



Handwritten red text:  $10 + 9 + 13 + 14 = \frac{46}{50}$

**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: **[studentID.assessment4C]**. An example would be something along the following lines: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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]**

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**

Which federal statute governs the bankruptcy regime in relation to an individual bankruptcy? Select the **correct answer** from the options below.

- (a) the Bankruptcy and Insolvency Act (BIA). ✓
- (b) The Companies' Creditors Arrangement Act (CCAA).
- (c) The Winding-up and Restructuring Act.
- (d) The Canada Business Corporations Act (CBCA).

#### **Question 1.3**

Which of the following is **incorrect** with respect to proceedings under the CCAA?

- (a) The CCAA is a debtor-in-possession restructuring statute.
- (b) The CCAA is available to companies with debts less than CAD 5 million. ✓
- (c) The CCAA is a federal statute.
- (d) The CCAA sets out a relatively skeletal framework, and affords broad discretion to a judge as compared to a restructuring under the BIA.

#### Question 1.4

Select the **best answer** from the options below.

The purpose(s) and objective(s) of the BIA is to:

- (a) provide for the financial rehabilitation of insolvent persons.
- (b) allow for an investigation to be made into the affairs of a bankrupt.
- (c) provide a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a *pari passu* basis.
- (d) All of the above. ✓

#### Question 1.5

Which of the following is **not** an “act of bankruptcy” listed in section 42 of the BIA?

- (a) the debtor makes an admission of his / her inability to pay debts.
- (b) the debtor ceases to meet liabilities generally as they become due.
- (c) the debtor makes an assignment of property to a trustee for the benefit of creditors.
- (d) the debtor misses a mortgage payment. ✓

#### Question 1.6

Indicate the **correct answer**:

Under Canadian law, when a company enters the “zone of insolvency”, the directors of a company:

- (a) continue to have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company. ✓
- (b) no longer have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.
- (c) cannot be held personally liable for any of the company’s debts.
- (d) cannot consider, under any circumstances, the interests of creditors, consumers, governments, employees, or any other stakeholder in discharging their duties.

#### 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:

Upon bankruptcy, the debtor ceases to have the legal right to deal with its property.

(a) True. ✓

(b) False.

### Question 1.9

Indicate whether the statement below is True or False:

There is no automatic stay of proceedings upon entering bankruptcy proceedings.

(a) True.

(b) False. ✓

### Question 1.10

Indicate whether the statement below is True or False:

Foreign creditors and Canadian creditors participate equally in a bankruptcy and no distinction is made between them.

(a) True. ✓

(b) False.

## QUESTION 2 (direct questions) [10 marks] 9

### Question 2.1 [maximum 3 marks]

Identify the conditions set out by the Supreme Court of Canada for a claim to be provable in bankruptcy under the BIA.

3 Supreme Court of Canada stipulate three conditions for a claim to be provable in bankruptcy under the BIA: (a) the claim (no matter it is obligation, debt, or liability) should be indebted to the creditor; (b) the claim should be occurred prior to the bankruptcy of debtor; and (c) the claim must have money value.

### Question 2.2 [maximum 2 marks]

Generally, in the context of an individual bankruptcy, what type of assets can a debtor keep in a bankruptcy?

2 In the context of individual bankruptcy, debtor can keep following type of assets in bankruptcy: (1) personal items and clothing; (2) essential tools for the work of debtor; (3) food, utensils, and household furniture in the permanent home of debtor; (4) certain value motor vehicle; and (5) farm property.

**Question 2.3 [maximum 3 marks]**

Name three methods for entering into bankruptcy.

3 There are three methods: (a) involuntary bankruptcy; (b) voluntary bankruptcy; and (c) defeat of BIA proposal or not carrying out the terms of BIA proposal.

**Question 2.4 [maximum 2 marks]**

What is the definition of "debtor" in section 2 of the BIA?

Debtor refer to: (1) an insolvent <sup>-define!</sup> person who lives in or performs business in Canada and is indebted at least CAD 1,000 to creditor and is unable to pay the debts as they fell due, or all of his asset is not enough to cover all his obligation; or (2) any person who have performed the act of bankruptcy, and at the time of act of bankruptcy, such person lived in or performed business in Canada.

