

**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 2123125 ONTARIO INC.

Applicant

**FACTUM OF THE APPLICANT
(Motion Returnable October 28, 2016)
(Re Claims Bar and Stay Extension)**

October 26, 2016

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PART I - INTRODUCTION

1. On April 21, 2016, as a result of severe financial difficulties, 2123125 Ontario Inc., formerly known as FirstOnSite G.P. Inc. ("**212**" or the "**Applicant**") filed for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the order of Justice Newbould of the same date (the "**Initial Order**"). The Initial Order provided for, *inter alia*, a stay of proceedings against the Applicant through to and including May 20, 2016 (the "**Stay Period**") and extended the relief under the Initial Order to Former Restoration L.P., formerly known as FirstOnSite Restoration L.P. ("**Former LP**", together with 212, "**FirstOnSite**").

2. Prior to commencing these CCAA proceedings, FirstOnSite marketed and sold substantially all of its assets (the "**Sale Transaction**") pursuant to an Asset Purchase

Agreement dated April 20, 2016 (the “**APA**”) with 3297167 Ontario Inc. (the “**Purchaser**”). The Sale Transaction was approved by this Court on May 9, 2016 and closed on June 1, 2016 (the “**Closing Date**”). Since the closing of the Sale Transaction, FirstOnSite has ceased carrying on any active business, with the exception of the performance of services (the “**Transition Services**”) under certain contracts (the “**Quebec Contracts**”) pursuant to a Transition Agreement dated June 1, 2016 (the “**Transition Agreement**”) with the Purchaser.

3. FirstOnSite seeks an order (the “**Claims Process Order**”), substantially in the form attached to the Motion Record at Tab 3 for, among other things:

- (a) approval of the Claims Process and form of the Claims Notice (each as defined below);
- (b) the setting of the Claims Bar Date (as defined below) for any:
 - (i) claims for the payment of approved goods and services provided to FirstOnSite from the CCAA filing date of April 21, 2016 to May 31, 2016;
 - (ii) trust claims pursuant to the *Construction Lien Act*¹ or equivalent provincial legislation;

¹ R.S.O., 1990, c. C.30.

(iii) other trust claims pursuant to applicable law

(collectively, “**Eligible Claims**”);

(c) approval of the Fourth Report of the Monitor to be filed, and the activities of the Monitor as set out therein; and

(d) an extension of the stay of proceedings (the “**Stay of Proceedings**”) set out at paragraph 15 of the Initial Order, as subsequently extended, to January 27, 2017.

4. FirstOnSite submits that (a) the Claims Process, Claims Notice and Claims Bar Date are appropriate in the circumstances and provide a reasonable time period for parties with Eligible Claims to submit their claim to the Monitor and (b) the extension of the Stay of Proceedings is just and appropriate in the circumstances as it is necessary to permit FirstOnSite to complete the Outstanding Matters (as defined below). FirstOnSite has and continues to act in good faith and with due diligence in these proceedings.

5. The relief sought on this motion is supported by the Monitor and, as of the date of this Factum, unopposed by any party, including BDC Capital Inc. (“**Capital**”).

PART II - THE FACTS

6. 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**”) and the affidavit of Kevin McElcheran, sworn October 21, 2016 (the “**McElcheran Affidavit**”).²

A. Commencement of the CCAA Proceedings

7. FirstOnSite carried 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. Since 2010, FirstOnSite experienced significant financial and liquidity difficulties due to, *inter alia*, insufficient equity, escalating operating losses and correspondingly escalating debt to fund these losses.³

8. FirstOnSite conducted a pre-filing sales and investor solicitation process which resulted in FirstOnSite entering into a sale transaction that contemplated the sale of substantially all of FirstOnSite’s assets to the Purchaser as set out in the APA.⁴

9. In order to effect the Sale Transaction, on April 21, 2016, FirstOnSite commenced these CCAA proceedings and was granted the Initial Order.⁵

² Capitalized terms not otherwise defined herein have the meaning assigned to them in the McElcheran Affidavit.

³ Affidavit of Kevin McElcheran sworn October 21, 2016, para 3-4, Motion Record of the Applicant, Tab 2 [“**McElcheran Affidavit**”].

⁴ *Ibid.*, para 5.

⁵ *Ibid.*, para 6.

B. Sale Transaction and Transition Agreement

10. The Sale Transaction and APA were approved by the Court on May 9, 2016 and the Sale Transaction was scheduled to close on June 1, 2016.

