INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

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 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: **[studentnumber.assessment4C]**. An example would be something along the following lines: 202021IFU-314.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 "studentnumber" 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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. 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 **7 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

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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

Commented [TE2]: 1/1

What features are common to all formal insolvency procedures in Canada? Select the **correct answer** from the options below.

(a) They are fragmented.

(b) They follow a “modified universalist” approach.

(c) They follow a single-proceeding model and take a universalist approach except in regard to cross-border issues.

(d) They are flexible and focused on restructuring, but they do not provide for the recognition or disposition of claims or assets held outside of Canada.

Question 1.3

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Proceedings under the CCAA and BIA are subject to the administrative oversight of:

(a) The provincial government.

(b) The municipal government.

(c) The Office of the Superintendent of Bankruptcy (the OSB).

(d) The bankruptcy court.

(e) (a) and (d).

Question 1.4

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Is the Stay of Proceedings automatic in a CCAA filing?

(a) Yes.

(b) No. It is a discretionary order granted as part of the initial order by the court.

(c) It depends on the circumstances of the proceeding.

Question 1.5

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An "insolvent person" under section 2 of the BIA means a person who is not bankrupt, resides or carries on business or has property in Canada, and whose liabilities to creditors provable as claims under the BIA amount to at least CAD 1,000, **and:**

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

(a) is unable to meet obligations as they generally become due.

(b) has ceased paying current obligations in the ordinary course of business as they generally become due.

(c) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all of his obligations, due and accruing due.

(d) any or all of the above.

Question 1.6

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

(a) In Canada or elsewhere the bankrupt makes any transfer of the debtor's property or any part of it, or creates any charge on it, that is a fraudulent preference.

(b) The debtor defaults on a proposal.

(c) The debtor ceases to meet liabilities as they generally become due.

(d) The debtor makes an admission of his inability to pay debts.

(e) All of the above.

Question 1.7

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Indicate whether the statement below is True or False:

It is possible to fund continued operations during restructuring proceedings in Canada.

(a) True.

(b) False.

Question 1.8

Commented [TE8]: 1/1

Indicate whether the statement below is True or False:

The CCAA provides for a statutory priority over pre-filing creditors to suppliers of goods and services to the debtor after the granting of an initial order.

(a) True.

(b) False.

Question 1.9

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Indicate whether the statement below is True or False:

If a **corporate** proposal under the BIA is rejected by a class of creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy.

(a) True.

(b) False.

Question 1.10

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Indicate whether the statement below is True or False:

Directors of a company have a fiduciary duty to act honestly and good faith with a view to the best interests of a company, even when the company is facing insolvency.

(a) True.

(b) False.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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Identify the different ways in which a debtor can enter bankruptcy in Canada.

[In Canada, the different methods to enter into Bankruptcy are three, which are as follows:

(a) **Involuntary;**
To make out a successful application for an involuntary bankruptcy order, the applying creditor must be owed in excess of CAD 1,000 of unsecured debt and provide evidence that the debtor has committed an "act of bankruptcy" within a period of six months of the date of the filing of the application

(b) **Voluntary,**
Voluntary bankruptcy occurs when the debtor voluntarily makes an assignment into bankruptcy proceedings.

(c) on the failure of, or failure to perform the terms of, a BIA proposal
The Bankruptcy and Insolvency Act contains provisions for both corporate and consumer proposals that allow debtors to reach compromises with their creditors. If

the proposals are rejected or not approved, then the debtor is deemed to have made an assignment in bankruptcy.]

Question 2.2 [maximum 2 marks]

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What are the requirements that a creditor must demonstrate to make out an application for an involuntary bankruptcy order?

[For the creditor to demonstrate in successfully making an application for an involuntary bankruptcy order, the following conditions must be fulfilled:-
a) The creditor must be owed in excess of CAD 1,000 of unsecured debt and
b) Provide evidence/proof that the debtor has committed an act of bankruptcy within six months of the date of the filing of the application.
The creditor need not prove the debtor currently carries on business or resides in Canada, or currently has assets in Canada. The 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 preceding year]

Question 2.3 [maximum 3 marks]

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The Office of the Superintendent of Bankruptcy has a number of functions. **Name three** of these functions.

[Some of the functions of the Office of the Superintendent of Bankruptcy are as follows:-
(i) licensing and supervising of trustees;
(ii) inspecting or investigating estates;
(iii) receiving and dealing with complaints from creditors against estate professionals during the proceedings;
(iv) examining a trustee's account of a bankruptcy and ensuring all the correct information is accounted for]

Question 2.4 [maximum 2 marks]

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What are the **four** criteria that must be met in order for an individual bankrupt to be automatically discharged within nine (9) months after the bankruptcy is filed?

