

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 ON SCHEDULE "A"
HERETO (collectively, the "**APPLICANTS**")

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

MOTION BRIEF

DATE OF HEARING: TUESDAY APRIL 3, 2012 AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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U.S. Direct Purchaser Class Action

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

1. Notice of Cross-Motion returnable April 3, 2012
2. Affidavit of J. Kohn sworn April 2, 2012
3. Affidavit of Jerry Henechowicz sworn April 1, 2012
4. Affidavit of K. McMahon sworn February 21, 2012
5. Pre-Filing Report of the Proposed Monitor
6. Initial Order dated February 22, 2012

PART II **STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON**

1. *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended
2. *Muscletech Research & Development Inc.* 2006 CarswellOnt 264 at paragraph 5
3. *Sierra Club vs. Canada (Minister of Finance)*, [2002] SCC 41
4. *Canwest Publishing Inc.* 2010 ONSC 222 at paragraph 29
5. *In the Matter of a Plan of Compromise or Arrangement of AT&T Canada Inc. et al*, Initial Order dated October 15, 2002, paragraphs 25 and 26
6. *Re Pacific National Lease Holding Corp.* 1992 15 C.B.R. (3rd) 265 (B.C.C.A.)
7. *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60 at paragraph 22
8. Standard Form Template CCAA Initial Order
9. E. Patrick Shea, "Dealing with Suppliers in a Reorganization", (2008) 37 C.B.R. (5th) 161
10. *Communications, Energy, Paperworks, Local 721G vs. Printwest Communications Ltd.*
2005 SKQB 331
11. *Canada Deposit Insurance Corp. vs. Commercial Bank* (1992) CarswellAlta 298
12. Janice P. Sarra, "Equitable Subordination in Canadian Insolvency Law - Annual Review of
Insolvency Law", 2008, page 24-25

13. *Re SemCanada Crude Company, et al* 2009 ABQB 90 (CanLII)

14. *Interest Act*, R.S.C. 1985, c. I-15

PART III LIST OF POINTS TO BE ARGUED

A. Onus on this Motion

1. Where an Initial Order is granted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") any person who did not receive notice of the application is at liberty to use the comeback clause to seek a variation of the Initial Order. In that respect, the onus rests with the Applicants under the CCAA, and the Applicants alone, to justify *ab initio* the relief requested and previously granted.

(Muscletech Research & Development Inc. 2006 CarswellOnt 264 at paragraph 5;
Canwest Publishing Inc. 2010 ONSC 222 at paragraph 29)

B. Access to Information

2. A confidentiality order should be granted only where needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk and when the salutary effects of the confidentiality order, including the effect on the rights of civil litigants to a fair trial, outweigh its deleterious effects.

(Sierra Club vs. Canada (Minister of Finance),
[2002] SCC 41)

3. The Direct Purchasers seek access to information sealed by order of the Court, subject to their undertaking to preserve the confidentiality of the information and prevent unauthorized disclosure of sensitive information. Nevertheless, the Monitor and the Applicants have denied the Direct Purchasers' request for access to the sealed information.

4. The Direct Purchasers are a significant unsecured creditor of Arctic Glacier. Based on the financial information provided by the Applicants and the Monitor, it appears that the unsecured creditors are the party “on the cusp”, and that the extent of their recovery will be significantly impacted by the decisions made and costs incurred in the course of this CCAA proceeding. The Direct Purchasers, therefore, have a legitimate interest in reviewing the information requested by MNP Ltd. as detailed in the Information Request attached to the MNP Ltd. report. Access to that information is required in order to protect the interests of the Direct Purchasers in this process.
5. When assessing whether to approve a charge in favour of a debtor in possession lender pursuant to the CCAA, one of the factors the Court ought to consider is the reasonableness of the financing terms and, more particularly, the associated fees .

*(Canwest Publishing Inc. 2010 ONSC 222
(CanLII), at paragraph 45)*

6. Without access to the information requested, the Direct Purchasers are unable to assess the reasonableness of the Debtor In Possession financing, or the reasonableness of the compensation payable under the SISF to the Financial Advisor, and to employees under the KERP agreements. As well, it is important to the Direct purchasers to ensure that all bonuses and incentives payable under the SISF and KERP agreements are properly structured to generate the greatest potential recovery for unsecured creditors.

B. Funding of Direct Purchasers’ Professional Costs

7. Section 11.5(2) of the CCAA was recently amended to provide the Court with express authority to make an order declaring that all or part of the property of a debtor company be subject to a charge to secure the financial and legal experts engaged by any “interested

person” and order that the security or charge rank in priority over the claim of any secured creditor. The factors to be considered by the Court in granting a charge to secure the fees and expenses of professional advisors include:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

(Re Canwest Publishing Inc. 2010 ONSC 222
(CanLII), at paragraph 54)

8. In *AT&T Canada Inc.*, the Honourable Mr. Justice Farley granted an initial order which directed the Applicants to pay the reasonable fees and disbursements of legal counsel and financial advisor to the unsecured noteholders, and granted a first ranking charge against all of the Applicants’ property to secure payment of those professional fees, ranking *pari passu* with the charge securing payment of the legal and financial advisors to the Applicants, the Monitor, and the Board of Directors. Similarly, in the *Air Canada* restructuring under the CCAA, Air Canada agreed to pay the reasonable legal and financial advisor fees and expenses of an *ad hoc* unsecured creditor committee, to enable the unsecured creditors to participate in the discussions and negotiations with respect to the restructuring plan and material transactions proposed during the course of the restructuring.

