Cite as: Roynat Inc. v. Keddy Motor Inns. Ltd.,
1992 NSCA 89

S.C.A. No. 02595
S.C.A. No. 02598

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Matthews and Freeman, JJ.A.

B E T W E E N:

ROYNAT INC. and ROYAL TRUST CORPORATION OF CANADA appellants - and - KEDDY MOTOR INNS LIMITED respondent	Daniel M. Campbell, Q.C. for appellant RoyNat Inc. Peter G. MacKeigan and Gregory Cooper for Royal Trust Corporation of Canada John D. Stringer, Richard Freeman and Roy F. Redgrave for Keddy Motor Inns Limited Gerald R.P. Moir for Central Guaranty Trust Company Appeal Heard: February 7, 1992 Judgment Delivered: March 2, 1992

THE COURT: Appeal dismissed from order sanctioning plan of arrangement under **Companies' Creditors Arrangement Act** between hotel chain and creditors per reasons for judgment of Freeman, J.A.; Clarke, C.J.N.S., and Matthews, J.A., concurring.

FREEMAN, J.A.:

Two secured creditors are seeking to overturn the Supreme Court order sanctioning a hotel chain's plan of arrangement under the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36, on grounds of voting irregularity and unfair practices.

Faced with debts totalling $42,000,000 that threatened to overwhelm it, the respondent, Keddy's Motor Inns Limited, brought proceedings under the Act. Under a series of court orders creditors' actions were stayed, creditors divided into classes according to interest, and a schedule established requiring a plan to be voted on by November 2, 1991.

Following the vote approving the plan as amended at the meetings, it was sanctioned on application to Mr. Justice Nathanson of the Trial Division.

The issues on the appeal from his decision are that he should not have allowed the inclusion of a proxy vote that arrived late, resulting in approval of the plan by the class of

capital lease creditors; that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote for a plan confiscatory of secured creditors' rights; and that the creditors had been unfairly classified.

The appellants must overcome obstacles including strong creditor approval of the plan, a well reasoned decision by Mr. Justice Nathanson and able submissions on behalf of both respondents.

The scheme of the Act is contained in s. 6:

> 6. Where a majority in number representing three-fourths in value of the creditors or class of creditors, as the case may be, present and voting, either in person or by proxy, at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; . . .

Important features are that the majority as defined

in the Act can bind the minority, that the final plan is defined by the vote of the creditors at the meetings, and that modifications can be negotiated up to the time of voting.

The right of majority creditors of a class to bind the minority is an extraordinary one, reflecting a willingness on the part of Parliament to deprive some creditors of their contractual rights in the interest of the survival of the economic unit comprised of the ailing corporation and its creditors. Fairness is preserved by the requirement for court sanction. But fairness must be understood within the spirit of the statute.

The Act itself, apart from the jurisprudence which has developed around it, is little encumbered by detail or nicety and provides minimal direct guidance as to procedures to be followed. It is intended to provide distressed businesmen and their creditors with a means of reaching an accommodation of benefit to both, and to the public generally. Writing for the British Columbia Court of Appeal, Mr. Justice Gibbs described the Act in Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1991] 2 W.W.R. 136 at p. 142:

> "The CCAA was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the only consequence of the only insolvency legislation which then existed--the Bankruptcy Act and the Winding-up Act. Almost invariably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the CCAA , to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business."

The Act was considered by the Supreme Court of Canada soon after its enactment in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., [1934] S.C.R. 659 in which Cannon, J. described it as follows:

> "Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency' proceedings with the object of preventing a declaration of bankruptcy and the sale of these assets. If the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part, provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation . . . "

The Act fell into disuse until recent years but now

appears to be enjoying a resurgency. McEachern, C.J.B.C., discussed its purpose in the influential case of Northland Properties Limited et al. v. Excelsior Life Insurance Company of Canada et al. (1989), 73 C.B.R. 195 (B.C.C.A.):

> ". . . there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable."