[An individual bankrupt is automatically discharged nine (9) months after the bankruptcy is filed if:
(i) it is a first bankruptcy;

(ii) the bankrupt has attended two financial counselling sessions;

(iii) the bankrupt is not required to pay a portion of his income into the bankruptcy estate as per the standards established by the Office of the Superintendent of Bankruptcy; and

(iv) the discharge is not opposed by a creditor, the trustee or the Office of the Superintendent of Bankruptcy]

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 8 marks]

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Compare and contrast the role of the "Monitor" in CCAA proceedings and the "proposal trustee" in a BIA proposal.

In your essay you should refer to at least the following:

- Whether the monitor and / or proposal trustee is court-appointed; and
- The statutory duties, if any, of the monitor and / or proposal trustee.

[The Companies' Creditors Arrangement Act (commonly referred to as the CCAA) orders appoint a Monitor. A monitor is a licensed insolvency professional and an officer of the court, and he is generally selected by the debtor. A monitor can also be an accounting or financial advisory firm that must also be licensed to act as a trustee in bankruptcy under the Canadian *Bankruptcy and Insolvency Act*. Monitors are required to be independent from the debtor company and, therefore, as an example, cannot have been related to a director or have been the auditor of the debtor company at any time during the two preceding years of their appointment. The Monitor has to play a supervisory and advisory role in the proceeding. In its supervisory role, the Monitor has the duty to oversee the steps taken by the company while in CCAA proceedings as an officer of the court and on behalf of all stakeholders. The Monitor assists with the preparation of the cash-flow statements as well as the negotiation of the plan between the company and its stakeholders. The Monitor also files periodic reports with the court and creditors, including reports setting out the views of the Monitor in connection with any proposed disposal of assets or in connection with any proposed DIP financing. The minimum powers of the monitor are set out in the CCAA, however in appropriate circumstances the monitor's powers may be augmented to exercise more control over the debtor company. As such, the monitor is an independent officer of the court who essentially implements the court's commercial oversight of the restructuring proceeding. In this regard, the monitor is not an adversary in the restructuring proceeding and generally avoids taking litigation positions directly against any party. Rather, the monitor will generally restrict itself to providing the court with its views as to the commercial consequences of the positions of the parties.

For instance, where the Board of Directors have resigned or creditors have lost confidence in management, the Monitor's powers can be expanded by the Court to allow the Monitor to effectively manage the company during the restructuring. The Monitor can be authorized to sell assets, subject to court approval, and can be authorized to direct certain corporate functions or engage in litigation on behalf of the company. .

Perhaps most importantly, however, as the court's independent and neutral officer the monitor can play an influential role in assisting the parties in resolving or otherwise significantly narrowing their disputes. Essentially, the monitor can proactively attempt to mediate disputes as they arise inside a restructuring with the considerable advantage of indirectly speaking for the court on the matter. Ultimately, as mentioned above, the monitor will have to provide the court with its views on the commercial impacts of the parties' positions

Monitors are required to be independent from the debtor company and, therefore, as an example, cannot have been related to a director or have been the auditor of the debtor

company at any time during the two preceding years of their appointment. Monitors are also statutorily mandated to act honestly and in good faith and comply with a prescribed code of ethics. Monitors have statutorily mandated powers, duties and liability protections pursuant to the CCAA in addition to those that may be provided for in the court orders pertaining to their appointment.

Whereas in case of the **proposal trustee**, he is selected by the debtor. Much like the Monitor, the proposal trustee plays a supervisory and advisory role and assists the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders. Under the Bankruptcy and Insolvency Act (BIA) proposal provisions, a receiver may be appointed in order to take 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.

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The proposal trustee has a number of statutory duties, including but not limited to giving notice of the filing of the NOI or the proposal to all known creditors, filing a projected cash-flow statement accompanied by a report from the trustee on its reasonableness, and calling a meeting of creditors to consider and vote on the proposal. At the creditor meeting the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The proposal trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.]

Question 3.2 [maximum 7 marks]

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Write a short essay that identifies the main policy goals of the Canadian insolvency regime and provide examples of how these policy goals are reflected in different aspects of the insolvency system. In your essay, explain why the national insolvency system in Canada is described as "universalist" in the context of Canada's approach to cross-border insolvency law.