(In the Matter of a Plan of Compromise or Arrangement of AT&T Canada Inc. et al, Initial Order dated October 15, 2002, paragraphs 25 and 26)

9. It is respectfully submitted that, in the circumstances of this case, where the unsecured creditors are the parties “on the cusp”, it is appropriate for Arctic Glacier to provide funding for the legal and financial experts retained to protect the interests of their unsecured creditors in connection with the CCAA proceeding, and for such funding to be protected by a charge ranking in the same priority as the charge securing payment of the Monitor’s and the Debtors’ professional advisors.

C. Payment of Pre-Filing Unsecured Claims

10. The purpose of the stay of proceedings which may be imposed pursuant to Section 11 of the CCAA is to maintain the status quo and place all creditors in the same class on an equal footing.

(Century Services Inc. v. Canada (Attorney General) (2010) SCC 60 at paragraph 22)

11. This general principle was stated by the British Columbia Court of Appeal as follows:

“It appears to me that an Order which treats creditors alike is in accord with the purpose of the CCAA.”

Re Pacific National Lease Holding Corp. (1992) 15 C.B.R. (3rd) 265 (BCCA), at pp. 271-2

12. The Initial Order in a CCAA proceeding typically restricts or prohibits the payment of any pre-filing claims that are stayed. The relevant paragraph in the model Initial Order approved by the Ontario Superior Court, Commercial List provides that “except as specifically permitted herein, the Applicant is hereby directed, until further order of this

Court (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date”.

13. Permitting a debtor to make payment of certain unsecured claims existing at the filing date, while preventing payments of other unsecured claims results in elevating the priority of certain unsecured creditors and granting them a preference over other unsecured creditors, in contravention of the basic principles underlying insolvency law.

(E. Patrick Shea, “*Dealing with Suppliers in a Reorganization*”, (2008) 37 C.B.R. (5th) 161)

14. In *Nortel*, 2009 CanLII 21600 (ONSC), certain employees of Nortel applied for an order authorizing payment of amounts owing to them by Nortel, notwithstanding the general stay of proceedings and prohibition on payment of pre-filing claims contained in the Initial Order. Morawetz J. expressed the view that in considering the impact of such a motion it was necessary and appropriate to take into account the overall financial position of the Applicants, including whether the Applicants were in a position to honour their obligations to other unsecured creditors. Morawetz, J noted, at paragraph 66:

“The CCAA contemplates that during a reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.”

15. Similarly, in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331, the Court rejected an application for payment of severance pay benefits for reasons stated as follows:

“If the union’s request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not

possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the Application of the union in this respect must be rejected. ”

D. Interest Act

16. Section 8 of the *Interest Act*, R.S.C. 1985, c. I-15 provides:

“No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that have the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.”

17. The Fourth Amended and Restated Loan Agreement among the Applicants and their First Lien Lenders dated February 10, 2010 provides for interest payments following default at the “Default Rate”, which is defined as “the rate of interest that is 2% per annum above the rate of interest otherwise payable on the applicable amount”. The debt owing by the Applicants to the First Lien Lenders is secured by mortgages on real property, among other security. Therefore, the payment of interest at the Default Rate is contrary to the provisions of Section 8 of the Interest Act, and the Court should not permit such payments to be made by the Applicants, and all such payments made following the Initial Order should be repaid.

E. Debt Service on Secured Lien

18. The Direct Purchasers submit that it is premature at this point in the CCAA proceedings of Arctic Glacier to permit the Applicants to make debt service payments to their Secured Lenders. The Direct Purchasers are concerned that the Secured Lenders engaged in inequitable conduct and exercised control over Arctic Glacier and its contractual relationship with the Direct Purchasers, in a manner that caused injury to the Direct

Purchasers and conferred an unfair advantage on the Secured Lenders. The Direct Purchasers are investigating whether they will proceed with an application for equitable subordination of the Lenders' security in connection with these restructuring proceedings.

19. The doctrine of equitable subordination provides the court with the authority to subordinate the claims of secured creditors as a result of inequitable conduct. That doctrine is codified in Section 510(c) of the United States Bankruptcy Code. In *Canada Deposit Insurance Corp. vs. Commercial Bank* (1992) CarswellAlta 298, the Supreme Court of Canada left open the possibility that the doctrine of equitable subordination applied in Canada and since that decision, Canadian courts have generally been open to considering the applicability of the doctrine.

(Janice P. Sarra, "Equitable Subordination in Canadian Insolvency Law - Annual Review of Insolvency Law", 2008, page 24-25)

20. In *Re SemCanada Crude Company, et al* (2009) ABQB 90 (CanLII), the Honourable Madam Justice Romain refused to permit the debtors to make an interim payment on account of amounts owing to their secured lenders during the continuance of the CCAA proceedings. Justice Romain noted that an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons. She also stated that the Court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders of the debtor entity. It is submitted that in the case at bar, as in the case before Justice Romain, an interim distribution to the Secured Lenders may give rise to a possibility that the Direct Purchasers will be prejudiced, and such prejudice outweighs the benefits of any early payment to the Secured Lenders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of April, 2012

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