

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC
GLACIER INC., ARCTIC GLACIER INTERNATIONAL, INC. and the ADDITIONAL
APPLICANTS LISTED IN SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

APPLICATION UNDER THE *COMPANIES' CREDITORS' ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36 AS AMENDED

MOTION BRIEF OF MARTIN MCNULTY

**(Motion Requesting that the Court Strike the Claims Officer Order as Applied to
Martin McNulty's Claims)**

DATE OF HEARING: TUESDAY, NOVEMBER 25, 2014 at 10:00 a.m.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

OCT 26 2014

MONK GOODWIN LLP

Barristers and Solicitors
800 – 444 St. Mary Avenue
Winnipeg, Manitoba R3C 3T1

SANDRA A. ZINCHUK

Phone No. 204-956-1060
Fax No. 204-957-0423
Agent for Kotchen & Low LLP

KOTCHEN & LOW LLP

1745 Kalorama Road NW
Suite 101
Washington, D.C. 20009 USA

DANIEL LOW

Phone No. 1-202-841-7164
Fax No. 1-202-280-1128
Email: dlow@kotchen.com
Counsel for Martin McNulty

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC
GLACIER, INC., ARCTIC GLACIER INTERNATIONAL, INC. and the ADDITIONAL
APPLICANTS LISTED IN SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

MOTION BRIEF OF MARTIN MCNULTY

INDEX

	Page
PART I List of Documents to be Relied Upon	3
PART II List of Points to be Argued	5

PART I **LIST OF DOCUMENTS TO BE RELIED UPON**

1. Notice of Motion, filed September 12, 2014
2. Affidavit of Claimant Martin G. McNulty, sworn September 12, 2014
3. Affidavit of Daniel A. Kotchen, sworn September 12, 2014
4. Affidavit of Daniel L. Low, sworn October 24, 2014
5. Claims Procedure Order, September 5, 2012
6. Eighteenth Report of the Monitor, with attachments, October 1, 2014
7. Motion Brief of the Monitor, March 5, 2013

PART II **LIST OF POINTS TO BE ARGUED**

A. Introduction

1. This motion is for an Order:
 - (a) striking the appointment of The Honourable John D. Ground, Q.C ("Hon. Ground") as a Claims Officer for the claim of Claimant Martin G. McNulty ("McNulty");
 - (b) requiring that, pursuant to paragraph 45 of the Claims Procedure Order, the Monitor consult with McNulty and Arctic Glacier in determining an appropriate process for resolving McNulty's claim; and
 - (c) such further and other relief as this Honourable Court may seem just.
2. The key points to be argued on this motion are as follows:
 - (a) the Monitor failed to consult with McNulty regarding his Dispute Notice prior to seeking a claims resolution process, as required by Paragraph 45 of the Claims Procedure Order;
 - (b) Arctic Glacier should be estopped from proceeding under Hon. Ground in light of McNulty's detrimental reliance on assurances from counsel for Arctic Glacier that appointment of an American Claims Officer would be appropriate for McNulty's claims; and

(c) McNulty lacked notice of the Monitor's motion to appoint a Claims Officer.

B. The Monitor Failed to Abide by the Procedural Protections Required by Paragraph 45 of the Claims Procedure Order

3. The Monitor did not comply with Paragraph 45 of the Claims Procedure Order. Paragraph 45 requires that “*in consultation with the . . . applicable Claimant*, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute”:

THIS COURT ORDERS that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor *in consultation with the Arctic Glacier Parties and the applicable Claimant, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute.* (emphasis added)

***Appendix E to Monitor's Eighteenth Report
Claims Procedure Order September 5, 2012***

4. As required by Paragraph 45, the Monitor consulted with the Arctic Glacier Parties about the appropriate process for resolving the dispute before seeking entry of the Claims Officer Order. At paragraph 6 of the Monitor's Motion Brief of March 5, 2013, it states that “The Monitor, *in consultation with the Applicants*, proposes to appoint two Claims Officers” (emphasis added).

Motion Brief of the Monitor March 5, 2013

5. However, the Monitor did not consult McNulty about the dispute resolution process. Further, the Monitor did not inform or serve notice on McNulty that the Monitor was seeking appointment of Claims Officers.

***Affidavit of Claimant Martin G. McNulty, paragraph 2 and
Affidavit of Daniel A. Kotchen, paragraph 2***

6. Had McNulty been permitted input into the appropriate dispute resolution process for his claim, as the Claims Procedure Order contemplates, he would have had the opportunity to object to the appointment of Hon. Ground and to suggest an alternative dispute resolution process. The appointment of Hon. Ground was inconsistent with the Claims Procedure Order and denied McNulty the procedural protections afforded by the Claims Procedure Order. It is respectfully submitted that the appointment should be vacated.

7. The Monitor submits an alternative interpretation of the Claims Procedure Order. However, the Monitor's interpretation is flawed, and in any event, it has failed to comply with its own interpretation of the Claims Procedure Order.

