

**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
(Comeback Motion returnable May 2, 2016)

Dated: April 28, 2016

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PART I - INTRODUCTION

1. On April 21, 2016, FirstOnSite G.P. Inc. ("**FirstOnSite GP**") and FirstOnSite Restoration L.P. ("**FirstOnSite LP**"), a limited partnership formed under the laws of Ontario (collectively, with FirstOnSite GP, "**FirstOnSite**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (the "**Court**"). At that time, the Court also granted the Charges (as defined below) over the assets and undertaking of FirstOnSite.

2. This motion is brought by FirstOnSite GP seeking to amend and restate the Initial Order to provide, among other things, that the Charges rank in priority to all Encumbrances (as defined below) except any claims of any person against FirstOnSite for amounts owing for services and/or materials supplied that have priority over Encumbrances by statute (The Lien Charge (as defined in the Initial Order), shall rank

subordinate to the Wells Fargo Security (as defined below) and the BDC Security (as defined below), but otherwise enjoys the same priority as the other Charges over Encumbrances, subject to the Court-ordered priority of the Charges as between each other set out in paragraph 49 of the Amended and Restated Order).

PART II - THE FACTS¹

A. Background

3. FirstOnSite is one of the largest independently owned, non-franchised restoration services provider in Canada. FirstOnSite was founded by the merger of two regional business from Ontario and British Columbia in 2007. Between 2007 to 2009, FirstOnSite consolidated a large portion of the fragmented, regional industry into a national operation through a series of debt-financed asset acquisitions.² At present, FirstOnSite holds significant market share in every province that it operates in.

Demos Affidavit, Application Record, Tab 2 at paras. 16, 21-25, 27-28, 35-38.

4. FirstOnSite offers customers a diverse range of services, including but not limited to emergency response work in connection with, *inter alia*, fire, flood and other weather-related events, follow-up rebuild and repair work, and other specialty services, such as content restoration and environmental clean-up.

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Kevin McElcheran sworn April 22, 2016 (the "McElcheran Affidavit").

² FirstOnSite carries on business in nine provinces: Ontario, Quebec, British Columbia, Alberta, Manitoba, Saskatchewan, Nova Scotia, New Brunswick and Prince Edward Island. FirstOnSite does not carry on business in any of the territories.

Demos Affidavit, Application Record, Tab 2 at paras. 28-30.

5. FirstOnSite has a diverse customer base, consisting of insurance companies and property owners, with two distinct revenue streams. Residential revenue, derived from restoration work on residential properties, is primarily generated from insurers as part of their property coverage programs. Commercial revenue, derived from restoration work on commercial properties, is generated from insurers as part of their commercial property coverage programs and, *inter alia*, commercial property owners, operators and managers.

Demos Affidavit, Application Record, Tab 2 at paras. 28-31 and 34.

6. As a participant in the construction pyramid, FirstOnSite frequently subcontracts part of its work to, *inter alia*, construction companies, independent contractors and numerous material or service suppliers.³ FirstOnSite LP has a number of essential supplier relationships, divisible into five types: (i) subcontractors; (ii) equipment suppliers and equipment rental companies; (iii) safety supplies and material vendors; (iv) temporary staffers and labourers; and (v) vehicle and transport suppliers (the “**Suppliers**”).

Demos Affidavit, Application Record, Tab 2 at paras. 32-33.

³ The construction pyramid is the term commonly used to describe the myriad contractual relationships for, *inter alia*, services and materials that are essential to the work necessary to complete a given project.

7. FirstOnSite has 935 employees, almost all of whom are situated in Canada. Their services are supplemented by teams of independent contractors and temporary workers, all of whom are recruited as needed based on, *inter alia*, project scope and demand.

Demos Affidavit, Application Record, Tab 2 at paras. 39 and 41.

B. FirstOnSite's Assets and Liabilities⁴

8. As at February 29, 2016, FirstOnSite had total assets of approximately \$86.9 million and total liabilities of approximately \$161.36 million.

Demos Affidavit, Application Record, Tab 2 at para. 40.

