



**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.

38/50

### 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. X
- (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.

- (i) It provides a legal framework for persons (whose financial condition is plagued with insolvency) to be financially rehabilitated.

③

- (ii) It provides a legal framework for instituting collective proceedings in which the secured creditors of an adjudged bankrupt can benefit from a structured and equitable distribution of the bankrupt person's assets albeit in proportion to the size of their claims (*pari passu* basis).
- (iii) It provides a mechanism for recovery of a bankrupt's assets by annulment of disposals that are tainted with under valuing, preferential treatment or other fraudulent transactions so that the recovered assets may join the value pool available for the structured and equitable distribution amongst creditors (on a *pari passu* basis).

**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?

- (i) Food, utensils and household furniture at the debtor's permanent residence.
- (ii) Clothing apparel and other personal effects.
- (iii) Tools required for the debtor's occupational work.

↳ full list?

①

**Question 2.3 [maximum 3 marks]**

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

- (i) Trustee (eg. s.71 BIA)
- (ii) Receiver (eg. s.243 BIA)
- (iii) Liquidator (eg. S. 130 WURA)

③

**Question 2.4 [maximum 2 marks]**

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

Full definition preferred

X It is widely couched to encompass (over and above an individual) a partnership, an unincorporated business, a body corporate, a cooperative society or organisation and their legal representatives or anyone taking over their legal interest by operation of law.

①

**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 some marked differences between a private receiver and a court appointed receiver some of which are outlined below.

**In terms of appointment**, a private receiver is appointed by a secured creditor pursuant to contractual powers embodied in an instrument such as a debenture or mortgage. Such appointment takes place outside Court with no requirement for preceding litigation.

By contrast, a Court appointed receiver is appointed by the Court pursuant to statutory powers vested in the Court (e.g. s.46(1), 47(1) or s.243 of the BIA) and exercisable after instituting a Court case.

**There are also differences in terms of duties.** The primary duties of a private receiver are owed to the secured creditor who appointed him and the duties can be set out in the security document pursuant to which he was appointed and also in the deed or instrument of appointment. He reports to and is accountable to the creditor who appointed him.

As for a Court appointed receiver, he is an officer of the Court and duty bound by directions in the Court order of appointment, any relevant statutory prescriptions and any subsequent directions from the Court issued from time to time. A Court appointed receiver owes duties to all creditors and reports to the Court.

**In terms of circumstances of use**, private receivers are typically used: (i) where the debt recovery process is not contentious as between creditor and debtor; (ii) where there are no competing creditor claims; and (iii) where the asset pool is on the smaller side. The receiver enforces the secured creditor's interests in the collateral in response to the debtor's default.

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Court appointed receivers on the other hand can be used as an interim measure of preservation of assets pending determination of the Court case (interim receivers) where there is a risk of waste or dissipation before the dispute is resolved or where the ownership of the assets is contested. Court appointed receivers can also be used in compounded situations where there is contention between the creditor and debtor or where there are cross claims amongst different creditors. They can also be used to realise the assets of the debtor and equitably distribute the value amongst the creditors in proportion to their claims before later assigning the debtor into bankruptcy proceedings (if it is so made out to the Court).

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**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 ways of entering into bankruptcy in Canada are:

- (i) voluntarily at the instance of the bankrupt (s.49 BIA);
- (ii) involuntarily (for the bankrupt) at the instance of a third party/creditor (s. 43(1) BIA); and
- (iii) consequential to a failure associated with a BIA proposal (eg. ss. 57 and 66.30(5) BIA).

**Voluntary bankruptcy** is an out of Court process instituted by the debtor itself through a filing with the Official Receiver in which the debtor assigns its property for the benefit of creditors; and to be administered by a trustee of the debtor's choosing, subject to confirmation by the unsecured creditors. In order to be entitled to this 'self help' process, the financial health of the debtor must qualify as one of a state of insolvency (insolvent person) within the meaning of s.2 of the BIA. The proceedings commence once the assignment is accepted and filed by the Official Receiver (s.49(3) BIA).

**Involuntary bankruptcy** at the instance of a creditor is a process whereby the creditor moves the Court to make a bankruptcy order against a debtor. Two broad criteria have to be met to entitle the creditor to such relief (s. 43(1) BIA):

- (i) there must exist an unsecured debt owed to it by the debtor of CAD1,000 or more; and
- (ii) there was an act of bankruptcy committed by the debtor in the 6 month period before the creditor moved the Court.

The term 'act of bankruptcy' has found meaning (in s.42(1) of the BIA) to encompass broadly speaking either (i) a deplorable act on the part of the debtor calculated to hinder or prevent debt recovery by creditors; or (ii) an act which shows that in terms of financial health the debtor is in a state of insolvency.

→ Full definition/except preferred.

