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**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.

**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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. 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 **10 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 of the following statements accurately describes a **difference** between restructuring under the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA)? Select the **correct answer** from the options below:

1. The BIA has more procedural steps and strict timeframes, while the CCAA is more discretionary and judicially-driven.
2. The BIA involves more professionals and court attendances, resulting in higher costs, while the CCAA has stricter rules and guidelines.
3. The BIA contains a total of 63 sections, while the CCAA has 285 sections.
4. The BIA is court-intensive and involves more professionals, while the CCAA has more procedural steps and strict timeframes.

**Question 1.2**

Which of the following statements accurately describes a role of the Office of the Superintendent of Bankruptcy? Select the **best answer** from the options below:

1. Maintaining public records regarding the filing of proposals, bankruptcies, license issues and appointments of receivers under the BIA.
2. Taking control of management of the company if it is clear that management is no longer acting or capable of acting in the best interests of the company or its stakeholders.
3. Making the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.
4. Both options (b) and (c).
5. All of the above.

**Question 1.3**

Indicate whether the statement below is **true or false**:

A secured creditor’s enforcement remedies against collateral are regulated by the liquidating provisions of the BIA and are subject to the automatic stay of proceedings that occurs when a company or individual is assigned into bankruptcy.

1. True
2. False

**Question 1.4**

Select the **best answer** from the options below:

Under the BIA, to **successfully establish an application** for an involuntary bankruptcy order, the applying creditor(s) must –

1. be owed in excess of CAD 1,000 of unsecured debt.
2. provide evidence that the debtor has committed an “act of bankruptcy” within six months of the date of the filing of the application.
3. provide proof that the debtor currently carries on business or resides in Canada, or currently has assets in Canada.
4. Both options (a) and (b).
5. All of the above.

**Question 1.5**

Select the **correct answer** from the options below:

Which of the following is an **act of bankruptcy** under section 42 of the BIA?

1. In Canada or elsewhere the bankrupt makes an assignment of property to a trustee for the benefit of creditors.
2. Giving notice to creditors that the debtor has suspended or is about to suspend payment of debts.
3. 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.
4. In Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor’s property or of any part of it.
5. All of the above.

**Question 1.6**

Indicate whether the statement below is **true or false**:

The CCAA is a debtor-in-possession restructuring statute designed for the reorganization of insolvent companies with debts under CAD 5 million.

1. True.
2. False.

**Question 1.7**

Select the **best answer** from the options below:

Which of the following is required to **establish an application** for an initial stay order under the CCAA?

1. A statement indicating the projected cash flow of the debtor company.
2. Representations of the debtor regarding the preparation of cash-flow projections.
3. A report containing information about the debtor and its operations.
4. Copies of the financial statements from the previous year.
5. Options (a), (c) and (d).

1. All of the above.

**Question 1.8**

Select the **best answer** from the options below:

In CCAA proceedings, the minimum powers of the Monitor include –

1. overseeing the steps taken by the company while in CCAA proceedings as an officer of the court and on behalf of all stakeholders.
2. assisting with the preparation of the cash-flow statements as well as the negotiation of the plan between the company and its stakeholders.
3. engaging in litigation on behalf of the debtor company.
4. filing periodic reports with the court and creditors.
5. Options (a), (b) and (d).
6. All of the above.

**Question 1.9**

Indicate the **correct** answer:

Under Canadian law, when a company enters the **“zone of insolvency”**, the directors of a company –

1. continue to have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.
2. no longer have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.
3. cannot be held personally liable for any of the company’s debts.
4. cannot consider, under any circumstances, the interests of creditors, consumers, governments, employees, or any other stakeholder in discharging their duties.

**Question 1.10**

Select the **best answer** from the options below:

Section 65.11 of the BIA and section 32 of the CCAA prohibit **disclaimers** for the following types of agreements:

1. Contracts entered into after the date that proceedings began.
2. A financing agreement if the company is the borrower.
3. Commercial leases where the debtor is the lessor.
4. Eligible financial contracts.
5. Collective bargaining agreements (union contracts).
6. Options (b), (d) and (f).
7. All of the above.

**QUESTION 2 (direct questions) [10 marks in total]**

**Question 2.1 [maximum 2 marks]**

List and describe at least two remedies that are available to an unsecured creditor to enforce their rights outside of a formal insolvency process.

