

**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 FIRSTONSITE G.P. INC.

Applicant

**FACTUM OF THE APPLICANT
(Re Approval of the Sale Transaction and Stay Extension
Returnable May 9, 2016)**

Dated: May 6, 2016

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TO: THE SERVICE LIST

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TABLE OF CONTENTS

	PAGE
PART I - INTRODUCTION	1
PART II - THE FACTS	2
A. The Development of the SISP	3
B. The SISP.....	5
C. The Sale Transaction	9
PART III - ISSUES	11
PART IV - LAW AND ARGUMENT	12
A. The APA and the Sale Transaction Should be Approved.....	12
(i) <i>The Test to Approve a Pre-Filing Sales Transaction is the Same as the Test to Approve a Post-Filing Sale Transaction.....</i>	<i>12</i>
(ii) <i>Criteria for Approving the Sale Transaction.....</i>	<i>13</i>
(iii) <i>The APA and Sale Transaction Satisfy the Section 36 Requirements and the Soundair Criteria</i>	<i>15</i>
(iv) <i>The Additional Factors for Sale Approval are Also Satisfied</i>	<i>18</i>
B. The Stay Period Should be Extended to May 31, 2016.....	19
(i) <i>The Court has the Jurisdiction to Extend the Stay of Proceeding.....</i>	<i>19</i>
(ii) <i>Extending the Stay Period is Necessary in the Circumstances</i>	<i>19</i>

C. The Confidential Exhibits Should be Sealed	20
PART V - ORDER REQUESTED.....	21
SCHEDULE "A"	
LIST OF AUTHORITIES	22
SCHEDULE "B"	
RELEVANT STATUTES.....	23

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PART I - INTRODUCTION

1. This motion is brought by the Applicant, FirstOnSite G.P. Inc. ("**FirstOnSite GP**"), the general partner of FirstOnSite Restoration L.P. ("**FirstOnSite LP**"), a limited partnership formed under the laws of Ontario. Hereinafter, where reference is made to the FirstOnSite enterprise as a whole, the term FirstOnSite will be used.
2. FirstOnSite received protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the Initial Order of the Honourable Justice Newbould of the Ontario Superior Court of Justice dated April 21, 2016 (the "**Initial Order**"). FTI Consulting Canada Inc. ("**FTI**") was appointed as monitor of FirstOnSite (in such capacity, the "**Monitor**") in these CCAA proceedings.
3. FirstOnSite now seeks, among other relief, court approval of the sale of substantially all of their business and property. In particular, FirstOnSite brings this motion seeking the following:
 - (a) An Order, substantially in the form of the draft order located at Tab 2 of the Motion Record ("**Approval and Vesting Order**");

- (i) approving the transaction contemplated by the Agreement of Purchase and Sale made and entered into as of April 20, 2016 (the “**APA**”) between FirstOnSite LP by its general partner, FirstOnSite GP (in such capacity, the “**Vendor**”) and 3297167 Nova Scotia Limited (the “**Purchaser**”) for the sale of the Purchased Assets (as defined therein) (the “**Sale Transaction**”);
 - (ii) vesting all of the Purchased Assets in the Purchaser free and clear of any Encumbrances other than Permitted Encumbrances (as such terms are defined in the APA); and
- (b) An order substantially in the form of the draft order located at Tab 2 of the Supplementary Motion Record (“**Stay Extension Order**”) extending the Stay Period (defined in paragraph 15 of the Initial Order) to June 10, 2016; and
- (c) Such other and further relief as this Court deems just.

4. The Sale Transaction represents the best possible outcome in the circumstances for FirstOnSite and its stakeholders. The APA was the result of a broad and comprehensive marketing process and extensive due diligence by and negotiations with a number of interested parties. The Purchase Price represents the highest realizable price obtained through the sales process. The senior secured lender of FirstOnSite LP – Wells Fargo Capital Finance Corporation Canada (“**Wells Fargo**”) and BDC and Capital (the anticipated fulcrum creditor) – is supportive of the relief sought herein. The Monitor also supports the relief sought herein.

