INSOL International

Cross-border DIP issues in *Re InterTAN Canada Ltd.*

Case Study Series - 6

Acknowledgement

INSOL is pleased to present the 6th case study on *Re InterTAN Canada Ltd*. Logan Willis of Goodmans LLP kindly prepared the case study.

This study highlights interesting cross-border issues that were dealt with in respect of Circuit City Stores Inc. in the USA that had filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code, and InterTAN Canada Ltd., that had filed for protection under the Canadian Companies' Creditors Arrangement Act. InterTan was a wholly owned subsidiary of Circuit City Inc.

In order to avoid imminent liquidation and to carry on the business operations of the company, InterTAN required immediate financing and it was proposed through a debtor in possession credit facility (DIP Facility). A notable feature of this facility was that it was a single financing package for both InterTAn in Canada and Circuit City Stores Inc and other debtors based in the USA. Consequently, there were concerns that the Canadian unsecured creditors may be adversely affected if the facility was approved.

Morawetz, J. approved the facility but emphasised that approval of the far reaching elements of the DIP Facility constitutes “extraordinary relief.”

In this case study the decision of the Canadian Court is examined which highlights numerous pitfalls, solutions and best practices relevant to cross-border DIP financing.

INSOL International thanks Mr. Logan Willis for taking the time to prepare this excellent study which we hope our members will find very interesting.

July 2011

Cross-border DIP issues in *Re InterTAN Canada Ltd.*

INSOL International
6 - 7 Queen Street
London
EC4N 1SP
Tel: +44 (0)20 7248 3333
Fax: +44 (0)20 7248 3384
www.insol.org

Cross-border Dip Issues in *Re InterTAN Canada Ltd.*

Logan Willis*
*Goodmans LLP**

I. Introduction

On the eve of the Christmas shopping season in November 2008, InterTAN Canada Ltd. ("InterTAN") faced a liquidity crisis that threatened to imperil the future of the company. Its U.S. parent, Circuit City Stores, Inc. ("Circuit City") and a number of other U.S. affiliates (collectively the "U.S. Debtors") had filed for protection under Chapter 11 of the United States Code, triggering defaults in the secured credit facility that InterTAN shared with the U.S. debtors (the "Secured Facility"). The Secured Facility was terminated as a result of these defaults and InterTAN was faced with the prospect of not being able to purchase inventory for its most significant sales season. Without financing, InterTAN faced an impending liquidity crisis, the prospect of a liquidation of its assets and the loss of over 3000 jobs.

In an effort to save the business, InterTAN filed for protection under the *Companies' Creditors Arrangement Act* (the "CCAA") on November 10, 2008. Due to its immediate need for financing, a crucial component of the CCAA relief requested by InterTAN was the approval of a debtor-in-possession credit facility (the "DIP Facility"). Like the Secured Facility, the proposed DIP Facility would be part of a single financing package to be provided jointly to InterTAN and the U.S. Debtors.

However, the proposed DIP Facility contained a number of notable features that raised questions for Canadian creditors and ultimately tested the limits of DIP financing in a cross-border context. The InterTAN proceedings provide an excellent overview of numerous pitfalls, solutions and best practices relevant to cross-border DIP financing. The difficult issues raised by the DIP Facility in the early days of the InterTAN case provide guidance as to how Canadian courts will balance a company's dire need for interim financing with the imperative of protecting Canadian stakeholders in a cross-border insolvency.

II. Background

At the time of its filing under the CCAA, InterTAN was a leading retailer of consumer electronics in Canada, with over 3000 employees and more than 750 retail locations operating under *The Source by Circuit City* trade name. InterTAN was the Canadian operating subsidiary of Circuit City, a U.S.-based company that operated a nationwide chain of large electronics stores.

InterTAN, Circuit City and the other U.S. debtors were financed under a single credit facility, the Secured Facility, which was provided by a lending syndicate led by Bank of America. The Secured Facility consisted of a US$1.25 billion loan to the U.S. Debtors and a separate US$50 million loan to InterTAN. InterTAN was a borrower only under the Canadian loan and was not liable for the borrowings of the U.S. debtors under the U.S. loan. The borrowers' obligations were secured by their receivables, inventory, cash and intangibles; however the security did not extend to equipment or real estate.

Although InterTAN had been in compliance with its obligations under the Secured Facility, the Chapter 11 filings by the U.S. Debtors constituted an event of default affecting all of the borrowers and ultimately resulted in the termination of the Secured Facility by Bank of America. InterTAN was required to repay immediately all amounts outstanding under the Canadian portion of the loan, and it was unable to draw any further amounts.

---

* The views expressed in this article are the views of the author and not of INSOL International, London.
* Goodmans LLP acted for Alvarez & Marsal ULC, the court-appointed Monitor in the InterTAN restructuring proceedings.

Without any other financing available, InterTAN filed for protection under the CCAA in the Ontario Superior Court of Justice (the "Ontario Court"). It was clear at the time of the CCAA filing that a going concern restructuring or sale would be far preferable to a liquidation and wind-down of InterTAN, which would detrimentally affect suppliers, landlords, customers, employees and numerous other stakeholders. However, the prospects of a going concern solution depended on InterTAN operating through the crucial holiday sales season. InterTAN needed interim financing immediately.

III. "No Other Alternatives"

The Cross-Guaranteed and Cross-Collateralized DIP Facility

InterTAN sought approval of the DIP Facility as part of the initial CCAA Order. Like the Secured Facility, the proposed DIP Facility would be governed by a single credit agreement and would be comprised of a US$1 billion U.S. component to be used by the U.S. Debtors and a US$50 million Canadian component to be used by InterTAN. However, the DIP Facility also introduced a number of new controversial features. In particular:

- unlike the Secured Facility, under which InterTAN was liable only for its own borrowings, the DIP Facility provided that InterTAN would also be liable for the amounts borrowed under the DIP Facility by the U.S. Debtors;

- unlike the security provided under the Secured Facility, which secured only InterTAN's borrowings, InterTAN would be required under the DIP Facility to pledge its assets and property as security for the U.S. Debtors' borrowings;

- unlike the Secured Facility, which provided the secured lenders with security over InterTAN's receivables, inventory, cash and intangibles, the DIP Facility was a court-ordered super-priority charge in favour of the DIP lenders (the "DIP Charge") that extended over all of the property and assets of InterTAN;

- even if InterTAN did not require all of the Canadian commitment under the DIP Facility, the Canadian commitment would remain fully drawn at all times and the unused amount would be advanced by InterTAN to the U.S. Debtors; and

- the DIP Facility would be a "roll-up" facility, meaning any new advances would be made under the DIP Facility but repayments would count towards the Secured Facility such that the pre-existing secured debt would be effectively rolled-up into the DIP Facility.

These features of the DIP Facility raised serious concerns for unsecured creditors of InterTAN. Without the changes introduced by the DIP Facility, InterTAN's unsecured creditors were in an in-the-money position – the estimated value of InterTAN's combined assets in an orderly liquidation of the business far exceeded InterTAN's borrowings under the Secured Facility – meaning it was likely that unsecured creditors' would receive a meaningful recovery on the estimated $27 - $32 million owed to them. However, the DIP Facility would render InterTAN liable, on a secured super-priority basis, for up to US$1 billion dollars of U.S. borrowings for which it had not previously been liable, and it would extend the lenders' security to include assets that were not previously secured. The DIP Facility therefore threatened to prejudice the Canadian unsecured creditors' in-the-money position.

To provide some measure of protection to the Canadian unsecured creditors, the DIP lenders ultimately agreed to the creation of a Canadian Creditors Charge of $25 million to secure payment of the claims of Canadian unsecured creditors. The DIP Charge would be split into two parts – the Primary DIP Charge would secure the borrowings of InterTAN under the DIP Facility, and the Subordinated DIP Charge would secure InterTAN's liability for any borrowings of the U.S. Debtors under the DIP Facility. The Canadian Creditors Charge would rank below the Primary DIP Charge but ahead of the Subordinated DIP Charge so that Canadian unsecured creditors were guaranteed

some recovery before InterTAN was permitted to apply its resources to the repayment of the U.S. Debtor's obligations. At the time of InterTAN's CCAA filing, both InterTAN and the Monitor recognized that this was an imperfect solution. However, with no other financing alternatives, InterTAN would either have to obtain approval of the DIP Facility on these terms or face certain liquidation.

Despite the issues with the DIP Facility, it was apparent that interim financing was essential to a going-concern restructuring of InterTAN. The DIP lenders were adamant that they were only willing to provide interim financing on the terms and conditions of the DIP Facility and subject to approval of the DIP Facility by both the U.S. court and the Ontario Court. In seeking court approval of the DIP Facility, InterTAN emphasized that the DIP Facility had been exhaustively negotiated and represented the best result that InterTAN could achieve in the circumstances. A going-concern solution would protect jobs and preserve value, and approval of the DIP Facility, despite its imperfections, was essential to a going-concern solution. InterTAN had no other alternative to avoid liquidation.

In considering whether to approve the DIP Facility, Morawetz, J. of the Ontario Court framed the central issue as follows:

> It is clear that the DIP Facility results in a substantial change to the status quo. The use of the assets of InterTAN as a basis for obtaining finance for Circuit City raises a number of questions, especially when the approval of the DIP Facility could very well affect InterTAN's ability to honour its current obligations ..... If there are no credit facilities, there is very little prospect of reorganizing or restructuring InterTAN.
>
> The issue is whether it is appropriate in the circumstances for InterTAN to provide support for its indirect parent, Circuit City.[1]

Morawetz, J. went on to emphasize that approval of the far-reaching elements of the DIP Facility would constitute extraordinary relief. It was therefore incumbent on parties requesting such relief to meet a high evidentiary standard commensurate with the extraordinary nature of the relief being sought.[2] Morawetz, J. ultimately held that the need for immediate approval of the DIP Facility had been substantiated and that the terms of the DIP Facility were warranted in the circumstances:

> In this case, however, I concluded, having considered and balanced the alternatives, that the DIP Facility should be approved. In my view, the potential upside of a going concern operation was preferable to a liquidation, notwithstanding the provisions of the DIP Facility which effectively transfers assets from InterTAN to another member of the enterprise group [i.e., the U.S. Debtors]. It was in my view, appropriate to approve the DIP Facility, taking into account the prospects of a continued going concern operation, the continued employment of over 3000 individuals and the benefits of a continued operation for other third party stakeholders. I also took into account that ... the creation of the [Canadian Creditors Charge] provides in theory, a degree of protection to this group of creditors who could otherwise be detrimentally affected by the DIP Facility.[3]

Critical to this decision was an analysis of the alternatives. In this case, the only alternative to a going concern restructuring was a value-destroying liquidation. The Ontario Court ultimately approved the DIP Facility, despite its far-reaching features, because DIP financing was proven to be essential to the going concern restructuring and the Ontario Court was satisfied that InterTAN truly had no other alternative than to accept the only deal on the table. InterTAN would have the interim financing it needed to carry it through the holiday sales season.

---

1 Reasons of Mr. Justice Morawetz, dated November 26, 2008 at para. 52 (See Appendix B).
2 Reasons of Mr. Justice Morawetz, dated November 26, 2008 at paras. 58-59 (See Appendix B).
3 Reasons of Mr. Justice Morawetz, dated November 26, 2008 at para. 69 (See Appendix B).

