



$$10 + 9.5 + 15 + 12 = \frac{46.5}{50}$$

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]

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]

9.5

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.

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Under Section 121(1) of the BIA, "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."

✓ SCC Abitibi →

The ruling in Newfoundland and Labrador v AbitibiBowater Inc [2012] SCC 67 further sets out that a provable claim in an insolvency proceeding must meet the following conditions:

- there must be a debt, a liability or an obligation to a creditor;
- the debt, liability or obligation must be incurred as of a specific time; and
- 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?

Both federal bankruptcy law and provincial exemption laws provide a list of assets that are exempt from seizure during individual bankruptcy.

Federal exemptions are listed out in Section 67(1) of the BIA and these include:

- a) property held by the bankrupt in trust for any other person;
- b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
- c) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
- d) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
- e) without restricting the generality of paragraph (b), property in a registered retirement savings plan, a registered retirement income fund or a registered disability savings plan, as those expressions are defined in the Income Tax Act, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy.

Each province has its own laws in relation to exempt assets and these assets generally include:

- a) Necessary food and fuel;
- b) Clothing;
- c) Household furnishing and appliances;
- d) Motor vehicle (with certain restrictions);
- e) Medical and health aids;
- f) Registered saving plans / certain pensions; or
- g) Certain farm property.

Question 2.3 [maximum 3 marks]

Name **three** methods for entering into bankruptcy.

The three ways of entering bankruptcy are:

- 1) Voluntary bankruptcy where the insolvent debtor makes an assignment of all their assets for the general benefit of all their creditors;
- 2) Involuntary bankruptcy where the creditor of an insolvent debtor files a petition against the debtor's assets for an insolvency bankruptcy order; or
- 3) Deemed bankruptcy where the insolvent debtor is deemed to have made an assignment in bankruptcy when a proposal proposed under the BIA fails or the debtor fails to perform the terms of such a proposal.

Question 2.4 [maximum 2 marks]

What is the definition of “debtor” in section 2 of the BIA?

In Section 2 of the BIA, the interpretation of “debtor” includes “an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada”. The BIA further defines an insolvent person as a “person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

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- a) who is for any reason unable to meet his obligations as they generally become due,
 - b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
 - ✓ c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.”

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

15

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.

Receivership is a process for the appointment of a licensed insolvency trustee to recover amounts outstanding under a secured loan. A receiver is appointed to take possession of and realize assets secured by the security agreement in order to repay the outstanding debt. There are two types of receivers, court-appointed receiver and private receiver.

Court-Appointed Receiver

A secured creditor may rely on Section 243 of the BIA to make an application to court for appointment of a receiver of the insolvent debtor. The court may appoint a receiver to do any or all of the following if it just or convenient to do so:

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- a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
 - b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
 - c) take any other action that the court considers advisable.

A court-appointed receiver's primary duty is to take possession of the property over which it is appointed over and realize said property for the secured creditor. By virtue of a receiver's appointment by the Court, they are in fact independent court offices who must act in a fiduciary capacity with respect to all stakeholders and not just to the secured creditor. The powers and rights of a court-appointed receiver will be generally provided for in the order appointing them.

Court-appointed receivers are used when there are multiple disputes between creditors and debtors to ensure that the secured creditor's rights are sufficiently protected. The power of the court may restrict other parties from taking action on the secured asset without leave of court. Secured creditors whose security agreement does not provide for the appointment of a receiver or finds such provision lacking may also decide to use a court-appointed receiver.

Private Receiver

A private receiver will generally be appointed through a letter of appointment according to the provisions in the security agreement between the secured creditor and the debtor.

A private receiver's primary duty will also be to take possession of the secured asset and realize it for the benefit of the secured creditor. While receivers are professionals and must act in good faith at all times to ensure maximum recovery and to obtain a fair value on the debtor's assets, their duties are primarily to the secured creditor that has appointed them. A secured creditor can direct the receiver as they see fit and be more involved in the realization process.

Private receivers are normally used in more simpler situations where there are minimal assets of the debtor or when there are no competing creditor claims or disputes with debtors.

With reference Section 246 of the BIA, a receiver whether appointed by the court or privately, also has the following duties:

- a) give notice of his appointment not later than ten days of his appointment;
- b) upon taking possession or control of the secured asset, to prepare a receiver's statement;
- c) prepare further interim reports relating to the receivership; and
- d) prepare a final report and statement of accounts of the receivership upon completion of his duties as receiver.

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 insolvency regime of Canada aims to strike a balance between reorganization and liquidation. Canada has encouraged the financial rehabilitation of viable, albeit financially distressed debtors, as the socio-economic impact of rehabilitation has proven be more beneficial than a liquidation. Some benefits to rehabilitation include better recovery to creditors, maintenance of supplier relations and preservation of jobs. At the same time, Canadian insolvency law recognizes the rights of different creditors and provides for equitable treatment of classes of creditors as well as setting out the ranking of claims.

