



**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.

Three of the recognised purposes of the BIA are:

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

3. Allowing for an investigation to be made into the affairs of a bankrupt.

③

**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, in the context of an individual bankruptcy, the types of assets a debtor can keep in a bankruptcy include:

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

②

**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 in insolvency proceedings are: (a) a trustee; (b) a court-appointed receiver; and (c) a Monitor in proceedings under the Companies Creditors Arrangement Act (CCAA).

③

**Question 2.4 [maximum 2 marks]**

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

Under 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.

#### Appointment of receivers

A privately-appointed receiver will be provided for in the security agreement between the debtor and the secured creditor, under which the secured creditor has a contractual right to appoint a receiver if the debtor is unable to meet its obligations.

In contrast, a court-appointed receiver is appointed by the court either upon application by a secured creditor or any interested party. Section 243 of the BIA authorizes a secured creditor to apply to the court for the appointment of a receiver with national authority to take control of the business when the debtor is unable to meet its obligations under the security agreement. In addition, the Courts of Justice Acts of individual Canadian provinces also allow the court to appoint a receiver on application by any interested party (including shareholders or unsecured creditors) where it is "just and convenient" to do so (*ie*, an "equitable receiver"). A court-appointed receiver derives its powers from the court order and any specific legislation governing its powers.

#### Duties of receivers

A private receiver's duties are owed mainly to the secured creditor that appointed it. Nonetheless, a private receiver still has a general duty to act honestly, in good faith and in a commercially reasonable manner, including to attempt to maximise recoveries and obtain the best price for the debtor's assets in the given circumstances (L A Rogers and P L J Huff, "Commercial Restructuring and Insolvency in Canada", The Insolvency law Institute, p 18).

A court-appointed receiver, on the other hand, is an officer of the court and has duties to all creditors of the debtor. The court-appointed receiver reports to and takes directions and instructions from the court, not the creditor that first sought its appointment.

#### Circumstances in which each type of receiver is generally used

Private receivers are most often used where there is a small business or a discrete pool of assets and there will not be competing creditor claims or disputes with the debtor. As private receiverships do not generally involve court attendances, they can be quick and cost effective. However, concerns over successor liability to the receiver's carrying on business means private receivers are not often used.

In comparison, court appointments usually occur in more complex cases, especially where there are competing claims between creditors or disputes between the creditor and debtor. Court appointments may also be the case where it appears likely from the outset that the court's assistance will be required on an ongoing basis. In such circumstances, a court-appointed receiver provides a greater degree of comfort for creditors and professionals in terms of the potential liability they may face as compared to in a private receivership, since the court must approve many of the receiver's decisions along the way.

#### **Question 3.2 [maximum 7 marks]**

Write a short essay that identifies the three methods for entering into bankruptcy. In your essay, explain the meaning of an "act of bankruptcy".

There are three methods for entering into bankruptcy:

1. Involuntary;
2. Voluntary;
3. And on the failure of, or failure to perform the terms of, a BIA proposal.

#### 1. Involuntary bankruptcy

A creditor may apply for an involuntary bankruptcy order. The applying creditor(s) must: (a) be owed in excess of CAD 1,000 of unsecured debt and (b) provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application. An involuntary bankruptcy application must be brought to the bankruptcy court in the location where the debtor ordinarily resides, does business has assets or property, or in the case where the debtor has no assets currently in Canada, where it did business within the previous year.

An "act of bankruptcy" involves one of two different types of conduct: (a) conduct that shows the debtor has violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of the creditor; (b) conduct that shows the debtor is insolvent.

Section 42 of the BIA lists the acts of bankruptcy:

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

The most common act of bankruptcy is where a debtor ceases to meet liabilities generally as they become due. The term "generally" means it is insufficient to allege that the debtor has failed to pay only the application creditor, unless the applicant creditor is either the only claimant or the debt owed is so large that the claims of other creditors are not of significance in comparison.

The debtor is entitled to object to the application and must demonstrate that it has the ability to pay their debts. If so, the court may dismiss the applicant creditor's application. If the court is satisfied that the facts in the application have been proven, the court can make the order of bankruptcy, following which the property of the debtor vests in a licensed trustee appointed by the court.

#### 2. Voluntary bankruptcy

Voluntary bankruptcy is when the debtor voluntarily makes an assignment into bankruptcy proceedings. The debtor may do so 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 the proceedings have concluded. The debtor, who must fall under the definition of an insolvent person in the BIA, executes an "assignment"



of its property for the benefit of its creditors accompanied by a sworn statement that discloses the debtor's property, the names and addresses of its creditors, and the amount of the creditors' claims. The documents are filed with the Official Receiver. Once accepted, the bankruptcy proceedings commence. The process does not involve a court application.