PART II - THE FACTS

5. The facts with respect to this application are more fully set out in the affidavit of Dave Demos sworn April 20, 2016, in support of the Initial Order (the “**Initial Order Affidavit**”), the affidavit of Kevin McElcheran, sworn April 26, 2016 in support of the orders sought herein (the “**Special Committee Affidavit**”) and the affidavit of Adam

Zalev, sworn April 26, 2016 (the “**Financial Advisor Affidavit**”), in support of the orders sought herein, and the affidavit of Kevin McElcheran, sworn May 5, 2016 (the “**Stay Extension Affidavit**”), in support of the orders sought herein.¹

A. The Development of the SISP

6. FirstOnSite carries on business in Canada and, to a lesser degree, the United States, by providing remediation, restoration and reconstruction services in the commercial, industrial and residential sectors. However, since 2010, FirstOnSite has experienced significant financial and liquidity difficulties due to, *inter alia*, insufficient equity, substantial and escalating operating losses, and correspondingly escalating debt to fund these losses.

Special Committee Affidavit at paras. 6, 14-16, Motion Record, Tab 2.

Initial Order Affidavit at paras. 16, 21-25, 27-28, 35-38, 107-115 Motion Record, Tab 2A.

7. Since 2012, FirstOnSite has pursued a number of strategies in an endeavour to alleviate its financial difficulties and liquidity problems (including aggressive cost-cutting and revenue-growth related strategies). Unfortunately, continuing and adverse economic conditions blunted the efficacy of FirstOnSite’s responses; its losses continued unabated.

Special Committee Affidavit at paras. 8, 14-16, Motion Record, Tab 2.

Initial Order Affidavit at paras. 113-118, Motion Record, Tab 2B.

8. In the fall of 2015, FirstOnSite’s equity sponsors indicated that they were longer prepared to fund its escalating operating losses. This withdrawal of support, combined with adverse economic conditions, exacerbated an already precarious liquidity situation.

Special Committee Affidavit at paras. 6 Motion Record, Tab 2.

Initial Order Affidavit at paras. 107-115 Motion Record, Tab 2A.

¹ All capitalized terms used but not defined herein have the meaning ascribed to them in the McElcheran Affidavit.

9. By October 31, 2015, as a result of its financial difficulties, FirstOnSite defaulted under its senior secured revolving credit facility, triggering a cascade of cross-defaults with respect to its senior and junior subordinated debt and a series of acceleration of payment clauses (the “**Credit Defaults**”).

Special Committee Affidavit at paras 4, 8-9, Motion Record, Tab 2.

Initial Order Affidavit at paras. 119-120, Motion Record, Tab 2A.

10. Following the equity sponsor’s withdrawal of support, the board of FirstOnSite GP (the “**Board**”) carefully considered its available options. After consultations with its legal and financial advisors, the Board determined that a transaction that would result in either a full sale of, or a substantial equity investment in, FirstOnSite LP by way of a sales and investor solicitation process (the “**SISP**”) would most likely maximize stakeholders’ returns. At the time, no decision was made as to whether any restructuring transaction would be executed through CCAA proceedings.

Special Committee Affidavit at para 16, Motion Record, Tab 2.

11. The Board and advisors considered that conducting the SISP prior to commencing CCAA proceedings would avoid a distressed-asset sale scenario and preserve FirstOnSite’s relationships with suppliers and customers at a critical and sensitive time, all without affecting or altering its secured creditors’ rights and remedies. In addition, the following four considerations underpinned the Board’s decision to conduct the SISP prior to commencing CCAA proceedings, even if such proceedings were subsequently required:

- (a) First, a going concern sale was necessary to maximize realizable value for stakeholders (as the majority of FirstOnSite’s assets are intangible);
- (b) Second, FirstOnSite had sufficient liquidity to continue to meet creditor obligations as they were incurred during the conduct of the SISP without super-priority debtor-in-possession financing;

- (c) Third, creditors most affected by a sale of the business as a going concern would be financial creditors who could be kept apprised during the SISP;
- (d) Fourth, and relatedly, the publicity associated with the commencement of CCAA proceedings without a committed offer to purchase the business on a going concern basis was likely to have serious and destabilizing effects on, *inter alia*, the vendors, employees, customers, and, thus, FirstOnSite's value.

Special Committee Affidavit at para. 17, Motion Record, Tab 2.

Financial Advisor Affidavit at paras. 11, 13, Motion Record, Tab 2.

B. The SISP

12. FirstOnSite engaged Alvarez & Marsal Canada Securities ULC ("A&M") as its financial advisor and identify one or more purchasers of, or investors in, FirstOnSite LP.

