



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.

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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 or Avenir Next 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: 202223-336.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 “studentID” 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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **8 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

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 of 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 **most correct** answer from the options below:

The purpose(s) and objective(s) of the BIA is / are 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 statements are correct.

Question 1.5

Which of the following is **not** included in the definition of an “insolvent person” under section 2 of the BIA:

- (a) A person who is not bankrupt.
- (b) A person who resides or carries on business or has property in Canada.
- (c) A person whose liabilities to creditors provable as claims under the BIA amount to at least CAD 10,000.
- (d) A person (i) who is unable to meet obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course of business as they generally become due, or (iii) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all his obligations due and accruing due.

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:

Insolvency proceedings in Canada are governed primarily by federal statutes.

(a) True.

(b) False.

Question 1.8

Indicate whether the statement below is true or false:

The CCAA is a debtor-in-possession restructuring statute designed for the reorganisation of insolvent companies with debts under CAD 5 million.

(a) True.

(b) False.

Question 1.9

Indicate whether the statement below is true or false:

In Canada, both natural persons and legal entities may be subject to bankruptcy proceedings under the BIA.

(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 in total]

Question 2.1 [maximum 3 marks]

Identify three of the recognised purposes of the BIA.

③

1. Providing for financial rehabilitation of insolvent persons;
2. Providing a collective proceeding in terms whereof the property of a bankrupt can be distributed on an orderly and fair basis amount the unsecured creditors on a *pari passu* basis (on equal footing / treated the same);
3. Allowing for an investigation to be launched into the affairs of a bankrupt.

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?

1. Personal items and clothes;
2. Furniture, food and utensils in the bankrupt's primary residence;
3. Tools of the bankrupt's trade required to do his work;
4. Motor vehicle with a certain maximum value;
5. Certain farm property.

②

Question 2.3 [maximum 3 marks]

Name three types of court-officers that may be appointed in insolvency proceedings.

1. Trustee in bankruptcy's
2. Monitor in Company Arrangements
3. Receiver in Receiverships

③

Question 2.4 [maximum 2 marks]

What is the definition of a "person" in section 2 of the BIA?

"person includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person"

②

QUESTION 3 (essay-type question) [15 marks]

Question 3.1 [maximum 8 marks]

Write an essay on the difference between a private receiver and a court-appointed receiver.

In your essay you should refer to at least the following: (i) how each type of receiver is appointed, (ii) the duties of each type of receiver, and (iii) the circumstances in which each type of receiver is generally used.

A receiver is a licensed professional who has the authority to deal with a debtor company's assets, to operate and manage the business and to shut down the business if it is to the prejudice of the creditors if the business continues to operate or where there are not sufficient funds to continue to operate.

There are two types of receivers:

1. Private receiver –

- (i) Receivers can be appointed in terms of security agreements entered into between the debtor and the secured creditor where the security agreement makes provision for the appointment of receivers. Receivers appointed in terms of such a security agreement are referred to as private receivers.

In terms of the security agreement, the secured creditor has a contractual right to appoint a receiver in circumstances where the debtor is unable to meet its obligations.

- (ii) It is a privately-appointed receiver's primary duty is to act to the benefit of the secured creditor who appointed him. He, however, also has a general duty in terms of Section 247 of the Bankruptcy and Insolvency Act 1985 ("BIA") to act honestly, in good faith and to deal with the assets of the debtor in a commercially reasonable manner. He therefore has a duty to attempt to sell the debtor's assets for the best possible price in order to maximise recoveries on these assets. In terms of Section 243(2)(b) of the BIA read with Section 243(2)(b)(ii) of the BIA, a receiver appointed under a security agreement is appointed to take possession or control of all or substantially all the assets, accounts receivable or other property of a debtor, which assets were acquired for the purpose of using same in the carrying on of a business by the debtor.

- (iii) Private receivers are generally used in circumstances where the business is small, there are not a lot of assets and where there will not be competition between creditors' claims or disputes with the debtor.

2. Court-appointed receiver –

- (i) In terms of Section 243(1) of the BIA a secured creditor can apply to court for the appointment of a receiver in circumstances where the debtor is unable to meet its obligations to take control of the business of the debtor. Receivers appointed in terms of a court order granted under such an application are referred to as court-appointed receivers.

- (ii) Court-appointed receivers are officers of the court and has duties to all creditors, not only the creditor that applied for his appointment. They take directions and instructions from the

→ could this analysis have been more comparative/following?

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court. In terms of Section 243(1)(a) – (c) a Court-appointed receiver may take possession or control of all or substantially all the assets, accounts receivable or other property of a debtor, which assets were acquired for the purpose of using same in the carrying on of a business by the debtor; exercise control over the property and business or take any other action the court considers advisable. He can sell the assets, but with court approval. In terms of Section 247 of the BIA he has the duty to act honestly and in good faith and to deal with the property of the debtor in a commercially reasonable manner.