The parties to the InterTAN case would later learn that the Ontario Court was less than pleased when key aspects of "the only deal on the table" were changed in the Chapter 11 proceedings without the Ontario Court's approval.

IV. "The Strength Of The Argument Is Also Its Weakness"

The Status Quo Order

The DIP Facility was approved on an interim basis in the Chapter 11 proceedings concurrently with the approval of the DIP Facility in the CCAA proceedings. However, final approval of the DIP Facility in the Chapter 11 proceedings was not scheduled to occur until late December of 2008. In the intervening period, the U.S. Debtors found themselves at odds with an unsecured creditors' committee appointed in the Chapter 11 proceedings (the "UCC") with respect to several features of the DIP Facility, including the expansion of the lenders' security to cover assets that had not been secured under the Secured Facility.

The U.S. Debtors engaged in settlement discussions with the UCC as the date approached for final approval of the DIP Facility in the Chapter 11 proceedings. The parties to the Canadian proceedings had little visibility as to the status and development of these discussions since they were taking place within the framework of the Chapter 11 proceedings. The court-appointed Monitor of InterTAN, Alvarez & Marsal Canada ULC, expressed concern over this lack of visibility – it recognized that any changes to the DIP Facility mandated by the Chapter 11 proceedings could have an indirect impact on InterTAN given the cross-border nature of the DIP Facility.

The Monitor's concerns were ultimately substantiated. On December 21, 2008, the day prior to the motion for final approval of the DIP Facility, the Monitor received a copy of an amendment to the DIP Facility that had been agreed to by the U.S. Debtors and the UCC in settlement of the UCC's objections. The U.S. Debtors advised that they would be seeking final approval of the DIP Facility (as amended, the "Amended DIP Facility") from the U.S. court the following day. On December 23, 2008, the U.S. court granted an order approving the Amended DIP Facility.

In the circumstances, the Monitor had insufficient time and facts to assess the impact of the Amended DIP Facility before the final approval motion in the Chapter 11 proceedings. However, based upon the Monitor's initial review, the Monitor concluded that two key features of the Amended DIP Facility could have an adverse impact on the stakeholders of InterTAN. Specifically:

- to address the UCC's concerns that the DIP Facility expanded the scope of the lenders' security, the Amended DIP Facility provided that certain property of the U.S. Debtors would no longer be secured under the Amended DIP Facility and that the U.S. Debtors' estate would have full access to the proceeds of that property; and

- the Amended DIP Facility provided that the DIP lenders would distribute 50% of any proceeds recovered from the Subordinated DIP Charge in the CCAA proceedings to the U.S. Debtors for the benefit of the U.S. Debtors' unsecured creditors.

The Monitor was of the view that these amendments could have an unfair and inequitable impact on the unsecured creditors of InterTAN. Firstly, the fact that the Amended DIP Facility provided unsecured creditors of the U.S. Debtors with access to the value of certain previously secured property would potentially reduce the recoveries of the DIP lenders in the Chapter 11 proceedings and thus *increase* the likelihood that the DIP lenders would need to have recourse to the Subordinated DIP Charge. This would negatively affect the recoveries to Canadian unsecured creditors if the Canadian Creditors Charge turned out to be insufficient to repay all of their claims.

Secondly, by enabling the DIP lenders to share half of the Subordinated DIP Charge with the unsecured creditors of the U.S. Debtors, the Amended DIP Facility would make property of InterTAN

available to unsecured creditors of the U.S. Debtors without any assurances that the unsecured creditors of InterTAN would be paid in full. Rather than protecting the DIP Lenders' ability to be repaid from InterTAN's assets for U.S. lending, the Subordinated DIP Charge could potentially be used to repay unsecured creditors of the U.S. Debtors *ahead* of unsecured creditors of InterTAN, thereby inverting the structural priority held by the Canadian unsecured creditors.

These concessions by the DIP lenders in the Chapter 11 proceedings contradicted the evidence adduced at the initial CCAA hearing that the DIP Facility, in its original form, was "the only deal on the table". From the Monitor's perspective, it appeared that the security provided by the Subordinated DIP Charge, which had apparently been a non-negotiable condition precedent to the provision of DIP financing, had been bartered away by the U.S. Debtors and the DIP Lenders to unsecured creditors of the U.S. Debtors to settle the UCC's objections to the DIP Facility.

The Monitor raised these concerns before the Ontario Court in an emergency hearing on December 24, 2008. In response, Morawetz, J. granted an Order that, among other things, prohibited any intercompany advances from InterTAN to the U.S. Debtors and any distribution of proceeds from InterTAN's property (the "Status Quo Order") pending a comprehensive hearing to address the impact of the Amended DIP Facility on InterTAN. In effect, the Ontario Court granted a temporary injunction that prevented any of InterTAN's funds from leaving Canada.

The Monitor subsequently brought a motion before the Ontario Court for an Order, *inter alia*, (i) extending the Status Quo Order until the Canadian creditors' recovery was better particularized and there was clarity as to the DIP lenders' need to access the Subordinated DIP Charge to cover any shortfall in their recoveries from the U.S. Debtors; and (ii) reducing the Subordinated DIP Charge by the amount of any recoveries U.S. unsecured creditors received from property of the U.S. Debtors that was originally secured under the DIP Facility but whose value was allocated to the U.S. unsecured creditors under the Amended DIP Facility. The Monitor's position was supported by several unsecured creditors of InterTAN.

Not surprisingly, the Monitor's motion was opposed by the DIP Lenders. The DIP lenders argued that they should be able to use the Subordinated DIP Charge in any manner they choose, whether to recover on their advances or to use as currency for the settlement of the UCC's objections in the Chapter 11 proceedings. They had already relied on unrestricted access to the Subordinated DIP Charge in making advances through the holiday season and now, after the fact, the Monitor was asking that their access to the Subordinated DIP Charge be restricted only to circumstances in which they had exhausted all possible recoveries from the U.S. Debtors. The DIP lenders argued that such a result would set the inauspicious precedent that DIP priority charges would be subject to retroactive adjustment if the DIP lenders' business decisions subsequently displeased the court. InterTAN also objected to the Monitor's requested Order on the basis that compliance with such an Order could put InterTAN in default of its obligations under the Amended DIP Facility.

The Ontario Court ultimately granted the Monitor's motion. The DIP lenders' rights under the initial CCAA Order, including the approval of the DIP Facility and the Subordinated DIP Charge, were a finely balanced "package" that was carefully calibrated to InterTAN's circumstances at the time of the CCAA filing. The DIP lenders could not then unilaterally make changes to the DIP Facility in the United States in a way that was detrimental to InterTAN's creditors. To do so would undermine the basis on which the Ontario Court had originally granted the DIP lenders their package of rights. The Ontario Court stated:

> I have no doubt that the DIP Lenders have relied on the approvals granted in the [initial CCAA Order]. I accept the submissions put forward by counsel to this effect. I also accept the submission that the DIP Lenders should be able to rely on what has been approved by this court. However, the strength of the ... argument is also its weakness. ...

> I do not agree that the DIP Lenders have the unilateral ability to discharge portions of the collateral package to the detriment of Canadian creditors without receiving court authorization to do so. The DIP Lenders' Charge incorporates a charge on the Property of [InterTAN]. In considering whether it is appropriate to approve such a facility, the court takes into account a number of factors which include the benefits that the [debtor company] will receive from the DIP Facility and the collateral that is charged under the DIP Lenders' Charge. In my view, it is not appropriate to provide court approval to the entire package and then tacitly approve the unilateral activities of the DIP Lenders in discharging portions of the collateral to the potential detriment of certain stakeholders in the CCAA proceedings...
>
> The DIP Lenders had an option in this case. They chose to obtain approval of the [Amended DIP Facility] in the Chapter 11 Proceedings and not to obtain such approval in this court. Having elected to proceed in this manner, the DIP lenders now take the position that they are entitled to rely on court approval. I agree, but in the context of these proceedings, court approval has not been obtained to incorporate into the DIP Facility the amendments which are contained in the [Amended DIP Facility] and approved in the Chapter 11 Proceedings. ...
>
> In my view, to the extent that the DIP Lenders made advances and relied upon the Final Second Amendment having effect in these CCAA proceedings, they did so at their peril.[4]

The Ontario Court went on to address InterTAN's submission that compliance with the Status Quo Order would result in an event of default under the Amended DIP Facility:

> If this, indeed, is the outcome of the Monitor's motion, it is one that defies logic. The crisis has been created by an arrangement as between the DIP Lenders and the UCC and agreed to by the U.S. Debtors. On this issue, it would appear that these parties have, for all practical purposes, ignored the CCAA proceedings. Having ignored the CCAA proceedings, the DIP Lenders take the position that steps taken by the Monitor to monitor compliance with existing court orders creates an event of default. This should not and cannot be the effect of this endorsement.[5]

On this basis, Morawetz, J. extended the Status Quo Order pending a final assessment of the DIP lenders' recoveries in the United States. In addition, the Subordinated DIP Charge was reduced by the amount of any recoveries U.S. unsecured creditors received from collateral of the U.S. Debtors that was originally secured under the DIP Facility but whose value was allocated to U.S. unsecured creditors under the Amended DIP Facility.

While the cross-border DIP issues were by no means the only complex and controversial matters in the InterTAN restructuring, they were perhaps the most ground-breaking in terms of the legal principles they established.

V. Developments Since InterTAN

There have been two key developments affecting the law of cross-border interim financing since the InterTAN case.

Firstly, the issue of cross-border guarantees was once again put before Morawetz, J. in the CCAA proceedings of Indalex Limited and certain of its affiliates (collectively, "Indalex Canada"). As part of a motion for approval of DIP financing, Indalex Canada sought approval of a secured guarantee granted by Indalex Canada in favour of the DIP lenders in respect of Indalex Canada's U.S.-based affiliates (collectively, "Indalex U.S."). Building on the principles considered in the InterTAN case,

[4] Reasons of Mr. Justice Morawetz, dated January 23, 2009 at paras. 49-57 (See Appendix C).
[5] Reasons of Mr. Justice Morawetz, dated January 23, 2009 at para. 58 (See Appendix C).

Morawetz, J. set out the following list of factors relevant to a court's consideration of a guarantee of U.S. borrowings by a Canadian debtor company in connection with a cross-border DIP facility:

a) the need for additional financing by the Canadian debtor to support a going-concern restructuring;

b) the benefit to the breathing space afforded by the DIP Financing to permit the Canadian debtors to identify a going concern solution;

c) the availability (or lack thereof) of any financing alternatives;

d) the practicality of establishing a stand-alone solution for the Canadian debtors given the integrated nature of Indalex Canada and Indalex U.S.;

e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;

f) any potential prejudice to unsecured creditors that may arise as a result of approving a super-priority secured financing, including whether unsecured creditors are put in any worse position by the provision of a cross-guarantee of a foreign affiliate than as existed prior to the filing, other than the impact of the super-priority status of new advances to the debtor under the DIP financing;

g) the benefits that may result for the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and

h) a balancing of the prejudice to creditors against any benefits accruing to stakeholders generally.[6]

While the Ontario Court did not expressly apply these factors in the InterTAN case, it is apparent that many of these considerations were relevant in Morawetz, J.'s decision to approve the DIP Facility.

