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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**.

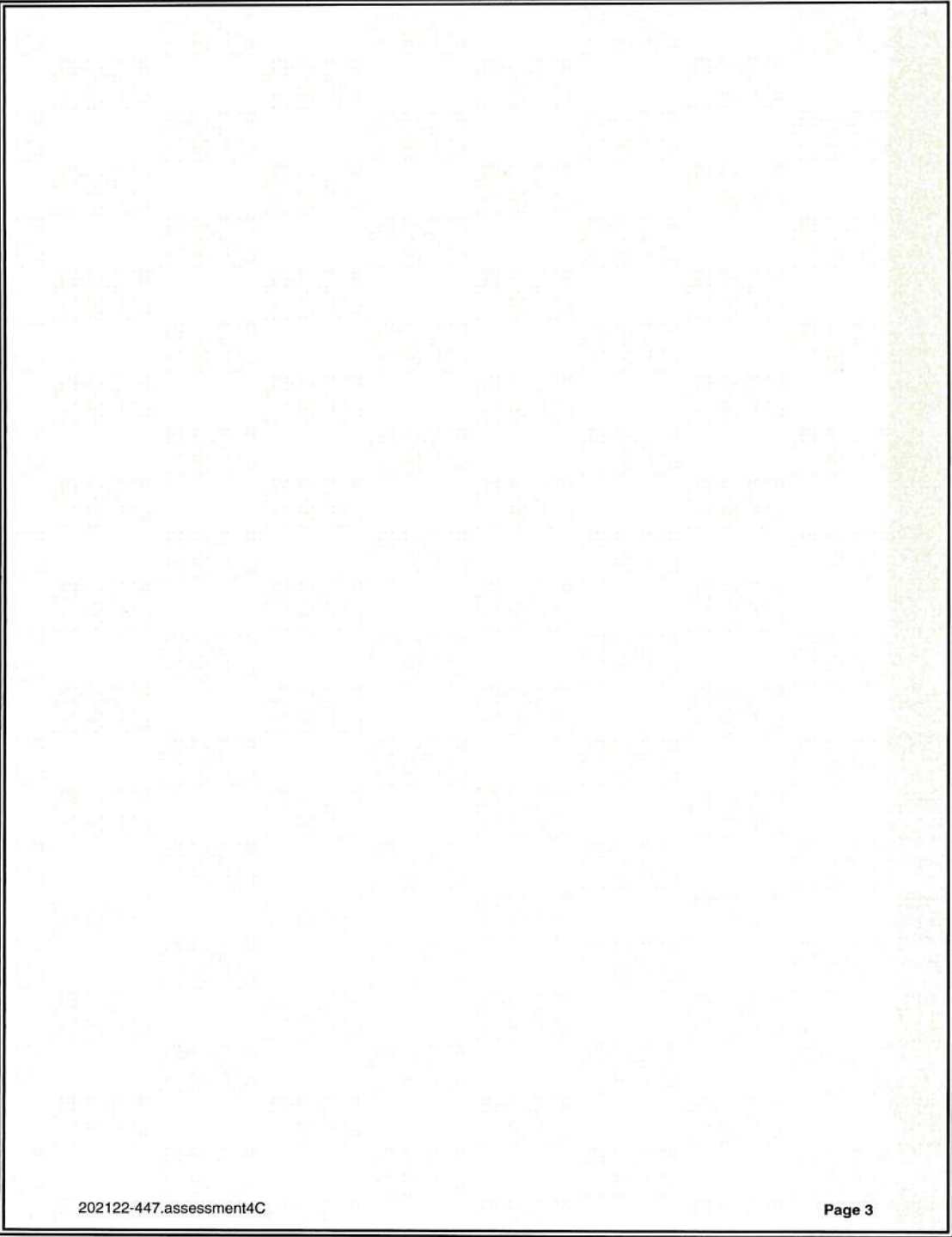
The **mark awarded for this assessment** will determine your final mark for **Module 4C**. In order to pass this module, you need to obtain a mark of **50% or more** for this assessment.

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 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: 202122-336.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 "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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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**.

Commented [DB1]: Please do me the courtesy of reading and following the instructions! I had to do this for you!



ANSWER ALL THE QUESTIONS**QUESTION 1 (multiple-choice questions) [10 marks in total]** 9

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 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 **best answer** from the options below.

The purpose(s) and objective(s) of the BIA is 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. ✓

Question 1.5

Which of the following is **not** an "act of bankruptcy" listed in section 42 of the BIA?

- (a) the debtor makes an admission of his / her inability to pay debts.
- (b) the debtor ceases to meet liabilities generally as they become due.
- (c) the debtor makes an assignment of property to a trustee for the benefit of creditors.
- (d) the debtor misses a mortgage payment. ✓

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**:

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

(a) True. ✓

(b) False.