8. According to the Monitor, it was only required to consult with McNulty with respect to whether his claim was "settled within a time or in a manner satisfactory to the Monitor." Yet, the determination of whether the timing and manner of the resolution of the dispute is satisfactory explicitly resides with the Monitor. A requirement that the Monitor "consult with" the Claimant about whether a settlement is satisfactory "to the Monitor" is nonsensical as a Claimant's input into whether the Monitor is satisfied would

be meaningless. To the extent that there is an ambiguity in the meaning of Paragraph 45, such an ambiguity should be construed against the Monitor as the drafter of same.

9. Even if the Court were to construe Paragraph 45 in the Monitor's favour and the Monitor was only required to consult the Claimant about settlement being satisfactory to the Monitor, the Monitor still did not comply with the requirements of Paragraph 45 for consultation.

10. In concert with only Arctic Glacier, the Monitor sought – unbeknownst to Creditor McNulty – appointment of Claims Officers during the very time when the Monitor was representing to McNulty that it was evaluating the merits of the claim and more than six months before the Monitor issued a Notice of Disallowance of the claim.

11. The sequence of events is as follows:

(a) McNulty filed his Proof of Claim on October 12, 2012;

Appendix F to Eighteenth Report of the Report

(b) on March 5, 2013, without consulting or notifying McNulty, the Monitor sought the appointment of Claims Officers pursuant to Paragraph 45 of the Claims Procedure Order. This Court signed the Claims Officer Order on March 8, 2013;

Appendix I to Eighteenth Report of the Monitor

- (c) in late April 2013, Arctic Glacier and the Monitor filed a motion to modify the Protective Orders in the underlying litigation between McNulty and Arctic Glacier pending in the Eastern District of Michigan;

Appendix G to Eighteenth Report of the Monitor

- (d) the Monitor informed McNulty's counsel that before taking a position on McNulty's Proof of Claim, the Monitor wished to review the relevant sealed materials, which included tape recordings made by McNulty during the course of assisting the Federal Bureau of Investigation ("FBI") in its investigation into the criminal price-fixing conspiracy to which Arctic Glacier later plead guilty. Modification of the Protective Order was granted June 4, 2013;

Appendix J to Eighteenth Report of the Monitor

- (e) on September 12, 2013, after reviewing the sealed materials, the Monitor issued a Notice of Disallowance of McNulty's claim;

Eighteenth Report of the Monitor, paragraph 4.23

- (f) on September 19, 2013, more than six months after the Claims Officer Order was entered, McNulty filed a Notice of Dispute;

Eighteenth Report of the Monitor, paragraph 4.24

- (g) on November 12, 2013, the Monitor spoke with McNulty's counsel and Arctic Glacier's counsel. The Monitor asked for additional details regarding the basis of McNulty's claim. The Monitor did not state during that call, nor any prior phone call, that McNulty's claim had not been settled within a time satisfactory to the Monitor, and McNulty's counsel agreed to provide additional details;

Eighteenth Report of the Monitor, paragraph 4.26

- (h) McNulty provided the additional details in a December 9, 2013 revised Notice of Dispute;

Eighteenth Report of the Monitor, paragraph 4.34

- (i) the Monitor attempted to refer McNulty's claim to Hon. Ground on November 22, 2013;

***Eighteenth Report of the Monitor, paragraph 4.28 and
Appendix K***

- (j) McNulty promptly objected in a letter dated December 3, 2013, citing, *inter alia*, the Monitor's failure to comply with Paragraph 45 of the Claims Procedure Order.

Appendix L Eighteenth Report of the Monitor

12. Paragraph 45 of the Claims Procedure Order requires that, before the Monitor can seek direction from the Court for a given claim, the Monitor must consult with the

Claimant about the “dispute raised in a Dispute Notice.” Paragraph 45 does not permit the selection of a dispute resolution process for claims that have been filed but not yet allowed or disallowed, and not yet disputed. Requiring consultation about the dispute resolution process or about settlement *after* a Dispute Notice is filed offers greater procedural protections than allowing consultation prior to a Dispute Notice.

13. It is respectfully submitted that no meaningful settlement discussions can occur until there is a Dispute Notice as it is premature for the parties to take a position on the proper claims resolution process before the dispute is ripe. Further, each Claimant would have a limited interest in contesting the dispute resolution process where he does not yet know whether his claim will be disputed.

14. The Monitor never consulted with McNulty about whether his claim had been settled “within a time period or in a manner satisfactory to the Monitor” before the Claims Officer Order was entered. Rather, settlement discussions had not yet begun, as the Monitor ostensibly continued to evaluate McNulty’s claim and had not yet disallowed the claim.

15. Paragraph 45 was intended to provide procedural protections to Claimants by ensuring that a dispute resolution process was not selected before a Dispute Notice was filed, that a meaningful attempt would be made to settle the claim, and that a Claimant would be notified of the request for the entry of a claims resolution procedure.

