



10 + 10 + 15 + 13 =  $\frac{48}{50}$

**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]**

10/10

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]**

10/10

**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.

[The Supreme Court of Canada has set out the following conditions for a claim to be provable in bankruptcy:

- ✓ (1) The debt, liability or obligation must be owed to the creditor.
- ✓ (2) A 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?

[The types of asset that a debtor can keep in a bankruptcy include following :

- ✓ (1) Personal items and clothing
- ✓ (2) Household furniture, food and utensils in the debtor's permanent home
- ✓ (3) Tools necessary to a debtor's work
- (4) A motor vehicle with a value up to a certain limit
- (5) A certain farm property]

**Question 2.3 [maximum 3 marks]**

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

[There are three methods for entering into bankruptcy:

- ✓ (1) Involuntary
- ✓ (2) Voluntary
- ✓ (3) On the failure of, or failure to perform the terms of, a BIA proposal]

**Question 2.4 [maximum 2 marks]**

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

✓ [The definition of "debtor" in section 2 of the BIA 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.

✓ **Person** includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person

✓ **Insolvent person** means 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 Canadian dollars, and

- (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; (*personne insolvable*)

]

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

15/15

**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.

[A receiver is a licensed professional who is given the authority to deal with a debtor company's assets, including authority to operate and manage the business in place of the existing management. There are two types of receivers: a privately appointed receiver and a court-ordered receiver.

The secured creditor has a contractual right to appoint a receiver if the debtor is unable to meet its obligations. While for court appointed receivers, Section 243 of the BIA authorizes a secured creditor 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. The Court of Justice Acts of the individual provinces also allow the court to appoint a receiver on application by any interested party i.e. including shareholders or unsecured creditors where it is "just and convenient" to do. A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers.

The private receiver's duties are primarily to the secured creditor that appointed it. In addition to it, it has a general duty to act honestly, in good faith and in a commercially reasonable manner, including to attempt to maximise recoveries and to obtain the best price for the debtor's assets in the circumstances. While a court appointed receiver is an officer of the court and possess duties to all creditors of the debtor. He reports to and takes directions and instructions from the court and not the creditor that first sought its appointment, unlike like private receiver.

Private receivers are generally used in a small business or a discrete pool of assets and there will not be competing creditor claims or disputes with the debtor. Court appointed receivers usually are appointed in more complex cases, especially when there are competing claims between creditors or disputes between the creditors and the debtor, or in cases where it appears likely from the outset that the 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.

[The insolvency system of Canada aims to strike a balance between reorganization and liquidation. It focusses on certainty, transparency, asset preservation, value maximization and rehabilitation. Moreover, the insolvency system of the country provides and favours debtor rehabilitation because of the perceived social benefits that flow from the rehabilitation of debtors. These also includes increased recoveries for creditors, the maintenance of supplier relationships and local economic activity, and the preservation of jobs. Also, it recognizes existing creditor rights and establishes clear rules for the ranking of priority claims and the equitable treatment of similarly situated creditors. This balanced approach transfers from the recognition that certain rules provides security for investors and lenders that influences the cost and availability of credit in the Canadian market.

The policy goals of Canadian insolvency regime in the way insolvency proceedings are managed through a combination of creditor control, estate professional management and court supervision that includes consideration of the interests of the debtor and other

stakeholders. The overall management of insolvency proceedings is done through the oversight of the court. Court supervises the process and Court appointed receivers are supposed to periodically report to court. Moreover, creditors are provided a degree of control over insolvency proceedings through voting mechanisms and other powers in both bankruptcy and restructuring situations. Creditors possess that right to information and right to be heard by the court looking after the insolvency proceedings. Thus we can say that the policy goals are reflected in different aspects of the insolvency system.

All Canadian insolvency processes provide for a single, collective proceeding that supersedes the usual processes available to creditors to enforce their claims. Also, the creditors remedies are collectivized in a single proceeding to avoid the costs. Thus, national insolvency system in Canada is described as following a "single proceeding" model.]

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

13/15

**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?

[The first step to commence a recognition application is to check whether the following requirements as per the provisions of the BIA and CCAA on the recognition of foreign proceeding is met. They are

5

- (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



(3) Whether the "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" based on a center of main interest analysis.

If the above requirements are met, the recognition application can be commenced by a foreign representative who files 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. Once the requirements for recognition have been met, the recognition is automatic and compulsory.

**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 a court recognises the proceeding as a "foreign main proceeding", all proceedings in the recognizing jurisdiction is automatically stayed.

3

If it determines that the proceeding is a "foreign non-main proceeding", a stay may be requested, but the court exercises the discretion to make any order necessary for the protection of the debtor's property or the interests of creditors. For such cases, a stay must be requested and justified.]

*must be necessary for protection of debtor's property or the interests of creditors.*

**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?

[Canadian courts are not restricted in the relief they can provide to foreign representatives. Both the BIA and the CCAA contain broadly worded, discretionary powers that provide where an order recognizing a foreign proceeding has been made, the court may, on application by the foreign representative, make "any order that it considers appropriate". This includes, but is not limited to, orders respecting the examination of witnesses and the taking of evidence, and the provision of information on the debtor's property and affairs.

5

The court is not restricted in exercising this discretion to only providing the same or similar remedies as available under Canadian Insolvency Law. In the past, the court has ordered relief in foreign main proceedings that would not ordinarily be available in a Canadian proceeding.]

**\* End of Assessment \***