

CI12-01-76323

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE COMPANIES')	Ms. S. Zinchuk,
CREDITORS ARRANGEMENT ACT, R.S.C.)	and
1985, c. C-36, AS AMENDED)	Mr. D. Low (via
)	teleconference),
AND IN THE MATTER OF A PROPOSED)	for Martin McNulty
PLAN OF COMPROMISE OR ARRANGEMENT)	
)	Mr. B. Taylor,
WITH RESPECT TO ARCTIC GLACIER)	and
INCOME FUND, ARCTIC GLACIER INC.,)	Mr. K. McElcheran,
ARCTIC GLACIER INTERNATIONAL)	(via teleconference,
INC. and the ADDITIONAL)	for the applicants
APPLICANTS LISTED IN SCHEDULE)	
"A" HERETO)	M. Milani, Q.C., (via
)	teleconference) for
(collectively, the "APPLICANTS")	the Trustees of Arctic
)	Glacier Income Fund
APPLICATION UNDER THE COMPANIES')	
CREDITORS ARRANGEMENT ACT, R.S.C.)	Mr. D. Jackson,
1985, c. C-36, AS AMENDED)	and
)	Mr. M. Wasserman,
)	Mr. J. Dacks,
)	Mr. R. Morawetz and
)	Mr. A. Hutchens,
)	(via teleconference),
)	for the monitor
)	
)	Judgment delivered
)	November 26, 2014

SCHEDULE "A"
ADDITIONAL APPLICANTS

Arctic Glacier California Inc.,
Arctic Glacier Grayling Inc.,
Arctic Glacier Lansing Inc.,
Arctic Glacier Michigan Inc.,
Arctic Glacier Minnesota Inc.,
Arctic Glacier Nebraska Inc.,
Arctic Glacier Newburgh Inc.,
Arctic Glacier New York Inc.,
Arctic Glacier Oregon Inc.,
Arctic Glacier Party Time Inc.,
Arctic Glacier Pennsylvania Inc.,
Arctic Glacier Rochester Inc.,
Arctic Glacier Services Inc.,
Arctic Glacier Texas Inc.,
Arctic Glacier Vernon Inc.,
Arctic Glacier Wisconsin Inc.,
Diamond Ice Cube Company Inc.,
Diamond Newport Corporation,
Glacier Ice Company, Inc.,
Ice Perfection Systems Inc.,
ICESurance Inc.,
Jack Frost Ice Service, Inc.,
Knowlton Enterprises, Inc.,
Mountain Water Ice Company,
R&K Trucking, Inc.,
Winkler Lucas Ice and Fuel Company,
Wonderland Ice, Inc.,

1 SPIVAK, J. (Orally)

2 Mr. McNulty has filed a motion for an order
3 striking the appointment of The Honourable John Ground as a
4 claims officer in respect of his claim in these CCAA
5 proceedings and requiring the monitor to consult with him
6 and Arctic Glacier in determining an appropriate process
7 for resolving his claim.

8 Mr. McNulty is a former employee of the
9 applicants who filed a proof of claim in these CCAA
10 proceedings in the amount of \$13.61 million in October
11 2012. His claim relates to outstanding litigation in
12 Michigan for tortious interference with prospective
13 economic advantage against the applicants and others who he
14 alleges were involved in an unlawful conspiracy to boycott
15 his employment in the packaged ice industry. He also
16 advances other claims related to the violation of the RICO
17 Act.

18 Prior to the filing of Mr. McNulty's proof of
19 claim, this court established a claims procedure by order
20 dated September 5th, 2012, which contemplated a further
21 court order to establish a process for resolving disputed
22 claims. Paragraph 45 of the claims procedure order
23 provided that in the event that a dispute raised in a
24 dispute notice is not settled within a time period or in a
25 manner satisfactory to the monitor in consultation with the
26 Arctic Glacier parties and the applicable claimant, the
27 monitor shall seek direction from the court concerning an
28 appropriate process for resolving the dispute.

