Court of Appeal File No.: COA-24-OM-0248
Court File No.: CV-2300696017-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Applicant

REPLY BOOK OF AUTHORITIES OF THE MOVING PARTIES LOYALTYONE, CO. AND THE MONITOR (MOTION FOR LEAVE TO APPEAL)

October 15, 2024

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Court of Appeal File No.: COA-24-OM-0248
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COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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TABLE OF CONTENTS

[1] The Moving Parties have included cases in this Book of Authorities that were not already included in their Book of Authorities dated September 9, 2024.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Edgewater Casino Inc. (Re),***
2009 BCCA 40

Date: 20090206
Docket: CA035922; CA035924

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c 57, as amended

In the Matter of Edgewater Casino Inc. and
Edgewater Management Inc.

Between:

Canadian Metropolitan Properties Corp.

Appellant
(Applicant)

And

**Libin Holdings Ltd., Gary Jackson Holdings Ltd.
and Phoebe Holdings Ltd.**

Respondents
(Respondents)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

J.J.L. Hunter, Q.C. and J.A. Henshall	Counsel for the Appellant
J.R. Sandrelli and A. Folino	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia January 7, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA"*).

[2] On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

[3] The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately $15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first

dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

[4] Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

[5] On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient

funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

[6] The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

[7] By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

[8] In his reasons for judgment dealing with the property tax dispute, indexed as 2008 BCSC 280, the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust

enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

[9] In his reasons for judgment dealing with the utilities dispute, indexed as 2007 BCSC 1829, the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

[10] In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (C.A. Chambers), and *Re Pine Valley Mining Corporation*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (Chambers), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

[11] The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

Discussion

[12] The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225.

[13] The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in *CCAA* proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

> [30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> [31] A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

> [32] Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

Numerous subsequent decisions have referred to these comments. These decisions include *Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (C.A.) at para. 57; *Re Woodward's Ltd.* (1993), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (B.C.C.A. Chambers) at para. 34; *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 (B.C.C.A. Chambers) at para. 8; *Luscar Ltd. v. Smoky River Coal Ltd.,* 1999 ABCA 179, 175 D.L.R. (4th) 703 at para. 62; *Re Blue Range Resource Corp.*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Chambers) at para. 3; *Re Canadian Airlines Corp.*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Chambers) at para. 42; *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at para. 52; *Re Fantom Technologies Inc.* (2003), 41 C.B.R. (4th) 55 (Ont. C.A. Chambers) at para. 17; and *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, [2005] 8 W.W.R. 224 at para. 20.

[14] The Landlord accepts the general proposition that leave to appeal from *CCAA* orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical *CCAA* situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice

McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease*, McEachern C.J.B.C. said the following:

> [58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, [1993] 2 S.C.R. 448, and the Court agreed generally with his dissenting reasons.

[15] The respondents submit that there should be the same test for leave to appeal from all orders made in *CCAA* proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

[16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA*

proceedings should be limited: see *Re Algoma Steel Inc.* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 at para. 8.

[17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. Chambers).

[18] This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a

recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

[19] The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

[20] First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that “[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters

and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

[21] The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to *CCAA* proceedings as "real-time" litigation.

[22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

[23] Similar views were expressed by Mr. Justice O'Brien in *Re Calpine Canada Energy Ltd.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Chambers):

> [13] This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

> [14] In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Other decisions on leave applications where the usual factors were expressly considered include *Re Blue Range Resource Corp*., *Re Canadian Airlines Corporation* and *Re Fantom Technologies Inc*., each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease*.

[24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena*

Forest Products at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

[25] The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

[26] I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

[27] I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

[28] There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have be an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

[29] I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.

2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).

3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.

4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

[30] A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as

of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

[31] I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice D. Smith"

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *John Doe (G.E.B. #26) v. Roman Catholic Episcopal Corporation of St. John's*, 2024 NLCA 26
Date: July 22, 2024
Docket Number: 202301H0004

BETWEEN:

JOHN DOE (G.E.B. #26), JOHN DOE #2 AND JOHN DOE #3, as CLAIMANT REPRESENTATIVES

APPLICANTS/APPELLANTS

AND:

ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S

FIRST RESPONDENT

AND:

ERNST & YOUNG INC., as MONITOR

SECOND RESPONDENT

Coram: F.J. Knickle, D.M. Boone and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 20220124092 (2023 NLSC 5)
Appeal Heard:	November 20, 2023
Judgment Rendered:	July 22, 2024

Reasons for Judgment by: D.M. Boone J.A.
Concurred in by: K.J. O'Brien J.A.
Separate Concurring Reasons by: F.J. Knickle J.A.

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Authorities Cited:

CASES CITED:

D.M. Boone J.A. (K.J. O'Brien J.A. Concurring):
John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's, 2018 NLSC 60; *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, leave to appeal to SCC refused, 39343 (14 January 2021); *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 81; *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 22; *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2023 NLSC 5; *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478; *Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18, [2012] 1 S.C.R. 636; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, leave to appeal to SCC refused, 29390 (20 March 2003); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Montréal (City) v. Deloitte Restructuring Inc*., 2021 SCC 53; *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417; *Re Orzy*, 1923 CanLII 489 (ONCA); *Nortel Networks Corporation (Re)*, 2015 ONCA 681, leave to appeal to SCC refused, 36778 (5 May 2016); *Re Milad*, 1984 CanLII 2152 (ONCA); *Kolodychuk (Re)*, 1978 CanLII 324 (BCSC); *Farm Credit Corporation v. Holowach (Trustee of)*, 1988 ABCA 216, leave to appeal to SCC refused, 21018 (22 June 1989); *AMIC Mortgage Investment Corporation v. Abacus Cities Ltd.*, 1992 ABCA 57; *Decker v. Canada (Superintendent of Bankruptcy)*, 2010 ABCA 189; *Penner v. Mitchell*, 1978

AltaSCAD 201; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Canada v. Canada North Group Inc*., 2021 SCC 30, [2021] 2 S.C.R. 571; *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div); *Canadian Red Cross Society, Re*, 2008 CanLII 53855 (ONSC).

F.J. Knickle J.A. (Separate Concurring):
John Doe (*G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60; *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, leave to appeal to SCC refused, 39343 (14 January 2021); *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, leave to appeal to SCC refused, 29390 (20 March 2003); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Price Estate v. Howse Estate*, 2001 CarswellNfld 377 (NFSC (TD)), aff'd 2002 NFCA 60; *MacLean v. MacDonald*, 2002 NSCA 30; *Harvey v. Harte*, 1999 CanLII 19024 (NLCA); *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *Ryan v. Moore*, 2003 NLCA 19, rev'd in part on other grounds 2005 SCC 38; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443; *Decker v. Canada (Superintendent of Bankruptcy)*, 2010 ABCA 189; *AMIC Mortgage Investment Corporation v. Abacus Cities Ltd.*, 1992 ABCA 57; *Nortel Networks Corporation (Re)*, 2015 ONCA 681, leave to appeal to SCC refused, 36778 (5 May 2016); *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ONCA).

STATUTES CONSIDERED:

D.M. Boone J.A. (K.J. O'Brien J.A. Concurring):
Bankruptcy and Insolvency Act, RSC, 1985, c. B-3, sections 50.4(1), 69(1)(a), 183, 141, 2, 121(1); *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36, sections 11, 13, 2(1), 22; *Survival of Actions Act*, RSNL 1990, c. S-32, section 4; *Interpretation Act*, RSC, 1985, c. I-21, section 12; *Excise Tax Act*, RSC, 1985, c. E-14.

F.J. Knickle J.A. (Separate Concurring):
Bankruptcy and Insolvency Act, RSC, 1985, c. B-3, sections 2, 121, 135; *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36, sections 20, 11, 13-14, 19, 2(1), 11.8(9); *Survival of Actions Act*, RSNL 1990, c. S-32, sections 4, 2-3, 11.

RULES CONSIDERED:

D.M. Boone J.A. (K.J. O'Brien J.A. Concurring):
Rules of the Supreme Court, 1986, SNL 1986, c. 42, Schedule D, rule 7.11.

TEXTS CONSIDERED:

F.J. Knickle J.A. (Separate Concurring):
Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto, ON: Buttersworths, 1983); Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed translated by Steven Sacks (Toronto, ON: Carswell, 2011); Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022).

ARTICLES CONSIDERED:

F.J. Knickle J.A. (Separate Concurring):
Robert J. Sharpe, "The application and impact of judicial discretion in commercial litigation" (1998) 17:1 Adv Soc'y J 4; Georgina R. Jackson & Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2007) Ann Rev Insol L 3, online: (WL Can) Thomson Reuters Canada.

OTHER:

D.M. Boone J.A. (K.J. O'Brien J.A. Concurring):
Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada, 4th Edition* (Release No. 6, June 2024) at sections 6:142, 1:8, online: (WL Can) Thomson Reuters Canada.

F.J. Knickle J.A. (Separate Concurring):
Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada, 4th Edition* (Release No. 6, June 2024) at sections 6:105, online: (WL Can) Thomson Reuters Canada.

D.M. Boone J.A. (K.J. O'Brien J.A. Concurring):

BACKGROUND

[1] This appeal considers the timing for the valuation of tort claims against a defendant who has sought statutory insolvency protection.

[2] More than one hundred people have either brought, or intend to bring, actions claiming that the respondent is vicariously liable for sexual assaults committed by clergy or members of lay religious orders. Some of these claimants started actions in the late 1990s or early 2000s. In 2003, the Supreme Court ordered, with the consent of the parties, that 40 of those "substantially similar" actions be placed under common case management. Those actions were all based on torts allegedly committed by Christian Brothers at Mount Cashel Orphanage during the 1940s and 1950s.

[3] The parties agreed that six plaintiffs would proceed to trial as test cases to determine the issue of the respondent's vicarious liability, and that the other case managed actions would not proceed pending the outcome of the test case trials. They advised the case management judge of this agreement in 2008. In the trial decision on the test cases, the trial judge noted that "[w]hile this is not a formal representative, or class, action, these four cases were put forth as being somewhat representative of the issues and damages which would arise in all of them. The outcome of this case may provide a precedent for resolution of the other outstanding actions" (*John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60, at para. 19, "Trial Decision"). The parties did not enter a formal standstill agreement with respect to the remaining claims and they made no agreement that would have relieved those plaintiffs of the burden of establishing that they were each assaulted or proving the damages that each had suffered.

[4] Two of the six test plaintiffs passed away before their trials started. The claims of the other four went to trial. The trial judge dismissed their actions against the respondent (Trial Decision, at para. 642). The claimants appealed and this Court set the dismissal aside (*John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, leave to appeal to SCC refused, 39343 (14 January 2021)). The Supreme Court of Canada dismissed the respondents' application for leave to appeal on January 14, 2021 (*Roman Catholic Episcopal Corporation of St. John's v. John Doe (G.E.B. #25)*, [2020] S.C.C.A. No. 309).