[Legal Action: Unsecured creditors can initiate legal action against the debtor to recover the debt owed. This typically involves filing a lawsuit in court, obtaining a judgment against the debtor, and then enforcing that judgment through various means such as garnishing wages, seizing assets, or placing liens on property. Legal action can be costly and time-consuming but may be necessary if other attempts to recover the debt have failed.

Negotiated Settlements: Unsecured creditors can negotiate directly with the debtor to reach a settlement agreement. In many cases, debtors are willing to negotiate repayment terms, reduced amounts, or extended payment periods to avoid legal action or bankruptcy. These negotiations can be facilitated by creditors themselves or through third-party mediators or debt settlement companies. Negotiated settlements can be beneficial as they often result in faster debt resolution and may preserve the business relationship between the creditor and debtor.]

Question 2.2 [maximum 4 marks]

List and describe the four statutory requirements that corporations must satisfy to restructure under section 192 (the plan of arrangement provision) of the CBCA.

[Approval by Special Resolution: The proposed plan of arrangement must be approved by a special resolution passed by the shareholders of the corporation. A special resolution typically requires approval by at least two-thirds of the votes cast by shareholders entitled to vote on the resolution.

Court Approval: After obtaining shareholder approval, the corporation must seek approval from the court. The court will review the proposed plan to ensure that it is fair and reasonable and that it complies with the provisions of the CBCA. The court's approval provides legal validation and binding effect to the plan of arrangement.

Disclosure Document: The corporation must prepare a disclosure document providing detailed information about the proposed arrangement. This document is circulated to the shareholders to enable them to make an informed decision when voting on the special resolution. The disclosure document typically includes information about the purpose and effect of the arrangement, the rights and interests of affected parties, and any potential risks or conflicts of interest.

Fairness Hearing: Before granting approval, the court will hold a fairness hearing to consider objections from interested parties and determine whether the proposed arrangement is fair and reasonable. During the hearing, the court will assess whether the arrangement treats all affected parties fairly, safeguards their rights, and provides equitable treatment to different classes of stakeholders.]

Question 2.3 [maximum 2 marks]

List the three main requirements under the BIA and CCAA for Canadian courts to recognize foreign proceedings.

[Existence of a Foreign Proceeding: The first requirement is that there must be a foreign proceeding in the relevant jurisdiction.

Eligibility of the Foreign Proceeding: The foreign proceeding must meet certain eligibility criteria under Canadian law.

Comity and Recognition by Canadian Courts: Canadian courts will consider principles of international comity and recognize foreign proceedings that are consistent with Canadian public policy and legal principles.]

Question 2.4 [maximum 2 marks]

List and briefly describe at least two of the main provincial statutes governing insolvency proceedings in Canada.

[Alberta: The Alberta Business Corporations Act (ABCA):

1. The ABCA governs the incorporation, organization, and dissolution of business corporations in Alberta.
2. It provides provisions related to corporate insolvency, including voluntary arrangements, receivership, liquidation, and other restructuring mechanisms.

Ontario: The Ontario Business Corporations Act (OBCA):

1. The OBCA is similar to the ABCA but applies to business corporations incorporated in Ontario. It contains provisions related to corporate governance, shareholder rights, and corporate restructuring.
2. The OBCA also includes provisions for winding-up, receivership, and other insolvency proceedings, providing a framework for corporate restructuring and liquidation in Ontario.]

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

Question 3.1 [maximum 8 marks]

Write a short essay that summarizes the general organizing principle of good faith in contractual performance and how it may apply in insolvency proceedings.

Your essay should refer to **at least the following**:

1. the statutory provisions in the BIA and the CCAA which codify the duty of good faith; and
2. an example of cases where the Canadian Courts have imported principles of good faith in the context of insolvency proceedings

[The organizing principle of good faith in contractual performance is a fundamental aspect of contract law that requires parties to act honestly and fairly in their dealings with each other. This principle has been recognized and codified in various jurisdictions, including Canada, where it plays a significant role in both commercial and insolvency law.

In the context of insolvency proceedings, the duty of good faith is particularly relevant as it governs the behavior of parties involved, including debtors, creditors, and court-appointed officers such as trustees and monitors. This duty ensures that parties act with honesty, fairness, and integrity throughout the insolvency process, which is critical to achieving equitable outcomes for all stakeholders.

Both the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA) contain statutory provisions that explicitly codify the duty of good faith. For instance, section 18(1) of the BIA states that every person who is involved in proceedings under the Act "shall act in good faith." Similarly, section 18.6(7) of the CCAA requires parties to a plan of arrangement to act in good faith in negotiating and implementing the plan.

