



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 can enter bankruptcy in the following ways:

- (i) involuntarily
- (ii) voluntarily
- (iii) on the failure of, or failure to perform the terms of, a 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?

The creditor or creditors must fulfil the following requirements:

- (i) be owed more than CAD 1,000 of unsecured debt and

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- (ii) provide evidence that the debtor has committed an **act of bankruptcy** within six months of the date of the filing of the application.

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The application must be brought to the bankruptcy location where the debtor resides, does business has assets or property or if the debtor does not have assets currently in Canada, where it did business within the previous year.

Question 2.3 [maximum 3 marks]

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

- (i) licensing and supervising trustees.
- (ii) inspecting or investigating estates.
- (iii) examining a trustee's account of a bankruptcy and ensuring all the correct information is accounted for.

Question 2.4 [maximum 2 marks]

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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?

An individual bankrupt is automatically discharged 9 months after the bankruptcy is filed if:

- (i) it is a first bankruptcy.
- (ii) the bankruptcy has attended two financial counselling sessions.
- (iii) the bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the OSB, and
- (iv) the discharge is not opposed by a creditor, the trustee or the OSB.

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 is a licensed insolvency professional and officer of the court that is selected by the debtor and must be appointed in all CCAA. The proposal trustee is also selected by the debtor in a BIA proposal.

The Monitor role is to supervise and advise during the proceeding. The proposal trustee also plays a supervisory and advisory role and assist the debtor in the development of the proposal and its negotiations with creditors and stakeholders.

The Monitor will oversee the steps taken by the company during the proceeding acting as an officer of the court and on behalf of stakeholders.

The monitor also assists with the preparation of cash-flow statements and the negotiation of the plan between stakeholders and the company. The proposal trustee must give notice of the filing of the NOI or the proposal to all creditors, must file a projected cashflow statement and a report from the trustee on its reasonableness, as well as call a meeting of creditors to consider and vote the proposal.

The Monitor must file periodic reports to the court and the creditors, including those with his views in connection with any proposed disposition of assets or in connection of proposed DIP financings. The proposal trustee must report the financial situation of the debtor and the cause of its financial difficulties in the creditor meeting. The proposal trustee must also make the final application to the bankruptcy court for approval of the proposal if it accepted by the creditors.

The Monitor's powers can be expanded if the board of directors resigns or if creditors lose confidence of the management. The Monitor can be authorized to sell assets if the court approves it and can be authorized to direct certain corporate functions or engage in litigation on behalf of the company. In a BIA proposal a receiver may be appointed if management is not acting or is not capable of acting in the best interests of the company or its stakeholders.

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.

Canada's insolvency regime looks for a balance between reorganization and liquidation, which can be seen in the fact that a corporate or consumer bankruptcy can be converted a proposal proceeding by a trustee by filing a "notice of Intention to File a Proposal" or filing a proposal to creditors. Also, a liquidating bankruptcy can be converted to CCAA process by court order with consent of the inspectors. Moreover, BIA proposal proceedings may transition to CCAA proceeding by court order where no proposal has yet been filed. Finally, if a debtor becomes solvent during a proceeding a bankruptcy can be annulled.

The policy rationales that underline the Canadian insolvency system focus on certainty, transparency, asset preservation, value maximization and rehabilitation. This can be seen in the supervisory and advisory role of monitors and proposal trustees, which give certainty to the creditors about the debtor's business and financial situation, as well as transparency. The asset preservation, value maximization and rehabilitation is reflected in the fact that in CCAA proceedings, secured creditors are generally stayed from enforcing their securities. In BIA proposal proceedings, secured creditors are initially stayed and such stay is lifted if the debtor chooses to make a proposal only to unsecured creditors.

Canadian insolvency systems favour rehabilitation because of its social benefits, including maintenance of supplier relationships and local economic activity and the preservation of jobs.

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An example that suppliers must continue to supply goods and services to the debtor during CCAA proceedings on the same terms that existed before the commencement of the proceedings, although they are not obligated to extend creditor to the debtor during this period and the stay of proceedings cannot prohibit a person from requiring immediate payment of such goods and services.

The Canadian insolvency law system is universalist in that it purports to extend to the debtor's assets wherever they are located. Canada system accepts that concurrent insolvency proceedings in various jurisdictions may be necessary, but the best means for fair and efficient outcome is for courts to coordinate and respect each other processes and orders to the possible, thus Canadian judges retain a high discretion to employ statutory provisions on recognition of foreign proceedings according to policy rationale in every individual circumstances. Also case law has interpreted provisions of the BIA and CCAA to confirm the willingness of Canadian Insolvency courts to recognize principles of international judicial operation and comity in the context of foreign insolvency proceedings that may impact stakeholder in Canada.

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?

Both BIA and CCAA provisions provide the following main requirements on recognition of foreign insolvency proceedings in Canada:

- (i) that the proceeding is a foreign proceeding according with the statutory definition.
- (ii) that the applicant is a foreign representative in accordance with the statutory definition.
- (iii) whether the foreign proceeding is a foreign main proceeding or a foreign non main proceeding based on a centre of main interest (COMI) analysis.

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The foreign representative must file 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. If the requirements for recognition have been met, the recognition is automatic and compulsory.

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Question 4.2 [maximum 5 marks]

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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 the proceeding is classified as a foreign main proceeding because the online seller has a fulfillment office and warehouse in Canada an automatic stay of proceeding will be ordered. However if it is recognized as a foreign non main proceeding the stay may be obtained if it is requested and justified, being that because of the a class action lawsuit 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, the stay would be most likely justified.

Question 4.3 [maximum 5 marks]

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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?

The recognition of the proceeding will impose an obligation to Canadian officials to cooperate with the foreign representative, including the Canadian resident. The foreign representative could request the court if it necessary for the protection of the debtor's property or interest of the creditors any order that considered appropriate, including orders to examine witness and taking evidence, including those documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction. However, if this is contrary to Canadian public policy the court may refuse it.

*** End of Assessment ***

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