



**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: 202021IFU-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**

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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]: 1/1

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/

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**

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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**

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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]**

**Question 2.1 [maximum 3 marks]**

Commented [TE11]: 3/3

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

There are three different ways in which a debtor can enter bankruptcy in Canada: (i) voluntary; (ii) involuntary; (iii) on the failure or failure to perform the terms of a BIA proposal.

The voluntary bankruptcy filing happens when the debtor itself files a request to enter a bankruptcy proceeding. To be eligible to file this kind of proceeding, the debtor must be adequate to the BIA definition of insolvent person. Different from the involuntary request, this proceeding does not involve a court application, but only an assignment of its property for the benefit of its creditors. The documents should be filed before the Official Receiver. The bankruptcy commences when the documents are accepted.

The involuntary bankruptcy should be filed by a creditor that is owed more than CAD 1000 of unsecured debt and provides any evidence that the debtor has committed an act of bankruptcy within 6 months of the date of the filing. The application should be directed to the court located where the debtor held its assets or do its business. The acts of bankruptcy are listed in section 42 of the BIA.

The last way to enter bankruptcy happens when a corporation or an individual fails to approve the proposal arranged with the creditors. The BIA contains provisions for both companies and individuals to try to reach an agreement with the creditors. Therefore, if the proposal made by the debtor is rejected, the debtor is deemed to have made an assignment in bankruptcy. Also, if the debtor defaults under the terms of its proposal and it is not waived, the trustee must inform the creditors and the official receiver. Therefore, a motion shall be filed to annul the reorganization, and, if granted, the debtor goes bankrupt.

**Question 2.2 [maximum 2 marks]**

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

The creditor must: be owed more than CAD 1000 of unsecured debt and provide any evidence that the debtor has committed an act of bankruptcy within 6 months of the date of the filing. The application should be directed to the court located where the debtor held its assets or do its business. The acts of bankruptcy are listed in section 42 of the BIA.

Commented [TE12]: 1/2 - you should list out at least some of the acts of bankruptcy

**Question 2.3 [maximum 3 marks]**

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

The Office of the Superintendent of Bankruptcy has the role to ensure that the bankruptcies and insolvency proceedings are being handled fairly. Therefore, the OSB should handle the administrative supervising into which the BIA applies and selected matters under CCAA.

Some of its related functions can be: (i) licensing and supervising trustees; (ii) inspecting or investigating states; (iii) examining trustee's account of bankruptcy to ensure the correct information is accounted for.

Commented [TE13]: 3/3

**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?

Individual bankruptcy can be automatically discharged after nine months if some conditions are met: (i) it should be the first bankruptcy; (ii) the bankrupt debtor attended to at least two financial counseling sessions; (iii) the bankrupt is not required to pay a portion of his income into to the bankruptcy estate as per the standards established by the OSB; (iv) the discharge is not opposed by a creditor, the trustee of the OSB. It is important to highlight that some debts are not released by the discharge order.

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

**Question 3.1 [maximum 8 marks]**

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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.

The monitor and the proposal trustees have similar functions, but they should be outlined by their characteristics that will be detailed described in this essay.

The monitor is appointed by a CCAA order, in which a licensed insolvency professional and an officer of the court will occupy the role. The Monitor is generally selected by the debtor and plays an advisory and supervisory role in the proceeding. Acting on behalf of all stakeholders, as an officer of the court, the monitor oversees the actions taken by the company during the proceeding. It also assists with the preparation of the cash-flow statements and with the plan negotiation.

The monitor has also the obligation to file reports with the court and the creditors regarding any proposed disposition of assets or DIP financing perspectives. The power of the monitor can also become bigger since it can be appointed to act in the company’s management. For instance, if the board of the insolvent company has resigned, the monitor can step in with its powers expanded and effectively manage the company during the proceeding, monitors who assume such kind of role are referred to in practice as “super monitors”.

On the other hand, the proposal trustee is selected by the debtors. As well as the monitor, but under the BIA rules, the proposal trustee has a supervisory and advisory role in assisting the debtor in the development of the proposal and its negotiation. Therefore, under de BIA rules a receiver can be appointed to take over management of the company if the board is no longer fulfilling its role.

