

Court File No.

**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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF MASTERMIND GP INC.

Applicants

FACTUM

November 23, 2023

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PART I – OVERVIEW

1. Mastermind GP Inc. (“**Mastermind GP**” or the “**Applicant**”) seeks protection from its creditors pursuant to an order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCA**”), in the form of the draft order attached to the Application Record at Tab 3. The Applicant also seeks to have the benefits of the Initial Order extended to Mastermind LP (together with the Applicant, the “**Mastermind Entities**”), a limited partnership.
2. The Applicant intends to return to the Court within eight days, and in any event, by no later than November 30, 2023 (the “**Comeback Hearing**”) to seek certain additional relief pursuant to an amended and restated initial order.
3. Mastermind LP operates under the retail banner “Mastermind Toys” and is a speciality retailer selling curated toys, games, puzzles and books.
4. The Mastermind Entities are insolvent and unable to meet their liabilities as they become due. Over the past six years, Mastermind LP has reported increasingly large net losses (except for 2021), despite concerted efforts to cut costs and increase revenues. Challenging retail market conditions, exacerbated by the COVID-19 pandemic, have resulted in a liquidity crisis for the business. As a result, Mastermind LP can no longer pay its vendors in the ordinary course and the Mastermind Entities are in default of their senior secured credit facilities. This has led to some vendors halting supply, just as Mastermind LP’s most profitable period of the year—the holiday season—approaches.¹

¹ The holiday season begins in the days leading up to Black Friday (on or about November 24) and ends on Boxing Day (December 26), (the “**Holiday Period**”).

5. The Mastermind Entities, in consultation with their financial advisors, have explored various strategies to save the business, including options to sell, refinance, or recapitalize the business through a comprehensive out-of-Court sales process. Despite these efforts, the Mastermind Entities have been unable to consummate a transaction, due to, among other things Mastermind LP's liquidity constraints and deteriorating financial condition

6. All options to improve the business's liquidity having been exhausted, the Mastermind Entities concluded that the only way forward given Mastermind LP's eroding financial state and downward sales trends, was to seek relief under the CCAA in order to provide Mastermind LP with the protections it needs to complete a liquidation of its business and pursue other strategic options.²

7. Accordingly, the Applicant seeks Court-ordered protection under the CCAA to provide the Mastermind Entities with a stable operational environment that will allow them to complete a Court-approved liquidation and pursue other strategic options, including ongoing negotiations with an interested party in connection with a potential going concern CCAA transaction for a portion of the business (the "**Potential CCAA Transaction**").

8. The Applicant believes that this CCAA proceeding is in the best interests of all the stakeholders of the Mastermind Entities. The relief sought in the Initial Order is reasonably necessary for the Mastermind Entities to preserve and maximize the value of their current inventory, maintain the stability of their operations, commence the liquidation sale in time to

² Initial Affidavit at para. 103.

take advantage of the holiday shopping surge in sales and explore the Potential CCAA Transaction.

9. For these reasons and those set out below, the Applicant requests that this Court grant the Initial Order together with the related relief and extend those benefits to Mastermind LP as an integral part of the Applicant's business operations.

PART II – FACTS

10. The facts underlying this Application are more fully set out in the Affidavit of Lucio Milanovich, sworn November 22, 2023, filed in support of this Application.³

A. Corporate Structure

11. The Applicant, Mastermind GP, is an Ontario corporation, and its sole purpose is as general partner of Mastermind LP.⁴ Mastermind LP, which operates the "Mastermind Toys" business, is a limited partnership⁵ formed under the laws of Ontario.

B. Business and Operations

12. Mastermind Toys is the largest Canadian-owned specialty toy and children's book retailer.⁶ Mastermind Toys enjoys an iconic brand and a national footprint, with 66 stores across eight provinces.⁷ Through its website, Mastermind LP holds an estimated 2% of the

³ All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit.

⁴ Initial Affidavit at para. 16; Initial Affidavit at Exhibit "A", the Corporate Profile of Mastermind LP.

⁵ The limited partners of Mastermind LP include: (i) BHEP (US) Mastermind Inc., an Ontario corporation and holding company; and (ii) minority unitholders. Initial Affidavit at para 17; Initial Affidavit at Exhibit "B".

⁶ Initial Affidavit at para. 5; Initial Affidavit at Schedule 1, the list of Mastermind Entities' leases.

⁷ Initial Affidavit at para. 5.

online toy market share, but the vast majority of its revenue (approximately 90%) is still generated from its brick-and-mortar sales.⁸

13. While the Canadian toy industry is very competitive, Mastermind LP has historically set itself apart by employing dedicated, knowledgeable staff called “Play Experts” that enhance the customer in-store experience.⁹ However, due to the increasing market penetration of multiline conglomerates such as Walmart, Amazon, Costco and Canadian Tire, it has become increasingly challenging for Mastermind LP to maintain its 3% share of the market.¹⁰

(i) Merchandising, Supply & Distribution

14. Mastermind LP sources the majority of its inventory on a purchase order basis, with 30% of merchandise coming from overseas.¹¹ Historically, Mastermind LP received 30- to 60-day payment terms but has since stretched its current days payable in excess of 85-days due to its liquidity pressure.¹²

15. Mastermind LP’s distribution centre receives most of its products, which are then picked, packed and allocated to stores across its network.¹³ All online orders are either shipped directly from the distribution centre or picked up in-store by customers.¹⁴ During the

⁸ Initial Affidavit at para. 39.