16. Had the Monitor sought the entry of the Claims Officer Order after consulting McNulty after he filed his Dispute Notice, McNulty would have filed objections with the Court to the appointment of Hon. Ground to resolve his claims (as he is now doing), and would have proposed an alternative dispute resolution process involving an American claims adjudicator, as the claims involve U.S. law, and most of the documents and witnesses are located in the U.S. Such consultation could have led to an agreement between the parties on an American claims adjudicator, which is exactly the process to which the Monitor agreed with the Indirect Purchaser Claimants.

17. Because the Monitor did not comply with the requirements of Paragraph 45, and McNulty has been denied the procedural protections of Paragraph 45, the entry of the March 8, 2013 Claims Officer Order should be vacated with respect to McNulty's claim.

C. McNulty's Detrimental Reliance on Representations by Arctic Glacier's Counsel

18. During discussions with counsel for Arctic Glacier in 2012 or early 2013, McNulty's counsel, Daniel Kotchen and Daniel Low, conferred by phone with counsel for Arctic Glacier, Paula Render.

Affidavit of Daniel A. Kotchen, paragraph 1

19. Ms. Render advised that Arctic Glacier would be amenable to the appointment of a claims adjudicator located in the United States for the resolution of Claimant McNulty's claim, that an American claims adjudicator had been appointed to resolve

another claim in this proceeding, and that it would make sense to appoint an American claims adjudicator to resolve McNulty's claim given that he and many of the likely witnesses resided in the United States, and litigation counsel for both parties resided in the United States.

Affidavit of Daniel A. Kotchen, paragraph 2

20. Based on these assurances, McNulty did not proactively seek the appointment of an American Claims Adjudicator after he filed a Dispute Notice.

***Affidavit of Daniel A. Kotchen, paragraph 7 and
Affidavit of Claimant Martin G. McNulty, paragraph 7***

21. McNulty's reliance on the assurances offered by Arctic Glacier makes the referral of his claim to a Canadian Claims Adjudicator unfair, and it is respectfully submitted that such appointment should be vacated.

22. The evidence of Paula Render is at odds with evidence of Daniel A. Kotchen. However, it submitted that Ms. Render's recollection of one of the most recent events is demonstrably inaccurate.

23. Ms. Render states that she sent an e-mail to Mr. Kotchen and Mr. Low on December 3, 2013 disputing their recollection of events, and asking them to correct the record. Ms. Render further states that she "did [not] receive a response from McNulty's counsel to my December 3, 2013, email."

Affidavit of Paula Render sworn October 1, 2014, paragraphs 7 and 8

24. However, McNulty's counsel did, in fact, respond. In a December 4, 2013 e-mail, Mr. Low responded to Ms. Render that, "[b]ased on Dan [Kotchen]'s and my recollection of our conversation, my letter was accurate and the record does not need to be corrected."

Affidavit of Daniel L. Low sworn October 24, 2014, paragraph 5

25. In the circumstances, it is respectfully submitted that the recollection of Mr. Kotchen be preferred to that of Ms. Render.

D. McNulty Was Not Served with Notice of the Motion for Appointment of a Claims Officer and Lacked Actual Notice

26. McNulty filed a Proof of Claim for \$13.61 million on October 12, 2012. But in light of Paragraph 45 of the Claims Procedure Order, which required that the Monitor consult with McNulty about the dispute in his Dispute Notice before seeking guidance from the Court regarding a dispute resolution process, McNulty had no reason to believe that filings made by the Monitor in 2013 would be material to the resolution of McNulty's claim, especially filings made before McNulty's September 19, 2013 Dispute Notice. McNulty and his counsel therefore had no reason to closely monitor the filings posted on the web site associated with this matter.

27. Despite McNulty's timely claim and the Monitor's duty to consult McNulty about the claims procedure for his claim, neither McNulty nor his counsel were served with the

notice of the motion to enter the Claims Officer Order, and lacked actual knowledge of the motion.

Affidavit of Claimant Martin G. McNulty, paragraph 2
Affidavit of Daniel A. Low, paragraph 3

28. In light of the lack of notice, it is respectfully submitted that the Claims Officer Order should be vacated with respect to McNulty's claim.

E. Conclusion

29. It is respectfully submitted that this Honourable Court ought to vacate the Claims Officer Order, consistent with the procedural protections afforded to Creditor McNulty by Paragraph 45 of the Claims Procedure Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF
OCTOBER 2014

Monk Goodwin LLP
Barristers and Solicitors
800-444 St. Mary Avenue
Winnipeg, Manitoba R3C 3T1
Sandra A. Zinchuk
Agent for Kotchen & Low LLP

Kotchen & Low LLP
1745 Kalorama Road NW, Suite 101
Washington, D.C. 20009 USA
Daniel Low
Counsel for Claimant Martin G. McNulty

TO: THE SERVICE LIST