



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4C**

**CANADA**

This is the **summative (formal) assessment** for **Module 4C** of this course and must be submitted by all candidates who selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for **Module 4C**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

31/50

### 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. 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.

Purposed of BIA

- Providing for the financial rehabilitation of insolvent persons.
  - Allowing for investigations to be made into the affairs of a bankrupt.
- /

- Providing a collection proceeding for orderly and fair distributions of property of a bankrupt among unsecured creditors on a pari passu basis.

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?

Certain assets of individuals are exempt from seizure under the provincial legislation and are exempt from distribution to creditors.

Individuals are also entitled to keep a portion of income earned to maintain a reasonable standard of living.

Assets that a debtor can keep in a bankruptcy include:

- Personal items and clothing
- Household furniture, food and utensils
- Tools for debtors' work
- Reasonable motor vehicle
- Certain farm property.

②

**Question 2.3 [maximum 3 marks]**

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

CCAA and BIA both already imposed duties of good faith on the court officers.

- Trustees in bankruptcy
- Receivers
- CCAA Monitors

③

**Question 2.4 [maximum 2 marks]**

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

A person includes:

- a partnership,
- an unincorporated association,
- a corporation,
- a cooperative society,
- a cooperative organization
- Successors
- Heirs
- Executors
- Liquidators of the secession
- Administrators or other legal representations 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.

Receiverships can take form in either private or court appointed. Court appointed is more common type of receiverships. Receiverships are used to provide equitable relief under the common law. A receiver is a licensed trustee in bankruptcy, which is mostly a licensed professional in accounting/advisory firms.

Receiverships can be used for:

- Used to replace inefficient management for profitable company with liability problems.
- Protect and preserve assets.
- To enforce secured party's interest in collateral.
- Facilitate a going concern sale of the business.

Private receiver.

- i. How is the receiver appointed.  
This is appointed by a security agreement between a debtor and a secured creditor. The secured creditor has a contractual right to appoint a receiver if the debtor is unable to meet the obligations.
- ii. Duties of receiver.  
The duties are primarily to the secured creditor that appointed it. They have the duty to act in good faith and be honest and reasonable.
- iii. Circumstances receiver is used.  
These are used to be quick and cost effective. These are not often used as there is concern over the success of recovering debt. They are mostly used for small business with discrete pool of assets with limited creditor claims and small disputes.

Court Appointed receiver.

- i. How is the receiver appointed.  
A receiver by way of court application could be appointed through a security agreement which can be granted for:
  - the right of the possession of assets, they also have the right to sell the assets.
  - Managing a business for a period
  - Conducting an investigation of affairs

Under the BIA Section 243, the secured creditor applies to the court for the appointment of the receiver with national authority. This application is to take control of the business when the debtor is unable to meet its obligations under the security agreement.

Under the Courts of Justice Acts, this allows the court to appoint a receiver on application of any interested party where it is seen as required. This is seen as an equitable receiver.

They can be appointed under the BIA by a secured creditor with the national power and authority or by an interested party under the Courts of Justice Acts- this allows the court to appoint a receiver. The BIA allow for an interim receiver to protect and preserve the assets, if necessary, on a temporary basis if urgently needed.

- 4
- ii. Duties of receiver.  
To act under the powers of the court. They have duties to all the creditors of the debtor but takes direction and instructions from the court. ✓  
Major asset sales could require court approval. They can also borrow DIP Financing.
  - iii. Circumstances receiver is used.  
These are used for more complex cases with competing claims.  
This is used where more security is in knowing the assistance of the court and professionals will be provided, due to the decisions being made and approved by the courts along the process. All transactions must be approved by the court to be fair and reasonable.

Short essay? Lacks detail -- could have been more from the guidance text?

### 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 act of bankruptcy is seen as the following conduct:

- X
- That shows that the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of creditor.

↳ Debtor is insolvent. Where is the definition from s.43 of the BIA? Full list?

