



10 + 9 + 14 + 11 =  $\frac{44}{50}$

**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]**

9/10

**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.

[Type your answer here]

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

3

- 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 a bankrupt;
- and

3) it must be possible to attach a monetary value to the debt, liability or obligation.<sup>1</sup>

**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?

[Type your answer here]

Individual bankrupts are entitled to keep a portion of income earned to maintain a reasonable standard of living.<sup>2</sup> Assets that a debtor can keep in a bankruptcy include personal items and clothing; household furniture, food and utensils in a 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.<sup>3</sup>

**Question 2.3 [maximum 3 marks]**

Name three methods for entering into bankruptcy.

[Type your answer here]

The three methods for entering into bankruptcy are:

- 1) involuntary – applied for by creditor(s) who is owed in excess of \$1000 CAD, and who provides evidence that the debtor has committed an act of bankruptcy within the last six months of filing of the petition;
- 2) voluntary – occurs when the debtor voluntarily make an assignment into bankruptcy proceedings for the benefit of its creditors; and
- 3) on the failure of, or failure to perform the terms of, a BIA proposal – If a corporate proposal is rejected by a class of creditors, voting on the proposal.<sup>4</sup>

**Question 2.4 [maximum 2 marks]**

What is the definition of “debtor” in section 2 of the BIA?

[Type your answer here]

A “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.<sup>5</sup>

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

**Question 3.1 [maximum 8 marks]**

<sup>1</sup> Finlayson, Gavin H, Foundation Certificate in International Insolvency Law, Module 4C Guidance Text Canada 2021/2022 (“Guidance Text”) page 25, 6.2.7; Case: Newfoundland and Labrador v AbitibiBowater Inc [2012] SCC 67 at para 26

<sup>2</sup> Guidance Text page 19, 6.2

<sup>3</sup> Guidance Text page 27, 6.2.10

<sup>4</sup> Guidance Text page 20, 6.2.2; page 20, 6.2.2.1; page 21, 6.2.2.2; page 22, 6.2.2.3

<sup>5</sup> Guidance Text page 19, 6.2.1

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.

[Type your answer here]

The secured creditor appoints a private receiver. A secured creditor's authority to appoint a private receiver is provided for in the security agreement between the debtor and the secured creditor.<sup>6</sup>

A private receiver's duties are primarily to the secured creditor that appointed it, however a private receiver has a general duty to act honestly, in good faith and in a commercially reasonable manner, including to maximise recoveries to obtain the best price for the debtor's assets.<sup>7</sup>

A private receiver is generally used where there is a small business or a discrete pool of assets where there are no competing creditors claims or disputes with the debtor, this is because of concerns over successor liability to receiver's carrying on business.<sup>8</sup>

A court-appointed receiver is sometimes appointed pursuant to section 243 of the Bankruptcy and Insolvency Act RSC 1985, c.B-3 ("**BIA**") which authorizes a secured creditor to apply to 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 a security agreement, though the Courts of Justice Acts of the individual provinces allows the court to appoint a receiver on application by any interested party where it is just and convenient to do so (an "equitable receiver").<sup>9</sup>

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers.<sup>10</sup> A court appointed receiver is permitted to borrow on a super-priority basis and the court may order critical suppliers to provide continued supply on fair market cash-on-delivery terms.<sup>11</sup>

A court-appointed receiver is an officer of the court and has duties to all creditors of the debtor, not just the creditor that first sought its appointment. It takes directions from the court, not the creditors. Usually the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement with certain actions such as major asset sales requiring court approval.<sup>12</sup>

A court appointed receiver is usually appointed in more complex cases such as when there are competing claims or disputes between the creditor and the debtor or otherwise

