



$$10 + 9 + 12 + 14 = \frac{45}{50}$$

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]

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.

- ✓ i. The debt, liability or obligation must be owed to the creditor;
 - ✓ ii. A debt, liability or obligation must be incurred before the debtor becomes bankrupt; and
 - ✓ iii. It must be possible to attach a monetary value to the debt, liability or obligation.
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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?

- i. Personal items and clothing;
- ✓ ii. Household furniture, food and utensils in the debtor's permanent home;
- ✓ iii. Tools necessary to a debtor's work;
- iv. A motor vehicle with a value up to a certain limit; and
- v. Certain farm property.

Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

- i. Involuntary;
- ✓ ii. Voluntary; and
- iii. 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 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 and, where the context requires, includes a bankrupt.

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.

A receiver is a licensed professional who is given authority to deal with a debtor company's assets.

A private receiver is appointed by a secured creditor under contract, by way of a provision in the security agreement that is entered into between the debtor and the secured creditor. This is an out of court procedure. However, a court-appointed receiver may be appointed by order of the court pursuant to Section 243 of the BIA, following application by a secured creditor. A receiver can also be appointed by the court upon application by an interested party where it is just and convenient to do so.

A private receiver's duties are primarily to the secured creditor that appointed it; however, it does have a general duty to act honestly, in good faith and in a commercially reasonable

manner. This includes attempting to maximize recoveries and to obtain the best for the debtor's assets in the circumstances. A court-appointed receiver, on the other hand, has duties to all creditors of the debtor. Further, a court-appointed receiver takes directions and instructions from the court, not from the creditor who first sought its appointment.

Private receivers are most often used in instances where there is a small business, or discrete pool of assets, and there will not be competing creditor claims or disputes with the debtor. A court appointment of a receiver, however, usually takes place in more complex cases, especially when there are competing claims between creditors, or when there are disputes between the creditor and the debtor, or in cases where it appears likely 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.

Canada's insolvency regime aims to strike a balance between reorganization and liquidation. The main underlying policies that the Canadian insolvency system focuses on are the following:

- i. Certainty;
- ii. Transparency;
- iii. Asset preservation;
- iv. Value maximisation; and
- v. Rehabilitation.

There are various provisions implemented in the Canadian insolvency legislation that make these policies achievable.

The Canadian insolvency system is perceived to favour debtor rehabilitation, but this is for the headline purposes of improving the chances of asset preservation and maximising recoveries for creditors, as well as some wider social economic benefits.

Although debtor rehabilitation is favoured, the insolvency framework in Canada provides for the interests of creditors to be protected. Where secured creditors will already have a degree of protection through their own security, which they can enforce for recovery of their debt, unsecured creditors generally direct the administration of a bankruptcy estate. Although a trustee is appointed in such proceedings, creditors are afforded power through voting processes for affecting the decision of proposals and resolutions, which must be approved by both the requisite threshold of creditors, as well as the court. For this reason, when running a voting process in such instances, such as for the approval of a Bankruptcy and Insolvency Act (BIA) proposal, sufficient information must be reported to the creditors to provide a greater degree of transparency on the matters at hand and the proposed plan moving forward to achieve a rehabilitation for the bankrupt debtor. In addition, the involvement and oversight of the court throughout such processes should provide unsecured creditors, and other stakeholders, with certainty that their interests are being considered and protected.

Whilst elements of Canada's insolvency proceedings are largely similar to proceedings available in some foreign jurisdictions, it should be noted that a number of jurisdictions, such as the UK, have bankruptcy proceedings that apply only to individuals and liquidation proceedings that apply only to corporations; however, in Canada, bankruptcy proceedings apply to both individuals and corporate entities and the BIA operates in a similar way for both individuals and corporate entities. This gives rise to Canada's insolvency system having a "single proceeding" model.

The BIA sets out provisions for the orderly liquidation and distribution of a bankrupt debtor's estate, which provides, *inter alia*, a method of achieving an organised and effective financial rehabilitation for the bankrupt debtor and, thus, meets the fifth policy of rehabilitation listed above.

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

Question 4.1 [maximum 15 marks]

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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 foreign agent will need to prove three (3) main requirements as part of the recognition application, proving that:

- i. The proceeding is a foreign proceeding in accordance with the statutory definition;
- ii. The foreign agent, being the applicant in this instance, is the foreign representative in accordance with the statutory definition; and

- iii. Whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding, based on the company's centre of main interest (COMI).

Requirement (i) can be proved as the agent in the foreign jurisdiction (that is a jurisdiction outside of Canada within the meaning of the statutory definition) is acting under the law of the foreign jurisdiction and is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies.

Requirement (ii) can be proved as the foreign agent is authorized in the foreign proceeding to act as a representative in respect of the foreign proceeding, as set out in the statutory definition.

With regards to requirement (iii), this will depend on where the debtor's COMI is. It is known that the debtor's head office is registered in the foreign jurisdiction where senior management of the company have their offices. It can, therefore, be assumed that the COMI is in the foreign jurisdiction and that would make the proceedings to be foreign main proceedings.

The foreign representative should then arrange for an application to be made with the court, which includes the documents as set out in section 269 of the Bankruptcy and Insolvency Act (BIA).

So long as the court is satisfied, a recognition order should then be made by the court pursuant to section 270 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?

This depends on whether the foreign recognition obtained is a foreign main proceeding or a foreign non-main proceeding.

Where a foreign proceeding is recognised as a foreign main proceeding, an automatic stay of proceedings occurs in Canada. However, where a foreign proceeding is recognised as a foreign non-main proceeding, a stay on proceedings may be obtained, but it must be requested and justified.

In this instance, on the basis that the debtor's COMI is assumed to be in the foreign jurisdiction, the foreign proceedings will be recognised as foreign main proceedings. Therefore, there will be an automatic stay in Canada, which includes a stay on the class action litigation being brought in Canada, as was the case in the matter *Re MtGox Co.*

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?

The Canadian court is not limited to the entitlements and remedies in relief that it can provide.

The Bankruptcy and Insolvency Act (BIA) (as well as the Companies' Creditors Arrangement Act (CCAA)) contains broadly worded, discretionary provisions that enable the court, upon the making of an order recognising the foreign proceeding, to make "any order that it considers appropriate".

Such an order (pursuant to section 272 of the BIA) may be made on application by the foreign representative and if it satisfies the court that the order is necessary for the protection of the debtor's property or is in the interests of a creditor or the creditors.

In this instance, we know that the Canadian resident in charge of the debtor's fulfilment office and warehouse in Canada is suspected of diverting funds improperly. The Canadian court could, therefore, grant such an order that would assist the foreign representative in furthering their investigations into this matter, such as orders for the examination of witnesses or orders compelling the provision of information of the debtor's affairs and financial records.

*** End of Assessment ***