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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.

Outside of a formal insolvency, unsecured creditors have numerous options to explore in respect of enforcing their rights. These include, but are not limited to, the following options:

* **Legal action in the form of civil action** – an unsecured creditor is able to approach the relevant court to obtain a judgement against the debtor and then enforce the judgement against the debtor and collect on their claim.
* **Injunctive relief –** if the unsecured creditor is concerned that the assets of the debtor may be sold or depleted, the unsecured creditor can obtain an injunctive order against the debtor.
* **Fraudulent conveyances and preferences –** if an unsecured creditor believes that the debtor has transferred an asset with the intention of avoiding payment to a creditor, the transaction may be declared void through the Fraudulent Conveyances Act and Assignments and Preferences Acts

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.

Where a corporation does not require an operation restructuring, but rather a balance restructuring, corporation may restructure under section 192 of the CBCA. The implementation must begin with an application for an interim and then a final order to the court. The 4 statutory requirements that need to be met are:

1. A notice must be provided to the Director of the CBCA – this entails sending the relevant documents to the Director appointed pursuant to the CBCA, who will review the proposed arrangement.
2. The proposed arrangement must constitute an “arrangement”: under section 192 of the CBCA – section 192 (1) lists a number of categories of arrangement. If the proposed plan falls into one of these categories, the court is generally satisfied that the plan is an arrangement.
3. It is not practicable to effect the proposed arrangement under any other provision of the CBCA – the applicant here can satisfy this requirement if they are able to demonstrate that it would be inconvenient or less advantageous to proceed under other provisions of the CBCA; and
4. The applicant is not “insolvent” – although an entity may be close to insolvency at interim order application, the plan once implemented needs to result in a solvent entity at conclusion and final order stage.

Question 2.3 [maximum 2 marks]

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

The Canadian courts require formal proof of the below three main requirements under the BIA and CCAA to recognize foreign proceedings:

1. The proceeding meets the statutory definition of “foreign proceeding”;
2. The applicant meets the statutory definition of “foreign representative”; and
3. Based on centre of main interest (COMI) analysis, whether the “foreign proceeding” is a “foreign main proceeding” or a “foreign non-main proceeding”.

Question 2.4 [maximum 2 marks]

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

There are 3 main provincial statutes that may affect insolvency proceedings in Canada:

1. Each province and territory has its own Personal Property Security Act (PPSA) which provides the regulations in respect of the creation and registration of security interests in personal property;
2. The Courts of Justice Act, Judicature Act and the Rules of Civil Procedure enacted by each province and territory provide the rules and procedures to be followed by a court during an insolvency proceeding. These acts also give the courts the authority to grant substantive relief such as appointing receivers or to issue injunctions to preserve assets or prescribe behaviour.
3. The provinces and territories have Corporations Acts which allow companies to complete reorganisations of share capital without shareholder approval if the companies are subject to BIA or CCAA restructuring procedures.

**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 general organizing principle of good faith in contractual performance requires that parties to the contract should perform their contractual duties honestly and reasonably and do not actively mislead or deceive their counterparts. As clarified by the Supreme Court of Canada (SCC), acting in good faith requires that parties must have appropriate regard for the legitimate interests of their counterparties. It does not require that you put the interest of the counterparty first. There is a minimum standard of honesty required and parties should not lie or knowingly mislead each other related directly to the contractual performance.

In respect of insolvency proceedings this duty of good faith applies to all participants in insolvency proceedings which include, but are not limited to, the debtor, the trustee, Court Officers, receivers and creditors. In particular, jurisprudence has recognized that creditors must act in good faith when voting on restructuring proposals or plans.

Both the BIA and CCAA were amended in 2019 to introduce a statutory requirement that all parties to insolvency proceedings act in good faith. This is contained in subsection 4.2(1) of the BIA and subsection 18.6(1) of the CCAA. These subsections require that any “interested party” to proceedings under these two acts act in good faith. It must be noted that there is no definition of “good faith” contained in either of the acts.

