



**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:

- (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 recognised purposes of the BIA include: (a) providing for the financial rehabilitation of insolvent persons; (b) providing a collective proceeding for orderly and fair distribution of the property of a bankrupt among unsecured creditors on a *pari passu* basis; and (c) allowing for an investigation to be made into the affairs of a bankrupt.

②

**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?

An individual debtor who is adjudged to be bankrupt can keep a portion of his or her income earned to maintain a reasonable standard of living.

This standard is determined by the Superintendent of Bankruptcy. Other kinds of assets may include: (a) personal items and clothing; (b) household furniture, food and utensils in the debtor's permanent home; (c) tools necessary to the debtor's work; (d) a motor vehicle with a value up to a certain limit; and (e) certain farm property.

However, how much of each exempt asset class a debtor can retain depends ultimately on the province or territory in which they live. For instance, in Ontario, there is an exemption under the Execution Act that prescribes the debtor's principal residence as exempted from forced seizure and sale. This is if the debtor's equity in that residence does not exceed the value of CAD 10,000.

Further, s 67 of the BIA prescribes for amounts held in RRSPs of the bankrupt to be exempt from seizure in bankruptcy. This is subject to a possible clawback for contributions made in the 12 months preceding bankruptcy.

(2)

**Question 2.3 [maximum 3 marks]**

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

The three types of court officers include trustees in bankruptcy, receivers and monitors.

(3)

**Question 2.4 [maximum 2 marks]**

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

The definition of a "person" under s 2 of the BIA would include a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, 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.

I begin with the role of a receiver. A receiver is a licensed trustee in bankruptcy. He or she is typically a licensed professional in an accounting or financial advisory firm.

Turning first to the question of appointment, a receiver may be appointed in three ways:

- (a) First, a secured creditor may privately appoint a receiver. This may be the case where the security agreement between the debtor and secured creditor provides for a mechanism for a privately appointed receiver. This means that a secured creditor has a contractual right to appoint a receiver if the debtor is unable to meet its obligations.
- (b) Second, under s 243 of the BIA, a secured creditor may apply to the court for an appointment of a receiver with national authority to take control of the business. This may happen when the debtor is unable to meet its obligations under the security agreement.
- (c) Separately, a court-appointed receiver may also be possible where, under the Courts of Justice Acts of each individual province, an interested party (including shareholders or unsecured creditors) satisfies the court that it is "just and convenient" to appoint the receiver.

Where court appointment of a receiver is concerned, the creditor making such an application must provide a statutory 10-day notice of its intention to enforce its security and appoint a receiver, if such receiver is to be appointed over all or substantially all of the inventory, accounts receivables or other property of an insolvent debtor. The giving of such notice is not necessary in the case of a private receiver.

It is also noteworthy that a court appointment of a receiver would lead to the court also issuing a broad stay of proceedings. This would restrict creditors from exercising any rights and remedies unless permission has been obtained from the courts. Amongst other things, a super-priority charge is also granted over the receiver's professional fees and that of its counsel and the appointing creditor over the assets. The court-appointed receiver also has the power to borrow on a super-priority basis.

Turning next to the question of the receiver's duties, the scope of duty of each receiver differs:

- (a) In the case of a privately appointed receiver, he has a general duty to act honestly, in good faith and in a commercially reasonable manner, including attempting to maximize recoveries and to obtain the best price for the debtor's assets in the circumstances.
- (b) In the case of a court-appointed receiver, he or she is an officer of the court and has duties to all creditors of the debtor. However, a court-appointed receiver reports and takes directions and instructions from the court, not the creditor that first sought its appointment.

- good.

Dealing finally with the circumstances where each kind of receiver is used:

- (a) 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. In such cases, the appointment of private receivers will be quick and cost-effective due to the relative simplicity of the matter, and hence no court attendance is required.



- (b) Court-appointed receivers are usually employed in more complex cases, such as cases involving competing claims between creditors or disputes between the creditor and the debtor, or in cases where it appears likely from the outset that the court's assistance is required on an ongoing basis. In addition, such forms of appointment provide a greater comfort for creditors because the requirement of court approval before a receiver makes a decision would minimise any concerns of liability or the likelihood that a transaction was carried out improperly, leading to scrutiny and even unwinding of the transaction by the court. In other words, the process gives creditors greater certainty, and translates to time and costs savings in certain cases.

One final point relates to the reporting requirements of a receiver. In this regard, both private and court-appointed receivers have obligations that come with their appointment. This includes the giving of notice to all known creditors and preparing and distributing interim and final reports concerning the receivership. On top of this, court-appointed receivers must also report to the court whenever necessary or required about how it is discharging its mandate.

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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".

There are three known methods under Canadian law for entering into bankruptcy.

