



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.

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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 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. 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 **8 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 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 of 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 **most correct** answer from the options below:

The purpose(s) and objective(s) of the BIA is / are 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.
- X (d) all of the above statements are correct.

Question 1.5

Which of the following is **not** included in the definition of an “insolvent person” under section 2 of the BIA:

- (a) A person who is not bankrupt.
- (b) A person who resides or carries on business or has property in Canada.
- ✓ (c) A person whose liabilities to creditors provable as claims under the BIA amount to at least CAD 10,000.
- (d) A person (i) who is unable to meet obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course of business as they generally become due, or (iii) the aggregate of whose property is not, at fair valuation, sufficient to enable payment of all his obligations due and accruing due.

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**:

Insolvency proceedings in Canada are governed primarily by federal statutes.

- ✓ (a) True.

(b) False.

Question 1.8

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

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

(a) True.

(b) False.

Question 1.9

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

In Canada, both natural persons and legal entities may be subject to bankruptcy proceedings under the BIA.

(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 in total]

Question 2.1 [maximum 3 marks]

Identify three of the recognised purposes of the BIA.

ANS:

The purpose of this regime is:

To allow the bankrupt entity protection from creditors

To provide fair and orderly liquidation

→ Financial rehabilitation?

To provide orderly distribution of bankrupt's assets to creditors and fair distribution of property among unsecured creditors on a pari passu basis.

It also allows for investigation to be made to have a check on the affairs of a Bankrupt. An important check is kept on the transfers undervalue or preferences, settlements or fraudulent transactions. This is done so as to give equal share to all creditors in the value of the assets of the bankrupt. Reference has been taken from the Houlden and Morawetz annotated 2019 Bankruptcy and Insolvency Act.

Operation of BIA is similar for individuals and companies. There may be some technical differences. Individuals are provided with the "summary administration", "consumer proposal" and "orderly payment of debt" processes.

Upon bankruptcy, a trustee becomes vested i.e ownership is transferred by operation of law, with all of the bankrupt's property that is subject to the bankruptcy.

The trustee's rights in the property are subject to the interests of third parties including secured creditors and property owners or the lessors of lease.

Although the trustee's rights are subject to those of secured creditors and property owners, and even though secured creditors and property owners are not typically stayed by a bankruptcy,

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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?

ANS:

specific examples.

The trustee's primary duties are to collect, preserve and sell the assets of the bankrupt, and to distribute available proceeds to creditors in accordance with their prescribed priorities and *pro rata* within each class of creditors.

The trustee must also investigate the affairs of the bankrupt and transactions entered into prior to bankruptcy.

There is some provision specially for individuals:

Some property of individuals is exempt from seizure under provincial legislation and thus exempt from distribution to creditors. Corporations do not have this privilege.

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They are entitled to keep a portion of income earned to maintain a reasonable standard of living. These standards are set by the Superintendent of Bankruptcy. Any income in surplus of such standard must be paid to the trustee. This facility is not available to corporations.

Question 2.3 [maximum 3 marks]

Name three types of court-officers that may be appointed in insolvency proceedings.

[ANS]

✓ ✓ ✓
Court officers, include trustees in bankruptcy, Liquidator, receivers and monitors in CCAA

The Superintendent licenses and regulates those persons, i.e accountants, who have undergone specialised training to become a trustee in bankruptcy. This an important point of difference between US and Canadian insolvency practice.

The trustee is the main actor in the insolvency system and has responsibility of administering bankruptcies and monitoring insolvency proposals and CCAA restructuring proceedings.

A receiver is a licensed professional who is given the authority to deal with a debtor company's assets, including authority to operate and manage the business in place of the existing management. He can even decide shut down the business in favour of recoveries for creditors.

The debtor company's assets do not vest in the receiver.

The receiver will have the right (but not the obligation) in the instrument appointing it which could be a contract or court order, to take possession and custody of the assets and to sell them and after deducting the receivership's fees and expenses and distributing the proceeds from the sale to creditors on a priority basis.

There are two types of receivers: a privately-appointed receiver and a court-ordered receiver.

Receivership may be used to protect and preserve assets on an interim basis. Receivership may be used to facilitate a going-concern sale of the business to a new buyer free and clear of pre-existing liabilities.

Under the BIA proposal provisions, a receiver may be appointed. If it is clear that the management is not acting in the best of the interests of the company, he has to take control of management of the company.