There are 3 methods of bankruptcy:

- Voluntary ✓  
The debtor makes an assignment into bankruptcy proceedings voluntarily.  
This can assist with providing a fresh start after the proceedings. There are no court proceedings, only a sworn statement which are filed with the Official Receiver.  
Person must be insolvent as per BIA section 2 and they chose the trustee.  
↳ Trustee selected by debtor? Where are the details from guidance text?
- Involuntary ✓  
The make an application, the applying creditor must be:  
Owed more then CAD 1,000 of unsecured debt and Provide evidence that act of bankruptcy was within 6 moths of date of filling application. The applying creditor choses the trustee.

↳ detail??



- Failure to perform the terms of the BIA proposal.

BIA allows provisions for corporate and consumer proposals to reach a compromise with creditors. These proposals must be accepted by majority of the creditors and approved by the courts.

The corporate proposal is binding on each class of creditors on approval by the class. If it is rejected the debtor is deemed to have made an assignment in bankruptcy as similarly if the court does not approve the proposal, then it is deemed to have made an assignment in bankruptcy. If there is any deviation of terms, this is then brought forward to the court and if the order is granted, they will be assigned into bankruptcy.

With a consumer, a motion must be brought to assign bankruptcy to an individual.

↳ details? process? what happens if approved?

3

#### QUESTION 4 (fact-based application-type question) [15 marks]

You are a lawyer in Canada. You are consulted by counsel in a foreign jurisdiction who is representing an agent operating under the law of that foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. An online seller has a fulfilment office and warehouse in Canada. The foreign agent has taken control of the assets of an online seller of clothing with a head office that is registered in the foreign jurisdiction where senior management of the company have their offices. The business sells clothing around the world, including to customers in Canada. Due to currency exchange- and supply-related issues, the company has been unable to maintain liquidity and has defaulted on various loans to its foreign-based secured lenders who are owed in excess of CAD 200 million and, as a result, has stopped fulfilling orders in process, including to Canadian customers. As a result, a class action lawsuit has been filed by a Canadian law firm seeking damages on behalf of customers for monies paid in respect of unfulfilled orders in the amount of CAD 2 million. This lawsuit in Canada is still in the pleadings phase. It also appears that the Canadian resident in charge of the fulfilment office and warehouse in Canada may have been diverting funds improperly. The foreign agent wants to further investigate. The foreign agent consults you about seeking recognition of the foreign proceeding in Canada in order to maximise recoveries and provide for an equitable distribution of value among all creditors.

#### Question 4.1 [maximum 5 marks]

The foreign agent wants to understand the process to commence a recognition application and obtain recognition of the foreign proceeding in Canada. What is your advice in this regard?

The provisions of the BIA and CCAA on the recognition of foreign insolvency proceedings require Canadian courts to recognise the foreign proceedings on formal proof of:

- The proceeding is a foreign proceeding (FP) as defined.
- The applicant is a foreign representative (FR)
- If the foreign proceedings is a main or non-main proceedings based on the COMI

This application is commenced by a FR who files evidence of the foreign law to show the Canadian court that the FR and the proceedings are FP. Once requirements are met, the court must make the order. If it is determined to be main proceedings, the court issues the stay. If it is non main proceedings a stay is requested.

Automatic and compulsory

Statutory definitions? Lacks detail...

2

**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?

The Centre of main interests (COMI) are based on if it is an individual or a company.

With regards to individuals the COMI is the debtors ordinary place of residence and with regards to a company is seen to be there the company's registered office is. Neither of these presumptions are defined in CCAA or BIA.

All cases are different and the above may not always be the most applicable, but the following considerations are followed, which are seen as the primary importance of determining COMI:

- The location of the significant creditors
- The location of the principal assets/operations
- The location of the head office.

②

Based on the above you can then determine if the proceedings are main or non-main. If the FP is where the COMI is determined, then it is main. And if it is not where the COMI is located then it is non-main.

↳ What is your advice exactly -- where is the COMI?  
What case law can we utilize here...

**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.

Based on the BIA and CCAA, they are broadly worded discretionary powers. They are not restricted in the relief that they can provide to Foreign representatives. These provide an order that is considered appropriate that include orders respecting the examination of witness and taking evidence as well as the provision of information on the debtor's property and affairs.

①

**\* End of Assessment \***