



$10 + 9 + 15 + 15 = \frac{49}{50}$

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

Question 2.1 [maximum 3 marks] 3

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

The conditions set out by the Supreme Court of Canada for a claim to be provable in bankruptcy under s 124 (1) of the BIA are as follows:

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] 2

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

In the context of individual bankruptcy, debtors are entitled to keep a portion of income earned to maintain a reasonable standard of living in accordance with standards set by the Superintendent; personal items and clothing; household furniture, food and utensils in the debtor's permanent home, tools necessary to a debtor's work; a motor vehicle with a value up to a certain limit; and certain farm property.

Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

The three methods for entering into bankruptcy are as follows:

- 3
1. Involuntary- where an application is made by a creditor who is owed in excess of CAD 1000 of unsecured debts and (ii) provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application.
 2. Voluntary were a debtor voluntarily makes an assignment into bankruptcy proceedings; and
 3. On the failure of, or failure to perform the terms of, a BIA proposal- if a proposal is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy.

Question 2.4 [maximum 2 marks]

What is the definition of "debtor" in section 2 of the BIA? 1

The definition of "debtor" in section 2 of the BIA includes an insolvent person and any person who at the time of an of bankruptcy was committed by him, resided or carried on business in Canada.

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.

✓ A private receiver is a receiver that is usually appointed pursuant to security agreement between the debtor and creditor. Accordingly, if a debtor fails to meet its obligations under the security

agreement, the secured creditor has a contractual right to appoint a receiver. The private receiver has a duty to act honestly and in good faith and in a commercially reasonable manner, including to attempt to maximize recoveries and to obtain the best price for the debtor's assets in the circumstances. Private receivers are generally 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. ✓

On the contrary, a court appointed receiver is an officer of the court which is appointed pursuant to statute i.e., section 243 of the BIA which 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 Courts of Justice Acts of individual provinces also allows the court to appoint receiver on application of any interested party which includes shareholders and secured creditors, where it is just and convenient to do so. 8
The circumstances in which they are appointment are usually in complex cases where there are competing claims between creditors or disputes between creditors and the debtor or because it appears that the assistance of the court may be required on an ongoing basis. The duties of court-appointment receivers are set out in statute or a court order. Court-appointed receiver has duties ✓ to all creditors of the debtors. It has a duty to report to, take directions and instructions from the court; to protect and preserve assets and to act in accordance with statute; to distribute proceeding in accordance with creditors entitlements and priority, to provide notice of its appointment to all known creditors and prepare and distribute interim and final reports concerning the receivership. These reports should be filed with OSB and distributed to all creditors.

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.

It is well-established that the Canadian insolvency regime aims to strike a balance between liquidation and reorganization. In doing so, there are several policy goals of the regime which includes providing debtor rehabilitation. Rehabilitation of debtors results in increased recoveries for creditors, the maintenance of supplier relationships and local economic activity and preservation of jobs. Other policy goals are to: (1) provide certainty to promote economic stability and growth; (2) maximize the value of assets; (3) ensure the equitable treatment of similarly situated creditors; (4) provide for timely, efficient and impartial resolution of insolvency; (5) preserve the insolvency estate to allow equitable distribution to creditors; (6) ensure transparent and predictable insolvency laws that contain incentives for gathering and dispensing information; and to (7) recognize existing creditor rights and establishes clear rules for ranking of priority claims. ✓ 7

These policies are reflected in the management of insolvency proceedings which is achieved through creditor control, estate management and court supervision or oversight by court appointed representatives such as trustees, receivers or CCAA monitor. ✓

As it relates to the issue of why the national insolvency system in Canada is described as a "single proceeding" model, the national insolvency system in Canada is described as a "single proceeding" model because it provides for a single, collective proceeding that supersedes the usual processes available to creditors to enforce their claims and avoids the inefficiency and chaos that would attend insolvency if each creditor-initiated proceedings to recover its debt..The remedies of creditors are therefore collectivized in one single proceeding. ✓

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?

In order for Canadian courts to recognize foreign proceedings in Canada, the statutory provisions of the BIA and CCAA requires formal proof of three main requirements:

- That the proceeding is a foreign proceeding in accordance with the statutory definition. The BIA defines foreign proceeding as a judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' 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 reorganisation or liquidation;
- That the applicant is a foreign representative in accordance with the statutory definition. This is a person or body, including one appointed on an interim basis, who is authorised, in a foreign proceeding in respect of a debtor to: (a) administer the debtor's property or affairs for the purpose of reorganisation or liquidation or (b) act as a representative in respect of the foreign proceedings.
- Whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on a center of main interest (COMI) analysis.

Therefore, if you are satisfied that those statutory requirements have been met, you should file an application with sufficient evidence of the foreign law before the Canadian court to allow the court to determine where you are a foreign representative and whether the proceeding is a foreign proceeding. Once the Court is satisfied that the requirements have been met, the court will grant an order recognizing the foreign proceeding. If the court determines that the foreign proceedings in a foreign main proceeding the court will issue a stay of the proceedings. However, if the foreign non-main proceeding, a stay can be requested.

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?

As mentioned previously, if the court determines that the foreign proceedings is a foreign main proceeding the court will issue a stay of the proceedings. However, if the court determines that the foreign proceeding is a foreign non-main proceeding, a stay can be requested and must be justified for the court to exercise its discretion in granting one.

To determine whether the Court will be inclined to grant an automatic stay of the proceedings, one must consider the COMI of the company which in the absence of proof of the contrary, is the registered office of the online insolvent company. The courts will also consider the following to determine the COMI of the online company: (1) the location that significant creditors recognize as being the centre of the company's operations; (2) the location in which the debtor's principal assets or operations are found; and (3) the location of the debtor's headquarter, head office or "nerve centre".

In the present circumstances, the head office of the company is registered in the jurisdiction where senior management of the company have their offices. If the foreign proceedings to be recognized is proceeding the jurisdiction of the head office of the online company, the court is likely to grant an automatic stay of the proceedings in Canada. However, if the proceedings are brought in a jurisdiction that is not the COMI of the company, the court will deem the proceedings as non-main foreign proceedings for which a stay must be requested and evidence submitted that its justified.

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 BIA and CCAA provides statutory provisions which provides that the court may on the application of foreign representatives, if satisfied that is necessary for the protection of the debtor companies and the interests of creditors, make any "*order that it considers appropriate*".

Subject to a public policy exemption under the BIA and CCAA, which permits the court to refuse to do something that would be contrary to public policy and ensuring orders are consistent with each other, the court is not restricted in exercising its discretion to only grant Canadian entitlements and remedies available under Canadian insolvency law and has in fact ordered relief in foreign-main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings.

*** End of Assessment ***