Secondly, the Canadian Parliament has enacted certain amendments to the CCAA that affect the parameters of DIP financing in Canada. Amendments to the CCAA effective September 18, 2009 codified much of the previously existing jurisprudence regarding the granting of interim financing in the CCAA context. Section 11.2 of the CCAA now provides a court with the authority to make an order declaring that all or part of the property of the debtor is subject to a security or charge in favour of a person who agrees to provide financing to the debtor. Thus, the section provides for the court to have broad discretion to make an order that it considers appropriate. However, section 11.2(1) now prohibits the application of a court-ordered DIP lenders' charge to any obligation that existed before the DIP financing order is granted. This would arguably preclude the kind of "roll-up" feature present in InterTAN's DIP Facility.

VI. Impact of the InterTAN Case

The cross-border DIP decisions in the InterTAN case are significant in several ways. The creation of a bifurcated DIP lenders' charge and the interposition of the Canadian Creditor Charge in the InterTAN case demonstrate that Canadian courts will go to great lengths and entertain highly flexible approaches to cross-border DIP financing to achieve the best possible balance of stakeholder interests.

However, it is equally clear that such a fine balance does not come without continued judicial scrutiny. Actions that upset the balance of interests, even if they occur south of the border and affect Canadian stakeholders only indirectly, will not be protected unless they have been disclosed and authorized by the CCAA court. Parties engaged in a cross-border restructuring should be mindful that seemingly

[6] *Indalex Ltd., Re*, (2009) 52 C.B.R. (5th) 61 (Ont. S.C.J.) ("*Re Indalex*").

remote steps taken in the foreign proceedings may very well require the approval of the CCAA court if they could have an impact on the Canadian restructuring.

The InterTAN cross-border DIP cases are also significant in terms of the active role played by the Monitor in voicing the interests of Canadian stakeholders. InterTAN did not have a functioning board of directors by the time of its CCAA filing and was being directed by certain of the U.S. Debtors pursuant to a unanimous shareholders agreement. In these circumstances, the Monitor took an interventionist approach in support of Canadian stakeholders' interests. Despite concerns expressed by other parties about the Monitor's more active role in this regard, the Court was of the view that it was entirely appropriate for the Monitor to bring a motion where it was necessary to voice its concerns to the court.[7]

While the cross-border DIP issues were only one of many interesting issues to emerge from the InterTAN restructuring, they leave behind an important legal legacy that will be considered and cited in many cross-border restructuring cases to come.

[7] Reasons of Mr. Justice Morawetz, dated January 23, 2009 at paras. 8-10 (See Appendix C).

APPENDIX A:
PARTIES AND COUNSEL IN CANADA

FOR:	
InterTAN Canada Ltd.	Osler, Hoskin & Harcourt LLP: Edward Sellers, Geoffrey Taber, Marc Wasserman, Jeremy Dacks, John MacDonald, Jeffrey Murray, Blair Wiley, Gillian Scott, Dale Seymour, Lida Bucyk, Rod Davidge, Janice Bayani, Ilana Cohen, John Cotter, Kelly Moffatt, Dov Begun, Paul Crampton, Paul Winton
Circuit City Stores Inc.	Skadden, Arps, Slate, Meaghan & Flom LLP: Gregg Galardi, Chris Dickerson, David Conway
Alvarez & Marsal Canada ULC (the Monitor)	Douglas McIntosh, Al Hutchens, Melanie Mackenzie, Stephen Moore
Counsel to the Monitor	Goodmans LLP: Jay Carfagnini, Joseph Latham, Fred Myers, Lauren Butti, Logan Willis
Bank of America N.A. (Canadian Branch), DIP Lender, Canadian Agent	Ogilvy Renault LLP: Kevin Morley, Mario Forte, Orestes Pasparakis, Arnold Cohen
Cadillac Fairview Corporation Limited	McCarthy Tetrault LLP: Kevin McElcheran
Foto Source Canada Inc.	Davis LLP: David Foulds, J. David Sydor
Garmin International, Inc., Rogers Communications	Cassels, Brock & Blackwell LLP: Harvey Garman
Monarch Construction Limited et al.	Berkow Cohen LLP: Alexandra Lev Farrell, Antonia Dimilta
OMERS Realty Management Corporation, Ivanhoe Cambridge 1 Inc., Morguard Investments Limited, 20 VIC Management Inc. on behalf of OPB Realty Inc., Retrocom Limited Partnership, 920076 Ontario Limited o/a The Southridge Mall	McLean and Kerr LLP: Lina Gallessiere
Unsecured Creditors' Committee in Chapter 11 Proceedings	Gowling Lafleur Henderson LLP: E. Patrick Shea
VFC Inc.	Miller Thompson LLP: Margaret Sims

APPENDIX B:

NOVEMBER 26, 2008 REASONS, OF MORAWETZ J.

Case Name:
InterTAN Canada Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.c. 1985, c.C-36, As Amended AND IN THE MATTER OF a Plan of Compromise and Arrangement of InterTAN Canada Ltd. and Tourmalet Corporation

(2008) O.J. No. 5692

49 C.B.R. (5th) 248

2008 CarswellOnt 8040

Docket: CV -0800007841-00 CL

Ontario Superior Court of Justice
Commercial List - Toronto, Ontario

G.B. Morawetz J.

Heard: November 26, 2008.
Oral judgment: November 26, 2008.

(70 paras.)

Bankruptcy and insolvency law -- Proposals -- Courtt approval or rejection -- Protection of creditors' interests -- Applicant InterTAN Canada Ltd. granted protection under the Companies' Creditors Arrangement Act -- InterTAN, an indirect wholly-owned subsidiary of Circuit City, operated stores and licensed dealer-operated stores -- The proposed monitor supported InterTAN's efforts to obtain interim refinancing and facilitate a restructuring -- The winding down of InterTAN would eliminate over 3, 000 jobs and would afect third party stakeholders -- The Debtor-in-possession Loan Facilty was preferable to a liquidation notwithstanding the fact it effectively transferred assets from the applicant to another member of the enterprise group -- Companies' Creditors Arrangement Act, s. 11.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters--Compromises and arrangements -- Sanction by courtt -- Applicant InterTAN Canada Ltd. granted protection under the Companies' Creditors Arrangement Act -- InterTAN, an indirect wholly-owned subsidiary of Circuit City, operated stores and licensed dealer-operated stores -- The proposed monitor supported InterTAN's efforts to obtain interim refinancing andfaciltate a restructuring -- The winding down of Inter TAN would eliminate over 3, 000 jobs and would affect third party stakeholders -- The Debtor-in-possession Loan Facility was preferable to a liquidation notwithstanding the fact it effectively transferred assets from the applicant to another member of the enterprise group -- Companies' Creditors Arrangement Act, s. 11.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arangement Act, R.S.C. 1985, c. C-36, s. 11

Counsel:

E. Sellers, J. Dacks, J. MacDonald for Applicants.

M. Forte for Ban of America, N.A.

J. Carfagnini, L.J. Latham for Alvarez and Marsal Canada Inc.

---

1 **G.B. MORA WETZ J**. (orally):-- The applicants, InterTAN Canada Ltd., ("InterTAN"), and Tourmalet Corporation, ("Tourmalet"), brought this application on November 10,2008. At the conclusion of argument, an order was granted providing the applicants with protection under the Companies' Creditors Arrangement Act, ("CCAA"), with reasons to follow. The following are those reasons.

2 InterTAN is incorporated under the laws of the Province of Ontario. It is a leading speciality retailer of consumer electronics in Canada and is the operating Canadian subsidiary of the major United States based electronics retailer, Circuit City Stores, Inc., ("Circuit City").

3 InterTAN is a privately held Ontario corporation and sole direct subsidiary of InterTAN Inc., which is owned by the Delaware corporation Ventoux International Inc., and Tourmalet, a Nova Scotia unlimited liability company. Tourmalet is in turn wholly owned by Ventoux, which is wholly owned by Circuit City. As such, InterTAN is an indirect wholly-owned subsidiary of Circuit City. Tourmalel is an affliliated non-operating, holding company whose sole asset is the preferred stock of InterTAN, Inc. which has sought insolvency protection.

4 InterTAN operates retail stores and licences dealer-operated stores selling brand name and private label consumer electronics throughout Canada under the trade name, "The Source by Circuit City", ("The Source").

5 InterTAN currently has 772 retail stores in Canada and employs approximately 3,130 people.

6 InterTAN's sole credit facility is through an agreement between Circuit City, certain U.S. affiliates, InterTAN and Bank of America N.A. as agent, together with other loan parties, (the "Secured Credit Facility"). InterTAN has historically relied on the Secured Credit Facility to maintain a consistent cash flow for its operations.

7 Circuit City and certain of its affiliates filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia on November 10, 2008.

8 As a result of the Chapter I I proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into a Debtor-in-Possession loan facility, (the "DIP Facility"), that replaced the Secured Credit Facility.

9 Counsel to InterTAN advised that the lenders providing the DIP Facility would only extend credit to

InterTAN if it was a borrower under the DIP Facility and an initial order was obtained from this court, in the CCAA proceedings, providing for a super priority charge on all of the assets and property of InterTAN (subject only to certain court ordered charges) as security for the DIP Facility.

10 Counsel for InterTAN also advised that without the DIP Facility, InterTAN was insolvent as it was not able to:

(a) access operating credit;
(b) operate as a going concern; or
(c) satisfy all of its ongoing obligations to its employees, dealers, landlords, suppliers and other stakeholders.

11 Counsel submitted that the applicants required a stay of proceedings and other relief sought in order to permit InterTAN to continue operating as it pursues restructuring options, which include the potential sale of the business, in order to maximize enterprise value. The applicants took the position that it was necessary and in the best interests of the applicants and their stakeholders, and in light of the Chapter II proceedings, that the applicants be afforded the protection provided by the CCAA as they attempt to restructure their affairs.

12 Counsel also submitted given the current economic situation, it was not practical for InterTAN to find a replacement to the Secured Credit Facility.

13 The applicants proposed Alvarez & Marsal Canada ULC, ("A & M"), as the Monitor in these proceedings and a consent to act was filed by A & M.

14 The application was supported by the affidavit of Mark J. Wong, Vice President, General Counsel and Secretary of InterTAN as well as a report filed by A & M in its capacity as proposed Monitor, (the "Report").

15 The purpose of the Report was to provide the court with information concerning:

(a) background on InterTAN's business;
(b) the financial position of InterTAN;
(c) the current Secured Credit Facility in place for InterTAN;
(d) recent action by InterTAN's trade creditors that have impacted its cash flow;
(e) the proposed restructuring of InterTAN and the proposed restructuring alternatives;
(f) the terms of the proposed DIP Facility;
(g) the implications of the DIP Facility for InterTAN's Canadian creditors; and
(h) A & M's summary comments.

