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:
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> (i) the proposed appeal is *prima facie* meritorious or frivolous;
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> (ii) the point on the proposed appeal is of significance to the practice;
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> (iii) the point on the proposed appeal is of significance to the proceeding; and
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> (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:
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>> 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.

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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.