

CITATION: 1462598 Ontario Inc. (Re), 2016 ONSC 7982  
COURT FILE NO.: CV-16-11634-00CL  
DATE: 20161219

**SUPERIOR COURT OF JUSTICE – ONTARIO**

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

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1462598 ONTARIO INC., carrying on business as TRICON FILMS AND TELEVISION, AND THE OTHER COMPANIES LISTED IN SCHEDULE "A"**

**BEFORE:** Mr. Justice H.J. Wilton-Siegel

**COUNSEL:** *Harvey Chaiton and George Benchetrit*, for the Applicants

*Sean Zweig*, for KSV Kofman Inc.

*Heather Meredith*, for SunTrust Bank

**HEARD:** December 12, 2016

**ENDORSEMENT**

[1] This application is brought by 1462598 Ontario Inc., carrying on business as Tricon Films and Television ("TFT"), and the other companies owned directly or indirectly by TFT listed in Schedule "A" to the application (collectively, "Tricon" or the "Tricon Companies"). They seek an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). At the conclusion of the hearing, the motion was granted with reasons to follow addressing the principal issues raised at the hearing. These are those reasons.

**Business of Tricon**

[2] Tricon is an independent producer and distributor of multi-genre content for film, television and other platforms. TFT owns a considerable number of single-purpose companies for the production of specific television programs. For present purposes, the principal companies are: TFT, an Ontario company; Tricon Films Inc. ("TFI"), an Ontario company; Tricon Media Inc. ("TMI"), a California company; and Tricon Films (UK) Limited ("TFI (UK)"), an English company.

[3] Tricon's production arm creates content for a number of companies, including Scripps Network, A&E Networks, Showtime, NBC Universal, Shaw Media, Corus Entertainment and Bell Media. Tricon's post-production business provides audio post-production services, including transcription and closed-captioning services. Tricon's distribution arm has a catalogue of over 3,000 hours of content seen on over 150 broadcast and digital networks including Netflix, Hulu, Crackle, Google, Apple, NBC Universal, AMC Networks, Turner, A&E

Networks, Scripps Network, Viacom, Canal +, Foxtel, and Sky Broadcasting. Distribution contracts are entered into by TFI, TMI or TFI (UK).

[4] Tricon has approximately 22 employees and 15 independent contractors. Of the overall workforce, 32 are located in Canada and 5 in the United States. Neither the employees nor the independent contractors are unionized.

### **Financial Statements**

[5] Tricon's financial statements are prepared on a consolidated basis with a May 31 year-end, although the fiscal years of the Tricon Companies differ. Tricon's financial statements have not been audited since 2013. Tricon has filed internal consolidated and unconsolidated financial statements as of May 31, 2016. Tricon has also filed an internal unconsolidated financial statement as of October 31, 2016.

[6] The proposed monitor, KSV Kofman Inc. ("KSV"), indicates in a pre-filing report dated December 11, 2016 (the "Pre-Filing Report") that, notwithstanding significant revenue growth, Tricon has incurred losses in each of its last three years. The loss for the year ended May 31, 2016 was approximately \$2.8 million. KSV indicates that these losses are attributable, in large part, to write-downs in Tricon's investment in completed television programs, which have totaled approximately \$4.7 million over the last three fiscal years. KSV also indicates that, for the last three fiscal years, Tricon has not generated EBITDA sufficient to service its debt and capital costs, including equipment purchases and minimum guarantees paid to producers pursuant to distribution agreements.

### **Assets of Tricon**

[7] The assets of Tricon consist mainly of accounts receivable, taxes receivable, television programs in development, and investment in television programs.

[8] The book value of the applicants' accounts receivable totaled approximately \$3.7 million at October 31, 2016. For the production business, the accounts receivable include all unpaid production license fees — being fees that are due when a production reaches a contractual date or delivery milestone. For the distribution business, the accounts receivable include unpaid amounts for executed distribution contracts with a license start date which has occurred. A licence start date for a program is the date on which a broadcaster is free to start broadcasting the relevant program.

[9] Taxes receivable involve two types of tax credits. First, production services tax credits are available, under federal tax legislation, for eligible labour expenditures in respect of a production and, under Ontario tax legislation, in respect of qualifying production expenditures incurred in Ontario in respect of the production. Second, content tax credits involve a tax credit under the federal tax regime in respect of qualifying labour expenditures paid to Canadian residents and, under Ontario tax legislation, paid to Ontario residents. Tax credits are claimed on the corporate tax return of the producer corporation when production is completed and delivered. There are currently approximately \$7 million in tax refunds owing to Tricon which are scheduled to be collected through the end of 2017.