---

<sup>6</sup> Guidance Text page 39, 6.4.1

<sup>7</sup> Guidance Text page 39, 6.4.1

<sup>8</sup> Guidance Text page 39, 6.4.1

<sup>9</sup> Guidance Text page 30, 6.4.2

<sup>10</sup> Guidance Text page 30, 6.4.2

<sup>11</sup> Guidance Text page 30, 6.4.2

<sup>12</sup> Guidance Text page 31, 6.4.2



when it appears likely from the outset that there assistance of the court will be required on an on-going basis.<sup>13</sup> As the court must approve many of the receiver's decisions along the way, a court appointed receiver provides a greater degree of comfort for creditors and professionals from a potential liability standpoint than a private receiver.<sup>14</sup>

### 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.

[Type your answer here]

Canada's insolvency regime aspires to strike a balance between reorganization and liquidation. The Canadian insolvency system focuses on certainty, transparency, asset preservation, value maximization and rehabilitation.<sup>15</sup> Where appropriate the insolvency system provides for and favours, debtor rehabilitation because of the perceived social benefits, which flows from rehabilitation of debtors, including increased recoveries for creditors, maintenance of supplier relationships, local economic activity and the preservation of jobs.<sup>16</sup>

6  
7

Insolvency of a debtor allows for an automatic stay of proceedings on entering bankruptcy proceedings. This allows for some breathing room against unsecured creditors trying to commence or continue action, execution or other proceedings for recovery.<sup>17</sup> In order for a creditor to prove a claim, they need to meet certain conditions such as the debt must be owed to the creditor, the debt must be incurred before the debtor becomes a bankrupt, and it must be possible to attach a monetary value to the debt<sup>18</sup> this ensures that a creditor proving a claim in the insolvency is a legitimate creditor for a debt actually incurred by the debtor and acts as a safeguard promoting value maximization for the pool of unsecured creditors.

Canadian insolvency system provides for a "single proceeding" model, which is a collective proceeding that supersedes the usual processes available to creditors to enforce their claims. Creditors' remedies are collectivized in a single proceeding to avoid the social and economic costs of a chaotic free-for-all where creditors are incentivized to enforce their rights to seize assets before other creditors do.<sup>19</sup> This model forms a part of the values set out in the policy goals of the Canadian insolvency system in that there is an orderly fashion of dealing with multiple creditors' claims against the debtor resulting in certainty, transparency and value maximization of assets available for the collective creditors.

<sup>13</sup> Guidance Text page 30, 6.4.2

<sup>14</sup> Guidance Text page 30, 6.4.2

<sup>15</sup> Guidance Text page 17, 6.1.1

<sup>16</sup> Guidance Text page 17, 6.1.1

<sup>17</sup> Guidance Text pages 23-24, 6.2.5

<sup>18</sup> Guidance Text page 25, 6.2.7

<sup>19</sup> Guidance Text page 11, 4.2.3

In terms of restructuring options available, the BIA reorganizations provides for the possibility for the debtor to restructure its affairs through debtor in possession "proposals"<sup>20</sup> and possibly obtain an outcome more beneficial for all parties collectively. Companies can also restructure pursuant to Companies Creditors Arrangement Act (CCAA) reorganizations which is a debtor-in-possession restructuring statute which sets out the framework for reorganization of insolvent companies with debts over CAD \$5,000,000 and follows many of the concepts of the US Chapter 11 procedure.<sup>21</sup> A CCAA restructuring provides for "plans of arrangement" so debtors can reach compromises with creditors.<sup>22</sup> These mechanisms allow for rehabilitation where possible, and strive to achieve social objectives such as the preservation of jobs.

The above are just a few examples of how the Canadian insolvency system provides for ways to achieve its policy goals. Court appointed receivers and in certain instances, the Winding Up and Restructuring Act also provides for their own mechanisms to achieve the policy goals of the Canadian insolvency system. ✓

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

11  
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?