### 3. Failure of or failure to perform the terms of a BIA proposal

The BIA contains provisions on both corporate and consumer proposals which allow debtors to reach compromises with their creditors. Failure of or failure to perform the terms of a BIA proposal occur when a corporate proposal is rejected by a class of creditors or is not approved by the court, in which case the debtor will be deemed to have made an assignment in bankruptcy. Such failure also occurs when a debtor defaults under the terms of its proposal and such default is not waived by inspectors (creditor-appointed representatives appointed in certain circumstances) or creditors themselves (if there are no inspectors). The proposal trustee must then inform the creditors and the Official Receiver, following which a motion may be brought to the court to annul the proposal. If the order is granted, the debtor is automatically assigned 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?

Canada has adopted a modified version of the UNCITRAL Model Law on Cross-Border Insolvency in Part XIII of the BIA and a new Part IV of the CCAA. The provisions of the BIA and CCAA on the recognition of foreign insolvency proceedings require Canadian courts to recognise foreign proceedings on formal proof of three main requirements (BIA ss 269 to 272, CCAA, ss 46 to 49):

- 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 a centre of main interest (COMI) analysis.

The recognition application commences with the foreign agent's filing of sufficient evidence of the foreign law to allow the Canadian court to determine that the foreign agent is a foreign representative and the proceeding is a foreign proceeding. Under Canadian case law, both terms are to be given a broad and purposive interpretation. The foreign agent is advised to file the foreign court order empowering him to deal with the assets of insolvent companies, and he should likely meet the requirements.

Once the requirements for recognition have been met, recognition is automatic and compulsory, and the court must make an order recognising the foreign proceeding. If the court determines the foreign proceeding to be a foreign main proceeding, the court will automatically issue a stay of proceedings. If the court determines that the proceeding is a foreign non-main proceeding, then a stay may be requested. The court exercises its discretion to make any order necessary for the protection of the debtor's property or the interests of creditors. To that end, the foreign agent may request for an order authorising him to further investigate into the movements of the Canadian resident in charge of the fulfilment office and the warehouse in Canada alleged to be improperly diverting funds. Investigative powers that the foreign agent may ask for include the examination of witnesses and the taking of evidence, and provision of information on the online seller's property and affairs.

**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?

Neither the BIA nor the CCAA contain a statutory definition of the "centre of main interest" (COMI). Both statutes contain a rebuttable presumption to that effect. In the case of an individual, the COMI is presumed to be the debtor's ordinary place of residence in the absence of proof to the contrary. As for a company, the COMI is the company's registered office in the absence of proof to the contrary (BIA, s 268 and CCAA, s 45). In determining the COMI, the courts have identified three considerations considered as a whole which are of primary importance (*Re Mt Gox* [2014] ONSC 5811):

1. The location that significant creditors recognise 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".

If the foreign proceeding is in the COMI, the foreign proceeding will be classified as the foreign main proceedings. If the foreign proceeding is not in the COMI, the foreign proceeding is a foreign non-main proceeding.

? So where is the COMI for this fact pattern

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**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.

Both the BIA and the CCAA contain broadly worded, discretionary provisions which provide that upon recognition, the court may, on the foreign representative's application and if it is satisfied that it is

necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make "any order that it considers appropriate" (BIA, s 272(1) and CCAA, s 49(1)). The Canadian court is not restricted in exercising this discretion to only providing the same or similar remedies or entitlements available under Canadian insolvency law. The Canadian court has in fact ordered relief that would not ordinarily be available in Canadian proceedings in foreign-main proceedings where there are ancillary Canadian proceedings (see *Re Hartford Computer Hardware Inc* 2012 ONSC 964).

However, the Canadian court's wide, discretionary powers to order relief are subject to the public policy exception, which permits the court to "refuse to do something that would be contrary to public policy" when implementing the cross-border insolvency provisions (BIA, s 284(2) and CCAA, s 61(2)). It should be noted, nevertheless, that Canadian courts are inclined to recognise foreign insolvency proceedings, particularly those initiated in common law jurisdictions where Canada has strong economic ties and the Canadian courts are familiar with the legal system, and are generally reluctant to employ the public policy exception absent clear circumstances that offend Canadian public policy. Insofar as there is no asymmetrical or unfair treatment of Canadian creditors, recognition will be ordered and the foreign agent will likely be able to obtain the relief sought.

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**\* End of Assessment \***

