



**INSOL INTERNATIONAL**  
**FOUNDATION**  
**CERTIFICATE**  
IN INTERNATIONAL INSOLVENCY LAW

10 + 10 + 14 + 12 = 46  
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**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]**

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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**

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]**

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**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.

Section 121 of the Bankruptcy and Insolvency Act (BIA) contains the provisions for the debts and liabilities to which the bankrupt is subject – both present and future. Whilst there is no statutory time limit for a creditor to file a proof of claim, without one, the claim will not be provable in the bankruptcy, so this is the first key point. As you would expect, a proof of claim must show the particulars of the claim and be submitted with evidence in support of the claim.

3 In addition, in order for a claim to be provable in the bankruptcy per the conditions set by the Supreme Court of Canada, the debt must be owed to the creditor and it must have been incurred prior to the debtor becoming bankrupt. In addition, the debt must have monetary value or be able to have monetary value assigned to it.

The completed proof of claim and supporting evidence will ultimately be assessed and determined as provable by the Trustee, taking into account the Supreme Court's conditions.

### 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 Assets that can be kept by a debtor fall under the category of 'exempt property'. This category applies only to individual bankrupts and would not be applicable to a corporate insolvency. The assets that would be considered exempt varies dependent on the province or territory in which they live. Most commonly, the assets that can be kept by a debtor include but are not limited to personal items, any tools that are necessary for the debtor to work, household items in the debtor's principle place of residence and a vehicle (within an allowable value).

### Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

- 3
1. Involuntary – as it sounds, an involuntary bankruptcy is not initiated by the debtor. It would occur when a creditor (who is owed more than CAD 1,000 of unsecured debt) applies for a bankruptcy order with sufficient evidence of the amount owing.
  2. Voluntary – again, as it sounds, a voluntary bankruptcy is an action taken by the debtor him/herself when they make an assignment into bankruptcy proceedings. The debtor must meet the BIA definition of an insolvent person in order to do so.
  3. Failure of a BIA Proposal – A BIA proposal is a compromise agreement between a debtor and their creditors. Failure can happen at the outset – if the proposal is rejected by the creditors (or does not get the support of the requisite majority of creditors). Or failure can happen during, if the debtor defaults on the agreement. Either way, upon failure, the debtor is deemed to have made an assignment to bankruptcy.

### Question 2.4 [maximum 2 marks]

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

2 Section 2 of the BIA states that a debtor includes an insolvent person and any person who, at the act of bankruptcy was committed, resided, or carried on business in Canada. To clarify, an insolvent person is any person who is not bankrupt and carries on business in Canada and has liabilities such that a creditor could have a provable claim under the provisions of the BIA. An act of bankruptcy is one which would demonstrate conduct of the debtor being insolvent and/or conduct that falls outside the normal commercial morality of business.

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

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**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.

A receiver, both private and court appointed, is typically a licensed professional and most likely from a financial services background and would be appointed under the common law with authority to deal with a debtor company's assets, in the interest of the secured creditor(s). This often includes authority to carry on the business of the debtor company, if this is what is likely to achieve the best results. They can also be authorised to close down a business if continuing to trade would be to the detriment of the creditors or if there are insufficient funds to do so. However, it should be noted that whilst the receiver has the authority to deal with the assets, the assets do not vest in the receiver.

8 In instances where there is a security agreement in place between the debtor and the secured creditor that includes provisions for a receiver, then a privately appointed receiver would be in office. Further, the secured creditor is contractually permitted to appoint the private receiver with the private receivers' primary duty being to act in the interests of the secured creditor, namely to maximise recoveries for their benefit. Private receivers generally tend to be utilised in smaller straight forward cases, with no claim disputes anticipated and often also in cases where discretion is preferred. Due to the absence of court involvement, private receiverships are often quicker and cheaper, however, seldom used due to the potential risk exposure from not having a Judge involved.

✓ A secured creditor can apply to Court pursuant to Section 243 of the BIA for a Court appointed receiver to be put in place to take control of the business and assets of a company. Contrary to what is noted above, Court appointments are appropriate for larger, more complex matters perhaps where there may be disputed claims or where the receiver is likely to need regular input and assistance from the Court. Of course, in a Court appointed receivership, the Court must approve of the receiver's decisions throughout the duration of the case both mitigating the risk for the receiver and providing comfort for the creditors. The Court will generally grant a stay of proceedings, preventing additional creditor action and will grant the receiver powers. What differs also in this type of appointment is that, rather than acting firstly for the appointing secured creditor as in a private arrangement, the receiver in a Court appointed receivership is an officer of the court acting for the body of creditors and seeking direction from the Court. Any major decisions will be subject to Court approval.

**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.



It is widely known that Canada has rescue focused remedies and that per the Canadian insolvency regime, Restructuring is seen as the primary goal. Accordingly, any appropriate steps should be taken to ensure a business can continue as a going concern. It seeks to promote economic stability and growth, whilst minimising the impact of the financial distress on all stakeholders.