16 A & M was retained by InterTAN on October 31, 2008, as the proposed Monitor. In the ten days prior to the bringing of this application, A & M has been reviewing InterTAN's available financial information in an attempt to gain knowledge of the business and financial affairs of InterTAN and has been preparing for this anticipated CCAA application.

17 A & M commented on the Secured Credit Facility which consists of a U.S. $1.25 billion commitment to Circuit City and certain of its affiliates, (the "U.S. Debtors"), and a U.S. $50 million commitment to InterTAN.

18 InterTAN has not guaranteed and is not liable for the borrowings of the U.S. Debtor under the Secured Credit Facility. Tourmalet is not a party to the Secured Credit Facility but it has guaranteed InterTAN's obligations thereunder. A & M is of the understanding that this guarantee is unsecured.

19 As a result of the commencement of the Chapter II proceedings, the Secured Credit Facility was terminated and the parties to that loan agreement entered into the DIP Facility. A & M is of the understanding that, unlike the Secured Credit Facility, the DIP Facility provides that credit would only be advanced to Circuit City on the condition that InterTAN agreed to become a joint and several borrower for all advances and a guarantor for the entire facility, including existing advances to the U.S. Debtors and to have all of InterTAN's assets pledged as security for those obligations. Further, A & M was of the tins understanding that the lenders providing the DIP Facility would only extend credit' to InterTAN if the Dip Facility was approved by an order of this court with a charge over all of the assets and property of InterTAN.

20 As of September 30, 2008, InterTAN had total assets of approximately $370 million. According to its internal, unaudited financial statements as at September 30, 2008, InterTAN's current assets represented in excess of $218 million of it total assets, including $148 million of inventory, nearly $50 million of current accounts and notes receivable and $5.8 million in cash. Non-current assets were comprised primarily of property, plant and equipment of$45 million, notes receivable of$91 million (representing promissory notes from InterTAN, Inc, and Tourmalet) and goodwill of $8.7 million.

21 As at September 30, 2008, InterTAN's total liabilities were approximately $110 million which consisted of current liabilities of approximately $90 million, miscellaneous long-term liabilities of approximately $20 million and a small inter-company payable of $250,000. Current liabilities as at September 30, 2008 included nearly $50 million of trade accounts payable, accrued expenses of $ 22.2 million, deferred service contract revenue of$9.8 million and short-term bank borrowings of$7.5 million.

22 In preparation for this application, a 17-week Cash Flow Forecast, (the "Cash Flow Forecast"), was prepared by InterTAN, with the assistance of its financial advisor, Fri Consulting. A & M reviewed the Cash Flow Forecast and noted that InterTAN's borrowings under the Secured Credit Facility were projected to be approximately $43.3 million through November 9, 2008. The Cash How Forecast projects that InterTAN will require further incremental funding during the cash flow period of up to $19.8 million, such that cumulative credit requirements to fund its operations are projected to peak at approximately $63 million during the week ending November 30,2008, $43.3 million of borrowings under the Secured Credit Facility plus approximately $19.8 million of incremental borrowings under the DIP Facility.

23 As a result of the seasonal nature of InterTAN's business, cash requirements decrease as a result of Christmas sales such that the expected borrowings under the DIP Facility are projected to be reduced to approximately $1 million by January 4, 2009. From that time forward, the Cash Flow Forecast indicates that borrowings under the DIP Facility will range from approximately $600,000 to $8.6 million through the week ending March 1, 2009.

24 A & M is of the understanding that the portion of the DIP Facility available to InterTAN will remain fully drawn, with the funds not needed to fund InterTAN's operations being advanced by InterTAN to the U.S. Debtors. A & M notes that there is presently no mechanism to ensure repayment of the amounts advanced by InterTAN to the U.S. Debtors and no mechanism to ensure that sufficient funds would be repaid to service InterTAN's liquidity needs.

25 The Secured Credit Facility is in default as a result of the Chapter 11 proceedings. The result of this default is the termination of the Secured Credit Facility, which causes all obligations under the Canadian Facility to become automatically due and payable. As of November 9, 2008, InterTAN had outstanding borrowings under the Secured Credit Facility of approximately $43.3 million.

26 A & M specifally points out that InterTAN's obligations under the credit agreement are limited to the amounts borrowed by InterTAN. As security for the obligations, InterTAN executed both a general security agreement and a deed of hypothec on moveable property in favour of the secured lenders.

27 A & M has received a preliminary opinion from its independent counsel that Bank of America holds valid and perfected security in Ontario over the inventory, receivables and intangible assets of InterTAN described in the security documents.

28 Over the past few months, as a result of public reports concerning potential liquidity concerns at Circuit City, several of InterTAN's significant suppliers have shortened their credit terms, requiring cash in advance or on delivery, which has had the effect of increasing the exposure of the secured lenders and decreasing trade payable. A & M is of the view that it is essential that InterTAN's suppliers continue to supply InterTAN throughout the crucial holiday sales period and while InterTAN has access to sufficient credit to obtain holiday season levels of inventory.

29 In order to ensure the continuity of InterTAN's supply chain from outside North America where the stay of proceedings will not apply, InterTAN is proposing to continue to pay foreign trade creditors and suppliers in the ordinary course both before and after the date of filing.

30 With respect to North American suppliers, InterTAN proposes to freeze all pre-filing trade claims until further order of the court, subject to the Monitor having discretion to authorize critical supplier payments for pre-filing amounts not to exceed $2 million (subject to further order of the court); and (ii) to authorize the payment of any other costs and expenses that are deemed necessary for the preservation of InterTAN's property and business.

31 InterTAN has also advised A & M that it has agreed to enter into a Key Employee Retention Plan, the ("KERP"), with certain of its key management employees. A & M is of the understanding that the maximum amount payable under the KERP will not exceed $838,000.

32 It is clear that the financing of InterTAN's Canadian operations are intertwined with the financing of Circuit City's U.S. operations as the Canadian and U.S. entities are parties to the same credit agreement. The result of the commencement of the Chapter II proceedings is that InterTAN no longer has access to financing under the Secured Credit Facility and would be unable to purchase inventory and discharge its obligations in the ordinary course.

33 A & M has acknowledged that it has not been a party to the negotiations between InterTAN and the secured lenders. A & M is of the understanding that the secured lenders have advised InterTAN that they are only willing to continue to extend credit to InterTAN under the DIP Facility as par of the CCAA filing co-ordinated with the Chapter II proceedings. The total amount of the DIP Facility will be U.S. $1.1 billion including a maximum Canadian commitment of U.S. $50 million for InterTAN, which could, in certain circumstances, escalate to U.S. $60 million.

34 The borrowers, including InterTAN, will be jointly and severally liable for the amounts outstanding under the DIP Facility, meaning that the obligations under the DIP Facility will he cross-guaranteed and cross-collateralized and that InterTAN and Tourmalet will be liable for the amounts drawn under the DIP Facility by the U.S. Debtors and will pledge their assets as security for the U.S. Debtor's obligations.

35 The applicants will grant the DIP lenders security, evidenced by a court ordered charge on the applicants' assets and property, (the "DIP Charge"), such that the security over the applicants' property and assets will rank as follows:

(i) the administrative charge in the amount of $2 million;
(ii) the directors' charge in the amount of$19.3 million;
(iii) the KERP charge in the amount of$838,000.
(iv) the DIP Charge to the maximum amount borrowed by InterTAN under the DIP Facility;
(v) a $25 million charge, (the "Unsecured Creditors Charge"), to secure payment of the claims of Canadian pre-filing unsecured creditors;
(vi) the remainder of the DIP Charge pertaining to the guaranteed liabilities of the applicants to the DIP lenders over and above the amount borrowed by InterTAN under the DIP Facility.

36 InterTAN has advised A & M that the proposed DIP Facility, while. not perfect, represents the only alternative available to the company, emphasizing that the Dip Facility will ensure the continuation of operations and employment for all of the current employees. In addition, because the approval of the DIP Facility is a condition precedent to all lending, the entire enterprise and all business and jobs in the North America operations would be at risk if the DIP Facility was not approved.

37 Pursuant to the proposed initial order, InterTAN is entitled, but not required to pay certain expenses payable on or after the date of the initial order, as well as amounts owing for certain goods and services supplied prior to the date of the initial order. These expenses and obligations include employee claims, amounts due to logistics or supply-chain providers and certain customs brokers, trade vendors and suppliers outside of North America and amounts related to servicing warranties and honouring gift cards and reward and loyalty programmes. As such, a significant portion of Inter TAN's liabilities will not be affected by the CCAA stay of proceedings.

38 It is estimated that liabilities of approximately $26.8 million, made up of $22.5 million of trade accounts payable, net of estimated potential set-offs, and .$4.3 milion of joint venture partner deposits and other smaller accrued liabilities, would he stayed by the initial order. In addition, management estimates that there will be $5 million of outstanding cheques that may also be stayed. Therefore, the estimated total trade creditors that may he stayed by the initial order are in the magnitude of between $26.8 and $31.8 million net of estimated potential set-offs.

39 A & M has also been provided with an extract of a report prepared on behalf of the secured lenders to estimate the net orderly liquidation value of InterTAN's inventory. This extract has been filed with the court but due to the sensitive information contained therein, it is the subject of a sealing order.

40 In addition to inventory assets addressed in the report extract, InterTAN also has accounts receivable, and property, plant and equipment. These assets have a combined net book value of approximately $80 million.

41 A & M has not conducted a detailed review of the realizable value of the assets but, the view of A & M, when considered together with the net orderly liquidation value of the inventory, the value of InterTAN's combined assets in an orderly wind down of the business far exceeds the current borrowing under the Secured Credit Facility.

42 Prior to the cross-collateralization in enhanced security provided for under the DIP Facility, A & M is of the view that it is likely that the trade creditor claims of $26.8 million to$31B million discussed above, would receive a meaningful recovery in an orderly wind down of the business.

43 InterTAN had reported EBITDA of$33.1 million for the fiscal year ended February 28, 2008 and, depending on the outcome of the critical holiday sales period, it is expecting EBITDA for fiscal 2009 to

be approximately $26 million. Although A & M has not conducted any type of enterprise valuation of InterTAN and has not had the opportunity to engage in any discussions with the investment banking advisors, InterTAN's projected EBITDA results would ordinarily auger well for a potential going concern solution.

44 In summary, A & M is of the view that:

(i) the liquidation and wind down ofInterTAN would eliminate over 3,000 jobs; and
(ii) would detrimentally affect dealers, joint-venture partners and other stakeholders.

45 In these circumstances, A & M is supportive of InterTAN's efforts to obtain interim financing, so as to avoid a liquidation, and to facilitate a restructuring or a going concern sale under the CCAA.

46 A & M also points out that the DIP lenders have agreed to the creation of the $25 million Unsecured Creditors Charge for the payment of pre-filing unsecured creditors. This charge provides some measure of protection for the unsecured creditors during a going concern restructuring of InterTAN. It is acknowledged that, if InterTAN achieves a going concern sale and provided that InterTAN or a buyer pays or honours certain other pre-filing claims as contemplated by the initial order, the result of the Unsecured Creditors Charge would appear to be positive. However, if no going concern outcome is achieved and there is a wind down after the initial order, those unsecured creditors may well receive a less meaningful recovery than they might receive in an immediate liquidation of InterTAN.

