



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

[Three of the recognized purposes of the BIA include, among others:

- Providing for the financial rehabilitation of insolvent persons
- Providing a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a pari passu basis

- Allowing for an investigation to be made 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?

[In the context of an individual bankruptcy, an individual is can keep some assets in order to maintain a reasonable standard of living. The types of assets that a debtor can keep include:

- Personal items and clothing
- Household furniture, food utensils in the permanent home
- Tools necessary to individual's work
- A motor vehicle with a value up to a certain limit
- Certain farm property

②

In certain provinces, such as Ontario, under the Execution Act, the principal residence of the debtor is exempt from forced seizure or sale if the value of the debtor's equity in the principal residence does not exceed a prescribed amount of CAD10,000.]

Question 2.3 [maximum 3 marks]

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

[Three types of court-officers that may be appointed are:

- Trustees in bankruptcy
- Court appointed receivers
- The Companies Creditors Arrangement Act monitor]

③

Question 2.4 [maximum 2 marks]

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

[In section 2 of the BIA, a person is defined as being 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 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 private receiver is one that is provided for in the security agreement between a debtor and a secured creditor. A secured creditor will usually have a contractual right to appoint a receiver in case

a debtor is unable to meet their obligations. The private receiver owes their primary duty to the party that appointed them. A private receiver must also act honestly, in good faith and in a commercially reasonable manner, including attempting to maximize recoveries and obtaining the best price for the assets of a debtor in the circumstances. Private receivers will not usually be required to attend court for private receiverships and are cost effective and fairly quick processes. Private receivers are usually preferred for small businesses or a discrete pool of assets and where there are not competing creditor claims or disputes with the debtor.

Court appointed receivers may be appointed under Section 243 of the Bankruptcy and Insolvency Act. Under this section a secured creditor may apply to court for the appointment of a receiver who will have national authority to take control over the business of a debtor should a debtor become unable to meet their obligations under a security agreement. The Court of Justice Acts of the respective provinces give the courts power to appoint a receiver following the application of an interest party, including shareholders or unsecured creditors, in the event it is just and convenient to do so, this is considered an equitable receiver. Court appointments are usually done in more complex cases especially where there are competing claims between creditors or disputes between a creditors and a debtor or in cases where it is likely from the outset that assistance of the court will be required on an ongoing basis. Court appointed receivers also provide a greater degree of comfort for creditors and professional from a liability point of view because while a court appointed receiver must have their decisions approved by court, a private receiver does not need to have their process approved by the court.

A court appointed receiver will usually have their powers set out in the court order and any specific legislation governing its powers. In practice, then appointing court usually issues a broad stay of proceedings which restricts creditors from exercising any remedies without seeking the approval of court for example ipso facto clauses. A court appointed receiver may borrow on a super priority basis. Commercial courts in Canada have template receivership order that set out the generally accepted powers and provisions of appointment. A private receiver will be limited to the terms of the agreement which govern their appointment.

A court appointed receiver is an officer of the court and unlike the private receiver has duties to all creditors of the debtor. They report and take instructions from court and not the creditor that appointed them, as would be the case with a private receiver.

A court appointed receiver has similar powers to those granted under a privately appointed receiver under a security agreement, although certain actions will require approval of the court. The sale of assets for example will require court approval.

Both private and court appointed receivers must meet the obligations of their appointment. The receiver must provide notice of their appointment to all known creditors and prepare and distribute interim and final orders concerning the receivership.

The report are filed with the office so the Superintendent of Bankruptcy and are available to all creditors. Court appointed receivers must report to court as and when necessary or required.]

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".

[In Canada, an act of bankruptcy occurs where a debtor commits an act which may suggest that the creditor is heading into or already in bankruptcy such as failure to pay debt obligations as and when they fall due.

The three methods to enter into bankruptcy in Canada are:

- Involuntary
- Voluntary; and
- On the failure of, or failure to perform the terms of, a BIA proposal

Involuntary Bankruptcy

In order to make an application for an involuntary bankruptcy order, the creditors must be owed in excess of CAD 1,000 of unsecured debt and provide evidence that a debtor has committed an act of bankruptcy in the six month prior to the date of the filing of an application.

An involuntary application is taken to the bankruptcy court in the location where the debtor ordinarily resides, does business, has assets, or property or in case there are not assets in Canada, where they did business in the previous year.

An act of bankruptcy involves:

- Conduct that shows that a debtor has violated certain norms of commercial morality by attempting to frustrate legitimate collection efforts from a creditor
- Conduct that shows that a debtor is insolvent

Section 42 of the BIA identifies acts of bankruptcy as:

- Where a bankrupt makes an assignment of property to a trustee for the benefit of creditors, in Canada or elsewhere
- Where a debtor makes a fraudulent gift, delivery or transfer of a debtor's property or any part of it, in Canada or elsewhere
- Where a debtor makes a transfer of the debtor's property or any part thereof or creates a charge on it, that is a fraudulent preference
- Where a debtor with the intent to defeat or delay creditors departs out of Canada or remains out of Canada or departs from his dwelling to otherwise absent himself
- Permitting for certain specified periods of time execution under which the debtor's property is taken
- Admission of inability to pay debts
- A debtor assigns, removes, secretes or disposes of or attempts or is about to do same with his property with the intent to defraud, defeat or delay his creditor or any of them
- Giving notice to creditors that the debtor has suspended or is about to suspend payment of debts
- Defaulting on a proposal
- A debtor ceasing to meet liability generally as they become due.

