



**INSOL INTERNATIONAL**  
**FOUNDATION**  
**CERTIFICATE**  
IN INTERNATIONAL INSOLVENCY LAW



$$10 + 8.5 + 10 + 11 =$$

$$\frac{39.5}{50}$$

**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]

10/10

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]**

3

8.5  
10.

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

[The conditions 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.
- (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?

[In individual bankruptcy, individual are entitled to keep personal items and clothing, household furniture, food and utensils in the debtor's permanent home, tools necessary to a debtor's work, motor vehicle with a value up to a certain limit and certain farm property. Individuals are also entitled to keep a portion of the income earned in order to maintain a reasonable standard of living. The portion of income to be retained is determined by the Superintendent of Bankruptcy]

**Question 2.3 [maximum 3 marks]**

Name three methods for entering into bankruptcy.

- 1. Involuntary,
- 2. Voluntary, and
- 3. on the failure of, or failure to perform the terms of, a BIA proposal

→ including rejection by creditors.

**Question 2.4 [maximum 2 marks]**

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

[Debtor in section 2 of the BIA includes an insolvent person, any person who at the time an act of bankruptcy was committed by him, resided or carried on business in Canada.]

define!

**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.

[Private receiver is appointed in accordance with the terms of a security agreement between the debtor and the secured creditor. Secured creditor may exercise the right to appoint a receiver where the debtor is unable to meet its obligations. His duties are primarily towards his appointor, the secured creditors. Nevertheless, he is expected to act in good faith, honestly and in a commercially reasonable manner that ensures he obtains the price for the assets of the debtor company been disposed. Private receivers are typically used where there is a small business or discrete pool of assets and there will not be competing creditor claims or dispute with the debtor.

Court-appointed receivers are receivers appointed by courts pursuant to an application by a secured creditor under Section 243 of the BIA to take control of a debtor company when it fails to meet its payment obligations. Being a court appointee and the court approves many of its decision, and this give comforts to secured creditors. As an officer of a court, the court-appointed

receiver has duties to all creditors of the debtor. He has broader powers than those given to private receivers under a security agreement, though certain actions such sale of major assets of the debtor, requires the court approval. Court-appointed receivers are used in complex cases, where there are disputes between creditors and debtor, competing claims between creditors and where court intervention may be necessary 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.

2/3 [Canada's insolvency regime tries to strike a balance between reorganisation and liquidation. It focuses on certainty, asset preservation, value maximization and rehabilitation. The regime pushes for debtor's rehabilitation because of the perceived social benefits such as preservation of jobs, increased recoveries for creditors, and the maintenance of suppliers relationships and local economic activity.

**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?



[Recognition application is commenced by a foreign representative filing sufficient evidence of the foreign law for the Canadian courts to reach a determination that the applicant is a foreign representative, and the proceeding is a foreign proceeding. Canadian courts recognise foreign proceedings on the formal proof of three main requirements:

1. That the proceeding is "a foreign proceeding"
2. That the applicant is a "foreign representative"
3. Whether the "foreign proceeding" is a "foreign main proceeding" or "foreign non-main proceeding"]

5 Upon meeting the above requirement, recognition is automatic and the court make an order recognising the proceedings. If the court determines that the foreign proceeding is the main proceeding, a stay of proceedings would automatically be issued by the courts. However, if the proceeding is considered to be a foreign non-main proceeding the courts exercise discretion in making orders for the protection the debtor's property or the interests of the 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?

4/5 [Canadian courts automatically grant stay where the court makes a finding that the foreign proceeding is the foreign main proceeding. To determine the foreign main proceeding the court considers the Centre of Main Interests ("the COMI"), which is usually the location of the company's registered office, except the contrary is proven. The location of significant creditors, debtor's principal assets and debtor's headquarters are the factors considered in identifying the COMI. In instant situation the debtor's headquarters and significant creditors are located in a foreign jurisdiction, while the assets are spread across various jurisdiction, therefore the Canadian court are likely to reach the conclusion that foreign main proceeding is outside Canada. In this circumstance, the Canadian courts would stay the Canadian litigation.]

**Question 4.3 [maximum 5 marks]**

2/5 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 adopt a purposive approach in recognising foreign judgments and are willing to grant entitlements and reliefs that are not usually available in Canada. In Re Hartford Computer Hardware Inc, the court ordered relief in foreign main proceedings where there are ancillary Canadian proceedings that are not ordinarily available in Canada.]

**\* End of Assessment \***