

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**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"**

Applicants

FACTUM OF THE APPLICANTS
(Application Returnable December 12, 2016)

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PART I - NATURE OF THE APPLICATION

1. 1462598 Ontario Inc., carrying on business as Tricon Films and Television ("**TFT**") and the other companies listed in Schedule "A" (collectively with TFT, the "**Applicants**" or "**Tricon**") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), including:

- (a) a stay of proceedings;
- (b) authority to enter into, and borrow under, the credit facility extended by SunTrust Bank ("**SunTrust**") pursuant to the DIP Commitment Letter (defined below); and
- (c) an order granting the following charges over the Property (defined below)::

- i. a priority charge in favour of the Applicants' counsel, the Monitor (defined below) and the Monitor's counsel;
- ii. a priority charge in favour of the DIP Lender to secure all amounts owing under the DIP Commitment Letter; and
- iii. a priority charge in favour of the directors and officers of the Applicants.

2. For the reasons explained below, this application is being brought without notice to the Applicants' creditors other than SunTrust, and a date will be set for a motion (the "**Comeback Motion**") in the near term. Until the Comeback Motion, the Applicants are seeking a priority DIP Charge (defined below) in the amount of \$200,000 which is required to meet any critical expenses necessary to preserve their business, and priority for the Administration Charge (defined below). The proposed monitor supports this relief on the basis that there is no prejudice to any creditor as it is in the interest of all stakeholders for the Applicants to be able to draw on the DIP Facility on a limited basis to maintain the business status quo until the Comeback Motion. This will enhance the prospect of recoveries for all stakeholders and assist to maintain the stability of the business until the priority of the DIP Charge for all advances beyond \$200,000 is approved on notice to all affected creditors.

PART II - THE FACTS

3. The facts with respect to this Application are more fully set out in the Affidavit of Andrea Gorfolova sworn December 9, 2016 (the "**Gorfolova Affidavit**"). Capitalized terms not defined herein shall have the meanings ascribed to them in the Gorfolova Affidavit.

A. The Applicants¹

4. Tricon's principal business is the production and distribution of multi-genre content developed for film and television. The companies that make up Tricon are generally organized by line of business and/or geographical location, with the majority of the companies (those containing the term 'Tricon Television') being single-purpose entities for the production of specific television programs.

5. Tricon Films Inc. ("**TFI**") is an Ontario corporation which holds the majority of Tricon's Canadian distribution assets and contracts. Tricon Media, Inc. ("**TMI**"), a California corporation, and Tricon Films (UK) Limited ("**TFI (UK)**"), a U.K. corporation, hold the balance of Tricon's distribution assets and contracts.

6. On each of June 1, 2015 and June 1, 2016, the company then known as 'Tricon Television Inc.' amalgamated with each of TFI's single-purpose television series production subsidiaries with respect to productions that had been completed to form a new entity called Tricon Television Inc. The company now known as Tricon Television Inc. (Ontario corporation #1955547, hereinafter referred to as "**TTI**") was formed on June 1, 2016 as a result of the amalgamation of 16 companies.

7. Tricon Interactive Inc. was established to hold Tricon's digital projects. It is not currently carrying on any business activities.

¹ Gorfolova Affidavit, paras. 3-8.

B. Tricon's Business²

i. Lines of Business

8. The head office of Tricon is in Toronto. Tricon also has an office in Los Angeles. From these leased locations, Tricon creates high-quality award winning content for various companies including Scripps Networks (including Great American Country, HGTV, DIY, Cooking Channel and Food Network), A&E Networks, Showtime, NBC Universal, Shaw Media, Corus Entertainment and Bell Media. Tricon has amassed a production roster of over 800 hours of original content.

9. Through Operator Post Inc. ("**OPI**"), Tricon also does its own post-production work from its Toronto premises. OPI provides in-house transcription and closed-captioning services utilizing a dedicated transcribing team. Its audio post-production facility handles all of the Applicants' voiceover and audio post-production needs (including 4 channel M&E versioning and 7.1 surround).

