



**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.
- X (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.

X

**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]**

②

Identify three of the recognised purposes of the BIA.

1. To set out the bankruptcy regime for individuals and the liquidation of businesses
2. To govern debtor in possession proposals

① financial rehabilitation

② collection proceeding

③ investigation into affairs of bankrupt

3. Sets out a restructuring process that allows debtor companies to reach compromise with their creditors

**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?

*Specific assets,*

Generally the property exempt from bankruptcy includes property held in trust for another person, RRSP's and property that is exempt from seizure under provincial law where the debtor is resident.

X

*↳ list some?*

*(5)*

**Question 2.3 [maximum 3 marks]**

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

1. The Office of the Superintendent of Bankruptcy
2. Official Receivers *can*
3. Court appointed receiver

*(1)*

**Question 2.4 [maximum 2 marks]**

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

A person includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, as well as the successors, heirs, executors, liquidators of the succession, administrators or other legal representative 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.

There are two types of receivers who are licensed professionals who are given authority to deal with the debtors assets. The debtors assets do not vest in the receiver, instead the receiver has the right in terms of the appointing instrument to take possession of the assets and sell them if the case requires. The two types of receivers are privately appointed receiver and court appointed receiver.

A privately appointed receiver is appointed in terms of a security agreement entered into between the debtor and the secured creditor. When a secured creditor provides security to the debtor there would be a clause in the agreement that the secured creditor has a contractual right to appoint a receiver if the debtor is unable to meet its obligations in terms of the agreement. Appointment of a private receiver does not involve court attendance and can be done quickly. Private receivers derive their powers from the security agreement. Thus the private receiver owes a duty primarily to the

secured creditor that appointed it however the receiver also has a general duty to act honestly, in good faith and in a commercially reasonable manner when dealing with the debtors assets. Private receivers are most often used where there is a small business or a discrete pool of assets and there will be competing creditors' claims.

Court appointed receivers are appointed by court on application in terms of section 243 of the Bankruptcy and Insolvency Act by the secured creditor when the debtor is unable to meet its obligations under a security agreement. The Courts of Justice Act also make provision for a court appointed receiver to be appointed on application by any interested party where it is "just and convenient" to do so. The court appointed receiver derives its powers from the court order and legislation governing its powers. A court appointed receiver is an officer of the court and has duties to all creditors of the debtor. The court appointed receiver reports and take directions from court, not the creditor that applied for the receiver's appointment. The court appointed receiver will have a duty to realize the assets of the debtor and seek to distribute the proceeds to creditors in accordance with their entitlements and priority under court approval. The appointment of court appointed receivers normally takes place in complex matters as the receiver will generally have court approved powers to sell and have wider ranging powers backed by court authority.

### 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 of entering into bankruptcy involuntary, voluntary and on the failure of, or failure to perform the terms of, a BIA proposal.

Involuntary bankruptcy is brought by way of an application by a creditor before the bankruptcy court in the location where the debtor ordinarily resides, does business, has assets or property, or in the case where the debtor has no assets in Canada, where it did business within the previous year. The creditor must prove it is owed in excess of CAD 1000 of unsecured debt and provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of filing the application. An "act of bankruptcy" are listed in sections 42(1) (a) - (j) of the BIA.

- (a) In Canada or elsewhere the bankrupt make an assignment of property to a trustee for the benefit of creditors
- (b) In Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or any part of it
- (c) In Canada or elsewhere the debtor makes any transfer of the debtor's property or any part of it, or creates any charge on it, that is a fraudulent preference
- (d) The debtor, with the intent to defeat or delay his creditors, departs out of Canada or remains out of Canada or departs from his dwelling or otherwise absents himself
- (e) Permitting for certain specified periods of time, execution under which the debtor's property is taken
- (f) An admission of his inability to pay his debts
- (g) The debtor assigns, removes, secretes or disposes of or attempts to do the same with his property with the intent to defraud, defeat or delay his creditors
- (h) Giving notice to creditors that the debtor has suspended or is about to suspend payment of his debts
- (i) Defaulting on a proposal
- (j) If the debtor ceases to meet liabilities generally as they fall due

Act of bankruptcy generally reflect the debtor either violated certain norms of commercial morality by attempting to frustrate the collection of debts by the creditor or that the debtor is unable to pay his debts as the fall due.