47 Having reviewed the record and having heard submissions, I am satisfied that InterTAN is a qualifying debtor corporation and Tourmalet is a qualifying affiliated debtor company within the meaning of the CCAA.

48 Both have obligations in excess of the $5 million qualifying limit and as a result of default in the Secured Credit Facility, the applicants are insolvent.

49 The jurisdiction of this court to receive the CCAA application has been established.

50 The applicants sought an initial order under s.ll of the CCAA. The required statement of projected cash flow and other financial documents required under ss. 11 (2) have been filed. The application was not opposed by any par appearing.

51 The only real significant issue on the initial application was the requirement for approval of the DIP Facility.

52 It is clear that the DIP Facility results in a substantial change to the status quo. The use of the assets of InterTAN as a basis for obtaining finance for Circuit City raises a number of questions, especially when the approval of the DIP Facility could very well affect InterTAN's ability to honor its current obligations.

53 The parties come to court, having negotiated the DIP Facility. They insist that this court make an immediate order, which approves the DIP Facility. If the DIP facility did not receive such approval, InterT AN indicated that there would be no credit facilities available and the enterprise would collapse.

54 It is recognized that in order to maintain its business activities InterTAN must have access to funds to enable it to continue to pay for inventory as well as all other costs associated with the running of the business. If there are no credit facilities, there is very little prospect of reorganizing or restructuring

InterTAN.

55 The issue is whether it is appropriate in the circumstances for InterTAN to provide support for its indirect parent, Circuit City.

56 On a motion such as this, it is necessary for the court to consider the approval of the DIP Facility in light of the alternatives. In this case, InterTAN says there are no alternatives and no further time to consider alternatives. However, the parties who could be detrimentally affected by the implementation of the DIP Facility, namely North American trade creditors, are not before the court, and it is open to speculate as to what this group would have to say on the issue. On the one hand, they could view the proposal favourably, as it could result in the continuation of InterTAN's business and thereby provide an outlet for ongoing sales. On the other hand, they could very well take the position that in a liquidation, they would get paid, and that this would be the preferred economic alternative, as opposed to the risk associated with the impaired ability of InterTAN to pay its obligations if the DIP Facility is approved.

57 This application was essentially brought on an ex-parte basis. The only other parties attending in court were the secured lenders and the proposed monitor. Timing was dictated to a degree by the applicant and the secured lenders. They had negotiated their financing and had applied for Chapter 11 protection. The relief being sought on this initial application was unusual, and I have no doubt that this was recognized by all parties.

58 In my view, the court has the jurisdiction to grant the requested relief. However, in situations such as this, it is up to the applicant to convince the court that it should exercise its discretion to grant this extraordinary relief. In this case, and as a general principle, it is up to the applicants to present sufficient evidence that would enable the court to conclude that such an order is appropriate, not only on factual grounds but also on the basis of the broad remedial purpose of and the flexibility inherent in the CCAA and the broad power of the court to stay proceedings under section 11 of the CCAA.

59 It must be recognized that if debtors and secured lenders are going to continue with the practice of requesting such extreme relief on an initial application, with little or no notice, the quid pro quo is that the applicant must establish the evidentiary basis for the requested relief. In the absence of such evidence, parties should have no expectation that the court will grant such extraordinary relief. The alternatives open to the court are clear. In certain circumstances, the motion could be adjourned until such time as the matter could be considered on a full record, or, alternatively, motions could be dismissed. Evidence can he provided by a representative of the applicants, as well as other sources such as the secured lenders or the proposed monitor or in some cases, representatives of key creditor groups.

60 This is not the first time that an issue like this has come before the court in recent weeks. No doubt the situation has been exacerbated by the current economic situation and the accompanying liquidity crisis. The record in this case indicates that there is a liquidity crisis.

61 By way of example, the CCAA proceedings of A & M Cookie Company Canada, came before this court on Friday, October 10, 2008 with a request to approve a ratification agreement under which it was conceivable that U.S. $5 million of assets of the debtor would not be available to the current creditors of the debtor. I deferred consideration of that matter until the following Tuesday so that the parties could provide additional evidence to support the request. The debtor did file additional material and an order was made approving the ratification agreement.

62 In my reasons, I noted the following: "Counsel to the proposed monitor advise that the monitor had not been in a position to comment on the liquidation analysis and was not in a position to provide any meaningful report on the potential impact of the ratification agreement. It would have been helpful if the monitor had been involved in the process at an earlier stage. The court certainly would have benefitted

from an analysis of this situation."

63 In this case, the proposed monitor did become involved some 10 days before the application. A & M was in a position to provide a report which I found to he of great assistance. In fact, in the absence of such a report, it is questionable as to whether the court would have been in a position to consider whether it was appropriate to approve the DIP Facility.

64 However, it seems to me that the A & M report could have been more comprehensive. I do not intend this statement to be in any way critical of A & M. On the contreary, under the circumstances, I commend them for their outstanding effort. A & M was retained 10 days before the application, and they did not have the time nor the mandate to review the affairs of InterTAN in great detail. A & M was not party to the negotiations between InterTAN and the secured lenders. The effectiveness of A & M was to some degree compromised by a lack of information. For example, A & M did not see documentation relating to the DIP Facility until the day before the application.

65 Had Circuit City and InterTAN provided the proposed monitor with relevant and verifiable information pertaining to the initial application on a timely basis, I have no doubt that a more comprehensive report could have been issued.

66 A party, who is being nominated as a court officer can, in the circumstances, playa pivotal role on an initial application. Generally speaking, the process can be enhanced if the debtor applicants take timely steps to involve the proposed monitor in the events leading up to an initial application.

67 It is recognized that debtor companies in distress face certain practical realities. They may be required to keep their status and intentions confidential, but if such debtors and their secured lenders have expectations and/or requirements of wide sweeping relief on initial applications, it is incumbent upon the applicants to present the evidentiary case for such relief. In doing so, such applicants have to take into consideration the benefits of having supporting evidence filed by a proposed court officer, who can he looked to by the court to provide a degree of objectivity to the proceedings.

68 The benefits of having such evidence coming from the proposed monitor cannot he underestimated, especially in circumstances where the volume of documentation that is being relied upon by the parties at the initial application is such that it creates additional practical difficulties for the judge to read and digest the information in an extremely short period of time.

69 In this case, however, I concluded, having considered and balanced the alternatives, that the DIP Facility should be approved. In my view, the potential upside of a going concern operation was preferable to a liquidation, notwithstanding the provisions of the DIP Facility which effectively transfers assets from InterTAN to another member of the enterprise group. It was in my view, appropriate to approve the DIP Facility, taking into account the prospects of a continued going concern operation, the continued employment of over 3000 individuals and the benefits of a continued operation for other third party stakeholders. I also took into account that certain creditor groups would be largely unaffected by the CCAA proceeding and that the creation of the Unsecured Creditors Charge provides in theory, a degree of protection to this group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

70 My endorsement of November 10, 2008 provided that an order was to issue in the form submitted, as amended, which order granted initial protection under the CCAA to the applicants, and it also approved the DIP Facility. I understand that this order has been issued and entered.

cp/s/qIrxc/qlcnt/qlaxw

APPENDIX C:

JANUARY 23, 2009 REASONS OF MORAWETZ J.

\5885110

C
2009 CarswellOnt 324, 49 C.B.R. (5th) 232

Intertan Canada Ltd., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **INTERTAN** CANADA LTD. AND TOURMALET CORPORATION (Applicants)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: January 14,16, 2009
Judgment: January 23, 2009
Docket: 08-CL-7841

Counsel: Edward Sellers, Jeremy Dacks for Applicant

Orestes Pasparakis, Mario Forte for Bank of America N.A. (Canadian Branch), DIP Lender, Canadian Agent

Fred Myers, Jay Carfagnini, L. Joseph Latham for Alvarez & Marshal Canada ULC, Monitor

Paul MacDonald for Rothschild Canada

Keven McElchern, J. Salmas for Cadillac Fairview Corporation Limited

Alexandra Lev-Farrell, Antonio Dimilta for Monarch Construction Limited et al

Linda Gallessiere for OMERS Realty Management Corporation, Ivanhoe Cambridge 1 Inc., Morguard Investments Limited, 20 VIC management Inc. on behalf of OPB Realty Inc., Retrocom Limited Partnership, 920076 Ontario Limited o/a The Southridge Mall

E. Patrick Shea for Unsecured Creditors' Committee in Chapter 11 Proceedings

H. Garman for Garmin International, Inc.

J. Davis-Sydor for FotoSource

Margaret Sims for VFC Inc.

Natalie Renner for Star Choice Communications Inc.

Subject: Insolvency; International; Corporate and Commercial

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Court made order in December 2008, status quo order, to not distribute payment of I Ltd.'s property to affiliates or lenders, provided that DIP lenders would still receive payment in accordance with earlier order related to direct debtedness — Monitor requested, among other things, for extension of status quo order and for variance of order regarding payment to DIP lenders — Monitor's concerns related directly to I Ltd.'s involvement in U.S. Chapter 11 proceedings that gave DIP lenders other course of recovery — Submissions were made regarding motion for directions — Motion granted; status quo order continued until further order — It was appropriate for monitor to bring motion of this type, in fulfilment of its obligations as court-appointed monitor under s. 11 of Companies' Creditors Arrangement Act — As I Ltd. did not have functioning board of directors, intervention of monitor was certainly appropriate — DIP lenders have no right to discharge portions of collateral package to detriment of Canadian creditors without receiving court authorization to do so — DIP lenders chose to obtain approval in Chapter 11 proceedings and not obtain such approval in this court — Priority ranking of charges, other than DIP lenders' charge, should not be dismissed or ignored.

Conflict of laws --- Bankruptcy — General principles

Court made order in December 2008, status quo order, to not distribute payment of I Ltd.'s property to affiliates or lenders, provided that DIP lenders would still receive payment in accordance with earlier order related to direct debtedness — Monitor requested, among other things, for extension of status quo order and for variance of order regarding payment to DIP lenders — Monitor's concerns related directly to I Ltd.'s involvement in U.S. Chapter 11 proceedings that gave DIP lenders other course of recovery — Submissions were made regarding motion for directions — Motion granted; status quo order continued until further order — It was appropriate for monitor to bring motion of this type, in fulfilment of its obligations as court-appointed monitor under s. 11 of Companies' Creditors Arrangement Act — As I Ltd. did not have functioning board of directors, intervention of monitor was certainly appropriate — DIP lenders have no right to discharge portions of collateral package to detriment of Canadian creditors without receiving court authorization to do so — DIP lenders chose to obtain approval in Chapter 11 proceedings and not obtain such approval in this court — Priority ranking of charges, other than DIP lenders' charge, should not be dismissed or ignored.

Cases considered by *Morawetz J.*:

TeleZone Inc. v. Canada (Attorney General) (2008), 2008 ONCA 892, 2008 CarswellOnt 7826 (Ont. C.A.) — considered

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), 1972 CarswellOnt 1010, 25 D.L.R. (3d) 386, [1972] 2 O.R. 280 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.14 — referred to

R. 59.06 — referred to

MOTION by monitor for directions.

