



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]

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

- **Involuntary Bankruptcy Proceedings-** A creditor can initiate involuntary bankruptcy proceedings against a debtor if the creditor: (i) is owed an unsecured debt that is in excess of CAD 1000; (ii) tenders plausible evidence of the fact that an "act of bankruptcy" as defined under §42 of the BIA has been committed by the debtor within a period of six months from the date of the filing of the application for the initiation of involuntary bankruptcy proceedings.
- **Voluntary Bankruptcy Proceedings-** A debtor can initiate voluntary bankruptcy proceedings by voluntarily making an assignment into bankruptcy proceedings. A statutory prerequisite for entering into voluntary bankruptcy proceedings is that the debtor must fall into the definition of an "insolvent person" as defined under the BIA. In order to initiate voluntary bankruptcy proceedings, the debtor first executes an "assignment for the benefit of its creditors," and subsequently also executes a sworn statement that contains the following information: (i) the particulars of the debtor's

property; (ii) the names and addresses of the debtor's creditors; (iii) the amounts of the creditors' claims. These documents are subsequently filed with the Official Receiver, and the voluntary bankruptcy proceedings commence post-acceptance of these documents by the Official Receiver.

- **Post-Failure of a BIA Proposal-** A debtor is deemed to have made an assignment in bankruptcy if: (i) If a class of creditors with voting powers rejects a corporate proposal; (ii) if the court does not allow the corporate proposal.
- **Failure to Comply with a BIA Proposal-** If a debtor defaults in complying with the terms of a proposal, and if such a default by the debtor is not waived either by the inspectors or by the creditors themselves, then the proposal trustee is required apprise the creditors and the Official Receiver regarding the same. Subsequently, upon motion, the court may annul the proposal, and post-annulment, the debtor is deemed to have been assigned into bankruptcy.

Question 2.2 [maximum 2 marks]

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

A creditor can initiate involuntary bankruptcy proceedings against a debtor if the creditor: (i) is owed an unsecured debt that is in excess of CAD 1000; (ii) tenders plausible evidence of the fact that an "act of bankruptcy" as defined under §42 of the BIA has been committed by the debtor within a period of six months from the date of the filing of the application for the initiation of involuntary bankruptcy proceedings.

Additional considerations to note w.r.t making out an application for an involuntary bankruptcy order are:

- The creditor need not prove that the debtor resides in/carries out business in Canada;
- The creditor need not prove that the debtor has assets in Canada;
- An involuntary bankruptcy application is usually brought before an appropriate bankruptcy court in a location where either the debtor is ordinarily a resident of, or in a location where the debtor does business, or in a location where the debtor has assets or property. (Note- If the debtor has no assets in Canada at the time of the application, then the application for an involuntary bankruptcy order must be brought at the location where the debtor did business last 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.

The three functions of the Office of the Superintendent of Bankruptcy ("**OSB**") are:

- **Trustee Licensing and Supervision-** The OSB is in charge of trustee licensing and supervision.
- **Inspection/Investigation of Estates-** The OSB inspects and investigates estates.

- **Grievance Redressal-** The OSB receives and processes complaints/grievances raised against estate professionals such as trustees during restructuring/bankruptcy proceedings.

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?

The four criteria that must be met in order for an individual bankrupt to be automatically discharged within 9 months after the bankruptcy is filed are:

- If it is the first bankruptcy proceeding of that debtor;
- If the debtor has attended a minimum of two financial counselling sessions;
- If the debtor has not been directed/required to deposit a portion of their income into the bankruptcy estate in accordance with the standards established by the OSB;
- If the discharge of the debtor has not been opposed either by a creditor or by the trustee or by 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.

A CCAA Monitor ("**Monitor**") is appointed by the court, whereas, a BIA Proposal Trustee ("**Proposal Trustee**") is appointed by the debtor.

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A Monitor largely plays a supervisory/advisory role in a CCAA proceeding, which a Proposal Trustee does too in a BIA proceeding.

As a supervisor in a CCAA proceeding, a Monitor mainly oversees the steps taken by a debtor company in their capacity of an officer of the court and also as a representative on behalf of all the stakeholders. A Monitor also assists during the negotiation of a restructuring/repayment plan Whereas, the Proposal Trustee, as an overseer in BIA proceedings, mainly assists the debtor in the development of the BIA proposal, and during the negotiations with the debtor's creditors and other chief stakeholders.

A Monitor prepares cash flow statements in CCAA proceedings, which a Proposal Trustee also does in BIA proceedings.

