



**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 through one of the following mechanisms:

- 1) Involuntarily, following a filing of a petition by a creditor holding at least CAD 1,000 in unsecured debt and providing evidence of an "act of bankruptcy" and the court's order (subject to debtor's ability to object before such order is entered); or
- 2) Voluntarily, through assignment of their property for the benefit of creditors and including a sworn statement describing the debtor's property and names, addresses and amounts owed to creditors; or
- 3) Following a failure of a BIA proposal, if 1) a creditor class does not approve the proposal or 2) the court does not approve the proposal or 3) the debtor defaults on the terms of the proposal and the default is not waived. Failure of proposals is deemed to result in an automatic assignment into bankruptcy for corporates, while for personal proposals, a motion must be filed to assign an individual into bankruptcy.

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**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 must demonstrate that: 1) they are owed at least CAD 1,000 in unsecured debt, and 2) provide evidence that the debtor committed an "act of bankruptcy" within 6 months of the filing, as defined in Section 42 of BIA.

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**Question 2.3 [maximum 3 marks]**

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

Generally, the role of the OSB is to ensure fair and efficient handling of bankruptcies and insolvencies. Its functions include, but are not limited to the following: 1) licencing and supervising trustees, 2) inspecting and investigating estates, and 3) maintaining public records of proposals, bankruptcies, licences, and appointment of BIA receivers.

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**Question 2.4 [maximum 2 marks]**

What are the **four** criteria that must be met in order for an individual bankrupt to be automatically discharged within nine (9) months after the bankruptcy is filed?

Automatic discharge within 9 months is available to individuals who meet the following criteria:

- 1) It is their first bankruptcy, and
- 2) They attended 2 financial counselling sessions, and
- 3) They are not required to pay a portion of their income into the bankruptcy estate per OSB standards, and
- 4) No opposition from creditors, the trustee or OSB

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**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 8 marks]**

Compare and contrast the role of the "Monitor" in CCAA proceedings and the "proposal trustee" in a BIA proposal.

In your essay you should refer to at least the following:

- Whether the monitor and / or proposal trustee is court-appointed; and
- The statutory duties, if any, of the monitor and / or proposal trustee.

The CCAA and BIA proposals are two alternatives for corporate rescue in Canada, where the debtor is supervised by an insolvency professional: a monitor in case of the CCAA or the trustee in case of the BIA. The Monitor under the CCAA and the proposal trustee under the BIA have a number of similar roles in their respective corporate rescue processes. Yet, there are several differences, including their appointment, duties and powers.

Under the CCAA, the monitor is a licensed insolvency professional and a court officer. The monitor is generally selected by the debtor, but appointed by a court order. Under the BIA proposals, the proposal trustee is selected by the debtor. While both processes are debtor-in-possession proceedings, the CCAA is more court-driven and the monitor is an officer of the court while the BIA trustee is not.

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Both the monitor's and the trustee's duties include a supervisory and an advisory role. In the supervisory role, the monitor and the trustee assist the debtor in their negotiation of the restructuring plan with its creditors and other stakeholders. The CCAA monitor is also responsible for assisting the debtor in preparation of the cash flow statements.

Both the monitor and the trustee have reporting requirements. Both the monitor and the trustee are required to file periodic reports providing their opinion on the reasonableness of the process as well as the cash flow forecasts. The monitor is required to update the court and creditors on their views on any potential disposition of assets and DIP financing. The proposal trustee is required to give notice of the NOI or proposal to all creditors, call creditor meetings and explain the debtor's financial situation and causes of distress at such meetings. In addition, the proposal trustee is responsible for making the final application for court approval of the plan once it is accepted by the creditors.

Both the monitor and the trustee are involved in the proof of claim process. Creditors are required to submit their claims to the monitor or the trustee who would scrutinize those claims.

Both the monitor and the trustee have the power to approve various actions by the debtor, including the process for sale of the debtors' assets and assignment or disclaiming of contracts. The sale of assets has to also be approved by the court in both cases.

The powers and responsibilities of the monitor can be further extended by the court when that is deemed required – for example, when creditors have lost confidence in the management and / or the debtor's board has resigned, the monitor can take over management of the business during restructuring, including selling assets and engaging in litigation. On the contrary, the BIA proposals trustee cannot take control of the business operations and a receiver would instead be appointed to take control of the company.