⁹ Initial Affidavit at para. 19.

¹⁰ Initial Affidavit at para. 18.

¹¹ Initial Affidavit at para. 34.

¹² Initial Affidavit at paras. 34 & 104.

¹³ Initial affidavit at para. 37.

¹⁴ Initial affidavit at para. 38.

Holiday Period, Mastermind LP uses third-party logistic operators, such as ASL Distribution Services Ltd., to address inventory overflow, a service it pays for in the ordinary course.¹⁵ Any interruption in this supply would be disruptive to Mastermind LP's operations.

(ii) Employee and Employee Benefits

16. Mastermind LP currently employs approximately 800 employees, 625 of whom are part-time store associates and 175 who are full-time employees.¹⁶ In addition, Mastermind LP relies on "temp agencies" to provide temporary staffing at its distribution centre during the Holiday Period.¹⁷ None of the employees are unionized.¹⁸ Mastermind LP provides health, dental, life insurance and vision benefits to certain employees, but does not administer any pension plans or RRSP.¹⁹

17. Mastermind LP's obligations to employees are current, as are employee source deductions.²⁰ During the upcoming Holiday Period, bi-weekly payroll for store employees is expected to be approximately \$800,000.²¹ Mastermind LP anticipates that certain headcount reductions will take place before the Comeback Hearing.²²

¹⁵ Initial Affidavit at para. 37.
¹⁶ Initial Affidavit at para. 27.
¹⁷ Initial affidavit at para. 29.
¹⁸ Initial affidavit at para. 27.
¹⁹ Initial Affidavit at para. 28.
²⁰ Initial Affidavit at para. 28.
²¹ Initial Affidavit at para. 28.
²² Initial Affidavit at para. 48.

(iii) Leases and Retail Stores

18. Mastermind LP conducts its business through 66 retail stores across the country, all of which are leased.²³ The total rent for all 66 locations is approximately \$1,250,000 per month and is paid up-to-date.²⁴ In addition, both the Mastermind Entities' headquarters and the distribution centre operate out of leased premises in Toronto, Ontario, with an annual rent of approximately \$900,000.²⁵ Mastermind LP is the tenant under certain leases, and Mastermind GP is the tenant under others.²⁶ The Mastermind Entities have not defaulted under any lease.²⁷

(iv) Gift Cards & Return Policies

19. Mastermind LP offers gift cards in-store, online or through other retailers, which can be redeemed in-store or online.²⁸ Mastermind LP receives money as soon as the gift card is used.²⁹ As of October 31, 2023, Mastermind LP had a net liability for outstanding Gift Cards of approximately \$5.6 million, net of breakage.³⁰ Because the gift card program is designed to increase sales, the Applicant is seeking authorization for Mastermind LP to continue honouring gift cards until December 24, 2023.³¹ Mastermind LP offers full refunds on new returns with a receipt, but will discontinue returns if the Initial Order is granted.³²

²³ Mastermind LP operates six stores in British Columbia, 13 stores in Alberta, three in Saskatchewan, two in Manitoba, 35 in Ontario, three in Nova Scotia, three in New Brunswick and one in Newfoundland and Labrador.

²⁴ Initial Affidavit at para. 22.

²⁵ Initial Affidavit at para. 24; Initial Affidavit at Schedule 1, the list of Mastermind Entities' leases.

²⁶ Initial Affidavit at para. 25; Initial Affidavit at Schedule 2, the list of Mastermind Entities' landlords.

²⁷ Initial Affidavit at para. 26.

²⁸ Initial Affidavit at para. 43; Initial Affidavit at Exhibit "C", the Gift Card Agreement dated May 18, 2016.

²⁹ Initial Affidavit at para. 44.

³⁰ Initial Affidavit at para. 44.

³¹ Initial Affidavit at paras. 44-45.

³² Initial Affidavit at para. 46.

C. Financial Position of the Mastermind Entities

20. Mastermind LP’s most recent financial statements, prepared as of December 31, 2022,³³ demonstrate that Mastermind LP is unable to meet its obligations as they become due.³⁴

(i) Assets and Liabilities

21. As of October 31, 2023, the assets of Mastermind LP have a book value of approximately \$65.2 million.³⁵ The bulk of Mastermind LP’s’ realizable assets consist of its inventory.³⁶ Excluding goodwill and intangible assets, Mastermind LP has approximately \$47.6 million in assets,³⁷ which is less than its liabilities that total approximately \$62.1 million.³⁸

22. Moreover, Mastermind LP has been operating at a loss for several years despite efforts to cut costs and increase revenues.³⁹ Indeed, Mastermind LP’s net loss has been steadily increasing over the past five years:⁴⁰

NTD Frank please make sure this chart does not break across two pages

\$CAD (000s)	2018	2019	2020	2021	2022	YTD2023¹
Sales	137,795	120,819	107,721	143,443	129,592	65,478
EBITDA	5,812	520	598	6,618	(3,988)	(12,407)

³³ Initial Affidavit at paras 49-50; Initial Affidavit at Exhibit “D”, Mastermind LP’s financial statements dated December 31, 2022.