Nathanson, J. recognized that court sanction for the plan required that the court be satisfied as to three criteria which have evolved through the case law and which were stated in the Northland Properties case.

> 1. There must be strict compliance with all statutory requirements.
>
> 2. All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Companies' Creditors Arrangement Act.
>
> 3. The plan must be fair and reasonable.

Each of the six classes of creditors voted in favour of the plan by the majority required under the Act. The

creditors did not vote as a whole. The votes cast at the class meetings--including the proxy vote at issue in this appeal--showed 92 per cent of the creditors representing 86.6 per cent of the value of the claims favored the plan.

After three days of hearings in November, 1991, Mr. Justice Nathanson sanctioned the plan. It provides for three unprofitable hotel or motel properties to be sold or transferred to mortgagees, and the eight profitable "core" properties to be retained. Interest rates on the core properties were standardized at eleven per cent and amortization periods at 25 years. Numerous variations were arrived at through negotiations, as contemplated by the Act, to make the plan acceptable to the majority of creditors. Many creditors received concessions of particular interest or benefit to themselves, that were not made to their class of creditors as a whole.

Central Guarantee, the largest creditor, was added as respondent in this appeal. It was owed $16,600,000 secured by mortgages on hotels in Halifax, Moncton and Fredericton. Relying on provisions of its security contracts, it negotiated for monthly payments of $66,000 to cover municipal taxes and for

payment of its legal fees of $25,000 as a protective disbursement out of a trust fund held for renovation expenses. The appellants did not receive equivalent benefits. It does not appear that they engaged in negotiations with the respondents to improve their positions, although they would have been free to do so. They did not expect the plan to be appoved.

The appellants, in voting against the plan, were in the minority in the secured creditor class. They were among the few secured creditors who were fully secure. Royal Trust held a first mortgage for $985,000 on a hotel at Shediac Road, Moncton, and RoyNat, Inc., held a first mortgage for $3,750,000 on Keddy's Saint John hotel. Both properties are valued in excess of the first mortgages. The appellants claim their position has worsened because their interest rates were reduced from 13 per cent, the amortization periods were increased, and they are precluded from realizing on their security during the five-year currency of the plan. They also object that some creditors negotiated benefits for themselves which the appellants did not receive. They say that they should not be bound by a majority of creditors voting out of self-interest in hope of realizing the benefits they had negotiated for themselves.

Moreover, they say the class of secured creditors is too broad, and that they are unfairly grouped with creditors secured by non-core properties, and by mechanics' lienholders. They should not, they say, be bound by the votes of secured creditors with whom they have no community of interest.

I will dispose of the classification of creditors issue first. Similar arguments were considered by Forsyth, J. of the Alberta Queens' Bench in Norcen Energy Resources Limited and Prairie Oil Royalties Company Ltd. v. Oakwood Petroleums Ltd., (1988), 72 C.B.R. 20. He discussed the "commonality of interests test" described in Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B. 573 (C.A) in which Lord Esher stated:

> ". . . If we find a different state of facts among different creditors which may differently affect their minds and their judgments, they must be divided into different classes."

Bowen, L.J. stated that a class:

> ". . . must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

Forsyth, J. also referred to the "bona fide lack of

oppression test" considered in the widely cited case of Alabama, New Orleans, Texas & Pac. Junction Ry. Co., [1891] 1 Ch. 2123 (C.A.). Lindley, L.J. stated at pl. 239:

> "The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent. . . ."

Forsyth, J. considered an article by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganizing of Major Financial and Commercial Debtors," Canadian Bar Association--Ontario Continuing Legal Education, 5th April 1983, at pl. 15 and summarized it as follows:

> "These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the 'identity of interest' proposition as a starting point in the classification of creditors necessarily results in a 'multiplicity of discrete classes' which would make any reorganization difficult, if not impossible, to achieve.
>
> In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the Hongkong Bank and the Bank of America, that since they hold

> separate security over different assets, they must therefore be classified as a separate class of creditors."