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

**Question 3.1 [maximum 8 marks]**

What is the difference between a private receiver and a court-appointed receiver?

In your essay you should refer to at least the following: (1) how each type of receiver is appointed, (2) the duties of each type of receiver, and (3) the circumstances in which each type of receiver is generally used.

8 There are some differences between a private receiver and a court-appointed receiver. In the first place, private receiver is appointed by secured creditor in accordance with the contractual term of security agreement entered into between debtor and secured creditor, as the said contractual term provides that if the debtor default on his obligation, the secured creditor is entitled to appoint receiver to protect his interest. Court-appointed receiver is appointed by the court to take over debtor's business when the court approve the application made by secured creditor under Section 243 of the BIA on the ground that debtor was in breach of his duties in security contract. In some provinces, under their Courts of Justice Acts equitable receivers can also be appointed by the court in respect of application by any interested party (e.g., unsecured creditors, shareholders) if the court think it is just and convenient to do so.

Secondly, regarding the duties of receiver, private receiver mainly owes duty to secured creditors because it was the secured creditors who appointed the receivers to defend their interest. Apart from this, generally speaking private receiver has common duty to act in good

faith, fairly, decently and also reasonably from commercial perspective, especially private receiver must try his best to achieve the maximum selling price of debtor's property. On the other hand, court-appointed receiver is appointed by the court, he is officer of the court, he owes duties to all the creditors rather than only to a secured creditor who make an application to the court for his appointment as receiver. Besides, court-appointed receiver also has to report duty to the court, and carry out the court's directions and instruction. ✓

Thirdly, regarding the circumstances in which each type of receiver is generally used, private receiver is usually used in the cases involving debtors whose properties are separate and distinct, their enterprises are also small-scale. Because insolvency cases of small-scale debtors usually do not involve disputes between debtors and creditors, competing creditors' claims in such cases are rare, accordingly the possibility of legal liability arising from private receiver's work outcome is also low. Under such circumstances, the needs of bringing the disputes to the court are also few, the private receiver almost need not attend the court procedure, his work can be more cost effective and timesaving. ✓

On the other hand, court-appointed receiver is usually used in more complicated insolvency cases which inherently require more court help during the process. The most complicated cases usually involve disputes between debtors and creditors, competing creditors' claims may also take place, accordingly the possibility of legal liability arising from receiver's work outcome is highly likely. Thus, if the receiver is appointed by the court, every important decision (e.g., selling out debtor's asset by receiver) made by court-appointed receiver during working process must be authorized by the court. The said approval of court will enhance the confidence of the creditors and even third parties involved, and also provide help and protection to receiver. Usually when the court appoint receiver, it will also grant wide power to court-appointed receiver, and such power are as wide as those possessed by private receiver. But as it has mentioned, some major decisions are subject to the approval of court orders, such as selling out the debtors' property on fair and reasonable basis or distribution proceeds to creditors after realizing the debtor's assets. Apart from these, court-appointed receiver is also granted by the court with additional power to borrow super-priority fund which is similar to DP financing. Under the BIA regime, interim receiver can also be appointed by the court to conserve the debtors' properties or business for a short period of time, during the term of appointment, interim receiver is empowered to realize debtors' properties which are liable to perish or easy to depreciate in value. ✓

### **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 following a "single proceeding" model.

The main policy goals of the Canadian insolvency regime are to make a compromise between liquidation and restructuring and if situation is proper the regime will tend to be in favour of recovery of debtors' business. For the sake of entire society, recovery of debtors' business is preferred, because it can preserve the interest of suppliers, employees and the local community concerned, and even the creditors' interests are also considered as repayment of debt would be enhanced if the debtor's business can be recovered.