³⁴ Initial Affidavit at para. 49; Initial Affidavit at Exhibit “D”, Mastermind LP’s financial statements dated December 31, 2022.

³⁵ Initial Affidavit at para. 51.

³⁶ Initial Affidavit at para. 51.

³⁷ Initial Affidavit at para. 51.

³⁸ Initial Affidavit at para. 52.

³⁹ Initial Affidavit at para. 53.

⁴⁰ Initial Affidavit at para. 53.

Net Income (Loss)	(875)	(5,313)	(7,402)	1,272	(9,031)	(18,135)
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(ii) Secured Creditors

The CIBC Facilities

23. Mastermind LP’s primary secured creditor is Canadian Imperial Bank of Commerce (“**CIBC**”) pursuant to a credit agreement dated October 24, 2014 with Mastermind LP, as borrower, and Mastermind GP, as guarantor (the “**Credit Agreement**”)⁴¹ under which CIBC has committed, among other things, a (i) \$30,000,000 revolving credit facility (“**Revolving Loan Facility**”); and (ii) a Business Credit Availability Program loan (the “**BCAP Loan**”) in the amount of \$6,250,000 (collectively, the “**CIBC Facility**”).⁴² The maximum availability under the Revolving Loan Facility is subject to a borrowing base formula linked to Mastermind LP’s inventory and accounts receivable.⁴³

24. The obligations under the CIBC Facility are secured by all present and after acquired property of Mastermind LP and are guaranteed on a secured basis by Mastermind GP.⁴⁴

25. Mastermind LP is currently in default of its obligations under the Credit Agreement for failure to maintain certain financial covenants and the guarantee from Mastermind GP has

⁴¹ Initial Affidavit at para. 54; Initial Affidavit at Exhibit “E”, the Credit Agreement dated October 24, 2014 between CIBC, Mastermind LP and Mastermind GP; Initial Affidavit at Exhibit “F”, the Amending Agreement to the credit agreement dated June 11, 2020.

⁴² Initial Affidavit at paras 54-57.

⁴³ Initial Affidavit at paras. 58-70.

⁴⁴ Initial Affidavit at para. 59; Initial Affidavit at Exhibit “E”, the Credit Agreement dated October 24, 2014 between CIBC, Mastermind LP and Mastermind GP; Initial Affidavit at Exhibit “G”, the Guarantee of Mastermind GP dated October 24, 2014.

become due and enforceable. On November 13, 2023, CIBC put the Mastermind Entities on notice of these defaults.⁴⁵

26. As of October 31, 2023, the Mastermind Entities are indebted to CIBC in the amount of \$19,460,000 under the Revolving Loan Facility and \$6,250,000 under the BCAP Loan.⁴⁶

27. The Mastermind Entities are working with CIBC to settle the terms of a forbearance agreement, pursuant to which CIBC will continue to make the Revolving Loan Facility available to Mastermind LP during the course of these CCAA proceedings (the “**Forbearance Agreement**”). If the Initial Order is granted, the Mastermind Entities anticipate seeking approval of the Forbearance Agreement and ancillary relief at the Comeback Hearing.

Grid Promissory Notes

28. Mastermind LP’s other secured lenders are three “Birch Hill Lenders”⁴⁷ to whom Mastermind LP issued grid promissory notes issued on June 11, 2020, with interest rates equal to 10% per annum, in the aggregate amount of \$1,250,000.⁴⁸ The Birch Hill Lenders have entered into a subordination agreement in favour of CIBC.⁴⁹

⁴⁵ Initial Affidavit at para. 71; Initial Affidavit at Exhibit “O”, the Letter from counsel for CIBC dated November 13, 2023.

⁴⁶ Initial Affidavit at para. 72.

⁴⁷ Initial Affidavit at Exhibits “H(1)”, “H(2)” and “H(3)”, the Grid Promissory Notes. The Birch Hill Lenders and amounts set out in their respective promissory grid notes are: (i) Birch Hill Equity Partners (Entrepreneurs) IV, LP in the amount of \$13,182.49; (ii) Birch Hill Equity Partners (US) IV, LP in the amount of \$736,627.81; and (iii) Birch Hill Equity Partners IV, LP, in the amount of \$500,190.70.

⁴⁸ Initial Affidavit at paras. 61-62.

⁴⁹ Affidavit para 66; Initial Affidavit at Exhibit “L”, the Mastermind and Birch Hill Lenders Subordination and Postponement Agreement with CIBC dated June 11, 2020.

