



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: 2020211FU-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.

The three ways of entering bankruptcy which are:

- Involuntary;
- Voluntary; or
- On the failure of, or failure to perform the terms of, a BIA proposal.

Involuntary bankruptcy must be made by a creditor that is owed in excess of CAD 1,000 and provide evidence that the debtor has committed an act of bankruptcy within 6 months of the application.

Voluntary bankruptcy is applied for by the debtor, where they can prove they fall under the BIA definition of an insolvent person, and the reason may be for a fresh start once proceedings have concluded. The debtor must file an assignment of property and the names and addresses of the creditors and the amounts owed, along with a sworn statement containing a list of

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property owned by the debtor, to the Official Receiver. Once these documents are filed the proceedings commence.

A BIA proposal is where a creditor and debtor come to an agreement. Failure to comply with the agreement automatically places a company in to bankruptcy. A consumer, however, is not automatically placed in to insolvency and a motion must be brought to assign the individual.

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?

In order to be successful in applying for an involuntary bankruptcy order, the creditor must:

- Be owed in excess of CAD 1,000; and
- Provide evidence that the debtor has committed an act of bankruptcy within six months of filing of the application.

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.

- Licensing and supervising of trustees;
- Inspecting or investigating estates; and
- Receiving and dealing with complaints from creditors against estate professionals during proceedings.

The other functions are:

- Maintaining public records regarding the filing of proposals, bankruptcies, license issues and appointments of receivers under the BIA.

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?

- It is a first bankruptcy;
- The bankrupt has attended two financial counselling sessions;
- The bankrupt is not required to pay a portion of their income into the bankruptcy estate as per the standards established by the OSB; and
- 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 in CCAA is court appointed, and is a licensed insolvency professional and an officer of the court, selected by the debtor. The trustee in a BIA proposal is instead appointed by the debtor.

A Monitor plays a supervisory role by overseeing the steps taken by the company whilst the CCAA proceedings are ongoing as an officer of the court and for the company's stakeholders. The trustee in a BIA, must like the Monitor, plays a supervisory and advisory role.

The Monitor assists in the preparations of cash-flows, and acts as a negotiator between the company and its state holders. In addition, the Monitor also filed period reports to the Court and its creditors which include an opinion for the disposition of assets or in connection with any proposed DIP financing. The Monitor has various powers, a minimum of which is set up in the CCAA, however the court may allow the Monitor additional powers if they consider is necessary.

The trustee has similar powers, and further, statutory duties which include giving notice of the filing of the NOI or the proposal to the creditors, filing cash flow statements accompanied by a report on its reasonableness, and calling meetings of creditors in order to vote on the proposal. At such as meeting, the trustee must report to the creditors regarding the financial position of the company, and the cause of its financial difficulties. Finally, the trustee makes the application to the bankruptcy court for approval if the proposal is accepted by the creditors.

In conclusion, the nature of the appointments lead to different roles in terms of the process, but the responsibilities of a trustee and a monitor are very much the same.

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.

The main purposes and goal of the Bankruptcy and Insolvency Act (known as "BIA" is to protect a bankrupt entity from creditors in order to facilitate certainty and transparency between parties to enable an orderly and fair liquidation and distribution of assets. Efficient distribution of assets means that they can be placed back in to the system quickly which, on a wider scale, improves Canada's economic performance and minimises the impact of the entity's insolvency on the economy and influences value maximisation.

The insolvency system in Canada has provision for debtor rehabilitation and very often, favours it because of the social benefit by increasing creditor recovery, maintaining supplier relationships, preserving the economy (mentioned above) and ensuring that there are jobs available for the Canadian residents. This increases the availability of credit in the Canadian marketplace.

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On November 1 2019, Act 97 was put in to force to assist workers and pensioners see a more accessible, fair and transparent process. The BIA:

- Requires all parties under to BIA to act in good faith;
- Allows the courts to inquire into certain payments made in the year preceding the insolvency; and
- Impose liability on directors.

As such, the Canadian Insolvency System is creditor friendly. In protecting assets, the Canadian Courts take a 'universalist' approach in that they purport to affect a debtors assets no matter where they are located. As such, the reciprocal nature enables foreign creditors to participate in Canadian insolvency proceedings with the same rights and ranking as domestic creditors.

Canada is also considered to be pragmatic in adopting a modified universalist approach in some cross-border insolvency matters, whereby they accept concurrent insolvency proceedings in multiple jurisdictions in order to facilitate the best means for a fair and efficient outcome.