Finally, the CCAA monitor and BIA proposals trustee have different priorities in their ability to receive a payment for their services. Under the CCAA, the monitor hold a super-priority claim for their fees, ranking ahead of secured debt. Under the BIA, the trustee's fees are a preferred claim, ranking behind secured claims, but before unsecured claims.

Thus, while there is substantial similarity in the monitor and proposal trustee duties, there is a difference in appointment process and compensation priority of the two.

### **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 Canadian insolvency regime is driven by an aspiration to provide a balance between value maximization through reorganization and ensuring creditor security and ability to receive recovery through a liquidation. On the one hand, the regime favours the opportunity of reorganization, given the social benefit from continued employment as well as the potential of value maximization of a going concern business for the benefit of all stakeholders. On the other hand, the regime ensures a robust framework for orderly liquidation provides equitable treatment for creditors.

Consistent with these policy goals, Canadian law takes "universalist" approach to insolvency proceedings, meaning it allows for one domestic proceeding to govern the process for all creditors. This provides the debtor and the relevant professionals, such as a BIA trustee or a

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CCAA monitor, with sufficient power and time to evaluate all the claims, consider all reorganization options and provide a comprehensive treatment of all creditors. In its approach to cross-border insolvency, Canada uses “modified universalism”, meaning that while it allows for several proceedings to take place in various jurisdictions, it only recognizes one main foreign proceeding. The recognition of a foreign proceeding as main ensures benefits like automatic stay of Canadian proceedings upon recognition, which is aimed at facilitating efficient and fair cross-border process.

The above approach is exemplified in various aspects of the Canadian insolvency regime. On the one hand, the law offers a number of debtor-friendly opportunities for corporate rescue. This is due to the fact that going concern restructuring is viewed as the preferred alternative to a liquidation. The three alternatives for corporate rescue that can be pursued by the debtor to avoid a liquidation are CCAA reorganization, BIA proposals and CBCA. All three provide for an orderly supervised process, ensuring a negotiation with creditors and provide varying degrees of stay and ability to restructure unsecured or all claims. The rescue proceeding can be voluntarily initiated by a debtor that committed an “act of bankruptcy” as defined by the BIA. Both the BIA and CCAA provide the benefit of stay, although it is limited in time and not automatic under the CCAA. Both CCAA and BIA are debtor-in-possession processes, allowing the company’s management to retain control of the business while negotiating a plan of reorganization. In addition, the Canadian law recognizes the potential need for additional financing often required to effectuate a reorganization, and therefore, provides a super-priority status for DIP financing, which facilitates the debtor’s ability to raise new funds. Finally, a process started as a bankruptcy, can still be converted into a restructuring under BIA proposals or a CCAA proceedings. This option ensures a going concern alternative can be explored if a viable alternative emerges after the bankruptcy had been initiated.

On the other hand, Canadian law provides protects creditors claims by ensuring their participation in corporate rescue as well as their ability to file an involuntary bankruptcy petition under the BIA. Under corporate rescue alternatives, the plan must be approved by the creditor meeting. The Canadian regime does not allow for dissenting creditor class cram-down and instead requires a plan to be acceptable to all classes. In addition, if the BIA proposals process is unsuccessful, the proceeding can be converted into a bankruptcy process. In certain cases creditor recoveries can be maximized through a sale of assets free and clear of liens and liquidation of the remaining estate. Under the BIA and CCAA, creditors are also entitled to regular reporting on the progress of the case and the company’s financial position, provided by the monitor or the trustee.

In general, the Canadian insolvency process is deemed flexible, especially under the CCAA. The law gives the court a lot of discretion around the corporate rescue process, as it is required by a specific case. Finally, with respect to cross-border insolvency, Canadian courts have the authority to grant approval for actions and remedies requested by foreign proceedings, otherwise not available under the Canadian law, which further ensures adherence to the principles of comity and modified universalism.

