



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

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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

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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

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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

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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

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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

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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

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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]

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

There are following three different ways/methods for entering bankruptcy in Canada: -

1. Involuntary bankruptcy: - The involuntary bankruptcy occurs when the applying creditor owns more than CAD 1000 of unsecured debt along with the evidence proving that the debtor has committed an act of bankruptcy within six months of the date of filing such bankruptcy application. Such application must be brought to the bankruptcy court in the location where the debtor ordinarily resides or does business or has assets or the place where the debtor currently does not have any assets in Canada, then it will be place of business during previous year.

2. Voluntary bankruptcy: - As the name suggest, it occurs when the debtor voluntary initiates bankruptcy proceedings due to various reasons such as, to put stay on legal actions by creditors, individuals looking for a fresh start after conclusion of proceedings.

3. On the failure of, or failure to perform the terms of, a BIA proposal: - BIA contains provisions for debtors to make compromises with their creditors and if such compromise proposal is rejected by a class of creditors having voting right or the proposal is not approved by court or debtor defaults under the terms of its proposal then bankruptcy proceedings can be started against such debtor.

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 basic requirement that a creditor must demonstrate is: -

1. The debtor must owe more than 1000 CAD of unsecured debt, and
2. Act of bankruptcy (inability to meet out liabilities) has been committed by the debtor within six months prior to the date of filling of bankruptcy application by the creditor.

Question 2.3 [maximum 3 marks]

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

The OSB is the regulatory agency that oversees Canada's bankruptcy and insolvency process including the administration of bankruptcies and consumer proposals under the Bankruptcy and Insolvency Act.

The three functions of Office of the Superintendent of Bankruptcy are as follows: -

1. Regulating the insolvency profession i.e. licensing and supervision of trustees
2. Inspecting or investigating estates, dealing with complaints against estate professionals and examining of trustee's account.
3. Maintaining public records with regard to bankruptcies, license issues and receiver's appointments etc.

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?

The criteria that must be met in order for an individual bankrupt to be automatically discharged within nine (9) months after the bankruptcy is filed is as follows: -

1. It should be the first bankruptcy of the bankrupt individual
2. He has attended two sessions of financial counselling
3. He is not required to pay part of his income to the bankruptcy estate as per the standards established by the Office of the Superintendent of Bankruptcy and

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4. Lastly, the discharge is not opposed by the creditor(s), Office of the Superintendent of Bankruptcy or the trustee.

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 an independent third party (a licensed insolvency professional) who is appointed by the Court to monitor the company's ongoing operations and assist with the filing and voting on the Plan of Arrangement.

Whereas, a Proposal Trustee is an independent third party who is appointed by the Official Receiver to assist the company with the filing of its NOI and/or Proposal and to monitor the company's ongoing operations during the Stay period.

The Monitor's duties in CCAA proceedings includes, monitoring the business, reporting to the Court on any major events that might impact the viability of the company, assisting the company in the preparation of the Plan of Arrangement, notifying the creditors (and shareholders) of any meetings and tabulating the votes at these meetings. The Monitor prepares a report on the Plan of Arrangement that is usually included in the mailing of the Plan.

Further, the Proposal Trustee's monitoring duties include monitoring the business' ongoing financial activities, reporting to the Court on any major events that might impact the viability of the company, assisting the company in the preparation of its Proposal, notifying the creditors of any meetings of creditors and tabulating the votes at these meetings. The Proposal Trustee will also prepare a report on the Proposal that is included in the mailing of the Proposal to creditors.

The roles and duties of Monitor in CCAA proceedings and Proposal Trustee in BIA proposal are quite similar with specific technical differences. Since Monitor plays a supervisory and advisory role such as reviewing steps taken by the company while in CCAA proceedings as an officer of court and give assistance in preparation & negotiation of plan between the company and stakeholders. The court at its discretion may increase the powers of Monitor where the management fails or where the creditors have lost confidence in management. Whereas the Proposal Trustee's plays similar role as of Monitor also its statutory duties include giving notice of the filling of the NOI or proposal to all creditors, filling of report of trustee, calling for meetings of creditors to consider and vote on proposal. He must also file the final application to the court for approval of proposal accepted by the creditor.

