



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 3 ways: (i) a person may enter involuntary bankruptcy, (ii) voluntary bankruptcy or on (iii) a failure of or failure to perform the terms of a Bankruptcy and Insolvency Act (BIA) proposal.

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 BIA s43(1) requires that the creditor establish that: (i) he is owed in excess of CAD 1,000 of unsecured debt; (ii) the debtor has committed an "an act of bankruptcy" within 6 months of the application filing date. The application is to be brought to the

Commented [TE2]: 1.5/3 - no explanation of who may bring these kind of insolvency proceedings, how they work etc.

Commented [TE3]: 1/2 - act of bankruptcy not defined/explained

bankruptcy court in the location where the debtor ordinarily resides, does business, has assets or property.

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 (**OSB**) performs the following functions: (i) to ensure bankruptcies and insolvencies are handled as fairly and as efficiently as possible; (ii) he is responsible for administratively supervising all estates and matters to which the BIA applies and select matters under the Companies' Creditors Arrangement Act (**CCAA**); (iii) regulating the insolvency profession and ensuring compliance through maintenance and enforcement of the regulatory framework such as licensing and supervising trustees, investigating or inspecting estates.

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 for an individual bankrupt to be automatically discharged within 9 months after the bankruptcy is filed are: (i) It is a first bankruptcy; (ii) the bankrupt has attended two financial counselling sessions; (iii) the bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the OSB; and (iv) 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.

We can compare and contrast the following features of the Monitor and proposal trustee: (i) how they are appointed, (ii) their duties, (iii) their powers and (iv) the termination of their services. The CCAA and BIA proceedings both have the common goal of being a debtor in possession restructuring process. A Monitor is appointed pursuant to section 11.7 of the CCAA by the court's order to monitor the business and financial affairs of the company. The person appointed as Monitor has to be a trustee within the meaning of the BIA and is generally selected by the debtor. By contrast the trustee is appointed in several ways

including being named in the notice of intention filed by the debtor or by a bankruptcy order or a trustee indenture.

The duties of the Monitor and proposal trustee are similar. The Monitor is charged to monitor the business and financial affairs of the company. Likewise, s50 of the BIA, the proposal trustee is to make an appraisal and investigation of the affairs and property of the debtor to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report to the meeting of creditors. Both the trustee and Monitor are mandated to file a cash flow statement which indicates the projected cash flow on a monthly basis. The trustee is to monitor and report on the business and financial affairs of the insolvent person. Both the Monitor and proposal trustee play an advisory and supervisory role and they oversee the steps taken by the company for the court and stakeholders. Both the Monitor and the proposal trustee assists with negotiating the plan or proposal. By contrast the BIA allows an interim receiver to be appointed as well who may take control of the management of the company where it is clear that the current management is no longer capable of acting in the best interests of the company or its stakeholders. The powers of the Monitor are contained in the order appointing him. These powers can be expanded to allow the Monitor to manage the company during restructuring. The Monitor can, with the Court's approval, sell assets, direct certain functions or engage in litigation on behalf of the company. Similarly, the proposal trustee is empowered by the BIA, section 18 to take conservatory measures and summarily dispose of property that is perishable or likely to depreciate in value to preserve its value. The proposal trustee may carry on the business of the bankrupt before the first meeting of creditors. The proposal trustee is required to insure insurable property of the bankrupt and maintain an account into which he pays proceeds from the bankrupt's estate.

Both the proposal trustee and the Monitor have an obligation to act honestly and in good faith.

On the termination of their duties, the Monitor may be replaced by application to the Court, the proposal trustee can apply to the court, pursuant to s42 of the BIA, upon completion of his duties, for a discharge.

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 goals of the Canadian insolvency regime are to strike a balance between restructuring and liquidation. The insolvency system aims to provide certainty, transparency, asset preservation, value maximization and rehabilitation. Where appropriate therefore, the system provides for and favours debtor rehabilitation which will also result in increased recoveries for creditors, the maintenance of supplier relationships and the preservation of jobs. Canada's insolvency framework recognises the existing rights of creditors and establishes clear rules for ranking priority claims and the equitable treatment of creditors of the same class. The Canadian insolvency system is described as universalist because it purports to extend to the debtors assets wherever they are located and it permits foreign creditors to participate in Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors.

Examples of the insolvency regime that favours the rehabilitation of the debtor are: (i) the BIA allows a company to file a proposal where they are in financial difficulty and seek to restructure rather than liquidate, the CCAA was created to allow restructuring of corporate entities who owe CAD 5million and a company may rehabilitate and restructure under the

provisions of the Canada Business Corporations Act, s 192 outside of the insolvency process; (ii) both the BIA and CCAA allow for stays of proceedings against a company seeking to enter into a proposal or plan, the stay is automatic under the BIA but discretionary under the CCAA.

Examples of a system that recognises creditors and provides clear rules for ranking priority claims, sections 136 to 147 governs the ranking of claims and provides that in a corporate insolvency, the rights of secured creditors rank ahead of all claims against the debtor except for certain 'super priority' claims. Another example of empowerment given to creditors, section 38 of the BIA gives creditors power to pursue remedies to challenge impeachable transactions where the assets of the estate are insufficient and the trustee or Monitor refuse to act. Any proposal or plan is generally open for the approval of creditors, in both the pre-filing and post-filing stage, significant creditors or creditor groups may influence the restructuring as commensurate with the value and priority of their claims. For example, creditors may individually or collectively hold sufficient debt of a class of creditors amounting to 33 1/3rd percent that allows them to block the approval of a CCAA plan or BIA proposal.

