ONTARIO

SUPERIOR COURT OF JUSTICE

COUR SUPÉRIEURE DE JUSTICE

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MESSAGE: **Endorsement: InterTAN #08-CL-7841**

COURT FILE NO.: 08-CL-7841
DATE: 20090123

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Edward Sellers and Jeremy Dacks, for the Applicants**

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

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

Paul MacDonald, for Rothschild Canada

Keven McElchern and J. Salmas, for the Cadillac Fairview Corporation Limited

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

Linda Gallessiere, for OMERS Realty Management Corporation, Ivanhoe Cambridge 1 Inc., Morguard Investments Limited and 20 VIC management Inc. on behalf of OPB Realty Inc., Retrocom Limited Partnership and 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.

HEARD: **JANUARY 14 and 16, 2009**

ENDORSEMENT

[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. Attorney General (Canada)*, 2008 ONCA 892 made reference to a previous decision of the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al*, [1972] 2 O.R. 280 (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 Facility.

[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(c) 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 non-negotiable 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.

MORAWETZ J.

DATE: **January 23, 2009**