



$10 + 8.5 + 14 + 15 = 47.5$
 $\frac{47.5}{50}$

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

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.

There are 3 ways conditions set out by the Supreme Court for a claim to be provable:

- (i) The debt, liability or obligation must be owed to the creditor;
- 3 (ii) The 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. ✓

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?

This will depend on the province or territory where the debtor lives. Generally, the assets that can be kept include

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

In Ontario, the principal residence of the debtor is exempted from forced seizure or sale if the value of the debtor's equity in the principal residence does not exceed CAD 10,000.

Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

The 3 methods are:

- 1. Involuntary;
- 2. Voluntary; and
- 3. 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?

Under section 2 of the BIA, a debtor is defined as including an insolvent person any person who, at the time the act of bankruptcy was committed by him, resided or carried on business in Canada, and where the context requires 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 licenced trustee in bankruptcy, and is generally a professional in an accounting firm or financial advisory firm. A receiver may be appointed as a private receiver or a court-appointed receiver.

Generally, a private receiver will be provided for in the terms of a security agreement between the debtor company and the creditor. The agreement will grant the creditor a right to appoint a receiver if the debtor is unable to meet its obligations.

The private receiver's primary duties are generally to the secured creditor who appointed him, and he must act honestly, in good faith and in a commercially reasonable manner, including to aim to maximise recoveries and to obtain the best price for the assets.

Private receivers are most often used in small businesses or for a discrete pool of assets where there is not many competing creditor claims and disputes.

8 A court appointed receiver, on the other hand, is appointed (as the name suggests) by the court. This may be based on section 243 of the BIA, which allows a secured creditor to apply to the court to appoint a receiver with national authority to take control of the company's business when the company is unable to meet its obligation under the security agreement. A court appointed receiver may also be appointed under the Courts of Justice Acts of the provinces and territories (excluding Quebec) which allows the court to appoint a receiver when it is just or convenient to do so. It may be just or convenient to do so for various reasons such as the managing of a business for a period, or for conducting investigations into certain affairs of the company. A court appointed receiver may also be appointed based on the need to protect and preserve assets on a temporary basis – that is, the appointment of an interim receiver.

The court-appointed receiver is an officer of the court and it reports and takes instructions from the court, although it will have a duty to all creditors. His duties will be similar to those of a private receiver, including the duty to provide interim and final reports to all creditors (and to the court also, where it is a court-appointed receiver).

Court appointed receivers will be used generally for more complex situation, where there are several competing claims and disputes, or where the assistance of the court is needed on an ongoing basis. They can be appointed to provide a greater degree of comfort as the court will need to approve most of the receiver's decisions.

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 main goals of the Canadian insolvency regime are to strike a balance between restructuring and liquidation. The insolvency system aims to provide certainty, transparency, asset preservation, value maximization and rehabilitation. Where appropriate therefore, the system provides for and favours debtor rehabilitation which will also result in increased recoveries for creditors, the maintenance of supplier relationships and the preservation of jobs. Canada's insolvency framework recognises the existing rights of creditors and establishes clear rules for ranking priority claims and the equitable treatment of creditors of the same class. The Canadian insolvency system is described as universalist because it purports to extend to the debtors assets wherever they are located and it permits foreign creditors to participate in Canadian

insolvency proceedings with the same rights and priorities as similarly situated domestic creditors.

Examples of the insolvency regime that favours the rehabilitation of the debtor are: (i) the BIA allows a company to file a proposal where they are in financial difficulty and seek to restructure rather than liquidate, the CCAA was created to allow restructuring of corporate entities who owe CAD 5million and a company may rehabilitate and restructure under the provisions of the Canada Business Corporations Act, s 192 outside of the insolvency process; (ii) both the BIA and CCAA allow for stays of proceedings against a company seeking to enter into a proposal or plan, the stay is automatic under the BIA but discretionary under the CCAA.

6 Examples of a system that recognises creditors and provides clear rules for ranking priority claims, sections 136 to 147 governs the ranking of claims and provides that in a corporate insolvency, the rights of secured creditors rank ahead of all claims against the debtor except for certain 'super priority' claims. Another example of empowerment given to creditors, section 38 of the BIA gives creditors power to pursue remedies to challenge impeachable transactions where the assets of the estate are insufficient and the trustee or Monitor refuse to act. Any proposal or plan is generally open for the approval of creditors, in both the pre-filing and post filing stage, significant creditors or creditor groups may influence the restructuring as commensurate with the value and priority of their claims. For example, creditors may individually or collectively hold sufficient debt of a class of creditors amounting to 33 1/3rd percent that allows them to block the approval of a CCAA plan or BIA proposal.

