



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.

46/50

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.

First, to allow insolvent persons to be rehabilitated financially. Second, to allow a bankrupt's property to be distributed fairly and orderly through collective proceedings, amongst unsecured creditors on a *pari passu* basis. As part of this process, undervalued transfers, preferences, settlements and fraudulent transactions may be set aside so that all creditors will

share in the value of the bankrupt's assets. Third, to allow a bankrupt's affairs to be investigated.

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?

Generally, these are the assets which a debtor can keep in a bankruptcy:

1. Personal items and clothing;
2. Tools necessary for the debtor to work;
3. Household furniture, food and utensils in the debtor's permanent home;
4. A motor vehicle (up to a maximum specified value);
5. Certain farm property.

The amount of each exempted asset class which a debtor can retain depends on the province in which the debtor lives. In some provinces, for example, there is a limited homestead exemption. In Ontario, a debtor's principal residence is only exempt from forced seizure or sale if the value of the debtor's equity in the principal residence does not exceed CAD 10,000 (Ontario Execution Act). Apart from this, s 67 of the BIA provides that amounts held by individuals in tax exempt retirement savings account (RRSPs) are exempt from seizure in bankruptcy, although transactions made in the 12 months preceding bankruptcy may be clawed back. This, however, must be read with provincial legislation. Provincial legislation applies where it exempts RRSPs from execution, but where provincial legislation is silent on the treatment of RRSPs, the clawback exception applies.

Question 2.3 [maximum 3 marks]

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

These are the three types of court-officers that may be appointed in insolvency proceedings:

1. Trustee in bankruptcy (appointed in a liquidating bankruptcy)
2. Monitor (appointed in CCAA proceedings)
3. Receiver (appointed in receiverships)

Question 2.4 [maximum 2 marks]

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

A "person" as defined in s 2 BIA 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.

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.

These are the differences between a private received and a court-appointed receiver:

A. How each type of receiver is appointed

Private receivers are appointed by a secured creditor. The secured creditor usually has a contractual right to do so that has been provided for in the security arrangement with the debtor. Court-appointed receivers, are, appointed by the court on an application by a secured creditor. A secured creditor can apply to court for the appointment of a receiver with national authority to take control of the business in circumstances where the debtor cannot meet its obligations under the security arrangement: s 243 BIA.

B. Duties of each type of receiver

The duties of a private receiver is generally to the secured creditor that had appointed them. However, the private receiver also has a general duty to act honestly, and in good faith, as well as in a commercially sensible manner. This includes attempting to maximise recoveries and obtain the best possible price for the debtor's assets in the circumstances. In contrast, a court appointed receiver owes its duties to all creditors of the debtor. The court appointed receiver acts on instructions from the court. While both types of receivers have reporting requirements, court-appointed receivers must report to the court as to how its mandate is being carried out.

C. Circumstances in which each type of receiver is used

Private receivers are often used in cases involving small business, and where there is a discrete pool of assets without any competing creditor claims or disputes with the debtor. Private receivers are also used when speed and cost-effectiveness are the main concern. Court-appointed receivers, however, are usually used for more complex cases – for example where there are competing claims between creditors or where there are disputes between creditor and debtor, or where it is likely that the court's assistance will be needed on an ongoing basis.

Apart from the differences sketched out above, one other difference is that using a court-appointed receiver may give creditors and professionals a greater degree of comfort, insofar as professional liability is a concern. This is because a court-appointed receiver, unlike a private receiver, must have its decisions approved by the court along the way. This reduces any concerns about the decisions of the court-appointed receiver being subsequently scrutinised by the court.

good overview.
but could
be more
detailed

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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 methods for entering into bankruptcy are: a) voluntary, b) involuntary and c) on the failure of, or failing to perform the terms of a BIA proposal. I will discuss them in turn. But first, I explain the meaning of an "act of bankruptcy".

An "act of bankruptcy" encompasses two types of conduct. First, conduct showing that the debtor has violated certain norms of commercial morality by attempting to frustrate the creditor's legitimate collection efforts. Second, that the debtor is insolvent. Section 42 BIA specifically scopes out acts of bankruptcy which include:

1. The bankrupt, in Canada or elsewhere, assigns property to a trustee for the benefit of creditors;
2. The debtor, in Canada or elsewhere:
 - a. Makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it; or
 - b. Transfers any property, or part of it, or creates any charge on the property, that is a fraudulent preference
3. The debtor, intending to defeat or delay his creditors, departs Canada or remains outside of Canada or departs from his dwelling or otherwise absents himself;
4. Allowing, for certain specified periods of time, execution under which the debtor's property is taken;
5. Where the debtor admits his inability to pay debts;
6. The debtor assigns, removes, secretes or disposes of or attempts, or is about to do the same with his property, intending to defraud, defeat or delay his creditor(s);
7. Where the debtor gives notice to creditors that he has suspended or is about to suspend payment of debts;
8. Where the debtor defaults on a proposal;
9. Where the debtor ceases to meet liabilities generally as they become due.

I turn now to discuss the three methods for entering into bankruptcy.

Voluntary bankruptcy

A debtor enters into voluntary bankruptcy when they: a) voluntarily make an assignment into bankruptcy proceedings by executing an "assignment" of its property for the benefit of its creditors, accompanied by a sworn statement disclosing the debtor's property as well as the names and addresses of the creditors and the amounts of the creditors claims, and b) fall within the definition of an insolvent person as set out in the BIA. Entering voluntary bankruptcy does not involve an application to court. The documents effecting the debtor's assignment of its property for the benefit of its creditors, as well as the sworn statement must be filed with the Official Receiver. Once the documents are accepted, bankruptcy proceedings are commenced. The debtor can choose the trustee, subject to confirmation by unsecured creditors at the first creditor's meeting.

