



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.

30/50

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.

The three out of the four are:¹

- a) provide for the financial rehabilitation of insolvent persons;
- b) allow for an investigation to be made into the affairs of a bankrupt; and
- c) provide a collective proceeding for the orderly and fair distribution of property of a bankrupt among unsecured creditors on a *pari passu* basis.

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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?

Exempt property generally² includes (but depends on the province or territory):

- personal items/clothing;
- household furniture, food and utensils at the debtor's permanent domicile;
- tools of trade;
- motor vehicle up to a certain value limit; and
- certain farm property.

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Question 2.3 [maximum 3 marks]

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

1. Trustees – which manages the bankruptcy proceedings under the BIA, including by seeking court approval to sell the debtor's property and finalising the discharge.³
2. Receivers under instrument or by the court, typically in respect of security interest.⁴
3. CCAA monitor – which oversees (on behalf of the court) the plan of arrangement approved by creditors.⁵

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¹ Hon Mr Justice Lloyd Houlden, Mr Justice Geoffrey B Morawetz and Dr Jannis P Sarra, "The 2019 Annotated Bankruptcy and Insolvency Act" A§2.

² Execution Act [1990], c E 24, s 2(2) provides that where the value of equity in the debtor's principal place of residence is less than CAD 10,000 (or some other prescribed amount), the debtor can retain that equity.

³ Guidance text, page 20. Please note any reference to guidance text page numbers is to the electronic page number, not the written page number.

⁴ *Ibid*, 21

⁵ *Ibid*.

Question 2.4 [maximum 2 marks]

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

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Section 2 of the BIA defines a person as including a natural person, partnership, an unincorporated association, corporation, a cooperative society/organisation, and other relevant legal representatives of the person.

Section 2 of the BIA defines a corporation as including a company or legal person that is incorporated under parliament/legislature and that is authorised to carry on business (or has an office or property) in Canada.

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.

Receiverships are said to be an equitable remedy under common law for the benefit of secured creditors. Under Canadian law, there are two types of receiverships: (1) private receiverships; and (2) court-appointed receiverships. The following table addresses the key differences between private and court-appointed receiverships.⁶

	Private receiver	Court-appointed receiver
How appointed?	Under instrument, ie the security agreement between the debtor and creditor. The instrument must specifically provide for such an appointment and set out the extent of the powers and rights of the Receiver. <i>Handwritten: Under instrument and by the court</i>	A secured creditor may apply to court under section 243 of the BIA for the appointment of a receiver or an interim receiver ⁷ over a debtor. An equitable receiver may also be appointed by a court on an application by, for instance, shareholders or unsecured creditors. The power to do so is under the Courts of Justice Act. The powers are conferred by the court order. For example, these powers may include stay on enforcement actions, the right to continue to trade the business of the debtor, sell assets (subject to court supervision), render <i>ipso facto</i> clauses inoperable and obtain DIP

⁶ Guidance text, pages 41-44.

⁷ BIA, ss 46-47.

↑ Not an essay as the question asks ...

	Private receiver	Court-appointed receiver
		financing (in appropriate circumstances).
Duties	Primarily to the secured creditor appointor. However, these duties also extend to acting honestly, in good faith and in a commercially reasonable manner (like when selling the debtor's assets). ⁸	<ul style="list-style-type: none"> • Officer of the court • Has duties to all creditors of the debtor, not just to the secured creditor • Takes instructions from the court •
General circumstances the appointed receiver may be used	May be used for small, uncomplex matters, typically involving small to medium sized businesses. Also, where there is not likely to be competing secured creditor claims or disputes.	<p>May be used for more complex matters, where there may be competing claims / disputes with creditors.</p> <p>Court assistance on an ongoing basis may be another reason why this type of receivership may be used over a private receiver.</p>
Cost and efficiency	Generally, does not require court interference and can be quick and/or less costly than court-appointed receiverships.	Requires material court interference and direction and is typically more costly than a private receivership.
Successor liability	Possible liability, as there is no court supervision. The private receiver needs to strictly adhere to their duties, particularly when it comes to selling the debtor's business/assets.	Any sale requires court approval, and, as such, it is less likely that the receiver would be subjected to successor liability.
Notice provided to the debtor before the appointment?	Will depend on the terms of the finance agreement and any applicable statutory obligations. But not necessarily an obligation.	Requires a 10-day s244 notice to the debtor of the secured party's intention to apply to court to appoint a receiver.
Reporting	Must report to creditors and file same with the OSB.	Must report to creditors and file same with the OSB. Also, must report to court as and when necessary.

