



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.

45/50

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.

The recognised purposes of the BIA are (per The Hon Mr Justice Lloyd Houlden, Mr Justice Geoffrey B Morawetz and Dr Jannis P Sarra, *"The 2019 Annotated Bankruptcy and Insolvency Act"*):

(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;
- (c) allowing for an investigation to be made into the affairs of a bankrupt; and
- (d) setting aside transfers under value, preferences, settlements and other fraudulent transactions so all creditors may share equally in the value of the bankrupt's assets.

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?

The debtor may generally keep: (a) personal items (including clothing); (b) household furniture, food and utensils in his permanent home; (c) tools necessary to his work; (d) a motor vehicle with a certain limited value and (e) some farm property. There is also a limited homestead exemption in some provinces which exempt the principal residence of a debtor from forced seizure or sale if the value of the debtor's equity in the principal residence does not exceed a prescribed amount.

2

Question 2.3 [maximum 3 marks]

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

In a liquidating bankruptcy, the trustee in bankruptcy represents the best interests of the creditors to manage and distribution of assets in accordance with the statutory distribution scheme. In CCAA proceedings, the court officer appointed to oversee distributions is a "monitor". In receiverships, the court officer appointed is called the receiver.

3

Question 2.4 [maximum 2 marks]

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

Pursuant to s 2 of the BIA, a person includes the following: a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the 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.

A receiver is a licensed trustee in bankruptcy – typically a licensed professional in an accounting or financial advisory firm – who is given the authority to deal with a debtor company's assets, including

the authority to manage the business, or to shut down the business if he concludes that the continued operation of the business will diminish recovery for creditors or if there is no funding to continue operations.

A private receiver is appointed by the secured creditor under a security agreement between the debtor and the secured creditor when the debtor is unable to meet its obligations. The duties of a private receiver are primarily to the secured creditor who appointed him, but also a general duty to act honestly, in good faith and in a commercially reasonable manner, including to attempt to maximize recoveries and to obtain the best price for the debtor's assets in the circumstances. Private receiverships are preferred for cost effectiveness and will not require court attendance. However, private receivers are not often used because of concerns over succession liability for those who take over the management of the company from them. They are therefore usually 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.

good.

A court-appointed receiver is appointed on the application of a secured creditor when the debtor is unable to meet its obligations under the security agreement (s 243 of the Bankruptcy and Insolvency Act) with a statutory 10-day notice of its intention to enforce its security and appoint a receiver (s 244 of the BIA). The Courts of Justice Acts of the individual provinces also allow the court to appoint a receiver on application by any interested party (including shareholders or unsecured creditors) where it is "just and convenient" to do. A court-appointed receiver has duties to all creditors of the debtor. He has to report and take directions from the court, not the secured creditor who applied for his appointment. Thus, court-appointed receivers may be more suited to complex cases which involve competing claims between creditors or disputes between the creditor and the debtor.

Both private and court-appointed receivers are held to the obligation to provide notice of its appointment to all known creditors and prepare and distribute interim and final reports concerning the receivership.

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 of entering into a bankruptcy are as follows:

- A. Involuntary bankruptcy;
- B. Voluntary bankruptcy; and
- C. On the failure of or failure to perform the terms of a BIA proposal.

200

6

Involuntary bankruptcy

To make an application for an involuntary bankruptcy order, the creditor applying must: (a) be owed in excess of CAD 1,000 of unsecured debt; and (b) provide evidence that the debtor has committed an "act of bankruptcy" within six months of the date of the filing of the application. An involuntary bankruptcy application must be brought to 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.

An "act of bankruptcy" essentially involves one of two different types of conduct: (a) conduct that shows that the debtor violated certain norms of commercial morality by attempting to frustrate the legitimate collection efforts of the creditor; or (b) conduct that shows the debtor is insolvent.

Pursuant to s 42 of the BIA, an act of bankruptcy includes: (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 time, execution under which the debtor's property is taken; (f) an admission of his inability to pay 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; and (j) if the debtor ceases to meet liabilities generally as they become due.

Voluntary bankruptcy

Voluntary bankruptcy occurs when the debtor voluntarily makes an assignment into bankruptcy proceedings. It may be motivated by a desire to stay creditors' actions. To file a voluntary bankruptcy, the debtor should fall within the definition of "insolvent person". The debtor company or individual executes 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 which are filed with the Official Receiver. The bankruptcy proceedings commence on the acceptance of the documents.

