



$$9 + 8.5 + 14 + 13 = \frac{44.5}{50}$$

**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]**

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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. X
- (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]

### Question 2.1 [maximum 3 marks]

8.5

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

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In Newfoundland and Labrador vs. AbitibiBowater Inc [2012] SCC 67 at para 26, the Supreme Court of Canada set out the conditions as follows: -

1. The debt, liability or obligation must be owed to the Creditor.
2. The debt, liability or obligation must be incurred before the debtor becomes bankrupt; and

3. It must be possible to attach a monetary value to the debt, liability or obligation.

**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?

This essentially looks at exempt property. It is noted that with the exception of trust property held under a tax exempt retirement savings account, the RRSPs, bankruptcy exemptions in Canada are set by provincial legislation and include the following:-

- a) Personal items and clothing.
- b) Household furniture, food and utensils in the debtor's permanent home.
- c) Tools necessary to a debtor's work.
- d) A motor vehicle with a value up to a certain limit; and
- e) Certain farm property.

It is worth noting that in some provinces, there is a limited homestead exception such as in Ontario where, pursuant to the Execution Act, the debtor's principal residence is exempt from forced seizure or sale if the debtor's equity in the residence does not exceed CAD 10,000.

**Question 2.3 [maximum 3 marks]**

Name three methods for entering into bankruptcy.

There are three methods of entering into bankruptcy. These include the following: -

- a) Involuntarily.
- b) Voluntarily and
- c) Upon failure of or failure to perform the terms of the BIA proposal where bankruptcy would be automatic in some corporate proposal circumstances but not automatic in consumer proposals.

**Question 2.4 [maximum 2 marks]**

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

The definition of a "debtor" in section 2 of the BIA includes an insolvent person who, at the time an act of bankruptcy was committed by the company, resided or carried on 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.

Private receiver

Court – appointed receiver

### **Appointment**

This receiver is appointed pursuant to a security agreement between the debtor and creditor. It is on the basis of the agreement that the creditor is vested with the power and authority to appoint the receiver if the debtor is unable to meet its obligations.

Under Section 243 of the BIA, a secured creditor is authorised to apply to the court for the appointment of a receiver with national authority to take control of the business when the debtor is unable to meet its obligations under the security agreement.

It is also worth noting that such a receiver will be appointed on application by any interested party (including shareholders or unsecured creditors) where it is "just and convenient" to do so. Such a receiver in this instance would be an equitable receiver.

### **Duties**

While the private receiver's duties are majorly to the appointing secured creditor, it has a general duty to act honestly, in good faith and in a commercially reasonable manner, including pursuing the maximization of recoveries and obtaining of the best price for the debtor's assets in the circumstances.

The court appointed receiver is an officer of court and has duties to all creditors of the debtor. It reports to and takes directions and instructions from the court, not the creditor that first sought its appointment.

### **Circumstances in which each receiver is used**

The private receiver is often used where there is a small business or a discrete pool of assets and there will be no competing creditor claims or disputes.

On the other hand, a court appointed receiver will be used in complex circumstances in which there are complex occurrences such as where there are competing claims between the creditor and debtor, or in cases where it appears likely from the outset that assistance of the court will be required on an ongoing basis.

### **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.

As far as the main policy goals of the Canadian Insolvency Regime go, there are majorly 4 in number.

First of all, it aims to strike a balance between reorganisation and liquidation. The focus is on certainty, transparency, asset preservation, value maximisation and rehabilitation. Secondly, it provides for and favours debtor rehabilitation because of the perceived social benefits that flow from rehabilitation of debtors. These social benefits include increased recoveries from creditors, the maintenance of supplier relationships and local economic activity and the preservation of jobs. Lastly, it recognises existing creditor rights and established clear rules for the ranking of priority claims and the equitable treatment of similarly situated creditors.

6 Once the main policy goals are appreciated, they are reflected in the manner in which insolvency proceedings in Canada are managed and regulated as well as the interplay within Canada's insolvency eco – system. These proceedings are managed through a combination of creditor control, estate professional management and court supervision that includes a consideration of the interests of the debtor and other stakeholders including employees, the community among others.

