



**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.

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### 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 are:

- a. Enabling an investigation into the affairs of a bankrupt;
- b. Providing for financial rehabilitation of insolvents; and



- c. Providing for collective proceeding and orderly and fair distribution of bankrupt property amongst unsecured creditors *pari passu*.

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?

specify assets

Certain property of individuals is exempt from seizure under provincial legislation and exempt from being distributed to creditors.

Additionally, individuals can keep a portion of income earned in order to maintain a reasonable standard of living, pursuant to standards set by the Superintendent of Bankruptcy.

①

**Question 2.3 [maximum 3 marks]**

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

Three types of court-officers that can be appointed in insolvency proceedings are:

- a. Trustees in bankruptcy;
- b. Monitors in CCAA proceedings; or
- c. Court-appointed receiver, pursuant to section 243 of the BIA.

③

**Question 2.4 [maximum 2 marks]**

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

A person is defined in section 2 of the BIA as including:

- a- A partnership;
- b- An unincorporated association;
- c- A corporation;
- d- A cooperative society or cooperative organisation,
- e- their 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.

Receivers are licensed professionals provided with authority to deal with a debtor company's assets. They have powers to operate and manage businesses in place of existing management, and can close

the business if receivers conclude that continued operations will likely erode creditor recoveries, or where there are insufficient funds to continue the operations. Receivership developed as an equitable remedy in Canada via the common law in order to protect secured creditors. Amendments have been implemented to the BIA to incorporate the common law developments in relation to receivership law. There are two types of receivers:

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- a. private receivers: the right to privately appoint a receiver will arise in the security agreement between the debtor and secured creditor. A secured creditor has a contractual right to appoint the receiver should the debtor be unable to meet its obligations. The privately appointed receiver owes duties principally to the secured creditor appointed it – they also owe a general duty to act in good faith, honestly and in a commercially reasonable way. They must attempt to maximise potential recoveries and obtain the best price for a debtor's assets in each case. Private receivers are mostly used for small businesses or discrete assets pools where there will not typically be competing creditor claims or debtor disputes.
  - b. Court-appointed receivers: pursuant to section 243 of the BIA, a secured creditor may apply to the Court for a receiver to be appointed. That receiver will have national authority to seize control of the debtor's business when it cannot meet its obligations under the security agreement. Further, the Courts of Justice Act of individual provinces are another means by which a Court may appoint a receiver, on application of an interested party, which can include unsecured creditors or shareholders where it is just and convenient. Such appointments often occur in more complex cases, including those where competing claims between creditors or disputes amongst creditor and debtor, or where it appears likely that Court assistance will be required in an ongoing basis. Court-appointed receivers derive power from legislation. They are officers of the court and have duties to all creditors of a debtor. They must report to and take instruction from the Court, not the creditor that had them appointed.
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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 various methods for entering bankruptcy in Canada. Three such methods are identified below, but before explaining those, it is important to bear in mind just what constitutes an "act of bankruptcy" – which is typically a requirement of any attempt to push a company into some form of bankruptcy proceeding. An "act of bankruptcy" typically involves two forms of conduct: (i) proving that a debtor violated certain commercial morality norms by attempting to frustrate legitimate efforts by creditors to collect debts or (ii) showing that a debtor is in fact insolvent. Acts of bankruptcy are listed in section 42 of the BIA, and includes things like a debtor making a fraudulent gift of property or where a debtor transfers any property or creates a charge over it (i.e. fraudulent preference).

→ could we have included the full list for thoroughness?

Three different methods for entering bankruptcy are:

- a. Voluntary bankruptcy: debtor's may voluntarily assign property into bankruptcy proceedings. The debtor must fall under the BIA definition of an "insolvent person" to do this. The debtor executes an assignment of property to the benefit of creditors accompanied by a sworn statement disclosing the debtor's property, creditors and their claims. No Court applications are made – these documents are filed with an Official Receiver.
- b. Involuntary bankruptcy: by creditor application, it must be shown that the creditor is owed more than CAD 1,000 of unsecured debt and that a debtor has committed an "act of



Answer lacks detail

3

- bankruptcy" within 6 months of the date of filing the application (per section 43(1) of the BIA).
- c. Failure of BIA Proposal: the BIA permits debtors to reach compromises with creditors. If a corporate proposal is rejected by creditors, for example, the debtor is then deemed to have assigned into bankruptcy. Similarly, if the corporate proposal is rejected by the Court, a debtor is also deemed to have assigned 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]**

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?

