



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.

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 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: **[studentnumber.assessment4C]**. An example would be something along the following lines: 202021FU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. 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 **7 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

Commented [TE1]: 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

Commented [TE2]: 0/1

What features are common to all formal insolvency procedures in Canada? Select the **correct answer** from the options below.

- (a) They are fragmented.
- (b) They follow a "modified universalist" approach.**
- (c) They follow a single-proceeding model and take a universalist approach except in regard to cross-border issues.
- (d) They are flexible and focused on restructuring, but they do not provide for the recognition or disposition of claims or assets held outside of Canada.

Question 1.3

Commented [TE3]: 1/1

Proceedings under the CCAA and BIA are subject to the administrative oversight of:

- (a) The provincial government.
- (b) The municipal government.
- (c) The Office of the Superintendent of Bankruptcy (the OSB).**
- (d) The bankruptcy court.
- (e) (a) and (d).

Question 1.4

Commented [TE4]: 1/1

Is the Stay of Proceedings automatic in a CCAA filing?

- (a) Yes.
- (b) **No. It is a discretionary order granted as part of the initial order by the court.**
- (c) It depends on the circumstances of the proceeding.

Question 1.5

Commented [TE5]: 1/1

An "insolvent person" under section 2 of the BIA means a person who is not bankrupt, resides or carries on business or has property in Canada, and whose liabilities to creditors provable as claims under the BIA amount to at least CAD 1,000, **and:**

Select the **best answer** from the options below.

- (a) is unable to meet obligations as they generally become due.
- (b) has ceased paying current obligations in the ordinary course of business as they generally become due.
- (c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all of his obligations, due and accruing due.
- (d) **any or all of the above.**

Question 1.6

Commented [TE6]: 1/1

Which of the following is an act of bankruptcy under section 42 of the BIA?

- (a) In Canada or elsewhere the bankrupt makes any transfer of the debtor's property or any part of it, or creates any charge on it, that is a fraudulent preference.
- (b) The debtor defaults on a proposal.
- (c) The debtor ceases to meet liabilities as they generally become due.
- (d) The debtor makes an admission of his inability to pay debts.
- (e) **All of the above.**

Question 1.7

Commented [TE7]: 1/1

Indicate whether the statement below is True or False:

It is possible to fund continued operations during restructuring proceedings in Canada.

- (a) **True.**
- (b) False.

Question 1.8

Commented [TE8]: 1/1

Indicate whether the statement below is True or False:

The CCAA provides for a statutory priority over pre-filing creditors to suppliers of goods and services to the debtor after the granting of an initial order.

(a) True.

(b) False.

Question 1.9

Commented [TE9]: 1/1

Indicate whether the statement below is True or False:

If a **corporate** proposal under the BIA is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy.

(a) True.

(b) False.

Question 1.10

Commented [TE10]: 1/1

Indicate whether the statement below is True or False:

Directors of a company have a fiduciary duty to act honestly and good faith with a view to the best interests of a company, even when the company is facing insolvency.

(a) True.

(b) False.

QUESTION 2 (direct questions) [10 marks]

Commented [TE11]: 3/3

Question 2.1 [maximum 3 marks]

Identify the different ways in which a debtor can enter bankruptcy in Canada.

- [(1) involuntary;
- (2) voluntary, and
- (3) on the failure of, or failure to perform the terms of, a BIA proposal

Involuntary bankruptcy

To successfully make out an application for an involuntary bankruptcy order, the applying creditor(s) must (i) be owed in excess of CAD 1,000 of unsecured debt and (ii) provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application.

The use of the words "at the time" in the definition of "debtor" means that the creditor need not prove the debtor currently carries on business or resides in Canada, or currently has assets in Canada. 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 has no assets currently in Canada, where it did business within the previous year.

Voluntary bankruptcy: Voluntary bankruptcy occurs when the debtor voluntarily makes an assignment into bankruptcy proceedings. This may be done for a number of 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. To be eligible to file a voluntary bankruptcy, the debtor must fall under the BIA definition of insolvent person discussed above. The process 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 the creditors, and the amounts of the creditors' claims. These documents are filed with the Official Receiver. Once the documents are accepted, the bankruptcy proceedings are commenced.

Failure of BIA proposal: The BIA contains provisions for both corporate and consumer proposals that allow debtors to reach compromises with their creditors, which are discussed in detail below. Proposals must be accepted by the requisite majorities of creditors and approved by the court. For a corporate proposal to be binding on each class of creditors it purports to affect, a majority of the proven creditors in that class, by number, together with two-thirds of the proven creditors in that class, by dollar value, must approve of the proposal. If a class of creditors approves the proposal, it is binding on all creditors within the class, subject to the court's approval]

Question 2.2 [maximum 2 marks]

Commented [TE12]: 1/2

What are the requirements that a creditor must demonstrate to make out an application for an involuntary bankruptcy order?