- (iii) Court-appointed receivers are generally appointed in more complex matters, especially where there will be competing claims or disputes with the debtor, or where it appears likely that court-involvement will be required on an ongoing basis.

Question 3.2 [maximum 7 marks]

Write a short essay that identifies the three methods for entering into bankruptcy. In your essay, explain the meaning of an “act of bankruptcy”.

There are three methods that can be used to enter into bankruptcy. These methods are the following:

1. **Involuntary bankruptcy –**

In terms of Section 43(1) of the Bankruptcy and Insolvency Act 1985 (“BIA”) one or more creditors may apply for a bankruptcy order against a debtor. In the application, the creditor(s) must allege that:

- (a) The debtor owes applicant creditor(s) an amount of CAD 1,000.00; and
- (b) The debtor committed an act of bankruptcy within six months prior to the filing of the application.

In terms of the definition of “debtor” in Section 2 of the BIA, a debtor includes and insolvent person and any person who committed an act of bankruptcy at the time the debtor resided or carried on business in Canada.

In terms of Section 42(1) of the BIA a debtor commits an “Act of bankruptcy” if:

- (a) in Canada or elsewhere the debtor makes an assignment of his property (transfers rights, property or other benefits) to a trustee for the benefit of his creditors;
- (b) in Canada or elsewhere the debtor makes a fraudulent gift or transfer of his property, or a portion thereof;
- (c) in Canada or elsewhere the debtor makes any transfer of his property or a portion thereof, or creates any charge on it, that would be void under the BIA or null in the Province of Quebec as a fraudulent preference;
- (d) with intent to defeat or delay his creditors, he departs out of Canada, remains outside of Canada if he already left, or departs from his place of residence or otherwise absents himself;
- (e) he permits that his property be seized, levied on or taken in execution for certain periods of time as a result of any execution or other process issued against him;
- (f) he admits to his creditors that he is insolvent or represents them with a written admission that he is unable to pay his debts;
- (g) he assigns, removes, secretes or disposes of or attempts or is about to commit any of these acts in relation to any of his property with the intent to defraud, defeat or delay his creditors or any of them;
- (h) he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts;
- (i) he defaults in any proposal made under the BIA; and

(j) he ceases to meet his liabilities generally as they become due.

The court will require proof of the facts alleged as referred to above at the hearing of the application and if the court is satisfied with the proof presented, may make a bankruptcy order (Section 43(6) of the BIA).

2. Voluntary bankruptcy –

In terms of Section 49(1) of the BIA an insolvent person may make an assignment of all his property for the general benefit of his creditors.

An insolvent person is defined in Section 2 of the BIA as *"a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and*

- (a) who is for any reason unable to meet his obligations as they generally become due,*
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or*
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."*

The assignment must be accompanied by a sworn statement showing the property that is available to be divided between his creditors, names and addresses of all his creditors and the amounts owed to the respective creditors' (Section 49(2) of the BIA). The assignment, together with the sworn statement, must be filed with the Official Receiver in the locality of the debtor. In terms of Section 2 of the BIA the locality of the debtor is the principal place where the debtor carried on business or resided during the year prior to the assignment being made. In terms of Section 49(3) of the BIA The assignment does not come into effect until it has been filed. The Official Receiver will file the assignment if it is in the prescribed form and it is accompanied by the sworn statement, at which time the bankruptcy proceedings commence.

3. On the failure of, or failure to perform in terms of, a proposal in terms of the BIA –

Debtors are, in terms of the BIA, allowed to make proposals to creditors with the purpose of reaching a compromise with creditors. The proposal may be made by an insolvent person, a receiver in relation to an insolvent person, a liquidator of an insolvent person's property, a bankrupt and a trustee of a bankrupt estate (Section 50(1) of the BIA).

The proposal can be filed by filing a Notice of Intention to make a proposal with the Official Receiver or by filing an already developed proposal with a licensed trustee. The trustee then files the proposal, together with a cash flow statement, which filing commences the bankruptcy proceedings.

The proposal must be accepted by the majority of the proven creditors in that particular class, in number, together with two-thirds of the proven creditors in that class in value. The aforementioned is applicable for each class of creditors that is affected by the proposal. The proposal must, upon acceptance by the creditors, be approved by the court.

If a corporate proposal is rejected by a class of creditors or if the proposal is not approved by court, the debtor is deemed to have made an assignment in bankruptcy. If a debtor defaults and does not perform in accordance with the terms of the proposal, and such default is not waived by the insolvency committee (if one exists) or the creditors, the proposal trustee has a duty to

inform the creditors and the Official Receiver accordingly. Thereafter a motion must be brought to the court to annul the proposal and if the court accordingly annuls the proposal, the debtor is automatically assigned into bankruptcy.

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Similarly, if a consumer proposal fails, a motion must be brought to the court to assign the debtor into bankruptcy.

QUESTION 4 (fact-based application-type question) [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 that foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. An 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. This 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.

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 this regard?

The foreign agent may apply in terms of Section 269(1) of the Bankruptcy and Insolvency Act 1985 ("BIA") to the court for recognition of the foreign proceeding in respect of which is he a foreign representative.

