



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.

The debt must be owed to the creditor; it must be incurred before the debtor becomes bankrupt; and it must be possible to attach a monetary value to it. 3

Question 2.2 [maximum 2 marks] 2

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

These include personal items, clothing, furniture, food and utensils (from the debtor's permanent home); tools which are necessary for the debtor's work; certain farm property; and a motor vehicle (up to a certain limit of value). ✓

Question 2.3 [maximum 3 marks] 3

Name three methods for entering into bankruptcy.

Involuntary bankruptcy; voluntary bankruptcy; and 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? 1/2

An "insolvent person" or anyone who resided or carried on business in Canada at the time at which they committed an "act of bankruptcy".

QUESTION 3 (essay-type questions) [15 marks in total] (13/15)

Question 3.1 [maximum 8 marks] 8/8

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 receivers arise from security agreements between the debtor and secured creditors. The secured creditor has a contractual right to appoint a receiver if the debtor cannot meet its obligations. Their duties are primarily to the creditor who appointed them; subject to general duties to act honestly, in good faith and in a commercially-appropriate manner. These receiverships do not involve court appearances and are quicker and cheaper; they are most often used where there is 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 are appointed either by application to the court by a secured creditor under s243 of the BIA; or by application of any interested party (including shareholders or unsecured creditors) where it is "just and convenient" to do so. These appointments generally arise in more complicated cases such as those where there are competing creditor claims. This type of receiver is an officer of the court and therefore has duties to all creditors of the debtor; it takes its instructions from, and reports to, the court. ✓

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 principal aim of the Canadian insolvency regime is to strike a balance between reorganisation and liquidation. To this end, the policy goals focus on certainty, transparency, asset preservation, value maximisation and rehabilitation. These goals are reflected in the way that the process is primarily managed through the oversight of the court. The office-holders (who are appointed by the court) are required to report regularly to creditors and to the court, giving transparency in the process.

The Canadian insolvency system is described as following a single-proceeding model because, when insolvency proceedings are in place, it provides a single, collective proceeding for creditors to enforce their claims, which supersedes all the usual methods by which a creditor may enforce their claims. These other methods remain available where insolvency proceedings are not in place. In order to facilitate the single-proceeding model, while recognising the difference between secured and unsecured creditors, secured assets are not considered to be part of the insolvent estate unless, and to the extent that, there is equity within them. This allows secured creditors to receive the benefit of their security while also keeping the single-proceeding model in place for unsecured creditors.

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

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?

In order to raise an application for recognition of the foreign proceeding, the court will require proof of the following:

- That the proceeding is a "foreign proceeding";
- That the applicant is a "foreign representative"; and
- Whether the foreign proceeding is a main or non-main proceeding.

✓ 5

The foreign representative will have to file sufficient evidence of the relevant foreign law to allow the Canadian court to determine that they are a foreign representative, and that the proceeding is a foreign proceeding. In practice, the courts take a broad and purposive approach to these terms so this is usually established without difficulty.

Once these requirements are met, recognition is automatic and compulsory; the court has no discretion. If the court determines that the foreign proceeding is the main proceeding (i.e. that it has been raised in the debtor's Centre Of Main Interests) then it will also order a stay of any proceedings. If it is a non-main proceeding the stay is available but at the discretion of the court, and subject to such orders the court thinks necessary to preserve property or protect the creditors' interests.

✓

The only exception to the above is that the court has a power to refuse to grant recognition for reasons of public policy, such as in *Canadian Imperial Bank of Commerce v ECE Group Ltd* where it was held that to grant recognition would unduly prejudice the interests of Canadian creditors.

✓

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?

In principle, a stay can be granted on recognition of the foreign proceedings. Where the foreign proceedings are main proceedings, the stay will be granted automatically. Where the foreign proceedings are non-main, it must be applied for and justified. In the present case, the online seller's head office and management staff are located in the foreign jurisdiction. As such, the likelihood is that the online seller's COMI is located in the foreign jurisdiction. It would therefore follow that the foreign proceedings are main proceedings and, as a result, a stay will be granted automatically upon recognition.

5

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

Once recognition is granted, this imposes an obligation on Canadian officials to cooperate with the foreign representative and foreign court. The court has a broad power to make "any order which it considers appropriate" including orders concerning examination of witnesses or provision of information on the debtor's property. This power is not restricted to providing remedies which are available under Canadian insolvency law. Provided the order is not contrary to public policy, and is consistent with orders made in any concurrent Canadian proceedings,

the court can order relief which would not normally be available in Canadian proceedings. The court can also make the orders in the jurisdiction of the foreign main proceedings, where it is necessary and appropriate to do so.

*** End of Assessment ***