



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]

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. Correct**
- (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. Correct**
- (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). Correct**
- (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. **Correct**

(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. **Correct**

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. **Correct**

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. **Correct**

(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. Correct

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. Incorrect. If a class of creditors rejects the proposal or the Court does not approve the Proposal, the company is deemed to have made an assignment in Bankruptcy and is automatically bankrupt.

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. Correct

(b) False.

9 marks out of 10

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.

1 Involuntary.

2 Voluntary.

3 On the failure of, or failure to perform the terms of, a BIA proposal.

3 Marks

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?

To successfully make out an application for an involuntary bankruptcy order, a creditor must (i) be owed in excess of CAD 1000 of unsecured debt and (ii) provide evidence that the debtor has committed an act of bankruptcy within 6 months of the date of the filing of the application.

Correct. 2 marks.

Question 2.3 [maximum 3 marks]

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

- 1 The role of the OSB is to ensure bankruptcies and insolvencies are handled as fairly and efficiently as possible.
- 2 The OSB is also responsible for administratively supervising all estates and matters which the BIA applies as well as select matters under the CCAA.
- 3 The position has a number of functions which include regulating the insolvency profession and ensuring compliance through maintenance and enforcement of the regulatory framework. This includes *inter alia* licensing and supervising of estates, inspecting or investigating estates, receiving and dealing with complaints from creditors against estate professionals during proceedings, examining a trustee's account of a bankruptcy and ensuring all the correct information is accounted for.

Comprehensive answer. 3 marks.

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?

An individual bankrupt is automatically discharged as aforesaid 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 standards established by the OSB; and
- 4 the discharge is not opposed by a creditor, the trustee or the OSB.

2 marks

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.

- 1 All CCAA orders appoint a monitor who is a licensed insolvency professional and an officer of the court, usually selected by a debtor. The proposal trustee on the other hand is selected by the debtor.
- 2 The monitor fulfils a supervisory and advisory role in the proceeding. When performing 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. Just like the monitor, the proposal trustee fulfils a supervisory and advisory role.
- 3 The monitor assists with the preparation of the cash flow statements and with the negotiation of the plan between the company and its stakeholders. Similarly, the proposal trustee assists the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders.
- 4 The monitor also files periodic reports with the court and creditors, including reports containing the monitor's views in relation to any proposed disposition of assets or in connection with any proposed BIP financing. The minimum powers of the monitor are contained in the CCAA, however those powers may in appropriate circumstances be extended to exercise more control over the debtor company. On the other hand, 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, projected cash flow statement accompanied by a report from the trustee on its reasonableness, and calling a meeting of creditors to consider and vote on the proposal. At the creditor's meeting the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The proposal trustee is also required to make the final application to the bankruptcy court for approval of the proposal if it is accepted by the creditors.

Good answer. 8 marks.

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.

Main policy goals

- 1 Canada's insolvency regime aims to strike a balance between reorganisation and liquidation. The policy considerations underpinning the Canadian insolvency system are certainty, transparency, asset preservation, value maximisation and rehabilitation. In appropriate circumstances, the Canadian insolvency system provides for and supports debtor rehabilitation because of the perceived social benefits that flow from the rehabilitation of debtors. These include increased recoveries from creditors, the

maintenance of supply relationships and local economic activity and preservation of jobs. Moreover, Canada's insolvency framework is very much mindful of the existing creditor rights and established clear rules for the ranking of priority claims and the equitable treatment of similarly situated creditors. This balanced approach is a consequence of the recognition that certain and reliable rules give comfort and security for investors and lenders. That, in turn, has an impact on the cost and availability of credit in the Canadian marketplace.

