



**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.

[(1) **Involuntary Bankruptcy** In this mode of entry to bankruptcy , a creditor can apply to the Court for an order of bankruptcy against the debtor. He needs to satisfy the Court that (i) the debtor owes him a sum of CAD 1000 or higher and that (ii) **the debtor committed an act of bankruptcy** within 6 months of the date of filing application. Of the 10 acts of bankruptcy listed in BIA (Sec 42) , 6 relate to violations of commercial morality with intent to defraud or defeat or delay collection by creditors , 4 relate to status of insolvent person being met. It will not suffice if the creditor proves default only in respect of dues relating to applying creditor. It is necessary to prove that debtor is unable to meet debts as they are generally falling due. **Debtor can contest the application in Court with defences such as that he does not in fact owe a sum exceeding CAD 1000 and also, that he has in fact the ability to meet his dues as they fall due.** If the Court is satisfied as to the conditions (i) and (ii) above then it will issue the

Commented [TE2]: 3/3

bankruptcy order and the property of the debtor will vest in a licensed Trustee, usually at the choice of the applying creditor. The court also has authority to appoint an interim Trustee to protect the property in the period between application and issue of order.

**] Voluntary Bankruptcy** A debtor can make an assignment into bankruptcy if he satisfies the definition of an insolvent person in BIA. The assets would be assigned to a licensed Trustee for the benefit of creditors. It only requires to be filed with the Official Receiver. The usual motivation is to preclude the evils of creditor action and is seen as a legitimate means of dealing with overwhelming financial strain. However, if the Court is approached by any aggrieved creditor, the Court does have authority to annul the bankruptcy, on the ground, either of the debtor not, in fact, having been an insolvent person on the date of filing or an abuse of process is established on the debtor's part.

#### **Failure of proposal in BIA or of Plan of Arrangement in CCAA**

Failure of a proposal under BIA arises when any class of creditors fails to vote in favour of the proposal with the requisite majority, or when the Court fails to accord approval for the proposal (under the extant powers if the court finds the proposal falling short in aspects of reasonableness and good faith). In the event of such proposal failure, the debtor automatically is assigned to bankruptcy. In the case of CCAA restructuring, if a Plan of Arrangement fails to secure the requisite vote from any class of creditors or if the Court does not accord approval for the Plan of Arrangement, then it does not automatically go into bankruptcy. However, it is likely that the stay will be lifted and the company will go into receivership or bankruptcy.

#### **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?

[ There are two requirements : (1) The debtor owes the applying creditor a sum exceeding CAD 1000/- and (2) The debtor has committed an act of bankruptcy as per Sec 42 of BIA in the 6-month period preceding the date of filing. ]

**Commented [TE3]:** 1/2 - act of bankruptcy not defined or expounded upon

#### **Question 2.3 [maximum 3 marks]**

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

[(1) Regulating and licensing of trustees (2) Handling Complaints from creditors regarding conduct of Trustees/Monitors/Receivers in bankruptcy and arrangement processes, (3) Maintaining records of BIA and CCAA processes, of Licensing of Trustees etc.]

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**Question 2.4 [maximum 2 marks]**

Commented [TE5]: 2/2

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?

- [(1) It must be the first bankruptcy proceeding for the bankrupt person (  
(2) The bankrupt should have attended two financial counselling sessions.  
(3) The bankrupt should not be under obligation, in terms of Office of Superintendent of Bankruptcy (OSB) stipulations to remit to the Bankruptcy Estate ,a portion of his income  
(4) The discharge is not opposed by a creditor or 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.

S No	Monitor	Proposal Trustee]
1.	Appointed by Court . Usually selected by Debtor subject to confirmation by Creditors at first meeting	Appointed by Court Usually selected by debtor subject to confirmation by creditors at first meeting
2.	Manages the CCAA process	Manages the bankruptcy process
3.		Duty to serve notice to all known creditors of the Notice of Intent filed with the Court And of the filing of proposal with the Court
4.	Assists the co. in cash flow preparation	Files the projected cash flow statement with the Court as prepared by the debtor
5.	Monitor has to file periodic reports to the Court	
6.		Report of Trustee on reasonableness of cash flow forecast .
7.	Calls a meeting of creditors	Calls a meeting of creditors
8.		At the Creditors' meet, Trustee furnishes Report on debtor's financial position