In order to obtain recognition of the foreign proceeding in Canada, formal proof of three main requirements need to be satisfied: (i) that the proceeding in question is a "foreign proceeding" pursuant to the statutory definition; (ii) that the applicant is a "foreign representative" pursuant to the statutory definition and (iii) that the foreign proceeding is a "foreign main proceeding" or "foreign non-main proceeding" based on an analysis of COMI – see sections 269-272 of the BIA and sections 46-49 of the CCAA.

To commence a recognition application in Canada, a foreign representative must file sufficient evidence of the foreign law to enable a Canadian Court to determine that they are a foreign representative and that the proceeding is in fact also a foreign proceeding. Canadian case law shows that each of those terms are afforded broad and purposive interpretations, which should enable the foreign rep on these facts to meet the requirements for recognition of the foreign proceeding without too much difficulty. The Canadian Courts will focus on the substantive effect of the foreign law, and not the strict wording.

Once the recognition requirements are satisfied, automatic recognition arises and is in fact compulsory, quite like the Model Law – whereby, the Canadian Court must grant an order recognising the foreign proceeding. The Court will also automatically issue a stay of proceedings, should it



## definitions of foreign proceeding and foreign representative

determine that the proceeding is found to be a foreign main proceeding. Where it is found that the foreign proceeding is a foreign non-main proceeding, a stay may be required and the Court retains a discretion to make an order necessary to protect a debtor's property or creditor's interests.

\* Answer could have been more full on.

### 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?

As with the Model Law, there is not statutory definition of what is COMI in either of the CCAA or the BIA. Like the Model Law, however, each of those acts contains an informative rebuttable presumption. For individuals, absent contrary proof, COMI is the debtor's ordinary place of residence. For a company like in this factual scenario, subject to contrary proof, a company's COMI is its registered office (see sections 268 of the BIA and section 45 of the CCAA).

Courts have identified three considerations of primary importance, when considered as a whole, in determining a debtor's COMI (e.g. in Re Mt Gox [2014], ONSC 5811):

- Location that significant creditors consider to be the centre of a company's operations'
- Location of a debtor's principal assets or operations; and
- Location of the debtor's head office.

On these facts, the registered office of the debtor and its head office (where senior management are situated) and assets are located in the jurisdiction of the foreign proceeding – this suggests that the COMI is the location of the foreign proceeding. It has operations around the world, including in Canada (including fulfilment offices and warehouses), and significant creditors (including secured) and potential fraud claims against Canadian-based personnel – absent the strong indication that COMI of this debtor is the location of the foreign proceedings, these factors might lean the other way, indicating it may be Canada (this is unlikely). Instead, the debtor would be considered to have an establishment in Canada, but its COMI is in the jurisdiction of the foreign proceeding.

↳ good. you acknowledged Canadian warehouse factor.

Once a debtor's COMI is determined, a foreign proceeding will be determined to be a foreign main proceeding if the COMI is located where the foreign proceeding is, or foreign non-main, if the proceedings is not situated where the COMI is. On these facts, the foreign proceeding would be treated as a foreign main proceeding given that is the location of its COMI. This determination impacts the rights and relief that may be sought from the Canadian courts – for example, an automatic stay is obtained in Canada (per sections 271 of the BIA and 48 of the CCAA).

### 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.

Recognition as foreign main proceeding (or even non-main), affords the foreign rep standing to appear in the Canadian Courts (section 49(1) CCAA). Further, recognition requires the Canadian Courts to cooperate with the foreign rep and foreign Court. Both of the BIA and CCAA contain broad discretionary powers in circumstances where a recognition order has been made, and a foreign rep has applied to the Court for relief – provided the Court is satisfied that it's necessary to protect debtor company property or is in the interests of creditors, the Canadian Court can make any order it deems

appropriate (per sections 272(1) of the BIA and 49(1) of the CCAA). Such orders include for the examination of witnesses and provision of information regarding property and affairs.

If, as is the case here, the foreign proceeding was treated by the Canadian courts as a foreign main proceeding, the Canadian court is not strictly limited to Canadian entitlements and remedies in the relief it can grant. Subject to a public policy exemption, and ensuring that the orders made are consistent with those in any concurrent proceedings under the BIA and CCAA (see e.g. Nishiyama (2020 BCSC 224)), the Canadian Court is not limited to exercising its discretion to only provide similar remedies as are available under Canadian insolvency laws. The Canadian courts have, in fact, ordered relief in foreign main proceeding where ancillary Canadian proceedings would not be afforded the same relief (see e.g. Re Hartford Computer Hardware Inc, 2012 ONSC 964).

**\* End of Assessment \***

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