According to Section 43(1) of the Bankruptcy and Insolvency Act, creditors may file in court for an application for a bankruptcy order against a debtor if -

- (a) the debts owing to the applicant creditor or creditors amount to one thousand dollars (CAD 1,000); and
- (b) the debtor has committed an **act of bankruptcy** within the six months preceding the filing of the application.

Commented [TE13]: define or at least refer to s. 42 of BIA

Question 2.3 [maximum 3 marks]

Commented [TE14]: 3/3

The Office of the Superintendent of Bankruptcy has a number of functions. **Name three of these functions.**

[The role of the Office of the OSB is to ensure bankruptcies and insolvencies are handled as fairly and efficiently as possible.

The OSB is responsible for administratively supervising all estates and matters to which the BIA applies, as well as select matters under the CCAA.

The position has a number of functions which include regulating the insolvency profession and ensuring compliance through maintenance and enforcement of the regulatory framework.

- (i) Licensing and supervising of trustees;
- (ii) Inspecting or investigating estates;
- (iii) Receiving and dealing with complaints from creditors against estate professionals during proceedings;
- (iv) Examining a trustee's account of a bankruptcy and ensuring all the correct information is accounted for; and

(v) maintaining public records regarding the filing of proposals, bankruptcies, license issues and appointments of receivers under the BIA.]

Question 2.4 [maximum 2 marks]

What are the **four** criteria that must be met in order for an individual bankrupt to be automatically discharged within nine (9) months after the bankruptcy is filed?

- I. This is a first bankruptcy;
- II. The bankrupt has attended two financial counselling sessions;
- III. The bankrupt is not required to pay a portion of his/her income into the bankruptcy estate as per the standards established by the Office of the Superintendent of Bankruptcy (OSB);
- IV. The discharge is not opposed by a creditor, the Licensed Insolvency Trustee (LIT) or the OSB.]

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 8 marks]

Compare and contrast the role of the "Monitor" in CCAA proceedings and the "proposal trustee" in a BIA proposal.

In your essay you should refer to at least the following:

- Whether the monitor and / or proposal trustee is court-appointed; and
- The statutory duties, if any, of the monitor and / or proposal trustee.

[- A monitor is appointed by the court to oversee the process on its behalf and any plan of arrangement approved by the creditors of the debtor must also be approved by the court while a proposal trustee is selected by the debtor

- The Monitor plays a supervisory and advisory role in the proceeding. In its supervisory role, the Monitor oversees the steps taken by the company while in CCAA proceedings as an officer of the court and on behalf of all stakeholders. Similar, the proposal trustee plays a supervisory and advisory role and assists the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders

- A Monitor is a licensed insolvency professional and an officer of the court, similarly, a proposal trustee is a trained insolvency professional.
Type your answer

Question 3.2 [maximum 7 marks]

Write a short essay that identifies the main policy goals of the Canadian insolvency regime and provide examples of how these policy goals are reflected in different aspects of the insolvency system. In your essay, explain why the national insolvency system in Canada is described as "universalist" in the context of Canada's approach to cross-border insolvency law.

[Policy Goals

Commented [TE15]: 2/2

Commented [TE16]: 6/8, mention specific functions such as filing reports, filing NOI/proposals, cashflow statements etc.

Commented [TE17]: 3/7 a lot of copying and pasting with no citation

Commented [gf18R17]: Copying and pasting does not show mastery of or engagement with the material.

Canada's insolvency regime aspires to strike a balance between reorganization and liquidation. The policy rationales that underlie the Canadian insolvency system focus on certainty, transparency, asset preservation, value maximization and rehabilitation. Where appropriate, the Canadian insolvency system provides for, and favours, debtor rehabilitation because of the perceived social benefits that flow from the rehabilitation of debtors. These include increased recoveries for creditors, the maintenance of supplier relationships and local economic activity, and the preservation of jobs. At the same time, Canada's insolvency framework recognizes existing creditor rights and establishes clear rules for the ranking of priority claims and the equitable treatment of similarly situated creditors. This balanced approach flows from the recognition that certain and reliable rules provide security for investors and lenders that, in turn, influences the cost and availability of credit in the Canadian marketplace.

Management of Proceedings

These policy concerns are reflected in the way insolvency proceedings are managed through a combination of creditor control, estate professional management and court supervision that includes consideration of the interests of the debtor and other stakeholders (including employees, the community, customers, etc). The overall regulation and management of insolvency proceedings is done through the oversight of the court. The day-to-day process is largely overseen by court appointed representatives such as trustees, receivers or the CCAA monitor, who owe broad duties to the court and all stakeholders and periodically report to creditors and the court. Creditors are provided a degree of control over insolvency proceedings through voting mechanisms and other powers in both bankruptcy and restructuring situations and may seek to replace estate professionals in certain circumstances.

Creditors also have the right to information and to be heard by the court overseeing the insolvency proceeding.