Some listed types of insolvent federal corporations, such as banks, trust companies and insurance companies, is controlled by the statutory provisions of the Winding Up and Restructuring Act. The liquidation of these upon giving an application to the court for proceeding, a liquidator can be appointed who takes the custody and control of the assets.

A number of powers the **liquidator** may exercise under WURA.

This can be done with the approval of the court, such as: bringing or defending actions on behalf of the company, carrying on the business of the company or disposing of its property and assets.

Monitor:

A monitor is appointed in CCAA Orders. He is an officer of the court. He is a licensed insolvency professional, generally the debtor selects him. Monitor oversees the steps taken by the company during CCAA proceedings. He also has an advisory role. The powers are set out in CCAA.

More powers may be added under appropriate circumstances for example if the directors have resigned or creditors have lost confidence in the management as held in Rogers and Huff and may then be referred to as 'Super Monitors'.

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Question 2.4 [maximum 2 marks]

What is the definition of a "person" in section 2 of the BIA?

[ANS]

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"Person" has an expansive definition and is defined in the BIA

A "person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, as well as the successors, heirs, executors, liquidators of the succession, administrators or other legal representatives of a person.

An "insolvent person" 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.

* 1) Insolvent person for any reason is unable to meet its obligations as they generally become due-

2) Has ceased paying current obligations in the ordinary course of business as they generally become due

3) Whose aggregate property is not, at a fair valuation, sufficient, or — would not be sufficient to enable payment of all obligations, due and accruing due.

not needed.

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

Question 3.1 [maximum 8 marks]

Write an essay on the difference between a private receiver and a court-appointed receiver.

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

[ANS]

A Receivership is a remedy available to secured creditors to recover amounts outstanding under a secured loan in the event the company defaults on its payments. The Receiver is appointed to take possession of and sell or liquidate the assets secured by the security agreement in order to repay the outstanding debt.

A receiver is usually instructed to take possession of the assets and control the receipts and disbursements of the debtor, either by private appointment or Court Order.

→ Answer could have been more organized + fullsome

In a security agreement between the debtor and the secured creditor there will be a provision of privately appointed receiver. Thus, he i.e the secured creditor has a contractual right to appoint a receiver if the debtor is not able to fulfill his obligations-Privately appointed receiver.

Now he has the primary duty to the secured creditor, the one that appointed it. In general he has to act in good faith, reasonable manner and honestly. This can involve him to the best of the interest to get good price for the assets of the debtor.

Privately appointed receivers are not involved in court attendances. They are not expected to carry on the business. They are most often used in small businesses. Private receivers derive authority from secured creditor's security documentation. Private receiver appointments are less common, are less costly.

Court appointed receiver:

An appointment under the BIA has a significant advantage in the enforceability of the receiver's powers across Canada.

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Court appointed receiver derives power from the order of the court under any legislation. General practice is that the court appointing issues stay of proceedings. This restricts the creditors from acting without first taking permission of the court. The ipso facto clauses are also made inoperable. Even the utilities are prohibited from terminating contracts.

Court appointed receiver can also borrow on super priority basis similar to that of DIP financing. Critical suppliers may be ordered to continue supply.

He has duties to all creditors of the debtor. He seeks directions from the court and also reports to the court. He is given broad powers. Major asset sales require approval from the court and a clean title is provided to the purchaser. Court approval is required to distribute the proceeds after the court appointed receiver has realized the assets of the debtor.

court-appointed receiver can provide a greater degree of comfort for creditors than a private receiver because the court must approve many of the receiver's decisions.

There is a provision of Interim receivers under BIA.

Both the receivers have obligations to fulfill which are mandated upon them by their appointment. Notice of appointment must be made known to all the creditors.

They need to prepare and distribute interim and final reports about the receivership and then reports are filed with the OSB and made available to all creditors. They must also report to the court itself as and when necessary or required about how its mandate is being carried out.

Question 3.2 [maximum 7 marks]

Write a short essay that identifies the three methods for entering into bankruptcy. In your essay, explain the meaning of an "act of bankruptcy".

[ANS]

The primary goal in the Canadian insolvency regime is restructuring and courts do everything reasonably possible to ensure that businesses can continue as a going-concern.

The initial bankruptcy event is the earliest of the filing of a voluntary assignment, a proposal, a notice of intention to file a proposal, a CCAA filing or the first application for an involuntary bankruptcy order against the debtor.