11. Prior to the Closing Date it came to the Purchaser's attention that it would require a licence issued pursuant to the *Builder's Act* (Quebec) to perform the Quebec Contracts. FirstOnSite holds an existing licence, and agreed to perform the Transition Services, comprised of temporarily holding, and continuing to perform the work under the Quebec Contracts, pursuant to the Transition Agreement.⁶

12. With the Transition Agreement in place, the Sale Transaction closed on the Closing Date, as scheduled. FirstOnSite has ceased having any active operations, with the exception of the Transition Services, since the closing of the Sale Transaction.⁷

13. Pursuant to the Transition Agreement, provided that there are no material breaches of the Transition Agreement by the Purchaser, the Vendor will perform the Transition Services until the earlier of (a) delivery of the Transition Date Notice, and

⁶ *Ibid.*, para 15.

⁷ *Ibid.*, para 11.

the Subsequent Monitor's Certificate (each as defined in the Transition Agreement) or (b) August 31, 2016 (the "**Expiry Date**").⁸

14. The Expiry Date has been extended twice pursuant to an amendment to the Transition Agreement dated August 31, 2016 and a second amendment to the Transition Agreement dated September 30, 2016 (the "**Second Amendment Agreement**").⁹ The current Expiry Date is November 15, 2016.

15. Pursuant to the Second Amendment Agreement the Purchaser also agreed to:

(a) provide timely, accurate and fulsome disclosure to FirstOnSite and the Monitor of its progress in obtaining the New Quebec License (as defined in the Transition Agreement); and

(b) pay or otherwise satisfy any remaining outstanding amounts on the Potential Trust Claimants List (as defined in the APA) that are owing to Potential Trust Claimants (as defined in the APA), as required pursuant to the APA and discussed further below, prior to November 15, 2016.¹⁰

⁸ Fourth Report of FTI Consulting Canada Inc. in its capacity as the Monitor dated October 24, 2016 at para 22 ["**Fourth Report**"].

⁹ McElcheran Affidavit, para 16.

¹⁰ *Ibid.*, para 17.

C. Trust Claims

16. Pursuant to the APA, the Purchaser assumed, among others, the obligations set out in the Potential Trust Claimants List, as such list may have been amended from time to time pursuant to the APA.¹¹

17. The APA also obliges the Purchaser to periodically deliver a report every two weeks (each a “**Trust Claims Report**”) to FirstOnSite and the Monitor setting out the amounts owing to persons on the Potential Trust Claimants List. As of October 5, 2016, the Trust Claims Report indicated that the Purchaser had satisfied approximately \$13.7 million in potential trust claims listed on the Potential Trust Claimants List and that approximately \$485,000 of potential trust claims listed on the Potential Trust Claimants List remain outstanding to Potential Trust Claimants. As noted above, the Purchaser has agreed to pay any outstanding amounts set out in the Potential Trust Claimants List and owed to Potential Trust Claimants (“**Potential Trust Claims**”) prior to November 15, 2016.¹²

18. Pursuant to the Distribution Order, granted by Justice Newbould on May 18, 2016 (the “**Distribution Order**”), the Monitor is to retain a reserve of funds (the “**Reserve**”) from the proceeds of the Sale Transaction (the “**Sale Proceeds**) in an amount satisfactory to the Monitor, in consultation with FirstOnSite, or in an amount determined by the Court, sufficient for the payment of all fees and expenses of the

¹¹ *Ibid.*, para 17(b).

¹² *Ibid.*, paras 28-29.

Monitor and the Monitor's legal counsel and of legal counsel to FirstOnSite (collectively, the "**Professional Expenses**") and amounts owing by FirstOnSite in respect to obligations incurred by FirstOnSite since the commencement of these CCAA proceedings (collectively, the "**Post-Filing Expenses**") and to secure the obligations under the Administration Charge, the KERP Charge, the Financial Advisor's Charge, any other obligations of FirstOnSite that rank in priority to the Charges, the security granted in respect of the Pre-Filing ABL Facility, the Pre-Filing BDC Loan and the Pre-Filing BDC Capital Loan (each as defined in the Distribution Order), including any statutory deemed trust claims that may arise under provincial legislation and including, with respect to the secured obligations under the Pre-Filing BDC Capital Loan, any outstanding claims secured by the Lien Charge, and any other contingent amounts appropriate under the circumstances.¹³

19. Based on the books and records of FirstOnSite, the Monitor understands that there are approximately \$110,000 of payables which may potentially constitute trust claims and are not listed on the Potential Trust Claimants List or otherwise assumed by the Purchaser.¹⁴

D. Outstanding Matters in CCAA Proceedings

20. There are a number of outstanding matters (the "**Outstanding Matters**") that FirstOnSite will have to attend to over the next four months, including:

¹³ *Ibid.*, para 32; Fourth Report at para 43.