There is some jurisprudence as relates to the principles of good faith in the context of insolvency proceedings. In their interpretation of the new statutory good faith requirement under the BIA and CCAA, the Canadian Courts have used the principles of organizing principle of good faith in contractual performance.

* In *Laurentian University of Sudbury, Re,* the Ontario Court of Appeal provides guidance in respect of subsection 18.6(1) of the CCAA. In this case the debtor had served a notice of disclaimer knowing that this would result in serious financial implications for its contractual counterparty. The court held that while the debtor was aware of the potential impact on its counterparty, this did not constitute bad faith conduct. Had the debtor not been allowed to serve the disclaimer, the businesses of both the debtor and counterparty would have suffered hardship while serving the disclaimer only impacted the business of the counterparty. Allowing the notice of disclaimer provided the debtor a better opportunity to develop a viable plan of compromise or arrangement. The court held that a debtor prioritising its own interests in the development of the restructuring plan is not in conflict with the statutory duty of good faith.
* The SCC held in the *Century Services* case held that the court, when exercising CCAA authority, should always consider the requirements of appropriateness, good faith and due diligence.
* In the *Blueberi* case, the SCC that a “supervising judge has the discretion to bar a creditor from voting on a plan or arrangement where they determine that a creditor is acting for an improper purpose”. In this case, the court did not have an issue with the creditor voting in their own self-interest but rather that the vote was improper.
* In the case *CWB Maximum Financial* the court provides guidance in respect of the BIA requirement of the duty of good faith. In this case, it was held that it is appropriate for a Court to use the common law principles stated and developed by the *Bashin* and *Callow* cases to provide context to the notion of good faith as included in the BIA.

There is some guidance provided by the relevant courts on the application of the general organizing principle of good faith in contractual performance in the context of insolvency context but the statutory amendments are relatively young and will require more time to develop further jurisprudence.

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.

A modified version of the UNICTRAL Model Law was adopted by Canada through the 2009 amendments to the BIA in Part XIII. The below summarises some of the similarities and differences between the Model Law and the BIA.

The similarities between the BIA and UNICTRAL Model Law include:

* Application and orders for recognition of a foreign main or foreign non-main proceeding
  + The Model Law has the requirement of the mandatory recognition of foreign insolvency proceedings (unless they are in conflict with public policy). The BIA requires that Canadian courts recognize foreign proceedings if it can prove 3 main requirements, (1) – the proceeding meets the statutory definition of a “foreign proceeding”, (2) – the applicant meets the statutory definition of “foreign representative” and (3) based on COMI analysis the proceeding is “foreign main” or foreign non-main”. If the application is granted, the recognition is automatic and compulsory as per the Model Law. If the proceeding is determined to be “foreign main” the Court will issue an automatic stay of proceedings and if not, a stay may be requested.
* Coordination of domestic and foreign proceedings and concurrent foreign proceedings
  + The above provisions are replicated directly into the BIA from the Model Law
* Appointment of persons to by Canadian court to represent Canadian proceedings outside of Canada for recognition of foreign courts
  + The above provisions, as contained in the BIA, are almost the same as those set out in the Model Law.
* Adoption of the hotchpot rule
  + This rule (Article 32 of the Model Law) intends to avoid the situation where creditors in certain jurisdictions receive more favourable treatment and payments than in others. This will be applicable where proceedings are taking place in Canada and another country at the same time and allows for any dividend received in the foreign proceeding to be taken into account in the Canadian process.