Special Committee Affidavit at para. 19, Motion Record, Tab 2.

Financial Advisor Affidavit at para 10, Motion Record, Tab 3.

13. The SISP was developed to govern the process by which FirstOnSite would select a purchaser for and investor in their business and/or assets. The SISP was designed to:

- (a) parallel and correspond to typical post-filing sales and investor solicitation processes used and approved in other CCAA proceedings;
- (b) allow FirstOnSite to canvass the widest possible market, absent any obligation to accept any bid;
- (c) offer FirstOnSite the flexibility necessary to select the transaction(s) that would maximize stakeholder value; and
- (d) identify the value maximizing transaction using clear, predetermined and objective criteria, based on, *inter alia*, the purchase price and the ability of the offeror to conclude a transaction within the timeline set out therein.

Financial Advisor Affidavit at para. 12, Motion Record, Tab 3.

14. The SISP was structured as a two phase process. Phase I of the SISP involved: (i) a thorough market canvass to attract strategic and financial buyers and ascertain their interest in a transaction; (ii) initial due diligence by the potential interested parties following execution of a non-disclosure agreement (“NDA”); and (iii) receipt by the FirstOnSite of non-binding letters of intent (collectively, “LOIs”) for the purchase of the whole or part of their business and assets or an investment in the same. Phase II of the SISP involved additional due diligence, data room access and management presentations.

Financial Advisor Affidavit at paras. 15-16, 18 Motion Record, Tab 3.

15. FirstOnSite, with the assistance of its professional advisors, thoroughly canvassed the market for potential interested parties. In total, A&M contacted 101 potential bidders (comprised of 35 strategic parties and 66 financial sponsors) starting on or about October 30, 2015. In total, 45 of the 101 parties executed NDAs and received access to confidential due diligence material.

Financial Advisor Affidavit at paras. 14, 20-21 Motion Record, Tab 3.

16. A&M formally advised parties of the SISP procedure by way of a process letter (the “Phase I Letter”). The Phase I Letter notified all parties that A&M would evaluate their proposals with the objectives of realizing the highest value and, *inter alia*, ensuring certainty of execution. The Phase I Letter advised that, using the criteria set out therein, certain qualifying parties would be invited to participate in Phase II of the SISP.

Financial Advisor Affidavit at para. 23, Motion Record, Tab 3A.

17. Partway through Phase I of the SISP, it became apparent that the realizable value of the business and assets of FirstOnSite LP was not sufficient to fully satisfy its secured obligations. As a result, a CCAA filing would be required to execute any sale transaction.

Special Committee Affidavit at para 22, Motion Record, Tab 2.

18. As a result of the foregoing marketing efforts, on December 18, 2015, eight parties submitted non-binding letters of intent ("**Phase I LOIs**"). FirstOnSite and A&M reviewed the Phase I LOIs with the assistance of their professional advisors using the SISP criteria.

Financial Advisor Affidavit at para. 23, Motion Record, Tab 3A.

19. Following a thorough review of the Phase I LOIs, FirstOnSite, with the assistance of its professional advisors and A&M, invited five of eight bidders to Phase II of the SISP. The three bidders who were not invited to Phase II submitted Phase I LOIs that were materially lower in value in comparison with the others and indicated that they were not prepared to increase their offers to the value required to be competitive in Phase II.

Financial Advisor Affidavit at paras. 26-27, Motion Record, Tab 3B.

20. Phase II of the SISP involved additional due diligence, including access to an expanded data room and provision of a vendor due diligence report that included a working capital analysis. During this period, A&M held numerous discussions with bidders selected for Phase II to respond to their due diligence enquiries and encourage them to improve their bids, all to maximize value for FirstOnSite's stakeholders.²

Financial Advisor Affidavit at paras. 28-32, Motion Record, Tab 3B.

21. On January 29, 2016, A&M formally advised all parties advancing to Phase II of the timeline and expectations for final bids by way of a process letter (the "**Phase II letter**").

Financial Advisor Affidavit at para. 33, Motion Record, Tab 3.

22. At the conclusion of Phase II, on February 19, 2016, two parties submitted offers to purchase all or substantially all of the assets of FirstOnSite (each a "**Final Bid**").³

Financial Advisor Affidavit at para. 37-38, Motion Record, Tab 3C.