③

Could have included more detail from the guidance text!

⁸ Rogers and Huff, p 18.

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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 of entering into bankruptcy are: (1) involuntary; (2) voluntary; and (3) a failure of a BIA proposal (whether merely by failing to perform a term of a BIA proposal).⁹

(1) Involuntary

The petitioning creditor, when applying to court, must show that they are owed at least CAD 1,000 and that the debtor has committed an act of bankruptcy within six months of the filing of the petition (**Threshold Elements**).¹⁰ The petition must be presented in the location where the debtor is ordinarily domiciled, does business, has assets/property or where it did business within the previous year.

Section 42 of the BIA lists the circumstances in which a debtor may have committed an act of bankruptcy. The list is made up of two different types of conduct, namely, one that violates certain norms of commercial morality and the other that demonstrates that the debtor is insolvent.¹¹



BIA definition of "Act of Bankruptcy"
The list includes, where the debtor (Acts of Bankruptcy List):

I would have preferred the full of "act of bankruptcy" explicitly?

- Has made an assignment of their property to a trustee for the benefit of creditors;
- Makes a fraudulent gift, preference, transfer, execution, or disposition of property that otherwise would be available to creditors, or does so with the intention to defeat or delay creditors;
- Departs Canada or their personal dwelling with the intention to defeat or delay creditors;
- An admission of inability to pay debts or expresses a suspension (or the intention to suspend) of payment of debt;
- Defaulting on a proposal; and
- If the debtor fails to meet its liabilities generally as and when they become due. Generally, this requires more than just the petitioning creditors debt being unpaid (unless the petitioning creditor is the only claimant or it makes up a materially large portion of debts).¹²

Notwithstanding a petitioning creditor meeting the Threshold Elements, a court may still exercise its discretion to dismiss the petition if the debtor can prove that it has the ability¹³ to pay the debt.

Where the court grants the petition, the property and affairs of the debtor vest in a licensed court-appointed trustee.

(2) Voluntary

A debtor may voluntarily apply to the Official Receiver to commence their bankruptcy (once accepted), as long as they meet one of the limbs of the Acts of Bankruptcy List, above. The documents filed by the debtor is a sworn statement of the affairs, property and creditors of the debtor, along with an assignment of its property for the benefit of its creditors.

⁹ Guidance text, pages 25-25.
¹⁰ BIA, s 43(1).
¹¹ BIA, s 42(1)(a) and Wood, p 62.
¹² *Re Real Time Fibre Supply Ltd*, 2007 CarswellBC 580.
¹³ BIA, s 43(7).

(3) Failure of a BIA proposal

BIA proposals allow debtors to reach agreements with their creditors under the BIA.

If the BIA proposal is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy, which in turn would meet the first bullet point under the Acts of Bankruptcy List above.

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If the BIA proposal is accepted, but a relevant term of the proposal is not met, the proposal trustee can make a motion to court to annul the proposal.¹⁴ This annulment is automatically deemed an assignment in bankruptcy. This does not apply to consumer bankruptcy's.

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?

(Canadian courts require formal proof on three main requirements)

Recognition of a foreign proceedings requires three main requirements:

- 1) The proceeding is a foreign proceeding. A foreign proceeding means a "judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation;"¹⁵

The facts says that the foreign representative is empowered under the law of that foreign jurisdiction to deal with the assets of insolvent companies. The facts however

¹⁴ See for instance BIA, ss 50(12), 50.4(9) and 50.4(11).

¹⁵ Section 268(1) of the BIA.

do not explain the nature of the law granting said power or whether the power is derived from a judicial or administrative proceeding.

- 2) The applicant is a foreign representative. A foreign representative means a person/body that authorised in a foreign proceeding to "administer the debtor's property or affairs for the purpose of reorganization or liquidation" or "act as a representative in respect of the foreign proceeding;"¹⁶ and

The facts says that the foreign representative is empowered under the law of that foreign jurisdiction, by the legislation and courts, to deal with the assets of insolvent companies. Accordingly, it is likely that the foreign representative meets this limbs.