(iii) Unsecured Debt

29. Mastermind LP also has various unsecured creditors, including: (i) trade creditors, to which it owes approximately \$22.15 million as of October 31, 2023; (ii) employees to whom it owes \$120,000 in accrued vacation pay and over \$65,000 per month in employee benefits;⁵⁰ and (iii) various charities to which it owes approximately \$40,000 that has been collected on their behalf.⁵¹

30. As of October 31, 2023, the Mastermind Entities had total liabilities of approximately \$62,124,000, inclusive of their unsecured obligations.⁵²

D. Urgent Need For Relief

31. Due to adverse market conditions, Mastermind LP's profitability peaked in 2017 and has deteriorated since.⁵³ Despite the introduction of various marketing initiatives,⁵⁴ an updated leadership team and expansion of stores, Mastermind LP's market share continues to decline.⁵⁵

32. The COVID-19 pandemic has had a long-lasting, disastrous effect on the Canadian retail industry, and Mastermind LP's financial circumstances particularly.⁵⁶ In the short run, the unprecedented mandatory store closures and capacity restrictions adversely impacted sales.⁵⁷ In the long run, the cost of raw inputs and freight increased, adversely affecting

⁵⁰ Initial Affidavit at para. 74.
⁵¹ Initial Affidavit at para. 78.
⁵² Initial Affidavit at para. 50.
⁵³ Initial Affidavit at para. 80.
⁵⁴ Initial Affidavit at paras. 36, 40-42 & 81.
⁵⁵ Initial Affidavit at para. 81.
⁵⁶ Initial Affidavit at para. 85.
⁵⁷ Initial Affidavit at paras. 82-83.

Mastermind LP's margins and revenue.⁵⁸ In 2020, Mastermind LP's revenues were down by approximately 11%.⁵⁹

33. While customers purchased toys online during the pandemic, Mastermind LP's online platform has not scaled to recover its IT investments.⁶⁰ Further, as a relatively small Canadian brand, "Mastermind Toys" has struggled to compete with international conglomerates such as Amazon and Walmart.⁶¹

E. Response to Financial Difficulties

34. In the face of such financial difficulties, Mastermind LP launched several initiatives in an effort to reverse its position from 2021 onwards.⁶² Mastermind LP launched the "Mastermind Toys Baby" brand, "Mastermind Toys Books", and a private brand.⁶³ Mastermind LP also identified four stores to close.⁶⁴ However, such efforts did not ameliorate Mastermind LP's financial situation.⁶⁵ In 2022, Mastermind LP's gross revenue decreased by 10%, and the partnership had a negative EBITDA percentage of (3)%.⁶⁶

35. In early 2023, the Mastermind Entities retained Alvarez & Marsal Canada ULC ("**AMC**") and Alvarez & Marsal Canada Securities ULC ("**A&M Corporate Finance**") to identify a potential going concern purchaser of the business. After a comprehensive out-of-Court sales process resulted in interest from a number of potential going concern purchasers,

⁵⁸ Initial Affidavit at para. 85.
⁵⁹ Initial Affidavit at para. 84.
⁶⁰ Initial Affidavit at para. 84.
⁶¹ Initial Affidavit at para. 84.
⁶² Initial Affidavit at para. 89.
⁶³ Initial Affidavit at para. 86.
⁶⁴ Initial Affidavit at para. 89.
⁶⁵ Initial Affidavit at paras. 49-53.
⁶⁶ Initial Affidavit at para. 53.

each except one withdrew from the sale process as Mastermind LP's financial position eroded. The remaining interested party and the Mastermind Entities entered into an agreement for a going concern transaction, which could have obviated the need for CCAA proceedings entirely. The going concern transaction was subject to mandatory pre-merger notification requirements under the *Competition Act* that ultimately proved too difficult to satisfy in a timely manner.

F. Urgency of the Application

36. The Mastermind Entities are experiencing extraordinary conditions that necessitate urgent and immediate relief.⁶⁷ The Mastermind Entities are operating on a week-to-week basis and do not have sufficient cash to continue with its operations.⁶⁸ On top of this, revenues continue to decline.⁶⁹ The Mastermind Entities will not have sufficient cash to survive the holiday season.⁷⁰ Operating on a week-to-week basis without sufficient cash to continue with the operations of Mastermind LP, the Mastermind Entities have no choice but to seek protection under the CCAA. To this aim, the Mastermind Entities have been working tirelessly with A&M Corporate Finance to arrange for a liquidation sale of some of its stores while continuing to pursue the Potential CCAA Transaction. The Mastermind Entities are negotiating a consulting agreement in connection with the liquidation sale (the “**Consulting Agreement**”) and a potential purchaser for the Potential CCAA Transaction has been identified and negotiations are ongoing.

⁶⁷ Initial Affidavit at para. 102.

⁶⁸ Initial Affidavit at para. 111.

⁶⁹ Initial Affidavit at para. 103.

⁷⁰ Initial Affidavit at para. 107.

37. The liquidity that the Mastermind Entities have is only available because Mastermind LP has delayed payments to suppliers, [NTD fix this footnote to make it superscript]⁷¹ and has stopped payment entirely to several international suppliers.⁷²

38. The Applicant brings this Application on an urgent basis so that the Mastermind Entities have the flexibility needed to continue negotiating the Potential CCAA Transaction while ensuring the liquidation can start in time to capitalize on increased sales during the Holiday Period and maximize the benefit of the Mastermind Entities' stakeholders.⁷³

PART III – ISSUES

39. The principal issues before the Court are whether:

- (a) the CCAA Applies to the Applicant;
- (b) the stay of proceedings, and other benefits under the Initial Order, should be extended to Mastermind LP;
- (c) the stay of proceedings is necessary;
- (d) the Proposed Monitor should be appointed;
- (e) the Court should exercise its discretion to expedite proceedings by holding the Comeback Hearing in eight days, and in any event, by no later than November 30, 2023; and

⁷¹ Initial Affidavit at paras. 103-104.

