



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]

Commented [TE1]: 10/10

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 a debtor can go into bankruptcy, i.e.

1. Voluntary – when a debtor makes an assignment into bankruptcy proceedings, on their own accord.
2. Involuntary – made by one's creditors
3. On failure of performance of the terms 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?

A creditor must demonstrate that:

- i. They are owed an excess of CAD 1000 of unsecured debt

Commented [TE2]: 1.5/3 - very little explanation on the details of these methods

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

- ii. Tender evidence that the debtor has committed an act of bankruptcy within six months of the date of filing the application for the involuntary bankruptcy order.

Question 2.3 [maximum 3 marks]

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

The functions of the Office of the Superintendent of Bankruptcy include:

- i. Regulating and ensuring compliance in the insolvency profession through maintenance & enforcement of the regulatory framework.
- ii. To ensure all insolvency proceedings (bankruptcy & insolvency) are handled fairly and efficiently.
- iii. To administratively supervise all estates and matters to which the Bankruptcy & Insolvency Act applies.

Question 2.4 [maximum 2 marks]

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

- i. That it is the bankrupt's first individual bankruptcy.
- ii. That the bankrupt is not required to pay a portion of his income into the bankruptcy estate and in accordance with the standards established by the Office of the Superintendent of Bankruptcy.
- iii. That the bankrupt has attended two financial counselling meetings.
- iv. That neither the Office of the Superintendent of Bankruptcy, the Trustee nor the creditors are opposed to the discharge.

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

Question 3.1 [maximum 8 marks]

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

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

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

The role of a monitor in CCAA proceedings and the proposal trustee in a BIA proposal have several differences and similarities. These are discussed and itemised are seen hereunder.

- Although selected by the debtor, a monitor is appointed by a court in CCAA orders and is an officer of the court and tends to be a licensed insolvency practitioner; whereas the proposal trustee is **only appointed by the debtor**.
- A monitor in CCAA is allowed to pursue remedies on behalf of the estate by engaging in litigation on behalf of the company.

Commented [TE4]: 2/3 last two answers both similar. something more specific such as maintaining public records or licensing and supervising of trustees would be better

Commented [TE5]: 2/2

Commented [TE6]: 7/8

Commented [TE7]: also appointed by court but selected by debtor

- Both play an advisory and supervisory role in their respective proceedings. As they assist the individual debtor/debtor company to develop the proposal and they participate in its negotiations with various creditors and/or stakeholders.
- There are circumstances where both are required to take up the effective control of the company. e.g. where the management is not acting in its best interests.
- Although during disclaimer of onerous contracts both are required to give their approval/authority for such disclaimer to be done; whenever either the monitor or the proposal trustee intends to sell the company's assets, they are required to seek the court's approval to do so.
- Both are required to report on the reasonableness of a decision to exclude the application of transactions that are undervalue and on preference provisions from a BIA proposal or a CCAA plan.
- Their statutory duties are similar in that: both are required to fill & file periodic reports setting out their views, with respective parties.

Question 3.2 [maximum 7 marks]

Commented [TE8]: 7/7

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 seek to maintain an equilibrium between reorganization and liquidation. This rationale is geared more towards promoting asset preservation, maximization of value for creditors and rehabilitation.

These policy goals are mirrored in the Canadian insolvency system through various principles and provisions such as corporate rescue, post-commencement financing, maintaining the business as a going concern, debt restructuring among others on one hand. This is geared towards giving debtors a second chance and increases the recovery rate for creditors which has an impact on the socio-economic benefits to the society as a whole.

On the other hand, there are provisions on creditor regulation in the processes where creditors have a say in the proceedings through voting mechanisms in both BIA & CCAA proposals, where for approval of proposals double majorities are required, and where successful, the proposals are adopted in court and bind all creditors. Additionally, the regime recognizes rights of creditors (such as the right to information, the right to participate in proceedings) and has establishes rules for priority of claims and equal treatment to creditors in a similar class. This in turn offers investors security that they will indeed get back their investment.

Provisions on court supervision are also geared towards striking the balance through the appointment of insolvency practitioners to play different roles i.e. monitors, trustees, receivers, sanctioning of sale of company assets, endorsement of proposals.