There is undoubtedly merit in the arguments of the appellants in the present case. Better classifications could no doubt be arranged with the benefit of hindsight. It might have been beneficial if secured creditors of core properties were in a separate class from secured creditors of non-core properties and holders of mechanics' liens. However the Act does not require more than a single class of secured creditors, and I am satisfied the present classification of creditors does not give rise to any substantial injustice. Classification was by a court order following a hearing at which the creditors were entitled to be heard. That order was made earlier than and distinct from the order sanctioning the plan. The classification order was never appealed, and the 21-day appeal period expired before the class meetings. The creditors and the debtor company were entitled to rely upon it as a foundation for the plan. It is not specifically included in the present appeal because it was not subject to collateral attack in the proceedings before Nathanson, J. who was bound by it. The proper procedure for attacking the classification order was by way of appeal from that order, not the sanctioning order.

Nevertheless, because of the overall supervisory duty of the court to ensure fairness of the plan, it is my view that we could intervene with respect to the classification order if necessary to avert substantial injustice. I am not satisfied the present circumstances warrant this court's intervention. I would reject the grounds of appeal based on classification.

The ground of appeal first stated by the appellants is their assertion that a late-arriving proxy vote should not have been counted in the voting for the plan for the class of capital lease creditors. Without that vote that plan would have been defeated. The assumpton of the appellants appears to be that rejection of a class plan would defeat the entire plan, or at least render it unfeasible, but that is contrary to the intention of the Act and to s. 7.03 of the plan as sanctioned. They assert a right to appeal from the result of voting for a plan approved by another class of creditors because approval of that plan was essential to the overall plan which is binding on them. Without endorsing that reasoning, the duty of this court, once again, is to consider whether the trial judge erred in assessing the fairness of the plan. This includes jurisdiction over the votes of all classes of creditors; if the impugned vote is a nullity it must be rejected.

Meetings of the six classes of creditors took place November 1 and 2, 1991. The meeting of the capital leasing creditors was held the first day. The original draft of the entire plan, including the plan for that class, and written statements of amendments were before the creditors. Disclosures of results of the most recent negotiations were made orally at the meeting, having the effect of amending the plan to include them.

Marcus Wide of Coopers & Lybrand, the court appointed monitor, acted as chairman of all the meetings. He called for a motion of "closure" of the meeting following the vote. That is, he sought a motion prior to the vote to take effect after the vote. The minutes disclose that such a motion was made and seconded but do not show that it was voted on. After this motion the creditors and their proxies cast their votes and dispersed. There was no motion for adjournment. The ballot box was sealed. The votes were not to be counted until after the last class meeting the next day. The Bruncor proxy in favour of Martin MacKinnon, Keddy's representative, was received by Mr. Wide at 5:08 p.m. on November 1. Mr. Justice Nathanson said that Mr. Wide

> " . . . declined to include and count the vote in the final tabulation of votes. However, reluctant to deny a legitimate creditor an opportunity to express its view concerning the plan, he brought the matter to the attention of the court in the monitor's final report".

The Monitor's report on the result of the vote by the capital lease creditors, and the controversial proxy, is as follows:

> 2. Capital Lease Creditors--failed to approve the plan

	For	Against
Value of creditors voting	$679,148	$261,509
Percentage	72	28
Number of creditors voting	8	1
Percentage	89	11

> The Monitor wishes to advise the Court that a proxy, instructing Mr. Martin MacKinnon to vote in favour of the plan, was received from Bruncor Leasing Inc., a capital lease creditor in the amount of $212,959, on the afternoon of November 1, 1991, subsequent to the meeting for that class, but not before the final meeting of creditors and while the ballots were still in sealed boxes. The instruction regarding proxies circulated with the notice of Meeting provides as follows:
>
> > A proxy may be deposited with, faxed or mailed to and received by the monitor at any time up to the respective creditor meeting, or any adjournment thereof, or may be deposited with the chairman of the meeting immediately prior

> to the creditors meeting, or any adjournment thereof.
>
> This vote has therefore not been tabulated,.
>
> Had the vote been tabulated the Capital Lease Class of Creditors would have approved the plan with 77.3 of the value of the votes cast in that class and 90 per cent of the number.