[5] The trial judge provisionally assessed the damages of the four plaintiffs. This Court dismissed appeals from those assessments and ordered judgment entered in their favour in the amounts assessed. The parties agreed that the plaintiffs would not execute on those judgments while the respondent considered how to pay those claims and deal with the remaining actions.

[6] On December 30, 2021 (the "Initial Filing Date"), the respondent filed a Notice of Intention under section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3 (the "*BIA*"). Under section 69(1)(a), this filing resulted in an automatic stay of all actions by creditors' proceedings, and the respondent had 30 days from that date to present a proposal to the claimants to satisfy their claims. The Supreme Court judge extended that time, and the stay of proceedings, on three occasions.

[7] The *BIA* stay order was due to expire on May 27, 2022. Before that date, the respondent filed an application to convert the *BIA* proceedings to a restructuring process under the *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36 (the "*CCAA*"). The Supreme Court judge granted the respondent's application over the objection of the appellants (*Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 81, the "Restructuring Application"). He found that the respondent demonstrated that it was insolvent (para. 34). Although the respondent had other creditors, the most significant obligations it was facing at that time were the potential liabilities to the plaintiffs with the substantially similar claims. The parties told the court that at that time there could be as many as 150 or more tort claimants presenting claims with an aggregate value greater than $50,000,000.

[8] The Supreme Court judge further ordered that the *BIA* stay of proceedings would continue until May 17, 2022, when a stay under the *CCAA*, section 11, would take effect. The Supreme Court judge extended the *CCAA* stay several times with the parties' agreement. The stay is still in effect.

[9] In February 2022, the appellant claimant John Doe #26 applied under Rule 7.11 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, and the *BIA*, section 183, to have himself and the other appellants appointed as Representative Plaintiffs for former residents of Mount Cashel Orphanage who were abused while they lived there, and other persons who may have been abused anywhere in this Province by clergy or members of lay religious orders for whom the respondent is responsible. The Supreme Court judge granted this order on

February 15, 2022 (*Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC 22), and this order continued into the *CCAA* proceedings.

[10] The *CCAA* allows a qualified insolvent company the protection of a stay while it attempts to work out a compromise arrangement with its creditors. The appellants and the respondent each developed proposals for a claim procedure and protocol. The parties' proposals agreed on all but four elements. They each applied to the Supreme Court for approval of their respective protocols, each of which incorporated their positions on the disputed elements. They sought direction regarding these disputed elements in the form of answers to four questions and presented arguments in respect of the elements on which they disagreed. The Supreme Court judge resolved the issues related to those elements (*Roman Catholic Episcopal Corporation of St. John's (Re)*, 2023 NLSC 5, the "Claim Directions Decision") and approved a protocol in a Claims Procedure Order issued April 19, 2023.

[11] The Claims Procedure Order will deal with any right or claim, including tort claims, related to events that occurred before the Initial Filing Date. Therefore, although many of the claims asserted in the original actions related to events that occurred a considerable time in the past, the approved claim procedure is designed to resolve all claims related to events that occurred at any time before the Initial Filing Date.

[12] Some of the claimants passed away after the Initial Filing Date. The fourth question put to the Supreme Court judge was "What damages may the estates of deceased Claimants seek?" The Supreme Court judge gave the following answer: "Only damages that have resulted in actual pecuniary loss to the estate are recoverable" (Claim Directions Decision, at para. 117).

[13] This appeal concerns that answer.

[14] At common law, most causes of action die with the plaintiff. The *Survival of Actions Act*, RSNL 1990, c. S-32 (the "*SAA*") changes this. It provides, in section 4, that causes of action vested in a person who dies survive for the benefit of the person's estate. However, section 4 restricts the nature of recoverable damages in a survival action to "only damages that have resulted in actual monetary loss to the estate".

[15] The Supreme Court judge described the appellants' argument as asking him to "find that the judgments of those who have died are not governed by the *Survival*

of Actions Act" (Claim Directions Decision, at para. 122). He concluded that the appellants were asking that he exercise discretion "and ignore section 4 of the *Survival of Actions Act* which, of course, I may not do" (Claim Directions Decision, at para. 126).

[16] The appellants contest that decision, and as the *CCAA* provides that they can only appeal with leave, they seek leave to appeal. They argue that the Supreme Court judge answered the wrong question by merely deciding whether the *SAA* applied. They say that they did not ask that the Supreme Court judge ignore the provisions of the *SAA*.

[17] Instead, the appellants say that they asked that the Supreme Court judge interpret the *CCAA* and *BIA* as fixing the date for valuing the creditors' claims as of the Initial Filing Date. Then, the valuation of claims would be based on each claimant's circumstances on that date. So, if they were alive on the Initial Filing Date, but later died, the restrictions in the *SAA* would not apply to their estates' claims.

[18] In the alternative, they argue that the Supreme Court judge had the discretion to set the Initial Filing Date as the valuation date and that he ought to have done so.

[19] The respondent maintains the position for which it advocated before the Supreme Court judge. It argues that the *SAA* limits the damages recoverable by the estates of deceased plaintiffs. It also says that estate claims for plaintiffs who later died could not be valued as of the Initial Filing Date because the estates were not creditors at that time. It argues further that the object of a *CCAA* stay is to maintain the *status quo,* among creditors and between creditor and the debtor, during the time that the parties attempt to work out a compromise arrangement. The *status quo* includes the application of the *SAA* to the claims. Therefore, says the respondent, exercising discretion to favour the claims of deceased plaintiffs would run contrary to the objectives of the *CCAA*.

[20] I have decided that leave to appeal should be granted, but that the appeal ought to be dismissed.

ISSUES

[21] The issues are as follows:

(1) Should this Court grant leave to appeal?

(2) Should the Court interpret the *BIA* and *CCAA* as providing that the Initial Filing Date is the date on which the claims of the plaintiffs should be valued, based on the circumstances (including that the deceased plaintiffs were then alive) that existed at that time?

(3) In the alternative, should the Supreme Court judge have exercised discretion to fix the Initial Filing Date as the date on which the claims of the plaintiffs should be determined, based on the circumstances (including that the deceased plaintiffs were then alive) that existed at that time?

LEAVE TO APPEAL

[22] The appellants require leave to appeal, pursuant to the *CCAA*, section 13. The factors that an appellate court will consider to determine whether leave should be granted in *CCAA* matters are well established. These factors were set out by the Ontario Court of Appeal in *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478:

> [19] Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the "generally discretionary character underlying many of the orders made by supervising judges in such proceedings" and the deference to be accorded to those decisions. In considering whether to grant leave, the court will consider whether:
>
> (i) the proposed appeal is *prima facie* meritorious or frivolous;
>
> (ii) the point on the proposed appeal is of significance to the practice;
>
> (iii) the point on the proposed appeal is of significance to the proceeding; and
>
> (iv) whether the proposed appeal will unduly hinder the progress of the action.

[23] Deciding whether the intended appeal is *prima facie* meritorious or frivolous involves considering the standard of review that the Court will apply if leave is granted. The appellants rely on two grounds of appeal. The first raises an issue of statutory interpretation to which this Court will apply a standard of correctness. The

second raises a question regarding the exercise of discretion by the *CCAA* supervising judge. A discretionary decision should be accorded considerable deference by an appeal court, which "should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision" (*Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41). An appellate court should show a particularly high degree of deference in reviewing discretionary decisions of *CCAA* judges to account "for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee", and that each exercise of discretion in the course of a *CCAA* proceeding is often only one of many interrelated decisions that must be made (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 53).

[24] The appellants argue that the Supreme Court judge erred in delimiting the bounds of his statutory discretion, which would be an error of principle. The appellants presented an arguable case supporting their interpretation of the *CCAA* provisions at issue and this first factor weighs in favour of granting leave.

[25] The second factor considers the significance of the point in issue to insolvency practice. The effective date of valuation of creditors' claims in insolvency is the main point at issue in this matter. This has been the subject of judicial discussion in only a few reported cases. More generally, the treatment of mass tort claims in insolvency has also been discussed in very few cases. The point is a significant one which has never been decided in a similar context. This factor weighs in favour of granting leave.

[26] The other two factors also weigh in favour of granting leave. The point on appeal will affect the value of the claims of some tort claimants and the value of their claims will impact the value of the assets remaining to satisfy the claims of the rest. The parties are continuing with the process of applying the claims protocol to decide the proof and value of the plaintiffs' claims and that process is not suspended pending the decision of this Court.

[27] I would grant leave to appeal.

THE APPEAL

[28] The appeal raises two issues, one involving statutory interpretation and the other the scope and exercise of judicial discretion under the *CCAA*. In such a case,

"the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding", although "when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65).

> ***Should the Court interpret the BIA and CCAA as providing that the Initial Filing Date was the date on which the claims of the plaintiffs should be valued, based on the circumstances (including that the deceased plaintiffs were then alive) that existed at that time?***

[29] The Supreme Court judge did not address this question. If he had done so, then this question of statutory interpretation would have been reviewable by this Court on a standard of correctness because it is a question of law (*Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, at para. 16). This Court can answer this question.

[30] In *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, leave to appeal to SCC refused, 29390 (20 March 2003), Green, J.A. (as he then was) described the approach that a court should take to interpret legislation:

> [15] …in *Stubart Investments Ltd. v. The Queen* (1984), 10 D.L.R. (4d) 1, Estey J. adopted, at p. 32, Dreidger's formulation of the "modern rule", taken from the second edition of his text, *The Construction of Statutes*, as follows:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament.

[31] The *Interpretation Act*, RSC, 1985, c. I-21, provides as follows:

> 12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[32] In *Archean Resources*, Green, J.A. said the provincial equivalent of that federal provision "enunciates a principle of harmonization in which the courts are directed, in cases of dispute, to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the

legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to have been directed. …".

The Objectives of the CCAA

[33] The *CCAA* and the *BIA* are elements of an integrated statutory scheme governing insolvency (*Century Services*, at para. 78) and "where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred" (*Callidus Capital Corp.*, at para. 74).

[34] The *BIA* "contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution" (*Century Services*, at para. 13).

[35] The purpose of the *CCAA* was described by the Supreme Court of Canada in *Montréal (City) v. Deloitte Restructuring Inc*., 2021 SCC 53:

> [44] The bankruptcy of large companies often resulted in "the entire disruption of the corporation, loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[36] The "key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (*Century Services*, at para. 14).

[37] In *Montréal (City)*, the Supreme Court of Canada listed the remedial objectives of the *CCAA*:

> [86] …These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and

> communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42).