Examples of how these policy goals are reflected

- 2 The aforesaid policy goals are reflected in the manner in which insolvency proceedings are managed and regulated 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 and customer and the like). The overall regulation and management of insolvency proceedings is primarily undertaken through the oversight of the court. The day to day process is mostly overseen by court appointed representatives such as trustees, receivers or the CCAA monitor, who owe broad duties to the court and other stakeholders and periodically report to creditors and the court. Furthermore, creditors are provided some measure of control over insolvency proceedings through voting mechanisms and other powers in both bankruptcy and restructuring situations and may seek to replace estate professionals in certain circumstances. Creditors also have the right to information and to be heard by the court overseeing the insolvency proceeding.
- 3 BIA liquidating bankruptcy proceedings are managed by a trustee, who is required to obtain 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 mainly 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 established 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.
- 4 Unsecured creditors drive the administration of the estate in a liquidating bankruptcy. Significant creditors or creditor groups will often be actively involved in the restructurings under the CCAA or BIA both in the pre-filing and post-filing stage and can exert a degree of influence commensurate with the value and priority of their claims. For example, creditors may either individually or collectively hold sufficient data of a class of creditors that allows them to effectively block approval of any CCAA plan or BIA proposal. This is an unpleasant or unwelcome phenomenon in Canada because unlike in the US there are no "cramp down" court provisions which permit the imposition of a plan by a court despite any objections by certain classes of creditors. Unions, pensioners, retirees and other employee groups may also have a significant impact on restructuring based on the size of their numbers, the different impact and insolvency has on their interest versus purely financial creditors and the resultant sensitivity that public and court generally have to their interest.

Why national insolvency system in Canada is described as universalist in the context of Canada's approach to cross border insolvency law

- 5 The Canadian insolvency law system is “*universalist*” in that it purports to extend to the debtor’s assets wherever located.

Great answer. 7 marks.

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?

- 1 The provisions of the BIA and CCAA on the recognition of foreign proceedings require Canadian courts to recognise foreign proceedings on formal proof of the following three main requirements:-
- 1.1 that the proceeding is a “*foreign proceeding*” in accordance with the statutory definition;
 - 1.2 that the applicant is a “*foreign representative*” in accordance with the statutory definition; and
 - 1.3 whether the “*foreign proceeding*” is a “*foreign main proceeding*” or a “*foreign non-main proceeding*” based on a centre of main interest (COMI) analysis.¹
- 2 The recognition application is commenced by a foreign representative who submits adequate evidence of the foreign law to enable the Canadian court to determine that

¹ BIA, s269-272 and CCAA, s46-49

they are a foreign representative and the proceeding is a foreign proceeding. The case law reflects that both terms are to be given a broad and a purposive interpretation, thereby enabling an applicant to meet the requirement for recognition of a foreign proceeding without difficulty. It bears flagging that the Canadian courts are more concerned with substance over form (and/or terminology utilised) of the foreign law.

5 marks

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?

- 1 Whether or not the foreign agent can obtain a stay of the Canadian litigation depends on whether or not the foreign proceeding is recognised as a foreign main proceeding or a foreign non-main proceeding. But before developing this point further, I deem it apposite to first state the consequence of satisfying all the necessary requirements for recognition. I do so below.
- 2 Once the requirements for recognition have been met, the recognition is automatic and compulsory, similar to the Model Law. That is to say 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 however the court determines that the proceeding is a foreign non-main proceeding a stay may be requested, but the court has a discretion to make any order necessary for the protection of the debtor's property or the interest of creditors. It may well be that an order staying the proceedings may well prove to serve the protection of the debtor's property or the interests of creditors.
- 3 An answer to this question would be incomplete without canvassing the meaning of COMI. There is no statutory definition of COMI in either the CCAA or the BIA, however each statute contains a rebuttable presumption. Although not relevant for purposes of this question but purely for sake of completion, I state that in the case of an individual, the COMI, in the absence of proof to the contrary, is the debtor's ordinary place of residence. As specifically important and directly relevant to our question, in the case of a company, the COMI, in the absence of proof to the contrary, is the company's registered office. Moreover, the courts have identified the following three considerations considered as a whole, are of primary importance for determining COMI:²
 - 3.1 the location that significant creditors recognise as being the centre of the company's operations;
 - 3.2 the location in which the debtor's principal assets or operations are found; and
 - 3.3 the location of the debtor's headquarters, head office or "nerve centre".
- 4 I now turn to apply the above principles to the facts.