[10] Television programs in development represent the capitalized amounts spent on productions in the development stage, net of any funding provided by networks. Investment in television programs includes minimum guarantees provided to producers in respect of titles under distribution contracts, as capitalized under applicable accounting rules, and a portion of the production budget for Tricon-produced titles, also as capitalized in accordance with applicable accounting rules.

[11] In addition to these assets, Tricon has a substantial library for distribution purposes. Tricon's library is primarily composed of approximately 72 filmed entertainment titles produced by a Tricon entity that are owned in perpetuity and approximately 185 third party titles for which Tricon has varying contractual rights. The value of these assets is uncertain, as it is derived from the anticipated cash flow from the titles in the library.

### **Liabilities of Tricon**

[12] TFT is indebted to SunTrust Bank ("SunTrust") in the amount of USD \$10.4 million, including accrued interest, pursuant to a credit agreement dated as of August 22, 2013, as amended July 29, 2014 and October 28, 2014 (the "Credit Agreement"). SunTrust holds security interests registered against almost all of the Canadian Tricon companies and the California Tricon Companies. All of the Tricon Companies are liable in respect of the amounts advanced under the Credit Agreement.

[13] By letter dated September 14, 2016, SunTrust demanded repayment of the amounts owed by Tricon and included a notice under s. 244 of *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. As of October 31, 2016, Tricon had outstanding advances in excess of its borrowing base under the Credit Agreement in the amount of \$513,000. As a result, SunTrust is not prepared to fund Tricon further outside of CCAA proceedings.

[14] TMI has entered into distribution agreements with the Independent Film Channel ("IFC") pursuant to which TMI committed to distribute all original productions for exhibition on the IFC channel and to provide minimum guarantees of 22.5% of the overall production budget of all such shows. TMI also entered into a distribution agreement with AMC Film Holdings LLC ("AMC") for the distribution of episodes of an AMC television series, pursuant to which TMI also agreed to pay minimum guarantees per episode which escalate in respect of each season. TFT has guaranteed repayment of TMI's obligations to IFC and AMC. The aggregate Tricon liability to IFC and AMC is approximately USD \$8 million.

[15] TMI is also indebted to the Cooking Channel LLC ("CCL") for approximately \$870,000 in respect of principal and interest under a loan agreement dated June 15, 2012 relating to certain episodes of a television series. As collateral for the loan, CCL has a security interest over the interest of Tricon in the particular episodes of the television series, which may rank in priority to the security interests in favour of SunTrust.

[16] The total accounts payable and accrued liabilities of Tricon at October 31, 2016 are understood to be approximately \$10.65 million, not including the amounts owed to SunTrust, IFC, and AMC described above, of which total approximately \$6.3 million was past due.

[17] There are a number of other security registrations of Tricon Companies in favour of third parties. However, KSV advises in a supplemental report to the Pre-Filing Report dated December 12, 2016 (the "Supplemental Report") that it understands that, in each case, SunTrust has a prior ranking security interest against Tricon's assets, there are no amounts owing to such other party, or there is a subordination agreement in favour of SunTrust.

### **The Statutory Requirements**

[18] Tricon has filed a cash flow statement, and accompanying report, and financial statements, as required by s. 10(2) of the CCAA for an application under section 11 thereof. Each of the Tricon companies listed as #1-#39 in Schedule A to the Notice of Application is also a "company" within the meaning of the CCAA, as each is incorporated under the laws of Ontario. Each of the companies listed as #40-#46 in Schedule A is also a "company" within the meaning of the CCAA, as each holds funds in a Canadian bank account. I am further satisfied that each of the aforementioned companies is a "debtor company", as the total claims against TFT exceed \$5 million and all of the Tricon Companies are affiliates as well as being operationally and functionally integrated in a number of respects.

[19] Based on the extent of its current liabilities and SunTrusts' advice that it is no longer willing to advance monies under the Credit Agreement, Tricon will run out of the liquidity required to fund its operations during the week of December 12. Accordingly, Tricon is insolvent according to the expanded definition of an insolvent person in *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C. [Commercial List]) per Farley J. at paras. 25 and 26. On this basis, the Tricon Companies are "insolvent" for the purpose of the CCAA.

