



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.

44/50

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. ✓

Providing for the financial rehabilitation of insolvent persons.

Providing a collective proceeding for orderly and fair distribution of property of a bankrupt among unsecured creditors on a *pari passu* basis.

Allowing for an investigation to be made into the affairs of a bankrupt.

③

Question 2.2 [maximum 2 marks]

②

Generally, in the context of an individual bankruptcy, what type of assets can a debtor keep in a bankruptcy?

A portion of their income earned that is necessary to maintain a reasonable standard of living. The reasonable standard of living is one determined in accordance with the standards set by the Superintendent of Bankruptcy.

Also, the debtor may keep personal items and clothing, household furniture, food and utensils in his permanent home, tools necessary to do his work, a motor vehicle with a value up to a certain limit and certain farm property. These are exempt property for individuals.

Question 2.3 [maximum 3 marks]

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

Receivers, monitors and trustees in bankruptcy.

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 or a cooperative organisation, as well as the successors, heirs executors, liquidators of the succession, administrators or other legal representatives of a person.

QUESTION 3 (essay-type question) [15 marks]

⑥

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 receiver is a licensed professional that is given the authority to deal with a debtor's assets. Receivers can be either privately appointed or court appointed.

A privately appointed receiver derives its authority from a security agreement between the debtor company and a secured creditor. Generally, a security agreement may provide that the creditor has a right to appoint a receiver if the debtor fails to meet its obligations.

On the other hand, a court appointed receiver derives its authority from an order of court, and the governing legislation. Under s 243 of the BIA, a secured creditor may apply to court for the appointment of a receiver when a debtor is unable to meet its obligations. In certain provinces, it is

* could have been slightly more detailed

also possible under the relevant Court of Justice Acts for other interested parties, such as shareholders or unsecured creditors, to apply for the appointment of a receiver.

It is also important to note that, under s 244 of the BIA, a secured creditor must give a 10-day notice of its intention to enforce its security and appoint a receiver if such receiver is to be appointed all or substantially all of the inventory, accounts receivables or other property of the debtor. There is no such requirement for privately appointed receivers.

When a private receiver is appointed by a secured creditor, its duties are owed primarily to that secured creditor. That being said, the privately appointed receiver is still subject to a general duty to act honestly, in good faith, and in a commercially reasonable manner. This entails attempting to maximise recoveries and to obtain the best price for the debtor's assets in the circumstances.

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In contrast, a court appointed receiver is an officer of the court and owes duties to all the debtor's creditors. It owes no additional duties to the secured creditor (or interested party) that applied for its appointment.

good distinction.

Generally, a court appointed receiver will be used in more complex cases, such as where there are competing claims between different creditors, disputes between the debtor and creditor, or where the assistance of the court is likely to be required. This is because, depending on the terms of the order appointing the receiver, some of the decisions or actions of the receiver will have to be approved by the court. This provides comfort to the different parties involved in a more complex insolvency that the receiver is acting properly.

On the other hand, a privately appointed receiver is more appropriate in simpler cases where the debtor is a small business, there is a discrete pool of assets, or where there are no competing creditor claims or disputes with the debtor. This is because a privately appointed receivership does not involve attending court, and it can therefore be quicker and more cost effective.

less complex

good.

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 into bankruptcy are:

- (a) Involuntarily
- (b) Voluntarily
- (c) On the failure of, or failure to perform the terms of, a BIA proposal

I will explain each in turn.

Involuntary bankruptcy occurs upon an application taken out by a creditor of the debtor under s 43(1) of the BIA. For such an application to be successful, the creditor must be owed more than CAD 1000 of unsecured debt and provide evidence that the debtor committed an "act of bankruptcy" within the six months prior. What constitutes an "act of bankruptcy" is set out in s 42 of the BIA: (a) in Canada or elsewhere the bankrupt makes an assignment of property to a trustee for the benefit of creditors; (b) in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it; (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; (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; (e) permitting, for certain specified periods of

good.

time, execution under which the debtor's property is taken; (f) the debtor 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; (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; (h) giving notice to creditors that the debtor has suspended or is about to suspend payment of debts; (i) defaulting on a proposal made under the BIA; and (j) the debtor ceases to meet liabilities generally as they become due. Most commonly, creditors will rely on a general failure to meet liabilities as they become due as an act of bankruptcy. For this to be made out, the debtor must have failed to meet more than just its liabilities to the applicant creditor, unless the debt owed to the applicant debtor is so large that other debts are not of significance in comparison: *Re Real Time Fibre Supply Ltd*, 2007 CarswellBC 580.