10. Tricon's distribution arm features a broad catalogue of high quality, multi-platform content, including primetime scripted drama and comedy, kids, lifestyle, factual and documentary series and specials. It currently represents a catalogue of over 3,000 hours of content which is seen on over 150 broadcast and digital platforms including Netflix, Hulu, Crackle, Google, Apple, NBC Universal, AMC Networks, Turner, A&E Networks, Scripps Network, Viacom, Canal +, Foxtel and Sky Broadcasting. Its library is primarily comprised of approximately 72 filmed entertainment titles produced by a Tricon entity and owned into

² Gorfolova Affidavit, paras. 9-22.

perpetuity, and approximately 185 third party titles for which Tricon has varying contractual rights.

ii. Employees and Contractors

11. Tricon has approximately 22 employees and another approximately 15 independent contractors, of which 32 are located in Canada and 5 are located in the U.S. None of the employees or contractors are unionized. None of the Tricon companies maintain or contribute to a pension plan for its employees.

iii. Bank Accounts and Cash Management

12. In the ordinary course of their business, the Tricon companies use a centralized cash management system (the “**Cash Management System**”) to, among other things, collect funds and pay expenses associated with their operations. The Cash Management System gives Tricon the ability to easily and cost-effectively control corporate funds and ensure cash availability for its operations.

13. The Tricon companies maintain bank accounts in Canada, the U.S. and the U.K. A bank account is typically established for each single-purpose television series production company. Each such account is used to deposit license fees and tax credits for that specific television production and to pay production costs.

14. Any surplus or deficit for a television series production company is consolidated with/funded by TFT by way of transfers between the single-purpose television series production company bank accounts and a TFT bank account.

15. Distribution contracts are entered into by either TFI, TMI or TFI (UK). Sales revenues are collected into accounts owned by those companies and are generally used to pay the respective companies' expenses.

16. U.S. sales collections are generally deposited to TMI's account at SunTrust, and are used to pay TMI's expenses, including the L.A. office overhead expenses. Any surplus or deficit at TMI is consolidated with/funded by TFT by way of transfers between the bank accounts of TMI and TFT.

17. All intercompany transfers are properly recorded in the books of Tricon.

18. Continued use of and access to the Cash Management System will be required by the Applicants in order to operate efficiently during the CCAA process and to avoid the process of changing bank account details with CRA for the purpose of receiving tax credits, which process can result in confusion and delay.

C. Assets and Liabilities³

i. Assets

19. The assets of the Applicants as reflected in its financial statements consist mainly of accounts receivable, taxes receivable, television programs in development and investment in TV programs, described in more detail below.

³ Gorfolova Affidavit, paras. 23-48.

a. Accounts Receivable

20. The accounts receivable for the production business include all unpaid production license fees. A production license fee is similar to a project billing - license fees are due when a production reaches contracted dates or delivery milestones (such as a production start date, the delivery of episodes, etc).

21. The accounts receivable for the distribution business include unpaid amounts for all executed contracts with a license period start date (“**LPSD**”) on or prior to the reporting date of the relevant financial statements. The LPSD is the date at which the broadcaster is free to start broadcasting the program. Distribution sales and accounts receivable have been recorded in either TFI, TMI or TFI (UK), depending on the company that entered into the relevant contract.

22. As at October 31, 2016, Tricon’s production and distribution accounts receivable totalled in the aggregate approximately CAD \$3.7 million.

b. Taxes Receivable

23. Taxes receivable involve two types of tax credits – Production Services Tax Credits and Content Tax Credits, each having an Ontario and Federal component. There are presently approximately \$7 million of CPTC refunds owing to the Applicants, which are scheduled to be collected through to the end of 2017.

c. TV Programs in Development

24. Every television production goes through a development stage before it is produced as a full, episodic production. Tricon develops various ideas for shows and ‘pitches’ them to

broadcasters. Development costs are reviewed on a quarterly basis by title to determine if they should be expensed or if there is still potential for continued development.

d. TV Programs in Progress

25. Production revenue is not recognized until the production is completed and delivered. Production costs for shows not yet delivered are temporarily moved to 'work-in-progress' until such time that the production is completed and delivered.

e. Investment in TV Programs

26. On the production side, for Tricon-produced titles, a portion of the production costs are capitalized and amortized against future distribution revenues.

27. On the distribution side, minimum guarantees ("MGs") provided to producers are capitalized to the balance sheet and amortized to the income statement as sales revenues are collected. MGs are prepaid royalties and are recoupable. MGs are capitalized and amortized over estimated future revenues. The costs for dubbing are also capitalized.