[38] The priority accorded to each or any of those objectives will vary with the circumstances, the stage of the *CCAA* proceedings or the nature of the order sought from the *CCAA* court (*Callidus Capital Corp*., at para. 46). Where distribution to creditors is under consideration, as it is in this case, the "equitable distribution of property to the creditors" is "a fundamental objective" of insolvency legislation (*Vachon v. Canada Employment & Immigration Commission*, [1985] 2 S.C.R. 417, at 429). In "bankruptcy the rule of equality is absolute except where the Act itself gives priority to some debts over others" (*Re Orzy*, 1923 CanLII 489 (ONCA), at 256). The *BIA* codifies this principle (known by its Latin term, *pari passu*) in section 141, which says that on distribution "all claims proved in a bankruptcy shall be paid rateably". This means that the distribution must treat all like creditors alike and pay them proportionately out of the realized assets.

[39] The principle that all like creditors must be treated alike also applies in *CCAA* proceedings. As stated by the Ontario Court of Appeal, in *Nortel Networks Corporation (Re)*, 2015 ONCA 681, leave to appeal to SCC refused, 36778 (5 May 2016), a *CCAA* proceeding:

> [23] It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, [2001] O.T.C. 486 (S.C.J.), at para. 20, *per* Blair J.[2] In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.
>
> [24] The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

[40] Insolvency proceedings are subject to supervision. In *BIA* proceedings a trustee conducts the supervision; in *CCAA* proceedings a monitor does. Both processes are subject to ultimate supervision and approval by the court. The powers of supervision must be exercised in accordance with the terms and objectives of the

governing legislation, including the *pari passu* principle: "the powers conferred by this section are not sufficiently wide to enable the bankruptcy judge to make an order which is inconsistent with a fundamental principle of the *Bankruptcy Act* [now the *BIA*], namely, the principle of *pari passu* distribution amongst creditors of the same rank" (*Re Milad*, (1984) CanLII 2152 (ONCA), at para. 5).

[41] The biggest advantage that a debtor gains from invoking the protection of either the *CCAA* or the *BIA* is time; time to work out a means to continue as a viable company or to provide for orderly liquidation if that fails. The advantage that creditors obtain is the opportunity to negotiate a compromise that still provides for equitable treatment among themselves in respect of repayment.

The CCAA does not specify or define a valuation date

[42] The appellants argue that the *BIA* and *CCAA* provide that the plaintiffs' claims should be valued as of the Initial Filing Date. Their position is that because the statutes provide that provable claims are only those that exist at the date of insolvency (the Initial Filing Date in this case), any event or circumstance that occurs following that date is irrelevant to the valuation of the claims. The effective date for valuation should be the same as the effective date for the determination of validity.

[43] The *CCAA*, section 2(1), defines a claim as "any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning" of the *BIA*, section 2. That provision of the *BIA* defines creditors as those with "provable" claims, and says that a claim provable in bankruptcy "includes any claim or liability provable in proceedings under this Act by a creditor." The *BIA*, section 121(1), says further that provable claims are only those that exist on the date of bankruptcy and section 2(1) says the date of bankruptcy is the date that the debtor makes an assignment or becomes subject to a bankruptcy order. The *BIA* requires proof of claims to be made to the trustee in bankruptcy and reviewed by the court. Therefore, creditors' claims must exist at the date of insolvency but be proven later.

[44] However, neither the *CCAA* nor the *BIA* expressly state the operative date for the valuation of claims. Whether the statutes should be interpreted to fix a valuation date has only rarely been the subject of judicial consideration.

[45] In *Kolodychuk (Re)*, 1978 CanLII 324 (BCSC), the court explained how intervening events may affect the value of an otherwise provable claim in insolvency. The debtor had granted a chattel mortgage and later declared

bankruptcy. The chattel mortgagee later seized and sold the property and then filed a claim in the bankruptcy for the deficiency. The provincial statute governing chattel mortgages provided that the mortgagee could seize the secured property or sue for the full debt but could not do both – in other words the "claim" for the debt was extinguished by the seizure. The *BIA* provided that the secured creditor could seize the secured property and file their claim in the bankruptcy for the deficiency. The trustee disallowed the claim for the deficiency. The creditor appealed and argued that there was conflict between the application of the legislation, and the federal *BIA* took precedence over the provincial legislation. The court determined at paragraph 7 that there was no conflict because once the creditor seized the property, it no longer had a claim provable in the bankruptcy. Since the *BIA* was silent on what constituted a "claim", the definition of the provincial statute was applicable: a claim exists only if there has been no repossession. Although the creditor had a provable claim at the date of bankruptcy, that claim "was immediately extinguished the moment he exercised his right to repossess the goods covered by the agreement."

[46] The Alberta Court of Appeal in *Farm Credit Corporation v. Holowach (Trustee of)*, 1988 ABCA 216, leave to appeal to SCC refused, 21018 (22 June 1989), at paragraph 7, cited the reasoning in *Kolodychuk* with approval (although in support of a slightly different proposition, that a provable claim must be one recoverable by legal process).

[47] In *AMIC Mortgage Investment Corporation v. Abacus Cities Ltd.*, 1992 ABCA 57, the Alberta Court of Appeal considered an argument by the trustee regarding proof of future claims and said the following:

> [39] The trustee asserted that all must be valued as at the date of bankruptcy. As this case can be decided without challenge to this assertion, I accept it for that purpose. But I note that judicial valuation occurs only when the trustee asks for it. **The valuing Court can have regard to events after bankruptcy, and before the hearing, to help it decide.** I see nothing in the cases, or in common sense, to the opposite effect. The learned chambers judge here accepted the impossibility of valuation at the date of bankruptcy. I see no evidence to support that finding.
>
> (Emphasis added.)

[48] The Alberta Court of Appeal explained its earlier decision in *Abacus Cities* in *Decker v. Canada (Superintendent of Bankruptcy)*, 2010 ABCA 189:

> [33] In short, the validity of a claim must be assessed as of the date of bankruptcy. Following that, if subsequent circumstances (such as payment being received) affect the amount of claim, then it should be revised. Such a revision is not contrary to the requirement that validation is determined by reference to the date that the bankrupt became bankrupt.

[49] The important holding of these cases is that claims should be valued effective as of the date that the trustee, monitor, or court conducts the valuation. Although the legislation does not expressly state a valuation date, the legislative scheme is consistent with that interpretation.

[50] The discretionary "interest stops" rule supports this interpretation of the *CCAA* and *BIA*. The interest stops rule, when applied as a matter of discretion, operates to fix the valuation date as of the date of insolvency so that the debts of creditors who otherwise would have a claim for interest would not accrue interest after that date. The appellants rely on analogy to the interest stops rule in support of their alternative argument and I will describe it further in addressing that argument. It is sufficient to note for present purposes that there would be no need to resort to or apply the interest stops rule within *CCAA* proceedings if the statute provided for valuation as of the date of insolvency.

[51] The judicial suspension of limitation periods during insolvency also supports this interpretation. Provable claims must be legally enforceable. If a creditor with a legally enforceable claim on the date of insolvency is subject to a stay and the limitation period expires before the claim is valued, then the claim would no longer be a provable claim because it would then no longer be legally enforceable. To avoid this unfair consequence, the courts have decided that the issuance of a stay suspends the operation of limitation periods (see Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada, 4th Edition* (Release No. 6, June 2024) at §6:142, online: (WL Can) Thomson Reuters Canada). There would be no need for this judge made law if the statute provided that claims were to be valued as of the insolvency date.

[52] Neither the *BIA* nor *CCAA* sets out specific rules for the valuation of tort claims. As with all other claims, therefore, tort claims must exist at the date of insolvency but be proven later.

[53] A tort victim is entitled to claim damages once the tort is complete. In the case of tort causing personal injury, virtually all damages are future damages at the time that the tort is complete. As time moves on from the completion of the tort, the

damages suffered by the tort victim become clearer. What once was a contingent future loss may become a certain past loss or it may be avoided altogether. Even claims for general, non-pecuniary damages compensate for past and future pain and suffering and therefore are valued with future contingencies at least implicitly in mind. The court assesses tort damages for personal injury on a lump sum, "once-and-for all" basis at the time of trial, considering past certainties and future contingencies.

[54] There is no reason inherent in the objectives of insolvency legislation to depart from these principles when valuing tort damages in an insolvency. Damages should be assessed once and for all at the time of proving the claim to a monitor in a *CCAA* arrangement, a trustee in bankruptcy, or a supervising court. Events intervening between the date of insolvency and the date of valuation must be considered: "any event that would otherwise be assessed as a future contingency is a relevant factor for assessing damages if it occurs before trial" (*Penner v. Mitchell*, 1978 AltaSCAD 201, at para. 29). Past events once proven are treated as certainties: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paragraph 28.

[55] I therefore would not interpret the *BIA* and *CCAA* as providing that the plaintiffs' claims should be valued as of the Initial Filing Date. I would dismiss the appellants' appeal based on the statutory interpretation ground.

> ***In the alternative, should the Supreme Court judge have exercised discretion to fix the Initial Filing Date as the date on which the claims of the plaintiffs should be valued, based on the circumstances (including that the plaintiffs in question were then alive) that existed at that time?***

[56] The appellants argue in the alternative that, if the *BIA* and *CCAA* do not provide that the valuation date is the Initial Filing Date, then the Supreme Court judge should have exercised his discretion to achieve this result. They argue that the discretion available to the judge under the *CCAA* was sufficiently broad to allow him to fix a date, and that proper application of the principles that guided his discretion would have led him to fix the Initial Filing Date as the valuation date. The result for all plaintiffs is that their claims would be valued on the Initial Filing Date and, specifically, the claims of plaintiffs who died after the filing date would be assessed as if they were alive.

[57] The jurisprudence has recognized that the *CCAA* is skeletal legislation and not designed to be a comprehensive code. The legislation relies for its efficacy instead

on judicial discretion set out in the *CCAA*, section 11 (*Century Services*, at paras. 57-58):

> **General power of court**
>
> 11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[58] As the Supreme Court judge noted in the decision on appeal, at paragraph 80, the Supreme Court of Canada has described the discretionary power granted by section 11 as "vast" (*Canada v. Canada North Group Inc*., 2021 SCC 30, [2021] 2 S.C.R. 571, at para. 21). Although vast, the discretion is not unlimited, as the Supreme Court of Canada noted in *Century Services*:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[59] Therefore, the boundaries of judicial discretion under the *CCAA* are set by the baseline requirements of appropriateness (measured against the remedial objectives of the statute), good faith and due diligence. The party seeking the discretionary order bears the burden "to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence" (see *Canada North Group Inc.*, at para. 21; *Century Services*, at para. 69).