[20] Accordingly, I am satisfied that Tricon is eligible for protection under the CCAA. Tricon requires a stay of proceedings to provide the necessary time to wind down its business in an orderly manner, including completing two television series, while preserving its tax credits and its accounts receivable. The stay of proceedings will also allow Tricon to determine if there are any potential buyers for all or part of its business and assets, including its film library. Based on the foregoing, the granting of a stay of proceedings is consistent with the purposes of the CCAA.

### **Priority Charges**

[21] In connection with this initial application under the CCAA, Tricon seeks approval of an administration charge, a debtor-in-possession financing charge, and a directors' and officers' charge as described below. I will address each request in turn.

#### **Administration Charge**

[22] Tricon seeks an administration charge to a maximum of \$500,000 over its property to secure the fees and disbursements of the proposed monitor, its legal counsel, and counsel to Tricon (the "Administration Charge"). Section 11.52(1) of the CCAA gives the Court the authority to grant an administration charge for such purposes.

[23] Having regard to the non-exhaustive list of factors identified in *Camvest Publishing Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.) at para. 54, I consider it is appropriate

to grant such a charge having priority over all pre-existing security interests. In this regard, the following considerations are relevant.

[24] First, the nature of the Tricon assets requires the involvement of a monitor to ensure an orderly and fair wind down process.

[25] Second, each of the professionals whose fees are to be secured will play an important role in these proceedings and there is no evidence of any anticipated duplication of roles of these parties. KSV advises in the Supplemental Report that the cash flows do not include any payments to professionals from the date of the Initial Order to the date of the Comeback Motion (as defined below) and, therefore, the professionals require the benefit of the Administration Charge for fees incurred in this period.

[26] Third, the Court understands that the pre-filing fees to be secured are restricted to activities pertaining to the current restructuring of Tricon, including this application and recent activities in respect of a potential sale of Tricon's assets and properties.

[27] Lastly, KSV is of the view that the proposed Administration Charge is reasonable and appropriate in the circumstances. More generally, KSV also supports the proposed Administration Charge on the basis that there would appear to be a net benefit to the secured creditors from an orderly wind down process and no obvious prejudice to them.

[28] Section 11.52(1) of the CCAA provides that the Court may make such an order on notice to the secured creditors who are likely to be affected by the security. Notification of this motion has not been provided to all secured creditors and, accordingly, this issue is to be revisited on the Comeback Motion.

### **The DIP Charge**

[29] Tricon has received an offer for a DIP facility from SunTrust in the maximum amount of \$1.4 million (the "DIP Loan") to allow it to continue its operations throughout the CCAA proceedings. The terms of the DIP Loan are set out in a term sheet dated December 11, 2016 (the "DIP Term Sheet"). The terms of the DIP Loan are understood to be substantially similar to the terms of the term sheet attached as Appendix "F" to the Pre-Filing Report. I note that, among other provisions, the DIP Term Sheet provides that SunTrust has the option to apply proceeds generated from tax credits, over which it already has the first charge under the Credit Agreement, to reduce the outstanding amount under the Credit Agreement.

[30] In the Pre-Filing Report, KSV states that it believes that the terms of the DIP Loan are reasonable in the circumstances. In this regard, KSV notes the following.

[31] As the applicants' principal lender, SunTrust is not prepared to have another lender rank in priority to its pre-filing advances. SunTrust is also unwilling to provide interim financing to fund these CCAA proceedings on any other terms. Further, without the DIP Loan, the applicants will be unable to fund their operations. KSV is also of the view that the cost of the DIP Loan appears consistent with other recent debtor-in-possession financings. Lastly, KSV believes that no creditor will be materially prejudiced by the DIP Loan and, to the contrary, the DIP Loan will enhance the prospects of maximizing the value of Tricon.

[32] The DIP Loan requires that all advances under the DIP Loan be secured by a charge (the “DIP Charge”) in the principal amount of \$1.4 million ranking in priority to all other security interests and other charges other than the Administration Charge, statutory deemed trusts, liens for unpaid source deductions, and such other permitted priority liens as may be agreed by SunTrust.

[33] This application was brought on an urgent basis and without notice to Tricon’s creditors, other than SunTrust, which is supporting this application. Accordingly, until the comeback motion scheduled for December 20, 2014 (the “Comeback Motion”), Tricon seeks approval of a priority position for the DIP Charge, subject only to the Administration Charge, but limited to the amount of \$200,000. Funding up to this amount may be required prior to the Comeback Motion to meet any critical expenses necessary to preserve Tricon’s business. The remaining \$1.2 million coverage of the DIP Charge will rank behind all other secured creditors of Tricon that have not received notice of this application until the Comeback Motion.