29 By March 2013, the monitor had already received
30 75 proofs of claim and determined that several of them,
31 including the McNulty claim, would likely not be resolved
32 without an adjudicator. The monitor therefore sought and
33 received from this court a claims officer order on March
34 7th, 2013. That order appointed The Honourable Jack

1 Ground, a former Ontario Superior Court Justice with
2 extensive commercial experience and a Winnipeg legal
3 practitioner, David Hill, as claims officers in these
4 proceedings. Paragraph 11 of the claims officer order
5 further provided that in the event a dispute raised in a
6 notice of dispute is not settled within a time period or in
7 a manner satisfactory to the monitor, in consultation with
8 the Arctic Glacier parties and the applicable creditor, the
9 monitor shall refer the dispute raised in the notice of
10 dispute to either claims officer or the court. The order
11 stated that the monitor is to be given the sole discretion
12 in this regard.

13 On September 12th, 2013, the monitor issued a
14 notice of disallowance with respect to the McNulty claim in
15 accordance with the claims procedure order. Mr. McNulty
16 filed a dispute notice with the monitor shortly thereafter,
17 on September 19th, 2013. On November 22nd, 2013, following
18 discussion with Mr. McNulty's U.S. counsel, the monitor
19 referred the McNulty claim to Claims Officer Ground for
20 adjudication.

21 By letter dated December 3rd, 2013 to Claims
22 Officer Ground, U.S. counsel for Mr. McNulty requested that
23 he not hear the McNulty claim on the basis that it should
24 be resolved by a United States adjudicator familiar with
25 applicable U.S. law and that U.S. counsel for Arctic
26 Glacier had indicated that she was amenable to this
27 position. Mr. McNulty's counsel also raised a concern
28 about the appearance of bias because Claims Officer Ground
29 was previously affiliated with the law firm of monitor's
30 counsel, Osler, Hoskin & Harcourt LLP. As well,
31 Mr. McNulty's counsel submitted that the monitor did not
32 follow the claims procedure order which, in his view,
33 obliged the monitor to consult with him prior to seeking
34 the order in March 2013 establishing the process for

1 resolving disputed claims.

2 As a result of U.S. counsel's letter, Claims
3 Officer Ground advised the parties to seek the court's
4 guidance on whether he can adjudicate the McNulty claim.
5 Hence this motion.

6 Before this court, Mr. McNulty similarly argues
7 that Claims Officer Ground's appointment should be struck
8 because paragraph 45 of the claims procedure order required
9 that he be consulted about the dispute resolution process
10 before the order appointing Officer Ground to hear disputed
11 claims was obtained in March 2013. In seeking this relief,
12 Mr. McNulty also relies on the fact that he did not receive
13 notice of the monitor's motion in March 2013.

14 To begin with, I do not accept that paragraph 45
15 of the claims procedure order imposes an obligation on the
16 monitor to consult with claimants about the appropriate
17 process for resolving disputes. Both the claims procedure
18 order and claims officer order are in accordance with the
19 well-accepted practice in CCAA matters to provide a claims
20 process that is flexible and expeditious. To ensure timely
21 participation and resolution, there are deadlines for
22 filing claims and disputing disallowance of claims.
23 Failing resolution, there is the ability of a claimant to
24 present its claim to a claims officer for adjudication
25 subject to the right of appeal to the court overseeing the
26 CCAA proceeding (see ScoZinc Ltd. (Re), 2009 NSSC 136, 53
27 C.B.R. (5th) 96).

28 To accept Mr. McNulty's interpretation of the
29 claims procedure order would require the monitor to consult
30 with each and every claimant about the appropriate process
31 for resolving a dispute before coming to court and
32 obtaining an order for dispute resolution. Such an
33 interpretation is inconsistent with the expeditious
34 resolution of claims in a CCAA proceeding and is not what

1 was intended. A process that obliges the monitor to
2 consult with multiple claimants about the appropriate
3 process to resolve its particular dispute lengthens the
4 time to resolve complaints.