However, the Canadian insolvency regime does also take a balanced approach in that it aims to focus both on debtor rehabilitation and recognition of creditor rights, balancing liquidation and reorganisation. There are both social benefits to this approach in that hopefully jobs will be preserved, creditor recoveries will be made and local economic activity will be maintained. It also ensures creditors are properly treated and claims are fairly prioritised by setting out clear rules ranking the priority of claims.

6 As we know, restructuring assignments and insolvencies are often much more complicated than this idealistic approach and often, striking the balance between debtor recovery and creditor interests can be tricky to achieve. A report produced by Industry Canada in 2015 picks up on certain issues on improvements that could be made to Canada's insolvency regime as a result of the complexities that are often faced but there are currently no formal amendments to the legislation being proposed.

The reason for the Canadian insolvency system being described as a 'single proceeding' model is due to the fact that Canadian insolvency processes provide for a single, collective proceeding that supersedes the avenues for creditors to enforce their claims, i.e. it centralises claims by creditors against the debtor. All creditor remedies that would usually be available are collectively covered in this one single proceeding that allows creditors to enforce their rights. ✓

#### **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 accordance with the provisions of the BIA and CCAA, Courts in Canada are required to recognise foreign proceedings upon proof of the following three 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"*

The provisions of the BIA and CCAA are adopted from the UNCITRAL Model Law which calls for mandatory recognition of foreign insolvency proceedings to facilitate cooperation between countries and allow foreign representatives to access Canadian Courts.

In this case, Counsel of the foreign jurisdiction are entitled to commence a recognition application upon the filing of sufficient evidence to allow the Court to determine that the proceedings of the online seller in the foreign jurisdiction are applicable foreign proceedings.

It would appear that both requirements 1 and 2 are already met – we have a foreign proceeding (connected to Canada, hence the need for the recognition) and we have a foreign representative. The applicant should therefore already be able to commence the application without difficulty.

Further, whilst there is no statutory definition for COMI under the provisions of the BIA or CCAA, for a company, the COMI would be considered the location of the company's registered office. In this case, the company's 'head office' – presumably the registered office – is in the foreign jurisdiction. However, the Court will further consider the location of the significant creditors and the location of the Company's operations. We would need further information but, we are only aware here of Canadian creditors in the sum of CAD 2million, which forms the minority of the CAD 200million foreign debt. In addition, though the fulfilment office and warehouse are in Canada, it would appear it does much of its business in a foreign jurisdiction, therefore, I would consider that the COMI is a foreign jurisdiction in this case and this would, therefore, be a foreign non-main proceeding in respect of point 3.

This is where my advice would change. Whether or not it is a foreign main proceeding or a foreign non main proceeding determines the level on control. For a foreign main proceeding, recognition would be automatic and there would be an automatic stay of proceedings. However, because in this case I believe it to be foreign non-main proceedings, the stay must be requested and this is something that should be included in the application and it must be requested with adequate justification. The Court will use its discretion as to whether to grant this and it will be in the interest of the creditors if it is so.

Case law suggests a willingness of Canadian insolvency Courts to recognise foreign insolvency proceedings, therefore, I would advise the foreign agent to proceed with making the application. Upon recognition, the foreign representative can be heard in Canadian courts and Canadian officials would be obligated to cooperate with the requests of the 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?

A "stay" in a proceeding is to stop, or put on hold the proceedings and such a stay can be either temporary or permanent.

3 As stated above, if this was a foreign main proceeding then a stay of the Canadian litigation would be automatic and compulsory. However, in this case, it is a foreign non-main proceeding and whilst a stay is still possible, it must be requested and the reasons for the request must be properly justified. In this case, there are multi-jurisdictional issues faced with global debts amounting to far more than the CAD 2 million owed domestically and, notwithstanding the significance of the Canadian creditors, it is still justifiable for the stay to be granted for the benefit of the wider estate to allow the foreign agent to properly conduct their investigations.

Canadian Courts are not restricted in the relief they can provide foreign representatives and the Court may, in fact, make any Order that it deems appropriate. Therefore, I would tell the foreign agent that he/she could absolutely obtain a stay of the Canadian litigation.

**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?

4 I would advise the foreign agent that the Canadian Court is not limited to Canadian entitlements and remedies in the relief they can provide, nor are they restricted to only providing the same remedies available under Canadian insolvency law. In fact, there have been cases known where an Order has been made that would not ordinarily be available under Canadian proceedings. There are provisions in both the BIA and CCAA which cover discretionary powers where a recognition order has been made and where the Court, upon application by the foreign agent, can make "any orders it considers appropriate" given the nature of the case. In this case, such requests could include (but are not limited to) pursuing the individuals responsible for the finances of the warehouse for witness examination regarding the misappropriation of funds, and submission of records in relation to the same as evidence, as well as provision of information on the fulfilment office and the debtor company's affairs.

**\* End of Assessment \***