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FRASER MILNER CASGRAIN LLP

APPROVAL OF CROSS BORDER DIP FINANCING FACILITIES

In *Re Intertan Canada Ltd.* (2009), WL 181688 (Ont. S.C.J. [Commercial]), 2009 CarswellOnt 324 [*Re Intertan*], Morawetz J denied the approval of an amended DIP financing agreement under CCAA proceedings which was granted under the Chapter 11 proceedings in the United States.

Intertan Canada Inc. (“Intertan”) is the corporate entity of the Canadian consumer store “The Source by Circuit City”. Intertan is a wholly owned subsidiary of Circuit City Stores Inc.. Circuit City Stores Inc. is an American retail company which sells brand name consumer electronics. In late 2008 both Intertan and Circuit City Stores Inc. were insolvent and sought concurrent protection under their respective jurisdiction’s insolvency legislation.

In the Canadian proceedings, an interim order, then an Amended and Restated Interim Order (“ARI Order”), was granted which allowed for extraordinary relief to be granted to the DIP Lenders (financing both the American corporation and the Canadian subsidiary). Similar relief was sought in the US proceedings. There was some objection to the financing by the American unsecured creditors, and after some negotiations, a Draft Second Amendment to the DIP Financing was proposed and approved in the American Proceedings. This Second Amendment was different than the agreement approved in Canada by the ARI Order. The Monitor reported that these changes could have adverse affects for the Canadian unsecured creditors and did not support the approval of the amendments under the CCAA.

The DIP Lenders sought the approval of the new arrangement as they had already made tens of millions of dollars in advances to the Canadian Debtors relying on the enforceability of the approval of the Second Amendments made in the US Proceedings. The issue in this case was over the approval of amendments made to the DIP financing agreement.

Morawetz J. found that the original ARI Order was to remain in effect in Canada and the amendments would not be approved

in the CCAA proceedings.

In making this decision, Morawetz J. outlined the Second Amendments were not considered, nor approved by the Canadian court. He found that the ARI Order already granted extraordinary relief to the DIP Lenders. He found that the DIP lenders relied on the ARI Order and that the DIP Lenders should be able to rely on the agreement approved by this court. He found, however, that the CCAA proceedings are obviously separate from the Chapter 11 Proceedings in the United States. Though there was a common DIP Facility, that facility and any amendments, needed to be approved in both jurisdictions in order to be relied upon. The approved agreements differed between the two jurisdictions.

Morawetz J. outlined that the DIP Lenders had an option in this case. They chose to seek approval of the Second Amendments in the Chapter 11 Proceedings and not to obtain the reciprocal approval in the Canadian Courts. He found they now wanted to rely on the U.S. approval, but this approval was limited to the agreement approved in the ARI Order. As a result, the Court found that the DIP Lender’s decision to rely on the Amendments approved in the Chapter 11 Proceedings when deciding to make advances was made at their own peril.

The DIP Lenders advanced an argument that if the Court did not approve the amendments, this would be considered an event of default under the DIP Facility. This was also denied by Morawetz J. when he noted it “defies logic” to think that a Monitor taking steps to comply with orders under the CCAA can create an event of default.

This case addresses some salient issues affecting Cross Border corporations seeking insolvency protection in multiple jurisdictions. It will be interesting to see if other jurisdictions hold these multinational corporations to the same standards as Morawetz J. outlined in this case

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