Voluntary bankruptcy occurs on an assignment by the debtor. The debtor can do this for a number of reasons, such as seeking a stay of legal actions by creditors or obtaining a fresh start once proceedings have concluded. In order to file such an application, the debtor must be an "insolvent person" as per the BIA. An "insolvent person" is defined at s 2 of the BIA as one 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 CAD 1,000, and: (a) is unable to meet obligations as they generally become due; (b) has ceased paying current obligations as they generally become due; or (c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all his obligations, due and accruing due. No court application is necessary – the debtor simply executes an assignment of its property for the benefit of its creditors and swears a statement that discloses his property, the names and addresses of his creditors and the amounts of the creditor's claims. The documents are then filed with the Official Receiver and bankruptcy proceedings commence once the filing is accepted.

Finally, bankruptcy can be entered where there is a failure of a BIA proposal. Under the BIA, debtors may initiate proposals to reach compromises with their creditors. For these proposals to become effective, they must be accepted by the requisite majorities of creditors and be approved by the court. If a corporate proposal is rejected by the voting creditors, the debtor is deemed to have made an assignment in bankruptcy. If a debtor fails to abide by the terms of a proposal that was approved, the proposal trustee must inform the creditors and the Official Receiver. Thereafter, a motion may be brought to annul the proposal. When such order is given, the debtor is automatically assigned into bankruptcy. For a consumer proposal, however, an additional motion will need to be brought to assign the individual 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?

Because Canada has adopted a modified version of the UNCITRAL Model Law in both the BIA and the CCAA, the foreign agent has a choice and may commence proceedings under either statute. Given the scale of the insolvency proceedings in this case (debt exceeding CAD 200m), I would recommend using the procedure in the CCAA.

The foreign agent may commence a recognition application pursuant to s 46(1) of the CCAA. The following documents need to be provided in the application: a certified copy of the instrument that commenced the foreign proceeding; a certified copy of the instrument that authorised the foreign agent to deal with the assets of the debtor in the foreign proceeding; and a statement identifying all foreign proceedings in respect of the debtor known to the foreign agent (s 46(2) of the CCAA). For the recognition application to be successful, the foreign agent must be able to convince the court that: the foreign proceeding is a "foreign proceeding" in accordance with the definition contained in s 45(1) of the CCAA; and the foreign agent is a "foreign representative" in accordance with the definition contained in s 45(1) of the CCAA. The foreign agent will also have to establish whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding". → based on the COMI.

Section 45(1) defines a "foreign proceeding" as "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". In this case, it is clear that this requirement is satisfied. The online seller has had its assets taken control of in insolvency proceedings in the foreign jurisdiction. Further, the objective of the foreign agent is to "maximise recoveries and provide for an equitable distribution of value among all creditors". The foreign proceedings therefore deal with the creditors' collective interests, and the online seller's assets are subject to control or supervision of the foreign court through the foreign agent. This is a foreign proceeding for the purposes of the CCAA.

Section 45(1) defines a "foreign representative" as 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. Here, it is clear from the facts that the foreign agent has been authorised by the foreign court in the foreign proceeding to take control of the online seller's assets for the purpose of reorganisation. He is a foreign representative for the purposes of CCAA.

Once these two requirements are satisfied, the Canadian courts must recognise the foreign proceeding and make an order stating so: s 47(1) CCAA.

What happens next depends on whether the foreign proceeding is found to be a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is found to be a foreign main proceeding, the court will also make an order: (a) staying, until otherwise ordered by the court, for

any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act; (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company; (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada (s 48(1) CCAA). If the foreign proceeding is found to be non-main, the foreign agent will have to make an application for similar further orders, and the court will grant them on a discretionary basis.

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 s 45(2) of the CCAA, which contains a presumption that a debtor's registered office is deemed to be the centre of its main interests.

In order to convince the court that the COMI of a debtor is somewhere other than the location of its registered office, the foreign agent may point to a number of factors that the courts have found to be relevant in this regard: the location that significant creditors recognise as being the debtor's COMI; the location in which the debtor's principal assets or operations are found; and the location of the debtor's head office, headquarters or "nerve centre".

From the facts given, the only relevant factor appears to be that the online seller's head office is registered in the foreign jurisdiction and that is also where senior management of the company have their offices. In the absence of further information, it would therefore appear that the foreign proceeding is a foreign main proceeding.

Get it done

→ worth mentioning the debtor has a warehouse + fulfilment centre in Canada.

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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.

The Canadian court is not so limited. Upon recognition of foreign proceedings, the court has, under the CCAA, the broad discretion to make "any order that it considers appropriate" where it is satisfied that such order is necessary for the protection of the debtor company's property or the interests of a creditor or creditors (s 49(1) CCAA). Pursuant to these powers, the court may grant remedies that are not available under Canadian insolvency law (see *Re Hartford Computer Hardware Inc*, 2012 ONSC 964). This is, however, subject to the exception that the court will not grant remedies where they would be contrary to public policy (s 61(2) CCAA).

subject to the public policy exception.

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*** End of Assessment ***