² Prior to receiving a management presentation, one bidder withdrew from the SISP as it advised that it could not dedicate the required time and resources to participate within the proposed timeline. Four parties attended at the management presentations.

³ A third party submitted a binding letter of intent with substantial outstanding due diligence conditions.

23. In the post-Phase II period, the Special Committee⁴ reviewed the Final Bids with input from A&M and their legal and other advisors. The Final Bids were evaluated with due and proper regard for the best interests of all of the stakeholders of FirstOnSite. FTI, in its capacity as proposed monitor, was involved in certain discussions with the Special Committee and FirstOnSite's advisors in connection with the selection of Final Bids in its capacity as proposed monitor.⁵

Special Committee Affidavit at para. 27, Motion Record, Tab 2.

Financial Advisor Affidavit at paras. 40-41, Motion Record, Tab 3.

24. The Special Committee concluded that the Purchaser's offer provided superior terms and consideration, including the ability to close the proposed transaction, offering the highest estimated enterprise value (on a debt free, cash free basis) and contemplating the least disruption for the business of FirstOnSite. Under the direction of the Special Committee, A&M continued to work with the Purchaser to improve and finalize its bid.

Special Committee Affidavit at para. 27, Motion Record, Tab 2.

Financial Advisor Affidavit at paras. 42-43, Motion Record, Tab 3.

25. On April 20, 2016 the Special Committee recommended to the Board to accept the Purchaser's bid and enter into the APA. The Board selected the Purchaser as the successful bidder and approved the execution of the APA. On April 20, 2016, the Vendor and the Purchaser executed the APA, conditional on Court approval.

Special Committee Affidavit at paras. 29-31, Motion Record, Tab 2.

⁴ On or about January 27, 2016, the Board determined that it would be appropriate to form a special committee to consider and evaluate the terms of any proposed transaction that may become available to FirstOnSite in connection with Phase II of the SISP (subject at all times to final approval by the Board) and passed a resolution forming a special committee (the "**Special Committee**").

⁵ On or about February 27, 2016, FirstOnSite retained FTI in the capacity of proposed monitor.

C. The Sale Transaction

26. The Purchaser will acquire substantially all of the business, assets and operations of FirstOnSite LP (the "**Purchased Assets**") including those set out in Schedule "A" to the APA), but excluding the Excluded Assets on an "as is, where is" basis free and clear of all Encumbrances but for the Permitted Encumbrances listed on Schedule "C" (as each term is defined in the APA).

Special Committee Affidavit at para. 33, Motion Record, Tab 2.

27. The Purchased Assets will not include certain Excluded Contracts (listed at Appendix 3 to Schedule A of the APA), the assets to be specified in Appendix 4 to Schedule A, and all cash and cash equivalents of the Vendor.⁶

Special Committee Affidavit at para. 34, Motion Record, Tab 2.

28. The aggregate purchase price payable by the Purchaser to the Vendor for the Purchased Assets is a set amount which is subject to adjustment pursuant to section 3.5 of the APA (an upward or downward adjustment based on working capital at closing), plus the assumption by the Purchaser of the Assumed Obligations (the "**Purchase Price**").

Special Committee Affidavit at para. 35, Motion Record, Tab 2.

29. The Purchaser and the Vendor have agreed, pursuant to an Escrow Agreement entered into on April 21, 2016, that \$2,000,000 of the Purchase Price (the "**Deposit**") will be deposited with FTI (in such capacity, the "**Escrow Agent**"), to be held in escrow pending the closing of the Sale Transaction.

Special Committee Affidavit at para. 40, Motion Record, Tab 2.

30. The APA also provides for a reserve in an amount to be determined by the Monitor (not to be less than \$3,000,000) to be established out of the proceeds of the sale to be

available to satisfy any potential claims that may be asserted against the Vendor by any person who is the beneficiary of a statutory deemed trust pursuant to applicable construction, builders' or mechanics' lien legislation (collectively, "**Trust Claims**").

Special Committee Affidavit at para. 37, Motion Record, Tab 2.

