



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.

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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.

Commented [TE3]: correct answer

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]

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Identify the different ways in which a debtor can enter bankruptcy in Canada.

[There are three methods for entering into bankruptcy:

- (1) Involuntary;
- (2) Voluntary, and
- (3) On the failure of, or failure to perform the terms of, a BIA proposal.

Involuntary bankruptcy order is passed on an application by a creditor owing in excess of CAD 1,000 of unsecured debt and providing evidence that the debtor has committed an act of bankruptcy within six months of the date of the filing of the application.

Voluntary bankruptcy occurs when the debtor voluntarily makes an assignment into bankruptcy proceedings. This may be done for a number of reasons, including to stay legal actions by creditors, or, in the case of an individual, to obtain a fresh start once the proceedings have concluded.

The BIA contains provisions for both corporate and consumer proposals that allow debtors to reach compromise with their creditors. If a corporate proposal is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy. If the corporate proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy. Similarly, if the debtor fails to perform the terms of the proposal, the Court may by order annul the proposal and the debtor is automatically assigned into bankruptcy.]

Question 2.2 [maximum 2 marks]

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What are the requirements that a creditor must demonstrate to make out an application for an involuntary bankruptcy order?

[To successfully make out an application for an involuntary bankruptcy order, the applying creditor must (i) be owed in excess of CAD 1,000 of unsecured debt and (ii) provide evidence that the debtor has committed an act of bankruptcy within six months of the date of the filing of the application. An act of bankruptcy essentially involves one of two different types of conduct. One is conduct that shows that the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of the creditor. The other is conduct that shows the debtor in insolvent.]

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 has a number of functions which include regulating the insolvency profession and ensuring compliance through maintenance and enforcement of the regulatory framework. This includes (i) licensing and supervising of trustees; (ii) inspecting or investigating estates; (iii) 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?

[An individual bankrupt is automatically discharged nine months after the bankruptcy is filed if:

- (1) It is a first bankruptcy;
- (2) The bankrupt has attended two financial counselling sessions;
- (3) The bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standard established by the OSB; and
- (4) The discharge is not opposed by a creditor, the trustee or the OSB.]

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

Question 3.1 [maximum 8 marks]

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

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

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

[The overall regulation and management of insolvency proceedings is primarily done through the oversight of the court. The day to day process is largely overseen by court appointed representative such as trustees, receivers or CCAA monitor, who owe broad duties to the court and all stakeholders and periodically report to creditors and the court.

While BIA liquidation bankruptcy proceedings are managed by a trustee. The trustee must seek court approval when taking certain steps, such as selling the debtor's property and finalising its discharge. BIA proposal proceedings are debtor in possession, but a proposal trustee manages the process. Any proposal approved by the debtor's creditors must also be approved by the court.

CCAA proceedings are also debtor in possession but are predominantly court driven. A monitor is appointed by the court to oversee the process on its behalf and any plan of arrangement approved by the creditors of the debtor must also be approved by the court.

The Monitor in CCAA proceedings:

All CCAA orders appoint a Monitor, who is a licensed insolvency professional and an officer of the court, generally selected by the debtor. The Monitor plays a supervisory and advisory role in the proceeding. In its supervisory role, the Monitor oversees the steps taken by the company while in CCAA proceedings as an officer of the court and on behalf of all stakeholders. The Monitor assists with the preparation of the cash flow statements as well as the negotiation of the plan between the company and its stakeholders. The Monitor also files periodic reports with the court and creditors, including reports setting out the views of the Monitor in connection with any proposed disposition of assets or in connection with any proposed DIP financing. The minimum powers of the monitor are set out in the CCAA, however in appropriate circumstances the monitor's powers may be augmented to exercise more control over the debtor company.

For instance, where the board of directors have resigned or creditors have lost confidence in management, the Monitor's powers can be expanded by the court to allow the Monitor to effectively manage the company during the restructuring. The Monitor can be authorised to sell assets, subject to court approval, and can be authorised to direct certain corporate functions or engage in litigation on behalf of the company. Monitors assuming this role are colloquially referred to as "super monitors".

The Proposal Trustee:

The Proposal Trustee is selected by the debtor. Much like the Monitor, the proposal trustee plays a supervisory and advisory role and assist the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders. Under the BIA proposal provisions, a receiver may be appointed in order to take control of management of the company if management is no longer acting or capable of acting in the best interest of the company or its stakeholders.

The Proposal Trustee has a number of statutory duties, including giving notice of the filing of the NOI or the proposal to all known creditors, filing a projected cash flow statement

accompanies by a report from the trustee or its reasonableness, and calling a meeting of the creditor to consider and vote on the proposal. At the creditor meeting the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The proposal trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.]

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.

[Modern Canadian Insolvency Law is fragmented in that it does not issue from a single statutory source. The Constitution Act confers exclusive power to the federal government to make laws in relation to bankruptcy and insolvency. Nevertheless, the provincial legislatures also exert influence over bankruptcy and insolvency through their authority in the realms of securities laws and property and civil rights subject to the doctrine of paramountcy.

An important distinction to keep in mind is that in Canada bankruptcy is a legal status that can be applied to both individuals and legal entities, while insolvency is a financial condition. In bankruptcy an entity's assets vest in a trustee, meaning they lose legal entitlement to deal with them, and the trustee liquidates the assets and distributes the proceeds to creditors in accordance with the priority of claims. Insolvency, on the other hand, is the financial state of being unable to meet one's debts as they fall due (cash flow test) or having liabilities that exceed the value of the assets (balance sheet test).

