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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**.

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. X
- (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]

6/10

Question 2.1 [maximum 3 marks]

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

The Supreme Court of Canada in the judgement of Newfoundland and Labrador v Artibowater Inc, established three conditions to determine a provable claim in bankruptcy. These conditions are:

- 3
- The existence of a creditor to which some consideration in the form of a debt, liability or obligation is owed
 - The outstanding debt, liability or obligation must have been incurred prior to the the filing for bankruptcy.

- A monetary value for the outstanding debt, liability or obligation must be ascertainable. ✓

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?

1 Property held in trust for the benefit of another individual is excluded from the bankruptcy estate of the individual debtor. Additionally, the debtor is also allowed to keep of portion of their income which is considered necessary for a reasonable standard of living.

Question 2.3 [maximum 3 marks]

Name three methods for entering into bankruptcy.

1. Involuntary
2. Voluntary
- 3 Failure of a BIA proposal

— how does a proposal fail? i.e. can be rejected,

personal items,
clothing,
household furniture,
etc.

Question 2.4 [maximum 2 marks]

What is the definition of “debtor” in section 2 of the BIA?

0 Section 2 of the Bankruptcy and Insolvency Act outlines the criteria to qualify as a debtor. According to the BIA, a debtor is a person who commits an act of bankruptcy while residing in Canada or conducting business or having property in Canada. X

QUESTION 3 (essay-type questions) [15 marks in total] 9/15

Question 3.1 [maximum 8 marks]

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.

6 The distinction between a private receiver and a court appointed receiver can be examined by reviewing the rules regarding the appointment process, the duties of the receiver and the reasons for the appointment.

243 An official receiver or a court appointed receiver is an officer of the court appointed under the provisions of Subsection 12(2) of the Bankruptcy and Insolvency Act (BIA). The court appointed receiver in performing the duties of his office must consider the interests of all the creditors. A Private Receiver is usually appointed by a secured creditor and generally will act solely on behalf of the secured creditors. The ability to appoint a private receiver is usually a contractual right granted to a secured creditor.

The duties of a private receiver generally involve taking possession of the assets over such the secured creditors have their security and realising those assets to settle their claims. Additionally, the private receiver may perform managerial duties for the insolvent company.

There is also a requirement for the private receiver to notify the creditors of the receivership, and to provide reports to the courts and the official receiver about the status of the proceedings.

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.

The Canadian insolvency regime has as its central purpose balancing reorganization or rescue-oriented insolvency proceedings and traditional insolvency proceedings such as liquidation and receiverships. The main regulations that govern bankruptcy and insolvency in Canada are the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act. These are supported by other federal and provincial statutes. Both regulations have provisions geared toward reorganization and liquidation of a debtor's estate.

All creditors can participate in an insolvency proceeding, this includes foreign creditors. The requirement for participation is that the foreign creditor satisfies the statutory definition and possess a provable claim under the Bankruptcy and Insolvency Act (BIA) or the Companies Creditors Arrangement Act (CCAA). Since all creditors can participate, there is no need for multiple proceedings. The benefits include reducing the costs of administration and encouraging the participating of small creditors who otherwise may be required to submit multiple claims in various jurisdictions.

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

7/15

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]

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?

4 In Canada, for a foreign proceeding and an appointed foreign practitioner to be recognized, an application must be made to the Canadian bankruptcy Court a foreign representative according to Section 269 (1) of the Bankruptcy and Insolvency Act (BIA). The process is outlined in Section 269 (2) of the BIA closely mirrors Article 15 of the UNICITRAL Model Law. The application should include a certified copy of the instrument granting the opening of the foreign proceeding and the appointment of the foreign representative. Similarly, a certified copy an instrument from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign practitioner should be submitted for review by the Canadian court. If no such instruments are available, the foreign practitioner should provide any other documents as evidence or the proceeding and the authority of the practitioner. The foreign representative must also provide a statement providing outlining all foreign proceedings in relation to the debtor of which the representative has knowledge.

Foreign proceeding, as defined by Section 268 (1) of the BIA, may be either administrative or judicial proceeding occurring outside of Canada, that is concerned with the interests of a body of creditors, and for which the debtor's assets place under the supervision or control of the court with the aim of reorganization or liquidation of the debtor's estate.

Recognition will be granted in the form of an order by the Canada court if the court satisfied that the definition of a foreign proceeding was met, and that the applicant is a foreign representative of the foreign proceeding. The order will state whether the proceeding is a ~~foreign main proceeding or a foreign non main~~ proceeding. The distinction between main or non-main foreign proceeding is determined by the presence of the centre of main interest (COMI). Section 268(2) presumes the COMI to be the registered office of the company unless there is contradictory evidence. Since the registered office, as well as the head office of the online seller were in the foreign jurisdiction, the Canadian court should recognize the foreign proceeding as the foreign main proceeding. In addition to satisfying the register office presumption, considerations such as where principal assets and operations reside, and nerve centre of the company are met since senior management have their office at the head office in the foreign jurisdiction.

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?

3 According to the Section 271 (1) the effects of the recognition of a foreign main proceeding by the Canadian court results in a stay of any proceeding in relation to the debtor's property, debts, liabilities or obligations regardless of whether or not such a proceeding was already opened. Based on this rule, the class action lawsuit against the debtor brought by a group of customers for unfulfilled orders totally 2 million CAD would be stayed.

Under Canadian Law, Section 121 defines which a provable claim as all debts and liabilities, present or future to which the bankrupt is subjected to on the date of the bankruptcy or prior to the bankruptcy because of a pre-existing obligation. Based on this definition, it would be appropriate for the Canadian Lawyer representing the customers to submit a claim to the foreign practitioner in the foreign main proceeding. The liability from the lawsuit would be recognized as contingent claim

Question 4.3 [maximum 5 marks]

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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]

*** End of Assessment ***