Differences:

* Definition of foreign non-main proceeding
  + The definition of a non-main proceeding in Canada is different to that of the Model Law. The BIA does not have the requirement of demonstrating that the debtor has an “establishment” (place where the debtor conducts any form of economic activity) as set out in the Model Law. The BIA will determine a proceeding to be “foreign non-main” if it is determined to not be a “foreign main” proceeding.
* BIA allows for a foreign representative to commence proceedings under BIA, once a recognition order has been made, to initiate of continue BIA proceedings as if the foreign representative were the debtor company itself or a creditor of the debtor company.
  + There is no such provision in the Model Law
* The BIA states that the courts are not prevented from applying any legal or equitable rules governing the recognition of the foreign insolvency order and giving assistance to foreign representatives that are not “inconsistent with the provisions of the BIA”, if there is an application by the foreign representative or any other interested party.
  + There is no such section in the Model Law.

It is also noted that there are 12 provisions of the Model Law that Canada has chosen not to adopt.

**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 order for the foreign agent to obtain recognition of the foreign proceedings in Canada, an application for recognition must be commenced by the foreign agent.

The agent must supply enough evidence to the Canadian Courts of the foreign proceedings and applicable laws to allow the courts to determine whether they are the foreign representative and that the proceedings are foreign proceedings.

Both the BIA and CCAA require that Canadian courts recognize foreign proceedings if there is formal proof of 3 main requirements:

1. the proceeding meets the statutory definition of a “foreign proceeding”,
   1. What is unclear here is whether the online seller has commenced insolvency proceedings in the foreign jurisdiction. Based on the fact that the agent is empowered by legislation and the court to deal with assets of insolvent companies and that the agent is in control of the assets of the foreign company, it is assumed that there are insolvency proceedings underway in the foreign jurisdiction. It is therefore likely that the requirement of “foreign proceeding” is met.
2. the applicant meets the statutory definition of “foreign representative” and
   1. given that the foreign agent is in control of the assets of the retailer and is empowered by legislation and the court to deal with assets of insolvent companies, it is likely that the foreign agent meets the definition of “foreign representative”
3. based on COMI analysis the proceeding is “foreign main” or foreign non-main”.

If the application is granted, the recognition is automatic and compulsory. If the proceeding is determined to be “foreign main” the Court will issue an automatic stay of proceedings and if not, a stay may be requested.

Based on the information presented above, it is likely that the court will recognize the proceedings and recognize them as “foreign main”. In terms of the analysis of COMI, the location of the head office and place of the offices of senior management are in that foreign jurisdiction.

The foreign agent should apply for recognition in Canada as soon as possible.

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?

If the foreign proceeding is recognized by the Canadian courts, it gives the foreign agent standing in Canadian courts and will allow him to appear and be heard by those courts. The recognition also creates an obligation on Canadian officials to cooperate with him as the foreign representative and with the relevant foreign courts. Canadian insolvency legislation, in the BIA and CCAA, provide discretionary provisions that where a foreign proceeding has been recognized, the courts may on application by the foreign representative make “any order that it considers appropriate”. The court must be satisfied that the order is needed for the protection of the assets of the debtor company or the interest of the creditors. These orders may include the examination of witnesses, taking of evidence or providing information about the debtor’s property or affairs. The court is not restricted to provide remedies available under Canadian insolvency law.

I believe that the Canadian court can grant an order against the Canadian resident who was in charge of the Canadian operations as there is suspicion of improper diversion of funds and this may impact on the assets of the debtor as well as the interest of the creditors.

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?

Both the BIA and CCAA contain an exception for public policy. This allows the court to “refuse to do something that would be contrary to public policy” when implementing the cross-border insolvency provisions.

These provisions allow the court the opportunity to refuse to act even if the proceeding has met the recognition requirements. Should the above proceeding be taking place in a jurisdiction that follows common law principles, where Canada has strong economic ties or the courts have a good understanding of the legal system, it is unlikely that the Canadian courts would not recognize the foreign proceeding.

Unless there are clear reasons and circumstances that are in conflict with Canadian public policy, the courts do not often use the public policy exception. The exception has only been used where the courts have determined that there is specific unfair treatment of Canadian creditors in the relevant insolvency proceedings.

**\* End of Assessment \***