28. "Investment in TV Programs" includes capitalized MGs for third party distribution contracts and a portion of the production budget for Tricon-produced titles.

ii. Liabilities

a. SunTrust

29. TFT is indebted to SunTrust in the amount of approximately USD \$10.1 million plus interest of approximately USD \$290,000 which continues to accrue pursuant to a Revolving Credit, Security, Guaranty and Pledge Agreement dated as of August 22, 2013, as amended July

29, 2014 and October 28, 2014 (the “**Credit Agreement**”). TFT’s obligations to SunTrust were guaranteed by all of the other Applicants.

30. SunTrust holds security interests registered against all of the Canadian Applicants’ assets⁴ which have been registered under the *Personal Property Security Act* (Ontario). For those Applicants located in California, the security interest of SunTrust has also been registered under the Uniform Commercial Code in that state.⁵

31. Following SunTrust’s notification to TFT that it was in default under the Credit Agreement, the Applicants entered into a Forbearance Agreement with SunTrust on August 19, 2015 (the “**Forbearance Agreement**”), providing for a forbearance of SunTrust’s enforcement rights against the Applicants, on terms and conditions as set out therein, until October 31, 2015. Pursuant to modification agreements signed by the Applicants, the forbearance period was extended to January 31, 2016, then to April 30, 2016 and then to July 31, 2016. Since August 1, 2016, the loan facilities under the Credit Agreement have been offered by SunTrust on a day-to-day basis and SunTrust has been in a position to demand repayment and enforce its security, and has reserved its right to do so.

32. SunTrust demanded repayment of the amounts owed by Tricon by letter dated September 14, 2016, which included a notice under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”).

33. Pursuant to the terms of the Forbearance Agreement, tax credit receipts for the various television productions are being used to permanently reduce the debt owed to SunTrust.

⁴ Other than Tricon Television80 Inc. and Tricon Television81 Inc.

⁵ Other than Tricon US Productions1 Inc., Tricon US Productions14 Inc. and Tricon US Productions15 Inc.

b. AMC/IFC

34. TFT guaranteed repayment of the obligations of TMI owed to Independent Film Channel LLC (“**IFC**”) and AMC Film Holdings LLC (“**AMC**”), as described in more detail below.

35. The total amounts owed to AMC and IFC in the aggregate total approximately USD \$8 million.

c. Cooking Channel, LLC

36. TMI is currently indebted to Cooking Channel, LLC (“**CCL**”) for approximately USD \$870,000 in respect of principal and interest owed under a loan agreement dated June 15, 2012 relating to certain episodes of the television series titled ‘*Nadia G’s Bitchin Kitchen*’ which were produced by Tricon Television62 Inc. (“**T62**”). As collateral for that loan, CCL has registered a security interest over the interests of TMI, TFI and T62 in the aforesaid television episodes, but no other assets.

d. Other Secured Creditors

37. The following parties also have registered security interests against Tricon:

- Actra Performers’ Rights Society
- Bravo Media Productions LLC
- Cooking Channel, LLC
- Independent Film Channel LLC
- National Bank of Canada
- Ovation R&G, LLC
- Roynat Inc.
- Shaw Media Inc
- Union of B.C. Performers
- Universal City Studio Production, LLLP
- Walt Disney EMEA Productions Limited
- Xerox Canada Ltd

e. Unsecured Creditors

38. Based on the Applicants' books and records, the Applicants' total accounts payable and accrued liabilities were approximately CDN \$10.65 million as at October 31, 2016 (which does not include the amounts owed to SunTrust, IFC or AMC), of which approximately CDN \$6.3 million was past due. The largest unsecured obligations are owed by TFI to producers in connection with their respective productions. TFI is in arrears of its reporting and payment obligations to producers, including over \$5 million owed to Beedie Film Distribution Inc.

D. Events Leading To Tricon's Current Circumstances⁶

39. Over the last 15 years, Tricon has grown into a reputable production and distribution business.

40. To grow its distribution business, and in order to compete on an international scale, it was decided that Tricon would invest into acquiring more product. Tricon started looking for opportunities and secured a \$20 million borrowing base credit facility with SunTrust to (among other things) finance Tricon's growth.