[34] The Court has authority to approve the DIP Charge pursuant to s. 11.2(1) of the CCAA. Section 11.2(4) sets out certain factors to be considered by a court in approving such a charge, which are supplemented by the factors set out in *Canwest Global Communications Corp. Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.) [*Canwest Global*], at paras. 31 and 34. The following considerations support the approval of the DIP Charge limited to \$200,000 as described above.

[35] A principal consideration is the limited extent of the DIP Charge contemplated prior to the Comeback Motion and the fact that the availability of an advance of up to \$200,000 under the DIP facility will maintain the stability of the Tricon business until the Comeback Motion, which should enhance the prospect for recoveries of all creditors. In addition, KSV is of the view that the proposed draws during this period would be limited to funding critical expenses that are likely to be incurred even if Tricon’s business were to be discontinued, including payroll, rent and utilities. I also note that Tricon’s cash flows indicate that it is able to maintain its business operations throughout this period and that Tricon has the support of SunTrust, its largest creditor. Lastly, KSV supports approval of the DIP Charge on the basis that there is no obvious prejudice to any stakeholder and that it is in the interests of all stakeholders for Tricon to be able to draw on the DIP Loan to the limited extent contemplated to maintain the *status quo* until the Comeback Motion.

#### **Directors and Officers Charge**

[36] Tricon also seeks approval for a charge over its property in favour of its former and current directors in the amount of \$250,000 (the “Directors and Officers Charge”) which, after the Comeback Motion, Tricon would request rank in priority to all charges and security interests other than the Administration Charge and the DIP Charge.

[37] The Court has jurisdiction to grant such a charge under s. 11.51 of the CCAA. In *Canwest Global*, Pepall J. (as she then was) stated the purpose of a directors and officers charge as follows, at para. 48:

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could

incur during the restructuring: *Re General Publishing Co.* [(2003), 2003 CanLII 7787 (ON SC), 39 C.B.R. (4th) 216.] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. [...]

[38] In *Jaguar Mining Inc. Re*, 2014 ONSC 494, 12 C.B.R. (6th) 290, at para. 45, Morawetz R.S.J. set out a list of factors to be considered in approving a directors and officers charge. In this regard, I note the following, which collectively support approval of the Directors and Officers Charge.

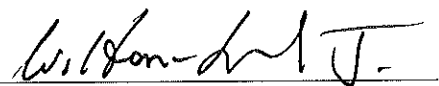
[39] The amount of the Directors and Officers Charge is reasonable given the potential liabilities involved, which are limited to liabilities incurred during the period of the CCAA proceedings, principally in respect of employee obligations, source deductions, and HST statutory remittances. KSV understands that Tricon is current on all pre-filing obligations for which directors may be personally liable. The cash flow forecast filed by Tricon contemplates that all such amounts will continue to be paid in the ordinary course and that Tricon will have sufficient liquidity to do so, given approval of the DIP Charge. In addition, the evidence establishes that adequate indemnification insurance is not available at a reasonable cost. Further, the charge will not apply to any obligations incurred by a director or officer as a result of gross negligence or wilful default. Lastly, KSV supports the proposed charge on the basis that the continued involvement of the sole director of TFT is beneficial to the business of Tricon and these proceedings, including the contemplated orderly wind-down of Tricon.

[40] Section 11.51 requires notice to secured creditors who are likely to be affected by the security or charge. As mentioned, as none of the creditors, apart from SunTrust, have been notified of this application and, accordingly, the priority of this charge is to be addressed at the Comeback Motion.

### Chapter 15 Proceedings

[41] On this application, Tricon also seeks the appointment of KSV, as the proposed monitor, to be the foreign representative of Tricon with respect to the proposed CCAA proceedings. I consider that is appropriate to exercise the Court's discretion under s. 56 of the CCAA to so order.

[42] Given the activities of TMI in California, it may be necessary to commence proceedings under Chapter 15 of Title 11 of the United States Code in the United States Bankruptcy Court for the Central District of California to enforce the stay of proceedings in this Initial Order in the United States in order to facilitate the orderly wind down of Tricon's business. Among other things, this reflects the operational integration of Tricon's American and Canadian businesses.



Wilton-Siegel J.

Date: December 19, 2016