- 3) Whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding, by reference to the COMI test.

For a company, the centre of main interest (COMI) is presumed (on a rebuttable basis) to be the location of the debtor's registered office.¹⁷ On the facts, the registered office of the online seller is said to be in the jurisdiction of the foreign agent. Accordingly, the online seller's COMI is presumed to be in the foreign jurisdiction.

To rebut this presumption, Courts in Canada have identified the following three key indicia to determine COMI:¹⁸

- a) The location that significant creditors recognise as the COMI for the debtor. The facts suggest that the online seller has creditors in Canada (by reason of the class action), but also that its main financiers are foreign-based lenders. The factual matrix does not contain sufficient information about the quantum, type and location of the online seller's creditors to be able to determine this indicia;
- b) The location of the debtor's principal assets. On the facts, the online seller has a fulfilment office and warehouse in Canada, but it also supplies clothing around the world. The factual matrix does not contain sufficient information about the quantum, type and location of the online seller's assets to be able to determine this indicia; and
- c) The location of head office. On the facts, the foreign jurisdiction is the location of the head office.

Therefore, I believe that the facts do not contain sufficient information to rebut the presumption of the COMI being in the foreign jurisdiction. *↳ not necessarily the question here.*

Accordingly, on the facts (as currently presented) it is likely that the foreign proceeding will be recognised as a foreign non-main proceeding. This means that the foreign agent is not automatically entitled to a stay in Canada (but they can apply to the courts for a stay), but the

¹⁶ Ibid.

¹⁷ Section 268 of the BIA and section 45 of CCAA.

¹⁸ *Re Mt Gox* [2014], ONSC 5811; *Re Massachusetts Elephant & Castle Group Inc* (2011), 81 CBR (5th) 102 (Ont SCJ); and *Re Lightsquared LP*, 2012 CarsewellOnt 8614 (Ont SCJ [Commercial List]).

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foreign agent is entitled to cooperation from Canadian authorities, standing before a Canadian court and many other powers (like obtaining documents and evidence).¹⁹

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?

For a company, the centre of main interest (COMI) is presumed (on a rebuttable basis) to be the location of the debtor's registered office.²⁰ On the facts, the registered office of the online seller is said to be in the jurisdiction of the foreign agent. Accordingly, the online seller's COMI is presumed to be in the foreign jurisdiction.

To rebut this presumption, Courts in Canada have identified the following three key indicia to determine COMI:²¹

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- 2) The location of the debtor's principal assets. On the facts, the online seller has a fulfilment office and warehouse in Canada, but it also supplies clothing around the world. The factual matrix does not contain sufficient information about the quantum, type and location of the online seller's assets to be able to determine this indicia; and
- 3) The location of head office. On the facts, the foreign jurisdiction is the location of the head office.

Therefore, I believe that the facts do not contain sufficient information to rebut the presumption of the COMI being in the foreign jurisdiction.

X → not necessarily... think about the details of the fact pattern. *could we have considered Re Mt Gox co in this question?

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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.

Pursuant to section 121 of the BIA, all debts and liabilities (whether domestic or foreign)²² are provable in the bankruptcy. For a claim to be provable, the claim must be:²³

- 1) a debt, liability or obligation owed to the creditor;
- 2) incurred prior to the debtor becoming bankrupt; and

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¹⁹ Guidance text, page 64 and section 272(1) of the BIA.

²⁰ Section 268 of the BIA and section 45 of CCAA.

²¹ *Re Mt Gox* [2014], ONSC 5811; *Re Massachusetts Elephant & Castle Group Inc* (2011), 81 CBR (5th) 102 (Ont SCJ); and *Re Lightsquared LP*, 2012 CarswellOnt 8614 (Ont SCJ [Commercial List]).

²² Guidance text, pages 28 and 60.

²³ *Newfoundland and Labrador v AbitibiBowater Inc* [2012] SCC 67, 26.

3) possible of attaching a monetary value to it.

The debt may even be contingent or unliquidated.

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Section 124 of the BIA requires that all creditors must prove their claim, in the approved form, otherwise they will not be entitled to share in any distributions.

Assuming some of the foreign-based creditors are lenders (ie secured creditors), section 127 of the BIA provides the basis upon which a secured creditor needs to prove for the shortfall portion of their secured debt.

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*** End of Assessment ***

