



**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.

39/50

### 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.

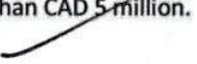
**Question 1.2**

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.

Some of the recognised purposes of the BIA are:

- a) Providing for the financial rehabilitation of insolvent persons;

- b) Providing a collective proceeding for orderly and fair distribution of 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 the bankrupt.

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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?

In bankruptcy an individual bankrupt may keep the following:

- A portion of their income to maintain a reasonable standard of living (standards are set by the Superintendent of Bankruptcy);
- A motor vehicle up to a certain value;
- Personal items and clothing;
- Tools necessary for their work;
- Certain farm property; and
- In certain provinces a limited homestead exemption applies.

2

**Question 2.3 [maximum 3 marks]**

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

'CCA Monitors' – appointed by the Court to oversee plans of arrangement.

'Receivers' – appointed by the Court and returns to Court for approval of their activities and distributions to creditors.

'Trustees' – manage BIA liquidating bankruptcy proceedings. The trustee must seek the Court's approval for certain acts such as selling the debtor's property.

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**Question 2.4 [maximum 2 marks]**

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

2

"Person" is defined in section 2 of the BIA quite broadly and it includes: partnerships, unincorporated associations, a corporation, a cooperative society or cooperative organisation as well as the successors, heirs, executors, liquidators of the succession, administrators or other legal representatives of the person.

**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.

'Receivers' are licensed professionals who are given the authority to deal with the debtor's assets and also have the authority to replace existing management in the day to day operation of the business. Receivership is an equitable remedy in the Canadian jurisdiction primarily aimed at protecting the interests of secured creditors. However common law developments have broadened the scope of receivership to include replacing poorly performing of an otherwise profitable business that is not satisfying debts due, protecting and preserving assets on an interim basis or to facilitate a going-concern sale of a business.

Receivers are split into two types: 'Private Receivers' and 'Court-Appointed Receivers'.

Private Receivers ("PRs") are appointed by virtue of certain clauses in security agreements where by secured creditors have an enshrined contractual right to appoint a receiver if the debtor is unable to meet its obligations under the agreement. A PR's duty is primarily to work for the benefit of the secured creditor who appointed them – usually by recovering, selling and realising funds to repay the debt. However a PR still has a general duty to act honestly, in a commercially reasonable manner and in good faith. They must attempt to maximise recoveries from the debtor's assets. Any sums recovered over and above the level of security will be returned to the debtor.

Court-Appointed Receiver ("CARs") by comparison are appointed by the Court upon application by a secured creditor (under s243 of the BIA). Once appointed, a CAR is endowed with a national authority to take control of the business if the debtor is unable to meet its obligations under the security agreement. The term CAR also includes a sub-set of so-called 'equitable receivers' appointed subject to the Courts of Justice Acts in the provinces – equitable receivers are appointed upon application by any interested party where it is 'just and convenient'.

CARs as opposed to PRs have a greater range of powers including being able to borrow funds on a super-priority basis and they may benefit from Court directors ensuring critical suppliers continue to deal with the business on fair market terms. CARs are therefore used more commonly and especially where the circumstances of the debtor are more complex and there may be disputes between creditors. The Court oversight adds more comfort for creditors and more legitimacy to sales of assets, as opposed to sales by PRs where there may be concerns over successor liability. Therefore, PRs are generally employed in more limited circumstances where the debtor is a small business or a limited pool of assets unlikely to cause creditor disputes. However the lack of Court interaction with PRs means this route is a more cost-effective option.

7

### 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 for entering bankruptcy are:

- Involuntary;
- Voluntary; and
- Upon the failure of a BIA proposal.

A successful application for an involuntary bankruptcy requires that the applying creditor is owed more than CAD1,000 in unsecured debt, and that they can demonstrate that the debtor has committed an "act of bankruptcy" within 6 months of the date of the filing.

So called 'Acts of Bankruptcy' are listed in section 42 of the BIA, acts include:

- Ceasing to meet liabilities as and when they generally fall due;
- Defaulting on a proposal;
- An admission of their inability to pay debts;
- The debtor, with the intent to defeat or delay his creditors, leaves Canada or otherwise absents himself;
- 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; and
- In Canada or elsewhere the bankrupt makes an assignment of property to a trustee for the benefit of his creditors.

The most common Act of Bankruptcy is ceasing to meet liabilities as they generally become due.

Once the two-limb test is satisfied the Court will be able to make an order for bankruptcy. It is worth noting that the debtor can defeat the application (demonstration of an act of insolvency notwithstanding) if they can show the Court they have the ability to pay their debts. Should the Court be minded that this is not the case and therefore that the tests for involuntary bankruptcy are satisfied, an order can be made for the bankruptcy. As soon as the order is made the property of the debtor automatically vests in the licensed trustee appointed by the Court.

Voluntary bankruptcy is when the debtor voluntarily enters bankruptcy without the need for a creditor application. Debtors may choose to voluntarily enter bankruptcy for a number of reasons such as: to stay legal actions by creditors, or to seek a fresh start once the proceedings have been finalised (individuals only). In order for an application to be made successfully to the Official Receiver, the debtor must satisfy the definition of an 'insolvent person':

*good.*  
 'a person who is not bankrupt, resides or carries on business or has property in Canada, and whose liabilities to creditors provable as claims under the BIA amount to at least CAD1,000m and a) is unable to meet obligations as they generally become due; b) has ceased paying current obligations in the ordinary course of business; or c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all obligations due and soon to be due.'