[60] Many examples of discretionary orders issued under the *CCAA* are intended to relieve from the deleterious effects caused by the fact that the *CCAA* freezes the *status quo* but time continues to pass outside of the regime. In *Century Services*, the debtor owed GST to the federal Crown. The *Excise Tax Act*, RSC, 1985, c. E-14

("*ETA*") created a deemed trust over the tax debtor's property for unremitted GST in favour of the Crown. The *ETA* provided that deemed trusts for unremitted excise taxes operated notwithstanding any other federal statute, except the *BIA*. Therefore, prevailing jurisprudence said that in *CCAA* proceedings Crown claims for unremitted GST ranked in priority to the claims of other unsecured creditors, but the Crown would lose its priority once the process moved to the *BIA*. The parties in *Century Services* were unable to work out a compromise arrangement and the debtor sought leave of the *CCAA* court to lift the *CCAA* section 11 stay so that it could make an assignment in bankruptcy. The Crown then applied to the *CCAA* court for immediate payment of the excise tax held in deemed trust. The *CCAA* judge dismissed the Crown application. The British Columbia Court of Appeal overturned that decision. On further appeal, the Supreme Court of Canada restored the decision of the *CCAA* judge. The majority of the Supreme Court interpreted the *CCAA* to mean that the deemed trust for GST did not continue under the *CCAA*. However, the Supreme Court also decided that in any event, the *CCAA* judge had the discretion to order the section 11 stay be partially lifted to allow the debtor to make an assignment into bankruptcy while maintaining the stay to preclude the Crown from enforcing its GST claim. As the majority put it at paragraph 80, "the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*".

[61] The interest stops rule is another example of the way in which judicial discretion can operate in insolvency. The appellants argue that the order they seek fixing the valuation date is analogous to the interest stops rule. The English courts developed this common law "rule" in the context of 19th century winding-up legislation. The rule recognizes that in most situations of liquidating insolvency it would be unjust to allow interest to accrue "in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and obtaining a right to interest" (*Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 648, per Giffard, L.J.). Although the rule is expressed as "interest stops", it operates by fixing the valuation date as the date of insolvency. The rule is based in the *pari passu* principle, that the assets of the debtor at the date of insolvency should be distributed among the creditors rateably and equally. However, as explained by Selwyn, L.J., in *Humber Ironworks*, at pages 645-646, in most cases it is unlikely that the debtor's assets "could be immediately realized and divided" and therefore the court should exercise discretion in the form of the interest stops rule to ensure that "no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that in the case of an insolvent estate, all the money being realized as speedily as possible,

should be applied equally and rateably in payment of the **debts as they existed at the date of the winding-up"** (Emphasis added).

[62] The judicial discretion under the *CCAA* therefore is extensive enough that it allows a presiding judge to fix the date of insolvency as the effective date on which debts subject to the *CCAA* should be valued. The Supreme Court judge held that making that order would have required that he ignore the *SAA*, which he said he could not do. I disagree with the Supreme Court judge to the extent that he decided that the discretion to do so was not available to him. The exercise of such discretion would not have vitiated the application of the *SAA* any more than the exercise of discretion to order only a partial stay would have vitiated the *ETA* in the *Century Services* case. The *SAA* would continue to apply to the claims, but it would be applied as of the Initial Filing Date, based on circumstances then prevailing. In other words, the estates of plaintiffs who died before the Initial Filing Date would be restricted by the *SAA*, but the claims of those plaintiffs who died after the Initial Filing Date would not.

[63] The determination that discretion was available to make such an order does not end the matter. As earlier noted, the exercise of discretion by a *CCAA* judge is limited by the requirements that the parties seeking the exercise of discretion must be acting diligently and in good faith, and the discretionary order sought must be appropriate measured by the remedial objectives of the legislation. The appellants argued that the Supreme Court judge did not consider that his discretion extended to the extent necessary and if he had done so, then he would have concluded that he should have exercised the discretion to fix the Initial Filing Date as the valuation date for the plaintiffs' claims.

[64] The Supreme Court judge found that the parties in this case "have acted diligently and in good faith" (Claim Directions Decision, at para. 67). None of the parties contested that finding.

[65] The question on appeal is whether the appellants have demonstrated that the Initial Filing Date was the only appropriate valuation date, measured against the remedial objectives of the *CCAA*.

[66] The appellants say the Order they sought was necessary to account for the fact that many of those they represent are now elderly and many may die before completing the proof and valuation of their claims. However, given the potential scope of the plaintiff class it is not possible to make such inferences concerning their

ages. The initial plaintiffs are former residents of Mount Cashel Orphanage who claim that they were abused while they lived there. However, Mount Cashel Orphanage only closed in 1989 so all the plaintiffs are not necessarily elderly. Moreover, the plaintiff class also includes those who claim they were victims of abuse by clergy or lay religious orders for whom the respondent is responsible anywhere in the Province at any time before the Initial Filing Date in December 2021. The record on appeal does not provide information about any of these other plaintiffs.

[67] The choice of effective date for the assessment of damages can be crucial in valuing tort claims. Some injuries remain latent for some time and only manifest later. The proposal in this case seeks to bar the claims of abused persons not initiated before September 2023. It is not clear in the proposal whether provision will be made, or a fund set aside for late or unknown claimants (see for an example of such a provision and discussion of the discretion of the Court to deal with late claims *Canadian Red Cross Society, Re*, 2008 CanLII 53855 (ONSC)). Moreover, the effects of some manifest injuries do not become evident immediately on the occurrence of the tort. Over the intervening period, the effects of a tort that were once future possibilities may become past certainties. We need look no further than the trial judge's assessment of damages in the four test cases to find examples of the long-term, changing, and sometimes latent, effects of the kind of abuse for which the plaintiffs claim.

[68] The Order sought by the appellants would increase the damages of claims continued by the estates of deceased plaintiffs who were alive on the Initial Filing Date. The Order would allow those estates to claim damages that the estates did not actually suffer (the definition of claims includes those who suffered abuse but not people who claim they suffered the secondary effects of abuse of their relatives). But setting that valuation date for all plaintiffs' claims would have a potential negative effect on the claims of other plaintiffs whose injuries have not yet manifested, or suffered latent effects of known injuries, by that date.

[69] A *CCAA* judge must exercise discretion in accordance with the objectives of the *CCAA*. One of the fundamental objectives of insolvency legislation is the *pari passu* principle. Creditors of equal rank must be treated equally.

[70] In interpreting insolvency legislation, courts have recognized the primacy of this principle:

> Where two interpretations of the Act are equally possible, the court should select the interpretation that favours equality among creditors, possessing the same characteristics, rather than the one that favours a particular group of creditors: Re Can. Tabulating Card Co., 17 C.B.R. (N.S.) 248, [1972] 3 O.R. 648, 1972 CarswellOnt 83, 29 D.L.R. (3d) 156; Re Olympia & York Developments Ltd. (1997), 143 D.L.R. (4th) 536, 1997 CarswellOnt 657, 45 C.B.R. (3d) 85 (Ont. Gen. Div.). .

(see *Bankruptcy and Insolvency Law of Canada*, at §1:8)

[71] The same interpretative principle should guide the exercise of discretion. In other words, the judge should not exercise discretion in favour of one group of creditors and give them an advantage over others who fall within their classification.

[72] The *BIA* does not explicitly define classes of creditors or the parameters for setting the boundaries of creditor classes. The rules for distribution in Part V of the *BIA* divide creditors only into secured creditors, unsecured creditors and those with claims specifically exempted from the general scheme. The *CCAA*, section 22 goes a little further, but only in describing how the debtor company might organize the voting for a compromise or arrangement.

[73] All the claimants whose interests the appellants represent are tort claimants and unsecured creditors. There is nothing in either the specific language or objectives of the *BIA* nor *CCAA* that would support a more granular division of tort claimants into different creditor classes depending on their respective circumstances or legal situations. The appellants did not provide any authority that would support such a division.

[74] In this case, it is not yet known whether the *CCAA* process will end in bankruptcy or liquidation or restored solvency with all creditors paid (see Claim Directions Decision, at para. 100). There may not be enough money available to pay all the respondent's creditors, and each may have to take a rateable share after compromise or liquidation. The *CCAA* court should not exercise discretion in a way that favours the claims of one set of creditors over those of equal rank.

[75] Although the Supreme Court judge may have erred in limiting the boundaries of his discretion, the appellants have not shown that the judge erred in principle by refusing to exercise his discretion to fix the Initial Filing Date as the valuation date. I would therefore dismiss the appellants' appeal from this decision of the Supreme Court judge.

CONCLUSION and DISPOSITION

[76] I would dismiss the appellants' appeal based on the statutory interpretation ground because I would not interpret the *BIA* and *CCAA* as providing that the plaintiffs' claims should be valued as of the Initial Filing Date.

[77] I also would dismiss the appeal based on the second ground, although I would do so for different reasons than the Supreme Court judge. I would affirm his decision refusing to exercise discretion to fix the Initial Filing Date as the date on which the claims of the plaintiffs should be determined based on the circumstances (including that the plaintiffs in question were then alive) that existed at that time.

[78] As neither party asked for costs, I would not award costs.

_____

D.M. Boone J.A.

I concur: _____

K.J. O'Brien J.A.

F. J. Knickle J.A. (Separate Concurring):

OVERVIEW

[79] This interlocutory appeal addresses damages for tort claims pursued by the estate of a deceased plaintiff where the defendant has sought insolvency protection.

[80] The question is whether the application of the insolvency legislation fixed the valuation of damages as of the date the first respondent sought protection, including for plaintiffs who passed away after that date but before their claims could be resolved. The applications judge concluded that it did not. He concluded that the estates of plaintiffs whose tort claims were to be resolved under the insolvency legislation would be limited in damages to actual monetary losses to the estates, as per the applicable provincial survival of actions legislation.

[81] The appellants seek leave to appeal to this Court to set aside the decision of the applications judge.

[82] For the reasons that follow, while I would grant leave to appeal, I would dismiss the appeal. The applications judge committed no error in concluding that survival of actions legislation's limitation on the available damages to an estate continues to apply notwithstanding that the litigation is now under the purview of the applicable insolvency legislation. The estates of plaintiffs who have passed away, or who may pass away, after the date the first respondent sought insolvency protection, are restricted in their recovery of damages to "actual monetary loss" to the estate.

BACKGROUND

[83] The history of the litigation is lengthy. However, the underlying facts relevant to this appeal are not in dispute.