In voluntary bankruptcy proceedings, the debtor may choose trustee. This is subject to confirmation by unsecured creditors at the first meeting of creditors.

Failure of or failure to perform the terms of a BIA proposal

The BIA proposal allows debtors work with the creditors on an arrangement in the spirit of compromise, and must be accepted by the requisite majorities of creditors and approved by the court.

The debtor is deemed to have made an assignment in bankruptcy if (a) a corporate proposal is rejected by a class of creditors voting on the proposal; (b) a corporate proposal is not approved by the court; and (c) if a debtor defaults under the terms of its proposal and such default is not waived by inspectors or the creditors themselves, the proposal trustee must inform the creditors and the Official Receiver and a motion to annul the proposal is granted.

↳ if granted? Debtor automatically assigned into bankruptcy.
For a consumer proposal, its failure does not result in an automatic bankruptcy and a motion must be brought to assign the individual into bankruptcy. ↳ the distinction.

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 that the Canadian courts rely on to recognise foreign proceedings pursuant to s 269 BIA and s 46 Companies' Creditors Arrangement Act ("CCAA"):

- (a) the proceeding is a "foreign proceeding";
- (b) the applicant is a "foreign representative"; and
- (c) the foreign proceeding is either a foreign main proceeding, or a foreign non-main proceeding, based on the centre of main interest ("COMI") analysis.

The terms "foreign proceeding", "foreign representative", "foreign main proceeding" and "foreign non-main proceeding" are defined in s 268(1) BIA and s 45(1) CCAA.

The foreign representative must file sufficient evidence of the foreign law to allow the Canadian court to determine that they are a foreign representative and that the proceeding is a foreign proceeding with his application for recognition. The terms "foreign proceeding" and "foreign representative" are interpreted broadly and purposively. In *Centaur Litigation SPC, Re* [2016] BCSC 1224, the Canadian court held that it was sufficient that a Cayman Islands proceeding dealt "with the creditors' collective interest generally under the Cayman Islands Companies law, which permits insolvent companies to restructure under the supervision of the court", for that proceeding to qualify as a foreign proceeding.

Assuming the purpose of the foreign proceeding is for reorganisation and/or liquidation, the foreign agent will likely be able to meet the requirements for recognition in Canada on the given facts.

If the requirements for recognition are met, then recognition is automatic and compulsory, and the court will make an order recognising the foreign proceeding. If the court determines that the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of proceedings. If the court determines that the foreign proceeding is a foreign non-main proceeding, a stay may be requested for the court's discretion to make any order necessary for the protection of the debtor's property or the interests of creditors

✓ good.
5

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?

No statutory definition of a COMI exists in the in the BIA or CCAA. Under s 268 BIA and s 45 CCAA, however, the individual debtor's ordinary place of residence is deemed to be his/her COMI, in the absence of proof to the contrary. As for a company, the COMI is deemed to be the company's registered office. The courts will also have regard to the following three considerations, which are of primary importance in determining COMI (see *Re MtGox* [2014] ONSC 5811):

- (a) The location that significant creditors recognise as being the centre of the company's operations;
- (b) The location in which the debtor's principal assets or operations are found; and
- (c) The location of the debtor's headquarters, head office or "nerve centre".

The relative weight of the factors depend on the circumstances. may carry more weight than others.

Here, the foreign company has a warehouse and fulfilment centre in Canada and is currently facing litigation in Canada. Its head office, however, is registered in the foreign jurisdiction, and its senior management have offices there. The inquiry as to whether the company's COMI is in Canada or elsewhere may depend on factors such as the size of its business operations or assets in Canada compared to that in another jurisdiction – the smaller the operations the less arguable that that is where the COMI.

→ ~~the COMI appears to be a foreign matter~~
Final opinion?

3

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.

No Canadian courts are not limited to Canadian entitlements and remedies. The BIA and CCAA contain discretionary powers that allow a court to make "any order that it considers appropriate", upon the recognition of a foreign proceeding and on the application of the foreign representative, and if the court is satisfied that such an order is necessary for the protection of the debtor company's property or the interest of creditors (s 272(1) BIA and s 49(1) CCAA). However, such orders should not be contrary to public policy.

→ Any examples? ie. *Re Hartford* or anything from guidance text?

* End of Assessment *

3