Mr. Justice Nathanson cited In re Alabama, New Orleans, Texas and Pacific Junction Railway Company, [1891] 1 Ch. 213 at p. 245 as authority for the statement that the vote required for approval of a plan is "a condition precedent to the jurisdiction of the court." He stated that "if the vote is not in accord with the statutory requirement, the court cannot exercise its jurisdiction under the statute to sanction the plan. Strict compliance with the statutory requirement is mandatory."

The Act provides statutory requirements as to the majorities necessary to approve a plan by a class of creditors, but no guidance as to the manner of voting. The words "present and voting either in person or by proxy at the meeting or meetings" of the creditors or a class of creditors have been referred to by counsel as a voting directive. In context,

however, they merely define the creditors to be considered in determining whether the requisite majorities for approval of the plan have been met.

The somewhat unusual procedure of "closing" the meeting by motion prior to the vote presumably fixed the plan in the form it had attained up to the moment of closure and cut off further discussion while the creditors turned their attentions to the actual process of voting. Voting is as much a function of the meeting as discussion of the plan; while the voting was in progress the meeting necessarily continued in existence. Counting the ballots is as much a function of the vote as casting them. Apart from the security measure of sealing the ballot box, no step was taken, no motion moved nor voted on, to end the meeting or to close the voting, between the casting of the votes and the counting of them.

The meeting must still have been an existing, though fictitious, entity at the time the votes were counted; the count necessarily occurred within the context of the meeting. The continuation of the meeting and the acceptance of the late proxy vote finds support in the case law. See Shaw v. Tati Concessions Limited, [1913] 1 Ch. 292, Washington State Labour

Council v. Federate American Insurance Company, Wash. 474 P. 2d 98 (S.C. En Banc).

Counsel for the appellants complain that the proxy was obviously solicited from Bruncor by representatives of Keddy's. However they specifically acknowledged that they do not allege it was induced by improper side deals or secret benefits.

While it was obviously intended that proxies should be produced prior to the meetings, there appears to be nothing in the Act, nor in the orders, nor in the voting instructions of the monitor, to preclude the tabulation of a proxy vote submitted prior to the counting of ballots. The common law applies. That is stated in Company Meetings by J.M. Wainberg, Q.C. 2nd ed., 1969 at p. 72 in his discussion of Rules of Order:

> When a poll is demanded, it shall be taken forthwith. If the poll is on the election of a chairman or on a motion to adjourn, the votes shall be counted forthwith, and the result declared before any further business is conducted. On any other question the count may be made at such time as the chairman directs, and other business may be proceeded with pending the results of the poll. Up to the time the poll is declared closed and the chairman (or the scrutineers) begin examining ballots, any qualified voter may vote.

The vote was carefully conducted, with due attention to fairness and security. I am not satisfied that prejudice was suffered by creditors of any other class as a result of the counting of the vote of a creditor qualified to vote in every respect save for tardiness. It is important that creditors not be disenfranchised for technical reasons; approval of a plan is an expression of the collective will of the creditors, and it is important that be as broadly based as possible. It must be borne in mind that this was a vote by creditors under the Companies' Creditors Arrangement Act, not a meeting of municipal councillors or a company board of directors. Clear evidence of illegality within the spirit and purpose of the Act, not mere irregularity, is necessary to invalidate the ballot. If the ballot was not invalid, it must be counted.

As McEachern, C.J.B.C. said in Northland,

> "As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority."

Nevertheless, late proxies are not desirable. They create uncertainty, and there exists a perceived possibility for abuse. The reason for holding the counting of the votes until all creditors had voted was to ensure that classes with the

latest meetings would not have the negotiating advantage of knowing how other classes had voted. Chairmen of creditors' meetings would be well advised to have the ballots counted promptly after they are cast and then to have the meeting properly adjourned. There would be no need to announce the results until after the last meeting.