[84] The appellants are part of a group of plaintiffs which, in 1999, commenced proceedings against the first respondent, the Roman Catholic Episcopal Corporation of St. John's (the "RCECSJ") and the Christian Brothers Institute Inc. (the "Christian Brothers"), for alleged sexual and physical abuse during the 1940's, 1950's, and 1960's at Mount Cashel Orphanage. The proceedings relating to the Christian Brothers are concluded. The allegations against the RCECSJ were that it was either

directly or vicariously liable for sexual abuse suffered by the plaintiffs while at the orphanage.

[85] By 2003, there were at least 40 plaintiffs who alleged similar abuse. Given the number of plaintiffs, the individual proceedings were case managed together by a justice of the Supreme Court of Newfoundland and Labrador. The RCECSJ has never admitted liability in respect of any of the plaintiffs. However, as part of the formal case management process, there was an agreement between the parties to select six cases from the group to serve as test cases. The understanding was that the outcome of the test cases might assist in resolving the remaining actions. The remaining plaintiffs did not pursue their claims while the test cases were pursued and there was no formal agreement that the plaintiffs could not pursue their actions.

[86] Two of the six test plaintiffs chosen passed away before the trial commenced but the trial of the other four plaintiffs proceeded. While the actions against the RCECSJ were dismissed, at the request of the parties, the trial judge assessed damages for each of the four plaintiffs as if liability had been established (*John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60).

[87] The four plaintiffs successfully appealed the trial judge's dismissal of their actions (*John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, leave to appeal to SCC refused, 39343 (14 January 2021)). This Court awarded damages in favour of the four plaintiffs totaling $2,395,312.45 plus costs. As a result of the Court's decision, the four plaintiffs filed the judgment in their favour with the Sheriff's Office.

[88] After the judgment was filed with the Sheriff's Office (but before monies were paid to the successful plaintiffs), the RCECSJ filed a Notice of Intention to Make a Proposal in Bankruptcy under the *Bankruptcy and Insolvency Act,* RSC, 1985, c. B-3 (*BIA*). One effect of this filing was that the outstanding litigation of the remaining plaintiffs was stayed by the Court. The RCECSJ then applied to the Court to convert the proceedings under the *BIA* to proceedings under the *Companies' Creditors Arrangement Act,* RSC, 1985, c. C-36 (*CCAA*). That application was allowed. A further stay of proceedings of the outstanding litigation was imposed with the agreement of the plaintiffs. As well, the appellants obtained an order to be appointed as representative plaintiffs for those plaintiffs who claimed abuse occurred in the Province.

[89] Although it is no longer disputed that RCECSJ will be vicariously liable if an individual plaintiff establishes their claim of abuse, whether abuse occurred in relation to the remaining individual plaintiffs is still a live issue. According to the RCECSJ, since the filing of the judgment for the four successful plaintiffs, they have been communicating with four separate solicitors representing in excess of 100 potential claimants. The RCECSJ advises that the outstanding claims could exceed $50,000,000.00 in damages.

[90] The parties attempted to reach an agreement as to the process to be used to resolve the outstanding claims. However, an agreement could not be reached and both parties brought separate applications under section 20 of the *CCAA* to have the Court approve the manner in which outstanding claims would be resolved. The applications judge heard the two applications together.

[91] One of the requests made in the interlocutory applications was how to address the claims of plaintiffs who might pass away after the date on which the proceedings became subject to the *BIA* and then the *CCAA* (the filing date), but before their particular claims were resolved. There was no dispute that had the RCECSJ not sought protection under the *BIA* or *CCAA*, any cause of action related to a plaintiff who passed away before its resolution would be subject to the *Survival of Actions Act*, RSNL 1990, c. S-32 (*SAA*). As per the *SAA*, in such circumstances, the extent of damages claimed by the estate of a deceased plaintiff would be limited to "actual monetary loss to the estate" (s. 4). Actual monetary loss would exclude any claim for non-pecuniary losses, such as damages for pain and suffering suffered by the deceased during their lifetime. Non-pecuniary damages comprise a significant component of damages claimed by the remaining plaintiffs.

[92] However, the appellants sought to limit the application of the *SAA* to the resolution of the claims under the *CCAA*. The appellants argued that either by virtue of the discretionary authority under the *CCAA* or through the inherent jurisdiction of a superior court, the applications judge should make an order fixing the quantum of damages available as of the filing date. In the appellants' view, if the quantum of damages was fixed as of the filing date, and a plaintiff should pass away before the resolution of a claim, the available damages will remain the same as if they were alive. The appellants submitted that such an order would be in keeping with the language in the *CCAA* and with insolvency principles.

[93] In contrast, the RCECSJ submitted that plaintiffs who pass away after the filing date, but prior to the resolution of their claims under the *CCAA*, should be

treated no differently than a plaintiff who passes away prior to the resolution of litigation that proceeds through the regular litigation process and not under the *CCAA* or *BIA*. The RCECSJ submitted that the fact that the litigation was now under the purview of the *CCAA* did not remove the application of the *SAA*. As such, the RCECSJ argued that the extent of damages available to the estates of deceased plaintiffs was subject to the *SAA* and the estate was limited to "actual monetary loss".

[94] The applications judge agreed with the RCECSJ and concluded that should a plaintiff pass away, the extent of damages that could be awarded to their estate was subject to the *SAA* and limited to "actual monetary loss to the estate". This would mean that any claim for non-pecuniary damages such as pain and suffering were excluded from recovery.

[95] The appellants now seek leave to appeal the application judge's decision to this Court.

POSITION OF THE PARTIES ON APPEAL

[96] The appellants submitted two arguments.

[97] Firstly, they argue that the applications judge asked himself the wrong question and that the issue was not whether the *SAA* applied, but whether the *CCAA* fixes the valuation of damages as of the filing date - whether or not a plaintiff subsequently passes away. Similar to their position before the applications judge, the appellants argue that fixing the valuation of damages as of the filing date would mean that as long as a plaintiff was alive as of the filing date, the full extent of damages would remain available to the estate of the deceased plaintiff who passes away after that date. As they did before the applications judge, the appellants rely on both the language in the *CCAA* and the principle of *pari passu* as reflected in the common law interest stops rule. They argue that the applications judge erred by failing to consider the language in the *CCAA* and the principle of *pari passu*.

[98] Secondly, the appellants argue that fixing the valuation of damages as of the filing date was within the applications judge's discretion under section 11 of the *CCAA* to fashion orders and that the applications judge ought to have exercised his discretion under section 11 to fix the valuation of damages. The appellants submit the plaintiffs have been prejudiced by the *CCAA* proceedings because resolution of their allegations has been delayed by the stay imposed under the *CCAA*. The appellants argue that fixing the valuation of damages as of the filing date is necessary

to ameliorate this prejudice. The appellants argue that such an order would maintain the *status quo* as between the plaintiffs and the RCECSJ and ensure a fair treatment of both, in keeping with the purposes of the *CCAA*.

[99] In contrast, the RCECSJ maintain their argument from the lower court that the law governing survival of actions is clear and that there is nothing in the *CCAA* or principles governing insolvency law that would displace or otherwise alter the application of the *SAA*'s limitation of damages to the estate of a deceased plaintiff. The RCECSJ submits that the applications judge's conclusion was not contrary to the insolvency principle of *pari passu* but the recognition that the death of a plaintiff fundamentally changes the nature of the litigation in that it is no longer a personal action by the plaintiff but an action by their estate. It is this change in the nature of the claimant, RCECSJ submits, that impacts the availability of damages under the *SAA*.

THE ISSUES

[100] The appellants submit and my colleagues agree that the issue is not the applicability of the *SAA* and its limitation of available damages to a plaintiff's estate, but whether the date at which the claims should be valued was the filing date. I would respectfully disagree.

[101] Whether damages claimed by the plaintiffs should be valued as of the filing date, even where a plaintiff subsequently passes away, depends on whether the *CCAA* displaces or alters the application of the *SAA*'s limitation on available damages to estates of deceased plaintiffs. It is the very application of the *SAA* that the appellants are seeking to avoid by fixing the valuation of damages as of the filing date.

[102] For this reason, while the appellants frame the issue as whether or not the applications judge erred in declining to value the claims of the plaintiffs as of the filing date, I would frame the issues as follows:

1. Firstly, as leave is required under the *CCAA*, should leave to appeal be granted?

2. Did the applications judge err in concluding that the *SAA* applies to the resolution of the tort claims under the *CCAA*?

3. Did the applications judge err in failing to exercise the discretion under section 11 of the *CCAA* by declining to fix the valuation of damages as of the filing date?

ISSUE 1: Firstly, as leave is required under the *CCAA*, should leave to appeal be granted?

[103] Sections 13 and 14 of the *CCAA* permit an appeal to this Court by way of leave. Section 13 does not establish the criteria necessary for leave, but the criteria for leave to appeal were described in *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478, at paragraph 19. According to *Essar Steel*, the Court must consider the following:

- whether the proposed appeal is *prima facie* meritorious or frivolous,

- whether the appeal is of significance to the practice,

- whether the proposed appeal is significant to the proceeding, and

- whether the proposed appeal will unduly hinder the progress of the action.

[104] I accept this is the proper approach and am satisfied that all criteria for leave to appeal are met.

[105] I am satisfied that the appeal is not frivolous. The proper scope of the *CCAA* and its relationship, if any, to the extent of damages available to tort plaintiffs whose litigation falls under its purview is a legal issue that is *prima facie* meritorious.

[106] I am also satisfied that this determination has significance to both the practice under the *CCAA* generally and the individual parties. The quantum of damages is a significant issue for both parties and the extent of the availability of damages for the estates of deceased claimants has application beyond these particular litigants. There appears to be no authority in Canada that definitively describes how tort claims, that have not yet been adjudicated, ought to be treated in the context of proceedings under the *CCAA*.

[107] Finally, despite the lengthy history of this litigation, this appeal will not unduly hinder the continuation of the proceedings under the *CCAA*. The parties advised that there is a mechanism in place for the resolution of claims on both

liability and damages and this process continues notwithstanding these appellate proceedings. The appellants advise that, to that end, damages for particular claimants are being calculated for both eventualities, one scenario where only actual monetary losses to the estate are available and the other where non-pecuniary or general damages are available.

[108] Given the above, I would grant leave to appeal.

THE STANDARD OF REVIEW

[109] Whether the *CCAA* impacts the application of the *SAA* in relation to available damages in the resolution of tort claims involves the interpretation of a statute. This is a question of law that is reviewed on a standard of correctness. Whether the discretionary authority under section 11 of the *CCAA* permits the applications judge to derogate from the *SAA*'s limitation on damages to an estate of a deceased plaintiff is also a question of statutory interpretation and, therefore, also a question of law. If that discretion was available, whether it was properly exercised by the applications judge is owed deference by this Court in the absence of an error in principle, jurisdiction, or palpable and overriding error.