Question 1.8

Indicate whether the statement below is True or False:

Upon bankruptcy, the debtor ceases to have the legal right to deal with its property.

(a) True. ✓

(b) False.

Question 1.9

Indicate whether the statement below is True or False:

There is no automatic stay of proceedings upon entering bankruptcy proceedings.

(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]

Question 2.1 [maximum 3 marks]

8.5

Identify the conditions set out by the Supreme Court of Canada for a claim to be provable in bankruptcy under the BIA.

[Type your answer here]

In *Newfoundland and Labrador v AbitibiBowater Inc* [2012], the Supreme court of Canada set out the following conditions for a claim to be provable in bankruptcy:

- (i) the debt, liability or obligation must be owned by the creditor;

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- (ii) a debt, liability, or obligation must be incurred before the debtor becomes bankrupt; and
- (iii) it must be possible to attach a monetary value to the debt, liability or obligation.

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?

[Type your answer here]

Bankruptcy exemptions in Canada are set by provincial legislation. How much of each exempt asset class a debtor can retain depends on the province or territory in which they live. Generally, the types of assets that a debtor can keep in a bankruptcy include:

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- (i) personal items and clothing;
- (ii) household furniture, food and utensils in the debtor's permanent house;
- (iii) tools necessary to a debtor's work;
- (iv) a motor vehicle with a value up to a certain limit; and
- (v) certain farm property.

Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

[Type your answer here]

Three methods of entering into bankruptcy in Canada are:

2.5

- (i) involuntary;
- (ii) voluntary; and
- (iii) on the failure of, or failure to perform the terms of, a BIA proposal.

Question 2.4 [maximum 2 marks]

What is the definition of "debtor" in section 2 of the BIA?

[Type your answer here]

Pursuant to section 2 of the BIA debtor is defined as:

"debtor includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt."

(define)

The acts of bankruptcy are listed in section 42 of the BIA.

QUESTION 3 (essay-type questions) [15 marks in total]**Question 3.1 [maximum 8 marks]**

13/15

What is the difference between a private receiver and a court-appointed receiver?

In your essay you should refer to at least the following: (1) how each type of receiver is appointed, (2) the duties of each type of receiver, and (3) the circumstances in which each type of receiver is generally used.

[Type your answer here]

Private Receiver

A private receiver is appointed via the contractual right of the secured creditor pursuant to the security agreement between the debtor and secured creditor.

The primary duties of a private receiver are those assigned to the private receiver by the secured creditor who appointed them. According to Rogers and Huff, the private receiver also has a general duty to act honestly, in good faith and in a commercially reasonable manner. This includes attempting to maximise recoveries and to obtain the best price for the debtor's assets (in the circumstances).

A private receiver is generally 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.

Court-appointed Receiver

Where a private receiver is appointed by a secured creditor pursuant to their contract, a court appointed receiver is appointed by a court order, typically on application by a secured creditor, under section 243 of the BIA. The application by the secured creditor is made under the rules of the court of the province where the debtor's business is based.

The Courts of Justice Acts of the individual provinces also allows the court to appoint a receiver on application by an interested party (i.e. shareholder or unsecured creditor) where it is just and convenient to do so. This is referred to as an equitable receiver.

As opposed to a private receiver having its duties assigned by the secured creditor, a court appointed receiver derives its power from the court order and any specific legislation governing its power. A court appointed receiver is an officer of the court and has duties to all creditors of the debtor. It reports to and takes instructions from the court, not the creditor who sought the appointment.

A court appointed receiver is generally used in more complex cases, especially where there are competing claims between the creditors or disputes between the creditor and the debtor. A court appointed receiver can also be used where on the outset it is decided that the assistance of the court will be required on an ongoing basis.

It is important to note that both private and court appointed receivers have certain obligations mandated by their appointment. Both types of receiver must provide notice of their appointment to all creditors and prepare and distribution interim and final reports. Interim and final reports are filed with the Office of the Superintendent of Bankruptcy Canada ("OSB") and made available to all creditors.

Question 3.2 [maximum 7 marks]

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 following a "single proceeding" model.

[Type your answer here]

As outlined in the *Industry Canada Statutory Review of Insolvency Laws ("CSRIL")* published in 2014, Canada has adopted a 'fresh start' policy for consumers / individuals, which relieves honest but unfortunate debtors of excessive debts. For commercial insolvency, Canada aims to encourage rehabilitation of viable, but financially distressed, businesses as a means of increasing recoveries for creditors, maintaining supplier relationships and protecting jobs.

According to the CSRIL, the objectives underlying the BIA and CCAA include minimising the impact of a debtor's insolvency on all stakeholders by pursuing an equitable distribution of the debtor's assets and, where possible, by rehabilitation of the debtor.

5 One example of how Canada has reflected their commitment to rehabilitation of debtors is through the implementation of the Companies' Creditors Arrangement Act ("CCAA") which is a Federal Act that allows financially troubled corporations the opportunity to restructure their affairs. Part III of the BIA also outlines a stricter proposal process which must consider the unsecured creditors of a debtor.