[The objectives underlying Canada's insolvency regime basically legislations like the BIA and CCAA aspire to reach a balance between reorganization and liquidation.
The Primary aims of the legislation are:-

a) provide certainty to promote economic stability and growth
b) maximize the value of assets
c) strike a balance between liquidation and reorganization
d) ensure equitable treatment of similarly situated creditors
e) provide for timely, efficient and impartial resolution of insolvency
f) preserve the insolvency estate to allow equitable distribution to creditors
g) ensure transparent and predictable insolvency laws that contain incentives for gathering and dispensing information; and
h) recognize existing creditor rights and establishes clear rules for ranking of priority claims.

As seen above, the policy rationales that underlie the Canadian insolvency system focus on certainty, transparency, balance, equitability, asset preservation, value maximization and rehabilitation. Wherever appropriate, the Canadian insolvency system provides for, and favours, debtor rehabilitation because of the perceived social benefits that flow from the rehabilitation of debtors. These include increased recoveries for creditors, the maintenance of supplier relationships and local economic activity, and the preservation of jobs. At the same time, Canada's insolvency framework recognizes existing creditor rights and establishes clear rules for the ranking of priority claims and the equitable treatment of similarly situated creditors. This balanced approach flows from the recognition that certain and reliable rules provide security for investors and lenders that, in turn, influence the cost

and availability of credit in the Canadian marketplace.

These policy concerns are reflected in the way insolvency proceedings are managed through a combination of creditor control, estate professional management and court supervision that includes consideration of the interests of the debtor and other stakeholders. The overall regulation and management of the insolvency proceedings is primarily done through the oversight of the court. The day-to-day process is largely overseen by court appointed representatives such as trustees, receivers or the CCAA monitor, who owe broad duties to the court and all stakeholders and periodically report to creditors and the court. Creditors are provided a degree of control over insolvency proceedings through various mechanisms and other powers in both bankruptcy and restructuring situations and may seek to replace estate professionals in certain circumstances. Creditors also have the right to information and to be heard by the court overseeing the insolvency proceeding.

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Canada has implemented insolvency laws and procedures that reflect particular national policy objectives and perceptions of the way the loss caused by insolvency should be shared/divided between creditors and other stakeholders and how the process for administering that process should be run. This is as per insolvency statutes promulgated in all countries. Canadian creditors and stakeholders order their affairs and base their expectations on this national insolvency law framework. The Canadian insolvency law system has an **universalist** approach in that it purports to extend to the debtor's assets wherever located. It is reciprocal in that it permits foreign creditors to participate in Canadian insolvency proceedings with the same rights and priorities as similarly situated domestic creditors. Companies or corporate groups that become insolvent carry on business and have assets and claims in multiple jurisdictions, each with their own set of national laws, some of which may conflict substantively with Canadian insolvency law. The Canadian system is only beneficial if other states reciprocate and respect properly initiated Canadian insolvency proceedings and recognize the rights of Canadian creditors in their proceedings.

These issues are particularly acute due to Canada's close proximity to the US and the sheer volume of trade between the countries. Canada's approach to the cross border insolvency is to pragmatically approach the challenges arising thereon on the basis of "modified universalism", accepting that concurrent insolvency proceedings in multiple jurisdictions will sometimes be necessary, but that the best means for a fair and efficient outcome is for courts to coordinate their efforts and respect each other's processes and orders to the most possible extent. Overall, Canadian judiciary retain a high degree of discretion to employ the statutory provisions on the recognition of foreign proceedings in a way that accords with this underlying policy rationale in individual circumstances. Canadian courts have, for the most part, faced the challenge of managing cross-border insolvency proceedings effectively and flexibly and have been quick to adopt the principles of comity and cross-border cooperation. To date, Canadian courts have enthusiastically embraced cross-border recognition orders, court-to-court communication, the use of cross-border insolvency protocols, coordinated assets sales and coordinated restructuring plans accordingly. Through the 2009 amendments to the BIA and CCAA, Canada has adopted a modified version of the UNCITRAL Model Law in Part XIII of the BIA and a new Part IV of the CCAA. These sections of the BIA and CCAA contain substantially similar provisions that provide a framework for recognition of foreign insolvency proceedings and acceptance of jurisdiction. The First principle of the Model Law is the mandatory recognition of foreign insolvency proceedings and the second is classification of the foreign proceeding of each debtor entity as either a "foreign main proceeding" or a "foreign non-main proceeding".]

QUESTION 4 (fact-based application-type question) [15 marks in total]

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Question 4.1 [maximum 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 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. 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]

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The foreign agent wants to understand the formal proof requirements to obtain recognition of the foreign proceeding in Canada. What is your advice?