Insolvent parties may become subject to several different formal and informal proceedings, bankruptcy proceedings being only one such form. The most common forms of insolvency proceedings are: (i) BIA liquidations; (ii) BIA reorganisations; (iii) CCAA reorganisations and (iv) court appointed or private receiverships.

There are two features common to all formal insolvency proceedings in Canada: (i) they follow the single proceeding model, and (ii) they take a universalist approach in that they purport to affect a debtor's assets wherever located. It is reciprocal in that it permits foreign creditors to participate in Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors. [Canada has embraced modified universalism in its approach to cross border insolvency issues.]

Policy Goals

Canada's insolvency regime aspires to strike a balance between reorganisation and liquidation. The policy rationales that underlie the Canadian insolvency system focus on certainty, transparency, asset preservation, value maximisation and rehabilitation. Where appropriate, the Canadian insolvency system provides for, and favours, debtor rehabilitation because of the perceived social benefits that flow from the rehabilitation of debtors. These include increased recoveries for creditors, the maintenance of supplier relationships and local economic activity and the preservation of jobs. At the same time, Canada's insolvency framework recognizes existing creditor rights and establishes clear rules for the ranking of priority claims and the equitable treatment of similarly situated creditors. This balanced approach flows from the recognition that certain and reliable rules provide security for investor and lenders that in turn, influences the cost and availability of credit in the Canadian marketplace.

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Management of Proceedings:

These policy concerns are reflected in the way insolvency proceedings are managed through a combination of creditor control, estate professional management and court supervision that includes consideration of the interest of the debtor and other stakeholders (including employees, the community, customers etc.). The overall regulation and management of insolvency proceedings is primarily done through the oversight of the court. The day to day process is largely overseen by court appointed representatives such as trustees, receivers or the CCAA monitor, who owe broad duties to the court and all stakeholders and periodically report to the creditors and the court. Creditors are provided a degree of control over insolvency proceedings through voting mechanisms and other powers in both bankruptcy and restructuring situations and may seek to replace estate professional in certain circumstances. Creditors also have the right to information and to be heard by the court overseeing the insolvency proceedings.

BIA liquidating bankruptcy proceedings are managed by a trustee. The trustee must seek court approval when taking certain steps, such as selling the debtor's property and finalising its discharge. BIA proposal proceedings are debtor in possession, but a proposal trustee manages the process. Any proposal approved by the debtor's creditors must also be approved by the court. CCAA proceedings are also debtor in possession but are predominantly court driven. A monitor is appointed by the court to oversee the process on its behalf and any plan of arrangement approved by the creditors of the debtor must also be approved by the court. A restructuring under a corporate statute such as the CBCA is managed by the corporation, but the court typically establishes the process for presenting the arrangement to the company's stakeholders and, once approved by the stakeholders, the arrangement must be approved by the court. In a court ordered receivership the receiver obtains its powers from the appointing order and periodically reports to the court to seek approval of its activities, including the approval of sales processes, the acceptance of bids and approval of major asset sales, as well as distributions to 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 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?

[The provisions of the BIA and CCAA on the recognition of foreign insolvency proceedings require Canadian Courts to recognise foreign proceedings on formal proof of three main requirements:

- (1) That the proceeding is a foreign proceeding in accordance with the statutory definition;
- (2) That the applicant is a foreign representative in accordance with the statutory definition; and
- (3) Whether the foreign proceeding is a foreign main proceeding, or a foreign non-main proceeding based on a centre of main interest analysis.

If we apply these principles to the facts of the case, no doubt the proceeding is a foreign proceeding originating in a foreign jurisdiction and the applicant is a foreign representative further since the head office and senior management i.e. nerve centre is based out of the foreign jurisdiction, the COMI analysis suggest that the proceedings should be held to be foreign main proceedings. Accordingly, the foreign agent satisfies the formal proof requirements to obtain the recognition of foreign proceedings in Canada.]

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?

[Once the requirement for recognition are met, the recognition is automatic and compulsory, and the court must make an order recognising the foreign proceeding. If the court determines the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of proceedings. If it determines that the proceeding is a foreign non-main proceeding a stay may be requested, but the court exercises discretion to make any order necessary for the protection of the debtor's property or the interest of creditor.

In the given facts, since the head office of the corporate debtor is registered in the foreign jurisdiction where senior management of the company have their offices meaning thereby the Centre of Main Interest is in the foreign jurisdiction. Thus, the proceeding would be recognised as a foreign main proceeding and the foreign agent can obtain an automatic stay of the Canadian litigation.]

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?

[Both the BIA and the CCAA contain broadly worded, discretionary provisions that provide that where an order recognising a foreign proceeding has been made the court may, on application by the foreign representative, if it is satisfied that it is necessary for the protection of the debtor companies property or the interest of creditors, make any order that it considers appropriate.

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This includes, but not limited to orders respecting the examination of witnesses and the taking of evidence, and provision of information on the debtor's property and affairs.

In *Nishiyama* (2020 BCSC 224), the Court held that the order making powers under section 272(2) grant the Court jurisdiction to make the enumerated kinds of orders in the jurisdiction of the foreign main proceedings where necessary and appropriate to do so once a foreign proceeding is recognised. This is novel because the statute does not specify the jurisdiction in which these orders may apply. The Court noted that section 272(1) of the BIA had not been judicially considered prior to this case. However, the necessity element was clearly made out in this case, as the target of the examination order was legally prohibited from leaving Japan and therefore could only be examined there.

Thus, only in exceptional circumstances such order may be made in the facts of the case, there is no exceptional circumstances in which the Court may allow examination under the foreign jurisdiction's procedure rather than Canadian procedure.]

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