Morawetz J.:

1 Alvarez & Marsal Canada ULC (the "Monitor" or "A&M") brings this motion for directions. In particular the Monitor requests an order extending the order of this court made December 24, 2008, (the "Status Quo Order") so that the Applicants shall not:

> (i) distribute or otherwise permit the payment of any of the Applicants' property to any of their affiliates or lenders, provided that nothing prevents the distribution or payment of such proceeds to the DIP Lenders in accordance with the Amended and Restated Initial Order dated November 10, 2008, and the DIP Agreement (defined therein) on account of direct indebtedness owing by the Applicants to the DIP Lenders; or
>
> (ii) make any advances to any of its U.S. affiliates.

2 The Monitor also requests an order directing that, notwithstanding the Amended and Restated Initial Order, no amount shall be paid to the DIP Lenders pursuant to the DIP Lenders' Charge listed as item number "six" in paragraph 44 of the Amended and Restated Initial Order (the "Sixth Charge") unless this court is satisfied that the DIP Lenders have exhausted all recourse they may have to realize proceeds from all other sources of recovery that may be available to them from the property and assets of the borrowers other than the property and assets of the Applicants.

3 Further, an order that the claims of the DIP Lenders under the Sixth Charge shall be reduced by the amount of the proceeds of the furniture, fixtures and equipment ("FF&E") of the U.S. Debtors and by an amount equal to the value or proceeds of any assets of the U.S. Debtors that were encumbered in the initial proposed DIP Facility which may be no longer subject to the DIP Facility approved in the U.S. Bankruptcy Court proceedings by order dated December 23, 2008.

4 Finally, the Monitor requests an order pursuant to the Second Amendment to the Senior Secured Super-Priority Debtor-in-Possession Credit Agreement dated as of December 19, 2008 and, in particular, paragraph 7(b) thereof, that until such time as this court orders otherwise, this court has made no determination to allow

any payment to be made pursuant to the Sixth Charge to be paid directly or indirectly to the estates of any of the U.S. affiliates of the Applicants or to any of the creditors of those entities.

5 The position of the Monitor is set forth in a very detailed Third Report. The Monitor is of the view that the circumstances under which the Initial Order was made, as amended by the Amended and Restated Initial Order and, in particular, the extraordinary nature of the relief granted in favour of the DIP Lenders have subsequently been determined to have changed and warrant the protection of the interests of the Applicants and their creditors by the relief sought.

6 The Monitor relies upon paragraph 53 of the Amended and Restated Initial Order which provides that the Applicants or the Monitor may from time to time apply to the court for advice and directions in the discharge of their powers and duties. In addition, reference was made to s.11 of the *CCAA*, Rules 37.14 and 59.06 as well as the inherent jurisdiction of this court to control its own process. I recite the grounds for bringing the motion as the Applicants have raised a concern that this is not a proper motion for directions.

7 Counsel for the Applicants questioned whether this was a proper motion to set aside or vary an order or to amend same. In my view, it is not necessary to consider whether there is technical compliance with Rules 37.14 and 59.06. I am satisfied that this court has the inherent jurisdiction to consider this motion. The Court of Appeal in the recent decision of *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892 (Ont. C.A.) made reference to a previous decision of the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.) where at p. 282, Brooke J.A. stated:

> As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters.

Borins J.A. stated, after referring to this quotation, as follows: "Brooke J.A. was of the view that no cause should fail for want of remedy".

8 In this case, I am of the view that this motion should be heard. I am satisfied that it is appropriate for the Monitor to bring a motion of this type, in fulfillment of its obligations as court-appointed Monitor under s.11 of the *CCAA*. In my view, in these particular circumstances, in view of the fact that **InterTAN** Canada Ltd. (**InterTAN**") does not have a functioning Board of Directors, the intervention of the Monitor is certainly appropriate. On October 7, 2008, **InterTAN**, Inc., in its capacity as sole shareholder of **InterTAN**, executed a Unanimous Shareholder Declaration ("USD") pursuant to the *Business Corporations Act (Ontario)* wholly relieving the Board of Directors of **InterTAN** of its directorial powers and assuming those powers unto itself. Members of the Board of Directors of **InterTAN** have been functioning in a managerial role since that time.

9 In view of the decision-making process of the Applicants, I am of the view that it is entirely appropriate for the Monitor to bring forth this motion in the interests of the Applicants and their creditors and, I might add, I find it surprising that the Applicants would in any way question the authority of the Monitor to bring forth such a motion.

10 The Monitor, as a court officer, has a role to play in these proceedings and, in my view, it would be remiss if it did not bring forth its concerns to the court.

11 The Monitor is of the view that circumstances warrant the protection of the interests of the Applicants and their creditors by the requested relief. The concerns of the Monitor relate directly to arrangements entered into in the Chapter 11 proceedings of *Circuit City Stores Inc. et al* (the "Chapter 11 Proceedings"). The Chapter 11 debtors are hereinafter referred to as (the "U.S. Debtors"). **InterTAN**, Inc. is directly or indirectly involved in the Chapter 11 Proceedings.

12 On November 10, 2008, the U.S. Debtors filed a motion for interim and final Orders of the U.S. Court authorizing post-petition financing under the DIP Facility (the "DIP Motion"). The U.S. Court granted an interim order approving the DIP Facility on November 10, 2008, with a view to hearing additional objections with respect to the DIP Facility before granting a final order with respect to the DIP Motion at a later date.

13 The Monitor reports that a number of objections to the final approval of the DIP Facility were subsequently filed in the Chapter 11 Proceedings. The Monitor understands that the Unsecured Creditors' Committee in the Chapter 11 Proceedings (the "UCC") raised a number of objections to final approval of the DIP Facil- ity.

14 The Monitor further reports that on December 20, 2008, counsel for the U.S. Debtors advised the Monitor's U.S. counsel that the UCC's objections to the DIP Motion had been settled. On December 21, 2008, the Monitor was provided with the Draft Second Amendment dated as of December 19, 2008 intended to be executed by the U.S. Debtors, the DIP Lenders and **InterTAN**.

15 Paragraph 5 of the Draft Second Amendment provides, in part, as follows:

> 5. Amendment to DIP Orders and Initial Orders — The Borrowers and the Required Lenders hereby agree that the terms of the DIP Orders and the Initial Order may be amended as follows:
>
> ...
>
> (b) to provide that the Liens granted under the Initial Order with respect to the Property may be limited to provide that after payment of clauses one through five of Section 44 of the Initial Order, fifty (50%) percent of the remaining proceeds of such Property shall be used to pay the DIP Lenders' Charge set forth in clause six of Section 44 of the Initial Order, and the balance shall be available to be distributed to the Domestic Loan Parties (to the extent allowed by the Canadian bankruptcy court) and retained by the estate and not applied in reduction of the Obligations.
>
> (c) to permit the proceeds from the Domestic Loan Parties' furniture, Fixtures and Equipment to be retained by the estate and not applied in reduction of the Obligations.

16 After an initial review, the Monitor concluded that the Draft Second Amendment would impact the Canadian proceedings and Canadian stakeholders.

17 As a result of the Monitor's concerns, a scheduling motion was heard by me at 9:30 a.m. on December 23, 2008. This court was advised that amendments were being contemplated to the Draft Second Amendment. A further hearing was held on December 24, 2008, at which time this court was provided with an unsigned copy of the Final Second Amendment and a copy of the final U.S. DIP Order. This court then scheduled the hearing of this motion and indicated an intention to make an order prohibiting the distribution of proceedings of the Applicants' Property and any inter-company advances from the Applicants to any of its U.S. affiliates. This resulted in

the Status Quo Order.

18 On December 23, 2008, the U.S. Bankruptcy Court granted final approval of the Applicants' DIP borrowing. Paragraph 2(e) of this order provides, in part:

> Notwithstanding the grant of the DIP Liens (a) the net proceeds, if any, realized after the date of this Final Order from the disposition of the Debtors' Equipment and Fixtures shall be paid to the Debtors' estates and not applied in reduction of the DIP Obligations or the Pre-Petition Debt; and (b) fifty percent (50%) of the net proceeds, if any, received by the DIP Lenders under the DIP Lenders' Charge set forth in clause six of Section 44 of the Initial Order (as amended and in effect) entered into in the CCAA proceedings of **InterTAN** Canada Ltd. (as ameded [sic] and in effect, the "CCAA Initial Order") shall be paid to the Debtors' estates and not applied in reduction of the DIP Obligations or the Pre-Petition Debt. For the avoidance of doubt, nothing in this Final Order, the DIP Credit Agreement, or any amendment thereto, including without limitation, the prior DIP Amendments, shall amend or modify the terms and conditions of the CCAA Initial Order in any respect. In the event of any inconsistency between the terms and conditions of the Final Order and the CCAA Initial Order with respect to (i) **InterTAN** Canada Ltd. and any other Canadian Subsidiary of Circuit City Stores, Inc., which are debtor companies in the Canadian Bankruptcy Case (collectively, the "Canadian Debtors") or (ii) the assets of the Canadian Debtors, the CCAA Initial Order shall control. (emphasis added)

19 A copy of the executed, finalized Second Amendment to the Senior Secured, Super-Priority, Debtor-in-Possession Credit Agreement (the "Final Second Amendment") has been filed with this court. Although **InterTAN** is recited as a party to the Final Second Amendment, it is not a signatory to the document.

20 Paragraph 7 of the Final Second Amendment provides, in part:

> 7. Amendment to DIP Orders — The Borrowers and the Required Lenders hereby agree that the terms of the DIP Orders may be amended as follows:
>
> ...
>
> (b) to provide that fifty percent (50%) of the net proceeds, if any, received by the DIP Lenders under the DIP Lenders' Charge set forth in clause six of Section 44 of the Initial Order (as amended and in effect) entered into [sic] the CCAA proceedings of **InterTAN** Canada Ltd. shall be paid to the Debtors' estates (to the extent allowed by the Canadian bankruptcy court) and not applied in reduction of the DIP Obligations or the Pre-Petition Debt,
>
> (c) to permit the proceeds from the Domestic Loan Parties furniture, Fixtures and Equipment to be retained by the estate and not applied in reduction of the Obligation. (emphasis added)

21 Prior to these proceedings, the Applicants were not liable to their secured lenders for the indebtedness of the U.S. affiliates. Neither the secured nor the unsecured creditors of the U.S. Debtors had any entitlement to share in the proceeds of the Applicants' assets as a means to realize their claims against the U.S. Debtors, other than through the U.S. Debtors as equity holders after payment of all creditors of the Applicants.

22 The Applicants moved for approval of the DIP Facility at its initial hearing in these proceedings on

November 10, 2008. Court approval of the DIP Facility was granted on that day with reasons to follows, which were released on November 26, 2008.

23 The Monitor reports at paragraph 65 of its Third Report that the DIP Lenders' Charge (as defined at paragraph 37 of its Amended and Restated Initial Order) was extraordinary because it was broader in scope (i.e. it charges more assets) than the lenders' pre-existing security and because it gave priority claims to the DIP Lenders against assets of the Applicants in respect of amounts owed by the U.S. Debtors ahead of the pre-existing claims of unsecured creditors of the Applicants. It was recognized, at the time of the hearing, that the DIP Lenders' Charge was potentially prejudicial to pre-existing trade creditors.