5 Further, a plain reading of the claims order does
6 not support Mr. McNulty's position. Rather, paragraph 45
7 refers to the monitor consulting with Arctic Glacier and
8 the claimant about whether the dispute is settled within a
9 satisfactory time period and manner. The claims procedure
10 order did not provide a specific method for adjudicating
11 claims that could not be resolved on a consensual basis and
12 contemplated the monitor seeking a further court order for
13 the resolution of disputed claims. The language does not
14 oblige the monitor to consult with the claimant about this
15 process before seeking such a court order. As well,
16 paragraph 11 of the claims officer order makes it clear
17 that it is the monitor who has sole discretion to refer the
18 dispute to a claims officer and it is only with the consent
19 of all parties that a further claims officer may be
20 appointed to deal with a specific claim.

21 The fact that Mr. McNulty's claim was not yet
22 formally disallowed at the time of the granting of the
23 claims procedure order or claims officer order is of no
24 moment. The monitor anticipated filing a notice of
25 disallowance in respect of the McNulty claim. This was
26 recognized in earlier discussions with Mr. McNulty's U.S.
27 counsel. Moreover, it would be unwieldy and inefficient to
28 require that all unresolved disputes needed to be
29 identified and crystallized in regard to each claim before
30 a dispute resolution process could be sought and approved
31 by the court. Again, this is contrary to the flexible and
32 expeditious approach to resolving claims endorsed in the
33 jurisprudence. I might also add that even were I to accept
34 Mr. McNulty's interpretation of paragraph 45 of the claims

1 process order (which I have said I do not), to now require
2 the monitor to consult with him about who should adjudicate
3 his claim when the monitor disagrees with his position
4 makes no sense and would delay and defer what is clearly a
5 dispute right now.

6 As for the claim of lack of notice, I have
7 difficulty with Mr. McNulty's position. Mr. McNulty's U.S.
8 counsel was served with the initial order when served with
9 materials for the initial recognition hearing in the
10 Chapter 15 proceedings, and then again in the Michigan
11 proceedings. That initial order is clear in its
12 requirement that interested persons need to request to be
13 added to the service list to be served in these
14 proceedings. This is in accordance with the standard
15 practice in CCAA proceedings and consistent with the
16 purposes and intent of the CCAA. Neither Mr. McNulty nor
17 his counsel asked to be added to the service list upon
18 being provided with the initial order. Nor was there any
19 request to be added to the service list after Mr. McNulty
20 filed his proof of claim. So I do not accept that the
21 appointment of Claims Officer Ground should be vacated
22 because of a lack of compliance with paragraph 45 of the
23 claims procedure order or for lack of notice of the claims
24 officer motion.

25 Mr. McNulty argues, as well, that Arctic Glacier
26 should be estopped from having his dispute adjudicated by
27 Claims Officer Ground because U.S. counsel for Arctic
28 Glacier represented that an American claims officer would
29 be appropriate and he therefore did not actively seek the
30 appointment of a U.S. adjudicator after he filed his
31 dispute notice.

32 In this regard, there are different versions of
33 the nature and timing of conversations between U.S. counsel
34 and Mr. McNulty's counsel which cannot and need not be

1 resolved on this motion.

2 Regardless of whether Mr. McNulty could have
3 objected to the appointment of Claims Officer Ground if he
4 had been consulted or had been given notice before the
5 claims officer order was granted, he does so now and the
6 substance of his objections can be addressed at this time.