ISSUE 2: Did the applications judge err in concluding that the *SAA* continues to apply to the resolution of tort claims under the *CCAA*?

The Principles of Statutory Interpretation

[110] The principles governing the interpretation of a statute are well established. The proper interpretation of the *CCAA*, including the extent to which section 11 permits discretionary orders, must be a liberal one that best attains the objectives of the *CCAA*. This consideration includes an interpretation that gives effect to the *CCAA*'s remedial objectives (*Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, at paras. 22, 28-29, leave to appeal to SCC refused, 29390 (20 March 2003)).

[111] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraphs 21-22, quoting from Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto, ON: Buttersworths, 1983), at 87, the Supreme Court of Canada explained that it is not the wording of the statute standing alone that informs its interpretation but that the words of a statute must be taken "in their entire context and in their grammatical and

ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Survival of Actions at Common Law and the *SAA*

[112] At common law, an action in tort, as a personal action, is extinguished by the death of a plaintiff (*Price Estate v. House Estate*, 2001 CarswellNfld 377 (NFSC (TD)), aff'd 2002 NFCA 60). As stated by Cromwell J.A., as he then was, the rights possessed at common law by deceased persons or their survivors were "simple" and "harsh". "There were none" (*MacLean v. MacDonald*, 2002 NSCA 30, at para. 20).

[113] Because at common law an action in tort is extinguished by the death of the plaintiff, the estate of a deceased person cannot continue with the prosecution of that action. At common law, an estate is entitled to realize only the assets of a deceased person. A cause of action is not an asset (*Harvey v. Harte*, 1999 CanLII 19024 (NLCA), at para. 11; see also *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at paras. 71-76).

[114] Survival of actions legislation such as the *SAA* enacted in this province, and similar legislation enacted in other common law jurisdictions, attempts to undo the harsh consequences of the common law rule. However, there are limitations. In *MacLean*, Cromwell J.A. explained, at paragraph 96:

> Survival of actions legislation was enacted to undo the effects of a general common law rule holding that personal actions in tort did not survive for or against a deceased person. It had the general purpose of putting the deceased's estate, with very minor exceptions, in the same position as regards causes of action by or against the deceased as the deceased would have been if he or she had not died. However, it did not attempt to place the estate in the same position as regards the available remedies; as noted, certain kinds of losses are <u>not</u> compensable in an estate action and only actual pecuniary losses are recoverable. …
>
> (Underlining in original.)

[115] Like the Nova Scotia legislation described in the above quote, the *SAA* in this province ensures the "survival" of a cause of action by virtue of sections 2 and 3. Section 2 of the *SAA* states:

> 2. Actions and causes of action
>
> (a) vested in a person who has died; or
>
> (b) existing against a person who has died,
>
> shall survive for the benefit of or against his or her estate.

(See also *Ryan v. Moore*, 2003 NLCA 19, at para. 34-35, rev'd in part on other grounds 2005 SCC 38; *Price Estate*; and *Harvey*, at para. 11)

[116] Section 3 explains the circumstances that may constitute an "existing" action.

[117] Further, even though the *SAA* revives certain causes of actions, there are limitations. Section 11 of the *SAA* prohibits the continuation of actions for defamation, malicious prosecution, false imprisonment, false arrest, and damages for physical disfigurement, or pain or suffering where the person dies.

[118] For those causes of actions that survive, the *SAA* explicitly limits damages to "actual monetary loss to the estate" under section 4. Section 4 states:

> Where a cause of action survives under this Act for the benefit of the estate of a deceased person, only damages that have resulted in actual monetary loss to the estate are recoverable…

[119] The term "actual monetary loss to the estate" under section 4 means only those losses to the estate that are "pecuniary", that is, a loss consisting of money (*MacLean*, at para. 111). As explained in *MacLean*, at paragraph 71, referring to *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229:

> Although the Court in *Andrews* did not define the terms 'pecuniary' and 'non-pecuniary', I think these terms are used in their ordinary sense. A pecuniary loss is one that is "... of, concerning or consisting of money" (see Katherine Barber, *The Canadian Oxford Dictionary* (1998) at p. 1071). A non-pecuniary loss is one that is not, such as pain and suffering and loss of enjoyment of life.

[120] The legislation at issue in *MacLean* stated "actual pecuniary loss to the estate" (para. 14), however, the interpretation applied in *MacLean* is applicable to the term "actual monetary loss to the estate" under section 4 of the *SAA*.

[121] The limitations under the *SAA* of the availability of damages to actual monetary losses to an estate means that claims for damages such as "pain or suffering" are not available to the estate of a deceased plaintiff. Damages to compensate a plaintiff for pain and suffering are not claims that constitute an actual monetary loss to the estate for the purposes of a cause of action continued under the *SAA*.

[122] In contrast, as explained in *Harvey*, a judgment debt is an asset of an estate. The assets of the estate can be realized. This is why there is no dispute that, for the four plaintiffs who have obtained judgment, the *SAA* does not limit their ability to recover the full judgment debt. If a judgment debt includes compensation for pain and suffering by a deceased plaintiff, that claim is not limited by the *SAA*. For those plaintiffs who have passed or may pass away prior to collecting on the judgment debt, the estate will be entitled to seek the full amount; whether under the *CCAA* or otherwise.

[123] In summary, the *SAA* has two fundamental impacts on tort litigation when a plaintiff passes away prior to the resolution of that litigation: (1) it allows an estate of a deceased plaintiff to continue with the cause of action, and (2) it limits the extent of damages available to the estate. The *SAA* ensures that an action survives the death of a plaintiff, but only to the extent permitted by the *SAA*.

The *Companies' Creditors Arrangement Act*

[124] The *CCAA* is one among several pieces of federal legislation that aims to assist insolvent companies in the orderly management of their finances. The *CCAA* facilitates an insolvent company's efforts to come to an arrangement with creditors while it reorganizes its affairs, with a view to avoiding bankruptcy or upheaval of its operations and employees. The full title of the *CCAA* includes its purpose:

> An Act to facilitate compromises and arrangements between companies and their creditors

[125] The *CCAA* is designed to assist larger companies whose failure could cause not only substantial economic losses, but significant social disruption to the communities in which they operate. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paragraph 77, in describing the *CCAA*, the Supreme Court of Canada stated:

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. …

[126] Then, in *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, building on *Century Services*, the Supreme Court of Canada explained the *CCAA* this way, at paragraph 44:

> The bankruptcy of large companies often resulted in "the entire disruption of the corporation, loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services* , at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services* , at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[127] To avoid the demise of a large but financially struggling company, section 11 of the *CCAA* provides a wide discretion to a judge to fashion orders that may assist in the restructuring. Section 11 states:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[128] The ability to make "any" order a judge "considers appropriate", subject only to restrictions in the *CCAA*, has resulted in the *CCAA* as being interpreted as a more flexible instrument than the *BIA* to manage the issues facing a financially struggling company (*Century Services*, at paras. 13-14).

[129] However, as explained in *Montréal (City)*, the broad discretion available to judges under section 11 of the *CCAA* must be exercised in accordance with the *CCAA*'s remedial purposes (para. 58). The Court, at paragraph 85, described three fundamental considerations for orders sought under section 11: "(1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part" (see also *Century Services*, at para. 70).

[130] In determining whether a particular order sought is appropriate, a judge must consider whether the order advances the remedial objectives of the *CCAA*. In *Montréal (City)*, paragraph 86, the Court explained the remedial objectives:

> … These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). ...

[131] The discretion exercised under section 11 is with a view to facilitating arrangements that will permit the company to emerge from insolvency in a position to continue carrying on business. This can be a significant difference in the goal under *CCAA* as compared to *BIA* in which the life of the bankrupt company may come to an end and the assets distributed among its creditors (*Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 35).

Discussion

[132] Keeping in mind the remedial objectives of the *CCAA*, and considering the words in the *CCAA* in their ordinary grammatical sense and harmoniously with its scheme, there is *nothing* in the *CCAA* (either expressly or by implication), that displaces the application of the limitation of damages under *SAA*, by fixing the date of the valuation of damages.

[133] A general rule of statutory interpretation is that in the absence of express language, legislation does not change the common law or other legislation (Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed translated by Steven Sacks (Toronto, ON: Carswell, 2011) at 538-541; and Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022) at 531-532). There is nothing express or implied in the language of the *CCAA* that purports to fix the valuation of damages as of the filing date under the *CCAA* and thereby remove the application of the *SAA*'s limitation of damages to an estate of a deceased plaintiff.

[134] The appellants submit that the applications judge failed to take the meaning of "claims" and section 19 of the *CCAA* into consideration. The appellants submit the meaning of "claims" under the *CCAA*, together with section 19, support that the quantum of damages available to the plaintiffs was fixed as of the filing date. I

disagree. Neither the meaning of "claims" in the *CCAA* nor section 19, taken either in isolation, or in conjunction with the other parts of the *CCAA*, support that damages available to a living plaintiff as of the filing date will be valued the same for the estate of a plaintiff who passes away after the filing date but before resolution of the claim(s).

The meaning of "claims" under the CCAA

[135] The meaning of "claims" under the *CCAA* is determined by reference not only to the *CCAA*, but the *BIA*. The *CCAA*, at section 2(1), defines a claim as:

> … any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

[136] Section 2 of the *BIA* defines a claim provable in bankruptcy:

> … includes any claim or liability provable in proceedings under this Act by a creditor;

[137] A claim that is provable (a provable claim) is further explained under section 121(1) of the *BIA*, and is defined as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[138] Section 121(2) states that whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135 of the *BIA*. Section 135 explains how claims are to be resolved.

[139] Nothing in the language of these sections fixes the valuation of damages as of the filing date or purports to remove the application of the *SAA*'s limitation of damages to a deceased plaintiffs' estate.

[140] The language in the definitions of "claims" in the *CCAA* and *BIA*, and section 121 of the *BIA*, is broad. The language is capable of encompassing a wide array of claims to ensure fairness between creditors and finality in insolvency proceedings (*Abitibi*, at paras. 34-35). The parties agree that the outstanding causes of action fall

within the broad meaning of claim under the *CCAA*. But the broad meaning of claims does not mean that the valuation date of damages is fixed.

[141] To the contrary, the *BIA* has been interpreted as permitting the valuation of a claim to take into account events that are subsequent to the filing date. For example, in *Decker v. Canada (Superintendent of Bankruptcy)*, 2010 ABCA 189, at paragraph 33, the court stated that the validity of a claim is determined as of the filing date, not necessarily the amount that may be owing. In *AMIC Mortgage Investment Corporation v. Abacus Cities Ltd.*, 1992 ABCA 57, the court held that in valuing claims under the *BIA*, the valuing court could "have regard to events after the bankruptcy, and before the hearing, to help it decide" how much was owed (para. 39; see also Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada, 4th Edition* (Release No. 6, June 2024) at § 6:105, online: (WL Can) Thomson Reuters Canada).

