



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]

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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

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

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

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

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

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

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

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

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

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]

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

A debtor in Canada can enter into bankruptcy by three means as:

1. Voluntary bankruptcy
2. Involuntary bankruptcy
3. By failure to perform the terms of his BIA proposal

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?

For a creditor to subject a debtor to an involuntary bankruptcy, the creditor must demonstrate that the debtor:

1. Owes in excess of CAD 1000

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2. Has committed "an act of bankruptcy" within 6 months of the date of filing; and
3. The application must be brought in the area of residence of the debtor, where the debtor has business, assets or properties or where the debtor did business in the previous year.

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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 (OSB) among other duties has the following functions:

1. Licensing and supervising trustees
2. Inspecting and investigating bankruptcy estates; and
3. Receiving and dealing with complaints from creditors against bankruptcy estate professionals during bankruptcy proceedings

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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?

For an individual bankrupt to be automatically discharged within 9 months after the bankruptcy is filed, he or she must meet the following criteria:

1. Be a first time bankrupt;
2. Attend two financial counselling sessions
3. Not been required to pay his income into the estate as per the requirement of the Office of the Superintendent of Bankruptcy; and
4. The discharge is not opposed by creditors, the trustee or the OSB

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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.

The Monitor in the CCAA proceeding is generally chosen by the debtor. He or She has both supervisory and advisory duties in the CCAA plan of arrangement process. He becomes an officer of the court upon appointment and must report both to the court and the stakeholders of the debtor company. He or She assists in the preparation of cash-flow statements as well

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as in the negotiation of the plan between the company and its stakeholders. He or She files periodic reports with the court and creditors including reports setting out his or her views in connection with any proposed Debtor -in-possession financing. His or Her powers are set out in the CCAA

However, upon resignation of the board of directors of the company or when the creditors have lost confidence in the performance of the management of the company, the Monitor may be assigned the duty of running the company during the period of the restructuring. The Monitor may be authorized by the court to sell assets of the company, subject to the court's approval in an outside the course of business situation and can also be directed by the court to direct certain corporate functions or engage in litigation on behalf of the company as a "super Monitor."

The proposal trustee in BIA proceeding like the Monitor in CCAA proceeding is selected by the debtor but may be replaced by the creditors. They function as supervisors and advisors in the BIA proposal proceedings and assist the debtor in developing the proposal and in the negotiations with the creditors and other stakeholders of the company. His statutory duties under the BIA include giving notice of the filing of the Notice of Intent or the filing of the proposal to all known creditors, filing projected cash-flow statement accompanied by a report on its reasonableness and calling a meeting of creditors to consider and vote on the proposal. He or She reports on the financial situation of the debtor and the cause of the debtor's financial situation at the creditors' meeting. He or She also makes the final application to the bankruptcy court for approval of the proposal if it is accepted by the creditors.

Unlike the Monitor in the CCAA, he or she does not run the company. Under the BIA proposal provisions, a receiver is appointed to take control of the management of the company if it is clear that management is no longer acting or capable of acting in the best interest of the company or its stakeholders.

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.

The main policy goals of the Canadian Insolvency regime are certainty, transparency, asset preservation, value maximization and rehabilitation. Canadian insolvency system provides for and favours debtor rehabilitation because of the perceived social benefits that flow from rehabilitation of debtors. These include increased recoveries for creditors, the maintenance of supplier relationships and local economic activity and the preservation of jobs. Canadian insolvency framework also recognizes existing creditor rights and establishes clear rules for the ranking of priority claims and equitable treatment of similarly situated creditors. This balanced approach flows from the recognition that certain and reliable rules provide security for interests and lenders that in turn, influences the cost and availability of credit in the Canadian marketplace.

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 primarily done through the oversight of the court. The day to day process is largely overseen by court appointed representatives such as the trustees, receivers or the CCAA monitors, 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 right to information and to be heard by the court overseeing the insolvency proceeding.

In certainty, a secured creditor enforces his remedies against the collateral are not regulated by the liquidating provisions of the BIA and are not subject to the automatic stay of proceedings that occur when the company is assigned into bankruptcy. Proceeds from secured collateral not in possession or control of the secured creditor are not used to satisfy all creditors, but instead are used to fully satisfy the obligations owed to the secured creditor's interest. If there is a surplus from the sale of the collateral exceeding the secured creditor's interest, the trustee is entitled to the surplus to distribute among the remaining creditor. A secured creditor has a right to assert an unsecured claim in bankruptcy for the balance of its claims if the collateral pertaining to the security interest does not satisfy their secured obligations. In CCAA proceedings, secured creditors are generally stayed from enforcing their security. In BIA proposal proceedings, secured creditors are initially stayed, but if the debtor chooses to make a proposal only to the unsecured creditors, then the stay is lifted with respect to the secured creditors.

For transparency, proceedings under the CCAA and the BIA are subject to the administrative oversight of the federal government office known as the Office of the Superintendent of Bankruptcy (OSB). The federal government appoints Official Receivers to carry out statutory administrative duties in each bankruptcy jurisdiction across Canada. The role of the OSB is to ensure that 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 regulatory framework

For assets preservation, both the BIA and CCAA proceedings have impeachable transactions provisions whereby transactions that took place pre-bankruptcy or insolvency are investigated and reversed if necessary. The impeachable transactions that augments the assets include transfers under value transfer of the property of the debtor that are made either for no compensation or for less than the market value of the transferred assets. Also preferences whereby some creditors are preferentially paid at the expense of other creditors and suspected fraudulent conveyances or fraudulent preferences are sought after from provisional legislations. The provisions of the BIA creates certain rebuttable presumptions based on the relationship of the parties and the timing of the impugned transaction relative to the debtor's initial bankruptcy event. The initial bankruptcy event is the earliest of the filing of voluntary assignment of a BIA proposal, a notice of intention to file a proposal, a CCAA filing or the first application for an involuntary bankruptcy against the debtor.