BIA liquidating bankruptcy proceedings are managed by a trustee. The trustee must seek court approval when taking certain steps, such as selling the debtor's property and finalizing its discharge. BIA proposal proceedings are debtor-in-possession, but a proposal trustee manages the process. Any proposal approved by the debtor's creditors must also be approved by the court. CCAA proceedings are also debtor-in possession, but are predominately court driven. A monitor is appointed by the court to oversee the process on its behalf and any plan of arrangement approved by the creditors of the debtor must also be approved by the court. A restructuring under a corporate statute such as the CBCA is managed by the corporation, but the court typically establishes the process for presenting the arrangement to the company's stakeholders and, once approved by the stakeholders, the arrangement must be approved by the court.

In a court-ordered receivership the receiver obtains its powers from the appointing order and periodically reports to the court to seek approval of its activities, including the approval of sales processes, the acceptance of bids and approval of major asset sales, as well as distributions to creditors.

Unsecured creditors direct the administration of the estate in a liquidating bankruptcy. Significant creditors or creditor groups will often be actively involved in restructurings under the CCAA or BIA both in the pre-filing and post-filing stage and can exert a degree of influence commensurate with the value and priority of their claims.

For instance, creditors may either individually or collectively hold sufficient debt of a class of creditors (33 1/3% of the debt) that allows them to effectively "block" approval of any CCAA plan or BIA proposal. This is a particularly acute issue in Canada because unlike the US there are no "cram down" provisions that allow for the imposition of a plan by a court despite any objections by certain classes of creditors.

The Canadian insolvency law system is "universalist" in that it purports to extend to the debtor's assets wherever located. It is reciprocal in that it permits foreign creditors to participate in Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors. Often, however, companies or corporate groups that become insolvent carry on business and have assets and claims in multiple jurisdictions, each with

their own set of national laws, some of which may conflict substantively with Canadian insolvency law. The Canadian system is only beneficial if other states respect properly initiated Canadian insolvency proceedings and recognize the rights of Canadian creditors in their proceedings. It should also be kept in mind that despite its imposingly large land area, Canada has a relatively small population and unimposing economy and military. It cannot simply impose its will on other countries.]

QUESTION 4 (fact-based application-type question) [15 marks in total]

Question 4.1 [maximum 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 the foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. The 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. That 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.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks]

The foreign agent wants to understand the formal proof requirements to obtain recognition of the foreign proceeding in Canada. What is your advice?

[As a foreign agent, you should know the following in order to gain recognition for a foreign proceeding in Canada. The process for recognition is as follows:

The provisions of the BIA and CCAA on the recognition of foreign insolvency proceedings require Canadian courts to recognize foreign proceedings on formal proof of three main requirements:

- (1) that the proceeding is a “foreign proceeding” in accordance with the statutory definition;
- (2) that 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 a center of main interest (COMI) analysis. The recognition application is commenced by a foreign representative who files sufficient evidence of the foreign law to allow the Canadian court to determine that they are a foreign representative and the proceeding is a foreign proceeding. The case law demonstrates that both terms are to 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. Once the requirements for recognition have been met, the recognition is automatic and compulsory,

Commented [TE19]: 3/5 used quotation marks for defined terms without defining them.

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

Question 4.2 [maximum 5 marks]

The foreign agent wants to understand whether or not you believe the foreign agent can obtain a stay of the Canadian litigation and why. What do you tell the foreign agent?

[If a foreign proceeding is recognized as the foreign main proceeding, an automatic stay of proceedings occurs in Canada. (BIA S. 271 AND CCAA S. 48)

If a foreign proceeding is recognized as a foreign non-main proceeding, a stay may still be obtained, but it must be requested and justified. If a foreign proceeding is recognized, as either main or non-main, it gives the foreign representative standing to appear and be heard in Canadian courts.(s. 49(1) CCAA).

Furthermore, the recognition imposes an obligation on Canadian officials to cooperate with the foreign representative and the foreign court. Both the BIA and the CCAA contain broadly worded, discretionary provisions that provide that where an order recognizing a foreign proceeding has been made the court may, on application by the foreign representative, if it is satisfied that it is necessary for the protection of the debtor companies property or the interests of a creditor or creditors, make "any order that it considers appropriate". (BIA S. 272(1); CCAA S. 49(1))This includes, orders respecting the examination of witnesses and the taking of evidence, and provision of information on the debtor's property and affairs.

Subject to the public policy exception, and ensuring that any such order is consistent with orders made in any concurrent proceedings under the BIA or CAA, the court is not restricted in exercising this discretion to only to providing the same or similar remedies as available under Canadian insolvency law and has in fact ordered relief in foreign main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings.

It should however be noted that recognition will result in a stay of all actions brought against the company in Canada, including the class action.]

Question 4.3 [maximum 5 marks]

The foreign agent wants to know whether they can compel the Canadian resident who was in charge of the fulfilment office and warehouse in Canada to submit to an examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction (for example, following that jurisdiction's procedure rather than Canadian procedure). What is your advice?

[Type your answer here]

*** End of Assessment ***

Commented [TE20]: 0/5

Commented [gf21R20]: No answer provided

Commented [TE22]: 30/50

Commented [gf23R22]: Copy pasting and not providing answers hurt your mark.