Voluntary bankruptcy does not require a court application and is done in terms of section 49 of the BIA. The debtor must execute an "assignment" of its property for the benefit of creditors which is accompanied in the prescribed form by a sworn statement that discloses the debtors property, the names and addresses of creditors and the amounts of each creditors claim. One of the qualifying criteria of voluntary bankruptcy is the requirement that the debtor must fall within the definition of an insolvent person as described in the BIA. An "insolvent person" is described as a person who is not bankrupt, resides or carries on business or has property in Canada, and whose liabilities to creditors amount to at least CAD 1000. Furthermore the debtor must be generally unable to meet his obligation as they generally become due or has ceased paying current obligations in the ordinary course of business as they generally become due or has the aggregate of his property at fair valuation not sufficient to enable payment of his debts due. The documents are filed with the Official Receiver in the locality of the debtor. Once the Official Receiver accepts the assignment, the Official Receiver shall appoint a trustee chosen by the debtor. The appointment of the trustee is subject to confirmation by creditors.

The third method of applying for bankruptcy is the failure of a BIA proposal which is set out in section 50 to 66 of BIA. The sections make provision for corporate and consumer proposals to be filed and accepted by creditors of the debtor with the intent a reaching a compromise with creditors.

For a corporate proposal to be binding on each class of creditors

↳ good start; could have completed this thought.

#### 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?



In 2009 amendments were made to the BIA and CCAA which adopted a modified version of the UNCITRAL Model Law in Part XIII of the BIA and a new part of IV of the CCAA. The principals of the Model Law on recognition of a foreign proceeding are two-fold. Firstly it is mandatory to recognise a foreign proceeding, unless it's contrary to public policy. Secondly the classification of the "foreign proceeding" is either a "foreign main proceeding" or a "foreign non-main proceeding". If a foreign main proceeding is recognized all proceedings in the recognized jurisdiction must be stayed. The Canadian courts require proof of three requirements before a foreign proceeding can be recognised. Firstly the foreign proceeding must meet the statutory definition of "foreign proceeding". Secondly the application by the foreign representative must fall within the statutory definition of "foreign representative". Whether or not the proceeding is classified as a "foreign main proceeding" or "foreign non-main proceeding" depending on where the debtors centre of main interest is located.

→ could we have defined these terms for the client?  
i.e. s.45(1) statutory definitions?

3

#### 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?

There is no statutory definition of "centre of main interest" in either the CCAA or BIA however there is a rebuttable presumption. In the case of an individual the COMI, in the absence of proof to the contrary, is the debtors ordinary place of residence. In the case of a company, in the absence of contrary proof, is the company's registered office. The courts will consider the following when determining the COMI. Firstly, the location that significant creditors recognise as being the centre of the company's operations. Secondly the location in which the debtors' principal assets or operations are located. Thirdly the location or headquarters, head office or "nerve centre". Once the COMI is determined the foreign proceeding will either be classified as a "foreign main proceeding" or "foreign non-main proceeding". If the COMI of the debtor is located in Canada, the foreign proceeding will be recognised as a "foreign main proceeding". If the COMI is located outside of Canada, the foreign proceeding will be recognised as a "foreign non-main proceeding". Based on the fact that the head office of the debtor is located in a foreign jurisdiction and its senior management are also located in the foreign jurisdiction, the Canadian court will recognise the foreign proceeding as a foreign non-main proceeding.

good.

possible

→ could we have discussed the warehouse/fulfilment centre factor?

#### 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.

Canadian courts are not restricted in the relief that they can provide a foreign representative. The BIA and CCAA are broadly worded and discretionary powers are provided when a foreign proceeding is recognised. The court may also make any order it deems appropriate on application by the foreign representative. The Canadian courts may make any order it considers appropriate, which may include, but is not limited to, orders in relation to the examination of witnesses and the taking of

evidence and provision for the information of the debtor's property and affairs. The Canadian courts are also not restricted to ordering remedies that are available under Canadian insolvency law. In the past the Canadian courts have ordered relief in foreign main proceedings that would not have been available in Canadian proceedings.

→ subject to public policy exceptions

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\* End of Assessment \*