A debtor can object to an application, in which case the court will decide whether a bankruptcy order should be issued or not.

The Court may also appoint a bankruptcy trustee as an interim receiver of all or part of the property of the debtor if it is shown to be necessary for the protection of the estate of a debtor.

Voluntary Bankruptcy

This occurs when a debtor voluntarily makes an assignment into bankruptcy proceedings. This may be done for a number of reasons including to stay legal actions by creditors or in the case of an individual to obtain a fresh start once proceedings have concluded. In order to be eligible, a debtor must be an insolvent person. The process does not involve a court application. The company would execute an assignment of its property for the benefit of its creditors and that is accompanied by a sworn statement that discloses the debtor's property, the names and addresses of the creditors and the

→ definition?

names and amounts of the creditors' claims. These are filed with the Official Receiver and once accepted, the bankruptcy proceedings are commenced.

The debtor chooses the trustee, however, the selection is subject to confirmation by unsecured creditors at the first meeting of creditors.

The BIA may also annul a bankruptcy where in the opinion of the court a bankruptcy order should not have been made or an assignment filed. In order to annul a proceeding, the court must be satisfied that the debtor was not an insolvent person when they made the assignment, the debtor abused the process of the court with the debtor's intent determining whether an abuse of process has occurred.

Failure of, or failure to perform terms of a BIA proposal]

Proposals must be accepted by the majority of creditors and approved by the court. For a corporate proposal to be binding on each class of creditor, a majority of the proven creditors in that class by number, and two third of the proven creditors in that class by dollar value must approve the proposal. Once creditors approve a proposal it is binding on all creditors within the class.

If a proposal is rejected by the creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy, for individuals. For corporate entities, if a corporate proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy. If a debtor defaults under the terms of the proposal and the default is not waived by the inspectors or creditors, a trustee will be required to inform the court to annul the proposal. If the order is granted, the debtor is automatically assigned into bankruptcy.

The failure of a consumer proposal does not result in an automatic bankruptcy and a motion must be brought to assign the individual into bankruptcy.

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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 to commence and obtain recognition in Canada, is set out in the BIA and the CCAA and has three main requirements

1. That the proceeding is a foreign proceeding in accordance with the statutory definition in Canada
2. The applicant is a foreign representative in accordance with the statutory definition in Canada
3. The foreign proceeding must be a foreign main proceeding or a foreign non main proceeding based on the analysis of the centre of main proceeding.

The recognition application is commenced by a foreign representative who files sufficient evidence of the foreign law to allow the Canadian court to determine that they are a foreign representative and the proceeding is a foreign proceeding.

Case law demonstrates that these terms are subject to broad interpretation and allow an applicant to meet the requirement without much difficulty. Courts in Canada are more focused on the substance of the foreign law.

Once the recognition requirements are met, the recognition is automatic and compulsory, similar to the Model Law. The Court must make an order recognizing the foreign proceeding. If the court determines the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of proceedings. If it determines that the proceeding is a foreign non-main proceeding, the court may exercise its discretion and issue the order necessary for the protection of the debtor's assets or the creditors' interest.]

↳ could we have defined foreign representative and foreign proceeding per s. 45(1)?

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?

[The Canadian CCAA and BIA do not provide a statutory definition of the COMI. Each of the statutes has a rebuttable presumption.

For individuals, COMI, in the absence of any proof of the contrary, is the debtor's ordinary place of residence.

In the case of company, the COMI, again in the absence of proof to the contrary will be deemed to be the company's registered office.

↳ maybe court would consider Canada-based warehouse?

The Court has identified three key considerations in determining COMI:

1. Location that significant creditors recognize as being the centre of the company's operations
2. The location in which the debtor's principal assets or operations are found
3. The location of the debtors headquarters, head office or nerve centre

3

Once the COMI is determined, the foreign proceeding will be classified as a foreign main or nonmain proceeding depending on the location of the COMI.]

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.

[The Canadian Courts are not restricted in the relief that they can provide to foreign representatives.

The BIA and the CCAA contain broadly worded discretionary powers that provide where an order recognizing a foreign proceedings has been made.

The Court may make any order that it considers appropriate. This may include orders that will assist the foreign agent in this case to preserve the assets.

The court is not restricted in exercising the discretion to only providing the same or similar remedies as available under Canadian insolvency law. *ie. subject to public policy exemptions*

Canadian courts have in the past provided relief stemming from foreign main proceedings that are not ordinarily available under Canadian proceedings.

3

Depending on the powers that the foreign agent would like included in the order, the Canadian Court would be able to consider and at its discretion make a determination on whether or not to grant the relief requested. The foreign agent will be able to act in Canada and maximize recoveries.]

*** End of Assessment ***

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