⁷² Initial Affidavit at para. 105.

⁷³ Initial Affidavit at paras. 12 & 107.

- (f) the Court should grant the Administration Charge and the D&O Charge (each as defined below).

PART IV – LAW AND ANALYSIS IN RESPECT OF THE INITIAL ORDER

A. The CCAA Applies to the Applicant

(i) This Court has Jurisdiction over the Applicant

40. Per subsection 9(1) of the CCAA, a debtor company may apply for protection under the CCAA in the province where its registered head office or chief place of business in Canada is situated.⁷⁴

41. This Court is unquestionably the most appropriate venue for these CCAA proceedings. The Mastermind Entities' chief place of business is Ontario, with over half of Mastermind LP's retail stores located in the jurisdiction.⁷⁵ The registered head office for both Mastermind Entities is located in Toronto, Ontario.⁷⁶ Mastermind LP's distribution centre, from which all inventory for stores across the country is received and distributed, is also located in Toronto, Ontario.⁷⁷

(ii) The Applicant is a “Debtor Company”

42. The Applicant qualifies for protection under the CCAA, which applies to a “debtor company or affiliated debtor companies” whose liabilities exceed \$5 million.⁷⁸

⁷⁴ CCAA, s. 9(1).

⁷⁵ Initial Affidavit at para. 24; *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 at para. 27.

⁷⁶ Initial Affidavit at para. 15.

⁷⁷ Initial Affidavit at paras. 20 & 24.

⁷⁸ CCAA, s. 3(1).

43. A “company” is defined as “any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province...”.⁷⁹ Mastermind GP, an Ontario *Business Corporations Act* corporation, meets this definition.⁸⁰

(iii) The Applicant is Insolvent

44. A “debtor company” is one that “is bankrupt or insolvent”.⁸¹ The term “insolvent” is not defined under the CCAA. However, it is well-established that in a CCAA application, courts may interpret this term by reference to “insolvent person” in subsection 2(1) of the *Bankruptcy and Insolvency Act* (“BIA”).⁸² Subsection 2(1) of the BIA provides the following:

...“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.

45. The tests for insolvency under the BIA are disjunctive, meaning that the Applicant need only satisfy one of the above tests to be found insolvent.⁸³ Further, in *Stelco*, the Court expanded the definition of “insolvent” in the CCAA context to reflect the “rescue” purposes of

⁷⁹ CCAA, s. 3(1).

⁸⁰ Initial Affidavit at para. 18.

⁸¹ CCAA, s. 2(1).

⁸² *Stelco Inc., Re*, 2004 CarswellOnt 1211, [2004] OJ No 1257 at para. 22 (ONSJ Commercial List); *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 at para 26.

⁸³ *Stelco Inc., Re*, 2004 CarswellOnt 1211, [2004] OJ No 1257 at para. 28.

the Act.⁸⁴ Accordingly, an “insolvent person” under the CCAA may include a “financially troubled corporation ... if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.⁸⁵

46. As noted above, the Applicant’s sole business is to act as the general partner of Mastermind LP, the operating entity of the “Mastermind Toys” retail stores.⁸⁶ As general partner of Mastermind LP, Mastermind GP at law “is fully liable to each creditor of the business of the limited partnership”.⁸⁷ In addition, Mastermind GP has additional financial obligations, including as tenant under a number of leases, and as guarantor under the Credit Agreement.⁸⁸

47. Accordingly, the Applicant meets at least three of the four foregoing tests for insolvency under the BIA, as expanded by *Stelco*, given that: (a) the Mastermind Entities are unable to meet their obligations as they become due;⁸⁹ (b) Mastermind LP has ceased paying its current obligations in the ordinary course as they become due: for instance, payments to merchandise vendors have stopped, and the Credit Agreement is in default;⁹⁰ (c) the

⁸⁴ *Stelco Inc., Re*, 2004 CarswellOnt 1211, [2004] OJ No 1257 at para. 25.

⁸⁵ *Stelco Inc., Re*, 2004 CarswellOnt 1211, [2004] OJ No 1257 at para. 26.

⁸⁶ Initial Affidavit at para. 17; *Limited Partnerships Act*, R.S.O. 1990, C. L. 16, s. 8; *Lehndorff General Partner Ltd., Re*, [1993] OJ No 14 [commercial list] at para. 17.

⁸⁷ *Limited Partnerships Act*, R.S.O. 1990, c. L.16, ss. 8-9. *Lehndorff General Partner Ltd., Re*, [1993] OJ No 14 [commercial list] at para. 17. See also *Forvest Trust S.A. v. Devine Entertainment Film Library Limited Partnership*, 2013 ONSC 3347, paras. 54-63.