Providing this test is satisfied the debtor may proceed with filing the relevant documents with the Official Receiver, including an 'assignment' of its property for the benefit of its creditors and a sworn statement disclosing the extent of the property held. Once bankruptcy proceedings are commenced the debtor's chosen trustee takes office but their appointment is subject to creditor approval.

It should be noted that the BIA allows for the Court to annul a bankruptcy where it is of the opinion that the order ought not to have been made or assignment ought not to have been filed. The requirements are that either the debtor was not an insolvent person, or that there has been an abuse of process.

The failure of a BIA proposal is the last method for entering bankruptcy. The BIA allows for both corporate and individual proposals to be made so debtors can reach compromises with their creditors. Corporate proposals must be approved by a majority of creditors in a class by number and two-thirds of that class by dollar value of claims. If approved it is binding on all creditors in the class subject to Court approval.

If a corporate proposal is rejected by a class of creditors the debtor is deemed to have made an assignment in bankruptcy, similarly if the Court does not provide its approval an assignment is deemed to have been made. If a debtor defaults under the terms of its proposal (and the default is not waived by inspecting creditors or the creditors themselves), the proposal trustee must inform the creditors



and the OR and thereafter a motion may be brought to the Court to annul the proposal with the debtor being automatically assigned into bankruptcy if the Court makes the relevant order.

It is to be noted that the failure of an individual proposal does not result in automatic bankruptcy, a separate motion must be brought.

7

**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?

There are three main requirements for a foreign proceeding to be recognised in Canada as provided for in both the BIA and CCAA:

1. That the proceeding is a 'foreign proceeding' in accordance with the statutory definition;
2. That the applicant is a 'foreign representative' in accordance with the statutory definition; and
3. Whether the foreign proceeding will be classed as a 'foreign main proceeding' or a 'foreign non-main proceeding' will depend on establishing the debtor's Centre of Main Interests.

The foreign representative must provide the Canadian Court with substantial evidence demonstrating the first two limbs of the test are satisfied. The case law shows that neither definition is interpreted restrictively and a purposive approach is taken by the Courts in this regard. The Canadian court will focus on the substance of the relevant foreign law not its title.

3

Once all three limbs are satisfied the recognition will be automatic and compulsory upon the making of the relevant order by the Court. The order will specify whether the proceedings have been recognised as 'foreign-main proceedings' or 'foreign non-main proceedings'. The relief available thereafter will differ depending on this clarification.

Could we have defined Foreign proceeding + foreign representative per s. 268(1) of the BIA? or s. 45(1) of the CCAA

this question could have elaborated more...

**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?

In determining the Centre of Main Interests ("COMI") of a debtor, in the absence of statutory definitions in either the BIA or CCAA, the Court analyses:

- The location that significant creditors recognise as being the centre of the debtor's operations;
- The location of the debtor's principle assets or operations; and
- The location of the debtor's headquarters.

Based upon the facts in this case, the Court will begin with the presumption that the debtor's COMI is where the company is registered – this would be the foreign jurisdiction. In order to rebut that and to make the case that the debtor's COMI is in Canada, the three points of analysis above would need to point to Canada. Unfortunately, point 1 is not satisfied because the level of creditor debt in Canada is 1% of the debtor's overall debt so the Canadian creditors would not be deemed to be 'significant'. The second point is also not satisfied, the debtor is an international online business and therefore is likely to have fulfilment centres or warehouses in many jurisdictions around the world. Finally the debtor's headquarters are known to be in the foreign jurisdiction along with the majority of creditors. Therefore, the proceedings are likely to be deemed to be a 'foreign non-main proceeding' with the main proceedings likely taking place in the originating foreign jurisdiction.

could this be a rebuttable assumption? ~~for example~~  
consider fulfilment centre and warehouse in Canada.

confusing analysis would have been more compelling if you explicitly stated requirement

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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.

Following successful recognition as a 'foreign non-main proceeding' the foreign agent would be entitled to:

- Petition the court for a stay of proceedings in Canada. As it is not a 'main' proceeding the stay is not automatic – but it may be needed in this case given the class action lawsuit afoot;
- Standing before the Canadian courts;
- Cooperation from Canadian authorities; and
- Any order the Court may see fit to grant upon application by the foreign agent providing it is necessary for the protection of the debtor's interests or property including orders for the examination of witnesses – this may be highly relevant given the allegations against the Canadian employee of the debtor.

Any relief granted is subject to a public policy exception where the Court can refuse to grant specific relief if it would be contrary to public policy.

It is worth noting that the Court is not strictly limited to only ordering relief that would be available to Canadian insolvency practitioners. Re Hartford Computer Inc. is an example but this was with regards to a 'foreign main-proceeding' so it may not be available in this case. However as stated in the last point above, the Court has significant discretion to make whatever order it sees fit upon petition.

1

**\* End of Assessment \***