



**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.

42.5 / 50

### 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.

1. Providing for the financial rehabilitation of insolvent persons.
2. Providing for the pari passu, orderly, and fair distribution of property among unsecured creditors in a single, collective proceeding.
3. Allowing for investigation of the bankrupt.

(3)

4. Voiding or setting aside fraudulent transfers, preferences, and other transactions which fraudulently reduce the creditors' ability to share equally from estate assets.

**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?

Individuals may retain a portion of their income. The income individual debtors may retain is what is necessary to maintain a reasonable standard of living.

*Specific assets in a list*  
(5)

**Question 2.3 [maximum 3 marks]**

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

1. Monitor
2. Trustee
3. Receiver

(3)

**Question 2.4 [maximum 2 marks]**

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

The term "person" under Section 2 of the BIA is quite broad, and includes (1) partnerships, (2) unincorporated associations, (3) a corporation, (4) a cooperative, (5) the successors of such person, (6) the heirs, executors, liquidators, administrators, or other legal representatives of such 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 secured creditor may bargain for the contractual right to appoint a private receiver in the case of default. In this case, the private receiver is selected by the secured creditor. The private receiver has a general duty to act honestly, in good faith and in a commercially reasonable manner, but their duties are primarily to the secured creditor who provided for their appointment. Secured creditors may benefit from the quick and cost-efficient nature of private receivers, but potential successor liability generally makes private receivers an uncommon choice except in the case of a small business or uncontested right to a discrete pool of assets.

*Not necessarily answering questions.*

Court-appointed receivers are more commonly used, especially in complex or contested cases where successor liability may be a concern. In this case a secured creditor or interested party may apply to the court for appointment of a receiver either under Section 243 of the BIA or the local provincial Courts of Justice Act, respectively. When a receiver is appointed by the court, they derive their power from the court's order appointing them (in addition to powers provided for in legislation) and therefore, as an officer of the court, the receiver owes a duty to all creditors and to the debtor. This is

in contrast to a private receiver, who owes a particular duty to the creditor who appointed them. Following the realization of the debtor's assets, the receiver will distribute the proceeds and facilitate the claims process, if required.

An interim receiver, a type of court-appointed receiver, may be appointed when the debtor has perishable or rapidly-depreciating property. In this case, the interim receiver is only entitled to take conservation measures, including disposing of said perishable property. The interim receiver's appointment will terminate when the receiver or trustee in bankruptcy takes over, upon approval of a proposal, or after the expiration of the appointment period determined by the court.

2

**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".

The three methods for entering into bankruptcy are (1) an involuntary bankruptcy, (2) a voluntary bankruptcy, and (3) the failure of a BIA proposal or failure to perform under a BIA proposal.

An involuntary bankruptcy is commenced by one or more applying creditors who must show (1) the unsecured debt owed to them exceeds \$1,000 CAD, and (2) within six months of application, the debtor committed an act of bankruptcy. An "act of bankruptcy" includes conduct which shows either (1) the debtor violated standard practices of "commercial morality" by trying to frustrate the creditor's legitimate collection efforts, or (2) the debtor is insolvent. Acts of bankruptcy are provided for in Section 42 of the BIA and include conduct such as making an assignment for the benefit of creditors or making a fraudulent conveyance.

A voluntary bankruptcy is commenced not by creditors, but when the debtor themselves makes an assignment into a bankruptcy proceeding under the BIA. The bankrupt entity or person makes an assignment of their assets for the benefit of creditors, which is filed with the Official Receiver. For there, the debtor's selected trustee is confirmed (or not) by unsecured creditors and the case commences.

3

Finally, a debtor might enter bankruptcy because of the failure of a prior proposal or the debtor's failure to perform thereunder. If a debtor defaults under the terms of a proposal, the proposal trustee will inform the creditors and the Official Receiver and brings a motion to annul the proposal. If the court grants the motion, a corporate is automatically assigned into bankruptcy. However, a consumer debtor may only be assigned into bankruptcy upon separate motion.

→ more detail?

**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 process of obtaining recognition of a foreign proceeding in Canada is provided for under the provisions for the BIA and CCAA. Canadian courts must recognize a foreign proceeding when formal proof of three requirements is presented.

First, the applicant must prove that the proceeding is a "foreign proceeding" under the statutory definition. Under BIA Section 269(2)(a) and CCAA Section 46(2)(a), the Canadian court may accept a certified copy of the instrument which commence the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding as evidence of the "foreign proceeding." (See BIA Section 269(3) and CCAA 46(3)).

Second, the applicant must prove that they are a "foreign representative" under the statutory definition. Under BIA Section 269(2)(b) and CCAA Section 46(2)(b), the Canadian court may accept a certified copy of an instrument authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the representative's authority to act. (See BIA Section 269(3) and CCAA 46(3)).

Third, the Canadian Court must determine whether the foreign proceeding is a main proceeding or a non-main proceeding in order to determine whether a stay of Canadian proceedings will issue. This analysis is based on the Centre of Main Interest (COMI) structure. If the Court determines the foreign proceeding is a main proceeding, a stay of Canadian proceedings will issue automatically. If the Court determines the foreign proceeding is a non-main proceeding, then a stay may be requested, but the Court has discretion to determine whether such a stay is necessary to protect the Debtor's property or the creditors' rights.

Following the presentation and recognition of the above three points, the foreign representative will have standing in Canadian courts to request additional relief or recognition.

**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?

The first step in a COMI analysis under both the CCAA and BIA is to determine the default COMI. For an individual, this will be the ordinary place of residence. For a corporation, this will be the company's registered office. The analysis begins with a rebuttable presumption that either the ordinary place of residence or the registered office is the debtor's COMI. However, such presumption can be rebutted by the presentation of proof to the contrary.

3

→ could we have defined foreign representative + foreign proceeding per the statutes here?



So what is your opinion for the client?

In determining if the presumption should stand, a court might consider where the debtor's major creditors who assume the debtor's COMI is, the primary location of the debtor's major assets or operations, and the location of the debtor's headquarters or "nerve centre." If any or all of these factors indicate a different jurisdiction than the default jurisdiction, the Court may find that the presumption has been rebutted and therefore the debtor's COMI is not the jurisdiction of their principal residence (for individuals) or registered office (for corporations).

By way of example, in *In re MtGOX Co*, the Court found that the debtor's COMI was in Japan because the company was registered in Japan, the books and records were in Japan, the relevant directors were located in Japan, and the bank accounts were in Japan, among other factors. The company did not have assets or offices in Canada, and therefore no evidence was presented to rebut the presumption that the COMI was in Japan. The court ultimately concluded that the Japanese proceeding was a foreign main proceeding.

**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.

No, a Canadian court is not necessarily limited to providing only the remedies available under Canadian insolvency laws. The CCAA and BIA both include a sweeping obligation to cooperate with the foreign representative and foreign court and a grant of broad discretion which allows the Canadian court to make an order that it considers appropriate in reaching that end. This broad discretion to exercise entitlements and remedies is slightly limited by a public policy exception, which provides that a Court may refuse to do something if it runs afoul of Canadian public policy. (See e.g. *Canadian Imperial Bank of Commerce v. ECE Group Ltd.*) However, Canadian courts are unlikely to invoke this exception when there is fair and even treatment of Canadian creditors or where Canada has strong economic ties and familiarity with the jurisdiction, such as the United States or United Kingdom.

**\* End of Assessment \***

