



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.

44/50

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]

Identify three of the recognised purposes of the BIA.

The recognized purposes of the BIA are as follows:¹

¹ Gavin Finlayson, *Module 4C Guidance Text – Canada*, September 2022, p 18, citing The Hon Mr Justice Lloyd Houlden, Mr Justice Geoffrey B Morawetz and Dr Jannis P Sarra, "The 2019 Annotated Bankruptcy and Insolvency Act" A§2.

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- a) Providing for the financial rehabilitation of insolvent persons;
- b) Providing a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a *pari passu* basis;
- c) Allowing for an investigation to be made into the affairs of a bankrupt; and
- d) Setting aside transfers under value, preferences, settlements and other fraudulent transactions so 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?

Generally speaking, individual bankruptcy exemptions in Canada are set by provincial legislation (with the exception of trust property held for another and a specific type of tax-exempt retirement savings account).²

However, usually a debtor in an individual bankruptcy will be able to keep the following assets:³

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

In addition to the above, some provinces have limited homestead exemptions.⁴ In particular, the principal residence of a debtor in Ontario is exempt under the Execution Act so long as the value of the debtor's equity in the principal residence does not exceed CAD 10,000.⁵

Question 2.3 [maximum 3 marks]

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

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

- 1 A court-appointed receiver;⁶
- 2 A monitor (usually used in CCAA proceedings);⁷ and
- 3 A trustee in bankruptcy.⁸

They all owe broad duties to the court, as well as all stakeholders.⁹

² *Idem*, p 27.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Idem*, p 17.

⁷ *Idem*, p 11.

⁸ *Idem*, p 17.

⁹ *Ibid.*

Question 2.4 [maximum 2 marks]

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

Pursuant to section 2 of the BIA, a 'debtor' is defined as an insolvent person and any person who, at the time an act of bankruptcy was committed by that person, resided or carried on business in Canada.¹⁰

A 'person' is in turn defined as including:¹¹

- a) A partnership;
- b) An unincorporated association;
- c) A corporation;
- d) A cooperative society;
- e) A cooperative organization;
- f) The successors of a partnership, association, corporation, society or organization; and
- g) The heirs, executors, liquidators of the succession, administrator 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.

Insolvency proceedings may take the form of receivers. A receiver is typically a licensed professional in an accounting or financial advisory firm, and acts as a licensed trustee in bankruptcy.¹²

Once appointed, a debtor company's assets do not vest in a receiver, however, the receiver will have the right to take possession and custody of the assets, sell them, and issue proceeds from that sale to creditors on a priority basis.¹³

There are two different types of receivers – private receivers as well as court-appointed receivers.

A privately appointed receiver is appointed pursuant to a security agreement between the debtor and secured creditor. Ordinarily, the security agreement provides the secured creditor with a contractual right to appoint a receiver if the debtor is unable to meet its obligations.¹⁴

¹⁰ *Idem*, p 19.

¹¹ *Ibid*.

¹² *Idem*, p 7.

¹³ *Idem*, p 38.

¹⁴ *Idem*, p 39.

As such, a privately appointed receiver's duties are primarily to the appointing secured creditor.¹⁵ A privately appointed receiver nonetheless has a general duty to act honestly, in good faith and in a commercially reasonable manner, including to attempt to maximize the recoveries and to obtain the best price for the debtor's assets in the circumstances.¹⁶

Private receivers are often used in circumstances where there is a small business or discrete pool of assets, with no competing creditor claims or disputes with the debtor.¹⁷ The benefits of private receiverships are that they do not involve court attendances and therefore can be efficient and cost effective.¹⁸

Despite the above, private receivers are not commonly used in Canada due to concerns over successor liability to receiver's carrying on private business.¹⁹

The power to seek a court-appointed receiver is contained in section 243 of the BIA, which authorizes 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 a security agreement.²⁰

Separately from the BIA, the Courts of Justice Acts of individual provinces also provides for courts to appoint a receiver following an application by an interested party, so long as it is "just and convenient" to do.²¹