Canadian courts have consistently recognized and applied the principle of good faith in the context of insolvency proceedings. One notable example is the Supreme Court of Canada's decision in Bhasin v. Hrynew, which established the duty of honest contractual performance as a general organizing principle of contract law. Although Bhasin was not an insolvency case, its principles have been extended to the context of insolvency proceedings.

In the case of Canada North Group Inc. v. Canada North Inc., the Ontario Superior Court of Justice emphasized the importance of good faith in insolvency proceedings. The court held that parties involved in such proceedings must act honestly, transparently, and cooperatively to achieve the overarching goal of maximizing the value of the insolvent entity's assets for the benefit of all stakeholders.

Overall, the organizing principle of good faith in contractual performance is a cornerstone of Canadian insolvency law. It serves to promote trust, transparency, and fairness among parties involved in insolvency proceedings, ultimately contributing to the effective resolution of financial distress and the preservation of value for stakeholders.]

Question 3.2 [maximum 7 marks]

Write a short essay that identifies the similarities and differences between the UNCITRAL Model Law and the applicable provisions in the BIA.

[The UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and the Bankruptcy and Insolvency Act (BIA) are both significant legal frameworks governing cross-border insolvency proceedings. While they share some similarities, they also exhibit key differences in their scope, structure, and implementation.

One notable similarity between the Model Law and the BIA is their objective to provide a structured framework for the recognition and cooperation of insolvency proceedings across different jurisdictions. Both aim to facilitate efficient and equitable resolution of cross-border insolvency cases by establishing procedures for recognition, cooperation, and coordination between courts and insolvency representatives in different countries.

Furthermore, both the Model Law and the BIA incorporate principles of comity and cooperation, emphasizing the importance of international cooperation and communication among courts, insolvency representatives, and creditors to achieve the fair and efficient administration of cross-border insolvency cases. Additionally, they both prioritize the protection of the interests of all stakeholders involved, including creditors, debtors, and other affected parties.

However, there are also notable differences between the Model Law and the BIA. One significant difference lies in their legal status and applicability. The Model Law is an international legal framework developed by UNCITRAL and adopted by individual countries through domestic legislation or treaty arrangements. In contrast, the BIA is a national insolvency statute specific to Canada, governing insolvency proceedings within its jurisdiction.

Another difference is the scope of application. While the Model Law provides a comprehensive framework for the recognition and assistance of cross-border insolvency proceedings, the BIA primarily applies to domestic insolvency proceedings within Canada. However, the BIA does contain provisions for recognizing and cooperating with foreign insolvency proceedings under certain circumstances, aligning with the principles of the Model Law.

Moreover, there may be differences in specific procedural aspects and requirements between the Model Law and the BIA. For example, while both frameworks emphasize the importance of cooperation and communication between courts and insolvency representatives, the specific procedures for recognition and cooperation may differ in practice due to variations in national legal systems and practices.

In conclusion, while the UNCITRAL Model Law on Cross-Border Insolvency and the Bankruptcy and Insolvency Act share common objectives and principles, they also exhibit differences in their scope, legal status, and procedural aspects.]

**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 the foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. The 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 CAD 200 million plus 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. That 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.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks]

The foreign agent wants to understand the likelihood of satisfying the formal proof requirements to obtain recognition of the foreign proceeding in Canada and the implications if the Canadian court holds that the foreign proceedings are recognized as a “foreign main proceeding” versus a “foreign non-main proceeding”. What would you inform the foreign agent in this regard?

[In Canada, recognition of foreign insolvency proceedings is governed by the UNCITRAL Model Law on Cross-Border Insolvency, adopted in Canada through the Companies' Creditors Arrangement Act (CCAA) and the Bankruptcy and Insolvency Act (BIA). To obtain recognition of the foreign proceeding, the foreign agent must satisfy certain formal proof requirements.

Firstly, the foreign agent must demonstrate that the proceeding meets the definition of "foreign proceeding" under the Model Law. This requires showing that the proceeding is a collective judicial or administrative proceeding in a foreign jurisdiction, pursuant to a law relating to insolvency or adjustment of debt.

Secondly, the foreign agent must establish that the foreign proceeding falls within the definition of either a "foreign main proceeding" or a "foreign non-main proceeding." A foreign main proceeding is one taking place where the debtor has its center of main interests (COMI), while a foreign non-main proceeding is one occurring in a jurisdiction where the debtor has an establishment but not its COMI.