A Monitor may also be subsequently additionally empowered by the court to exercise greater control over the affairs of the debtor company/take certain additional actions on behalf of the debtor company in the event certain exigent circumstances arise- e.g., the board of directors of the debtor company resigns, creditors lose confidence in the management, etc. A Monitor whose scope of duties gets subsequently expanded by the court, has been traditionally referred to as a "Super Monitor." On the other hand, the Proposal Trustee does not exercise any additional control over the affairs of the debtor company should any of the aforementioned exigencies arise. Instead, a receiver is appointed to take control of the affairs of the company should any of the aforementioned exigencies arise.

Some of the mutually overlapping statutory duties of the Monitor and the Proposal Trustee are: (i) approval of disclaimers; (ii) approval for the assignment of contracts; and (iii) approval of the sale of the assets of the debtor outside the ordinary course of business.

Lastly, some of the additional statutory duties of a Monitor are: (i) filing periodic reports regarding the status of the CCAA restructuring with the Bankruptcy Court and with the Committee of Creditors; (ii) filing reports with the Bankruptcy Court and with the Committee of Creditors that contain the views of the Monitor regarding the disposition of the assets of the debtor or regarding a proposed DIP financing for the debtor. Whereas, in contrast, some of the additional statutory duties of a Proposal Trustee are: (i) giving a Notice of Intent of Proposal ("NOI") to all the known creditors of the debtor; (ii) preparation of a projected cash-flow statement that is complemented with a report from the Proposal Trustee that speaks as to the commercial viability and reasonableness of the same; (iii) calling a meeting of the Committee of Creditors to discuss and subsequently vote upon the BIA restructuring proposal; (iv) filing a final application with the bankruptcy court seeking approval of the BIA proposal once it has been approved by the creditors.

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- (i) Certainty; (ii) Transparency; (iii) Asset Preservation; (iv) Value Maximization; (v) Rehabilitation; and (vi) Recognition of Existing Creditor Rights. These policy goals are embedded and entrenched in the entirety of the Canadian insolvency regime.

The aforementioned policy goals mainly find embodiment in the design and structure of the insolvency proceedings under the Canadian insolvency regime. Essentially, the insolvency proceedings are conjunctly managed through a combination of creditor-control, management of the estate managers such as trustees, monitors, etc., and court supervision. Due consideration is also given to the interests of the debtor and other stakeholders such as the employees of the debtor while managing the insolvency proceedings under the Canadian insolvency regime.

Regulation and management of the insolvency proceedings is further divided into two broad spokes: (i) overall management and (ii) day-to-day management. The overall management and supervision of the insolvency proceedings is primarily the prerogative of the court, whereas the day-to-day management of the insolvency proceedings is the prerogative of court-appointed representatives such as trustees, receivers, and CCAA-monitors, who are accountable to the court and the other stakeholders. Further, creditors are also empowered to exert significant influence over the insolvency proceedings through their powers to vote on

a restructuring plan, their powers to replace estate management professionals in certain circumstances, their right to demand information, and their right to be heard by the court during the insolvency proceedings.

Further, even a restructuring under a company-driven statute such as the CBCA is although primarily managed by the debtor company; however, the court mandates the manner in which the arrangement/restructuring plan is to be presented to the different stakeholders of the company, and any stakeholder-approved arrangement/restructuring plan is required to be finally approved by the court.

The essence of the aforementioned policy goals is rescue and rehabilitation. Both of Canada's primary restructuring/insolvency legislations- both BIA and CCAA are debtor-in-possession legislations that provide adequate room to the debtor to reorganize its affairs and restructure its debts and obligations. Both the BIA and CCAA strive to stave off liquidation to the extent feasible as their primary aim is to preserve and maximize value and avoid the socioeconomic harms that stem from liquidation (note- the policy goals of asset preservation, value maximization, and rehabilitation are met through this).

The primary goal of the entire Canadian insolvency regime is restructuring, and bankruptcy courts in Canada are known to take all reasonable and feasible measures to ensure the continuity of the debtor enterprise as a going concern, which also includes the complete or the partial sale of the debtor enterprise as a going concern to a third-party investor/purchaser (note- the policy goals of asset preservation, value maximization, and rehabilitation are met through this).

Both the CCAA and BIA restructuring procedures are essentially contractual mechanisms through which creditor claims can be restructured. Restructuring plans under both the legislations must be approved by a majority of the creditors by number, and by 2/3rd of the creditors by value in each class of creditors that votes on the restructuring plan. Neither of the legislations provide for a "cramdown" provision (which is the flagship characteristic of the U.S. Chapter 11) in which deemed consent can be obtained from the dissenting creditors by a majority of the creditors. Restructuring plans under both legislations only become enforceable post court-approval, regardless of how each creditor class voted on the restructuring plan. Further, the Canadian insolvency regime has put in place clear rules governing the priority that is to be accorded to each class of creditors and on the equitable treatment of creditors that are similarly placed (note- the policy goals of certainty, transparency, and recognition of existing creditor rights are met through this).