[142] The death of a plaintiff subsequent to the filing date would be a "subsequent" event that could be considered in valuing a claim under the *BIA*. There is no reason to think this approach is also not available under the *CCAA*.

[143] Apart from the meaning of claims, because the parties are proceeding under the *CCAA*, the summary procedure under section 20 of the *CCAA* governs the resolution of both the validity and quantum of the claims. The relevant section states:

> 20(1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> (a) the amount of an unsecured claim is the amount
>
> …
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is *not admitted by the company*, the amount is to be determined by the court on summary application by the company or the creditor; …
>
> (Emphasis added.)

Nothing in this section fixes the valuation of damages for a successful claim as of the filing date. Nor does the language remove the application of the *SAA*'s limitation on damages.

Section 19 of the CCAA does not displace or alter the application of the SAA

[144] The appellants also submitted that section 19 of the *CCAA* supports that damages are to be valued as of the filing date. Again, respectfully, I disagree. In my view, there is nothing in section 19, either expressly or by implication, that fixes the quantum of damages as of the filing date.

[145] Section 19 is the section that explains the types of claims that may be subject to an arrangement under the *CCAA*:

> 19(1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[146] Section 19(1)(a)(i)'s reference to the "day on which proceedings commenced under this Act", does not refer to any date on which damages are to be valued, but establishes the date before which the basis for a claim must have arisen in order to constitute a claim for the purposes of the *CCAA*. Section 19 does no more than establish that, in order for the causes of action to constitute claims under the *CCAA*, the alleged conduct underlying the claims under the *CCAA* would have had to have arisen prior to the RCECSJ having commenced proceedings under the *CCAA*.

[147] This interpretation of section 19 is supported by section 11.8(9) of the *CCAA* which establishes that a claim for the costs of remedying environmental damage will constitute a claim under the *CCAA*, whether the conditions occurred "before or after the date" on which the proceedings under the *CCAA* are commenced. Section 11.8(9)

was a necessary addition to the *CCAA* to overcome the difficulties a creditor may face in proving that environmental damage underlying the basis for a claim arose before the date proceedings were commenced as per section 19 (*Abitibi*, at para. 28).

[148] This interpretation is also consistent with *Decker* that the validity of a claim may be determined as of the date of filing; not necessarily the value of the claim. The appellants provided no basis for interpreting this section otherwise.

[149] In summary, neither the meaning of "claims" nor section 19 of the *CCAA*, when considered with the overall scheme of the *CCAA*, supports the conclusion that the damages available to an estate that continues with an action of a deceased claimant are to be valued as of the filing date.

[150] That the applications judge did not allude to these sections in his decision does not mean that he did not consider the language of the *CCAA* in concluding that he could not abrogate from the *SAA*.

[151] There being no language, express or implied, that fixes the valuation of damages as of the filing date, there is nothing that displaces the application of the *SAA* should a plaintiff pass away.

[152] As argued by the RCECSJ, it is the change in the nature of the litigation, from being a personal action to an action by the estate, that impacts damages, and the legal principles that apply to the status of a litigant outside the purview continue to apply to the resolution of claims under the *CCAA*. As stated by the Supreme Court of Canada the resolution of claims under the *CCAA* would involve similar power to assess claims "as would a court hearing a case in the common law or civil law context" (*Abitibi*, at para. 34).

The significance of the pari passu principle and interest stops rule to CCAA proceedings

[153] The appellants argue that claims are "crystalized" in their amounts as of the filing date under the *CCAA* by virtue of the common law *pari passu* principle. The *pari passu* principle holds that the assets of the debtor, as they exist as of the date of insolvency, should be distributed fairly and ratably amongst creditors. The principle applies to *CCAA* proceedings. As explained in *Montréal (City)*, the fair distribution of a debtors' assets amongst creditors is one of the remedial purposes of insolvency legislation (para. 86).

[154] The appellants provide no authority for the proposition that this principle fixes the valuation of damages as of the filing date. Rather, they argue by analogy using the example of the interest stops rule. The appellants submit that because the interest stops rule has resulted in fixing the amounts potentially available to the creditors as of the filing date under the *CCAA (Nortel Networks Corporation Re*, 2015 ONCA 681, at paras. 23-27, leave to appeal to SCC refused, 36778 (5 May 2016)), damages to plaintiffs should also be fixed as of that date.

[155] The facts in *Nortel* were that certain creditors had arrangements allowing for the accrual of interest on the debt owed by Nortel. Other creditors did not have such an arrangement. In order to level the playing field as between the creditors and ensure a fair distribution of Nortel's assets, as per the *pari passu* rule, the Court reasoned that the common law "interest stops" rule applied to all of the outstanding debts as of the filing date under the *CCAA* (*Nortel*, at para. 34). The application of the "interest stops" rule meant that those debts that would otherwise have continued to accrue interest would not so accrue after the filing date. The court in *Nortel* reasoned that if the interest stops rule did not apply to all the claimants acquiring Nortel's assets, those creditors with interest accruing on the debts would be in a more advantageous position than those creditors whose claims did not enjoy the accrual of interest (*Nortel*, at paras. 37-40).

[156] By analogy, the appellants argue that if the amount of a claim cannot be augmented by the accrual of interest after the filing date, neither should a claim for damages be diminished because a plaintiff passes away after the filing date due to the application of the *SAA*. The appellants submit that this approach is in keeping with maintaining the *status quo* as between the claimants, as creditors, and the RCECSJ, as debtor. At paragraph 58 of their factum, they argue:

> If the ability to obtain damages for pain and suffering is taken away from Deceased Claimants who had an entitlement to those damages as of the Filing Date (as contemplated by the Lower Court Decision) the *status quo will not have been preserved, and this central purpose of the CCAA and other insolvency legislation will have been undermined*.
>
> (Emphasis in original.)

[157] Respectfully, the appellants' position puts the cart before the horse. The *status quo* at this stage is not that the individual plaintiffs had an entitlement to damages, as they argue in their factum and before the applications judge, but that they have a cause of action, which if proven, may entitle them to damages. As discussed, the

status of the plaintiffs' "claims" is that they are outstanding causes of action. The RCECSJ has not admitted liability for any of the alleged individual wrongs. Having sought protection under the *CCAA*, does not change their position with respect to the status of outstanding individual claims.

[158] But the appellants' position would expand the availability of damages to the deceased plaintiffs under the *CCAA* that would not otherwise be available. The practical effect of this argument is to elevate the plaintiffs' claims to the equivalent of a judgment debt. This was argued before the applications judge (Appeal Book, Vol. 1, Tab 7, at paras. 103-110).

[159] It is precisely because the claims cannot be characterized as a judgment debt that the applications judge concluded that he could not fix the valuation of damages as of the filing date and that the *SAA* continued to apply. As explained in *Harvey*, relied on by the applications judge, the difference between the status of having obtained or not having obtained judgment is the dividing line as to whether or not the *SAA* impacts damages available to an estate. As stated by the applications judge, at paragraph 11 of his Decision:

> I note for completeness that the RCECSJ has other creditors than the Claimants. However, their claims, which I believe are mostly for liquidated amounts, are not beset with the difficulties of proof of the latter. For the Claimants, their claims against the RCECSJ are unsecured, contingent liabilities as yet, for undetermined amounts; except, of course, for the four plaintiffs that Faour, J. dealt with in *John Doe (G.E.B. # 25) v. The Roman Episcopal Corporation of St John's*, as generally affirmed by the Newfoundland and Labrador Court of Appeal on damages.

[160] At paragraph 61, the applications judge reiterated the nature of the claims of individual plaintiffs as "contingent" and "uncertain", as compared to those claims of the four plaintiffs who had obtained judgment:

> Presently, only the four Claimants Faour, J. dealt with in 2018, whose judgment the Court of Appeal dealt with in 2020, are judgment creditors of the RCECSJ. The remaining Claimants, whose numbers are as yet uncertain, are still contingent, unsecured creditors of the RCECSJ. It falls to those Claimants now to prove both that the RCECSJ is liable to them and for how much.

[161] I take the applications judge's reference to the claims being "contingent" as a reference to the fact that the claims are not proven and not judgment debts. Again, at paragraph 84, the applications judge referred to the claims as matters that were "contingent" and had yet to be proven:

> The Claimants are easily the most numerous creditors of the RCECSJ, and the contingency of their liabilities complicates the process somewhat. …

[162] The applications judge correctly observed that while the claims of the remaining plaintiffs were provable under the *CCAA*, this did not mean that claims were proven. Yet the practical effect of the appellants' submission, if accepted, ignores that, as argued by the RCECSJ, because the claims are yet to be proven, the death of the plaintiff prior to the resolution of the claims fundamentally changes the nature of the litigation. When the plaintiff passes away, the estate becomes the litigant.

[163] The legislature has determined the estate possesses fewer rights to damages than the living person who was previously acting as the plaintiff. It is not for the court to ignore this legislative intent in the absence of clear legal authority.

[164] To expand an estate's right to damages under the *CCAA* beyond that which it would have at common law or by virtue of the *SAA*, would put debtors facing such unresolved tort litigation in a worse position under the *CCAA* than if they had not sought protection. To pursue protection under the *CCAA* would expose a defendant as debtor to potential damages beyond that which they could be found liable had they not proceeded under the *CCAA*.

[165] This consequence of the appellants' position does not maintain the *status quo* and is incongruous with the remedial purposes of the *CCAA* to facilitate fair arrangements between debtors and creditors while the debtor, here the RCECSJ, reorganizes its affairs. To put the RCECSJ in a worse position then if they had not pursued protection under the *CCAA*, does not promote fairness between creditors and the debtor, or the credit system generally, as explained in *Nortel*. It also results in unequal treatment between those plaintiffs who pass away prior to the filing date and those creditors who pass away after the filing date. In my view, this result is exactly the kind of unequal treatment cases like *Nortel* tried to avoid.

[166] It is one thing to apply the common law interest stops rule to creditors under the *CCAA* to limit the accrual of interest on a liquidated claim in order to maintain a level playing field among all the creditors as occurred in *Nortel*. It is quite another to suggest the application of the *CCAA* to tort actions expands the rights of deceased plaintiffs' estates beyond what would be available if the matter had remained outside the purview of the *CCAA*.

[167] In *Nortel,* the application of the interest stops rule did not change the nature of the litigation. It only changed the quantum of money available to creditors. The application of the interest stops rule under the *CCAA* does not mean that a plaintiff obtains more rights under the *CCAA* than they would have if the matter had not proceeded under the *CCAA*. The circumstances in *Nortel* were different than what is at issue between the plaintiffs and the RCECSJ.