In the case of voluntary bankruptcy:

For an individual or company to become bankrupt is by making a voluntary assignment into bankruptcy. This requires an application to the official receiver on a prescribed form which nominates a trustee to administer and distribute the assets of the bankrupt to creditors. Bankruptcy comes into effect on the date of acceptance by the official receiver. No application needs to be made to a court.

Bankruptcy may be initiated involuntarily through court action by a creditor or creditors whose claim exceeds CAD 1,000 and where an act of bankruptcy has been committed.

An application for a bankruptcy order must set out the debt owed by the debtor, the proposed trustee, and the act of bankruptcy that the creditor believes has been committed.

Both the BIA and CCAA have recently been amended to require that all participants in insolvency proceedings "act in good faith" The statutes now give courts sufficient discretion to find an appropriate remedy where this obligation is breached.

There are a number of similarities between CCAA and BIA restructuring procedures. Both proposals and plans must be approved by double-majorities (majority in number, two-thirds in value) of each class of creditors that votes on them.

Proceedings under the CCAA may be commenced for a debtor company or group of debtor companies. A debtor company is a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada.

Any assets including a bank account in Canada, will be sufficient to meet the technical requirements of the definition.

A debtor company:

- (1) must be insolvent or have committed an "act of bankruptcy" as defined in the BIA;
- and
- (2) must have creditor claims against it for at least CAD 5 million, or an aggregate of at least CAD 5 million in debts against a corporate group .

The typical **act of bankruptcy** alleged is generally failing to pay debts when they are due, and it can also include the giving of preferences to other creditors and fraud.

Various Acts which constitute as the Acts of Bankruptcy according to S.42:

- If he makes an assignment of his property to a trustee for the benefit of his creditors, whether authorized by the Act or not.

- The debtor has made fraudulent gift or transfer of property.
- The debtor creates a charge or transfer of property as a fraudulent preference.
- If for the purpose of delay the debtor departs out of Canada or departs from his house with the intent to absent himself.
- If the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized or taken in execution.
- If at any meeting of creditors he presents his written admission of his inability to pay his debts.
- If he assigns, removes, or disposes of or attempts or is about to assign, remove, dispose of any of his property with intent to defraud, defeat or delay his creditors.
- If he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.
- If he defaults in any proposal made under this Act.
- If he ceases to meet his liabilities generally as they become due.

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→ Answer does not delve into the three methods; missing failure of a BIA proposal entirely.

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 that foreign jurisdiction and who is empowered by the legislation and courts of that foreign jurisdiction to deal with the assets of insolvent companies. An 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. This 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.

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 in this regard?

[ANS]

A broad and purposive approach is taken by Canadian courts to the recognition of foreign proceedings, focusing on the substance of the foreign law.

According to section 270(1) of the BIA, a Canadian court will recognize a proceeding in another jurisdiction if the proceeding is a "foreign proceeding" and the applicant before the court is a "foreign representative" as defined in section 268(1).

An illustration:

In *Centaur Litigation SPC*, a Cayman's liquidator successfully brought an application for an order that proceedings commenced in the Cayman Islands be recognized as a foreign main proceeding.

Syncreon case is another recent example of a court recognizing a foreign non-main proceeding. There, the applicant sought to have UK scheme of arrangement proceedings recognized in Canada as a foreign non-main proceeding. As a part of the scheme, Syncreon Canada – a Syncreon entity, not a scheme company would receive the benefit of releases.

In *Re Mt Gox Co*, the Ontario court applied the provisions of Part XIII of the BIA to recognize Japanese bankruptcy proceedings for Mt Gox Co Ltd in Canada as a foreign main proceeding.

Class action for 500 million was instituted by Canadian investors, against Mt Gox alleging negligence, breach of contract and fraud. Then Mt Gox's bankruptcy trustee sought recognition of the Japanese bankruptcy proceeding in Ontario as a foreign main proceeding. It was observed that Recognition would result in a stay of all actions brought against the company in Canada, including the class action.

Mt Gox's COMI was found to be in Japan. Court also determined that the trustee met the two-part definition of foreign representative. Thus, the trustee had the authority to act as a representative in respect of the foreign proceeding.

In *Re Hartford Computer Hardware Inc*, the Ontario Superior Court of Justice, granted a recognition order pursuant to the CCAA which, among other things, approved a Final DIP Facility.

? An example where Canadian courts chose to refuse to grant a recognition order on the grounds of public policy was the pre-2009 amendment case: *Canadian Imperial Bank of Commerce v ECE Group Ltd*. The *ECE Group* case provides for an important example of a public policy case where the court refused to recognize a foreign order on the basis that it may be prejudicial to Canadian creditors.

