



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.

41/50

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: NONE – ALL ARE INCLUDED

- (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.

C IS CORRECT.

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. X

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.

To rehabilitate the debtor and assist in providing them with a fresh start. To aid the efficient allocation of credit and the price of that credit in the Canadian marketplace. Where insolvency laws are certain and the creditor understands the process and procedures then that impacts on the availability and cost of credit. The BIA, with its process and procedures assists in the efficient allocation of credit. Also,

the BIA promotes the maximisation of the debtors assets and their equitable distribution to creditors on a pari passu basis. The BIA allows for an investigation into the affairs of the 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?

Bankruptcy exemptions are set by provincial legislation but generally a debtor may keep

- Personal items and clothing;
- Household furniture and utensils in the debtor's home;
- Tools necessary for the debtors work;
- A motor vehicle up to a certain limit and
- Certain farm property.

②

There is also in some provinces a principal dwelling house or homestead exemption where the equity in the home is below a certain threshold. This exempts the debtor's home from forced seizure. In addition, certain tax-exempt retirement savings accounts are exempt from seizure depending on the provincial legislation.

Question 2.3 [maximum 3 marks]

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

1. A court appointed receiver may be appointed by a secured creditor under section 243 of the BIA or the various provincial Courts of Justice Acts
2. A monitor in CCAA proceedings.
3. A liquidator appointed under the Winding Up and Restructuring Act 1985.

②

Question 2.4 [maximum 2 marks]

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

Section 2 of the BIA defines a **person** as including a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the 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 typically appointed under contract and in most cases by a secured creditor pursuant to a security agreement between the debtor and the secured creditor. The entitlement to appoint generally arises where the debtor has defaulted on its obligations under the agreement. Private receiverships may be quick and cost effective in the sense that an application to court is not required for appointment and neither is court approval required in the event of a secured asset sale. Removing the court from the asset realisation process speeds up the return to the secured creditor with a saving of time and money. The private receiver's duty is to the secured creditor that appointed him/her albeit a fiduciary duty does exist to other creditors in obtaining the best price possible in the sale of the secured asset(s). Private receivers are generally used where the business is relatively small, there is a discrete pool of assets, the appointment is not contentious and there are no competing creditor claims. In the event that any of these issues arise, the more prudent course of action is to appoint a receiver pursuant to s 243 of the BIA and/or by way of court application.

private receiver must also act honestly, in good faith and in a commercially reasonable manner

Court appointed receivers may be appointed pursuant to an application to court under s243 of the BIA whereby a secured creditor applies to the court for the appointment of a receiver where a debtor is unable to meet its obligations pursuant to the terms of the security agreement between the debtor and the secured creditor. Normally the secured creditor sends a statutory notice pursuant to s244 warning of its intention to appoint a receiver.

The Courts of Justice Acts of the individual provinces also allow the court to appoint a receiver on application by any interested party, such as shareholders of the debtor and unsecured creditors, where it is "just and convenient" to do so.

As noted above, an application to court to appoint a receiver is typically made in contentious situations such that the receiver may seek court approval of his/her actions such as for example the approval of the sale price achieved for the secured asset or where there is a dispute between competing creditors. The court must usually approve of the receiver's decisions which provides the receiver and creditors with a certain degree of comfort in that decisions approved by the court are less likely to be scrutinized at a later date.

A court appointed receiver is an officer of the court and owes its duties to the court and all creditors of the debtor which is different to the private receiver's duties as outlined above.

The powers granted by the court to the receiver on appointment are broadly similar to the private receiver appointed under a security agreement. As mentioned, the primary useful difference is that in the sale of the secured asset, the sale is approved by the court and in the court order approving the sale the court will vest title to the purchaser free and clear of prior encumbrances and claims thereby giving "clean" title to the purchaser. This level of comfort to a purchaser is not available in a sale by a private receiver.

It is also possible to apply to court to appoint an interim receiver. The circumstance in which this is usually done is where there may be an issue with the secured asset that requires the secured creditor to take immediate custody and control. The court regulates the level of control that the receiver will

yes. max 11 marks

commercially reasonable manner

6

?

have. The appointment is for a specified period which is typically a short period of time prior to the full application being made.

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 are involuntary bankruptcy, voluntary bankruptcy and the failure of a BIA proposal.

An "act of bankruptcy" involves one of two different types of conduct: where the debtor's actions have been done to frustrate the genuine collection efforts of the creditor and/or where the debtor's conduct shows that it is insolvent. Acts of bankruptcy are listed in s42 of the BIA and include fraudulent gifts or transfers of debtor assets in an attempt to put them beyond the reach of creditors; and admission of inability to pay debts; and the debtor ceases to meet liabilities generally as they become due.