⁸⁸ Initial Affidavit at Schedule 1, the list of Mastermind Entities’ leases; Initial Affidavit at Exhibit “J”, the General Security Agreement between Mastermind GP and Mastermind LP dated October 24, 2014.

⁸⁹ Initial Affidavit at para. 53.

⁹⁰ Initial Affidavit at paras. 104 & 69.

Mastermind Entities have debts in excess of \$5 million;⁹¹ and (d) the Mastermind Entities are in a liquidity crisis and have a negative working capital position.⁹²

B. This Court Should Extend the Stay and Other Benefits and Protections of the Initial Order to Mastermind LP

48. The Applicant seeks to extend the Stay (defined below) and other benefits and protections of the Initial Order to Mastermind LP. This Court has broad jurisdiction to do so under sections 11 and 11.02(1) of the CCAA, which is limited only to what is “appropriate in the circumstances.”⁹³

49. It is well established that where the operations of a partnership are “integral and closely related to the operations of the Applicant”, it is appropriate to extend the protection of the relief granted under the Initial Order to that partnership to ensure fulfilment of the purposes of the CCAA.⁹⁴ This Court has, on numerous occasions, found it fair and appropriate to extend the benefits, protections and other relief granted under CCAA proceedings to closely related partnerships that are integrated with an applicant’s business operations.⁹⁵

50. In the present case, Mastermind LP is the main operating entity of the Mastermind Toys retail business and is the business for which Mastermind GP is liable at law.⁹⁶

⁹¹ Initial Affidavit at para. 77.

⁹² Initial Affidavit at para. 53.

⁹³ CCAA ss. 11 & 11.02(1); *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at paras. 29-32.

⁹⁴ Initial Affidavit at para 17; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at para. 30; *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42-43.

⁹⁵ *Gesco Industries Inc. (Re)*, 2023 ONSC 3050 at paras. 19-20; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at para. 30; *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42-43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215 at paras. 25-27.

⁹⁶ *Lehndorff General Partner Ltd., Re*, [1993] OJ No 14 [commercial list] at para 17.

Mastermind LP employs all of the business' employees, including senior management,⁹⁷ holds all bank accounts, is the borrower under the Credit Agreement with CIBC, and is a party to the majority of the business' leases.⁹⁸ Consequently, it would be neither just nor appropriate to grant the stay to Mastermind GP and not extend that relief to Mastermind LP. Such a decision would defeat the very purposes of the CCAA.

51. As the operating entity of the business, Mastermind LP is also insolvent and needs the breathing space provided by the Stay to prevent the disastrous consequences of uncoordinated enforcement actions from its many creditors.⁹⁹

C. A Stay of Proceedings is Necessary

52. Subsection 11.02(1) of the CCAA allows this Court to grant an initial stay of up to 10 days on application for an initial order, provided that such a stay is appropriate and the Applicant has acted with due diligence and in good faith.¹⁰⁰ The Applicant is seeking an initial stay for the 8 days between the granting of the Initial Order and the Comeback Hearing (November 30, 2023) (the "**Stay**"). While discretionary, the purposes underlying the CCAA must guide this Court's decision.

53. It is well-established that a stay of proceedings under the CCAA provides a debtor with "breathing space" while it consults with its stakeholders, preserves business value and attempts to avoid the social and economic costs of liquidating the entire business.¹⁰¹ As the

⁹⁷ Except for the Interim Chief Financial Officer, Lucio Milanovich: see Initial Affidavit at para 1.

⁹⁸ Initial Affidavit at paras. 22, 52 & 54; Initial Affidavit at Schedule 1, the list of Mastermind Entities' leases.

⁹⁹ Initial Affidavit at para. 103.

¹⁰⁰ CCAA at s. 11.02.

¹⁰¹ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 14-15; *Re Just Energy Corp.*, 2021 ONSC 1793 at para. 30.

Supreme Court of Canada makes clear, in exercising its discretion under the CCAA, this Court must be “cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors”.¹⁰²

54. The Mastermind Entities require the Stay to afford the Mastermind Entities breathing space while they diligently organize their affairs in preparation for what is, by far, the busiest and most profitable period in their industry—the holiday season.¹⁰³ The Stay will allow the Mastermind Entities to continue operations during the holiday season while negotiating the Proposed CCAA Transaction and preparing for the proposed liquidation of at least some of their retail stores.¹⁰⁴ The Stay will also prevent creditors of the Mastermind Entities from taking action against the Mastermind Entities and their assets, allowing the Mastermind Entities to continue to manage the day-to-day operations of the business in the period between the date of the Initial Order and the Comeback Hearing.

D. The Proposed Monitor Should be Appointed

55. Section 11.7 of the CCAA provides that when granting the Initial Order, this Court must concurrently appoint a person to monitor the Applicant’s business and financial affairs. A&M has consented to act as monitor in these CCAA proceedings and is a licensed insolvency trustee within the meaning of subsection 2(1) of the BIA. Further, A&M is not subject to any restriction to act as monitor under section 11.7(2) of the CCAA.¹⁰⁵ A&M has extensive

¹⁰² *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 60.

¹⁰³ Initial Affidavit at para. 107.

¹⁰⁴ Initial Affidavit at paras. 103-107.

