



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.

49/50

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.**
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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]

Identify three of the recognised purposes of the BIA.

Three of the recognised purposes of the BIA are:

- (1) providing the financial rehabilitation of insolvent persons;
- (2) providing a collective proceeding for the orderly and fair distribution of the property of a bankrupt among unsecured creditors on a *pari passu* basis; and

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(3) setting aside transfers under value, preferences, settlements and other fraudulent transactions such that all creditors may share equally in the value of the bankrupt's assets.

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 the context of an individual bankruptcy, generally, the types of assets that a debtor can keep in a bankruptcy include: (1) personal items and clothing; (2) household furniture, food and utensils in the debtor's permanent home; (3) tools necessary to the debtor's work; (4) a motor vehicle with a value up to a certain limit; and (5) certain farm property. The debtor is 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, and any income exceeding such standard must be paid to the trustee.

With the exception of trust property held for another and RRSPs, bankruptcy exemptions in Canada are determined by provincial legislation. Under s 67 of the BIA, amounts held by individuals in RRSPs are exempt from seizure in bankruptcy, subject to a possible claw-back for contributions made in the 12 months preceding bankruptcy. However, where provincial legislation exempts RRSPs from execution, the provincial legislation will apply. Contrarily, where provincial legislation is silent in this regard, RRSPs will be exempt subject to the mentioned claw-back. Thus, how much of each exempt asset a bankrupt can retain depends on the province or territory that they live in.

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Question 2.3 [maximum 3 marks]

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

Three types of court-officers that may be appointed in insolvency proceedings are:

- (1) monitors;
- (2) trustees in bankruptcy; and
- (3) receivers.

③

Question 2.4 [maximum 2 marks]

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

Section 2 of the BIA defines a "person" as including "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".

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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.

A receiver refers to a licensed professional who is given the authority to deal with a debtor company's assets, which includes the authority to operate and manage the business in place of the existing management, shut down the business if the receiver concludes that the continued operation of the debtor will likely erode recoveries for creditors or if there is insufficient funding to continue operations. The receiver has the right in the instrument appointing it to take possession and custody of the debtor's assets, to sell them and to distribute the proceeds from the sale to creditors on a priority basis after deducting the receivership's fees and expenses. The two types of receivers are those who are privately appointed and those who are appointed by the court.

How each type of receiver is appointed

The appointment of a privately appointed receiver is usually provided for in the security agreement between the debtor and the secured creditor. The secured creditor has a contractual right to appoint a receiver if the debtor is unable to meet its obligations.

Conversely, a court-appointed receiver is appointed under s 243 of the BIA, which authorises a secured creditor to apply to the court 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 an equitable receiver on the application of any interested party (including shareholders or unsecured creditors) where it is just and convenient to do so. Notably, under s 244 of the BIA, a secured creditor must provide a statutory 10-day notice of its intention to enforce its security and to appoint a receiver, if such receiver is to be appointed over all or substantially all of the inventory, accounts receivables or other property of an insolvent debtor. An interim receiver may also be appointed prior to the expiry of the 10-day notice period if it is necessary to protect or preserve the company's assets on an interim basis.

The duties of each type of receiver

A privately appointed receiver's duties are primarily owed to the secured creditor that appointed it. Nevertheless, a private receiver still has a general duty to act honestly, in good faith, and in a commercially reasonable manner. This includes a duty 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 owes duties to all creditors of the debtor. However, the court-appointed receiver reports to and takes directions and instructions from the court, and not the creditor that initially sought its appointment. Once a court-appointed receiver has realised the assets of the debtor, it will distribute the proceeds to creditors in accordance

with their entitlements and priority, which generally requires court approval. If the only recovery is to secured creditors, there may be no need for a claims process. Moreover, if there are surplus funds after satisfying all the 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.

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In relation to both privately-appointed receivers and court-appointed receivers, they have certain obligations mandated by their appointment. Both must provide notice of their appointments to all known creditors and prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and will be 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.

