



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: No Court File# assigned

DATE: November 23,2023

NO. ON LIST: 4

TITLE OF PROCEEDING: Re: Mastermind GP Inc. vs Alvarez&Marsal Canada Inc. et al

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Natasha MacParland	Mastermind GP Inc.	NMacParland@dwpv.com
Natalie Renner	Mastermind GP Inc	NRenner@dwpv.com
Kristine Spence	Mastermind GP Inc	KSpence@dwpv.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig	ALVAREZ& MARSAL CANADA INC.	zweigs@bennettjones.com
Joshua Foster	ALVAREZ& MARSAL CANADA INC.	fosterj@bennettjones.com
Evan Cobb	Canadian Imperial Bank of Commerce	evan.cobb@nortonrosefulbright.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE STEELE:

- [1] This is an application by Mastermind GP Inc. for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").
- [2] The Applicant also seeks to have the benefits of the initial order extended to Mastermind LP, a limited partnership formed under the laws of Ontario (Mastermind GP and Mastermind LP are referred to collectively as the "Mastermind Entities").
- [3] The proposed monitor is Alvarez & Marsal Canada Inc. (the "Proposed Monitor" or "A&M").
- [4] The evidence before the Court is set out in an affidavit of Lucio Milanovich, sworn November 22, 2023. Mr. Milanovich is the Interim Chief Financial Officer of Mastermind LP and the Pre-Filing Report of the Proposed Monitor, dated November 22, 2023.
- [5] On November 23, 2023, having reviewed the material filed and heard oral submissions, I granted the relief sought with reasons to follow. These are my reasons.

Background

- [6] Mastermind Toys is a specialty retailer, which sells curated toys, games, puzzles and books. The sole purpose of Mastermind GP is to act as the general partner of Mastermind LP, which operates retail stores under the retail name "Mastermind Toys".
- [7] The sole shareholder of Mastermind GP is Birch Hill Equity Partners Management Inc.
- [8] Mastermind Toys operates through 66 retail locations in eight provinces. The Mastermind Entities lease the real property used in their business.
- [9] Mastermind LP currently employs approximately 800 non-unionized employees (consisting of approximately 625 part-time and 175 full-time employees). Mastermind LP's obligations to its employees, and employee source deductions are current.
- [10] Even though the Mastermind Entities have undertaken concerted efforts to cut costs and increase revenues, over the past six years Mastermind LP has reported increasingly large net losses (other than 2021). The business is in a liquidity crisis, because of challenging market conditions, which were exacerbated by the COVID-19 pandemic. The Mastermind Entities are in default of their senior secured credit facilities and Mastermind LP can no longer pay its vendors in the ordinary course.
- [11] The Mastermind Entities, with the assistance of A&M, have explored various strategies to save the business, including a sale that recently fell through because of certain requirements under the *Competition Act* that unfortunately could not be met in a timely manner. The Mastermind Entities are in ongoing

discussions with an interested party in connection with a potential sale of a portion of the business in the CCAA proceedings.

- [12] The Mastermind Entities have determined that the only way forward is through a CCAA proceeding to provide Mastermind LP with protection so that it may pursue other strategic options (including the potential sale of a portion of the business) or the completion of a liquidation of the business.
- [13] The only secured lenders of the Mastermind Entities are Birch Hill and CIBC, both of which were present at the initial hearing.
- [14] Mastermind LP's primary secured creditor is CIBC pursuant to a credit agreement guaranteed by Mastermind GP. As of October 31, 2023, the Mastermind Entities are indebted to CIBC in the amount of \$19,460,000 under a revolving loan facility and \$6,250,000 under a business credit availability program loan.
- [15] Mastermind LP's unsecured creditors include (i) trade creditors, to which it owes approximately \$22.15 million; (ii) employees to whom it owes \$120,000 in accrued vacation pay and approximately \$65,000 per month in employee benefits; and (iii) certain charities to which it owes approximately \$40,000 that Mastermind LP has collected on their behalf.
- [16] Mastermind LP is in default of its obligations under the credit agreement with CIBC and the guarantee from Mastermind GP has become due and enforceable. CIBC has put the Mastermind Entities on notice of the defaults.
- [17] CIBC and the Mastermind Entities are working together to settle terms of a forbearance agreement. The Mastermind Entities anticipate that at the Comeback Hearing they will be seeking approval of the forbearance agreement and certain ancillary relief.