I am not satisfied the appellants have demonstrated that Mr. Justice Nathanson erred at law in approving the Bruncor ballot. I would dismiss this ground of appeal.

The remaining grounds of appeal include the allegation that the plan for secured creditors was actually a number of plans tailored to individual creditors. This ground is closely related to the classification issue. The commonality of interests test is no longer strictly applied because of its unwieldiness. It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment--as opposed to equitable treatment--is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is proper disclosure. They must, however, be determined to be fair and reasonable

within the context of the plan as a whole.

The other grounds to be considered within the general heading of unfairness include allegations that votes of secured creditors obtained by inducements should have been excluded, that the plan was not fair and reasonable among secured creditors and that the process employed by the respondent was inherently unfair.

The instances complained of are set forth in Mr. Justice Nathanson's decision and need not be repeated here. In dealing with them generally, he remarked that what the appellants overlooked was "that their objections must be examined in the light of what is in the best interests of the class of secured creditors to which they belong and of the creditors as a whole."

He summarized his conclusions about the complaints as follows:

> " . . . some of the complaints are relatively inconsequential, others have another context which is not stated. What appears on the surface to be the whole truth is, in reality, of less moment . . . "

He stated that he applied the following principles, which he derived from the case law:

> 1. Negotiations between the debtor company and creditors are salutary and ought to be encouraged.
>
> 2. Secret or side deals or arrangements are improper. Their impropriety can be ameliorated by making full disclosure in a timely manner.
>
> 3. There is no authoritative definition of what constitutes full disclosure or timely manner; therefore, these may be questions of fact to be determined in each individual case.
>
> 4. Members of a class of creditors must be treated fairly and equitably. Where different members are treated differently, all members of the class must have knowledge of the plan overall and for the particular class.

Mr. Justice Nathanson made the following findings:

> "I find that the debtor company made full disclosure in a timely manner by setting out the essential characteristics of the proposed plan, that is, all material information needed by a creditor in order to make a fair and informed judgment, in the draft plan as filed, in the two addenda circulated to the members of the class, and in the oral communications made during the meeting which could not have been made in writing at an earlier time because of the continuance of negotiations with various creditors. I also find that the members of the secured creditors class had full knowledge of the plan in its application to all members of that class and generally in its application to all creditors of all classes.
>
> I find that the members of the secured

> creditors class are treated fairly and equitably in the plan as amended. Some sacrifices will be made, but the evidence discloses that at least some of those sacrifices are of windfalls which might accrue if the plan is not approved and the sacrificing creditors are able to realize on the security which they hold.
>
> I hold that the proposed plan is fair and reasonable. It is a bona fide and creditable attempt to achieve a result which is generally fair to the creditors. . . ."

The burden on the appellants to show otherwise is a very heavy one. In considering fairness Mr. Justice Nathanson was in the last analysis exercising his discretion in addition to identifying and applying rules of law and making findings of fact. This court has ruled repeatedly, on sound authority, that it should only interfere with discretionary findings by a trial judge if serious or substantial injustice, material injury or very great prejudice would otherwise result. See, for example, McCarthy v. Acadia University (1977), 18 N.S.R. (2d) 364; Exco Corporation v. Nova Scotia Savings and Loan et al. 59 N.S.R. (2d) 331; Coughlan et al. v. Westminer Canada Holdings Ltd. et al. (1989), 91 N.S.R. (2d) 214; Minkoff v. Poole and Lambert (1991), 101 N.S.R. (2d) 143; and the authorities cited therein.

When the judicial discretion is exercised in favour of sanctioning a plan proposed by a debtor company but in a very real way created by a resounding majority vote of its creditors, the burden on the appellants becomes even heavier.

Nevertheless, there remain some matters of serious concern which the appellants have raised, including the fact that the respondent Central Trust Guaranty did not support the plan until arrangements had been made for paying its legal costs and for monthly instalments of municipal taxes. If these could be characterized as inducements to procure its vote, unfairness would be apparent.