The Canadian insolvency regime generally provides for greater recovery scope for creditors, a discretion to the bankruptcy courts to order essential suppliers to continue to provide supply of essential goods and services on a fair value basis, and preserve jobs (note- the policy goals of asset preservation, value maximization, and rehabilitation are met through this).

The approach of Canada's insolvency system has been globally described as "universalist" because it extends in its application to all of the debtor's assets wherever they are located. The Canadian insolvency system is also reciprocal in the sense that foreign creditors can participate in Canadian insolvency proceedings on the same footing as the domestic Canadian creditors. However, contextually speaking, as opposed to the universalist approach in its domestic insolvency cases, Canada follows the "modified universalism" approach in its cross-border insolvency cases. As per the tenet of modified universalism, courts in a cross-border insolvency scenario, manage and coordinate their respective individual processes and orders, and at the same time, respect each other's processes and orders to the extent possible.

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?

The formal proof requirements for obtaining recognition of the foreign proceeding under the Canadian insolvency law are:

- The proceeding from the foreign jurisdiction must satisfy the criteria laid down in the definition of "foreign proceeding" under the Canadian insolvency law;
- The counsel from the foreign jurisdiction must satisfy the criteria laid down in the definition of "foreign representative" under the Canadian insolvency law;
- A statutory analysis will have to be undertaken in order to determine whether the proceeding from the foreign jurisdiction pursuant to which the foreign counsel has been empowered to take control of the assets of the online seller is a "foreign main proceeding" or a "foreign non-main proceeding" basis a determination of the center of main interests (COMI) of the online seller.

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 can obtain a stay on the Canadian litigation, as the foreign proceeding is likely to be recognized as a foreign main proceeding in Canada. Once a foreign proceeding is recognized as a foreign main proceeding under the Canadian insolvency law, an automatic

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stay of proceedings in Canada occurs. Thus, consequently, a stay on the Canadian litigation is likely to be obtained.

Per the Canadian Cross-Border Insolvency Law (which is in line with the UNCITRAL Model Law on Cross-Border Insolvency, 1997), a foreign proceeding will be recognized as a foreign main proceeding if the foreign proceeding originates in a jurisdiction where the Center of Main Interests (COMI) of the debtor lie.

The primary presumption regarding a company's COMI under the Canadian insolvency law is that a company's COMI lies where the company's registered office is located, unless it is proved otherwise. Here, the foreign agent has been empowered pursuant to a foreign proceeding that has been initiated in a jurisdiction where the company's headquarters are located, and thus presumably, the foreign proceeding has been initiated in a jurisdiction where the debtor has its COMI. Hence, consequently, it is likely that the foreign proceeding will be recognized as a foreign main proceeding in Canada.

Additionally, as per the factual matrix, the senior management of the company is also based out of the same jurisdiction where the foreign proceeding has been initiated. This also satisfies the "nerve centre" test for COMI determination.

Further, a direct consequence of recognition of a foreign proceeding as a foreign main proceeding in Canada is a direct stay of all on going proceedings in Canada.

Hence, the foreign proceeding will be recognized as a foreign main proceeding, pursuant to which the Canadian litigation will be automatically stayed.

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?

If the Canadian court recognizes the foreign proceeding, then upon an application by the foreign agent, and after being so satisfied, the Canadian court can pass an order that will allow the foreign agent to examine the Canadian resident under oath and produce documents related to the company's operations and accounts. Further, the Canadian court can permit the foreign agent to do so in accordance with the civil procedure of the foreign jurisdiction instead of doing so in accordance with the Canadian procedure.

Under the Canadian cross-border insolvency law, if a Canadian court recognizes a foreign proceeding, then post-recognition, the foreign representative can submit an application to the court seeking appropriate orders conferring certain quasi-judicial powers to protect the debtor company's property or the interests of the creditors of the debtor company. Some of the orders that the Canadian court can pass (if it is so satisfied) in this regard are- permitting examination of witnesses under oath, taking of evidence, and provision of information on the debtor company's property and affairs. Additionally, subject to the public policy exception, upon recognition, the Canadian court is empowered to provide remedies to the foreign representative that are not ordinarily available under the Canadian insolvency law.

Hence, post-recognition, the Canadian court can pass an order that allows the foreign agent to examine the Canadian resident under oath in accordance with the civil procedure of the foreign jurisdiction, if it is satisfied that it is so required to protect the debtor company's property or the interests of the creditors of the debtor company.

*** End of Assessment ***

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