¹⁰⁵ CCAA, s. 11.7(2).

experience acting as a Court-appointed monitor in CCAA proceedings, including in respect of retail companies.

E. This Court should exercise its discretion to expedite proceedings by holding the Comeback Hearing by no later than November 30, 2023

56. Due to exigent circumstances, the Applicant respectfully requests that this Court hold the Comeback Hearing within eight days of the granting of the Initial Order and, in any event, by no later than November 30, 2023.

57. This Court has wide discretion under section 11.02(1) of the CCAA to grant a stay of proceedings following the issuance of the Initial Order for “no more than 10 days” before holding the Comeback Hearing.¹⁰⁶ As discussed above, that discretion is tempered only by the mandate that all relief in the Initial Order be “appropriate” and “reasonably necessary”.¹⁰⁷ In the circumstances, an expedited Comeback Hearing is warranted for two reasons.

58. First, there is urgency to have the Consulting Agreement approved as soon as possible in order to maximize recovery for creditors through the proposed liquidation. Pursuant to the Consulting Agreement, the liquidation sale is scheduled to commence on November 30, 2023 to take advantage of Mastermind LP’s most profitable sales period: the holiday season—beginning in the days leading up to November 24 (Black Friday) and continuing until December 26 (Boxing Day)—which typically accounts for over a quarter of Mastermind LP’s annual sales.¹⁰⁸

¹⁰⁶ CCAA s. 11.02(1).

¹⁰⁷ CCAA ss. 11 & 11.001.

¹⁰⁸ Initial Affidavit at para. 12.

59. Second, the Mastermind Entities are currently negotiating the Forbearance Agreement with CIBC that will set out the terms upon which the Mastermind Entities may continue to use the Revolving Loan Facility during the CCAA proceedings.¹⁰⁹ It will be imperative to have that agreement approved by no later than November 30, 2023, when Mastermind LP has significant payment obligations become due and payable.¹¹⁰ For example, on November 30, 2023 the payroll for Mastermind LP's employees—an obligation of \$1,000,000—becomes due.¹¹¹ To ensure continued stability during this tumultuous time, it is imperative that the Mastermind Entities obtain Court approval for the continued use of the Revolving Credit Facility.

F. This Court Grant the Administration Charge and the Directors' Charge.

(i) The Administration Charge should be granted

60. The Applicant requests that this Court grant a first-priority charge (the "**Administration Charge**") on all of the Mastermind Entities' present and future assets, property and undertakings in favour of A&M, as the Proposed Monitor, counsel to the Proposed Monitor, and counsel to the Applicant. The Applicant is seeking an Administration Charge in the amount of \$750,000.¹¹²

61. Section 11.52 of the CCAA expressly gives this Court the power to grant an administration charge. In *Canwest Publishing*, this Court identified a list of non-exhaustive factors to consider when granting an administration charge:

¹⁰⁹ Initial Affidavit at para. 131.

¹¹⁰ Initial Affidavit at para. 133.

¹¹¹ Initial Affidavit at para. 133.

¹¹² Initial Affidavit at para. 122.

- (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.¹¹³

62. The proposed Administration Charge is warranted, necessary and appropriate in the circumstances, given that:

- (a) with a strong presence in eight provinces, the partial liquidation and potential going-concern transaction of Mastermind LP's business will involve a highly complex, multi-jurisdictional coordination of resources and skilled professionals;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout these proceedings;
- (c) the Applicant anticipates no unwarranted duplication of roles;
- (d) the Applicant has worked with A&M and other professionals to estimate the proposed quantum of the Administration Charge, and both parties believe it to be reasonable and appropriate in the circumstances;¹¹⁴ and
- (e) CIBC and the Birch Hill Lenders are the only secured creditors of the Mastermind Entities that will be affected by the Administration Charge and they do not oppose such charge.

¹¹³ *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54.

¹¹⁴ Initial Affidavit at para. 129.

(ii) The Directors' and Officers' Charge Should be Granted

63. The Mastermind Entities also seeks a charge on their assets in favour of the directors and officers of the Mastermind Entities in an amount not exceeding \$4,000,000 (the “**D&O Charge**”).¹¹⁵ The D&O Charge is to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA proceedings, including proceedings in respect of unpaid accrued wages and unremitted taxes. The D&O Charge is necessary because the Mastermind Entities' current directors' and officers' insurance policies contain certain limitations.¹¹⁶ For example, some policies exclude coverage for claims related to wages, worker's compensation or unemployment, or only covers director's statutory liability for taxes.¹¹⁷ The directors and officers were unable to obtain adequate additional indemnification insurance at a reasonable cost.¹¹⁸

64. Section 11.52 of the CCAA expressly gives this Court the power to grant a “super priority” charge to directors and officers as security for the indemnity.¹¹⁹ In *Canwest Publishing*, the Court held 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 that process.¹²⁰ Accordingly, a directors' and officers' charge is a crucial component of the insolvency process because it avoids the destabilizing effect that a global loss of a company's executive management team has on a

¹¹⁵ Initial Affidavit at para. 124.

¹¹⁶ Initial Affidavit at para. 125.

¹¹⁷ Initial Affidavit at para. 126.