41. In 2012, TMI entered into a distribution agreement with IFC pursuant to which TMI committed to, among other things, become the distributor for all original productions for exhibition on the IFC channel, and to provide minimum guarantees of 22.5% of the overall production budget on all such shows. At the time, there were about 2-3 series per year being produced for exhibition on the IFC channel at budgets of between \$200,000 and \$300,000 per

⁶ Gorfolova Affidavit, paras. 49-62.

episode. TMI intended to pre-sell these shows during the production process in order to offset its exposure, and had also secured an output deal with Bell Media for the Canadian territory.

42. In October 2013, TMI also entered into a distribution agreement with AMC for an AMC television series under which TMI agreed to pay a minimum guarantee of over \$800,000 per episode for the first season and increasing amounts per episode for each subsequent season. TMI's obligations under that agreement were guaranteed by TFT on an unsecured basis.

43. Tricon also made further commitments for scripted programs with a few individual producers, and built a business plan to exploit its product and grow its distribution business internationally.

44. Within one year, the budgets of the IFC shows doubled and there were more series than expected. There were also significant changes in the international marketplace, as new U.S. content producers (such as Netflix and Hulu) emerged and almost every U.S. channel started to invest into production of scripted series. These developments caused the international markets to be flooded with content, leading to a reduction in prices and leaving few buyers outside of all the studio and output deals.

45. As a result of these circumstances, Tricon's sales dropped significantly and it was unable to continue making payments for advances to which it had committed (the most significant of which were owed to IFC) on a positive cash flow basis.

46. In November 2014, TMI was able to renegotiate its distribution agreements with IFC and AMC, but by then significant losses had been suffered by the Applicants. As part of the renegotiation with IFC, TMI granted a security interest in favour of IFC over all of TMI's assets

ranking subordinate to SunTrust's security position, and TFT guaranteed TMI's obligations to IFC.

47. As explained above, the Forbearance Agreement with SunTrust expired on July 31, 2016, and SunTrust is now in a position to demand repayment of all amounts owed and enforce its rights against the Applicants.

48. To deal with its financial difficulties, Tricon effected various cost-cutting measures, including staff reductions, a hold on new equipment purchases, performing only essential repairs on existing equipment, laying off staff between productions, consolidating offsite storage and reducing travel.

49. The majority of Tricon's production activities were also reduced, except for 'Counterfeit Cat' and 'The Lodge', each of which is believed to have positive value.

50. Tricon also undertook a process starting in early 2016 to solicit interest from investors or buyers, both directly and through intermediaries, which resulted in various letters of intent being submitted for investment in or acquisition of Tricon or parts of its business. Tricon continued to hold discussions with one of those parties, a strategic buyer, with a view to possibly completing a sale transaction in respect of some of Tricon's assets and business on a going-concern basis. Following protracted discussions, which included participation by SunTrust, it became apparent on or about December 7, 2016 that the parties were unable to conclude an agreement.

51. By letter dated November 21, 2016, lawyers representing IFC and AMC notified TMI that (among other things) IFC and AMC terminated their agreements with TMI, demanded the

return of IFC programs, and demanded that TMI notify all sub-distributors and/or licensees that all gross receipts from the IFC programs be paid directly to IFC.

52. Tricon is facing a liquidity crisis which has necessitated this CCAA application. Based on its current projections, Tricon expects to have insufficient cash on hand to meet its day-to-day obligations during the week of December 12, 2016. Tricon also continues to be in an “overadvance” position on its borrowing base reports filed with SunTrust.

PART III - LAW AND ARGUMENT

A. THE APPLICANTS MEET THE CCAA STATUTORY REQUIREMENTS

i. Each of the Applicants is a “debtor company” under the CCAA

53. Pursuant to section 3(1) of the CCAA, the CCAA applies to a “debtor company or affiliated debtor companies” if the total claims against the company or affiliated companies exceed \$5 million.

54. The Applicants are eligible for protection under the CCAA since they have total claims against them that far exceed \$5 million.

55. Under Section 2(1) of the CCAA, “company” and “debtor company” are defined as follows:

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

...