↳ full list could have been included

Involuntary bankruptcy involves an application to the bankruptcy court in the location in which the debtor ordinarily resides in Canada in which the creditor must evidence that the debt owed is greater than CAD 1,000 of unsecured debt and the debtor has committed an "act of bankruptcy" within the past six months. The creditor must evidence inability to pay by showing that it is not just their debt that is outstanding but other creditors also unless the debt owed is so large as to dwarf other claims. The debtor has the right to object to the application in which case the court adjudicates on whether the order should be made. As soon as the order is made, the property of the debtor vests in a licensed trustee appointed by the court.

Voluntary bankruptcy occurs when the debtor of his own volition enters into bankruptcy proceedings. The debtor must fall within the BIA definition of "insolvent person" in order to be eligible. This process does not involve or require an application to court. Instead the debtor completes certain paperwork that is filed with the Official Receiver in which the debtor assigns his property to the benefit of his creditors, with a sworn statement setting out his property together with a list of creditors and the amounts owed to each. The bankruptcy proceedings commence when the application and documentation have been accepted by the Official Receiver. The debtor chooses his own trustee who is subject to approval by creditors at the first creditors meeting.

A proposal under the BIA allows corporates and consumers to reach a compromise with their creditors. In circumstances where a corporate proposal is rejected by a class of creditors voting on the proposal the debtor is deemed to have made an assignment into bankruptcy. Likewise, if the proposal is not approved by the court an assignment into bankruptcy is deemed to have occurred. If a debtor defaults under the terms of the proposal and the default is not waived by inspectors, creditors (if no inspector), or the Official Receiver (following notice by the trustee) then a motion is brought to assign the debtor into bankruptcy. If the order sought is granted then the debtor is automatically assigned into bankruptcy. The failure of a consumer proposal does not result in automatic bankruptcy. In such circumstances creditors may bring a motion to assign the debtor 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 in Part XIII of the BIA and Part IV of the CCAA and the Canadian courts operate on the basis of comity and cross border co-operation. The provisions of both require the Canadian courts to recognise the foreign proceedings on proof that the proceeding is a "foreign proceeding" and the applicant is a "foreign representative" and whether the "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" (which is determined based on a centre of main interest ("COMI") analysis). Once the requirements of recognition are met the recognition is automatic and gives the foreign representative standing to be heard before the Canadian Courts. In this case the foreign agent needs to show that his proceedings are a foreign proceeding and that he is a foreign representative.

In relation to the definition of what is a "foreign proceeding", the case of *Centaur Litigation SPC* illustrates what the court will look at – whether the foreign proceeding is a judicial proceeding outside Canada dealing with creditors collective interests generally under the law of the foreign jurisdiction which permits insolvent companies to restructure under the supervision of the court. A broad, facilitative approach is adopted by the Canadian court.

With regard to the test of whether the applicant is a "foreign representative", the court will look to determine whether the representative has the authority pursuant to his local law to administer the company's property and affairs for the purpose of the liquidation and that the representative had the authority to act as a representative in respect of the foreign proceeding. The Canadian court will look to the substance of the law and adopts a purposive approach. It will be a matter for the agent to file evidence of the foreign law to convince the court that both definitions are met.

once the requirements for recognition are met, the recognition is automatic and compulsory.

* Could we have gone into more detail about what would happen if court determines the foreign proceeding is a foreign main proceeding vs. foreign non-main 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?

With regard to COMI there is no statutory definition rather a rebuttable presumption that in the case of a company the COMI is where the company's registered office is. In addition, the court will look to where the centre of the management of the company is, the location of where the debtor's principal assets or operations are found and the location of the debtor's headquarters. If the foreign proceedings are where the COMI is located then they are "foreign main proceedings" which results in an automatic stay of proceedings. The situation is more complicated when dealing with group company structures but in applying the above factors the court will analyse each situation.

It appears from the facts of this case that the company has its registered office and centre of management in the foreign jurisdiction and there is legislation in the foreign jurisdiction that deals with insolvent companies ... *who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies*. The foreign proceedings are likely to be recognised and recognised as foreign main proceedings with the result that the Canadian class action claim for \$2m will be stayed automatically.

↳ where is the COMI? unclear?
could we have discussed similarities with the case of Re MTGOX CO?
would have contributed to the 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.

The Canadian court is not limited to Canadian entitlements and remedies. The court is empowered to make "any order that it considers appropriate" under both the BIA and CCAA which contain broad discretionary powers that may be exercised if the court is satisfied that it is necessary for the protection of the debtor property or in the interests of creditors. An example of the court exercising its discretion is the case of *re Hartford Computer Hardware Inc.* where the court in making the recognition order approved a DIP financing facility that effectively paid off pre-petition debt. Under the CCAA, an interim financing charge in favour of a DIP lender cannot secure an obligation that existed before an order is made. Notwithstanding this provision of Canadian law, in making the order, the court considered the public policy exception contained in s61 of the CCAA and construed it narrowly. The court focused on the status of the proceeding as a foreign main proceeding, the fact that the US court had granted the relief as necessary and the fact that Canadian creditors were not unfairly prejudiced. In certain circumstances, Hartford shows that the Canadian court will grant relief over and above existing Canadian entitlements.

*** End of Assessment ***