31. The APA contemplates that the Purchaser will secure either with cash, or one or more unconditional and irrevocable standby letters of credit, in the aggregate face amount of \$5,000,000, to satisfy potential Trust Claims (the "**Potential Trust Claimant Reserve**") to be held by the Monitor (in its capacity as Escrow Agent). The Monitor (in its capacity as Escrow Agent) is authorized to draw upon the Potential Trust Claimant Reserve, on the delivery by the Vendor and Purchaser of a duly executed written direction, to satisfy a potential Trust Claim using the Potential Trust Claimant Reserve following a process by which the parties to the APA may resolve any disputes as to the entitlement of a Trust Claim.

Special Committee Affidavit at para. 38, Motion Record, Tab 2.

32. The Purchaser will assume, perform, discharge and pay the obligations and certain liabilities of FirstOnSite set out in section 2.4 of the APA. The Purchaser will not assume, perform, discharge and pay FirstOnSite' obligations as per section 2.5.

Special Committee Affidavit at paras. 36 and 39, Motion Record, Tab 2.

33. FirstOnSite employed approximately 935 people as of February 29, 2016. The Purchaser agreed to offer employment, conditional on closing and effective as of the closing time, to no less than 90% of these employees. The Purchaser is obligated to make such offer no later than five (5) business days prior to closing, on employment terms substantially similar to those terms as at the closing date of the Sale Transaction.

Special Committee Affidavit at para. 44, Motion Record, Tab 2.

⁶ However, the Purchaser also has the right, at any time prior to the Closing Date, to add to the list of assets and/or contracts that form "Excluded Assets" and "Excluded Contracts" under the APA.

34. The APA contemplates that FirstOnSite will assign to the Purchaser certain contracts identified as the “**Assumed Contracts**” (as defined in the APA). Assignment to the Purchaser of a subset of those contracts (the “**Essential Contracts**”), whether by notice, counterparty consent or court order (the “**Assignment Order**”) is a condition precedent to closing. FirstOnSite is required to use commercially reasonable efforts to secure assignment of any contracts that require counterparty consent (the “**Consent Required Contracts**”). The hearing for the approval of the Assignment Order has been adjourned to May 18, 2016.

Special Committee Affidavit at para. 46-53, Motion Record, Tab 2.

Stay Extension Affidavit at paras. 13-17, Supplemental Motion Record, Tab 1.

35. The APA provides that the Sale Transaction will close (i) one business day after the date upon which the Approval and Vesting Order is granted and is final, not stayed or varied in a manner prejudicial to the Purchaser, or vacated or appealed, (unless the Purchaser provides written consent that closing occur despite such appeal); or (ii) on such other earlier or later date as may be agreed by the parties.

Special Committee Affidavit at para. 54, Motion Record, Tab 2.

PART III - ISSUES

36. The issues on this motion are as follows:

- (a) The request that this Court approve the APA and the Sale Transaction contemplated therein and vest all of the Purchased Assets in the Purchaser;
- (b) The extension of the Stay of Proceedings to June 10, 2016; and
- (c) The sealing of the confidential exhibits to the Special Committee Affidavit and the Financial Advisor Affidavit.

PART IV - LAW AND ARGUMENT

A. The APA and the Sale Transaction Should be Approved

(i) *The Test to Approve a Pre-Filing Sales Transaction is the Same as the Test to Approve a Post-Filing Sale Transaction*

37. In *Nelson Education Limited (Re)*, Justice Newbould held that the same principles that apply to the approval of a sale transaction resulting from a post-filing sales process apply to the approval of a sale transaction resulting from a pre-filing sales process.

Nelson Education Limited (Re), 2015 ONSC 5557, Applicants BOA, Tab 1 at paras. 32-33, 35-38 [*"Nelson"*]

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), Applicants' BOA, Tab 2 at para. 16 [*"Soundair"*]

38. *Nelson* recognized, *inter alia*, the following nine circumstances as salient in determining if a pre-filing sales process was conducted in a manner concordant with the the *Soundair* principles and the requirements of s. 36(3) of the CCAA. FirstOnSite submits that each of the following factors are satisfied in this case:

- 1) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
- 2) The SISP allowed interested parties adequate opportunity to conduct due diligence; both management and their financial advisors were responsive to all requests from potentially interested parties; and the timelines were reasonable in the circumstances;
- 3) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;

- 4) Both senior management of FirstOnSite and A&M were incentivised to achieve the best value available in the circumstances and there was no impediment to doing so;
- 5) The SISP was undertaken in a thorough and professional manner;
- 6) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the business of the debtor that would be sufficient to repay more than the amounts owing to the Wells Fargo and BDC (with Capital being the fulcrum creditor); and
- 7) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the APA and the Purchase Price contemplated therein.