**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?

Canada takes a “modified universalism” approach to cross-border proceedings, meaning that it recognizes multiple concurrent proceedings in various jurisdictions, while considering one proceeding as main and the rest as non-main. Following the 2009 amendments to BIA and CCAA, based off the principles of UNCITRAL Model Law, it is also mandatory for Canadian courts to recognize foreign insolvency proceedings.

In order for the foreign proceeding to be recognised, it must provide a proof of meeting three main requirements: 1) that the proceeding is a “foreign proceeding”, 2) that the applicant is the “foreign representative” and 3) a determination if the proceeding is main or non-main based on the COMI.

To commence the process of recognition, the counsel representing the foreign agent should file evidence satisfying the above requirements with the Canadian court. If evidence is sufficient, the court will enter an order recognizing the foreign proceeding, which would be automatic and mandatory. Based on recent case law, such as the *Centaur Litigation SPC*, the counsel may provide detail of the foreign proceeding being a proceeding that permits the company to restructure under supervision by the court under the local law, and the agent being an appointed court representative, in order to satisfy the requirements. The determination around the proceeding being main or non-main will then guide the next steps with respect to the stay granted. Thus, the counsel should also provide the information about the debtor’s COMI and if they expect the proceeding to be recognized as main based on the location of the head office and management.

**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?

In order for the agent to obtain stay in the Canadian litigation, the Canadian court must first recognize the foreign proceeding. After that, if the proceeding is recognized as main, the stay would be granted automatically, while if it is recognized as non-main, the Canadian court will use its discretion to determine if stay is necessary.

Based on the information provided in the text, it appears that a foreign court has empowered the counsel’s client to control the assets of the insolvent company. Canada gives a broad

**Commented [TE9]:** 4/5 foreign representative and “foreign proceeding” not defined/explained

**Commented [TE10]:** 4/5 should also consider how the opposing counsel would argue this to be foreign non-main proceeding

interpretation for the definition of foreign proceedings and representatives, so the counsel may be able to provide a proof that the existence of the court proceeding should be recognized and a foreign proceeding, and that the agent controlling the insolvent debtors' assets should be recognized as the foreign representative.

However, the question does not provide a clear determination of the nature of the foreign proceeding that resulted in the agent taking control of the assets. While in many cases it is common for a trustee to take control of the assets as a result of an insolvency proceeding, it may be the case that the agent's action took place outside of a formal process, in which case the Canadian court would question the existence of the foreign proceeding. Similarly, while in many cases the agent managing the assets of the insolvent debtor may be a qualified representative, the Canadian court would look into the substance of their role under foreign law to determine if the requirement had been satisfied.

Finally, based on the information, the foreign proceeding was initiated in the place where the online seller's head office and senior management are located. BIA and CCAA do not have a formal definition of the COMI, but take into consideration 1) the centre of company' operations according to its creditors, 2) the location of the debtor's principal assets and 3) the location of the management and decision-making. The foreign proceeding in question could be considered main based on the third definition, provided that there is no competing foreign proceeding seeking to be recognized as main based on the other two. If the foreign proceeding is recognized as foreign main proceeding, the stay in Canadian litigation would be granted. Alternatively, if the court takes a view that the foreign proceeding is non-main (e.g., if the company has significant assets in a different jurisdiction), the foreign representative would need to appear in the Canadian court to justify stay being necessary.

**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?

Canadian approach to foreign proceedings is governed by the principle of comity, meaning that the Canadian court is required to cooperate with the foreign proceeding to achieve the fairest outcome for all creditors. In addition, subject to the order of recognition of the foreign proceeding by the Canadian court, Canadian law allows for a broad range of powers for the court to order various actions requested by the foreign jurisdiction's procedure, not limited to those available under the Canadian law only. The court may enter any "order that it considers appropriate". The Canadian court will consider the public policy exemptions, in case the examination required by the foreign representative, for example, disadvantages Canadian creditors specifically.

In this specific case, so long as the court recognizes the foreign proceeding and the agent acting as the foreign representative, I would expect the Canadian court to allow examination of the Canadian resident, if such examination is a procedure mandated by the foreign proceeding. This does not appear to be an action contradicting Canadian public policy goals or disadvantaging Canadian creditors specifically, so the exemption should not apply.

**\* End of Assessment \***

Commented [TE12]: 45/50 Well done!