[168] Further, while the remaining plaintiffs make up the majority of creditors, they are not the only creditors to whom the RCECSJ must respond. The advantages gained by appellants in this position would be disadvantageous to the other creditors. It also creates inequality between those plaintiffs who passed away prior to the filing date and those plaintiffs who pass(ed) away after the filing date.

[169] Finally, fixing the valuation of damages as of the filing date could also create inequality in the treatment of the remaining plaintiffs. It may be that for certain plaintiffs there are aspects of their claims for pain and suffering that become augmented after the filing date. Because the appellants' argument would foreclose any consideration of pain and suffering past the filing date, this would deprive such a particular plaintiff of that part of their claim for damages.

[170] For the above reasons, the appellants' argument that the application of the principle of *pari passu* (as applied in *Nortel* through the interest stop rule) supports fixing the valuation of damages as of the filing date, must fail.

ISSUE 3: Did the applications judge err in failing to exercise the discretion under section 11 of the *CCAA* by declining to fix the valuation of damages as of the filing date?

[171] For similar reasons, I am also of the view that, notwithstanding the broad discretion under section 11 of the *CCAA*, the applications judge properly concluded that such discretion did not extend to derogating from the application of the *SAA* in the resolution of the tort claims.

[172] The appellants argue that if the discretion under section 11 is not exercised to fix the valuation of damages as of the filing date for those plaintiffs who subsequently pass away, they are prejudiced by the delay caused by the stay of the litigation under the *CCAA*.

[173] The appellants submit that certain plaintiffs are aged. They argue that the delay caused by the commencement of proceedings under the *BIA* and *CCAA* exacerbates the risk that they may never be able to claim full damages if they pass away. Many plaintiffs have already passed away or may yet pass away before their claims have been resolved. They argue that this provides an incentive for a debtor to utilize *CCAA* proceedings to delay litigation until a plaintiff dies, thus reducing the damages payable.

[174] The applications judge's reasons illustrate that he was keenly aware of the discretionary authority under section 11. Indeed, in excess of 40 paragraphs of his reasons discuss this discretion under the headings "Discretion under the *CCAA*" and "Limiting Discretion under the *CCAA* to the Appropriate" (Decision, at paras. 60-102). The applications judge correctly described the scope of the discretion at paragraph 67:

> It is clear from my review of the *CCAA* earlier in these reasons that the *Act* provides a broad discretion for this court to make orders that are "appropriate in the circumstances." The only limiting factors are the propriety of the orders and whether the parties, both debtor and creditors, are duly diligent and acting in good faith. I am satisfied that both parties here, have acted diligently and in good faith.

[175] And, as mentioned earlier, the applications judge explicitly referred to the appellant's argument that the exercise of discretion under section 11 was one of two bases (the other being inherent jurisdiction) for fixing the valuation of damages as of the filing date.

[176] In concluding that he would not fix valuation of the damages as of the filing date, the applications judge stated, at paragraph 126:

> The claimants are asking me to exercise my discretion and ignore section 4 of the *Survival of Actions Act* which, of course, I may not do. …

[177] When his reasons are taken as a whole, it is clear that the applications judge concluded that given the applicability of the SAA, to exercise his discretion under section 11 in this way would not be "appropriate". I would agree.

[178] While I would not foreclose the availability of section 11 to displace the application of provincial legislation such as the *SAA*, the discretion under section 11 must be exercised in a manner that would advance the purposes of the *CCAA*.

[179] For example, in another context, in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, the Supreme Court of Canada upheld the ability of the applications judge to fashion an order that overrode otherwise applicable provincial legislation on the basis of the paramountcy of the *CCAA* (paras. 48-60). The order overrode the provincial legislation as it was the only means to ensure the necessary fairness between the parties and in keeping with the purposes of the *CCAA*. No such argument of paramountcy was made by the appellants. In these circumstances there is no basis to fashion an order that is contrary to the *SAA*.

[180] In these circumstances an order that damages be valued as of the filing date, even for those plaintiffs who pass away, would not be appropriate because the effect would be that the *SAA*'s limitation on damages no longer applies to actions continued by the estate of a plaintiff under the *CCAA.* This means that, as discussed, a debtor who seeks protection under the *CCAA* is at more of a disadvantage, as far as potential exposure to damages is concerned, than if they had not sought *CCAA* protection. It would not be an incentive to use the *CCAA* if the defendant facing tort litigation could be exposed to more damages than they would be if they had not sought *CCAA* protection.

[181] The purpose of the *CCAA* is not to put a debtor in a worse position *vis-à-vis* its creditors or to expand the rights of tort litigants. Its purpose is, to the extent appropriate, to maintain the *status quo* as between the debtor and its creditors (as well as between creditors) in a way that is fair to all parties and that allows the debtor to re-organize its affairs.

[182] The continued application of the *SAA* to the resolution of the claims, as far as the availability of damages is concerned, maintains the *status quo* as between the plaintiffs as creditors and the RCECSJ as debtor. As between these creditors and the RCECSJ, it is the quantum of damages that is at the heart of the claims. The principles that apply to estate litigation prior to the commencement of the insolvency proceedings apply to the continuation of litigation under the *CCAA*. This is the approach, as far as damages are concerned, that is fairest to all of the creditors and the RCECSJ.

[183] Further, that damages will be resolved under the *CCAA* as they would be in the regular trial court process with the continued application of the *SAA* does not necessarily mean that a debtor might be tempted to use *CCAA* proceedings as a delay tactic in tort litigation.

[184] While RCECSJ's filing for protection under the *BIA* and then conversion of the matter to the *CCAA* resulted in a delay of the resumption of the outstanding litigation, that the claimants have suffered prejudice because of this delay (as suggested by the appellants), is speculative. There is no evidence that the resolution of this litigation would have been more efficient if it had continued without the RCECSJ having sought protection under the *CCAA*. The reality is that by either route a particular plaintiff may pass away. Delay may impact the resolution of litigation whether it is resolved under the *CCAA* or not, and the plaintiffs have always faced the risk that they might pass away before judgement is obtained. There is no way to predict when a plaintiff would achieve a determination on liability and the available damages on the merits.

[185] If anything, resolution of the outstanding claims under the *CCAA* has likely accelerated the process. As explained earlier, the *CCAA* allows for a "summary" procedure for the resolution of claims and many evidentiary issues that may have arisen during the litigation process are no longer an issue in the summary procedure under the *CCAA*. For example, as noted by the applications judge, the parties have agreed that there will be no need for the plaintiffs to present expert evidence in the prosecution of their claims.

[186] As well, the good faith of the party seeking the order under section 11 is a fundamental consideration by an applications judge. Evidence that a debtor was seeking *CCAA* protection as a means to delay proceedings with the intention of "waiting out" a plaintiff, might be evidence that the debtor is not acting in good faith. However, it is unnecessary to decide what impact, if any, evidence that a party was not acting in good faith might have on whether the discretion under section 11 could extend to fixing the valuation of damages as of the filing date and derogating from the application of the *SAA*. In these circumstances, as the applications judge noted, the RCECSJ was acting in good faith in seeking *CCAA* protection and attempting to re-structure its affairs (Decision, at para. 102).

[187] Further, section 19(2) of the *CCAA* establishes that as claimants for physical and sexual abuse, the plaintiffs are not bound by the *CCAA*. There is no requirement for the claimants to accept an arrangement under the *CCAA*, as per section 19(2). If the claimants are dissatisfied with a proposal from the RCECSJ, unlike other creditors, they are not obliged to accept the proposal.

[188] Finally, the appropriate exercise of judicial discretion under section 11 of the *CCAA*, in keeping with the remedial purposes of the *CCAA*, is not an open-ended invitation to ignore applicable legal principles or authority.

[189] As stated by Blair, J.A. in *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ONCA), at para. 44, the discretion under section 11 is "not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues."

[190] In his article in which he argues that the exercise of judicial discretion in the commercial context is "constrained" and must comport with "identifiable legal principles", Justice Robert Sharpe argued that the goal of the exercise of judicial discretion is no different than a judge deciding a "rule bound case". The "judge must carefully consider and weigh the facts and delve deeply into the applicable rules and principles" (Robert J. Sharpe, "The application and impact of judicial discretion in commercial litigation" (1998) 17:1 Adv Soc'y J 4 at 4, 8; see also Georgina R. Jackson & Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2007) Ann Rev Insol L 3, online: (WL Can) Thomson Reuters Canada).

[191] Here, the circumstances involved the resolution of tort claims, to which the *SAA* applied. It was within that legal framework that the applications judge concluded that it was not "appropriate" to exercise his discretion under section 11 to value damages as of the filing date.

[192] For these reasons, in my view, the applications judge properly concluded that, in these circumstances, the discretion under section 11 of the *CCAA* does not extend to fixing the quantum of damages as of the filing date for plaintiffs who pass away after the filing date but before the claims can be resolved. In my view, the applications judge properly concluded that the *SAA*'s limitation of damages available to an estate continues to apply to the resolution of tort litigation under the *CCAA*.

CONCLUSION

[193] The appeal should be dismissed. In my view, the applications judge did not err in declining to fix the valuation of the plaintiffs' claims as of the filing date under the *CCAA*. There is nothing in the *CCAA* or the jurisprudence that fixes the valuation

of damages as of the filing date in order to displace the application of the *SAA* to the resolution of tort claims.

[194] Likewise, the application of the principle of *pari passu* as reflected in the interest stops rule does not support that the *CCAA* fixes the valuation of the plaintiffs' damages as of the filing date in order to displace the application of the *SAA*.

[195] Finally, in my view, the applications judge properly declined to exercise his discretion under section 11 of the *CCAA* on the basis that it was not appropriate in the circumstances to impose an order contrary to the *SAA*.

[196] I would dismiss the appeal. As neither party addressed costs, I, like my colleagues, would make no order as to costs.

F.J. Knickle J.A.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of a Proposed Plan of Compromise or Arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is general ly exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of

apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

(Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

Authorities referred to

Driedger, E.A., The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983)

Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --),

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase

substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this

view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares. [page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
>
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed

that:

(a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

(b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

(c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is

little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be e vident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

(b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and

> therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception

of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the

statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy gr ounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . . . .

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1); [page20]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . . .

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in

conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other

applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> 20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada". [See Note 5 at the end of the document]
>
> SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark,

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this

court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

> [67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business

judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28]situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in

appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of di rectors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual aebias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, infra, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6:Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

Court of Appeal File No. COA-24-OM-0248
Court File No. CV-23-00696017-00CL

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

REPLY BOOK OF AUTHORITIES
OF THE MOVING PARTIES
(MOTION FOR LEAVE TO APPEAL)

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