Nelson, Applicants' BOA, Tab 2 at paras. 35-36

Special Committee Affidavit at paras. 20, 28-29, 58, 62-63, Motion Record, Tab 2

Financial Advisor Affidavit at paras. 13-14, 20, 23-24, 28-29, 32, 44-46, Motion Record, Tab 3.

Second Report of FTI Consulting Canada Inc., in its capacity as the Monitor at paras. 52-58 [**"Second Monitor's Report"**]

(ii) *The Criteria for Approving the Sale Transaction*

39. The power of this Court to approve a sale of assets prior to the formulation of a plan of compromise or arrangement is contained in section 36 of the CCAA. Courts have recognized that, as "reorganizations of differing complexity require different legal mechanisms," the sale of "substantially all of the assets of a debtor company to preserve it as a going concern under new ownership" is a valid objective under the CCAA.

PCAS Patient Care Automation Services Inc. (Re), 2012 ONSC 3367, Applicants' BOA, Tab 3 at paras. 35

First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299 at para 32, Applicants' BOA, Tab 4

Nortel Networks Corp. (Re) (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), Applicants' BOA, Tab 5 at paras. 27, 32-34, 36, 38 and 40 [*"Nortel Networks"*]

40. The Court must look at the transaction as a whole and decide whether the sale is appropriate, fair and reasonable. Section 36(3) of the CCAA sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (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.

CCAA section 36(3)

Re White Birch Paper Holding Company, 2010 QCCS 4915 at paras. 48-49, leave to appeal ref'd 2010 QCCA 1950 at para. 13, Applicants' BOA, Tab 6

41. In *Re Canwest Publishing Inc.*, Justice Pepall held that the section 36(3) criteria largely overlapped with the traditional common law criteria established in *Soundair* for approval of a sale of assets in an insolvency scenario:

- a. Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- b. The interests of all parties;

- c. The efficacy and integrity of the process by which offers have been obtained;
and
- d. Whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

Re Canwest Publishing Inc. (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.), Applicants' BOA, Tab 7 at para. 13

Soundair, Applicants' BOA, Tab 2 at para. 24

42. Section 36 of the CCAA grants the necessary jurisdiction to approve a sale transaction where certain creditors will not recover at all if the transaction is otherwise in the best interest of the stakeholders of the debtor. In *Nelson*, Justice Newbould approved a credit bid, the effect of which was that second-lien lenders would not recover anything. Similarly, in *Re Grant Forest Products Inc.*, Justice Campbell approved a sale transaction where "there will be a shortfall" for the first-lien lenders, "likely no recovery" for second-lien lenders and no recovery for the unsecured creditors.

Nelson, Applicants' BOA, Tab 3 at para. 1

Re Grant Forest Products Inc., 2010 ONSC 1846, Applicants' BOA, Tab 8 at paras. 10-11, 37 and 49

(iii) *The APA and Sale Transaction Satisfy the Section 36 Requirements and the Soundair Criteria*

43. The APA and the Sale Transaction satisfy section 36 of the CCAA requirements and the *Soundair* criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

- (a) **Section 36(3)(a):** The process leading to the Sale Transaction was reasonable in the circumstances.
 - (i) The SISF was designed to maximize the purchase price that could be obtained for the assets of FirstOnSite;

- (ii) The SISP was developed and structured in a manner consistent with and analogous to post-filing sales processes commonly approved by this Court; and
- (iii) The marketing process was carried out in accordance with the SISP and the opportunity to acquire the business and assets of FirstOnSite was widely known;
- (iv) The SISP allowed interested parties adequate opportunity to conduct due diligence and A&M and FirstOnSite's management were responsive to requests from potentially interested parties;
- (v) The SISP was conducted in a fair and transparent and reasonable manner.
- (vi) The degree of creditor consultation was appropriate in the circumstances and no material change in the outcome of the SISP would have resulted from additional creditor consultation;
- (vii) Further canvassing of the market is unnecessary in the circumstances as there has been no material improvement in the business or market conditions that would suggest that a different result could be achieved if the sales process was reopened at this time.

Special Committee Affidavit at paras. 20, 28-29, 58, 62-63, Motion Record, Tab 2

Financial Advisor Affidavit at paras. 24, 29, 44-46, Motion Record, Tab 3.