The proposal trustee, unlike the monitor, has some fiduciary duties, such as giving notice of the filing of the NOI of the proposal, filing a projected cash-flow with a statement and a report from the trustee, and calling a meeting of creditors to consider and vote the proposal. Also, if the proposal is accepted by the creditors the proposal trustee should make the final application to the bankruptcy court approval.

Therefore, despite being similar, both functions have their standards when it comes to appointing rules and duties.

### 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.

Canadian insolvency regime has some main policy goals. The most notorious one is that the systems aim to grant a balance between reorganizations and liquidations proceedings. This means that asset and value preservation are privileged by the proceeding.

**Commented [TE16]:** 6/7 should mention the limitations of universalism, particularly fir states that don't recognize Canadian insolvency proceedings

Also, Canadian insolvency provides a viable way out of a financial crisis for individuals and companies, encompassing debtor rehabilitation, aiming at the social and future benefits of this type of conduct. For instance, if an individual wants to be granted an automatic discharge after 9 months of an insolvency proceeding, one of the prerequisites is attending a financial advice class. In this sense, despite also being effective in reorganizing the financial life and promoting a fresh start, the goals are also to improve the role of such citizens and companies in society. At the same time, the social benefits also provide maintenance of jobs, economic activities, and supplier relationships.

It is important to highlight that the balance is also pends to the creditor side, in which are established rules for priority claims, equitable treatment, the right of the creditor to file for bankruptcy and the cognizance of fraudulent actions against is debts and against the estate. The court provides regulatory assistance, and the management of insolvency proceedings is done mostly with court oversight. In this sense, the system provides the creditors some kind of control over the proceeding so that they will not feel exposed and without information in hand when needed.

This kind of system approach enables the policy to develop proceedings that are friendly to all stakeholders and encourages the parties to act upon an insolvency situation as soon as possible.

Also, is important to bear in mind that the Canadian insolvency system is known for its "universalist" approach, as for that, it purports to extend to the debtor's assets wherever they are located. Therefore, if creditors from other nations intend to participate in an insolvency proceeding that is being held in Canadian territory, one will have the same rights and prerogatives.

#### **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]**

Commented [TE17]: 3/5



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

The BIA and CCBA provisions for recognition of foreign insolvency proceedings require formal proof of three main requirements: (i) the proceeding is a foreign proceeding following the **statutory definition**; (ii) the applicant is a foreign representative under the statutory definition and (iii) whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on a COMI analysis.

The commencement of the recognition proceeding should be made by the representative who files the evidence to the Canadian court. Once the requirements have been met, the recognition is automatic and compulsory.

Commented [TE18]: more explanation required

**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?

The chances of getting an automatic stay in the Canadian proceeding will mostly depend on the recognition made by the court. If the court recognizes the foreign proceeding as the main proceeding, it will promote an automatic stay to each proceeding in the recognizing jurisdiction, which shall be Canada.

Although, if the proceeding is recognized as a non-main proceeding, it is as of the discretionary power of the court to grant the stay or not. On this occasion, the requirement shall be instructed with evidence that this proceeding needs to stay. In this case, the "danger" would be harder to prove since the proceeding is in the initial phase.

The fact is that this analysis shall be made based upon the premises and concepts of COMI. Therefore, if the court understands that the company's COMI is not in Canada, and as a matter of fact it is in the foreign jurisdiction, the main proceeding shall be recognized.

Canada adopted the UNCITRAL model law in parts, and the "main" or "non-main" proceeding definition is a part of its provisions. Also, it should be noted that defining what is the characteristic of the proceeding is important to limit the court power and its role and also to encourage cooperation between courts.

Commented [TE19]: 4/5 what is the COMI test?

**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 fulfillment 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?

If the foreign proceeding recognition application is granted, it imposes obligations on Canadian officials to cooperate with the foreign representative and court. Therefore, both BIA and CCA contain provisions that grant discretionary powers to the representative, embracing "any order that it considers appropriate". Therefore, this includes proceedings as orders regarding the witness's examination, taking on evidence, and gathering information regarding debtor property. All these powers are subject to the public policy exemption, which permits the court to refuse to do some act that would be contrary to public policy.

Commented [TE20]: 4/5 you should mention that court's remedies in this case aren't limited to Canadian law

Commented [gf21]: 44/50 Good Job!

**\* End of Assessment \***