24 In an effort to address this issue of prejudice, the Applicants proposed a structure under which the DIP Lenders would have priority for the repayment of direct borrowings by **InterTAN**, followed by the Canadian Creditor Charge, which was to provide certain protection to pre-existing trade creditors of **InterTAN** in the amount of $25 million, and thereafter the DIP Lenders would have priority for any remaining DIP borrowings.

25 Under paragraph 37 of the Amended and Restated Initial Order, the DIP Lenders were entitled to and were granted the benefit of a DIP Lenders' Charge on the "Property" of the Applicants. Property covered the Applicants' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds.

26 Subsequently, the extent of the Canadian Creditor Charge was revised on the basis that the Directors' Charge may not be fully required. The amendment to the Canadian Creditor Charge was incorporated at paragraph 43 of the Amended and Restated Initial Order. This amendment was made on or about December 5, 2008.

27 At paragraph 70 of the Third Report, the Monitor reports that, from the Final Second Amendment, it now appears that the UCC raised concerns with respect to, among other things, the widening of the scope of the security covered by the DIP Facility to include assets that were not previously encumbered under pre-existing security. The Monitor goes on to report that unlike the situation in Canada, the DIP Lenders and the U.S. Debtors effectively agreed with the UCC to exclude the pre-petitioned unencumbered FF&E from the scope of the DIP security in the U.S. The Monitor's concluding comments in paragraph 70 are as follows:

> • The Final Second Amendment provides that:
>
> (a) the proceeds from the furniture, fixtures and equipment of the U.S. Debtors are to be retained by the U.S. estate for the benefit of the U.S. unsecured creditors rather than being used by the DIP Lenders to reduce the obligations owing to them by the U.S Debtors; and
>
> (b) half of all amounts paid under the Sixth Charge, if any, are to be paid to the U.S. estate for the benefit of the U.S. unsecured creditors and will not reduce amounts owing to the DIP Lenders.

28 The Monitor's conclusions are set out at paragraphs 71-78 of the Third Report which provide as follows:

> 71. Therefore, the security that the Monitor and this Court were advised was a nonnegotiable condition precedent to the DIP Lenders' provision of the DIP Facility, without which the Applicants and the U.S. Debtors would fail, has been bartered away by the U.S. Debtors and the DIP Lenders to unsecured creditors of the U.S. Debtors to settle their complaints as to the proposed terms of the DIP Facility. That is, rather than simply supporting the need for the DIP Lenders to be re-paid amounts advanced to the U.S. Debtors, the

Sixth Charge has been used as a form of value or currency in negotiations with the UCC.

72. By enabling the DIP Lenders to share half of the Sixth Charge with the unsecured creditors of the U.S. Debtors, the Final Second Amendment makes proceeds of the assets of the Applicants available to unsecured creditors of the U.S. Debtors without any assurances that the unsecured creditors of the Applicants will be paid in full. This was not what the Monitor understood to be the purpose of the granting of the Sixth Charge to the DIP Lenders and is not consistent with the purposes of the accommodation that the Court was asked to grant. Rather than protecting the DIP Lenders' ability to be re-paid from Canadian assets for U.S. lending while protecting Canadian unsecured creditors and supporting the North American operations, the Final Second Amendment potentially allows unsecured creditors of the U.S. Debtors, which have no claims against the Applicants, to have access to the Applicants' assets and achieve recoveries ahead of the unsecured creditors of the Applicants. Therefore, the Monitor is of the view that the Final Second Amendment could have an unfair and inequitable impact on the unsecured creditors of the Applicants.

73. The Monitor notes that paragraph 7(b) of the Final Second Amendment provides that any proposed sharing of the Sixth Charge is only available "to the extent allowed by the Canadian bankruptcy court". The Monitor submits that it would be appropriate, fair and reasonable for this Honourable Court to make directions to govern the determination whether this Honourable Court is willing to allow any such sharing of the Sixth Charge.

74. The Monitor had been advised by the U.S. Debtors that the purpose of negotiations with the UCC was to obtain further credit that would decrease the likelihood of claims being made into Canada. In fact, by allowing the U.S. estate to access the value of the furniture, fixtures and equipment of the U.S. Debtors, the Final Second Amendment would potentially reduce the recoveries by the DIP Lenders in the Chapter 11 Proceedings and thus *increase* the likelihood that the DIP Lenders will need to have recourse to the Sixth Charge. Accordingly, the Monitor submits that, to the extent that any proceeds of the U.S. Debtors' assets are ultimately not used to repay the DIP Lenders, the equivalent amount ought to be deducted from the obligations owing by the Applicants to the DIP Lenders and the Sixth Charge should be likewise reduced.

75. During the 9:30 hearing on December 23, 2008 this Honourable Court was advised that the intention of parties to the Draft Second Amendment was that it would not allow a "double dip" (i.e. to the extent the DIP Lenders either shared the proceeds of the DIP Lenders' Charge or did not claim the proceeds of the U.S. Debtors' furniture, fixtures and equipment, there would be a corresponding reduction in the DIP Obligations) and that the DIP Lenders were prepared to confirm this in writing. However, the Final Second Amendment and the U.S. Court Order of December 23, 2008 (which are quoted above in paragraphs 60 and 62 above) do not reflect this, nor does the letter dated January 8, 2009 from Canadian counsel for the DIP Lenders to the Monitor's counsel. A copy of this letter is attached as Appendix "G".

76. Until Canadian creditors' recovery is better particularized and until there is better clarity as to whether access to Canadian realization is required to protect the DIP Lenders from suffering a shortfall on their advances to the U.S. Debtors, if ever, the Monitor recommends that the Court make the following directions:

(i) An Order extending the Status Quo Order so that, until further Order of this Court, the Applicants shall not:

(a) distribute or otherwise permit the payment of any of the Applicants' property, assets and undertaking to any of their affiliates or lenders, provided that nothing herein prevents the distribution or

payment of such proceeds to the DIP Lenders in accordance with the Initial Order and the DIP Agreement (defined therein) on account of direct indebtedness owing by the Applicants to the DIP Lenders; or

(b) make any advances to any of its U.S. affiliates;

(ii) An Order directing that, notwithstanding anything contained in the Initial Order, no amount shall be paid to the DIP Lenders pursuant to the DIP Lenders' Charge listed as item number "six" in paragraph 44 of the Initial Order (the "Sixth Charge") unless and to the extent that this Honourable Court is satisfied that the DIP Lenders have exhausted all recourse that they may have to realize proceeds from all other sources of recovery that may be available to them from the property and assets of the borrowers other than the property and assets of the Applicants;

(iii) An Order that the claims of the DIP Lenders under the Sixth Charge shall be reduced by the amount of the proceeds of the furniture, fixtures and equipment of the U.S. Debtors and by an amount equal to the value or the proceeds of any assets of the U.S. Debtors that were encumbered in the initial proposed DIP Facility which may be no longer subject to the DIP Facility approved in the U.S. Bankruptcy Court by Order dated December 23, 2008; and

(iv) An Order pursuant to the Final Second Amendment (as defined herein) and, in particular, paragraph 7(b) thereof, that, until such time, if ever, as this Honourable Court orders otherwise, this Honourable Court has made no determination to allow any payment to be made pursuant to the Sixth Charge to be paid directly or indirectly to the estates of any of the U.S. affiliates of the Applicants or to any of the creditors of those estates.

77. In effect, the Monitor proposes that the property and assets of the U.S. Debtors should be applied first to repay direct advances by the DIP Lenders to the U.S. Debtors and only once this is completed would the Court determine the extent to which resort would be had to the Applicants' property and assets under the Sixth Charge. At that time, in accordance with the right given to this Court by the parties in paragraph 7(b) of the Final Second Amendment, the Court can determine if it will allow any sharing under the Final Second Amendment. With respect, it is the Monitor's view that this recommendation is consistent with the pre-filing state of affairs between Canada and the U.S. and their respective creditors; respects the basic concepts of the Initial Order; is responsive to the present circumstances; and allows the Sale Process and restructurings both in Canada and the U.S. to proceed with the least amount of disruption.

78. Finally, in light of: (a) the fact the U.S. Debtors do not anticipate requiring advances from **InterTAN**; (b) there have been no discussions with the U.S. Debtors since November 19, 2008 as to the nature of the security to be provided to ensure the re-payment to **InterTAN** of any such advances in the event that they do seek to borrow from **InterTAN**; and (c) the concerns expressed above that access by creditors of the Applicants' affiliates to Canadian distributions should await realization on the property of all of the affiliates in any event, the Monitor therefore recommends that the Status Quo Order be extended pending further Order of this Honourable Court.

29 The position of the Monitor is supported by counsel to Cadillac Fairview, the OMERS/Ivanhoe landlord Group, BFC, Garmin and Monarch Construction.

30 Not surprisingly, the motion is opposed by the DIP Lenders, on the basis that if the motion is granted it

would have significant ramifications:

(a) the Applicants will be in default of the DIP Facility;

(b) the DIP Lenders will have relied to their detriment on the Sixth Charge by making advances through the holiday season and by agreeing to subordinate their security to, *inter alia*, the $19.3 million Directors' Charge; and

(c) significant uncertainty will arise in respect of the protection afforded by Canadian orders to DIP Lenders.

31 Counsel to the DIP Lenders submits that what really is in issue is that the Monitor does not approve of the manner in which the Sixth Charge has been used in the DIP Lenders' negotiations. Counsel further submits that if the Monitor succeeds, the DIP Lenders (and any future DIP Lenders) will lose their court-ordered protection if they use their rights in a manner that is deemed by some stakeholders to be unfair and, in other words, an unstated condition should be read into DIP orders that any priority is subject to retroactive adjustment if the DIP Lenders' business decisions subsequently displease the court.

32 Counsel also submits that the DIP Lenders negotiated and struck what they believed to be a principled bargain which was the subject of debate in court, with the Monitor expressing its concerns. Counsel submits that the end result was ultimately accepted by the court and embodied in the Initial Order. Further, as an accommodation, on December 5, 2008, the DIP Lenders consented to an alteration of the waterfall priorities that permitted the Canadian creditors to avail themselves of any unused portion of the Directors' Charge, thereby effectively increasing the pool subject to the Canadian Creditor Charge to $44.3 million. As noted above, this alteration was court approved.

33 Counsel further submits that the position of the DIP Lenders in the renegotiated deal is that they compromised their position for the benefit of the Canadian creditors and that by compromising on this issue in Canada for the benefit of the Canadian creditors, the DIP Lenders arguably prejudiced the position of the U.S. unsecured creditors by agreeing to dilute the DIP Lenders priority claim.

34 The DIP Lenders take the position that the Initial Order established the DIP Lenders' Charge and dictated its parameters and, in reliance on the DIP Lenders' Charge in the Initial Order, and subsequently as amended in the Amended and Restated Initial Order, the DIP Lenders made tens of millions of dollars in advances to the Applicants and hundreds of millions of dollars to the U.S. debtors. Counsel further submits that the DIP Lenders relied on their rights in the Amended and Restated Initial Order both in making advances and also in their dealings with stakeholders within the Chapter 11 Proceedings.