Examples of the universalist nature of Canadian insolvency laws are: (i) the definition of corporation in the BIA is broad enough to support a filing by a foreign based registered company with assets or property in Canada subject to COMI principles being satisfied. Both the BIA and CCAA have provisions that address cross border issues, Canada has adopted a modified version of the UNCITRAL Model Law on Cross Border insolvency to recognise foreign judgments. The courts have wide discretionary power from statute for recognising foreign statute that accords with principles of comity and cross border cooperation. Canada courts have embraced cross border recognition orders, the use of cross border insolvency protocols, court to court communication and the coordinated assets sale and restructuring plans. Important modifications to the UNCITRAL Model law include the fact that the definition of foreign non main proceedings does not require that the debtor have an 'establishment' in the place of the foreign proceedings. Outstandingly, the Canadian court illustrated in the case Purdue that it will prevent undue prejudice to non-Canadian creditors. In this case a Canadian creditor applied to be excluded from a stay order issued by a US court. The Canadian court declined to exclude the Canadian company on the basis that the Canadian creditors will have an advantage over US creditors by allowing them to continue to pursue actions against the related parties while the actions by the US claimants were stayed.

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?

As both the BIA and CCAA have adopted a modified version of the UNCITRAL Model Law on Cross Border insolvency, there are 3 requirements to be met for the Canadian court to recognise the foreign insolvency proceedings. The first is that the proceeding has to be a "foreign proceeding" as is defined in the statute. A foreign proceeding in s 268 of the BIA means 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. Second, the applicant must be a "foreign representative" in accordance with the statutory definition. This is defined to mean 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. Third, the Court will determine whether the foreign proceedings are foreign main proceedings or foreign non main proceedings following an analysis of the centre of main interest (**COMI**). The foreign representative is required to file sufficient evidence of the foreign court to allow the Canadian court to determine that they are a foreign representative and that the proceeding is a foreign proceeding. The Canadian court will look at the substance of the foreign law. Once the requirements for recognition have been met, the recognition will be automatic and compulsory and the court must make an order recognising the foreign proceedings.

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?

The Court, when determining whether or not to recognise the foreign proceedings will have to categorise the foreign proceedings as either "foreign main proceedings" or foreign non-main proceedings. This is relevant because the categorisation will help determine the nature of relief

that the Canadian court will grant in support of the foreign proceedings. If a foreign proceeding is recognised as a foreign main proceeding, all proceedings in Canada as the recognising jurisdiction must be stayed. This will include the class action commenced.

5 To determine whether the foreign proceedings are main or non-main, the Court will analyse the evidence presented before it to determine the COMI of company. The BIA defines a COMI as, in the absence of proof to the contrary, a debtor's registered and in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests. On the premise that the foreign proceedings are foreign main proceedings the stay of the Canadian proceedings will be ordered. If the proceedings are considered foreign non-main proceedings a stay of the Canadian proceedings can still be obtained but it must be requested and justified. The recognition of the proceedings as main or non-main gives the foreign representative standing to appear and be heard in Canadian courts. The recognition also places an obligation on Canadian officials to cooperate with the foreign representative and the foreign court. The BIA and CCAA contains wording which gives the court wide discretionary power, if the court is satisfied that it is necessary for the protection of the debtor companies property or the interests of a creditor, to make "any order that it considers appropriate."

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 The foreign agent wants to know whether they can compel the Canadian resident who was in charge of the fulfilment office and warehouse in Canada to submit to an examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction (for example, following that jurisdiction's procedure rather than Canadian procedure). What is your advice?

5 ✓ The Canadian court is given wide discretionary power, when recognising a foreign judgment, to make any order it considers appropriate if the court is satisfied that this is necessary. The only limitation to the Canadian court making an order in accordance with the civil procedure rules of the foreign jurisdiction, even if not present in Canadian rules, would be if the order is contrary to public policy. The Canadian court rarely however invokes this ground and is more inclined to recognise foreign insolvency proceedings especially from jurisdictions where Canada has strong economic ties like the USA and is familiar with the legal system of that country. The Canadian court has in the past, in the case *Re Hartford Computer Hardware Inc*, where there are ancillary proceedings in Canada, the court has ordered relief in foreign proceedings that would not ordinarily be available in Canadian proceedings. In the *Nishiyama* case, the court held that the order making powers given under s272(2) of the BIA gave the Court jurisdiction to make the orders listed in the provision in the jurisdiction of the foreign main proceedings where "necessary" and "appropriate" to do so once a foreign proceeding is recognised. The orders that may be made includes examining witnesses, the taking of evidence or an order for delivery of information concerning the property, affairs, debts, liabilities and obligations of the debtor. The Court will therefore construe the facts of the case to determine whether the order is necessary. The foreign representative should therefore present the court with the evidence it has to confirm why an order to compel the Canadian resident to submit to an examination under oath and produce documents related to the company's operation and accounts.

*** End of Assessment ***