Analysis

Jurisdiction and Application of the CCAA

- [18] Under section 9 of the CCAA a debtor company may apply for protection under the CCAA in the province where its registered head office or principal place of business in Canada is located. The Mastermind Entities' chief place of business is Ontario; over half of Mastermind LP's retail stores are in Ontario. The registered head office for both Mastermind LP and Mastermind GP is in Toronto, Ontario.
- [19] I am satisfied that Ontario is the most appropriate venue for these proceedings.
- [20] I am also satisfied that the Applicant qualifies for protection under the CCAA.
- [21] The CCAA applies to a "debtor company" where the total claims against it exceed \$5 million: s. 3(1) CCAA. Mastermind GP is liable for the liabilities of Mastermind LP: *Limited Partnerships Act, R.S.O., C.L. 16, ss. 8-9*. As noted in *Lehndorff General Partner Ltd., Re*, [1993] OJ No 14 [commercial list] at para. 17: "a general partner is fully liable to each creditor of the business of the limited partnership." As

noted above, under the CIBC credit facilities alone, the Mastermind Entities have claims against them in excess of \$5 million.

[22] Section 2 of the CCAA defines a “debtor company” to include a “company” that is bankrupt or insolvent.

[23] The Applicant is a “company” as defined in the CCAA. Section 2 of the CCAA defines a “company” to mean any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, among other entities. The Applicant, Mastermind GP is a corporation under Ontario’s *Business Corporations Act*. Its sole purpose is as a general partner of Mastermind LP.

[24] For the CCAA to apply, a debtor company must be bankrupt or insolvent. Although not defined in the CCAA, the Court may interpret this term by reference to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act: Stelco Inc., Re*, 2004 CarswellOnt 1211, at para. 22; *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422, at para. 26. Section 2(1) of the BIA defines insolvent person as follows:

... “insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability 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.

[25] In *Stelco* the Court recognized the “rescue” purpose of the CCAA and broadened the definition of “insolvent” in the CCAA context. Under the CCAA, an “insolvent person” may include a “financially troubled corporation ... if it 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:” *Stelco*, at para. 26.

[26] Mastermind LP cannot pay its vendors in the ordinary course. Mastermind LP is unable to meet its obligations as they become due, as demonstrated in Mastermind LP’s most recent financial statements. The Mastermind Entities are in default of their senior secured credit facilities. As a result, some vendors have halted supply.

[27] The Mastermind Entities are insolvent and unable to meet their liabilities as they become due.

[28] I am satisfied that the Applicant qualifies for protection under the CCAA.

Application of Order to Mastermind LP

- [29] As noted above, the Applicant also seeks to extend the stay and other benefits and protections of the initial order to Mastermind LP, the operating entity. The Court has broad jurisdiction to grant such an order under s. 11 and 11.02(1) of the CCAA, which permits the Court make an initial order “on any terms that it may impose.”
- [30] The Court has extended CCAA protection to limited partnerships in other cases, where the operation of the partnership is integral and closely related to that of the applicant’s business operations: *Gesco Industries Inc. (Re)*, 2023 ONSC 3050, at paras. 19-20; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at para. 30.
- [31] In the instant case, Mastermind LP is the operating entity of the retail business. Mastermind LP is also the employer of the employees of the business and is a party to the majority of the business’ leases. Mastermind GP is the general partner of Mastermind LP and holds the sole general partnership unit and all Class B limited partnership units. Mastermind GP does not have operations. Mastermind GP exists for the sole purpose of acting as Mastermind LP’s general partner. Clearly the operation of Mastermind LP is integral and closely related to Mastermind GP.
- [32] I agree with the Applicant’s submission that it would be neither just nor appropriate to grant the stay to Mastermind GP and not extend the relief to Mastermind LP.
- [33] I am satisfied that it is appropriate to extend the CCAA protection and Initial Order to Mastermind LP.