In conclusion, the Canadian courts aim for the best outcome for all stakeholders and are enthusiastic about embracing cross-border recognition and being communicative and co-operative with foreign courts in order to reach the best and most economically sound outcome.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Question 4.1 [maximum 15 marks]

You are a lawyer in Canada. You are consulted by counsel in a foreign jurisdiction who is representing an agent operating under the law of the foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. The online seller has a fulfilment office and warehouse in Canada. The foreign agent has taken control of the assets of an online seller of clothing with a head office that is registered in the foreign jurisdiction where senior management of the company have their offices. The business sells clothing around the world, including to customers in Canada. Due to currency exchange- and supply-related issues, the company has been unable to maintain liquidity and has defaulted on various loans to its foreign-based secured lenders who are owed in excess of CAD 200 million and, as a result, has stopped fulfilling orders in process, including to Canadian customers. As a result, a class action lawsuit has been filed by a Canadian law firm seeking damages on behalf of customers for monies paid in respect of unfulfilled orders in the amount of CAD 2 million. That lawsuit in Canada is still in the pleadings phase. It also appears that the Canadian resident in charge of the fulfilment office and warehouse in Canada may have been diverting funds improperly. The foreign agent wants to further investigate. The foreign agent consults you about seeking recognition of the foreign proceeding in Canada in order to maximise recoveries and provide for an equitable distribution of value among all creditors.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks]

The foreign agent wants to understand the formal proof requirements to obtain recognition of the foreign proceeding in Canada. What is your advice?

There are three main requirements under the BIA and the CCAA are:

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Commented [TE10]: 3/5 foreign representative and "foreign proceeding" not defined/explained

- That the proceedings are foreign proceedings and accordance with the statutory definition;
- The applicant is a foreign representative in accordance with the statutory definition; and
- Whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on a centre of main interest analysis.

As such, the foreign representative will need to approach the Canadian Court and seek recognition, providing sufficient evidence of the foreign law in the foreign jurisdiction where they have power so that the Canadian court can determine that they have power to commence foreign proceedings and that they are a qualified foreign representative.

Once the court approves the foreign proceedings, the foreign proceedings will be determined to be main or non-main –foreign proceedings.

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?

If the proceedings are determined to be non-main proceedings then a stay may be requested.

Main and non-main proceedings are determined by the COMI (or Centre of Main Interests) which has no statutory definition in CCAA or BIA, however a rebuttable presumption can be made. The COMI for a company tends to be the jurisdiction where the registered office is located, however, the following tests may also be considered:

- The location that significant creditors recognise as being the centre of the company's operations;
- The location in which the debtor's principal assets or operations are found; and
- The location of the debtor's headquarters, head office or "nerve centre".

Let's considered the different the different options for COMI above:

Registered office: Foreign jurisdiction.

Significant creditors/operations: Foreign jurisdiction. (only CAD 2mil in Canada, CAD 200mil elsewhere)

Principal assets or operations: Foreign jurisdiction (management office in foreign jurisdiction, only fulfilment centre in Canada)

Debtor's headquarters: Foreign jurisdiction.

As is clear, the COMI would be in the foreign jurisdiction, and as such, these would be foreign non-main proceedings and a stay of the Canadian litigation could be sought.

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?

An example to use here is for US litigation proceedings with Canadian residents involved.

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Canadian courts are known for being forthcoming and assisting with foreign proceedings as universalist or modified universalist. There are no rules that state foreign litigators or officers cannot seek to obtain evidence from willing people in civil matters and this can be done without the involvement of the court. If the Canadian resident is unwilling to give evidence, then the process is more complicated.

The foreign officer should obtain a letter of request from the foreign court which would be submitted to the Canadian Court seeking assistance in obtaining evidence from the Canadian Resident. The decision to assist, and to what extent, is entirely at the discretion of the Canadian Court.

The Canadian Court, in making their decision, will typically consider the underlying reasons for the request and the contrasts with the Canadian public policy. In case law such as *Lantheus Medical Imaging Inc. v Atomic Energy of Canada Ltd*, the following non-exhaustive list was given regarding the application to the Canadian Court relating to the collation of evidence:

- the evidence sought is relevant;
- the evidence sought is necessary for trial and will be adduced at trial, if admissible;
- the evidence is not otherwise obtainable;
- the order sought is not contrary to public policy;
- the documents sought are identified with reasonable specificity; and
- the order sought is not unduly burdensome, bearing in mind what the witnesses will be required to do, and produce, were the action to be tried.

As such, the Canadian Court is likely to assist *“unless it is contrary to public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction to which the request is directed.”* (*Perlmutter v. Smith*, 2020 ONCA 570).

In applying for the assistance, the foreign officer should ensure that they are concise. The Canadian court does not appreciate vague nor generalised requests as demonstrated in *Third Point LLC v. Fenwick* where the Court denied the request because the request was too broad, and the Court determined that there was too much guesswork involved.

In Canada, under the BIA, the creditors of the company can instruct the officer to seek examination under oath of any person who is considered to have knowledge of the conduct of or the affairs of the bankrupt company if there is potential that it will assist in the recovery of assets. If the Court considers there to be good reason and significant cause, the Court may order the investigation and delivery of documents relating to the bankrupt estate.

In conclusion, the foreign officer will be able to seek assistance either through the foreign court by seeking to apply their own civil procedure, or by seeking the assistance of the Canadian court by application of their own procedure. It is completely at the Canadian Court’s discretion whether they accept the conditions set out by the foreign officer. In the past, the Canadian Court has been forthcoming provided that the foreign agent is straightforward, concise, and has good reason for the application,

*** End of Assessment ***

Commented [TE13]: 44/50 Well done!