A creditor which withholds its support from a plan because it has failed to address legitimate concerns arising from its contractual relationship with the debtor company is perfectly within its right to insist on improvements. The Act encourages just this kind of negotiation. It is not material whether agreement occurs soon after the first draft of the plan is circulated, so the resulting amendments can also be circulated to

creditors, or whether a last-minute compromise is reached moments before the vote. The disclosure to be made in the latter instance will be necessarily sketchier than the one made in the former.

On the other hand a creditor whose legitimate concerns have been met on a basis similar to that of other creditors in its class, but which continues to insist on a benefit to which it is not entitled as the price of its vote, is attempting to commit the debtor to an unfair practice which could invalidate the whole plan. The distinction between the two situations must be drawn by the trial judge, and there will be occasions when it is a very difficult and murky one.

The benefit derived by the Relax Company in the Northlands case is an example of the first instance. So are the benefits negotiated by the Central Guaranty Trust in the present case. It seems clear that when other complaints of instances of unfairness were found by Mr. Justice Nathanson to involve matters of substance, he was able to consign them to the first category. I am not satisfied that he was wrong in doing so.

The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority. Lack of disclosure, however, can transform an intrinsically fair alteration in the terms of a plan into an unfair secret deal which invalidates a plan. As a general rule the plan must include all of the arrangements made between the debtor company and the creditors; in principle, undisclosed

arrangements cannot be part of the plan because they are not what the creditors voted for. Nathanson, J. found there is no authoritative definition of full or timely disclosure--these were questions of fact. Consequences of inadvertent and innocent non disclosure and imperfect or inadequate disclosure must be assessed. This involves a fine sifting of all factors to tax the skill of a trial judge; I am not satisfied Nathanson, J. committed reversible error in his analysis nor in his conclusion that all material information had been disclosed.

Another concern of the appellants, and of this court, is that regardless of any benefits they did not receive but which were negotiated by other secured creditors in their own interests, they are left worse off under the plan than they were under the provisions of their own security contracts. The appellants had taken pains to protect their own interests when they made the loans, and they would be repaid if they were left the freedom to realize on their security.

In his decision on a classification order in Re NsC Diesel Power Inc. (1990), 97 N.S.R. (2d) 295 Mr.

Justice Davison cites with approval an article by Stanley E. Edwards in the Canadian Bar Review (1947) Vol. 25 at p. 587. He quotes Mr. Edwards at p. 595 as follows:

> "There can hardly be a dispute as to the right of each of the parties to receive under the proposal at least as much as he would have received if there had been no reorganization. Since the company is insolvent this is the amount he would have received upon liquidation.

At p. 594 Mr. Edwards said

> "A further element of feasibility is that the plan should embrace all parties if possible, but particularly secured creditors, so that they will not be left in a position to foreclose and dismember the assets after the arrangement is sanctioned as they did in one case."

The one major disadvantage the appellants suffer is the loss of the present right to realize on their security. They may well consider that that right has been confiscated from them. It is essential to the purpose of the Act to bring about such a result, but it must be done fairly.

With an exception involving a government agency which had not been receiving a commercial rate of interest, all the secured creditors have their interest rates reduced to the current market level of eleven per cent, amortization periods

increased, and in one case, principal and interest blended. However the appellants' security is unimpaired, and apart from the reduced interest, they stand to recover as much as they would have if the reorganization had not taken place. Their worst disadvantage is that they are delayed in recovering under their security, which appears to be a necessity if the plan is to succeed. There is nothing to suggest that Keddy's, or the other creditors, sought to take advantage of them. Rather, they were asked to accept what appears to be the minimum disadvantage consistent with a plan which might permit the company's survival. And, had they chosen to negotiate, they might have improved the terms.

In the long term creditors in the position of the appellants should be required to suffer no loss, and when such appears likely courts must be vigilant to protect them in keeping with the spirit of the Act.