¹⁴ McElcheran Affidavit, para 38.

- (a) Continuing to provide the Transition Services, reviewing further Trust Claims Reports and ensuring the satisfaction of Potential Trust Claims;
- (b) Resolving or litigating the Stub Bonus Motions;
- (c) Consulting with the Monitor with respect to completing the Claims Process and paying any Eligible Claims; and
- (d) Consulting with the Monitor with respect to any distributions of the Sale Proceeds.

a) Transition Services and Potential Trust Claimants

21. As noted above, pursuant to the Second Amendment Agreement, FirstOnSite has agreed to extend the Expiry Date for the provision of Transition Services until November 15, 2016, and the Purchaser has agreed to pay all Potential Trust Claims by November 15, 2016.¹⁵

22. FirstOnSite will continue to provide the Transition Services, review the Trust Claims Reports and work with the Purchaser to ensure that the Potential Trust Claims are satisfied in accordance with the APA and the Second Transition Agreement.

¹⁵ *Ibid.*, paras 16-17.

b) Stub Bonus Motion

23. The APA contemplates a Purchase Price adjustment based on the difference between the Estimated Working Capital of FirstOnSite at the date of closing and the amount determined to be the Final Working Capital (each as defined in the APA).¹⁶ FirstOnSite and the Purchaser have agreed upon the Final Working Capital, subject to a determination by this Court of an issue relating to the payment of stub bonus amounts to certain former employees of FirstOnSite (the “**Stub Payments**”) by the Purchaser (the “**WCC Motion**”).¹⁷

24. Capital has indicated that it intends to bring a motion for a declaration that its security interest is entitled to priority over any Stub Bonus Payments (the “**Capital Motion**” and together with the WCC Motion the “**Stub Bonus Motion**”). The Stub Bonus Motion is scheduled to be heard on November 16, 2016.¹⁸

25. FirstOnSite continues to be engaged in discussions with the Purchaser and BDC to resolve the issues raised in the Stub Bonus Motion.

¹⁶ McElcheran Affidavit, para 21.

¹⁷ *Ibid.*, paras 21, 25.

¹⁸ *Ibid.*, para 25.

c) Claims Process

26. FirstOnSite and the Monitor will work together to implement the claims process (the “**Claims Process**”) to solicit claims from parties that may have an Eligible Claim against FirstOnSite. The key features of the Claims Process are:

(a) As soon as practicable after the granting of the requested Claims Process Order (if granted), the Monitor will send a claims notice (the “**Claims Notice**”) in substantially the form attached to the McElcheran Affidavit to those creditors of FirstOnSite based on the books and records of FirstOnSite whose claims were not assumed by the Purchaser;

(b) The Claims Notice states that any Eligible Claims must be received by the Monitor by November 15, 2016 (the “**Claims Bar Date**”) or the claim will be barred and extinguished pursuant to the order of this Court;

(c) The Monitor and FirstOnSite will review any claims submitted and subject to the availability of funds, pay any valid outstanding Eligible Claims; and

(d) Pursuant to the Claims Process Order the Monitor would be authorized to resolve claims submitted pursuant to the claims process with the applicable

claimant, or, if the claim cannot be resolved, return to the Court for a determination of the claim.¹⁹

d) Distributions

27. Pursuant to the Distribution Order, FirstOnSite must consult with the Monitor with respect to the distribution of the Sale Proceeds.²⁰ After the Claims Bar Date has passed, the Claims Process is completed and all Eligible Claims and post-filing expenses, including professional fees, have been paid, the Monitor, in consultation with FirstOnSite, intends to make a final distribution of the remaining Sale Proceeds to Capital.

E. Stay Extension

28. The Stay of Proceedings granted under the Initial Order was extended by further orders of this Court to October 31, 2016. A further extension of the Stay Period to January 27, 2017 is necessary to provide FirstOnSite with sufficient time to complete the Outstanding Matters.²¹

¹⁹ *Ibid.*, paras 35-39.

²⁰ *Ibid.*, para 32.

²¹ *Ibid.*, para 42.

29. FirstOnSite has acted and continues to act in good faith and with due diligence and no creditor will suffer any material prejudice if the Stay Period is extended to January 27, 2017.²²

30. The extension of the Stay of Proceedings is supported by the Monitor and Capital and, as of the date of this factum, unopposed by any party.²³

PART III – ISSUES

31. The issues on this motion are:

(a) Should this Court approve the proposed Claims Process and grant the Claims Bar Date; and

(b) Should this Court grant an extension of the Stay of Proceedings to January 27, 2017?