The circumstances in which each type of receiver is generally used

Private receivers are most commonly used where there is a small business or a discrete pool of assets such that there will not be competing creditor claims or disputes with the debtor. As private receiverships generally do not involve court attendance, they can be quick and cost effective. However, due to concerns over successor liability to the receiver in carrying on of the debtor's business, private receivers are not often used.

On the other hand, court appointed receivers are usually appointed in more complex cases, especially where there are competing claims between creditors or disputes between the creditor and the debtor, or where from the outset it appears likely that the assistance of the court will be necessary on an ongoing basis. A court-appointed receiver also provides a greater degree of reassurance for creditors and professionals from a potential liability standpoint compared to a private receiver because the court must approve many of the receiver's decisions along the way. For instance, a sale process for the business may be approved by the court as fair and reasonable, thereby permitting the receiver and any potential purchaser to be less concerned about the sale process decisions being scrutinised by the courts later on.

Moreover, a court-appointed receiver derives its powers from the court order and any specific legislation governing its powers. The appointing court typically issues a broad stay of proceedings which restricts creditors from exercising any rights or remedies without first obtaining permission from the court. This renders *ipso facto* clauses inoperable, prohibits all parties including utilities from terminating contracts for pre-filing breaches, 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. The court-appointed receiver is also allowed to borrow on a super-priority basis. In appropriate cases, the court may also order critical suppliers to provide a continued supply on fair market cash-on-delivery terms. Thus, the appointment of a court-appointed receiver would be appropriate if any of these consequences are desirable for the company.

Typically, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement. However, certain actions, such as major asset sales, usually require court approval. In the sale of assets, the court will provide an order that vests title in the property to the purchaser free and clear of prior encumbrances and claims, where thereafter "attach" to the sales proceeds without change to their priority. Thus, a creditor seeking to a court-appointed receiver must bear in mind these restrictions.

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".

The three methods for entering into bankruptcy are: (1) involuntary bankruptcy; (2) voluntary bankruptcy; and (3) on the failure of, or failure to perform the terms of, a BIA proposal.

This essay will first explain the meaning of an "act of bankruptcy" before delving into the three methods for entering into bankruptcy. An "act of bankruptcy" essentially involves two different types of conduct: (1) conduct showing that the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of the creditor; and (2) conduct that shows the debtor is insolvent. Pursuant to s 42(1) of the BIA, a debtor commits an act of bankruptcy in the following ten instances:

- (1) if in Canada or elsewhere the debtor makes an assignment of his property to a trustee for the benefit of his creditors generally;
- (2) 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;
- (3) 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 the BIA be void or, in the Province of Quebec, null as a fraudulent preference;
- (4) if, with intent to defeat or delay his creditors, the debtor departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling-house or otherwise absents himself;
- (5) if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is taken, for certain specified periods of time;
- (6) if the debtor 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;
- (7) if the debtor 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 the debtor's creditors or any of them;
- (8) if the debtor gives notice to any of his creditors that the debtor has suspended or that the debtor is about to suspend payment of the debtor's debts;
- (9) if the debtor defaults in any proposal made under this Act; and
- (10) if the debtor ceases to meet the debtor's liabilities generally as they become due.

The most common act of bankruptcy by a debtor is the debtor ceasing to meet liabilities generally as they become due. In this regard, it is not sufficient to allege that the debtor has failed to pay only the application creditor, unless the applicant creditor is either the only claimant or the debt owed is so large that the claims of other creditors are not of significance in comparison (*Re Real Time Fibre Supply Ltd*, 2007 CarswellBC 580).

Involuntary bankruptcy

To make a successful application for an involuntary bankruptcy order, pursuant to s 43(1) of the BIA, the applicant creditor(s) must show that:

- (1) the applicant creditor(s) are owed debt(s) in excess of CAD 1,000 of unsecured debts; and
- (2) the debtor has committed an "act of bankruptcy" within the six months preceding the filing of the application.

Section 2 of the BIA defines a debtor as an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt. Thus, the creditor does not need to prove that the debtor currently carries on business or resides in Canada, or currently has assets in Canada, but merely that the debtor satisfies those conditions "at the time" of the act of bankruptcy.