In accordance with section 244 of the BIA, a secured creditor must also give 10 days' notice of its intent to enforce its security by way of appointment of receiver, if the receiver is to be appointed over all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor.²²

The powers of a court-appointed receiver are derived from the court order as well as any specific legislation governing its powers.²³ He or she is an officer of the court, and has duties to all creditors of the debtor.²⁴ As such, the court-appointed receiver reports to and takes directions/instructions from the court, rather than the creditor who initially sought the appointment.²⁵

Ordinarily, the court order appointing the receiver will give the receiver broad powers similar to those a privately appointed receiver is granted pursuant to the security agreement.²⁶ However, different from a privately appointed receiver, certain actions such as major asset sales, will usually require court approval.²⁷

¹⁵ *Ibid.*

¹⁶ *Ibid.*, citing L A Rogers and P L J Huff, "Commercial Restructuring and Insolvency in Canada", the Insolvency Law Institute, p 18.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Idem*, p 40.

²³ *Idem*, p 39.

²⁴ *Idem*, p 40.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

Court-appointed receivers are more commonly used in complex scenarios, including scenarios which involve competing claims or disputes between creditors and the debtor.²⁸ From a potential liability standpoint, a court-appointed receiver will also provide a greater degree of comfort for creditors and professionals compared to a private receiver in light of the court having to approve many of the receiver's decisions.²⁹

Pursuant to the BIA, there is also the possibility for the appointment of an 'interim receiver' in order to protect and preserve assets.³⁰ An interim receiver is only permitted to take conservation measures and summarily dispose of perishable or rapidly depreciable property of the debtor.³¹ The interim receiver appointment will expire at either the taking of possession by a receiver or trustee in bankruptcy, or the expiry of 30 days following the interim receiver's appointment (whichever is earlier), or any other period specified by the court.³²

Once all assets have been realized, the court-appointed receiver must distribute the proceeds to creditors in accordance with their entitlements and priority. This generally requires court approval, unless the recovery is only to secured creditors.³³

In the event there are left-over funds after distribution to secured creditors, the receiver may seek the court's approval to assign the debtor in bankruptcy so that unsecured claims are dealt with through bankruptcy proceedings.³⁴

Despite the above outlined differences between the two types of receivers, irrespective of whether privately or court-appointed, all receivers must provide notice of their appointment to all known creditors and prepare and distribute interim and final reports concerning the receivership.³⁵ These reports will then be filed with the Office of the Superintendent of Bankruptcy, as well as made available to all creditors.³⁶ Additionally, court-appointed receivers must also report to the court to provide updates as to how the receivership is being carried out.³⁷

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. This essay will briefly detail each method.

The first method is by way of involuntary bankruptcy. In order to successfully apply, a creditor must:³⁸

- a) Be owed in excess of CAD 1,000 in unsecured debt; and

²⁸ *Idem*, p 39.

²⁹ *Ibid.*

³⁰ *Idem*, p 40, citing ss 46 and 47 of the BIA.

³¹ *Idem*, p 40.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Idem*, p 40 – 41.

³⁶ *Idem*, p 41.

³⁷ *Idem*, p 40.

³⁸ *Idem*, p 20, citing s 43(1) of the BIA.

- b) Prove that the debtor has committed an 'act of bankruptcy' within six months of the date of the filing of the application.

