



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 a debtor can enter into bankruptcy in Canada, as listed below:

- Involuntary;
- Voluntary; and
- on the failure of or failure to satisfy the terms and conditions of a 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 creditor must demonstrate that:

- They are owed more than CAD 1,000 of unsecured debt; and

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- Provide evidence that the debtor has committed an “act of bankruptcy” within the 6 months prior to the date of filing of the involuntary bankruptcy 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.

Three functions of The Office of the Superintendent of Bankruptcy are:

- licensing and supervision of trustees;
- inspecting or investigating estates; and
- receiving and dealing with complaints from creditors against estate professionals during proceedings;

Question 2.4 [maximum 2 marks]

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

The four criteria are:

- It is a first-time bankruptcy;
- the bankrupt has attended 2 financial counselling sessions;
- the bankrupt is not required to pay part of his income into the bankruptcy estate as per the OSB; and
- the discharge is not opposed by a creditor.

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.

In CCAA proceedings, all CCAA orders appoint a Monitor. The Monitor is a licenced insolvency professional and an officer of the court and is generally selected by the debtor.

The Monitor supervises the steps taken by the debtor while acting as an officer of the court in CCAA proceedings, on behalf of all stakeholders. The Monitor assists with preparation of the cash-flow statements and helps negotiate the plan between the debtor company and its stakeholders. The Monitor files regular reports with the court and creditors, including reports on proposed disposition of assets or Debtor-In-Possession (DIP) financing. The minimum statutory powers of the Monitor are set out in the CCAA. Further powers can be granted by the court to for the Monitor to manage the company in effect, provided the board of directors has resigned or the creditors have list confidence in management. Additional powers can include the power to sell assets, subject to court approval. The Mionitor can also be authorised to direct certain corporate functions and even engage in litigation on behalf of the company.

The Proposal Trustee, under BIA, is selected by the debtor. The duties of the Proposal Trustee are similar to the Monitor under CCAA in that the Proposal Trustee supervises, advises and assists the debtor in proposal development and in negotiations with creditors and other major stakeholders. The Proposal Trustee's statutory duties include providing notice of the filing of the NOI or the proposal to all known creditors, filing a projected cash-flow statement, reporting on the reasonableness of the cash-flow statement and calling meeting of creditors to consider and vote on the proposal. The Proposal Trustee reports during the creditor meeting on the debtor's financial status and the cause of its financial troubles. If accepted by creditors, the final application to the bankruptcy court for approval of the proposal is also carried out by the Proposal Trustee.

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, in general, seeks to achieve a balance between reorganisation and liquidation. The focus is on certainty / predicability, transparency, asset preservation, value maximisation and rehabilitation.

These policy goals are reflected in the provision for, and even favouring, of debtor rehabilitation because of the apparent social benefits that flow from rehabilitation, such as improved recoveries for creditors, preservation of supplier relationships and local economic activity as well as the safeguarding of employment.

At the same time, existing creditor rights are also recognised, with clear rules established on ranking of priority claims and fair treatment of creditors, in similar classes. These aim to provide security for creditors and investors, which would positively impact the availability and cost of credit in Canada.

Canada's national insolvency system is described as universalist in that all formal insolvency proceedings cover a debtor's assets, wherever they are located. With regards to cross-border insolvency, Canada has adopted a modified **universalist system** whereby it is accepted that concurrent insolvency proceedings in multiple jurisdictions, especially the USA, may sometimes be necessary while continually striving for courts to communicate and co-ordinate in order to achieve a fair and efficient outcome for all stakeholders. Thus, Canadian courts generally accept, assist and support cross-border recognition orders, court-to-court communication, use of cross-border insolvency protocols, co-ordinated asset sales and co-ordinated restructuring plans.

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

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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?

Canadian courts are required, under the provisions of the BIA and CCAA, to recognise foreign insolvency proceedings, provided formal proof is provided;

- that the proceeding is a "foreign proceeding" as per the statutory definition;
- that the applicant is a "foreign representative" as per the statutory definition; and
- that the "foreign proceeding" is either a "foreign main proceeding" or a "foreign non-main proceeding" based on analysis of the debtor's Centre Of Main Interests (COMI).

Case law indicates that the first two requirements above are interpreted broadly by Canadian courts, as Canadian courts are concerned more with the substance of the foreign law rather than its nomenclature, and hence are not difficult to meet, given the set of facts in this case where the foreign counsel and agent have already been empowered by the foreign jurisdiction to take control of the assets of the insolvent online seller.

The third requirement should similarly be easily fulfilled given this set of facts, where it can be presumed that the insolvency proceedings in the foreign jurisdiction are "foreign main proceedings" given that both the registered head office and the actual senior management offices of the insolvent online seller are in the foreign jurisdiction.

With all three requirements easily fulfilled, given the set of facts, recognition is automatic and mandatory.

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?

Obtaining a stay can be automatic or subject to the discretion of the Canadian court, dependent on whether the "foreign proceeding" is a "foreign main proceeding" or "foreign non-main proceeding". To determine this, the insolvent online seller's Centre Of Main Interests (COMI) is analysed. While there is no definition of COMI in Canadian statutes (BIA and CCAA), there is a rebuttable presumption in both statutes that in the case of a company, the COMI is company's registered office address, absent proof to the contrary.

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To determine COMI, the Canadian courts will consider the location that significant creditors recognise as being the center of the company's operations, the jurisdiction in which the debtor's principal assets or operations are located and the location of the company's headquarters, head office or senior management are located.

In this case, the insolvency proceedings in the foreign jurisdiction are "foreign main proceedings" given that both the registered head office and the actual senior management offices of the insolvent online seller are in the foreign jurisdiction.

Once the Canadian court determines that the above is true, the court will automatically issue a stay of proceedings.

Hence, I believe the foreign agent can obtain a stay of the Canadian litigation - automatically.

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?

Once recognition has been granted, the foreign agent has standing to appear before and be heard in Canadian courts (whether or not it is recognised as a main or non-main foreign proceeding).

Recognition imposes an obligation on Canadian officials to cooperate with the foreign agent. Both the BIA and CCAA have broadly worded, discretionary provisions that allow the court, after granting recognition, can make any order that it considers appropriate, on application by the foreign insolvency professional, provided the court is satisfied that it is necessary for the protection of the debtor company's property or to safeguard the interests of a creditor or creditors.

Canadian courts' orders can include, but are not limited to, orders for examination of witnesses and the taking of evidence, and provision of information on the debtor's property and affairs. The court is not restricted to only providing remedies available under Canadian insolvency law and has, in the past, ordered relief, in foreign main proceedings, which are not found in Canadian insolvency laws.

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Hence, especially if the "foreign proceeding" is recognised as a "foreign main proceeding", it is highly likely that the foreign agent can compel the Canadian resident, in-charge of the fulfilment office and warehouse, to submit to an examination under oath and produce documents related to the company's operations and accounts.

*** End of Assessment ***

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