(a) Involuntary Bankruptcy

The first is involuntary bankruptcy. This application must be made at 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.

The application should be brought by the creditor under s 43(1) of the BIA. Upon application, the creditor has to: (i) show that the debtor owes the creditor a sum in excess of CAD 1,000 which is unsecured; (ii) provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application.

The creditor need not prove the debtor currently carries on business or resides in Canada, or currently has assets in Canada, based on a reading of the provision and the words "at the time".

An "act of bankruptcy" is statutorily defined under s 42 of the BIA, with s 42(1) of the BIA listing the situations in which a debtor can be said to have committed an act of bankruptcy. These situations include: (a) if in Canada or elsewhere the bankrupt makes an assignment of property to a trustee for the benefit of creditors (see s 42(1)(a)); (b) if in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it (see s 42(1)(b)); (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 or, in the Province of Quebec, null as a fraudulent preference (see s 42(1)(c)); (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 (see s 42(1)(d)); (e) permitting, for certain specified periods of time, execution under which the debtor's property is taken (see s 42(1)(e)); (f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such

meeting a written admission of his inability to pay his debts (see s 42(1)(f)); (g) the debtor assigns, removes, secretes or disposes of or attempts or is about to do same with his property with the intent to defraud, defeat or delay his creditors or any of them (see s 42(1)(g)); (h) giving notice to creditors that the debtor has suspended or is about to suspend payment of debts (see s 42(1)(h)); (i) defaulting on a proposal made under the BIA (see s 42(1)(i)); and (j) if the debtor ceases to meet liabilities generally as they become due (see s 42(1)(j)).

The most common act of bankruptcy is s 42(1)(j). However, in showing that the debtor ceases to make payment of his liabilities as they become due, is not sufficient 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: see *Re Real Time Fibre Supply Ltd*, 2007 CarswellBC 580.

Even if the applicant creditor proves that there is an "act of bankruptcy" and that the debtor owes a debt, the court may still dismiss the involuntary bankruptcy application if the debtor can demonstrate they have the ability to pay their debts: see s 43(7) of the BIA.

Once the court makes an order of bankruptcy, the property of the debtor vests in a licensed trustee appointed by the court.

#### (b) Voluntary Bankruptcy

The second situation is when a debtor enters into voluntary bankruptcy. As the term suggests, this occurs when the debtor voluntarily makes an assignment into bankruptcy proceedings.

To be eligible to file a voluntary bankruptcy, the debtor must fall under the BIA definition of insolvent person. This definition is found under s 2 of the BIA, and states that an "insolvent person" is one who (1) is not bankrupt; (2) resides or carries on business or has property in Canada; and (3) whose liabilities to creditors provable as claims under the BIA amount to at least CAD 1,000, and: (a) is unable to meet obligations as they generally become due (the cash flow test); (b) has ceased paying current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all of his obligations, due and accruing due (the balance sheet test).

Upon fulfilling these requirements, the debtor company or individual simply has to execute an assignment of its property for the benefit of its creditors which is accompanied by a sworn statement that discloses the debtor's property, the names and addresses of the creditors, and the amounts of the creditors' claims. These documents are filed with the Official Receiver. Once the documents are accepted, the bankruptcy proceedings are commenced.

Upon entering into bankruptcy, the debtor may choose the trustee, although his or her selection is subject to confirmation by unsecured creditors at the first meeting of creditors.

#### (c) Failure of, or failure to perform the terms of a BIA proposal

The final method is the entering into of bankruptcy upon the failure of, or failure to perform the terms of a BIA proposal.

While the BIA contains provisions for both companies and natural persons to reach compromises with their creditors by way of a proposal, a proposal only comes into effect when it is accepted by the requisite majorities of creditors and approved by the court.

For a corporate proposal to be binding on each class of creditors it purports to affect, a majority of the proven creditors in that class, by number, together with two-thirds of the proven creditors in that class, by dollar value, must approve of the proposal. If a class of creditors approves the proposal, it is binding on all creditors within the class, subject to the court's approval. Where a corporate proposal is either rejected by a class of creditors voting on the proposal or not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy.

For a consumer proposal, its terms cannot exceed five years and the creditors will vote to either accept or reject the proposal. If the proposal is approved by a simple majority of the creditors, the proposal is binding on all creditors, regardless of their vote. If the consumer proposal is not accepted, the debtor can make changes to the proposal and resubmit it; or declare bankruptcy.

In the case of a default:

- (a) Where the default occurs in the case of a corporate proposal, and where such default is not waived by the representative of the creditors, ie, inspectors, or the creditors themselves, the proposal trustee must inform the creditors and the Official Receiver. Thereafter a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically assigned into bankruptcy.
- (b) Where the default occurs in the case of a consumer proposal, such as where the debtor fails to make three consecutive monthly payments, the proposal will automatically be annulled. The debtor may seek to negotiate a new proposal or seek court approval to re-instate the proposal within 30 days. Creditors may bring a motion on annulment of a failed consumer proposal to assign the debtor into bankruptcy.