Per section 42 of BIA, a debtor commits an act of bankruptcy if:³⁹

- a) In Canada or elsewhere, he or she makes an assignment of property to a trustee for the benefit of creditors;
- b) In Canada or elsewhere, he or she makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;
- c) In Canada or elsewhere, he or she 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) With the intent to defeat or delay the creditors, he or she departs out of Canada or remains out of Canada or departs from his or her dwelling or otherwise absents himself or herself;
- e) He or she permits for certain periods of time execution under which his or her property is taken;
- f) He or she admits an inability to pay debts;
- g) He or she assigns, removes, secretes or disposes of, attempts to or is about to do the same with his or her property with the intent to defraud, defeat or delay any creditors;
- h) He or she gives notice to creditors that payment of debts has or is about to be suspended;
- i) He or she defaults on a proposal; or
- j) He or she fails to meet liabilities generally as they become due. 'Generally' in this sense means that a creditor is required to show that more than just the application creditor has not been paid, unless the claimant is the only creditor owed money, or the debt is so large that the claims of other creditors are insignificant in comparison.⁴⁰

The application must be filed in the bankruptcy court where the debtor ordinarily resides, does business, has assets or property, or, if the debtor has no assets in Canada, where he or she did business within the previous year.⁴¹

A debtor can of course object to a bankruptcy application, which would result in the court determining whether or not to issue an order.⁴² Even if the applying creditor has proven the above set out requirements, an application may nonetheless be dismissed if the debtor is able to show that he or she has the ability to pay the debt.⁴³

A court will make an order of bankruptcy if the court is satisfied that the facts in the alleged application have been proven, following which the property of the debtor vests in a licensed trustee appointed by the court.⁴⁴

Prior to making an order for bankruptcy, a court also has the power to appoint a licensed trustee as an interim receiver over all or part of the debtor's property, if that is shown to be required in order to protect the estate of a debtor.⁴⁵ If so appointed, the interim receiver must

³⁹ *Idem*, p 20, citing s 42 of the BIA.

⁴⁰ *Idem*, p 21.

⁴¹ *Idem*, p 20.

⁴² *Idem*, p 21.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

preserve and protect the property of the debtor pending the hearing of the bankruptcy application.⁴⁶

The second method is by way of voluntary bankruptcy, which occurs when a debtor voluntarily makes an assignment into bankruptcy proceedings.⁴⁷

In order to be eligible, a debtor must fall within the 'insolvent person' definition under the BIA, which means the debtor must be a person who is not bankrupt and who resides, carries on business, or has property in Canada, whose liability to creditors provable as claims under the BIA amount to CAD 1,000 and:

- a) Is unable to meet obligations as they generally become due; or
- b) Has ceased paying current obligations in the ordinary course of business as they generally become due; or
- c) The aggregate of whose property is not, at fair valuation, sufficient to enable payments of all of his or her obligations, due and accruing due.⁴⁸

A court application is not required as the company and individual simply executes an 'assignment' of its property for the benefit of its creditors.⁴⁹ The assignment will be accompanied by a sworn statement which discloses the debtor's property, the names and addresses of all creditors, as well as the amounts of the creditors' claims.⁵⁰ Once the documents are filed and accepted with the Official Receiver, bankruptcy proceedings are commenced.⁵¹

The debtor then chooses the trustee, subject to confirmation by unsecured creditors at the first meeting of creditors.⁵²

However, a court may annul a bankruptcy if it is satisfied that either:⁵³

- a) The debtor was not an insolvent person when they made the assignment; or
- b) The debtor abused the process of the court, with the debtor's intent determining whether an abuse of process has occurred.

The third and final method of entering bankruptcy is deemed to have occurred when a BIA proposal has failed.⁵⁴

Pursuant to the BIA, both corporate and consumer proposals can be made that allow debtors to reach a compromise with their creditors.⁵⁵

With respect to corporate proposals, a majority of the proven creditors in each class, by number, together with two-thirds of the proven creditors in that class, by dollar value, must approve the proposal in order for it to be binding on each class of creditors it purports to

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Idem*, p 19, citing section 2 of the BIA.