At first blush the reduction of their interest rates from approximately 13 per cent to 11 per cent appears to represent a greater loss than can fairly be imposed upon them. However what they are entitled to is not what they would recover if the contract were to be continue to its fulfillment as

originally contemplated. What they are entitled to, as Mr. Edwards points out, is what they would recover from an insolvent company upon liquidation.

That is, they would be entitled to recover the outstanding balance they are owed plus interest to date. The reduced interest rate relates to future interest. On liquidation they may be presumed to reinvest their recovered capital at present market rates. The eleven per cent rate fairly represents the present market rate they would likely obtain on reinvestment of the funds. The other disadvantages of which they complain are merely delays in recovery for which they will be compensated by interest. They have suffered inconvenience but no injustice. They have not been treated unfairly within the spirit of the Act.

The plan originally proposed by Keddy's was unacceptable to many of the creditors, although it would appear to have been offered in good faith. Keddy's had to try to offer an acceptable plan, without any certain knowledge of the matters of chief concern to the individual creditors. If there had been no room for movement the plan would predictably have failed. What appears to be controversial is that a process of

negotiations took place within a compressed time frame between Keddy's and the creditors, in which the concerns of the creditors were considered. It does not appear that advantages negotiated by any creditor were offset by substantial disadvantages to another, nor does it appear that the advantages were so great as to constitute substantial unfairness even viewed in their worst light. In keeping with the purposes of the Act, substance must prevail over merely theoretical or technical considerations. The process took place in the open, and the other creditors were reasonably well advised of all amendments that were agreed to, with the possible exception of some last minute changes of a relatively minor nature that escaped detailed disclosure. There appears to have been no deliberate intention to conceal or mislead.

The appellants were aware of the process but, in the belief that the plan would fail, did not fully participate. They were under no duty to negotiate for better terms. However, their choice not to do so does not entitle them on these facts to destroy a plan so strongly supported by the other creditors. The plan does not treat the creditors equally, but it treats them equitably. In my view both the plan and the process by which it was achieved were not perfect, nor beyond

criticism, but they were roughly fair and within the objectives of the Act, as Nathanson, J. determined.

Considered as a whole, the concerns of the appellants are understandable. But when they are examined within the framework of the purposes and objectives of the Companies' Creditors Arrangement Act they lack sufficient substance to justify interference by this court with the plan sanctioned by Mr. Justice Nathanson.

I would dismiss the appeal. As the issues involved in this appeal were not previously considered by this court, the parties should bear their own costs.

Freeman, J.A.

Concurred in: Clarke, C.J.N.S.

Matthews, J.A.

1991 S.H. No. 77974

057

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

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

- and -

IN THE MATTER OF: The Application of KEDDY MOTOR INNS LIMITED, a body corporate with its registered office in the City of Halifax, County of Halifax, Nova Scotia

HEARD in Chambers at Halifax, Nova Scotia before the Honourable Mr. Justice Nathanson, Trial Division, on November 20, 27 - 29 and December 5, 1991.

DECISION December 5, 1991 (oral)

COUNSEL

J. Stringer, Esq. R.F. Redgrave, Esq. R. Freeman, a/c	- for the applicant, Keddy Motor Inns Limited
J.F. Merrick, Q.C. D.R. Beveridge, Esq.	- for the monitor, Coopers & Lybrand
G.R.P. Moir, Esq.	- for creditor, Central Guaranty Trust Company
T.O. Boyne, Q.C.	- for creditor, Bank of Montreal
D.M. Campbell, Q.C. J.C. McCrea, Esq.	- for creditor, RoyNat Inc.
E.A.N. Blackburn, Q.C. G.A. MacIntosh, Esq.	- for creditor, Eddy Group Limited
P. MacKeigan, Esq. G. Cooper, Esq.	- for creditor, Royal Trust Corporation of Canada
K.A. MacDonald, Esq.	- for creditor, Royal Bank of Canada
T.C. Matthews, Esq.	- for creditor, Confederation Trust Company
C.A. Holm, Q.C.	- for creditor, Canadian Imperial Bank of Commerce