Files the Proposal with the Court

<u>S No</u>	<u>Monitor</u>	<u>Proposal Trustee</u>
9.	Places Plan of Arrangement with Creditors, Class-wise for voting as per CCAA	Places Proposal with Creditors class-wise for voting
10.	If requisite majority approves P/A , places it to Court for final approval	If requisite majority approves proposal, files application with Court for final approval.
11.	Processes debtor's application for disclaimer of contracts to accord his approval or otherwise	Processes debtor's application for disclaimer of contracts to accord his approval or otherwise.
12.	Processes debtor's request for assigning Contracts to accord approval or otherwise	Processes debtor's request for assign- ing contracts to accord approval or Otherwise.
13.		Submits application to Court for assigning contracts where he approves.
14.	Processes for approval or otherwise of sale of assets of debtor	Processes for approval or otherwise of sale of assets of debtor.
15.	Monitor gives his views to Court on DIP financing	Debtor applies to Court to permit DIP financing. Trustee's files cash flow report in this regard.
16.		Where a Proposal has been approved by the Court and Debtor defaults on the terms of the proposal, Trustee must inform the creditors and the Official Receiver.
17.	<.....Authority to review past transactions for relevant suspect period.....> (3 months preceding initiation of bankruptcy for arms length and 12 months preceding for other transactions) to determine Transactions Under Value <..... (TUV) and preference transactions and can file with Court for avoidance...>	
18.	<.....Can file Report on reasonableness of excluding application of TUV and .....> Preference transactions from a proposal or a CCAA Plan.....>	
19.	Powers of Monitor can be expanded in special circumstances (e.g. Board resigns or creditors lose confidence in the management), and Court can empower the Monitor to effectively run the company.	If management is no longer acting in the best interests of the stakeholders, then Court can appoint a Receiver for the Debtor .
20.	<.....Can exercise oppression actions u/s 241 of CBCA.....>	



## CLAIMS

S No	Monitor	Proposal Trustee
21	Creditors can file claim with Proposal Monitor who would first set out claims as per company records and undertake preliminary scrutiny. But , for adjudication, Claims Officers are appointed.	Creditors can file claim with Trustee. Adjudication of disputed claims will be by Court.

Above sets out the duties and powers of the Monitor and the Proposal Trustee. Of 21 items listed, many are cases where the roles resemble each other. However, items 3/4/5/6/8/13/19/21 all set out differences in their functioning. The above table indicates a greater involvement of the Court in CCAA proceedings and at the same time, a greater flexibility in those proceedings.

### Question 3.2 [maximum 7 marks]

Commented [TE7]: 7/7

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 policy objectives of insolvency law in Canada are Certainty, Transparency, Asset Preservation, Value Maximisation and Rehabilitation of viable debtors. These principles are evidenced in the provisions of law as under:

S. No.	Principle	Evidenced In
1.	Certainty	Lack of a cramdown provision in BIA and CCAA reduces uncertainty as it gives a blocking opportunity for a sufficiently large group of unsecured creditors in any Plan of Arrangement or Proposal voting. Overall creditor-friendliness also makes for more predictability.
2.	Transparency	Provision for creditors meeting under both CCAA and BIA bankruptcy proceedings give full opportunity to creditors to ascertain debtor’s financial position (e.g.from the report thereon of the Proposal Trustee u/BIA ) and position of other creditors. The judicial system with its orders / rulings accessible openly also makes for transparency.
3.	Asset Preservation	Provision u/BIA for appointment of Interim Trustee where necessary to preserve assets and avoid depletion incorporates this principle
4.	Value Maximisation	Provisions for disclaimer of contracts available in both BIA and CCAA enable value maximisation where continuance of the contracts would be detrimental to the estate/co.
5.	Rehabilitation of	There is a whole enactment, the CBCA which is designed

viable companies

to quickly revive companies with the main problem of overwhelming debt which is not serviceable from potential EBITDA. DebtorInPossession mode is available in both BIA and CCAA. Stay and assisting role of Monitor and Proposal Trustee aid reaching of a compromise with Creditors and revival.