The trustee in bankruptcy is proposed by the applicant for the bankruptcy order but subject to vetting by the unsecured creditors (s. 43(9) BIA).

As stated above, bankruptcy can also be entered into as a consequence of a failure associated with a BIA proposal. There are two possible limbs to this:

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- (i) the first is where a debtor fails to honour the terms of its BIA proposal then if such default is not remedied and not waived (by the creditors or their appointed inspectors), the Court can be moved to annul the proposal. Annulment if granted operates to assign the debtor into bankruptcy; and
- (ii) the second limb is where a corporate proposal is either rejected by the eligible cluster of creditors who voted or if it is accepted by them but not approved by the Court, in which event it is deemed that the debtor made an assignment in 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?

Since the company's debts exceed CAD5million, the foreign agent can apply not just under the BIA but the CCAA too as an alternative route for recognition.

The process would require a formal application to a Canadian court with jurisdiction. The application would have to be supported by evidence to prove that the foreign agent qualifies as a 'foreign representative' and that the proceedings in his country qualify as 'foreign proceedings' within the statutory definitions (under s.268(1) BIA or s.45(1) CCAA).

→ could we have listed the three formal requirements?

This could be achieved by exhibiting (under s.269(2) BIA or s.46(2)(a) CCAA):

- (i) certified copies of the Court process that instituted the foreign proceeding or a certificate from the foreign court attesting to the existence of the proceedings; and
- (ii) a certified copy of the instrument or court order appointing the foreign agent to monitor the company's business or financial affairs for purposes of reorganisation or to otherwise act as representative in respect of the foreign proceedings;

The background facts show that the foreign agent is authorised under the law and courts of the foreign jurisdiction concerning insolvent companies. Thus provided that proof of same is deduced in the Canadian court as alluded to in the previous paragraph, then the relevant part of the burden of proof would have been met.

It would also have to be proven to the court whether the proceedings are foreign main or non-main proceedings.

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Additionally, there would have to be a disclosure of all proceedings that the foreign agent is aware of against the company, in his home country.

If the above recognition requirements are met and if the recognition would not result in a conflict of with Canadian public policy (s.284(2) BIA or s.61(2) CCAA) then the foreign agent and the relevant proceedings in his country would be recognised as 'foreign representative' and 'foreign proceedings', respectively.

Depending on the level of recognition given that is as a foreign main or foreign non-main proceeding, the foreign agent (as foreign representative) could either enjoy the benefit of an automatic stay of proceedings against the debtor company (including the class action lawsuit) or have to apply for one (s.271(1) and 272(1) BIA or s.48(1) and 49(1) CCAA). Such would help to safeguard the assets whilst he pursues a collective proceeding to maximise the recoveries in an orderly manner with an equitable distribution of value amongst the creditors on a *pari passu* basis.

**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 issue of centre of main interest (COMI) though not defined in the BIA would be the tipping point in whether to recognise as a foreign main proceeding (if the COMI is located there) or a foreign non-main proceeding (if the COMI is not located there).

✓ The BIA in s.268 also has a rebuttable presumption that the COMI for a company is located in the jurisdiction where its registered office is.

✓ Case law such as *Re Mt Gox* (2014) ONSC 5811 <sup>✓ good.</sup> has established three primary considerations for the Court in determining where the COMI lies:

- ✓ (i) the location recognised by significant creditors as the heart of the operations of the debtor company;
- (ii) the location housing the debtor's main assets or operations; and
- (iii) the location of the debtor's nerve centre or head office.

In the scenario at hand, the background information shows that the debtor's assets are in the hands of the foreign agent and that the debtor's head office is registered in the foreign jurisdiction from which he hails. Thus there appears to be more that points to the debtor's COMI being in the foreign jurisdiction than not.  
↳ what about the warehouse in Canada?

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Accordingly, there are reasonable prospects that if recognition of the foreign proceedings is given, it would be as 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.

✓ Under both the BIA (s.272(1)) and the CCAA (s.49(1)), the Canadian court is given broad discretionary power to grant post recognition remedies, which discretion is not limited to the remedies typically available under Canadian insolvency law. A case in point is the decision in *Hartford Computer Hardware Inc.* 2012 ONSC 964 which dealt with a s.49 CCAA application and the presiding Canadian court recognised a final debtor in possession facility order made by a foreign court from the United States of America.

✓ Therefore, in addition to or in place of remedies (under s.272(1)(a)-(d) of the BIA or s.49(1)(a)-(c) of the CCAA) such as the examination of witnesses and delivery of documents relating to the debtor company's affairs (including auditing the activities of the Canadian resident in charge), the foreign agent could request the Canadian court to grant a remedy or remedies which in the foreign agent's country of origin would be available and necessary in the circumstances.

↳ subject to public policy exceptions.

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**\* End of Assessment \***