The Insolvency system in Canada permits post-commencement financing for the debtor-in-possession (DIP) lending. It grants the post-commencement financing lenders priority over secured creditors of the debtor. Both the BIA and the CCAA impose three prerequisites to DIP financing: 1) notice must be given to secured creditors who may be affected by the interim financing charge, 2) the amount granted must be appropriate and no more than what is required and 3) interim financing cannot be used to secure an obligation that exists before the charge was made. In considering the appropriateness of DIP financing, the court is required to take into account:

- 1) The expected duration of the proceedings
- 2) How the debtor's management and financial affairs are to be managed during the proceedings
- 3) Whether the debtor's management has the confidence of the major creditors
- 4) Whether the DIP loan would enhance the prospects of a viable restructuring
- 5) The nature and value of the debtor's property
- 6) Whether any creditor would be materially prejudiced as a result of the DIP priority; and
- 7) The monitor/proposed trustee's report on the cash flow forecast of the debtor

A number of important principles have come out of the court approved super priority DIP financing, including that: DIP financing will be approved if all or substantially all secured creditors consent; DIP financing will be approved where secured creditors are not adversely affected because the financing will result in new collateral to repay the DIP; the DIP financing will be approved where the funds are used to pay essential expenditures; and DIP financing will not be approved if there is a reasonable prospect of successful restructuring in another manner.

Canada has another restructuring arrangement under its corporate CBCA as against its insolvency statutes. Restructuring through corporate statute is alternative to corporations in proper circumstances due to its flexible interpretation and broad discretion exercised by the court. Section 192 of the CBCA may be used by corporations that do not require operational restructuring but instead only a restructuring of their assets and liabilities. Implementing a plan of arrangement under section 192 begins with an application by the corporation for an interim order, followed by an application for a final order once the process is complete. The first thing the court considers is whether the statutory requirements under section 192 have been met, which are: 1) notice must be provided to the CBCA director; 2) the proposal arrangement must constitute "an arrangement" under section 192 of the CBCA; 3) it is not practicable to effect the proposed arrangement under any other provision of the CBCA; and 4) the applicant is "insolvent."

The courts' general concern is the efficiency offered by the arrangement. Section 192 of the CBCA states that the applicant must be solvent. At the interim order stage, the case law indicates that the court will approve the application if at least one of the applicant companies is not insolvent. At the final order stage, the court must conclude that the corporate entity that emerges, once the plan of arrangement is implemented, will not be insolvent. (What this means in practice is that while applicants are able to skate by solvency requirements at the interim order stage with a newly incorporated shell company, they must be seeking to implement a plan of arrangement that will result in a solvent entity on the other end).

The second requirement for court approval of the arrangement under section 192 is that the application being put forward must be in good faith. This can be easily satisfied if it can be demonstrated that the applicant has a valid business purpose for putting forward the arrangement.

The last requirement for court approval under section 192 is that the arrangement must be fair and reasonable in the circumstances. The court considers the positive benefits to the corporation which flow from the valid business purpose established under the second requirement of section 192. The necessity of the arrangement for the future success of the corporation is often an important factor. The court also considers any objections by stakeholders and whether the arrangement has been approved by the majority of the secured holders or whether an informed and reasonable business person would approve the plan.

The Canadian insolvency law is "universalist" in that it purports to extend to the debtor's assets wherever located. It is also reciprocal in that it permits foreign creditors to participate in the Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors.

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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?

For a formal proof requirement to obtain recognition of the foreign proceeding in Canada, the foreign agent must establish that the proceeding qualifies for the statutory definition of foreign proceeding under the BIA or the CCAA statutes.

He must also satisfy the statutory definition requirement for a foreign representative and the proceeding must be statutorily be classified as foreign main or non-main proceeding using the COMI definition as explained by the courts.

Finally the proceeding must not sin against the public policy rule exemption of Canada.

The recognition application must be commenced by the foreign representative who must file sufficient evidence of the foreign law to allow the Canadian court to determine that he or she is a foreign representative i.e. he or she has been appointed by the foreign court as a foreign representative in the foreign proceeding. The foreign proceeding must be a judicial proceeding in a forum outside Canada dealing with creditors' collective interests generally under the laws of the foreign state under the supervision of a foreign court.

The foreign proceeding must also qualify as either a foreign main or non-main proceeding. For a foreign main proceeding the proceeding must be at the Centre of Main Interest (COMI) of the debtor company. For the proceeding to be at the COMI, the forum must rebuttably be the location that significant creditors of the debtor recognize as the centre of the debtor company's operations or the location in which the debtor's principal assets or operations are found or the location of the debtor company's headquarters, head office or "nerve centre."

For the non-main proceeding, the debtor company need not have an establishment at the foreign forum, but any link, however tenuous may do such as having financial accounts at the place.

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 would have to understand that under Canadian insolvency laws in cross-border cases, once the recognition of the foreign proceedings is determined and granted, there is automatic stay of proceedings in Canada if the foreign proceedings is determined and granted as a foreign main proceedings. For a foreign non-main proceedings stay of Canadian proceedings must be requested for and justified for it to be granted.

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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?

The Canadian Insolvency laws 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 company's property or the interests of a creditor or creditors make any order it considers appropriate. This includes but is not limited to orders respecting the examination of witnesses and the taking of evidence, and the 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 concurrence proceedings under the two Canadian Insolvency statutes. The court has discretion and has ordered reliefs in foreign proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings.

*** End of Assessment ***

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