7 While Mr. McNulty raised a concern of
8 apprehension of bias in his U.S. counsel's December 2013
9 letter, at this hearing his counsel quite fairly advised
10 that such an objection was not being pursued. I say this
11 because in my view, having regard to the test for
12 reasonable apprehension of bias as outlined by the Supreme
13 Court of Canada in Wewaykum Indian Band v. Canada, 2003 SCC
14 45, [2003] 2 S.C.R. 259, his position is not sustainable.
15 The mere fact that Claims Officer Ground was affiliated
16 with the monitor counsel's law firm some 23 years ago would
17 not lead a reasonable person to believe that he would
18 either consciously or unconsciously, favour his former
19 firm's client.

20 I turn then to Mr. McNulty's position that his
21 claim should be determined by a U.S. lawyer because it
22 involves claims brought under U.S. law and is the more
23 convenient forum given that U.S. counsel are involved and
24 the most relevant witnesses and evidence are situate in the
25 U.S. The monitor and Arctic Glacier submit that this is
26 not a case that requires a U.S.-trained claims officer.

27 Though this dispute is in the context of a CCAA
28 proceeding and has therefore distinct features which are
29 predominant, the principles that are considered generally
30 to disputes relating to forum non-convenience are of some
31 assistance (see Amchem Products Inc. v. British Columbia
32 (Workers' Compensation Board), [1993] 1 S.C.R. 897).

33 As for the issue of convenience and connection,
34 as I just mentioned, counsel who would be handling this

1 matter are U.S. lawyers, as are many of the witnesses; but
2 they are all not located in any one state in the United
3 States. In any event, the monitor is situate in Toronto,
4 as is Canadian counsel who would also be involved in the
5 litigation. There is also the potential for witnesses from
6 Winnipeg. And of course, this is a CCAA proceeding in the
7 Manitoba courts with cross-border recognition of Manitoba
8 as the main proceeding. The applicant's head office was in
9 Manitoba.

10 Mr. McNulty does not suggest that he would lose
11 any juridical advantage if the matter were heard by Claims
12 Officer Ground and there is no dispute that the law to be
13 applied is U.S. law. However, I am of the view that there
14 is no issue as to Claims Officer Ground's ability to
15 acquire U.S. law with appropriate expert opinion, if
16 necessary, given his experience as a supervising judge of
17 the commercial list and a claims officer in previous CCAA
18 proceedings. Further, the adjudication of Mr. McNulty's
19 claim primarily depends on credibility assessments, factual
20 findings and inferences from facts. This is quite
21 different from the indirect purchasers' class action claim
22 where it was agreed that a U.S. adjudicator was necessary
23 because of the complexity of the matter.

24 Moreover, this dispute arises within the context
25 of a Canadian CCAA proceeding and the interests of all
26 stakeholders have to be considered. This is a CCA
27 proceeding with a streamlined process where claimants
28 cannot, as of right, pick and choose who will adjudicate
29 their claim and where. Such a fragmentation of disputes is
30 inconsistent with the "single control" principle and the
31 need for an expedited valuation of claims to facilitate the
32 CCAA process.

33 As counsel for the monitor stressed, a U.S.
34 adjudicator would be costly and significantly delay the

1 adjudication of Mr. McNulty's claim, which has already
2 taken considerable time to reach the point where it could
3 be referred for adjudication. This additional delay and
4 expense would negatively affect unit holders and the timing
5 of the distribution of the estate.

6 In the end, Mr. McNulty does not raise any issues
7 that cause the court concern about whether his claim can be
8 fairly determined by Claims Officer Ground. The order
9 sought by Mr. McNulty does not advance the policy
10 objectives underlying the CCAA. To allow the claim to be
11 determined in the United States by a U.S. adjudicator is to
12 prolong proceedings and add cost. Both the claims
13 procedure order and claims officer order are consistent
14 with the CCAA objective of providing an efficient mechanism
15 to resolve matters and achieve finality without undue
16 delay.

17 For all these reasons I am dismissing
18 Mr. McNulty's motion. The parties are encouraged to move
19 this matter forward as soon as possible by bringing the
20 matter back before Claims Officer Ground. Thank you.

21