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Question 3.2 [maximum 7 marks]

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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 runs on a modern and balance approach where interest of creditors and debtors are secured through various alternatives. The options such as re-organisation, liquidation, alternatives to personal bankruptcy available to individuals are there in Canadian insolvency regime to ensure the asset preservation, value maximization, transparency and rehabilitation.

The Canadian system of insolvency does not only allow liquidation but, where appropriate it favours debtor rehabilitation so that recoveries can be increased, jobs can be secured and business relation & local economy can be preserved. Simultaneously, it recognises creditors rights and establish clear rules for priority ranking of claims and equal treatment similarly situated creditors.

The broader aim of the whole system of insolvency regime is to create balance in economy and provide a reliable & secure environment to businesses and lenders.

The purpose is to reinstate or revive the businesses or the individuals which are facing financial distress due to the wrong business decisions or/and liquidate the businesses which can't be kept as going concern with preserving the value. The system contains clear provisions for avoidance of undervalued, preferential and fraudulent transactions.

The whole insolvency system runs under the supervision of courts, its appointed officers, professionals, OSB and participation of creditors so that a transparent and integrated system with objectives of prosperity can be achieved.

The national insolvency system allows sharing of losses between creditors and other stakeholders, the rules and procedures are made in such a way that the system becomes Universalist, since it purports to extend the debtor's assets located anywhere in the world and simultaneously it permits foreign creditors to participate in Canadian bankruptcy proceeding with same rights and priorities as of local/domestic creditors it can be said that the national insolvency system in Canada is "universalist" as it does not discriminate between local or foreign creditors and provides for universal rights & priorities to all creditors if rest of the conditions are fulfilled.

Further, Canada also works on the concept of Modified Universalism when and where required, since rest of the world doesn't have same rules and procedures due to which conflict arises and Modified Universalism gives solution to this problem of cross border insolvency to some extent.

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?

There are three main formal proof requirements to obtain recognition of the foreign proceeding in Canada: -

1. It should be an "foreign proceeding" as per the statutory definition
2. The applicant should be an "foreign representative" as per the statutory definition and
3. Centre of Main Interest analysis, whether "foreign proceeding" is a "foreign main proceeding" or "foreign non-main proceeding".

To obtain recognition of the foreign proceeding in Canada, the foreign representative has to submit above said three formal proofs, which in the given case seems to be available since the case laws demonstrates that both the terms "foreign proceeding" & "foreign representative" is to be given a broad and purposive interpretation thereby allowing an applicant to meet requirements easily. Therefore, in my opinion, recognition will be provided.

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 foreign agent will obtain a stay of the Canadian litigation or It can be said that there will be an automatic stay once the foreign agent obtains recognition of foreign proceedings in Canada as "foreign proceeding" with status of "foreign main proceeding".

Since the given facts fulfils the following basic conditions of Centre of Main Interest: -

1. The location that significant creditors recognize as being the Centre of Company's operations.
2. The location in which the company's principal assets or operations are found, and

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3. The location of the debtor's headquarters, head office or nerve centre.

Therefore, in my opinion foreign proceeding will be recognized as the foreign main proceeding and an automatic stay of proceedings will occur in Canada.

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?

Once the recognition as "foreign proceeding" is obtained there will be an obligation on Canadian officials to cooperate with the foreign representative and foreign court. Moreover, on application by the foreign representative, if it is satisfied that it is necessary for protection of debtor's assets and interest of creditors, the court may make orders which it deems fit which includes examination of witnesses, collection of evidences, supply of information etc subject to public policy exemption.

In my opinion, in the given case, the foreign representative after recognition of "foreign proceeding" may file an application with the Canadian court seeking relief and compelling the said 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 subject to public policy exemption and the court will accept the application.

*** End of Assessment ***

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