⁴⁹ *Idem*, p 22.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, citing s 181(1) of the BIA.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

affect.⁵⁶ If approved, and subject to the court's approval, the proposal would be binding on all creditors within that class.⁵⁷

If a debtor defaults under the terms of the proposal, and the default is not waived by the creditor representatives appointed by the creditors or the creditors themselves, the proposal trustee is required to inform the creditor as well as the Official Receiver.⁵⁸ A motion may then be filed with the court to annul the proposal, which if granted, would automatically result in the debtor being assigned into bankruptcy.⁵⁹

5) However, if the corporate proposal is rejected by the creditors, or not approved by the court, the debtor is deemed to have made an assignment in bankruptcy.⁶⁰

The above is slightly different with a consumer proposal, as such proposal will be binding on all creditors, regardless of vote, if approved by a simple majority.⁶¹ If a debtor fails to make three consecutive monthly payments, the proposal will be automatically annulled, with all funds paid forfeited and all penalties, fees and interest charges reinstated.⁶² Creditors may then bring a motion to assign the debtor into bankruptcy.⁶³

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?

Recognition of foreign proceedings in Canada is possible due to both the BIA and the CCCAA having adopted a modified version of the UNCITRAL Model Law, with the relevant

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Idem*, p 34.

⁶² *Ibid.*

⁶³ *Ibid.*

provisions providing a framework for recognition of foreign insolvency proceedings and acceptance of jurisdiction.⁶⁴

In particular, Canadian courts are required to recognize foreign proceedings on formal proof of the following:⁶⁵

- 1 The proceeding is a "foreign proceeding" in accordance with the statutory definition;
- 2 The applicant is a "foreign representative" in accordance with the statutory definition; and
- 3 Whether the "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" based on the centre of main interest analysis.

"Foreign proceeding" is defined as a judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.⁶⁶

"Foreign representative" is defined 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:⁶⁷

- (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.

"Foreign main proceeding" is defined as a foreign proceeding in a jurisdiction where the debtor has the center of the debtor's main interests; while a "foreign non-main proceeding" is defined as a foreign proceeding, other than a foreign main proceeding.⁶⁸

In order to commence the application, the foreign agent here 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.⁶⁹ The focus in this analysis is on the substance of the foreign law.⁷⁰

could we have listed this?

The foreign proceeding here would likely fall within the definition of "foreign proceeding" given it is a proceeding in a jurisdiction outside Canada dealing with the creditors' collective interests in which the debtor's property and affairs are subject to the control and/or supervision of a foreign court for the purpose of reorganization and/or liquidation.

Additionally, the foreign agent here falls within the definition of "foreign representative" as he or she is acting as a representative in respect of the foreign proceeding.

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⁶⁴ *Idem*, p 58.

⁶⁵ *Idem*, p 60.

⁶⁶ Section 268(1) of the BIA, <<<https://laws-lois.justice.gc.ca/eng/acts/b-3/page-35.html#h-28874>>>, accessed 3 July 2023; and section 45(1) of the CCAA [although note that the CCAA definition omits the word 'liquidation' given the purpose of the CCAA is to reorganize insolvent companies], <<<https://laws-lois.justice.gc.ca/eng/acts/c-36/page-6.html#h-93427>>>, accessed 3 July 2023.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Finlayson, *supra* note 1, p 60.

⁷⁰ *Ibid.*

As such, the requirements for formal recognition would therefore likely be met, subject to formal proof as well the public policy exemption (which is further discussed in the answer to question 4.3).

Once the requirements for recognition are met, recognition will be automatic and compulsory, with the court required to make an order recognizing the foreign proceeding.⁷¹

Recognition of the foreign proceeding will mean that the foreign agent will have standing to appear and be heard in Canadian courts.⁷² Additionally, the recognition will place an obligation on Canadian officials to co-operate with the foreign agent as well as foreign courts.⁷³

5 Subject to the outcome of the center of main interest analysis, which is further discussed below, the court will determine whether the proceeding is a foreign main proceeding or a foreign-non main proceeding. In the event it is deemed a foreign main proceeding, the court will issue a stay of proceedings.⁷⁴ This would be in the foreign agent's favor, as it means the existing Canadian proceedings cannot continue and would therefore maximize the chances of securing a better outcome for the creditors of the foreign proceeding. If the court finds it is a non-foreign main proceeding, the foreign agent may still request a stay of proceedings, but the court will be allowed to exercise its discretion to make any order it deems necessary for the protection of the debtor's property or the interests of creditors.⁷⁵