PART IV – LAW AND ARGUMENT

32. FirstOnSite submits that:

(a) The Claims Process and Claims Bar Date are appropriate in the circumstance and consonant with the purpose recognized by this Court for

²² *Ibid.*, para 44.

²³ *Ibid.*, para 43 and Fourth Report at para 58.

claims processes in the past of having all claims against the insolvent entity determined in a single flexible and expeditious manner; and

(b) it is appropriate that this court extend the Stay of Proceedings to January 27, 2017. Extending the Stay Period will permit FirstOnSite to complete all of the Outstanding Matters and avoid unnecessary costs associated with a further motion to extend the Stay Period.

A. The Court Should Approve the Proposed Claims Process

33. Section 11 of the CCAA affords the Court the jurisdiction to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the CCAA itself, which includes the ability to approve a process to solicit and determine claims against the debtor company.²⁴

34. The Court's authority to approve a process to solicit claims against a debtor company has been described as "well accepted" in Canada.²⁵ In *Re ScoZinc Ltd.*, Justice Beveridge noted that, in the context of a claims process, "the practice has arisen for the court to create by order a claims process that is both flexible and expeditious".²⁶

²⁴ CCAA, s. 11.

²⁵ *ScoZinc Ltd. (Re)* (2009), 53 C.B.R. (5th) 96 (N.S. S.C.) at para 25, Applicants' Book of Authorities, Tab 1.

²⁶ *Ibid.* at para. 23.

35. The Claims Process Order contemplates that all claims against the applicants be dealt with through the Claims Process regardless of the location of the claimant. Canadian courts have clearly stated that it is appropriate, in CCAA proceedings, for courts to sustain the single proceeding model with respect to claims against a CCAA debtor company.

36. This approach to insolvency proceedings has been articulated by the Supreme Court of Canada in *Re Century Services*, where the court noted that the single proceeding model was what avoided the chaos of individual enforcement attempts and the associated inefficiency:

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise²⁷

37. In *Re Nortel*, Newbould J. held a creditor to the claims process established by the debtors on the grounds that doing so would avoid a multiplicity of proceedings that would unnecessarily inhibit the timely resolution of all claims and preservation of the debtors' resources, despite a forum selection clause requiring the dispute to be heard in the United States:

²⁷ *Leroy Trucking [Century Services] (Re)* 2010 SCC 60 at para. 22, Applicants' Book of Authorities, Tab 2.

A CCAA court should not lightly lose control of the process whereby claims against the debtor are to be determined. I agree that procedures should be imposed to ensure that the process for resolving the [claim] does not become more expensive or complicated than the circumstances permit or the claims merit.²⁸

38. In the case at bar, the overwhelming majority of claims against the FirstOnSite estate have been:

- (a) paid through a prior distribution of the Sale Proceeds,
- (b) assumed and/or paid by the Purchaser; or
- (c) will not be entitled to any distribution as a result of their position in the waterfall.

39. Known creditors of FirstOnSite were provided with notice of the proceedings pursuant to the Initial Order in April 2016. Since that date FirstOnSite and the Monitor are not aware of:

- (a) any Post-Filing Expenses incurred prior to the Closing Date that were not assumed by the Purchaser, other than Professional Expenses incurred in connection with these CCAA proceedings; or

²⁸ *Nortel Networks Corp., (Re)* 2015 ONSC 1354 at para 35, Applicants' Book of Authorities, Tab 3.

(b) any party asserting any trust claims, other than with respect to certain Lien Claims which have been dealt with separately pursuant to the Initial Order.²⁹

40. In order to facilitate the release of the Reserve and make a final distribution of the Sale Proceeds, FirstOnSite believes it is necessary and appropriate to determine and pay any potential remaining Eligible Claims which are entitled to be paid in priority to Capital.³⁰

41. In these circumstances, the Claims Process Order is designed to efficiently solicit claims from persons with potential Eligible Claims based on the books and records of FirstOnSite.

42. The proposed Claims Process accords with the discretion given to the courts under the CCAA and meets the purpose of claims processes generally, which is “to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner”.³¹

43. In addition to the fairness of the Claims Process with respect to the claims caught by the Claims Process Order, the Claims Process is procedurally fair and efficient, as discussed below.

²⁹ Fourth Report at para 49.

³⁰ McElcheran Affidavit, para. 37

³¹ *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (S.C.J.), at para. 40, Applicant’s Book of Authorities, Tab 4 [“*Canwest Global*”].