The application must, in terms of Section 269(2) of the BIA, be accompanied by the following documents before it will be considered by the court:

- (a) A certified copy of the instrument (foreign court order) commencing the foreign proceeding or a certificate from the foreign court confirming the existence of the foreign proceeding;
- (b) A certified copy of the instrument (foreign court order / certificate of appointment / or document) appointing the foreign representative to act in his capacity as such or a certificate from the foreign court confirming the authority of the foreign representative to act in his capacity as such; and
- (c) A statement identifying the existence of all the foreign proceedings that are pending in respect of the debtor that are known to the foreign representative.

In terms of Section 269(3) of the BIA, the documents referred to in (a) and (b) above, may be accepted by the court as evidence that the proceeding referred to therein is a foreign proceeding and that the

→ could we have listed the formal proof requirements?
1. Foreign proceeding
2. Foreign representative
3. COME ANSWER

applicant is a foreign representative without further proof being provided by the foreign agent (applicant).

In the absence of the documents referred to in (a) and (b) above, any other evidence of the existence of the foreign proceeding and the authority of the foreign representative may be accepted by the Court in terms of Section 269(4).

In terms of Section 270(1) of the BIA the court shall recognise the foreign proceeding if the court is satisfied that:

1. the application for recognition relates to a foreign proceeding; and
2. the applicant is a foreign representative in respect of that foreign proceeding.

A foreign proceeding is defined in Section 268(1) of the BIA as *"a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's 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 reorganization or liquidation."*

A foreign representative is defined in Section 268(1) as *"a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or (b) act as a representative in respect of the foreign proceeding."*

The foreign proceeding will therefore, if an application as detailed above is launched and all the required documents are lodged, be recognised as a foreign proceeding and the foreign agent will be recognised as a foreign representative, as the definitions as referred to above are complied with. As such, the foreign proceedings will be recognised as a foreign proceeding.

3.5

Question 4.2 [maximum 5 marks]

The foreign agent wants to understand the factors considered by a court in determining whether a jurisdiction is a "centre of main interest" in respect of a foreign proceeding. What would you inform the foreign agent in this regard?

Section 268(2) of the Bankruptcy and Insolvency Act 1985 ("BIA") creates an assumption with reference to a centre of main interest ("COMI"). In terms of the said section, in the absence of proof to the contrary, a company debtor's COMI will be deemed to be the registered office and an individual's COMI will be his ordinary place of residence.

The court identified three considerations, which must be considered as a whole, when the question as to where a debtor's COMI is found is considered. These considerations are, as per the judgment in *Re Mr Gox [2014], ONSC 5811*, the following:

1. the location recognised by the majority of creditors as being the company's COMI;
2. the location where the principal assets or operations are situated; and
3. the location of the debtor's headquarters, head office or nerve centre (place from where the company's activities are controlled and where its management meet).

With reference to what has been stated hereinabove, the following will be considered to ascertain the COMI of the online seller that the foreign agent is representing:

1. Location of the online seller's registered head office – Foreign jurisdiction;
2. Location of the online seller's senior management – Foreign jurisdiction;

3. Location of the online seller's primary assets – worldwide;
4. Location of the majority of the online seller's creditors or the majority of creditors that will be affected by the recognition – worldwide;
5. Location of the online seller's other premises (fulfilment office & warehouse) – Canada;

The jurisdiction whose law will apply to most of the disputes will therefore be that of the foreign jurisdiction, as the registered head office, senior management and certain of the primary assets are situated the said foreign jurisdiction. The COMI of the online seller will therefore be the foreign jurisdiction.

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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 that they can provide. Advise the foreign agent in this respect.

In terms of Section 272(1) of the Bankruptcy and Insolvency Act 1985 ("BIA"), if an order recognising the foreign proceeding is granted, the foreign agent may apply to court for any order that the court considers appropriate. In this regard a court may, if it is necessary for the protection of the debtor's property or the interest of the creditor(s), make any order that it considers appropriate.

The court, in the matter of Hartford Computer Hardware Inc, 2012 ONSC 964, referred to a similar section in the Companies Creditors Arrangement Act 1985 ("CCAA"). Section 49 of the CCAA also provides that, in recognising an order of a foreign court, the court may make any order that it considers appropriate if it is necessary for the protection of the debtor company's property or the interest of the creditor(s). The court held that an order as applied for can be granted as long as the order does not raise public policy issues.

Section 284(1) of the BIA provides that, on the application of a foreign representative, nothing in this Part of the Act prevents the court from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the Act and Section 284(2) of the BIA provides that nothing in this part of the Act prevents the courts from refusing to do something that would be contrary to public policy.

With reference to what has been stated above, the Canadian Courts are therefore not restricted from exercising its discretion to only entitlements and remedies available under Canadian Insolvency Law and can grant relieve not available in Canadian proceedings as long as it is not contrary to the Canadian public policy.

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*** End of Assessment ***