The underlying objective of the BIA and CCAA is to minimize the impact of a debtor's insolvency by pursuing an equitable distribution of the debtor's assets and where possible, rehabilitation. This is achieved through legislation that:

- a) provides certainty to promote economic stability and growth.;
- b) maximizes the value of assets;
- c) strikes a balance between liquidation and reorganization;
- d) ensures equitable treatment of similarly situated creditors;

- e) provides for timely, efficient and impartial resolution insolvency;
- f) preserves the insolvency estate to allow equitable distribution to creditors;
- g) ensures transparent and predictable insolvency laws that contain incentives for gathering and dispensing information; and
- h) recognizes existing creditor rights and establishes clear rules for ranking of priority claims.

These policy goals are reflected in the management of insolvency proceedings. One of the ways this is done is by following the "single proceeding" model. In *Bankruptcy and Insolvency Law*, Professor Wood describes the single proceeding model as "a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies." The grouping of all actions against the debtor in a single proceeding helps with negotiations with creditors as creditors are placed on equal footing. In order to achieve this, both the CCAA and BIA has provisions allowing for an automatic stay of proceedings against a debtor while a solution is sought with creditors. This is again held by the Supreme Court of Canada in its decision in *Albert (Attorney General) v. Moloney, 2015 SCC 51* where the court held that the foremost purpose of bankruptcy is the equitable distribution of assets achieved through a single proceeding model where creditors must not be allowed to enforce their provable claims individually.

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?

Part XIII of the BIA and Part IV of the Companies' Creditors Arrangement Act ("CCAA") provides mechanisms for dealing with cases of cross-border insolvencies. The foreign agent may commence the recognition application of a foreign proceeding in which he or she is the representative by applying to Court under these parts.

Pursuant to Section 270(1) of the BIA or Section 47 of the CCAA, the court shall make an order recognising the foreign proceeding if the court is satisfied the application relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding. The court shall also specify in the order if the foreign proceeding is a foreign main proceeding or foreign non-main proceeding which entails different reliefs upon recognition.

In satisfying the definition of foreign proceeding, the proceeding should be a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation (Section 268(1) of BIA or Section 45(1) of CCAA). As the type of proceeding is not provided, further information is required to consider if the foreign proceeding in relation to the company can satisfy this definition.

In satisfying the definition of foreign representative, the foreign representative should be a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to (Section 268(1) of BIA or Section 45(1) of CCAA):

- a) administer the debtor's property or affairs for the purpose of reorganization or liquidation;
or
- b) act as a representative in respect of the foreign proceeding.

While the foreign agent is empowered deal with the assets of insolvent companies, the type of proceeding is not provided nor is any appointment instrument. Further information on this is required to consider if the definition of foreign representative can be satisfied.

The court must also specify in the order recognising the foreign proceeding whether it is a foreign main proceeding or foreign non-main proceeding which will be determined by the debtor's registered office, in the absence of proof of the contrary.

Considering the company has amounts owing to creditors in excess of CAD 5 million, the foreign agent should apply for the recognition application under the CCAA.

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?

The effect of a recognition of a foreign main proceeding is an automatic moratorium. The court shall make an order staying all proceedings against the debtor, restraining further proceedings against the debtor, prohibiting commencement of actions against the debtor and prohibiting the debtor from disposing of its assets. In the case of a foreign non-main proceeding, there is no automatic moratorium but the court has the discretion to make any order necessary for the protection of the debtor's assets for the interest of its creditors.

Pursuant to Section 268(1) of BIA or Section 45(1) of CCAA, a foreign main proceeding means foreign proceeding in a jurisdiction where the debtor company has the centre of its main

interests and a foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. The court will consider the debtor's registered office in determining a company's centre of main interest, in the absence of proof of the contrary. In relation to the online seller, its registered office is in the foreign jurisdiction and unless there is proof of contrary, the foreign proceeding may be recognized as a foreign main proceeding, thus can benefit from the automatic moratorium.

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?

There are several restrictions and exceptions in the BIA and CCAA in relation to the reliefs provided upon recognition of a foreign main proceeding. The automatic moratorium provided after an order recognising the foreign main proceeding is made, is not applicable if at the time the order was made, proceedings under the BIA or CCAA was commenced in respect of the debtor. It is also important to note that an order recognising the foreign main proceeding does not preclude a debtor from commencing or continuing proceedings under the BIA, CCAA or the Winding-up and Restructuring Act in respect of the debtor. Further, an order recognising a foreign main proceeding must be consistent with any order that may be made in any proceedings under the BIA or CCAA, if the proceeding was commenced at the time the order recognising the foreign main proceeding was made.

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STAY

- BIA and CCAA provide court with wide discretion to make "any order it considers appropriate":
* End of Assessment *
- see Hartford Computer hardware inc.
- not limited to remedies available in Canada!