



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.

31.5 / 56

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 rehabilitation of insolvent persons,
- 2) Providing a collective procedure for the orderly and fair distribution of the bankrupt's property amongst unsecured creditors in a pari passu manner,

3

- 3) Allowing for an investigation into the affairs of a bankrupt and to set aside any under value transfers so that creditors may share equally in the 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?

specific list?

Assets that an individual can keep are property held in trust for another or property that is exempt from seizure in provincial law where the debtor resides. Under section 67 of the BIA amounts held in RSPs are exempt from seizure subject to a 12 month clawback in the months leading up to bankruptcy. Depending on the province – the exemption on an individual's homestead is set at different values.

5

Question 2.3 [maximum 3 marks]

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

1. Trustees are appointed in BIA appointed bankruptcy proceedings who manage the proceedings.
2. A receiver is a licensed trustee in bankruptcy and by way of a court order, pursuant to a security sharing agreement, can be granted the right to take possession of the debtors assets and sell them subject to the receivership.
3. In CCAA proceedings distributions are generally overseen by a court appointed officer known as a "monitor".

2

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 organisation, 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 provided for in the security arrangement between the debtor and the secured creditor with the latter having the right to appoint the receiver. While the receiver will have

obligations to the secured creditor in the event that the debtor is unable to meet its obligations, they will have a general duty to act honestly, in good faith and in a commercially reasonable manner, including acting in a manner to maximise the value of the security to the benefit of the debtor and creditor. This type of receiver is generally used in small businesses or where the pool of assets is discrete and there are no competing claims or disputes with the debtor. Private receivers do not require any court involvement.

The above is in contrast to court appointed receivers, who are generally appointed in matters where there are competing claims on security where there are disputes with the debtor and or where it appears there will be ongoing assistance required from the courts. The benefit of having a court appointed receiver will be that the receiver derives their authority from the court and so such issues a fair value and process will have to have the court approval compared to a private receiver. The receiver can be appointed on application of a secured creditor or by any interested party (such as shareholder or unsecured creditor) where it is just and convenient to do so. The receiver will have duties to all creditors of the debtor, not just the creditor who sought their appointment – the receiver reports and takes instructions from the court.

→ answer is incomplete.

4

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 bankruptcy are;

1. Involuntary
2. Voluntary and
3. On the failure of, or failure to perform in terms of a BIA proposal

1. Involuntary bankruptcy is initiated by court application/order whereby the applying creditor must show that the debtor owes in excess of CAD1000 and that the debtor has committed an act of bankruptcy in the previous 6 months.
2. A voluntary bankruptcy is initiated when a debtor voluntarily makes an assignment into bankruptcy proceedings. The process does not involve a court application and the debtor executes an assignment of its property for the benefit of its creditors which is accompanied by a sworn statement that discloses the debtors property, names and addresses of the creditors and the amounts owed to them. Once the documents are accepted, proceedings have commenced.
3. The BIA includes provisions for proposals to be made and accepted by creditors and ratified by the court. Should any plan not get the approval of its creditors or a class of its creditors, the debtors is deemed to have made an assignment in bankruptcy

An act of bankruptcy is listed in the BIA and includes any of the following;

- a) In Canada or elsewhere the bankrupt makes and assignment of property to a trustee for the benefit of creditors.
- b) The debtor makes a fraudulent gift, delivery or transfer of the debtor's property or any part of it.
- c) The debtor makes any transfer of the debtors property or any part of it, or creates a 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 the country 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 or is about to do same with his property with the intent to defraud, defeat or delay his creditors or any of them.
- h) Giving notice to creditors that the debtor has suspended or is about to suspend payment of debts.
- i) Defaulting on a proposal
- j) If the debtor ceases to meet liabilities generally when they are due.

→ could this answer have been more fulsome?

4

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 Canadian insolvency system is one of modified universalism. In 2009 amendments in both the BIA and CCAA were made as Canada adopted a modified version of the UNCITRAL Model Law in Part XII of the BIA and a new Part IV of the CCAA. These sections provide a framework for recognition of foreign insolvency proceedings and acceptance of jurisdiction.

The two main principles are 1) mandatory recognition of foreign insolvency proceedings (unless they are against public policy) and 2) the classification of the foreign proceedings as either "foreign main proceedings" or "foreign non-main proceedings". The mandatory recognition of foreign proceedings is intended to facilitate judicial cooperation between countries and provide access to domestic courts for foreign representatives.

The Canadian courts therefore need to recognize the foreign proceedings on formal proof of three main requirements;

- 1) That the proceeding is a foreign proceeding in accordance with the statutory definition,
- 2) That the applicant is a foreign representative in accordance with the statutory definition and

- 3) Whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding based on center of main interest analysis.

The recognition application is commenced by a foreign representative who files sufficient evidence to allow the Canadian court to determine that they are a foreign representative and proceeding is a foreign proceeding. Once these requirements are met the recognition is automatic and the court must make an order recognizing the foreign proceeding.

↳ could we have defined foreign representative + foreign proceeding

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 ("COMI") in either the CCAA or the BIA, however each statute contains a rebuttable presumption. In the case of an individual, the COMI, in the absence of proof is the debtor's ordinary place of residence and with a company it is the company's registered office. There are three considerations which are important for the courts to determine COMI;

1. The 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 and
3. The location of the debtor's headquarters, head office or "nerve centre". good.

Based on the above – while the company's headquarters are not in Canada, it may want to argue that the warehouse is a "nerve centre" or that the warehouse is the principal operations or if there are significant creditors in Canada – the company may have a case to argue the company's COMI is in Canada.

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 have taken a broad and liberal approach to the enforcement of foreign judgements, which can be time consuming, costly and procedurally complex to have a foreign judgement recognized and enforced. There are two main routes to enforce foreign judgements;

1. By way of reciprocal enforcement of judgements – where the judgement in question is issued by a jurisdiction governed by reciprocal enforcement legislation. Each province has reciprocal jurisdictions with one another and Canada is party to several conventions such as the Convention between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters – which makes it fairly straightforward to register and enforce judgements obtained within 6 years of the judgement. So the foreign agent would have to advise which country the judgement has been obtained. Most Canadian provinces have a streamlined process for enforcing judgements from reciprocal jurisdictions by way of a simplified court application and thereafter enforcement.

- ?
2. In common law provinces one can obtain common law recognition of the judgement in accordance with the test articulated in the Supreme Court of Canada's decision in *Morguard Investments Ltd v De Savoye*. Since Quebec is governed by the Civil Code – its laws are found in the code itself. In this instance if the foreign agent is wishing to enforce in Quebec it would

have to start enforcement proceedings and meet the test for enforcement. The test for enforcement may be presumptively enforced in Canada provided there is a "real and substantial connection" between the foreign court and: i) the defendant; ii) the cause of action, or iii) the subject matter of the action. From the prime face evidence it appears this is the case with the foreign agent's matter regarding the warehouse in Canada.

*** End of Assessment ***