Involuntary bankruptcy

An application for involuntary bankruptcy must be brought to the bankruptcy court in the location where the debtor ordinarily resides, does business, has assets or property, or where the debtor has no assets in Canada – where it did business within the previous year. The application for involuntary bankruptcy will only succeed if it can be shown that:

1. The applying creditor(s) is owed, in excess of CAD 1,000 of unsecured debt; and
2. There is evidence to show that the debtor has committed an "act of bankruptcy" (as explained in the paragraphs above) within six months of the date of the filing of the application.

The creditor who makes the application need not prove that the debtor currently carries on business or resides in Canada, or currently has assets in Canada.

The debtor can object to the application – in such a case, the court must determine whether the bankruptcy order should be issued. Even if the applicant(s) has proven the existence of debt and that an act of bankruptcy has occurred, the application may still be dismissed if the

court is convinced that the debtor has the ability to pay their debts. However, if the court is satisfied that the facts of the alleged application has been proven, the judge can make the bankruptcy order, and upon the order being made, the property of the debtor vests in a court-appointed licensed trustee.

Failure to perform terms of a BIA proposal

The debtor is deemed to have made an assignment in bankruptcy if:

- a. The corporate proposal is rejected by a class of creditors voting on the proposal; and
- b. The corporate proposal is rejected by the court.

Further, in a situation where a debtor defaults under the terms of its proposal, and this default is not waived by inspectors or the creditors themselves, the proposal trustee has to inform the creditors and the Official Receiver. A motion can be brought to court to annul the proposal – and if the order is granted, the debtor is automatically assigned into bankruptcy.

↳ what about consumer proposals?

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?

I would explain to the foreign agent that the provisions of the BIA and CCAA stipulate that the Canadian courts will recognise foreign proceedings if formal proof of the following are shown:

1. That the proceeding is a "foreign proceeding" as statutorily defined;
2. The applicant is a "foreign representative" as statutorily defined;
3. Whether the "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" based on an analysis of the center of main interest.

I would also tell the foreign agent that he/she must commence the recognition application and file sufficient evidence of the foreign law in order to allow the Canadian court to determine that they are indeed a foreign representative and that the proceeding is a foreign proceeding. I would tell the foreign agent that the focus of the analysis here is on the substance, as opposed to the form of the foreign law (*Centaur Litigation SPC, Re* [2016] BCSC 1224). I would also tell the foreign agent that what a "foreign proceeding" and "foreign representative" are is given,

as evidenced by Canadian case law, a broad and purposive interpretation – so an applicant is unlikely to face much difficulty in meeting the requirements for recognition of a foreign proceeding.

Once the requirements for recognition are met, recognition is automatic and compulsory – the court must make an order recognising the foreign proceeding. If the court determines that the foreign proceeding is a foreign main proceeding, an automatic stay of proceedings will be issued. If it is not a foreign main proceeding, a stay can be requested but the court can exercise its discretion to make any order necessary to protect the debtor's property or the creditor's interests.

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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?

I would tell the foreign agent that the center of main interest ("COMI") is not statutorily defined in the BIA or CCAA – however, each statute contains a rebuttable presumption. Because we are dealing with a company here, the relevant statutory presumption is that the COMI, absent proof to the contrary, is the company's registered office. The Canadian courts have identified the following three considerations which must be considered as a whole, which are of primary importance in determining the COMI.

First, the location that significant creditors recognise as being the company's COMI. Second, the location in which the debtor's principal assets or operations are found. Third, the location of the debtor's headquarters/head office or "nerve center".

I would tell the foreign agent that based on what they have told me, that the Canadian court will likely find that the foreign proceeding is a foreign main proceeding because the company's COMI is in that foreign jurisdiction. This is because the foreign agent had taken control of the online seller's head office registered in the foreign jurisdiction where the senior management of the company has its main office. It thus appears, assuming that there is no evidence to the contrary, that the statutory presumption that the COMI is the company's registered office, applies.

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yes

good analysis.

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.

I would explain to the foreign agent that the Canadian court is not limited to Canadian entitlements and remedies in the relief that they can provide. This is because recognition imposes an obligation on Canadian officials to cooperate with the foreign representative and the foreign court. The BIA and CCAA contain broadly worded, discretionary provisions, which provide that in cases where an order recognising a foreign proceeding has been made, the court can, on an application by a foreign representative, make any order that it considers appropriate (provided that the court is satisfied that it is necessary for the protection for the debtor company's property or the interests of the creditor(s)).

While any order the court may make is subject to a public policy exception (which states that the court can refuse to do something contrary to public policy when implementing cross-border insolvency provisions – this is usually invoked where there is unfair treatment of Canadian creditors) and ensuring that the order is consistent orders made in any concurrent proceedings under the BIA or the CCAA, the Canadian court is not restricted in exercising its discretion to only providing the same or similar remedies available under Canadian insolvency law. I would tell the foreign agent that unless Canadian creditors are being unfairly treated in the insolvency proceedings, it is likely that they will be able to secure the assistance of the Canadian courts.

good.

good recommendation.

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*** End of Assessment ***



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