Stay of Proceedings

- [34] On an initial application, the Court may grant a stay of proceedings of up to 10 days, provided that the Court is satisfied that circumstances exist that make the order appropriate, and the Applicant has acted in good faith and with due diligence: CCAA, 11.02(1), (3).
- [35] I am satisfied that the requested initial stay of proceedings of eight days is necessary for the Mastermind Entities to provide them with the breathing room necessary to, among other things: (1) organize their affairs in preparation for the busiest season in their industry and continue operations during this season; and (2) negotiate the potential CCAA going concern transaction and prepare for the proposed liquidation of certain stores. Further, the stay will prevent creditors of the Mastermind Entities from taking immediate action against them and will allow the Mastermind Entities to continue to manage their day-to-day operations pending the Comeback Hearing.
- [36] The Comeback Hearing is scheduled for November 30, 2023 at 10 am.

Appointment of Proposed Monitor

- [37] Section 11.7 of the CCAA provides that when granting the initial order, the Court must also appoint a monitor. A&M is the proposed monitor and is a licensed insolvency trustee within the meaning of s. 2(1) of the BIA.
- [38] A&M has consented to act as Monitor and is not subject to any restriction to act as monitor under s. 11.7(2) of the CCAA.

[39] I appoint A&M as Monitor in these CCAA proceedings.

The Administration Charge

[40] The Mastermind Entities seek an Administration Charge of \$750,000 to secure the professionals' fees and disbursements.

[41] The Court has jurisdiction to grant the Administration Charge pursuant to s. 11.52 of the CCAA. In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54, the Court identified the following non-exhaustive factors that the Court may consider when granting an administration charge:

- 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.

[42] The Mastermind Entities submit that the proposed Administration Charge is appropriate and necessary in the circumstances for the following reasons:

- a. The Mastermind Entities have a strong presence in eight provinces. Accordingly, the partial liquidation and potential going-concern transaction of Mastermind LP's business will involve a complex, multi-jurisdictional coordination;
- b. The beneficiaries of this charge will provide essential financial and legal advice;
- c. The Applicant anticipates that there will not be any unwarranted duplication of roles;
- d. The Applicant has worked with the professionals to estimate the proposed quantum of the charge. Both the Applicant and A&M believe the amount sought to be reasonable and appropriate in the circumstances; and
- e. The only secured creditors of the Mastermind Entities that will be affected by the charge, CIBC and Birch Hill, do not oppose the charge.

[43] I am satisfied that the Administration Charge is warranted, necessary, and appropriate in the circumstances.

Directors' and Officers' Charge

- [44] The Mastermind Entities seek a charge in favour of the officers and directors of the Mastermind Entities in an amount not exceeding \$4,000,000.
- [45] Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the D&O charge in an amount the Court considers appropriate, provided that notice is given to the secured creditors who are likely to be affected by it.
- [46] In *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ON SC) the Court held, at para. 48, that the purpose of a directors' and officers' 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."
- [47] In *Jaguar Mining Inc., Re*, 2014 ONSC 494, at para. 45, the Court identified the following four factors that must be satisfied before granting a directors' charge:
- a. Notice has been given to the secured creditors that are likely to be affected;
 - b. The amount is appropriate;
 - c. The applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
 - d. The charge does not apply in respect of any obligation incurred as a result of the director's or officer's gross negligence or wilful misconduct.
- [48] I am satisfied that the factors set out in *Jaguar Mining* have been met in this case. Specifically,
- a. CIBC and Birch Hill, the only secured lenders likely to be affected by the D&O Charge, had notice and appeared at the initial hearing;
 - b. The directors and officers of Mastermind LP have indicated that they will resign if court approval to the D&O Charge in the amount sought is not granted;
 - c. The amount of the D&O Charge is reasonable in the circumstances and is limited to any potential exposure during the initial stay period;
 - d. The D&O Charge will only apply to amounts that are not otherwise covered under the directors' and officers' existing insurance policy; and
 - e. The D&O Charge would only cover liabilities incurred during these proceedings and would not cover liability incurred as a result of the directors' or officers' gross negligence or wilful misconduct.
- [49] The Proposed Monitor is of the view that the D&O Charge is "required and reasonable" in the circumstances.

[50] I am satisfied that the D&O Charge is reasonable and appropriate in the circumstances.

Comeback Hearing

[51] As required under s. 11.001 of the CCAA, the Applicant has limited the relief sought on this initial application to only that which is reasonably necessary in the circumstances for the continued operation of the business. Additional requested relief will be addressed at the comeback hearing.

[52] The Comeback Hearing is scheduled for November 30, 2023 at 10 am.

A handwritten signature in blue ink, appearing to be 'J. [unclear]', located on the right side of the page.

Date: November 24, 2023