



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.

26/50

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. (0)

X

- 1) It sets out the bankruptcy regime for individuals
- 2) It sets out the bankruptcy regime for liquidation of a business
- 3) It provides procedural steps for business restructurings

① Financial rehabilitation

② provide collective proceeding for orderly distribution of property

③ Allows for investigations

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?

Specific assets?

X In an individual bankruptcy, a debtor can keep property held in trust for another person or property exempt from seizure in accordance with the provincial laws where the Debtor resides.

①

Question 2.3 [maximum 3 marks]

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

- X 1.) An Administrator
- 2.) A Court appointed trustee
- 3.) A receiver

②

Question 2.4 [maximum 2 marks]

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

Section 2 of the BIA defines a person as a cooperative society, corporation, corporative organisation, an unincorporated association and includes a partnership as well as heirs, successors, executors, administrators, liquidators of the successors and 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.

There are two types of receivers in the Canadian Bankruptcy regime being a private receiver and a court appointed receiver.

A private receiver is provided for in the agreement between the debtor and the creditor. A creditor had a right to appoint a private receiver to recover his debt from the debtor when the debtor fails to meet his obligations. The duties of a private receiver include taking possession of the debtor's assets to recover the creditor's debt. The Private receiver woes his duty to the creditor however, he is till mandated to act with honesty and good faith. He must also act in a commercially reasonable manner and try to maximise recoveries and obtain the best prices for the debtor's assets. A private receiver is not mandated to make court appearances.

A court appointed receiver is appointed by the Court at the request of a secured creditor. A court appointed receiver is appointed in complex situations where the debtor fails to meet its obligations to a security agreement. The Court appointed receiver has duties to all the creditors to carry out major asset sales and recover the creditor's debt.

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".

Under the Canadian bankruptcy regime, the three methods for entering into bankruptcy are voluntary bankruptcy, involuntary bankruptcy and failure to perform the terms of a BIA proposal.

Voluntary bankruptcy is when the debtor voluntarily commences proceedings for bankruptcy. The debtor must fall under the BIA definition of an insolvent person at the time of initiating proceedings for bankruptcy.

The other method of entering into bankruptcy is through an involuntary Bankruptcy. This is where creditors apply to the Court for an involuntary bankruptcy where the debtor has committed an act of Bankruptcy. An act of bankruptcy is where the debtor ceases to meet liabilities as they fall due or where the debtor violates certain norms of commercial morality by attempting to frustrate the creditor's legitimate efforts to collect.

The failure to perform the terms of BIA proposal entails a situation where the debtor does not abide by the compromises agreed upon between the debtor and the Creditors and a motion is brought before the Court 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.

Not an essay... more detail could have been included

2

Question 4.1 [maximum 5 marks]

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

The process to commence a recognition application requires the foreign agent to file an application before the Canadian Courts. The Foreign Agent must show sufficient evidence of foreign law. This will help the Court determine that he is a foreign agent and that the process is a foreign proceeding. There are three main requirements that the Court will take into consideration when recognising a foreign proceeding in Canada. In this case, the foreign agent must;

- 1.) Demonstrate that the proceeding is a foreign proceeding in line with the statutory definition
- 2.) That the foreign agent is a foreign representative within the statutory definition
- 3.) Show that the foreign proceeding is a foreign main proceeding or a foreign non main proceedings in accordance with the center of main interest analysis.

When the Court determines that the requirements for the application have been met, an order of recognition will be made.

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 Canada, the Court will determine the center of main interest based on three factors being;

- 1.) The location of company's headquarters
- 2.) The location of the Company's senior management
- 3.) The location known to significant creditors as the company's headquarters.

In this case, the foreign agent is advised that the Foreign Jurisdiction would be considered as the center of main interest as it fulfils the above three factors.

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.

Canadian Courts are not limited to Canadian entitlements and remedies when providing reliefs. Canadian Courts respect other entitlements from other Jurisdictions and will enforce them in Canada. Canadian Courts have also proven to be good with Court-to-Court communications with Courts in other Jurisdictions.

Canada accepts foreign insolvency proceedings and recognises other Jurisdictions in insolvency proceedings.

*** End of Assessment ***