[Type your answer here]

---

<sup>20</sup> Guidance Text page 6, 4.1.2

<sup>21</sup> Guidance Text page 6, 4.1.2

<sup>22</sup> Guidance Text page 6, 4.1.2

The provisions of the BIS and CCAA on foreign insolvency proceedings require Canadian courts to recognize foreign proceedings of form proof of three main requirements:

- 1) The proceedings is a "foreign proceeding" in accordance with the statutory definition;
- 2) The applicant is a "foreign representative" in accordance with the statutory definition; and
- 3) Whether the "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" based on the centre of main interest (COMI) analysis.<sup>23</sup>

6 The foreign representative filing sufficient evidence of the foreign proceedings to allow the Canadian court to determine that he/she is a foreign representative and the proceedings is a foreign proceeding commences the recognition application. This determination is given a broad and purposive interpretation in case law allowing the applicant to meet requirements for recognition without great difficulty. Once requirements are met, the recognition is automatic and compulsory, similar to the Model Law.<sup>24</sup>

In this case, the foreign representative is a representative from a jurisdiction where senior management of the company have their offices, and have their registered offices in the foreign jurisdiction. Accordingly this will be a "foreign main proceeding" on a COMI analysis as the "nerve centre" of the company is in that foreign jurisdiction.<sup>25</sup>

#### 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?

[Type your answer here]

If a foreign proceeding is recognised as a foreign-main proceeding (as discussed in 4.1 above, in this instance it is), an automatic stay occurs in Canada. If it the proceeding is a foreign non-main proceeding, then a stay may still be obtained but it must be requested and justified.<sup>26</sup>

5 Once recognised as either a foreign main or foreign non-main proceeding, the foreign representative is given a standing to appear and be heard in Canadian courts and recognition imposes an obligation on Canadian officials to cooperate with the foreign representative and he foreign court. The BIA and CCAA provide that on application of a foreign representative, a court "make any order it considers appropriate" once satisfied that the necessary protection of the debtor companies property or the interest of creditors are in place and that it is not contrary to public policy.<sup>27</sup>

Accordingly, yes, on recognition of the foreign agent, in this instance as a representative in a foreign main proceeding, an automatic stay of proceedings applies, there is no need to specifically apply for a stay in this instance.

---

<sup>23</sup> Guidance Text page 59, 7.4

<sup>24</sup> Guidance Text page 59, 7.4

<sup>25</sup> Guidance Text page 60, 7.5

<sup>26</sup> Guidance Text page 60, 7.6

<sup>27</sup> Guidance Text pages 60-61, 7.6, 7.7

**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?

[Type your answer here]

1  
5

The Canadian insolvency law system is “universalist” in that it purports to extend to the debtor’s assets wherever located. It is reciprocal in that it permits foreign creditors to participate in Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors.<sup>28</sup> However it is noted that no all countries reciprocate this approach in its treatment of Canadian creditors in their jurisdiction. Accordingly, Canada approaches the challenge posed pragmatically on the basis of “modified universalism” accepting that concurrent insolvency proceedings in multiple jurisdiction may sometimes be necessary. Canadian judges retain a high degree of discretion to employ the statutory provisions on the recognition of foreign proceedings in a way that accords with this underlying policy rationale in individual circumstances.<sup>29</sup>

Most Canadian provinces has enacted “reciprocal enforcement of judgments” legislation which allow a litigant to “register: a judgment by way of simplified court application and thereafter enforce, this however only available to reciprocating jurisdictions.<sup>30</sup> Canada is also party to several international conventions such as the *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, which allow Canadian federal and provincial governments as well as governments of Great Britain and Northern Ireland to mutually register and enforce judgments obtained in each others’ jurisdictions with the same force and effect, provided it is within six years of the judgment.<sup>31</sup>

Depending on the foreign jurisdiction, Canadian courts may not be limited to Canadian Entitlements and remedies in the relief they can provide.

**\* End of Assessment \***

<sup>28</sup> Guidance Text pages 56-57, 7.1

<sup>29</sup> Guidance Text page 57, 7.1

<sup>30</sup> Guidance Text page 68, 8.2

<sup>31</sup> Guidance Text page 69, 8.2