✓ The 2009 amendments to the BIA and CCAA, Canada 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 contain similar provisions that provide a framework for recognition of foreign insolvency proceedings and acceptance of jurisdiction.

The principles of the Model Law are two-fold. The first is the mandatory recognition of foreign insolvency proceedings unless contrary to public policy and the second is classification of the foreign proceeding of each debtor entity as either a foreign main proceeding or foreign non-main proceeding. The mandatory recognition of foreign proceedings is intended to facilitate judicial cooperation between countries and provide access to domestic courts for foreign representatives. It also determines how much can then the foreign court can assert on the proceedings.

If a foreign main proceeding is recognized, all proceedings in the recognizing jurisdiction must be stayed.

Also, Canada has chosen to adopt the "hotchpot rule" in cross-border proceedings. Where there are concurrent proceedings both in Canada and another country it allows for a distribution of property that is received by a creditor in a foreign insolvency proceeding to be taken into account in a Canadian insolvency.

The BIA and CCAA allow a foreign representative, once a recognition order is made, to commence or continue proceedings under the BIA or CCAA as if the foreign representative were a creditor of the debtor company or the debtor company itself. S.274

There is also a section in both the BIA and the CCAA that states that nothing prevents the court, on application of a foreign representative, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of the BIA or CCAA - S.284, BIA and S. 61, CCAA

The court observed in *Morguard Investments Ltd v De Savoye* and concluded that comity is an idea based not only on respect between sovereign states, but is also necessary for the reciprocal flow of communication and skill in the modern world. This is the central principle governing Part IV of the CCAA.

Question 4.2 [maximum 5 marks]

The foreign agent wants to understand the factors considered by a court in determining whether a jurisdiction is a "centre of main interest" in respect of a foreign proceeding. What would you inform the foreign agent in this regard?

[ANS]

There is no statutory definition of COMI in either the CCAA or the BIA.

Each statute contains a rebuttable presumption. In the case of an individual, the COMI, in the absence of proof to the contrary, is the debtor's ordinary place of residence. In the case of a company, the COMI, in absence of proof to the contrary, is the company's registered office. for determining COMI

Reference has been made and addressed in the cases: *Re: Massachusetts Elephant & Castle Group Inc* (2011),

Re: Mt Gox [2014]

In *Re Lightsquared LP*, 2012, a Canadian court gave a non-exhaustive list of three factors to consider when determining whether a debtor's COMI is located in a particular jurisdiction: (a) the location is readily ascertainable by creditors; (b) the location is the one where the debtor's principal assets or operations are found; and (c) the location is where the management of the debtor takes place.

These can be identified as below:

(1) the location that significant creditors recognize as being the centre of the company's operations;

(2) the location in which the debtor's principal assets or operations are found; and

(3) the location of the debtor's headquarters, head office

Once the COMI is determined, the foreign proceeding is either classified as the foreign main proceedings, if it is where the COMI is located, or the foreign non-main proceeding, if it is not where the COMI is located.

An automatic stay of proceedings occurs in Canada, if a foreign proceeding is recognized as the foreign main proceeding.

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However, when a foreign proceeding is recognized as a foreign non-main proceeding, a stay may still be obtained. This 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.

A foreign main proceeding will be given greater deference than a foreign non-main proceeding and have greater remedies available including automatic remedies upon recognition.

An obligation is imposed on Canadian officials to cooperate with the foreign representative and the foreign court. Both the BIA and the CCAA contain discretionary provisions: Court can make "any order that it considers appropriate". S.272(1), BIA and S.49(1) CCAA. Both these acts contain a public policy exception which permits the court to "refuse to do something that would be contrary to public policy". S.284(2) BIA, S.61(2) CCAA

→ You did not provide an opinion? Where is the COMI? What are the factors

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 that they can provide. Advise the foreign agent in this respect.

[ANS]

The Acts BIA and CCAA, both provide discretionary powers while recognising foreign proceedings. Such order when by the court on an application by the foreign representative can make 'any order that it considers appropriate'. The court may not restrict to orders of examination of witnesses and taking evidence and provision of information regarding the affairs and property of the debtor. Courts are not restricted in exercising the discretion to only providing remedies available under Canadian insolvency law. The reliefs may go beyond what is ordinarily available in Canadian proceedings.

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* End of Assessment *