“debtor company” means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

56. Companies 1 to 39 listed in Schedule “A” are each corporations incorporated under the *Ontario Business Corporations Act*, RSO 1990, c C.38, and therefore are each a “company” within the meaning of the CCAA.⁷

57. Companies 40 to 46 are also “companies” within the meaning of the CCAA because they are foreign corporations having assets within Canada, being funds held on deposit in a Canadian bank account.⁸

58. In *Re Cinram*, Justice Morawetz (as he then was) held that holding funds in a Canadian bank account met the test for being a “company” under the CCAA:⁹

Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, bring a foreign corporation within the definition of “company”. In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

⁷ Gorfolova Affidavit, para. 63.

⁸ Gorfolova Affidavit, para. 63.

⁹ *Re Cinram*, 2012 ONSC 3767 [“*Cinram*”], paras. 46 and 47.

59. When determining whether an applicant is a debtor company on the basis of having nominal assets in Canada, courts have stated that they will not engage in a qualitative or quantitative analysis of the applicant's assets, as doing so would undermine the effectiveness of the CCAA. It is well-established that the creation of "instant assets" by a debtor depositing funds in a Canadian bank account is effective for the purpose of qualifying under the CCAA definition of "company".¹⁰

60. Furthermore, the Applicants are part of a consolidated business with operations in both Canada and the United States. The Tricon companies are operationally and functionally integrated in several respects, including being organized along business lines rather than by jurisdiction of incorporation and having common directors, officers and management. Where the applicants are an integrated but international group of companies, all of whom are integrated across business lines with at least nominal Canadian operations, the CCAA should be interpreted in a manner that permits a coherent resolution of claims in a singular forum.¹¹

ii. Each of the Applicants is insolvent

61. The insolvency of a debtor under the CCAA is assessed as of the time of filing of the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the BIA, which defines an insolvent person as a person: (i) who is not bankrupt; (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

¹⁰ *Cinram*, para. 48.

¹¹ *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, at para. 83.

- (a) is for any reason unable to meet its obligations generally as they become due;
- (b) has ceased paying its current obligations in the ordinary course of business as they become due; or
- (c) the aggregate of its property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.¹²

62. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.¹³

63. In *Stelco*, Justice Farley applied an expanded definition of insolvent person in the CCAA context to reflect the “rescue” emphasis of the CCAA, modifying part (a) of the BIA’s definition of “insolvent person” to include a financially troubled corporation that is “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.¹⁴

64. The Applicants meet the test for insolvency under the BIA and the expanded definition set out in *Stelco* as a result of the following circumstances:

- (a) the Applicants have liabilities owing to SunTrust totaling approximately USD \$10.4 million, as well as other amounts owed to various other creditors;

¹² BIA, section 2 (“insolvent person”); *Re Stelco Inc.* (2004), 48 CBR (4th) 299 (Ont. Sup. Ct. [Commercial List]; leave to appeal to CA refused [2004] OJ No. 1903; leave to appeal to SCC refused [2004] SCCA No 336 (“**Stelco**”).

¹³ *Stelco*, at paras. 26 and 28, Applicants’ BOA, Tab 3.

¹⁴ *Stelco*, at paras. 25 and 26, Applicants’ BOA, Tab 3.

- (b) the Applicants are unable to meet their obligations in the ordinary course as they come due; and
- (c) the Applicants will run out of liquidity to generally fund their operations during the week of December 12, 2016. Their current liquidity is subject to SunTrust's discretion to continue advancing funds in light of Tricon's "over-advance" position.

65. The Applicants respectfully submit that they each meet the traditional test for insolvent person under the BIA and the expanded definition set out in *Stelco* and are therefore debtor companies under the CCAA.

B. THE STAY OF PROCEEDINGS IS APPROPRIATE

66. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings wherever possible.¹⁵

67. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.¹⁶

¹⁵ *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (WL) (Ont. C.A.), at paras. 22 and 56-60.

¹⁶ *Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (WL) (Ont. Gen. Div.), at para. 6.

68. It is also consistent with the purposes of the CCAA to order a stay of proceedings to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.¹⁷

69. Pursuant to section 11.02 of the CCAA, the Court has discretion to make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, “on any terms that it may impose”, provided the court is satisfied that circumstances exist that make the order appropriate.

