtor defaults under the terms of the proposal and such default is not waived by inspectors (*ie*, creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. Thereafter, a motion may be brought to the court to annul the proposal. If such an order is granted, the debtor is automatically assigned into bankruptcy.

Consumer proposals allow insolvent individuals with debts or CAD 250,000 or less (excluding the mortgage on a principal residence) to reach payment compromises with their creditors. In a consumer proposal, the debtor's property does not automatically vest in a trustee and the process does not involve a complete liquidation of the debtor's assets. A proposal is created with the assistance of a trustee and the term of the proposal cannot exceed 5 years. The proposal is binding on all creditors if it is approved by a simple majority of creditors holding accepted claims (one vote for each dollar of debt). If the consumer proposal is not accepted, the debtor can resubmit an amended proposal or declare bankruptcy.

If a debtor fails to make three consecutively monthly payments, the proposal is automatically annulled, and creditors may resume enforcement proceedings. Creditors may bring a motion on annulment of a failed consumer proposal to assign the debtor into bankruptcy. Notably, unlike failed corporate proposals, a failed consumer proposal will not result in an automatic bankruptcy and a motion must be brought to assign the individual into bankruptcy. ** Key distinction.*

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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?

Under s 269 BIA and s 46 Companies' Creditors Arrangement Act ("CCAA"), Canadian courts must recognise foreign proceedings on formal proof of three main requirements:

- (a) the proceeding is a "foreign proceeding";
- (b) the applicant is a "foreign representative"; and
- (c) the foreign proceeding is either a foreign main proceeding, or a foreign non-main proceeding, based on the centre of main interest ("COMI") analysis.

The terms "foreign proceeding", "foreign representative", "foreign main proceeding" and "foreign non-main proceeding" are defined in s 268(1) BIA and s 45(1) CCAA as follows:

- (a) **foreign main proceeding** means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests.
- (b) **foreign non-main proceeding** means a foreign proceeding, other than a foreign main proceeding.
- (c) **foreign proceeding** means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation,
- (d) **foreign representative** means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to
 - i. administer the debtor's property or affairs for the purpose of reorganization or liquidation; or
 - ii. act as a representative in respect of the foreign proceeding.

The recognition application is commenced by the foreign representative who must file sufficient evidence of the foreign law to allow the Canadian court to determine that they are a foreign representative and that the proceeding is a foreign proceeding. The terms "foreign proceeding" and "foreign representative" will be given a broad and purposive interpretation, thereby allowing an applicant to meet the requirements for recognition of a foreign proceeding without difficulty. The focus of the Canadian court is on the substance of the foreign law rather than its nomenclature. This is illustrated by *Centaur Litigation SPC, Re* [2016] BCSC 1224, where the Canadian court held that it was sufficient that a Cayman Islands proceeding dealt "with the creditors' collective interest *generally* under the Cayman Islands Companies law, which permits insolvent companies to restructure under the supervision of the court" [emphasis added], for that proceeding to qualify as a foreign proceeding.

good example.

In the present case, it is not stated whether the purpose of the foreign agent's powers and the purpose of the foreign proceeding is for reorganisation and/or liquidation. Assuming that is the case, the foreign agent will likely be able to meet the requirements for recognition in Canada. Based on the given facts, the foreign proceeding appears to be a judicial proceeding dealing with the assets of insolvent companies (given the involvement of the foreign courts), and which subjects the insolvent company's affairs to control or supervision by a foreign court (given the seizure of the company's property in the foreign jurisdiction). The foreign agent also arguably fulfils the definition of a foreign representative, given that he/she has the power to administer the debtor's property or affairs (eg, by seizing the company's property).

Once the requirements for recognition have been met, recognition is automatic and compulsory (similar to the UNCITRAL Model Law on Cross-Border Insolvency). The court will

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make an order recognising the foreign proceeding. If the court determines that the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of proceedings. If the court determines that the foreign proceeding is a foreign non-main proceeding, a stay may be requested but it is up to the court's discretion to make any order necessary for the protection of the debtor's property or the interests of creditors.

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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?

There is no statutory definition of a "centre of main interest" ("COMI") in the BIA or CCAA. However, under s 268 BIA and s 45 CCAA, in the case of an individual, the debtor's ordinary place of residence is deemed to be his/her COMI, in the absence of proof to the contrary. In the case of a company, the COMI is deemed to be the company's registered office, in the absence of proof to the contrary. The courts will also have regard to the following three considerations, which are of primary importance in determining COMI (see *Re MtGox* [2014] ONSC 5811):

- (a) The location that significant creditors recognise 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, head office or "nerve centre".

Depending on the facts of the situation, some factors may carry more weight than others. A foreign proceeding commenced in the jurisdiction where the debtor's COMI is located is a foreign main proceeding, while a foreign proceeding commenced elsewhere is a foreign non-main proceeding. In *Re MtGox*, the Canada court found that MtGox's COMI was in Japan rather than Canada, and considered it relevant that:

- (a) MtGox had no assets or offices in Canada;
- (b) MtGox was and always had been organised under the laws of Japan;
- (c) The registered office, books and records of MtGox were in Japan;
- (d) The sole director of MtGox resided in Japan;
- (e) Most of MtGox's bank accounts were located in Japan;
- (f) MtGox's parent corporation supplied services to it in Japan;
- (g) The MtGox website disclosed that it was a Japanese corporation located in Japan; and
- (h) MtGox was investigating the hacking that occurred against it under the oversight of the Tokyo District Court.

good example.

In the present case, it may be noted that the foreign company has a warehouse and fulfilment centre in Canada and is currently facing litigation in Canada. That said, this has to be weighed against the fact that the company's head office is registered in the foreign jurisdiction, and its senior management have offices there. Whether the company's COMI is in Canada or elsewhere may ultimately depend on factors such as the size of its business operations or assets in Canada compared to that in the foreign jurisdiction. For instance, if the company's operations in Canada are relatively small, it may be argued that the presence of some assets and litigation in Canada is not sufficient to shift the COMI away from the foreign jurisdiction.

→ missing your opinion where you believe the COMI to be. good analysis.

Question 4.3 [maximum 5 marks]

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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, Canadian courts are not limited to Canadian entitlements and remedies. Both the BIA and CCAA contain broadly worded discretionary powers that allow a court to make "any order that it considers appropriate", upon the recognition of a foreign proceeding and on the application of the foreign representative, and if the court is satisfied that such an order is necessary for the protection of the debtor company's property or the interest of creditors (s 272(1) BIA and s 49(1) CCAA). This includes, but is not limited to, orders regarding the examination of witnesses and the taking of evidence, and the provision of information on the debtor's property and affairs. The court is therefore not restricted to Canadian entitlements and remedies, so long as its order is not contrary to public policy and is consistent with any orders made in concurrent proceedings under the BIA or CCAA. Canadian courts have in fact previously ordered relief in foreign main proceedings that would not ordinarily be available in Canadian proceedings, where there are ancillary Canadian proceedings (see *Re Hartford Computer Hardware Inc*, 2012 ONSC 964). Likewise, in *Nishiyama* (2020 BCSC 224) at [48], the court observed that its powers under s 272(2) of the BIA granted it jurisdiction to make the enumerated kinds of orders in the jurisdiction of the foreign main proceeding where "necessary" and "appropriate" to do so.

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*** End of Assessment ***