Second Monitor's Report at paras. 56-57.

- (b) **Section 36(3)(c): The Monitor has filed a report attesting to the benefit of the Transaction.** In particular, the Monitor is of the view that:
 - (i) The Sale Transaction would be more beneficial to FirstOnSite's creditors than a sale or disposition in a bankruptcy; and

- (ii) The Sale Transaction represents the best available outcome for all stakeholders.

Second Monitor's Report at paras. 55-57.

- (a) **Section 36(3)(d): Creditors were adequately consulted.** Wells Fargo (in its capacity as ABL Agent), the first-ranking secured creditor of the FirstOnSite, BDC, Capital and Torquest were kept apprised of the progress of the SISP by way of regulate update calls.

Financial Advisor Affidavit at paras. 17 and 39, Motion Record, Tab 3.

- (b) **Section 36(3)(e): The effects of the Sale Transaction are positive.** The Sale Transaction provides for the continued operation of FirstOnSite's business, which will mean ongoing employment for its employees and business for suppliers, service providers and customers that would not be available in the event that FirstOnSite was to be liquidated.

Special Committee Affidavit at paras. 62-63, Motion Record, Tab 2

Financial Advisor Affidavit at paras. 42, 44-46, Motion Record, Tab 3.

Second Monitor's Report at paras. 55-57.

- (c) **Section 36(3)(f): The consideration to be received for FirstOnSite's business and property is adequate.** The APA, which is the result of a thorough market canvass and test, represents the highest price realizable for the Purchased Assets that could be obtained pursuant to the SISP.

Special Committee Affidavit at paras. 9, 28-29, 62-63, Motion Record, Tab 2

Financial Advisor Affidavit at paras. 42 and 47, Motion Record, Tab 3.

Second Monitor's Report at paras. 58

44. Courts will not lightly interfere with the proper exercise of commercial and business judgment where the marketing and sale process was fair, reasonable, transparent and efficient. FirstOnSite's uncontested evidence is that the Sale Transaction is the

product of a fair and transparent procedure and that it constitutes the best value realizable in the circumstances for all of FirstOnSite's stakeholders.

Re AbitibiBowater Inc., 2010 QCCS 1742, Applicants BOA, Tab 10, at paras. 70-71

45. For all of the foregoing reasons, the circumstances set out in section 36(3) in the CCAA are satisfied and the Sale Transaction should be approved.

(iv) The Additional Factors for Sale Approval are Also Satisfied

46. In addition to the factors set out in section 36(3), section 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

CCAA, s. 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a).

47. FirstOnSite intends to continue making payments required under sections 6(5)(a) and 6(6)(a) of the CCAA in the ordinary course, to the extent applicable.

Special Committee Affidavit at para. 66, Motion Record, Tab 2

Second Monitor's Report at paras. 61.

48. The restrictions in sections 36(4) and (5) of the CCAA are not applicable as the Purchaser and the FirstOnSite LP are not related persons as defined therein.

Special Committee Affidavit at para. 65, Motion Record, Tab 2

B. The Stay Period Should be Extended to May 31, 2016

(i) The Court has the Jurisdiction to Extend the Stay of Proceeding

49. Pursuant to section 11.02 of the CCAA, the Court may extend a stay of proceedings with respect to a debtor where (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCAA s. 11.02(2), 11.02(3).

(ii) Extending the Stay Period is Necessary in the Circumstances

50. The stay of proceeding expires on May 20, 2016. An extension of the stay up to and including May 31, 2016 is necessary to give FirstOnSite time to, among others, obtain the Assignment Order and close the Sale Transaction (if approved).

Stay Extension Affidavit, at para. 19, Supplemental Motion Record, Tab 1.

51. In *Re Canwest Global Communications Corp.*, Justice Pepall granted an extension of the stay of proceedings for a group of debtors that were continuing to work with their stakeholders. She found that the extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the continuation of their businesses as a going concern. The factors which supported her decision were: (a) the cash flow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period; (b) the monitor supported the extension; (c) there was no opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

Re Canwest Global Communications Corp., [2009] O.J. No. 4788 (S.C.J.), Applicants' BOA, Tab 11 at para. 43 [*"Canwest Global"*]

52. FirstOnSite has been working diligently and in good faith since the start of the CCAA proceedings. Among other things, FirstOnSite has been:

- (a) Communicating with its key financial and other stakeholders, including its customers and employees, as well as certain governmental regulators;

- (b) Addressing issues raised by its suppliers in the ordinary course, including providing payment in advance as necessary and paying pre-filing amounts where required as provided for in the Initial Order; and
- (c) Working to satisfy all of the Vendor's conditions to closing the Sale Transaction in accordance with the timeline contemplated by the APA.