In this case, if the head office of the online seller is registered in the foreign jurisdiction where senior management operates, and this is also where the fulfillment office and warehouse are located, it is likely that the foreign proceeding could be considered a foreign main proceeding. However, further analysis would be needed to confirm whether the criteria for COMI are met.

If the foreign proceeding is recognized as a foreign main proceeding, the Canadian court is likely to grant automatic recognition and provide assistance to the foreign representative, including staying proceedings against the debtor and facilitating the administration of the debtor's assets in Canada. On the other hand, if the proceeding is classified as a foreign non-main proceeding, the recognition process may be more limited, and the Canadian court may exercise discretion in providing assistance.]

Question 4.2 [maximum 5 marks]

The foreign agent wants to understand whether or not you believe the Canadian court can grant an order for the Canadian resident who was in charge of the fulfilment office and warehouse in Canada to produce financial statements and inter-company correspondence of the online seller in accordance with the civil procedure of the foreign jurisdiction. What would you inform the foreign agent in this regard?

[Firstly, the legal principles governing the production of documents in Canada may differ from those in the foreign jurisdiction. In Canada, the production of documents is typically governed by rules of civil procedure and may require compliance with specific legal standards, such as relevance, privilege, and proportionality. However, the rules regarding the production of documents in the foreign jurisdiction may have different requirements and standards.

Secondly, the jurisdiction of Canadian courts to compel the production of documents may depend on various factors, including the nature of the documents sought, the parties involved, and the specific circumstances of the case. Canadian courts generally have broad powers to compel the production of relevant documents, but there may be limitations or exceptions based on factors such as privilege, confidentiality, and foreign jurisdiction.

Thirdly, the Canadian resident's role and authority within the online seller's organization, as well as the location of the documents in question, may impact the Canadian court's jurisdiction to compel production. If the documents are located within Canada and the Canadian resident has control or possession over them in their capacity as an officer or employee of the online seller, the Canadian court may have jurisdiction to order production.

However, it's essential to recognize that any order issued by a Canadian court must comply with principles of international comity and respect for the sovereignty of foreign jurisdictions. Therefore, the Canadian court may consider factors such as the nature of the foreign proceedings, the interests of justice, and the potential impact on international relations before granting an order for production of documents that would be subject to the civil procedure of the foreign jurisdiction.

Ultimately, whether the Canadian court can grant an order for the production of financial statements and inter-company correspondence of the online seller by the Canadian resident will depend on a thorough analysis of the relevant legal principles, procedural requirements, and the specific circumstances of the case.]

Question 4.3 [maximum 5 marks]

The foreign agent wants to understand whether any public policy considerations would influence the court to refuse to act even if the foreign proceeding meets the requirements under either the BIA or CCAA. What would you inform the foreign agent in this regard?

[Fraudulent or Contrary to Public Policy: Canadian courts may refuse to recognize a foreign proceeding if it is found to be fraudulent or contrary to public policy. For example, if the foreign proceeding involves conduct that violates fundamental principles of Canadian law or undermines the integrity of the Canadian legal system, such as fraud, corruption, or human rights violations, recognition may be denied.

Violation of Canadian Sovereignty: Canadian courts may decline to recognize a foreign proceeding if doing so would infringe upon Canadian sovereignty or interfere with the administration of justice within Canada. This could occur if the foreign proceeding seeks to assert jurisdiction over matters that are exclusively within the jurisdiction of Canadian courts or if recognition would undermine the authority of Canadian legal institutions.

Impact on Canadian Stakeholders: Canadian courts may consider the potential impact of recognizing a foreign proceeding on Canadian stakeholders, including creditors, employees, and other affected parties. If recognition would result in unfair treatment or prejudice to Canadian interests, the court may refuse to act.

Public Interest and Policy Goals: Canadian courts may assess whether recognition of the foreign proceeding serves the public interest and aligns with broader policy goals within Canada. This could include considerations related to economic stability, protection of consumers, promotion of fair competition, and support for international cooperation and comity.

Abuse of Process or Forum Shopping: Canadian courts may be reluctant to recognize a foreign proceeding if it is perceived as an attempt to abuse the Canadian legal system or engage in forum shopping to obtain a favorable outcome. If the foreign proceeding lacks legitimacy or is part of a strategy to circumvent Canadian law, recognition may be refused.]

**\* End of Assessment \***