Examples of the universalist nature of Canadian insolvency laws are: (i) the definition of corporation in the BIA is broad enough to support a filing by a foreign based registered company with assets or property in Canada subject to COMI principles being satisfied. Both the BIA and CCAA have provisions that address cross border issues, Canada has adopted a modified version of the UNCITRAL Model Law on Cross Border insolvency to recognise foreign judgments. The courts have wide discretionary power from statute for recognising foreign statute that accords with principles of comity and cross border cooperation. Canada courts have embraced cross border recognition orders, the use of cross border insolvency protocols, court to court communication and the coordinated assets sale and restructuring plans. Important modifications to the UNCITRAL Model law include the fact that the definition of foreign non main proceedings does not require that the debtor have an 'establishment' in the place of the foreign proceedings. Outstandingly, the Canadian court illustrated in the case *Purdue* that it will prevent undue prejudice to non-Canadian creditors. In this case a Canadian creditor applied to be excluded from a stay order issued by a US court. The Canadian court declined to exclude the Canadian company on the basis that the Canadian creditors will have an advantage over US creditors by allowing them to continue to pursue actions against the related parties while the actions by the US claimants were stayed.

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]

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

As both the BIA and CCAA have adopted a modified version of the UNCITRAL Model Law on Cross Border insolvency, there are 3 requirements to be met for the Canadian court to recognise the foreign insolvency proceedings. The first is that the proceeding has to be a "foreign proceeding" as is defined in the statute. A foreign proceeding in s 268 of the BIA means a judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation. Second, the applicant must be a "foreign representative" in accordance with the statutory definition. This is defined to mean a person or body, including one appointed on an interim basis, who is authorised, in a foreign proceeding in respect of a debtor to: (a) administer the debtor's property or affairs for the purpose of reorganisation or liquidation or (b) act as a representative in respect of the foreign proceedings. Third, the Court will determine whether the foreign proceedings are foreign main proceedings or foreign non main proceedings following an analysis of the centre of main interest (*COMI*). The foreign representative is required to file sufficient evidence of the foreign court to allow the Canadian court to determine that they are a foreign representative and that the proceeding is a foreign proceeding. The Canadian court will look at the substance of the foreign law. Once the requirements for recognition have been met, the recognition will be automatic and compulsory and the court must make an order recognising the foreign proceedings.

Question 4.2 [maximum 5 marks]

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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 Court, when determining whether or not to recognise the foreign proceedings will have to categorise the foreign proceedings as either "foreign main proceedings" or foreign non-main proceedings. This is relevant because the categorisation will help determine the nature of relief that the Canadian court will grant in support of the foreign proceedings. If a foreign proceeding is recognised as a foreign main proceeding, all proceedings in Canada as the recognising jurisdiction must be stayed. This will include the class action commenced.

To determine whether the foreign proceedings are main or non-main, the Court will analyse the evidence presented before it to determine the COMI of company. The BIA defines a COMI as, in the absence of proof to the contrary, a debtor's registered and in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests. On the premise that the foreign proceedings are foreign main proceedings the stay of the Canadian proceedings will be ordered. If the proceedings

are considered foreign non-main proceedings a stay of the Canadian proceedings can still be obtained but it must be requested and justified. The recognition of the proceedings as main or non-main gives the foreign representative standing to appear and be heard in Canadian courts. The recognition also places an obligation on Canadian officials to cooperate with the foreign representative and the foreign court. The BIA and CCAA contains wording which gives the court wide discretionary power, if the court is satisfied that it is necessary for the protection of the debtor companies property or the interests of a creditor, to make "any order that it considers appropriate."

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?

The Canadian court is given wide discretionary power, when recognising a foreign judgment, to make any order it considers appropriate if the court is satisfied that this is necessary. The only limitation to the Canadian court making an order in accordance with the civil procedure rules of the foreign jurisdiction, even if not present in Canadian rules, would be if the order is contrary to public policy. The Canadian court rarely however invokes this ground and is more inclined to recognise foreign insolvency proceedings especially from jurisdictions where Canada has strong economic ties like the USA and is familiar with the legal system of that country. The Canadian court has in the past, in the case *Re Hartford Computer Hardware Inc*, where there are ancillary proceedings in Canada, the court has ordered relief in foreign proceedings that would not ordinarily be available in Canadian proceedings. In the *Nishiyama* case, the court held that the order making powers given under s272(2) of the BIA gave the Court jurisdiction to make the orders listed in the provision in the jurisdiction of the foreign main proceedings where "necessary" and "appropriate" to do so once a foreign proceeding is recognised. The orders that may be made includes examining witnesses, the taking of evidence or an order for delivery of information concerning the property, affairs, debts, liabilities and obligations of the debtor. The Court will therefore construe the facts of the case to determine whether the order is necessary. The foreign representative should therefore present the court with the evidence it has to confirm why an order to compel the Canadian resident to submit to an examination under oath and produce documents related to the company's operation and accounts.

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