



$$10 + 9 + 10 + 10 = \frac{39}{50}$$

**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]**

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**

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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]  $\frac{9}{10}$**

**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.

3 The Supreme Court of Canada set out three conditions for a claim to be provable in bankruptcy, pursuant to Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443: (i) the debtor in bankruptcy must owe the claim to the creditor; (ii) the claim must exist prior to the bankruptcy; and (iii) the claim must have a monetary value that can be ascertained. ✓

### 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?

2 As bankruptcies exemptions are provided by provincial legislation, the assets that a debtor can keep in an individual bankruptcy may vary according to region. In general, these are assets necessary for the debtor to maintain a minimum standard of dignity, such as personal items and clothing, tools necessary to work, food and utensils that garnish the debtor's permanent home. ✓

### Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

- ✓ 3
- (i) Involuntary, pursuant to section 43(1) of BIA;
  - (ii) Voluntary, when the company or individual files with the Official Receiver a sworn statement disclosing its property, all its creditors and amount of claims along with the assignment of its assets for the benefit of its creditors; and
  - (iii) If a BIA proposal is rejected by creditors or not approved by the court, or if the proposal if defaulted and such default is not waived by creditors or their inspectors.

### Question 2.4 [maximum 2 marks]

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

✓ Pursuant to section 2 of the BIA, a debtor is an insolvent person and any person who had a residence or business activity in Canada at the time of committing an act of bankruptcy and includes a bankrupt. ✓ *defined!*

## 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.

6 Private and court-appointed receivers are licensed professionals whose objective is to administer the debtor's assets, including the management of its operation. Such receivers have the right to collect the debtor's assets, sell them, and distribute the proceeds among the relevant creditors after deducting their fees and expenses incurred. ✓

Private receivers are more commonly used in less complex cases, where there is usually no dispute among creditors or with the debtor himself, because there is a risk that decisions made by the receiver will be challenged in court attracting possible liability for the successor. ✓

Such private receivers are appointed by the secured creditor himself, according to the rights conferred to him by the security agreement signed with the debtor, so that they report directly to ✓

the secured creditor and no one else, although they are still obliged to act in good faith and in a reasonable manner.

Once appointed, the receiver must issue a notice to all known creditors of the debtor and issue and deliver a report on the receivership.

As for court-appointed receivers, they can be appointed upon the application of a secured creditor to the court or by an interested party in cases deemed necessary, as more complex cases, where there are disputes between creditors or litigation against the debtor. Considering the scenario of greater animosity, these court-appointed receivers are generally more used, since all their acts are submitted to the court's approval, which ends up mitigating the risk of liability of the successors. In the same way as with the private receivers, the court-appointed receivers also must issue a notice to all known creditors of the debtor and issue and deliver a report on the receivership. In addition, the court-appointed receivers must also report to court whenever necessary.

*duties of court-appointed officers?*

### **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.

4 The Canadian insolvency system favours, above all, the maintenance of the economic activity of those insolvents, trying to balance the liquidation and reorganization proceedings, because it considers the benefits that the recovery of a person in this state brings to the community.

At the same time, the Canadian insolvency system seeks to respect and give security to the rights of creditors, by means of clear rules as to the treatment given to each of them and how the order of preference is given, including in relation to secured creditors, to bring stability to the country's credit granting system, especially regarding rates and availability of resources.

To maintain such a social and economic organization, Canada's insolvency system unifies the measures that may be taken by creditors in a single collective proceeding to avoid imbalance and unequal treatment among them, thus avoiding a scenario of inequality and instability harmful to the population, local businesses and investors.

### **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?

3 Pursuant to BIA, sections 269-272, and CCAA, sections 46-49, the foreign agent must apply to the court and provide evidence that the foreign proceeding and the foreign applicant fall under the respective concepts provided by the statutory definitions, with certified copies of the instruments that commenced the foreign proceeding and that affirm the foreign representative's authority. If the necessary evidence is provided, the recognition is automatic and compulsory.

**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?

3 The occurrence of a stay of the Canadian litigation will depend on whether the foreign proceeding will be recognized as a foreign main proceeding or a foreign non-main proceeding. In case of the former, then an automatic stay of the Canadian litigation will occur, pursuant to BIA, section 271, and CCAA, section 48.

The recognition of the foreign main proceeding as a main or non-main proceeding is based on an analysis of the debtor's center of main interest (COMI), pursuant to BIA, section 284 and CCAA, section 61.

Considering that the online seller of clothing is registered in the foreign jurisdiction, where senior management of the company have their offices, the debtor's COMI is in the foreign jurisdiction, pursuant to BIA, section 268(2), and, therefore, the foreign proceeding will probably be recognized as a foreign main proceeding and a stay of the Canadian litigation will occur.

**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?

4 In *Hartford Computer Hardware, Inc. (Re)*, 2012 ONSC 964, the Superior Court of Justice of Ontario granted a motion for recognition and implementing order issued by the United States Bankruptcy Court on the grounds that such recognition was necessary for the protection of debtor's property and creditor's interests, provided that such recognition did not raise any public policies issues.

Therefore, the Canadian court is not limited to Canadian entitlements and remedies of relief and can grant motions for recognition and implementing of foreign proceedings measures, provided

that such measures fall within the limits indicated in Hartford Computer Hardware, Inc. (Re), 2012 ONSC 964.

**\* End of Assessment \***