35 The DIP Lenders submit that it was understood that pursuant to the U.S. Bankruptcy process, the U.S. DIP Order would not be finalized until the return date of the first omnibus hearing and it ought to have been clear that there could be alterations to the DIP Facility.

36 They submit that finding a consensual resolution with the UCC was important for all concerned and that this resolution was embodied in the Final Second Amendment. In Canada, the DIP Lenders compromise took the form of a $44.3 million Canadian Creditor Charge and in the U.S. it involved the DIP Lenders foregoing additional post-petition security on FF&E and agreeing to share 50% of the proceeds of the Sixth Charge received, to

the extent received, with the U.S. Debtors' estate.

37 The DIP Lenders acknowledged that under certain scenarios, the business deal outlined in the Second Amendment could adversely affect Canadian unsecured creditors. They do, however, submit that this is no different from the fact that the Directors' Charge and Canadian Creditor Charge may prove to work to the disadvantage of the U.S. unsecured creditors.

38 The DIP Lenders take the position that its interests as stakeholders straddles both insolvency proceedings, and it recognizes that any decision it makes in one forum may affect the other. However, it submits it must act, within its rights, to the best of its business judgment.

39 Counsel submits that the effect of the Monitor's motion would be pernicious as it would effectively allow the DIP Lenders' Charge to be reconsidered after advances made in reliance on the charge, had been made. They argue that the flexibility involved in *CCAA* proceedings cannot extend to re-opening and re-arguing issues that have already been resolved by the court. Further, by relying on the court-ordered charge, the DIP Lenders now retroactively face the prospect that (a) a form of "marshalling" may be imposed; (b) there will be a carve out for U.S. FF&E; and (c) there will be ongoing uncertainty as the "status quo" is frozen until further order of the court.

40 The DIP Lenders submit that this cannot be the right outcome. They emphasize that once the DIP Lenders were granted the Sixth Charge, they could assign it, sell it or negotiate with it. The rights of the DIP Lenders they submit, have been set out in the materials before the court, and that they are entitled to certain rights. Further, these rights should not be redefined after the deal has been made. Counsel concludes that commercial certainty requires that the order requested by the Monitor should not be made.

41 Counsel to the UCC supported the position of the DIP Lenders.

42 Counsel to the Applicants submitted that, if the relief sought by the Monitor is granted, it would constitute the entry of an order which modifies the Initial Order or which otherwise materially adversely affects the effectiveness of the Initial Order without the express written consent of the DIP Lenders. The Applicants point out that it is their understanding that the DIP Lenders do not consent to the relief sought by the Monitor and that the granting of the requested relief would result in an Event of Default under the DIP Facility. Counsel points out that **InterTAN** still requires access to the DIP Facility and is concerned that such access would be lost if the motion was granted.

43 Counsel to **InterTAN** submits that **InterTAN** should not be put in the position where an Event of Default will occur under its DIP Facility in that the court can just as effectively deal with the issues inherent in the requested relief that only become "ripe" after proceeds of sale have been realized. Counsel submits that any consideration of what should happen with respect to the priority of the Sixth Charge only becomes relevant after the five prior charges have been satisfied and that this will not happen until the completion of a transaction involving **InterTAN's** assets.

44 In the circumstances, counsel submits that **InterTAN** cannot consent to an extension of the Status Quo Order. Counsel observes that there is no compelling reason for the court to consider now any of the remaining Sixth Charge relief as the Canadian stakeholders would be protected if the court were to order a continuation of the Status Quo Order. By considering the matter after the completion of a going concern sale or other transaction involving the assets of the Canadian and U.S. estates, the court could avoid (i) putting **InterTAN's** access (and

that of the U.S. Debtors) to the DIP Facility in peril; (ii) impacting the allocation negotiations to come concerning certain assets owned by the U.S. Debtors that are used in the operation of **InterTAN's** business; and (iii) considering the matter "in the abstract" without knowing whether the recovery issue raised by the Monitor has any relevance in this proceeding.

45 Counsel also points out that if the DIP Lenders do recover on **InterTAN's** guarantee first, **InterTAN** will be subrogated to the position of the DIP Lenders and become entitled to participate in the U.S. estate. A similar submission was also contained in the factum submitted by counsel on behalf the DIP Lenders.

46 It is clear that there are significant differences of opinion as to the effect of the Final Second Amendment. However, one thing is abundantly clear. The Final Second Amendment has not been considered, let alone approved, by this court.

47 The starting point of my analysis is to consider the DIP Facility in the context of the Amended and Restated Initial Order.

48 In the circumstances of this case, the granting of the DIP Facility, in the form requested, was extraordinary relief. I took into account that the creation of the Canadian Creditor Charge provided in theory, a degree of protection to the group of creditors, who could otherwise be detrimentally affected by the DIP Facility.

49 I have no doubt that the DIP Lenders have relied on the approvals granted in the Amended and Restated Initial Order. I accept the submissions put forward by counsel to this effect. I also accept the submission that the DIP Lenders should be able to rely on what has been approved by this court.

50 However, the strength of the DIP Lenders' argument is also its weakness.

51 These *CCAA* proceedings are obviously separate from the Chapter 11 Proceedings. There is a common DIP Facility, but in order to be effective in the respective insolvency proceedings, the DIP Lenders, as well as the Applicants, recognized that the DIP Facility had to be court approved in both jurisdictions. The difficulty in this case is that there has not been a common approval process. The document that has been approved in the Chapter 11 Proceedings is different than what has been approved in the *CCAA* proceedings.

52 In considering the relief requested by the Monitor, it is necessary to consider what has been approved in the *CCAA* proceedings. The DIP Lenders, the Applicants and the Monitor participated in the initial hearing. The scope and extent of the DIP Lender's Charge and other charges were before the court and the priority to be afforded to the specific charges was also before the court. This is the package, in essence the bundle of rights, that was approved. Certain rights were subsequently amended as a result of expansion of the size of the Canadian Creditor Charge, but again, this amendment was court approved and was embodied in the Amended and Restated Initial Order.

53 To the extent that the DIP Lenders entered into an agreement with the UCC which was subsequently incorporated into the Final Second Amendment, these changes may have an adverse impact or a potential adverse impact on the Canadian creditors.

54 Counsel to the DIP Lenders took the position that the DIP Lenders are entitled to certain rights and, if used in a way that the Monitor does not approve, that is too bad. I have not been persuaded by this submission. In the context of these proceedings, I do not agree that the DIP Lenders have the unilateral ability to discharge

portions of the collateral package to the detriment of the Canadian creditors without receiving court authorization to do so. The DIP Lenders' Charge incorporates a charge on the Property of the Applicants. In considering whether it is appropriate to approve such a facility, the court takes into account a number of factors which include benefits that the Applicants will receive from the DIP Facility and the collateral that is charged under the DIP Lenders' Charge. In my view, it is not appropriate to provide court approval to the entire package and then tacitly approve of the unilateral activities of the DIP Lenders in discharging portions of the collateral to the potential detriment of certain stakeholders in the *CCAA* proceedings. In view of the extraordinary nature of the DIP Lenders' Charge, and the balancing of interests that was considered by the court when court approval was provided, a document which purports to amend a portion of the collateral, would not, in these circumstances, be a document that fits within a document contemplated by the DIP Facility or as may be reasonably required by the DIP Lenders under paragraph 36 of the Amended and Restated Initial Order.

55 The DIP Lenders had an option in this case. They chose to obtain approval of the Final Second Amendment in the Chapter 11 Proceedings and not to obtain such approval in this court. Having elected to proceed in this manner, the DIP Lenders now take the position that they are entitled to rely on court approval. I agree, but in the context of these proceedings, court approval has not been obtained to incorporate into the DIP Facility the amendments which are contained in the Final Second Amendment and approved in the Chapter 11 Proceedings.

56 The DIP Lenders point out that there was a *quid pro quo* in that the DIP Lenders made compromises in Canada which is reflected in the increased Canadian Creditor Charge. This submission ignores two important facts. Firstly, the extension of the Canadian Creditor Charge was specifically court approved in Canada and secondly, this amendment was agreed to and incorporated into an Amended and Restated Initial Order on or about December 5, 2008, some two and one-half weeks before the Final Second Amendment was agreed to by certain parties in the U.S. Proceedings. One cannot determine, after the fact, whether there would have been any linkage between the two events.

57 In my view, to the extent that the DIP Lenders made advances and relied upon the Final Second Amendment having effect in these *CCAA* proceedings, they did so at their peril.

58 The next issue to consider is the practical implications of the lack of this court's approval of the Final Second Amendment as well as the Monitor's motion. The Monitor has requested that the court make certain orders. If they are made, the DIP Lenders take the position that such orders would be an Event of Default under the DIP Facility. If this, indeed, is the outcome of the Monitor's motion, it is one that defies logic. The crisis has been created by an arrangement as between the DIP Lenders and the UCC and agreed to by the U.S. Debtors. On this issue, it would appear that these parties have, for all practical purposes, ignored the *CCAA* proceedings. Having ignored the *CCAA* proceedings, the DIP Lenders take the position that steps taken by the Monitor to monitor compliance with existing court orders, creates an Event of Default. This should not and cannot be the effect of this endorsement.

59 The Amended and Restated Initial Order speaks for itself. The DIP Lenders, the UCC and the Applicants are free to do what they want with respect to the Chapter 11 Proceedings, but they have to ensure that a proper accounting is provided in the *CCAA* proceedings. A proper accounting has to ensure that the claims of the DIP Lenders under the Sixth Charge are to be reduced by the amount of the proceeds realized on the Property charged in the DIP Lenders' Charge as approved by Amended and Restated Initial Order. In this context, the accounting will require that the Sixth Charge be reduced by the amount of the proceeds of the FF&E of the U.S. Debtors and by an amount equal to the value or proceeds of any assets of the U.S. Debtors that were encumbered

in the DIP Facility approved by this court which may be no longer be subject to the DIP Facility approved in the Chapter 11 Proceedings by order dated December 23, 2008. In my view, this direction is entirely consistent with the terms of the Amended and Restated Initial Order.

60 Further, in considering whether any payments are to be made pursuant to the Sixth Charge, it is appropriate to take into consideration the ranking of the various charges as set out in paragraph 44 of the Amended and Restated Initial Order. The DIP Lenders' Charge is fourth (with certain restrictions and limitations) and sixth in priority. The Canadian Creditor Charge ranks between these two charges. The priority ranking of charges, other than the DIP Lenders' Charge, should not be dismissed or ignored. It is incumbent upon the Applicants to ensure that appropriate consideration is given and protection provided, to ensure that these priorities are respected, especially the Canadian Creditor Charge. In view of the USD, the Monitor is directed to report to the court if it is of the view that further direction is required.

61 In the circumstances, it is, in my view, appropriate to extend the Status Quo Order until such time as the affected parties have had the opportunity to consider the impact of these reasons.

62 In the result, the Status Quo Order is continued until further order of this court. I decline to make the orders requested at (ii), (iii) and (iv) as set out in the Notice of Motion. However, the claims of the DIP Lenders are to be accounted for in accordance with the foregoing directions.

Motion granted.

END OF DOCUMENT