Canada's insolvency regime is considered universalist since the regime in its approach applies to the debtor's assets despite their location/ the assets being in several jurisdictions. Therefore, the liquidation of an insolvent debtor in Canada, with assets in multiple countries will be carried out Canada so long as it is the country where the debtor has its centre of main interests (COMI). The Canadian court in such a context will have global reach to pool together and administer the debtor's assets worldwide. Moreover, it applies the reciprocity principle which allows creditors to participate in the insolvency proceedings with similar rights as local creditors. It is worth noting that, this approach is only beneficial where the other jurisdiction respect properly initiated proceedings and recognize rights of Canadian creditors in their proceedings. Where the other states don't allow reciprocity, these benefits may not be reaped.

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?

For the Canadian courts to recognise the foreign proceeding, the BIA & CCAA provide three requirements that must be adhered to by the foreign agent. These include:

- i. That the proceeding is a foreign proceeding in accordance with the definition given by the BIA or the CCAA. In this context, it is a proceeding in which a debtor company's business and financial affairs are subject to control or supervision of a foreign court for the purpose of reorganization or liquidation.
- ii. That the applicant (the foreign agent) is a foreign representative in accordance with the definition provided for by the BIA or the CCAA. For this to be determined, the Canadian courts & statute allow the foreign agent to adduce sufficient evidence to support his claim in their foreign application.
- iii. Whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on the centre of main interest (COMI) analysis. The significance of this classification is whether there will be an automatic stay or not. Since the foreign main proceeding is a proceeding in a jurisdiction where the debtor has its centre of main interest, and the opposite applies to foreign non-main proceedings. For the determination will be made through identifying the location of debtor's principal assets, its significant creditors and head office as the COMI.

Commented [TE9]: 3/5

Commented [TE10]: explain or provide definition

Commented [TE11]: more thorough analysis required, what are the other two considerations?

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?

Commented [TE12]: 5/5

According to the Canadian insolvency regime, it is possible for one to obtain a stay of the litigation. Upon recognition, the court will be required to categorise the proceeding either as a foreign main proceeding or a foreign non-main proceeding. If it is classified as a foreign main proceeding, there is an automatic stay against any action concerning the debtor's property, debts, liabilities, or obligations. If recognized as a non-main proceeding, there is no such automatic stay, and where the stay is necessary, the foreign agent is required to make the request and justify the same in order to obtain such relief. This classification enables the court to determine the level of control over the administration proceedings and also the control the foreign representative has over the assets of the company.

The stay of proceedings is issued to prevent undue prejudice, to allow the debtor company attempt corporate rescue by either coming up with a BIA/CCAA proposal, compromise for debt, debt for equity swaps, reorganization, post-commencement financing etc. vis-à-vis its creditors agreeing to a compromise. In addition to the stay, the court may grant additional orders as it deems fit e.g. with regards to examination of witnesses, taking evidence, prohibition on dispositions of property etc.

Additionally, recognition affords the foreign representative locus standi to appear and be heard in Canadian courts & the courts to obligation to cooperate with the foreign representative.

However, the court may refuse to grant recognition and even certain orders where the same are deemed to be against the public policy of Canada.

Question 4.3 [maximum 5 marks]

Commented [TE13]: 4/5

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?

It is possible for the foreign representative to compel the Canadian resident who was in charge of the fulfilment office to submit to an examination under oath and produce documents. Canada assented to several amendments in 2019 to both the BIA&CCAA that allow the court inquire into payments made in the year preceding insolvency and impose liability on directors in respect to such payments; and to allow the court compel individuals to disclose their economic interest in the company. Moreover, upon recognition, the foreign representative in addition to the stay orders granted & where it is necessary for the protection of the assets of the company or the creditors, may seek further orders with regards to examination of witnesses, taking evidence, provision of information relating to the debtor's affairs and property. The Canadian courts have the discretion to grant or restrict the prayers sought.

According to previous case law and the interpretation of provisions of section 272 of the BIA, it has proven difficult to have a party/witness subjected to the foreign procedure rather than the Canadian procedure and going by the Court's decision in Nishiyama(2020BCSC 224), where the party that was to be examined was prohibited from leaving Japan and could only be examined in Japan.

However, since the Court is not constrained when exercising its discretion, if orders to have the Canadian resident 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 are pleaded and the court is convinced by evidence and other reasons, the court may make such a relief that would not be 'ordinarily' available in Canada which may include submitting the Canadian resident to the foreign jurisdiction.

Commented [TE14]: if it is not opposed to public policy

*** End of Assessment ***

Commented [TE15]: 42.5/50 – well done!