70. The Applicants require a stay of proceedings in order to provide the necessary breathing space to wind down their business in an orderly manner including, potentially, completing certain productions, while preserving their tax credits which have significant value. During the CCAA process, the Applicants intend to limit their production activities primarily to the completion of two television series, being ‘Counterfeit Cat’ and ‘The Lodge’. Both of these productions are substantially complete and have significant accounts receivable and tax credits which the Applicants wish to preserve and collect.¹⁸

71. The Applicants also need the stay of proceedings in order to allow them an opportunity to determine whether there are other potential buyers for all or part of their business and assets, including the sale or other form of realization with respect to the Tricon film library.¹⁹

¹⁷ *Lehndorff General Partners Ltd.* (1993), *supra*, at para. 7.

¹⁸ Gorfolova Affidavit, para. 69.

¹⁹ Gorfolova Affidavit, para. 70.

72. Without a stay of proceedings and the interim financing described below, material production and distribution contracts may be terminated due to Tricon's insolvency and other defaults, payroll and rent obligations will not be met in the near term, and Tricon's ability to collect its tax credits and accounts receivable will be impaired.²⁰

73. For the foregoing reasons, it is respectfully submitted that circumstances exist in the present case that make it appropriate to grant the Applicants the requested protection under the CCAA.

C. THE CHARGES

74. The Applicants seek approval of certain court-ordered charges (the "**Charges**") over their current and future assets, undertakings and properties (the "**Property**").

75. At the initial return date of December 12, 2016, the priority sought for the Charges will only affect the secured party to be served with notice of the hearing, being SunTrust.

76. Assuming that the requested relief is granted by the Court on December 12, 2016, the Applicants will schedule the Comeback Motion at which time they will seek to elevate the priority of the Charges on notice to all secured parties likely to be affected by such priority.

i. The Administration Charge is Appropriate

77. The Applicants are seeking a charge over the Property in the maximum amount of \$500,000 to secure the fees and disbursements at the standard rates and charges of the proposed monitor, its legal counsel and counsel to the Applicants (the "**Administration Charge**").

²⁰ Gorfolova Affidavit, para. 71.

78. Section 11.52 of the CCAA confers on CCAA courts the statutory jurisdiction to grant an administration charge:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

79. In *Re Canwest Publishing Inc.*, this Court provided a list of non-exhaustive factors to consider in assessing the appropriateness of the administration charge being sought:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.²¹

²¹ *Canwest Publishing Inc., Re* (2010), 63 C.B.R. (5th) 115 (WL), 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), at para. 54.

80. The Applicants submit that this is an appropriate circumstance for this Court to grant the Administration Charge with priority over pre-existing security interests. Each of the professionals whose fees are to be secured by the Administration Charge will play a critical role in these proceedings.

81. The Applicants worked with the proposed monitor to estimate the quantum of the Administration Charge, which is reasonable and appropriate in the circumstances. The proposed monitor is supportive of the proposed Administration Charge.

ii. The DIP Charge is Appropriate

82. The Applicants seek approval of a debtor-in-possession interim credit facility (the “**DIP Facility**”) to provide them with the funds necessary to continue their operations throughout these CCAA proceedings.

83. Tricon received an offer for interim financing from SunTrust, which it evaluated with the assistance of the proposed monitor. After good faith negotiations, Tricon and SunTrust were able to finalize the terms of the proposed financing.²²

84. An essential condition of the DIP Facility is that advances thereunder are secured by a charge (the “**DIP Charge**”), ranking in priority to all other obligations other than the Administration Charge, statutory deemed trusts and liens for unpaid source deductions and such other permitted priority liens as may be agreed to by SunTrust.

85. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession financing charge:

²² Gorfolova Affidavit, paras. 75-78.

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

86. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant an interim financing charge:

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

87. The above list of factors is not exhaustive. The Court may also consider additional factors in determining whether to grant an interim financing charge.²³

88. In *Canwest Global*, Justice Pepall (as she then was) set out important factors that may be considered in addition to those listed above:²⁴

²³ Section 11.2 of the CCAA.

- (a) whether notice has been given to secured creditors likely to be affected by the security or charge;
- (b) whether the amount to be granted under the interim financing facility is appropriate and required having regard to the debtors' cash-flow statement; and
- (c) whether the charge secures an obligation that existed before the order approving the interim financing facility was made.