¹¹⁸ Initial Affidavit at paras. 125-129.

¹¹⁹ CCAA, s. 11.51; *Comark Inc., Re*, 2015 ONSC 2010 at paras. 45-48.

¹²⁰ *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2009 CarswellOnt 6184, [2009] OJ No 4286 at para. 48.

company.¹²¹ Courts will grant such charges if reasonable and necessary in the circumstances and where the applicant was unable to acquire adequate insurance at a reasonable cost.¹²²

65. This Court identified four factors in *Jaguar Mining Inc., Re* that must be satisfied before granting a directors' charge:¹²³

- (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 or officer at a reasonable cost; and
- (d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

66. The Applicant submits that it is appropriate in these circumstances for this Court to grant the proposed D&O Charge, given that:

- (a) CIBC and the Birch Hill Lenders have been given notice of this Application and they are the only secured lenders likely to be affected by the D&O Charge;
- (b) absent approval by this Court of the D&O Charge in the amount set out above, the directors and officers of Mastermind LP have indicated that they will resign;¹²⁴
- (c) the amount of the D&O Charge is reasonable in the circumstances and is limited to any potential exposure during the initial eight-day stay period contemplated under the Initial Order;

¹²¹ *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2009 CarswellOnt 6184, [2009] OJ No 4286 at para. 48.

¹²² CCAA, ss. 11.001 & 11.51(3).

¹²³ *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45.

¹²⁴ Initial Affidavit at para. 128.

- (d) the D&O Charge will apply only with respect to amounts not otherwise covered under the directors' and officers' current insurance policy;¹²⁵ and
- (e) the D&O Charge would only cover obligations and liabilities incurred during these CCAA proceedings and would not cover liability as a result of the directors' or officers' gross negligence or wilful misconduct.¹²⁶

PART V – ORDER SOUGHT

67. For all of the foregoing reasons, the Applicant requests that this Court grant the proposed relief by making an order substantially in the form of the Initial Order found at Tab 3 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd, day of November, 2023.



**Davies Ward Phillips & Vineberg
LLP**
Counsel for the Applicant

¹²⁵ CCAA, s. 11.51(3).

¹²⁶ CCAA, s. 11.51(4).

**SCHEDULE A
LIST OF AUTHORITIES**

Case Law

1. *4519922 Canada Inc. (Re)*, 2015 ONSC 124.
2. *Canwest Publishing Inc./Publications Canwest Inc.*, Re, 2009 CarswellOnt 6184, [2009] OJ No 4286.
3. *Forvest Trust S.A. v. Devine Entertainment Film Library Limited Partnership*, 2013 ONSC 3347.
4. *Gesco Industries Inc. (Re)*, 2023 ONSC 3050.
5. *Jaguar Mining Inc., Re*, 2014 ONSC 494.
6. *Just Energy Corp. (Re)*, 2021 ONSC 1793.
7. *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (Ontario Court of Justice [General Division - Commercial List]).
8. *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422.
9. *Payless ShoeSource Canada Inc. and Payless ShoeSource Canada GP Inc. (Re)*, 2019 ONSC 1215.
10. *Stelco Inc., Re*, 2004 CarswellOnt 1211, [2004] OJ No 1257.
11. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60.
12. *Target Canada Co. (Re)*, 2015 ONSC 303.
13. *Target Canada Co. (Re)*, 2016 ONSC 316.

Legislation

14. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
15. *Limited Partnerships Act*, R.S.O. 1990, c. L.16

**SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

1. *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

2.

2(1) Definitions

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, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; ("compagnie")

...

"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;

("compagnie débitrice")

...

3.

3(1) Application

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.

...

9.

9(1) Jurisdiction of court to receive applications

Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

...

11.001 Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

...

11.02

11.02(1) Stays, etc. — initial application

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 10 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.

11.02(2) Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(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.

11.02(3) Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4) Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

...

11.51

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 obligations and liabilities that they may incur as a director or officer of the company after the 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.

...

11.7

11.7(1) Court to appoint monitor

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.

11.7(2) Restrictions on who may be monitor

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).

2. **Limited Partnerships Act, R.S.O. 1990, c. L.16**

8. Rights of general partners

A general partner in a limited partnership has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners except that, without the written consent to or ratification of the specific act by all the limited partners, a general partner has no authority to,

(a) do any act in contravention of the partnership agreement;

(b) do any act which makes it impossible to carry on the ordinary business of the limited partnership;

(c) consent to a judgment against the limited partnership;

(d) possess limited partnership property, or assign any rights in specific partnership property, for other than a partnership purpose;

(e) admit a person as a general partner;

(f) admit a person as a limited partner, unless the right to do so is given in the partnership agreement; or

(g) continue the business of the limited partnership if a general partner dies, retires or becomes incapable as defined in the *Substitute Decisions Act, 1992* or a corporate general partner is dissolved, unless the right to do so is given in the partnership agreement.

...

9. Liability of limited partner

Subject to this Act, a limited partner is not liable for the obligations of the limited partnership except in respect of the

value of money and other property the limited partner contributes or agrees to contribute to the limited partnership, as stated in the record of limited partners.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MASTERMIND GP INC.

Applicant

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

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