² *Re Mt Gox* [2014], ONSC 5811, see also *Re Massachusetts Elephant & Castle Group Inc* [2011], 81 CBR (5th) 102 (Ont SCJ)

- 5 I believe that the foreign agent can obtain a stay of the Canadian litigation on the following basis:-
- 5.1 the Canadian court is likely to recognise the foreign proceeding as a foreign main proceeding because:-
- 5.1.1 there is a rebuttable presumption that the COMI is the company's registered office, which in this case is located in the foreign jurisdiction;
- 5.1.2 furthermore the company's head office, where senior management of the company have their offices, is located in the foreign jurisdiction.
- 6 Once the court recognises the foreign proceeding as a foreign main proceeding, the Canadian litigation will be automatically stayed by the court.
- 7 Alternatively, and if I'm wrong in my opinion that the foreign proceeding is likely to be recognised as a foreign main proceeding, that is not the end of the world for the foreign agent. That is because even if the foreign proceeding is recognised as a foreign non-main proceeding, a foreign representative is still entitled to apply for an order to stay the Canadian litigation as the court enjoys such a discretion to make an order necessary for the protection of the debtor's property or the interests of the creditors. As stated above, it is likely that the court will find that ordering such a stay of proceedings will serve to protect the debtor's property and/or serve the interest of the creditors.

Excellent application of law to the facts and consideration of relevant concepts. 5 marks

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?

- 1 It is possible for the foreign agent to compel the Canadian resident 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, provided an application is made and a court order is granted to that effect. In order to develop this point, one would have to have regard to the relevant provisions of the BIA and CCAA. I do so below.
- 2 Both the BIA and the CCAA contain broadly (and arguably generously) 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 company's property or the interests of a creditor/s, make "*any order that it considers appropriate*". Most importantly and directly relevant to our question, this includes (but without limitation) orders for the examination of witnesses and the taking of evidence, and provision of information on the debtor's property and affairs. Subject to the public policy exception (discussed more fully herein below), and ensuring that any such order is consistent with orders made in any concurrent proceedings under the BIA or CCAA, the court is not restrained in exercising this discretion to only providing

the same or similar remedies as are available under Canadian insolvency law and has in fact ordered relief in foreign main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings. That is *inter alia* why I say that it is possible for the court to grant such an order even if it would be in accordance with the civil procedure of the foreign jurisdiction, bearing in mind that I have already expressed an opinion above that the foreign proceeding concerned is likely to be recognised as a foreign main proceeding. This answer would be incomplete if I do not canvass what the public policy exception rule entails.

- 3 As foreshadowed above, both the BIA and the CCAA contain a public policy exception which permits the court to “*refuse to do something that would be contrary to public policy*” when implementing the cross border insolvency provisions.³ The public policy exemption allows the courts to refuse to act even if the particular foreign proceedings meet the recognition requirements under either the BIA or the CCAA. In practice the exemption appears to only have been employed where there is unfair or prejudicial treatment of Canadian creditors specifically. It cannot seriously or reasonably be argued that subjecting the Canadian resident to examination under oath and requesting him to produce documents relating to the company’s operations and accounts in accordance with the civil procedure of the foreign jurisdiction would be prejudicial or unfair to the Canadian creditors, with the result that the public policy exception does not arise, in my view, in this case. In fact on the contrary, all the creditors of the company will benefit from such an examination because it may bring information to light in relation to the diverted funds and which will in turn provide for an equitable distribution of value among all creditors.

Really good answer. 5 marks

Overall this was excellent and shows you garsp and can apply the material.

49/50

*** End of Assessment ***

³ BIA, s284(2) and CCAA, s61(2)