If the court is satisfied that the facts in the alleged application have been proven, the court may make the order of bankruptcy. As soon as the order of bankruptcy is made the property of the debtor vests in a licensed trustee appointed by the court. However, the debtor has the right to object to the application, in which case the court will determine whether the bankruptcy order should be issued. Even if the applicant creditor(s) have proven the existence of debt and that an act of bankruptcy has occurred, the court may still dismiss the application if the debtor can demonstrate that they have the ability to pay their debts. In an involuntary bankruptcy proceeding, the applying creditor selects the trustee, subject to confirmation at the first creditors' meeting.

Voluntary bankruptcy

Voluntary bankruptcy occurs when the debtor voluntarily makes an assignment into bankruptcy proceedings. Voluntary bankruptcy may be commenced for several reasons, including to stay legal actions by creditors or, in the case of an individual, to obtain a fresh start once the proceedings have concluded. The process does not involve a court application.

To be eligible to file for a voluntary bankruptcy, the debtor must fall within the definition of an insolvent person under s 2 of the BIA – that is a person who (1) is not bankrupt; (2) resides, carries on business or has property in Canada; (3) whose liabilities to creditors provable as claims under the BIA amount to CAD 1,000, and:

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

The company or individual must execute an "assignment" of its property for the benefit of its creditors which is accompanied by a sworn statement disclosing the debtor's property, the names and addresses of the creditors, and the amounts of the creditors' claims. These documents are filed with the Official Receiver and once accepted, will lead to the commencement of the bankruptcy proceedings. The debtor chooses the trustee in a voluntary bankruptcy proceeding. However, this selection is subject to confirmation by unsecured creditors at the first meeting of creditors.

Failure of, or failure to perform the terms of, a BIA proposal

The BIA has provides for both corporate and consumer proposals that allow debtors to reach compromises with their creditors. Proposals must be accepted by the by the requisite majorities of creditors and approved by the court.

In relation to a corporate proposal, for a corporate proposal to be binding on each class of creditors that it affects, a majority of the proven creditors in that class by number, together with two-thirds of the proved creditors in that class by dollar value, must approve of the proposal. If a class of creditors approves the proposal, it will be binding on all creditors within that class, subject to the court's approval.

For corporate proposals, the debtor will be deemed to have made an assignment in bankruptcy:

- (1) if a corporate proposal is rejected by a class of creditors voting on the proposal; or
- (2) if the corporate proposal is not approved by the court.

Moreover, if a debtor defaults under the terms of a corporate 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), then 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 order is granted, the debtor will be automatically assigned into bankruptcy.

As for consumer proposals, they allow insolvent individuals with debts of CAD 250,000 or less (excluding the mortgage on a principle residence) to reach payment compromises with their creditors. A consumer proposal is created with the assistance of a trustee – 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 term of a consumer proposal cannot exceed five years. The creditors then vote to either accept or reject the consumer proposal by resolution carried out by the majority of votes (one vote per dollar of debt) of the accepted claims of the creditors at a 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.

If the debtor fails to make three consecutive monthly payments, the proposal is automatically annulled. All funds that have been paid will be forfeited; all penalties, fees and interest charges are reinstated; and creditors may then resume enforcement proceedings. The debtor may seek to negotiate a new proposal or seek court approval to reinstate the proposal within 30 days.

However, the failure of a consumer proposal does not result in an automatic bankruptcy. Creditors may bring a motion on the annulment of a failed consumer proposal to assign the debtor into bankruptcy.

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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?

The foreign agent in the present case wishes to apply for recognition of the foreign proceeding in Canada. In that regard, the relevant provisions are ss 269-272 of the BIA and ss 46-49 of the CCAA. Under both statutes, the Canadian courts will recognise foreign proceedings on formal proof of three main requirements:

- (1) the proceeding must be a "foreign proceeding" in accordance with the statutory definition;
- (2) the applicant must be a "foreign representative in accordance with the statutory definition; and
- (3) whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on the center of main interest ("COMI") analysis.

Under s 269(1) of the BIA and s 46(1) of the CCAA, a foreign representative may apply to the court for recognition of the foreign proceeding in which he/she is a foreign representative. Under s 270(1) of the BIA and s 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.