**Universalism** is at the core of Canadian Insolvency law as an insolvency proceeding applies to the Debtor's assets everywhere. The 2009 amendments to BIA and CCAA are broadly in line with the Model Law on Cross-Border Insolvency (**MLCBI**) of UNCITRAL, but the Canada amendments are a carefully and extensively modified version of the MLCBI provisions. In keeping with the strong common law traditions of Canada, considerable discretion is vested in the judiciary even in insolvency matters, going beyond MLCBI approach in some instances. Sec 272(1) of BIA and Sec 284 of BIA as well as the equivalent sections of CCAA deploy the language of "any other action that the Court considers appropriate" and of "nothing prevents the Court on application by a Foreign Representative (FR) or any interested person from applying any legal or equitable rules governing recognition.....for assistance to FRs etc ". There is a requirement of consistency with other sections of BIA and CCAA, but overall, these sections considerably empower the courts. Case Law, ever of importance in a common law jurisdiction, also demonstrates the focus of Canadian Courts on the purpose of the BIA and CCAA as well as comity principles. In the Hartford Computer Systems case, Ontario Superior Court allowed application of a greater relief than is found in Canadian law, as it stemmed from a US Chapter 11 proceeding which would ultimately benefit the creditors including Canadian creditors. Again, in British Columbia Superior Court, in the Nishiyama Case, the residual powers in the aforementioned legislative wording were used to grant a relief that was necessary but went beyond Canadian law provisions and was extended in the foreign jurisdiction. All this demonstrates the faithful and purposive modified universalism of Canadian Cross-Border insolvency law. ]

#### **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 [TE8]: 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?

[Sec 268 of BIA:

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation. (instances étrangères)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or (c) act as a representative in respect of the foreign proceeding

Proof has to be offered of a court proceeding in the **foreign jurisdiction (say, "Far-Land")** under legislation in Far-Land for a collective procedure of insolvency resolution for the purpose of reorganisation or liquidation. A pure receivership, for example, for recovery will not meet this criterion. Proof can be in the form of a Court order from the Far-Land court which has commenced an insolvency proceeding for **the Debtor, "WebClothe"**. That would constitute proof of a foreign proceeding. In addition, a Court order specifying that X is appointed as Insolvency Representative would allow the Canada Court to recognise X as a Foreign Representative. Further, since the regd office of the debtor is in Far-Land, the Canada Court will regard Far-Land as the **COMI** for WebClothe and treat the proceeding there as a foreign Main Proceeding or F-M-P.]

Commented [TE9]: not defined

Commented [TE10]: not explained

**Question 4.2 [maximum 5 marks]**

Commented [TE11]: 3/5 more thorough COMI analysis should be provided, should also consider how the opposing counsel would argue this to be foreign non-main proceeding

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?

[Since we can expect the Canada Court to recognise the Far-Land insolvency as an F-M-P, there will be an automatic stay u/s 271 of BIA:

271 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada

When subsection (1) does not apply

(2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding

is made.

#### Exceptions

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the Companies' Creditors Arrangement Act or the Winding-up and Restructuring Act in respect of the debtor.

The class action lawsuit is an action for damages and is not an application under BIA or CCAA or WURA. It is therefore not covered by the exclusions under Sec 271(4). It is therefore stayed by operation of Sec 271(1).

I will tell the foreign agent X (acting for WebClothe) that he can immediately file for recognition of the foreign proceeding as an F-M-P and recognition of X himself as a Foreign Representative (FR). That will result in a stay on the Canadian law firm continuing the Class Action Law Suit. ]

#### **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 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?

[ Sec 272 of BIA envisages :

**"272 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order**

Commented [TE13]: mention the limitations on the courts discretion, ie as long as not against public policy

**(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations "**

**In this case, X as FR can apply to the court in Canada for an order for examination under oath of the particular Canadian resident-employee in respect of WebClothe's affairs , debts, liabilities etc. The Court is authorised u/s 272(1) to "make any order as may be appropriate". It can therefore also be an order to examine under Far-Land procedure rather than Canada procedure. The decisions of Ontario Superior Court and British Columbia Superior Court in the matters of Hartford Computer Systems**

and Nishiyama respectively are available precedents where the Canadian Court was willing to depart from Canadian procedure. ]

\* End of Assessment \*

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