**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]

missing the formal proof requirements?  
① foreign proceeding  
② foreign representative  
③ FP or AMP proceeding based on COMI

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 present situation presents a case where the foreign agent is seeking recognition of the foreign agent's status as a foreign representative of the insolvent company as well as to obtain recognition of the foreign insolvency process.

Although both the CCAA and the BIA have adopted the UNCITRAL Model Law (albeit modified), my recommendation is for the foreign agent to proceed under the CCAA. This is because of the potential complexity and size of the debt that is owed by the foreign company amounting to over CAD 200 million.

The recognition application is commenced by the foreign representative making an application to the court under the CCAA; see s 46(1) of the CCAA. The application must be accompanied by: (a) a certified copy of the instrument that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding; (b) a certified copy of the instrument authorizing the foreign agent to act in that capacity or a certificate from the foreign court affirming the foreign agent's authority to act in that capacity; and (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative: see s 46(2) of the CCAA.

The definition of the terms "foreign proceeding" and "foreign representative" can be found under s 45(1) of the CCAA. The former refers to "a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization" whereas the latter refers to "a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding."

In the present case, there is no doubt that both requirements are satisfied. In respect of the definition of a foreign proceeding, the facts state that the foreign proceeding involves an insolvent company and seeks to deal with that company's assets in a manner that would maximise recovery and provide for an equitable distribution of value among all creditors. That company's business and financial affairs are also presently controlled by the foreign agent, who seeks to proceed with reorganisation. In respect of the definition of a foreign representative, it is clear that the foreign agent fulfils this definition as he was appointed by the foreign court and empowered by foreign legislation to deal with the assets of the insolvent company and to also maximise recoveries and provide for an equitable distribution of value among all creditors.

Once the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding: see s 47(1) of the CCAA. The recognition is automatic and compulsory once the abovementioned requirements are satisfied.

Following this, the court must determine the nature of the foreign proceedings: see s 47(2) of the CCAA. If the court determines the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of proceedings: see s 48(1)(a) of the CCAA. If it determines that the proceeding is a foreign non-main proceeding a stay may be requested, but the court exercises

?

↳ not sure if the question specifically asks for this ...

②

discretion to make any order necessary for the protection of the debtor's property or the interests of creditors: s 49(1)(a) of the CCAA. The determination of whether a "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" turns on a determination of the foreign corporation's center of main interest ("COMI").

**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 starting point is that there is no statutory definition of COMI under the CCAA or the BIA. These legislations merely state that "in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests": see s 45(2) of the CCAA and s 268(2) of the BIA.

This is but a mere presumption that is rebuttable. In determining whether the presumption is rebutted such that another location is deemed to be the COMI, the Canadian courts have enumerated a number of factors that can be used to rebut the presumption. For example, in *Re Lightsquared LP*, 2012 ONSC 2994, a Canadian court outlined a non-exhaustive list of three factors to consider when determining whether a debtor's COMI is located in a particular jurisdiction: (a) the location is readily ascertainable by creditors; (b) the location is the one where the debtor's principal assets or operations are found; and (c) the location is where the management of the debtor takes place. (3)

In the present case, the facts state that the foreign company has a head office that is registered in the foreign jurisdiction where senior management of the company has their offices. It is therefore likely that the proceeding ongoing in that foreign jurisdiction will be classified as a proceeding involving the debtor company's center of main interest and hence likely to be characterized as a foreign main proceeding.

→ Is it possible this presumption is rebuttable? Consider the location OR their warehouse + fulfilment centre...

**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.

→ Does not answer the question -- No they are not limited.

The starting position is that once a foreign proceeding is recognised as a foreign main proceeding, as argued above, the Canadian courts have an obligation to cooperate with the foreign representative and the foreign court. This may include the foreign representative being permitted to make an application seeking an order for remedies that may not be available under Canadian insolvency law in respect of ancillary Canadian proceedings. This is subject to the relief not being contrary to public policy.

The ability of the Canadian courts to grant reliefs that may not necessarily be found under Canadian law is due to the broad wording of the BIA and CCAA. In particular, these legislations contain broadly worded, discretionary powers that provide where an order recognizing a foreign proceeding has been made, the court may, on application by the foreign representative, make "any order that it considers appropriate." Such reliefs may therefore include, but is not limited to, orders respecting the examination of witnesses and the taking of evidence, and the provision of information on the debtor's property and affairs. (2)

**\* End of Assessment \***