Section 268(1) of the BIA defines:

- (1) a foreign proceeding as 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.
- (2) a foreign representative as a person or body, including one appointed on an interim basis, who is authorised in a foreign proceeding in respect of a debtor, to: (a) administer the debtor's property or affairs for the purpose of reorganisation or liquidation; or (b) act as a representative in respect of the foreign proceeding.

Section 45(1) of the CCAA defines:

- (1) a foreign proceeding as a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.
- (2) a foreign representative as a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to: (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.

✓ → "formal proof"
In both cases, the recognition application is commenced by a foreign representative who files sufficient evidence of the relevant foreign law to allow the Canadian court to determine that they are a foreign representative and that the proceeding is a foreign proceeding. Case law shows that both terms are to be accorded a broad and purposive interpretation, which allows an applicant to meet the requirements for recognition of a foreign proceeding without difficulty.

Once the requirements for recognition under the relevant BIA and CCAA provisions have been met, the recognition is automatic and compulsory. The court must 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 (see s 71(1)(a) of the BIA and s 48(1)(a) of the CCAA). On the other hand, if the court determines that the proceeding is a foreign non-main proceeding, a stay of proceedings may be requested, but the court can exercise its discretion to make any order necessary for the protection of the debtor's property or the interests of the creditors. ✓

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In the present case, I would advise applying for recognition under the CCAA instead. The CCAA is a debtor-in-possession restructuring statute and is generally used for complex restructurings of large businesses. The present case likely would require a complex restructuring, seeing as it involves a company which has defaulted on loans in excess of CAD 200m and is facing a class action lawsuit in the amount of CAD 2m. Moreover, the BIA involves more procedural steps and strict timeframes, rules and guidelines while the CCAA is more discretionary and judicially-driven. However, I would also inform the foreign agent that CCAA proceedings are court intensive and often involve more professionals and court attendances and consequently, may result in higher costs. ?

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?

The concept of COMI is not statutorily defined under the BIA or CCAA. However, each statute contains a rebuttable presumption. Section 268(2) of the BIA provides 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 is deemed to be the debtor's COMI. Similarly, s 45(2) of the CCAA provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be its COMI.

The courts have identified the following three considerations which are to be considered as a whole and are of primary importance in determining the COMI of the debtor.

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

✓ Once the COMI is determined, the foreign proceeding is either classified as a foreign main proceeding if that country in which the foreign proceeding is commenced is where the COMI is located. If the foreign country is not where the COMI is located, it is classified as a foreign non-main proceeding. Depending on whether the foreign proceeding is a foreign main or foreign non-main proceeding, certain reliefs would be granted automatically while others are granted at the court's discretion pursuant to: (1) ss 271 and 272 of the BIA; and ss 48 and 49 of the CCAA.

In the present case, I would also advise the foreign agent that the COMI of the debtor company (the "Foreign Company") is likely to be the foreign jurisdiction (the "Foreign Jurisdiction") as that is where the head office of the Foreign Company is registered and where its senior management have their offices. There is therefore a presumption under the BIA and CCAA that the Foreign Jurisdiction is the COMI of the Foreign Company. That conclusion would not be displaced by the location of the Foreign Company's operations, since it sells clothing around the world.

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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.

I would advise the foreign agent that Canadian courts are not restricted in the relief that they can provide to foreign representatives. In this regard, both the BIA and CCAA contain provisions that are worded broadly and afford discretionary powers on the court.

For instance, s 272(1) of the BIA provides that if an order recognising 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 the following:

- (1) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in ss 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;
- (2) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;
- (3) 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
- (4) 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.

Similarly, s 49(1) of the CCAA provides that if an order recognising 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 the following orders:

- (1) if the foreign proceeding is a foreign non-main proceeding, orders referred to in subsection 48(1);
- (2) 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
- (3) authorising the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganisation.

In exercising the broad discretion conferred on it under the BIA and CCAA, the Canadian court is not limited to Canadian entitlements and remedies in the relief that they can provide.

*** End of Assessment ***