It is due to this interplay at the core of the insolvency proceedings in Canada that one of the characteristic features of the Canadian insolvency regime is that it pursues a single – proceeding model. This implies that all Canadian insolvency proceedings/processes provide for a single, collective proceeding that supersedes the usual processes available to creditors to enforce their individual claims. Creditors' remedies are collectivized in a single proceeding to avoid the social and economic costs of a chaotic free – for – all where creditors are incentive to enforce its rights to seize assets before other creditors do. As a side note to this, it is important to highlight that this aligns with one of the key principles of corporate insolvency law, that it provides for the collective management of the insolvent's estate for the general benefit of the creditors participating in the process.

#### **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?

Key point to note from the facts are that the foreign representative has been appointed in the country hosting the online seller's head office and where its senior management sits, its COMI. This would imply that any other proceeding opened in Canada would be a foreign – main proceeding without the further need to prove the existence of an establishment as would have been the case under the Model Law. Canadian insolvency law does not fully subscribe to the requirements of an establishment to qualify a foreign non – main proceeding.

That said, through the 2009 amendments to the BIA and CCAA, Canada adopted a modified version of the UNCITRAL Model law under Part XIII of the BIA and Part IV of the CCAA. The provisions in the aforementioned parts of the Law are substantially similar to the framework contained in the UNCITRAL Model Law on recognition of foreign insolvency proceedings and acceptance of jurisdiction and a contained in Sections 269 – 272 of the BIA and Section 46 – 47 of the CCAA.

The process to commence a recognition application is commenced by the filing of sufficient evidence of the foreign law to allow the Canadian court to determine that they are a foreign representative and the proceeding is a foreign proceeding. Under Section 269(2) of the BIA, the foreign representative would have to accompany his/her application with the following: -

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- a. A certified copy of the instrument, however designated, 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, however designated, 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.

When presented with the application, the Court will investigate the following to consider whether or not the application for recognition should be granted: -

- a. That the proceeding is a "foreign proceeding" in accordance with the statutory definition.
- b. That the applicant is in fact a "foreign representative" in accordance with the statutory definition; and
- c. Whether the "foreign proceeding" is a foreign main proceeding" or a "foreign non-main proceeding" based on COMI analysis.

The definitions of a foreign representative, foreign main proceeding and foreign proceeding are contained in Section 268 of the BIA.

**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?

3 The first step is to ensure that the application for recognition previously filed meets the standard of a proper application such that it is granted. Once is granted, we can then consider the available remedies. There is an automatic stay of proceedings with the effect that no creditor may commence or continue action or any other kind of proceedings such as litigation for the recovery of a claim provable in insolvency. ✓

The reasoning for this lies in the two fundamental purposes for the stay of proceedings. First of all, a stay of proceedings allows the office holder to review, accept, reject and value the claims against the insolvent's estate, replacing lengthy adjudication with a summary and more precise cost saving process. Secondly, it prevents creditors from commencing or continuing actions against the insolvent's estate and finally, it ensures that at the end of it all, there is an orderly liquidation or management of the insolvency proceeding with the creditors collectively and equally benefitting from the available pools of assets.

**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?

✓ They are not restricted in the kind of relief that they can provide in the circumstances. The applicable laws, that is, the BIA and CCAA given discretionary powers to the courts in instances where there is an order recognising a foreign proceeding. By way of example, in Section 272(1) of the BIA, it provides that if an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate including orders on examination of witnesses under para. (b), taking of evidence among others.

I would also tell the foreign representative that the court's discretion is not restricted to only providing the same remedies as those specified in Canadian law. It could go beyond as the history of Canada's insolvency law has demonstrated.

In addition to the above, it is clear from the facts that there are critical issues that the representative will need to deal with, circumstances in which he/she will need the assistance of court. The class action law suit in Canada would be stayed upon recognition and the improper diversion of funds by the officer who should be investigated will be a matter for the court to give guidance on because two of the effects of recognition is that the representative will have standing before the court and be heard, in which case he or she may obtain the necessary orders to order or direct an investigation and secondly, recognition also imposes an obligation on Canadian officials to cooperate with the foreign representative and the foreign court.

**\* End of Assessment \***