Stay Extension Affidavit, at paras. 18, 24, Supplemental Motion Record, Tab 3

53. The cash flow forecast included in the Pre-Filing Report of the Proposed Monitor demonstrate that, subject to the underlying assumptions, FirstOnSite will have sufficient funds to continue operating to the anticipated closing date of the Sale Transaction. Funds will be available from the sale proceeds to complete the CCAA proceedings thereafter.

Pre-Filing Report of the Proposed Monitor at para. 20, 24.

54. The Monitor supports the motion to extend the stay of proceeding and FirstOnSite are unaware of any creditor who opposes this motion. No creditor will suffer any material prejudice if the stay of proceeding is extended as requested.

Second Monitor's Report at paras. 46-51.

55. For the foregoing reasons, it is respectfully submitted that the stay of proceeding should be extended to May 31, 2016.

C. The Confidential Exhibits Should be Sealed

56. This Court has the jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, RSO 1990, c C.43 s. 137(2).

57. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci adopted the following test to determine when a sealing order should be made:

A confidentiality order ... should only be granted when:

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 at para. 53, Applicant's BOA Tab 21.

58. It is a term of the APA that the Vendor will use commercially reasonable efforts to seek an order of the Court sealing, until further order of the Court, the financial terms of this Agreement and of the Transaction. The material to be sealed contains unredacted, sensitive financial and commercial information with respect to, *inter alia*, the nature of the bids received during the SISP and the terms of the APA, the disclosure of which will cause harm to FirstOnSite and its stakeholders, which is an important commercial interest warranting protection.


59. Special Committee Affidavit at para. 31, Motion Record, Tab 2
Financial Advisor Affidavit at paras. 38 and 47, Motion Record, Tab 3.

60. For all of the foregoing reasons, it is appropriate to order the confidential exhibits to the Special Committee Affidavit and the Financial Advisor Affidavit to be sealed.

PART V - ORDER REQUESTED

61. For all of the foregoing reasons, FirstOnSite submit that it is appropriate for this Court to grant the orders sought herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of May, 2016.



Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Nelson Education Limited (Re)*, 2015 ONSC 5557
2. *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)
3. *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 3367
4. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299
5. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)
6. *Re White Birch Paper Holding Company*, 2010 QCCS 4915, leave to appeal ref'd 2010 QCCA 1950
7. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.)
8. *Re Grant Forest Products Inc.*, 2010 ONSC 1846
9. *Re Century Services Ltd.*, 2010 SCC 60
10. *Re AbitibiBowater Inc.*, 2010 QCCS 1742
11. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (S.C.J.)
12. *Target Canada Co. (Re)*, 2015 ONSC 7574
13. *Re AbitibiBowater Inc.*, 2009 QCCS 6461
14. *Re Windsor Machine & Stamping Ltd.* (2009), 55 C.B.R. (5th) 241 (Ont. S.C.J.)
15. *Re Northstar Aerospace, Inc.*, 2012 ONSC 4423
16. *Re Crystallex International Corp.*, 2012 ONSC 2125, aff'd 2012 ONCA 404
17. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600, aff'g 22 C.B.R. (5th) 298 (Ont. Sup. Ct. J.)
18. *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.)
19. *Re Target Canada Co.*, 2015 ONSC 303
20. *Canwest Publishing Inc.*, 2010 ONSC 222
21. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Compromises to be sanctioned by court

Restriction — employees, etc.

6(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

[..]

6(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

[...]

General power of the court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Stays, etc. — other than initial application

11.02(2) 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.

Burden of proof on application

11.02(3) 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.

[...]

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

36(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

36(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.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company;
and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Courts of Justice Act, R.S.O. 1990, c. C-43

137 Documents public

(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record

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

Court File No. CV-16-11358-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FIRSTONSITE G.P. INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL
LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE MAY 9, 2016)**

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(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

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