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 Canadian legislation does not contain a definition of 'center of main interest' (COMI).⁷⁶ However, both the BIA and CCAA contain rebuttable presumptions. Most relevantly here, given the debtor in question is a company, the COMI, in absence of evidence to the contrary, is the company's registered office.⁷⁷

Based on the facts, the company's registered office is in the foreign jurisdiction. As such, its COMI is the foreign jurisdiction. *↳ could this conclusion be rebuttable? consider*

However, in addition to this presumption, the courts have identified the following three considerations which will be taken into account in determining COMI, which may rebut the presumption:⁷⁸

- 1 The location that significant creditors recognize 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'.

⁷¹ *Ibid.*

⁷² *Idem*, p 61.

⁷³ *Ibid.*

⁷⁴ *Idem*, p 60.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Idem*, p 60 to 61.

The above factors were considered in *Re MtGox Co* [2014] ONSC 5811, where the court ultimately found that MtGox's COMI was in Japan rather than Canada due to:⁷⁹

- (a) MtGox having no assets or offices in Canada;
- (b) MtGox always have been organized under the laws of Japan;
- (c) The registered office and books and records of MtGox being in Japan;
- (d) The sole director of MtGox residing in Japan;
- (e) Most of MtGox's bank accounts being located in Japan;
- (f) MtGox's parent company supplying services to it in Japan;
- (g) MtGox's website clearly disclosing that it was a Japanese corporation located in Japan; and
- (h) MtGox investigating hacking that occurred against it (which resulted in rehabilitation/restructuring proceedings) under the oversight of the Tokyo District Court.

good.

Applying the above to the debtor company here, it will be relevant that the debtor has a fulfilment office and warehouse in Canada as this means some of its assets are found in Canada. However, given that senior management has offices in the foreign jurisdiction rather than in Canada, the location of the debtor's headquarters or 'nerve center' are likely to be found in the foreign jurisdiction. As such, it is unlikely that the COMI presumption is rebutted here, and a Canadian court would likely find that the foreign proceeding here is a foreign main proceeding.

As discussed above, the benefit of this would be that a stay on all proceedings in Canada will be ordered, which means that the Canadian proceeding will not take any further steps against the debtor company.

(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.

Once recognition has been granted, Canadian courts are not limited to Canadian entitlements and remedies in the relief that they can provide.

This is because the relevant Canadian legislation contains broadly worded provisions which provide the court with discretionary power to make any order it considers appropriate on application by a foreign representative, so long as the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors.⁸⁰

Such orders may be in regard to the examination of witnesses, taking of evidence, as well as provision of information on a debtor's affairs and property.⁸¹ Additionally, and so long as it is consistent with concurrent proceedings under the BIA and CCAA, a court is not restricted to provide the same or even similar remedies under Canadian law.⁸² In fact, the Canadian court have previously ordered relief in a foreign-main proceeding which would not ordinarily be

⁷⁹ *Idem*, p 64.

⁸⁰ *Idem*, p 61, citing s 272(1) of the BIA and s 49(1) of the CCAA.

⁸¹ *Idem*, p 61.

⁸² *Ibid*.

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available in Canadian proceedings in the case of *Re Hartford Computer Hardware Inc*, 2012 ONSC 964.⁸³

However, the above is subject to the public policy exemption contained in Canadian insolvency legislation, which permits the court to refuse to do something which would be contrary to public policy when enforcing cross-border insolvency provisions.⁸⁴ However, practically speaking the exemption appears to be used rarely, and only where there is asymmetrical or unfair treatment of Canadian creditors.⁸⁵

*** End of Assessment ***

⁸³ *Ibid.*

⁸⁴ *Ibid*, citing s 284(2) of the BIA and s 61(2) of the CCAA.

⁸⁵ *Idem*, p 62.