The national insolvency system in Canada is described as following a 'single proceeding' model because the Canadian insolvency process collectivises all creditors' remedies into a single proceeding. The methodology is that by grouping all possible actions against a debtor into a single proceeding controlled in a single forum is more efficient and facilitates negotiation with creditors because it places all creditors on equal footing.

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

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.

15
15

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?

[Type your answer here]

For the Foreign Agent to gain recognition in Canada for the insolvency proceeds of the Business, the foreign Agent will have to provide formal proof of three main requirements to the Canadian Courts:

- (i) that the proceeding is a "foreign proceeding" in accordance with the statutory definition;
- (ii) that the applicant is a "foreign representative" in accordance with the statutory definition; and
- (iii) whether the "foreign proceeding" is a "foreign main proceeding" or a foreign non-main proceeding" based on a Center of Main Interest ("COMI") analysis.

Pursuant to section 268(1) of the BIA the statutory definition of a foreign proceeding is:

"a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation."

The Foreign Agent is acting under the foreign law of the foreign jurisdiction and is empowered by that foreign jurisdiction's legislation and courts to deal with the assets of the Business. Therefore, the foreign proceeding meets the broad definition of a foreign proceeding as the foreign jurisdiction is outside of Canada, under laws relating to insolvency, and, the appointment is over the assets of the Business.

Pursuant to section 268(1) of the BIA the statutory definition of a foreign representative is:

"a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

- (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or*
- (b) act as a representative in respect of the foreign proceeding."*

The Foreign Agent is appointed over the assets of the business for the purpose of insolvency / reorganisation pursuant to the legislation and court of the foreign jurisdiction. Therefore, the Foreign Agent meets the statutory definition of a foreign representative.

There is no statutory definition of COMI. However, both the BIA (section 268) and CCAA (section 45) contain a rebuttable presumption. In the case of a company, the COMI, in absence of proof to the contrary is the company's registered office. The Canadian Courts have identified

three primary considerations, considered as a whole, are of primary importance for determining the COMI:

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

From the information provided, the known creditors of the business are foreign based secured lenders who are owed approximately CAD200 million. Whether those creditors are in the same foreign jurisdiction is not clear. It is also not known the quantum of creditors the Business has in Canada.

Although the Business has a fulfilment office and warehouse in Canada, it is not clear whether that is the location of the Business's principal assets.

The head office of the Business is located in the foreign jurisdiction.

Because there is limited evidence to the contrary, the COMI of the business is in the foreign Jurisdiction where its head office is located. Therefore, if the Foreign Representative is successful in achieving recognition, the proceedings will be considered foreign non-main proceedings.

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?

[Type your answer here]

The class action lawsuit has been filed in the Canadian Court on behalf of customers of the Business for monies paid in respect of unfulfilled order in the amount of CAD2 million ("the Lawsuit"). The Lawsuit is still in the pleadings phase.

As discussed above, it is likely that the Court would determine that the Foreign Agent's appointment be classified as a foreign non-main proceeding in Canada. Pursuant to section 272(1) of the BIA / section 49(1) of the CCAA, a stay may be requested by the Foreign Agent, but the Court will exercise its own discretion to make any orders necessary for the protection of the Business's property or the interest of creditors. The Foreign Agent may make an application for an Order pursuant to section 271 of the BIA / section 48 of the CCAA including that no person shall commence or continue any action, execution or any other proceedings concerning the Business's property, debts liabilities of obligations. Accordingly, the Foreign Agent may make an application to the Canadian Court to stay the Lawsuit.

In deciding whether or not to make an order to stay the Lawsuit, the Canadian Court will consider public policy exemption. Pursuant to section 284(2) of the BIA / section 61(2) of the CCAA, the Court may refuse to do something that would be contrary to public policy. The Court would have to consider whether staying the Lawsuit would be unfairly prejudicial to the Canadian customers CAD2 million claim.

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 they can provide? What do you tell the foreign agent?

[Type your answer here]

The Courts are not restricted in the relief they can provide to the Foreign Representative. In circumstances where the Foreign Representative's appointment has been recognised, pursuant to section 272(1) of the BIA / section 49(1) of the CCAA, should the Foreign Representative make an application in the Canadian Court, the Canadian Court has discretionary powers to make "any order that it considers appropriate".

The Court is not restricted in exercising the discretion to only providing the remedies available under Canadian insolvency law. In the case of *Hartford Computer Hardware Inc, 2012* the Ontario Court ordered relief in foreign main proceedings where there are ancillary Canadian proceedings that would not ordinarily be available in Canadian proceedings. The Ontario Court determined that recognition of a US Debtor-in-possession order was necessary for the US debtors property, for the interest of the debtors US creditors and was not contrary to public policy.

*** End of Assessment ***