44. A notice to creditors (the “**Claims Notice**”) will be sent by the Monitor to all known creditors of FirstOnSite that, based on its books and records, have outstanding amounts owing to them by FirstOnSite that were not assumed by the Purchaser pursuant to the APA.

45. Persons will have adequate time to file their Claims. The Claims Notice will be sent as soon as practicable after the granting of the proposed order. Claims must be received by the Monitor by no later than 5 p.m. (Eastern Standard Time) on November 15, 2016 (the “**Claims Bar Date**”) or the claimant will be barred from enforcing their claim and their claim will be extinguished. This information is clearly set out in the Claims Notice.

46. The proposed Claims Bar Date provides sufficient time for potential claimants to submit any Eligible Claims they may have against FirstOnSite. The Monitor states in its Fourth Report that the proposed Claims Notice and Claims Bar Date are appropriate in the circumstances.³²

47. The proposed Claims Process is flexible and efficient. It encourages claimants to submit claims via an electronic system but, where necessary, also allows claimants to submit claims via facsimile, personal delivery, courier or prepaid mail.³³ The

³² Fourth Report at para. 53.

³³ Claims Process Order at para. 42, Motion Record, Tab 3.

Monitor supports FirstOnSite's position that the proposed Claims Process should be approved by the Court.³⁴

48. For the foregoing reasons, it is respectfully submitted that the Claims Process should be approved.

B. Extending the Stay Period is Necessary in the Circumstances

49. The Stay of Proceedings expires on October 31, 2016.³⁵ An extension of the stay up to and including January 27, 2017 is necessary to give FirstOnSite time to, among other things, complete the Outstanding Matters.

50. In *Re Canwest Global Communications Corp.*, Justice Pepall considered the following factors relevant in granting an extension of a stay of proceedings: (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.³⁶

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

- (a) entered into and performed the Transition Agreement, as amended;

³⁴ Fourth Report at para 59.

³⁵ McElcheran Affidavit at para 12.

³⁶ *Canwest Global* at para. 43.

- (b) resolved a motion brought by the Purchaser with respect to cure costs under the APA;
- (c) closed the Sale Transaction;
- (d) disclaimed certain contracts not assumed by the Purchaser;
- (e) worked to facilitate the transition of the FirstOnSite business to the Purchaser through the transition of any assets still required by the Purchaser to operate the business;
- (f) consulted with the Monitor with respect to certain distributions;
- (g) entered into the CRO Agreement;
- (h) negotiated the Final Working Capital, subject to the Stub Bonus Motion;
- (i) is productively discussing the potential resolution of the Stub Bonus Motion with the Purchaser and Capital; and
- (j) prepared the Claims Process and Claims Notice.³⁷

52. The Monitor has indicated that it holds sufficient cash in reserve, pursuant to the Distribution Order, to provide FirstOnSite with sufficient liquidity to fund the Outstanding Matters and CCAA proceedings to January 27, 2017.³⁸

³⁷ McElcheran Affidavit, *supra.*, at para. 46.

53. The Monitor supports the motion to extend the Stay of Proceedings and FirstOnSite are unaware of any creditor who opposes this motion.³⁹ No creditor will suffer any material prejudice if the Stay of Proceedings is extended as requested.

54. For the foregoing reasons, it is respectfully submitted that the Stay of Proceedings should be extended to January 27, 2017.

PART V – ORDER REQUESTED

55. For the reasons set out herein, FirstOnSite respectfully requests that this Court grant an order:

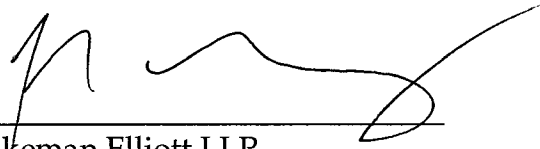
- (a) approving the proposed Claims Process and the form of the Claims Notice;
- (b) ordering the Claims Bar Date;
- (c) extending the Stay of Proceedings to January 27, 2017; and
- (d) approving the reports of the Monitor and its activities as set out therein.

³⁸ Fourth Report at para 37.

³⁹ Ibid at para 39.

- (d) approving the reports of the Monitor and its activities as set out therein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of October, 2016.



Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *ScoZinc Ltd. (Re)* (2009), 53 C.B.R. (5th) 96 (N.S. S.C.)
2. *Leroy Trucking [Century Services] (Re)* 2010 SCC 60.
3. *Nortel Networks Corp., (Re)* 2015 ONSC 1354.
4. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (S.C.J.)

SCHEDULE "B"
LIST OF AUTHORITIES

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

General power of 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.

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE OCTOBER 28, 2016)**

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