Having said that, under the liquidation regime the creditor's interests are also protected via the rule of priority claims for secured creditors, equal treatment of unsecured creditors on pari-passu basis, and also the administration of the estate by the direction of unsecured creditors. Besides, under restructuring regime the creditors can also protect their interests by voting on the BIA proposal or CCAA plan of arrangements which require over 1/2 of debtors in number and also 33 1/3 of debts in value to approve, and there is no so-called crawl-down dissenting creditors procedure in Canadian insolvency regime.

5 In order to maintain the said compromise between liquidation and restructuring, the supervision and management of the bankruptcy court over insolvency is essential. Under the supervision of the bankruptcy court, the interest of debtors and other stakeholders are also considered and preserved. For daily operation and supervision of insolvency process, the bankruptcy court delegate powers to receivers, trustees, and CCAA monitors who act as officers of the court. The said officers of the court owe obligations to the court and all stakeholders, especially they have to act in the best interest of all stakeholders. Trustee is responsible for the operation of BIA liquidation proceeding, when making important decisions the trustee have to seek approval from the bankruptcy court. Both BIA proposal and CCAA proceedings are debtor-in-possession, but their operations are handled by trustee or monitors respectively. The said creditors' voting on BIA proposal or CCAA plan of arrangement are also subject to final approval of bankruptcy court.

Moreover, under national insolvency regime of Canada, the single proceeding model is adopted. In order to protect debtor from having to defend creditors' claims in separate and distinct proceedings, all creditor's claims against or concerning the same debtor is concentrated under the jurisdiction of a single national court. In other words, all creditors' claims or disputes against the same debtor can be dealt with in a single proceeding rather than multiple proceedings. Likewise the national insolvency regime of Canada also provide single proceeding for creditors to enforce their claims against the same debtor.

#### **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 process to commence a recognition application and obtain recognition of the foreign proceeding in Canada. What is your advice?

In order to obtain recognition of foreign proceeding by Canada court, the foreign agent have to satisfy the Canada court that the following three factors are established: (a) the proceeding in question is a "foreign proceeding" according to legal definition in BIA or CCAA; (b) the applicant is a "foreign representative" according to legal definition in BIA or CCAA; and (c) if the proceeding in question is foreign proceeding; center of main interest test ("COMI") is adopted to determine whether the said foreign proceeding is foreign main proceeding or foreign non-main proceeding.

Therefore, under Section 269 of BIA or Section 46 of CCAA, the foreign agent may apply to the court for recognition of the foreign proceeding in respect of which he is a foreign representative. His application must be accompanied by: (a) a certified copy of the instrument that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding; (b) a certified copy of the instrument authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and (c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

Besides, when the foreign agent starts to make a recognition application to the Canada court, he may also file with sufficient materials of substantial foreign law to prove that the proceeding in question is a foreign proceeding; and the representative in question is a foreign representative.

**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?

If foreign agent can satisfy the Canada court that COMI test has proved the foreign proceeding in question is foreign main proceeding, foreign agent can obtain an automatic stay of the Canadian litigation. In order to satisfy the test of COMI, the foreign agent (representative) must prove to the court that the location of foreign proceeding in question is (a) accepted by important creditors as the centre of debtor's management; (b) the place where the main asset or management of debtor locate; and (c) the place where the headquarter of debtor locate.

Even the foreign proceeding is defined as foreign non-main proceeding under COMI test, the foreign agent may still obtain a stay of Canadian litigation (though not automatic) by making an application to Canada court accompanying with the grounds for supporting the stay of action.

**Question 4.3 [maximum 5 marks]**

The foreign agent wants to know whether the Canadian court is limited to Canadian entitlements and remedies in the relief they can provide? What do you tell the foreign agent?

✓  
5 The Canadian court is not limited to Canadian entitlements and remedies in the relief they can provide. After order for recognition of foreign proceedings has been issued by the Canadian court under BIA or CNAIA, if there is an application made by foreign representative, the Canadian court has wide discretionary power to make any order as it thinks appropriate. As per Re Hartford Computer Hardware Inc, 2012 ONSC 964, Canadian court can exercise its wide discretionary power to order relief in foreign main proceeding which is not usually existed or accessible in Canadian insolvency proceedings.

**\* End of Assessment \***