[For the Foreign proceedings to be recognised in Canada, the provisions of the BIA and CCAA will have to be referred to. These provisions require Canadian courts to recognize foreign proceedings on formal proof of three main requirements:

(1) that the proceeding is a “foreign proceeding” in accordance with the statutory definition;

(2) that the applicant is a “foreign representative” in accordance with the statutory definition; and

(3) whether the “foreign proceeding” is a “foreign main proceeding” or a “foreign non-main proceeding” based on a center of main interest (COMI) analysis.

The Foreign proceedings recognition application is commenced by a foreign representative who files sufficient evidence of the foreign law to allow the Canadian court to determine that they are a foreign representative and the proceeding is a foreign proceeding. The existing case law requires that both terms are to be given a broad and purposive interpretation, thereby allowing an applicant to meet the requirements for recognition of a foreign proceeding without difficulty. The focus of the Canadian court is on the substance of the foreign law rather than its nomenclature.

Once the requirements for recognition have been met, the recognition is automatic and compulsory, similar to the Model Law: the court must make an order recognizing the foreign proceeding. If the court determines the foreign proceeding is a foreign main proceeding, the court will automatically issue a stay of proceedings. If it determines that the proceeding is a

foreign non-main proceeding a stay may be requested, but the court exercises discretion to make any order necessary for the protection of the debtor's property or the interests of creditors.]

Question 4.2 [maximum 5 marks]

The foreign agent wants to understand whether or not you believe the foreign agent can obtain a stay of the Canadian litigation and why. What do you tell the foreign agent?

[As per the provisions of BIA and CCAA, if a foreign proceeding is recognized as the foreign main proceeding, an automatic stay of proceedings occurs in Canada. If a foreign proceeding is recognized as a foreign non-main proceeding, a stay may still be obtained, but it must be requested and justified. If a foreign proceeding is recognized, as either main or non-main, it gives the foreign representative standing to appear and be heard in Canadian courts. The proceedings in this case qualify as a Foreign main proceeding. Furthermore, the recognition imposes an obligation on Canadian officials to cooperate with the foreign representative and the foreign court. Both the BIA and the CCAA contain broadly worded, discretionary provisions that provide that where an order recognizing a foreign proceeding has been made the court may, on application by the foreign representative, if it is satisfied that it is necessary for the protection of the debtor companies property or the interests of a creditor or creditors, make "any order that it considers appropriate". Considering the available information and the application before the Court on the Foreign main proceedings, the stay of the Canadian Litigation could be obtained]

Question 4.3 [maximum 5 marks]

The foreign agent wants to know whether they can compel the Canadian resident who was in charge of the fulfilment office and warehouse in Canada to submit to an examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction (for example, following that jurisdiction's procedure rather than Canadian procedure). What is your advice?

[In *Morguard Investments Ltd v De Savoye,* the Supreme Court of Canada adopted the approach that a foreign judgement may be presumptively enforced in Canada, provided there is a "real and substantial connection" between the foreign court and:
(i)the defendant;
(ii) the cause of action, or
(iii)the subject matter of the action

Both the BIA and the CCAA contain broadly worded, discretionary provisions that provide that where an order recognizing a foreign proceeding has been made the Canadian court may, on application by the foreign representative, if it is satisfied that it is necessary for the protection of the debtor companies property or the interests of a creditor or creditors, make "any order that it considers appropriate". This includes, but is not limited to, orders respecting the examination of witnesses and the taking of evidence, and provision of information on the debtor's property and affairs. Subject to the public policy exception, and ensuring that any such order is consistent with orders made in any concurrent proceedings under the BIA or CAA, the court is not restricted in exercising this discretion to only to providing the same or similar remedies as are available under Canadian insolvency law and has in fact ordered relief in foreign- main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings. A significant right granted to creditors by the BIA is the ability to instruct the trustee to seek examination under oath of the bankrupt or any person having knowledge of the conduct or affairs of the

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bankrupt to aid in the recovery of assets for the benefit of the estate. On application to the Court, by a creditor, or other interested person, here in this case the foreign agent, and on sufficient cause being shown, the Court may order the examination of the bankrupt or any other person for the purpose of investigating the administration of the bankrupt estate. The court may also order delivery of documents relating to the bankrupt, its dealings or property. This broad power is often used in conjunction with the BIA TUV and preference provisions to obtain evidence to support exercise of the trustee's avoidance remedies.
Subject to the above, the foreign agent can compel the Canadian resident who was in charge of the fulfilment office and warehouse in Canada to submit to an examination under oath and produce documents related to the company's operations and accounts in accordance with the civil procedure of the foreign jurisdiction, except where the civil procedure of that jurisdiction is in conflict with Canadian law and in public policy exceptions]

*** End of Assessment ***

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