89. Until the Comeback Motion, the Applicants are seeking priority for the DIP Charge ahead of the interests of any person other than the beneficiaries of the Administration Charge - whether or not served with notice of the application for this Order - in the amount of \$200,000. This funding is required prior to the Comeback Motion to meet any critical expenses necessary to preserve the Applicants' business. The proposed monitor supports this relief on the basis that there is no prejudice to any creditor as it is in the interest of all stakeholders for the Applicants to be able to draw on the DIP Facility on this limited basis to maintain the business status quo until the Comeback Motion. This will enhance the prospect of recoveries for all stakeholders and assist to maintain the stability of the business until the priority of the DIP Charge for all advances beyond \$200,000 is approved on notice to all affected creditors.

90. The Applicants respectfully submit that the granting of the DIP Charge as described above is appropriate in the circumstances of this case given that Tricon urgently requires interim financing to continue to operate. Without access to interim financing, Tricon would be forced to cease its operations, to the detriment of all of its stakeholders.

²⁴ *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (S.C.J. [Commercial List]), paras. 31 and 34.

iii. The D&O Charge is Appropriate

91. The Applicants seek a charge over the Property in favour of Tricon's former and current directors in the amount of \$250,000 (the "**Directors' Charge**") in order to protect their director and officer from the risk of significant personal exposure. The Directors' Charge is proposed to rank in priority to all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, other than the Administration Charge and the DIP Charge.

92. Section 11.51 of the CCAA provides the Court the statutory jurisdiction to grant the Directors' Charge and provides as follows:

11.51(1) *Security or charge relating to director's indemnification* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against the obligations and liabilities that they may incur as a director or officer of the company after commencement of proceedings under this Act.

11.51(2) *Priority* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) *Restriction* – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) *Negligence, misconduct or fault* – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

93. In approving a similar charge in *Canwest Global*, Justice Pepall applied section 11.51 of the CCAA and noted that the Court must evaluate the propriety of the amount of the charge in light

of obligations and liabilities that may be incurred by the directors after the commencement of proceedings. Justice Pepall held as follows:

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 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. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

94. The Court in *Jaguar Mining Inc, Re.* stated that in order to grant a charge in favour of the directors, the Court must be satisfied of the following factors:²⁵

- (a) notice has been given to the secured creditors likely to be affected by the charge;
- (b) the amount is appropriate;
- (c) the applicant could not obtain adequate indemnification insurance for the director at a reasonable cost; and
- (d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

95. The Applicants submit that the above noted factors are satisfied in this case. The amount requested is reasonable in the circumstances having regard to the potential liabilities. The Applicants are unable to obtain adequate indemnification insurance for the directors at a reasonable cost. The Directors' Charge does not apply in respect of any obligation incurred by

²⁵ *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para 45.

the director as a result of the director's gross negligence or wilful misconduct. Further, the proposed monitor has advised that it is supportive of the Directors' Charge.

96. The Applicant respectfully submits that this is an appropriate case to grant a charge in favour of their director and that the amount of the Directors' Charge is reasonable in the circumstances.

D. CHAPTER 15 PROCEEDING

97. Should the relief sought under the CCAA be granted by this Court, the Applicants may 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, if requested by SunTrust or otherwise with its consent. It is proposed that KSV (as monitor, if appointed) would act as the Applicants' Chapter 15 "foreign representative" if such a proceeding is commenced.

98. Section 56 of the CCAA grants the Court the authority to appoint "any person or body" to act as a representative for the purpose of having CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.²⁶

99. It may be necessary to seek recognition of the Initial Order by the United States Bankruptcy Court in order to enforce the stay of proceedings requested in the Initial Order in the United States and to facilitate the orderly wind down of Tricon's business. Accordingly, Tricon seeks authorization in the Initial Order for the appointment of KSV Kofman Inc., with authority

²⁶ CCAA, s. 56.

to act as foreign representative of Tricon, if necessary to seek recognition of these proceedings in the United States under Chapter 15 of the Bankruptcy Code.²⁷

100. Courts have consistently encouraged comity and cooperation between courts in cross-border insolvencies to enable enterprises to restructure on a cross-border basis. Authorizing KSV to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to these principles.²⁸

101. The recognition of these proceedings in the United States is necessary and appropriate in the circumstances because, among other things, Tricon operates a cross-border business that is operationally integrated. For instance, Tricon has creditors in the United States that could seek to enforce their rights or commence proceedings against one or more of the Applicants.²⁹

102. It is respectfully submitted that for the above reasons, it is appropriate for this Court to exercise its jurisdiction under section 56 of the CCAA to appoint KSV as the foreign representative of Tricon with respect to the proposed CCAA proceedings.

