



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.

There are three methods in which a debtor can enter bankruptcy in Canada which are:-

- (a) involuntary (which the creditor make out an application for the bankruptcy)
- (b) voluntary (which debtor voluntarily makes an assignment to bankruptcy proceedings), and
- (c) on the failure of a BIA proposal (which a class of creditors rejected the corporate proposal in voting).

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?

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Commented [TE3]: 2/2

For a creditor to take out an application for an involuntary bankruptcy order, he/ she must prove himself/herself be owed in excess of CAD 1,000 of unsecured debt and provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application. The "act of bankruptcy" involves the conduct which either shows that the debtor is insolvent or shows that the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collect efforts of the creditor.

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 Office of the Superintendent of Bankruptcy is to ensure bankruptcies and insolvencies are handled fairly and efficiently. The functions of the Office of the Superintendent of Bankruptcy are to supervise all estates and matters which the BIA applies or select matters under CCAA, regulate the insolvency profession as well as to ensure compliance through maintenance and enforcement of the regulatory framework. It includes the following:-

- (a) licensing and supervising of trustees;
- (b) inspecting or investigating estates;
- (c) receiving and dealing with complaints from creditors against estate professionals during proceedings;
- (d) examining a trustee's account of a bankruptcy and ensuring all the correct information is accounted for; and
- (e) 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?

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

- (a) it is his/her first bankruptcy;
- (b) the Bankrupt has attended two financial counselling sessions;
- (c) the bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the Office of the Superintendent of Bankruptcy;
- (d) the discharge is not opposed by a creditor, the trustee or the Office of the Superintendent of the Bankruptcy.

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.

Though BIA proposal proceedings and CCAA proceedings are debtor-in-possession, the "Monitor" in the CCAA proceedings is appointed by the court and act as an officer of the

court to oversee the process on its behalf and any plan of arrangement which was approved by the creditors of the debtor must also be approved by the court while the “proposal trustee” in a BIA proposal is an independent third party who is appointed by the Official Receiver to assist the company with the filing of its Notice of Intention to make a proposal and/or Proposal and to monitor the company's ongoing operations during the Stay period.

Both the Monitor and proposal trustee play a supervisory and advisory role in the proceeding. The proposal trustee gives notice of the filing of the Notice of Intention to make a proposal or the proposal to all known creditors, files a projected cash-flow statement accompanied by a report from the trustee of its reasonableness and call a meeting of creditors to vote on the proposal. In the creditor's meeting, the proposal trustee is required to report on the financial situation of the debtor and the cause of the financial difficulties of the debtor. Lastly, the proposal trustee must make the final application to the bankruptcy court for approval of the proposal when such proposal was approved by the creditors.

The Monitor in CCAA proceedings acts an officer of the court on behalf of all stakeholders oversees the steps taken by the company. The Monitor assists with the preparation of the cash-flow statements and the negotiation of the plan between the company and its stakeholders. The Monitor files periodic reports to the courts and creditors, including reports to set out their views regarding any proposed disposition of assets or debtor-in-possession financing. Subject to the court's approval, the Monitor can be authorized to sell assets, direct certain corporate functions or engage in litigation on behalf of the company in order to allow the Monitor manage the company more effectively during the restructuring.

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 policy goals of the Canadian insolvency regime is to strike a balance between reorganization and liquidation. The policy focus on certainty, transparency, asset preservation and especially rehabilitation. For example, an individual bankrupt is automatically discharged 9 months after the bankruptcy is filed if it is his/her first bankruptcy, he/ she has attended two financial counselling sessions, he/she is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the Office of the Superintendent of Bankruptcy and such discharge is not opposed by a creditor, the trustee or the Office of the Superintendent of the Bankruptcy. The speedy discharge favours debtor rehabilitation.

The national insolvency system in Canada is described “universalist” approach as its system affect the debtor's assets wherever located. The Canadian insolvency permits foreign creditors to participate in Canadian proceedings with the same rights and priorities as similarly situated domestic creditors.

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

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empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. The online seller has a fulfillment 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 fulfillment 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 maximize 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?

To obtain recognition of the foreign proceeding in Canada, there are three formal proof requirements which includes:-

- (1) to prove the proceeding is a foreign proceeding in accordance with the statutory definition;
- (2) to prove that the foreign agent is a foreign representative in accordance with the statutory definition; and
- (3) to confirm whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on a center of main interest "COMI" analysis.

First of all, the foreign agent should provide evidence to show that the online seller has a head office where senior management of the company have their offices located in the foreign jurisdiction. Also, the foreign agent should also provide sufficient information which indicates the subject online seller was registered in the foreign jurisdiction. Furthermore, the foreign agent could show where the principal assets or operations that the online seller was found.

After proving the location of the COMI that the online seller locates, the foreign agent could provide his authority empowered by the legislation in the foreign jurisdiction/ foreign proceedings and how he operates under the law of the foreign jurisdiction.

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?

Whether the foreign agent can obtain a stay of the Canadian litigation depends on whether the foreign proceeding could be recognized as the foreign main proceeding. If the foreign agent could provide evidence to show the location of the COMI of the online seller was located in the foreign proceedings, it could help the foreign proceeding to be recognized as

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the foreign main proceedings. When a foreign proceeding is recognized as the foreign main proceeding, automatic stay of proceedings could be obtained.

However, if a foreign proceeding is recognized as a foreign non-main proceeding, a stay of the Canadian litigation may also be obtained if its request was justified. If there is no asymmetrical, public policy violation or unfair treatment to Canadian creditors, recognition would be generally permitted by court.

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 fulfillment office and warehouse in Canada to submit to an examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction (for example, following that jurisdiction's procedure rather than Canadian procedure). What is your advice?

After the recognition of the foreign proceeding as foreign main proceeding, the foreign agent can obtain a stay of the Canadian litigation. The foreign agent was given the authority to appear and be heard in the Canadian courts. If the Canadian resident who was in charge of the fulfillment office and warehouse in Canada was discovered of acting or had acted unfairly which undermines or prejudices their legitimate expectations, the foreign agent could assert their claim in court. If the foreign agent could prove their claim successfully, the Canadian court has broad remedial powers to ensure the affected party (i.e. Foreign agent) has access to an appropriate remedy, which might include a return of the value from the Canadian resident or request the Canadian resident to restore the position as before the oppressive transaction occurred.

*** End of Assessment ***

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