PART IV - RELIEF REQUESTED

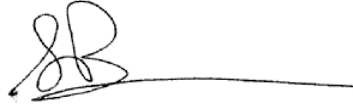
103. For the reasons set out above, the Applicants request that this Court grant an order substantially in the form of the Initial Order included in the Application Record.

²⁷ *Nortel Networks Corporation (Re)*, 50 CBR (5th) 77 at para. 43; *Cinram*, paras. 31-35.

²⁸ *Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712, para. 38; *Re Lear Canada* (2009), 55 CBR (5th) 57, paras. 11 and 17; *Re Babcock & Wilcox Canada Ltd.* (2000), 18 CBR (4th) 157, para. 9.

²⁹ *Re iMarketing Solutions Group*, 2013 ONSC 2223, at para. 30.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2016.



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Lawyers for the Applicants

Schedule “A”

1. 1462598 Ontario Inc.
2. Operator Post Inc.
3. Tricon Education Inc.
4. Tricon Films Inc.
5. Tricon Interactive Inc.
6. Tricon Television Inc.
7. Tricon Television10 Inc.
8. Tricon Television44 Inc.
9. Tricon Television49 Inc.
10. Tricon Television54 Inc.
11. Tricon Television55 Inc.
12. Tricon Television58 Inc.
13. Tricon Television59 Inc.
14. Tricon Television62 Inc.
15. Tricon Television63 Inc.
16. Tricon Television64 Inc.
17. Tricon Television65 Inc.
18. Tricon Television66 Inc.
19. Tricon Television67 Inc.
20. Tricon Television68 Inc.
21. Tricon Television69 Inc.
22. Tricon Television70 Inc.
23. Tricon Television71 Inc.
24. Tricon Television72 Inc.
25. Tricon Television73 Inc.
26. Tricon Television74 Inc.
27. Tricon Television75 Inc.
28. Tricon Television76 Inc.
29. Tricon Television77 Inc.
30. Tricon Television78 Inc.
31. Tricon Television79 Inc.
32. Tricon Television80 Inc.
33. Tricon Television81 Inc.
34. Tricon Television82 Inc.
35. Tricon Television83 Inc.
36. Tricon Television84 Inc.
37. Tricon Television85 Inc.
38. Tricon Television86 Inc.
39. Tricon Television87 Inc.
40. Tricon Media Holdings, Inc.
41. Tricon Media Productions, Inc.
42. Tricon Media, Inc.
43. Tricon US Productions1 Inc.
44. Tricon US Productions14 Inc.
45. Tricon US Productions15 Inc.
46. Tricon Films (UK) Limited

SCHEDULE “B” - LIST OF AUTHORITIES

1. *Re Cinram*, 2012 ONSC 3767
2. *Yukon Zinc Corporation (Re)*, 2015 BCSC 836
3. *Stelco, Inc., Re*, 2004 CarswellOnt 1211 (S.C.J. [Commercial List]).
4. *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (WL) (Ont. C.A.)
5. *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (Gen. Div. [Commercial List]).
6. *Canwest Publishing Inc. Re*, 2010 ONSC 222 (Commercial List).
7. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (S.C.J. [Commercial List]).
8. *Jaguar Mining Inc., Re*, 2014 ONSC 494 (Commercial List).
9. *Nortel Networks Corporation (Re)*, 50 CBR (5th) 77
10. *Caesars Entertainment Operating Company, Inc. (Re)*, 2015 ONSC 712
11. *Re Lear Canada* (2009), 55 CBR (5th) 57
12. *Re Babcock & Wilcox Canada Ltd.* (2000), 18 CBR (4th) 157
13. *Re iMarketing Solutions Group*, 2013 ONSC 2223

SCHEDULE “C” - RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

2. “insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

2. (1) In this Act,

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

“debtor company” means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*,

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

[...]

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or

provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value

[...]

Authorization to act as representative of proceeding under this Act

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada

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 COMPANIES LISTED IN SCHEDULE "A"

Court File No. CV16-11634-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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