9. FirstOnSite's secured creditors hold security interests over the assets of FirstOnSite in the following priority:

- (a) subject to (b), Wells Fargo Capital Finance Corporation ("**Wells Fargo**") has first ranking priority with respect to all other personal moveable property, assets and undertakings including, without limitation, inventory and accounts (the "**Wells Fargo Security**"). The Wells Fargo Security secures an indebtedness of \$17,377,000;⁵

⁴ FirstOnSite's secured and unsecured debt obligations are set out in greater detail at paras. 56-106 of the Demos Affidavit.

⁵ As at February 29, 2016.

- (b) The Business Development Bank of Canada (“**BDC**”) has first ranking priority on any and all machinery and equipment, including, without limitation, certain fixed assets (the “**BDC Security**”). The BDC Security secures an indebtedness of approximately \$2,461,000⁶;
- (c) BDC Capital Inc. (“**Capital**”) ranks subordinate in priority with respect to both the Wells Fargo Priority Assets and the BDC Priority Assets, but in priority to all other secured creditors (the “**Capital Security**”). The Capital Security secures an indebtedness of \$4,903,000;⁷
- (d) the Tranche 1 Debentureholders hold a fourth ranking security interest over all of FirstOnSite’s present and after-acquired property (the “**Tranche 1 Debentureholders Security**”). The Tranche 1 Debentureholders Security secures an indebtedness of \$5,100,002;⁸
- (e) the Tranche 2 Debentureholders hold a fifth ranking security interest over all of FirstOnSite’s present and after-acquired property (the “**Tranche 2 Debentureholders Security**”). The Tranche 2 Debentureholders Security secures an indebtedness of \$150,000;⁹

⁶ As at February 29, 2016.

⁷ As at February 29, 2016.

⁸ As at December 1, 2010. The Tranche 1 Debentures bear interest at 14% per annum, payable in kind interest compounded annually.

⁹ As at June 9, 2011. The Tranche 2 Debentures bear interest at 14% per annum, payable in kind interest compounded annually.

- (f) the Tranche 3 Debentureholders hold a sixth ranking security interest over all of FirstOnSite's present and after-acquired property (the "**Tranche 3 Debentureholders Security**"). The Tranche 3 Debentureholders Security secures an indebtedness of \$5,000,000;¹⁰
- (g) the Tranche 4 Debentureholders hold a seventh ranking security interest over all of FirstOnSite's present and after-acquired property (the "**Tranche 4 Debentureholders Security**"). The Tranche 4 Debentureholders Security secures an indebtedness of \$11,002,000;¹¹
- (h) the Tranche 1 Subordinated Debentureholders hold a eighth ranking security interest over all of FirstOnSite's present and after-acquired property (the "**Tranche 1 Subordinated Debentureholders Security**"). The Tranche 1 Subordinated Debentureholders Security secures an indebtedness of \$2,100,000;¹²
- (i) the Tranche 2 Subordinated Debentureholders hold a ninth ranking security interest over all of FirstOnSite's present and after-acquired property (the "**Tranche 2 Subordinated Debentureholders Security**").

¹⁰ As at February 8, 2012. The Tranche 3 Debentures bear interest at 14% per annum, payable in kind interest compounded annually.

¹¹ As at March 11, 2013. The Tranche 4 Debentures bear interest at 14% per annum, payable in kind interest compounded annually. In addition, certain further Tranche 4 Debentures were issued on April 1, 2013 and July 7, 2014.

¹² As at August 1, 2013 and September 16, 2013. The Tranche 1 Subordinated Debentures bear interest at 16% per annum, payable in kind interest compounded annually.

The Tranche 2 Subordinated Debentureholders Security secures an indebtedness of \$3,000,000.¹³

McElcheran Affidavit, Motion Record, Tab 2 at para. 11.

C. Financial Difficulties and Defaults

10. FirstOnSite has been, and continues to be, facing severe financial and liquidity issues due to, among other issues, an overleveraged balance sheet and a substantial decline in revenue caused by unseasonably moderate weather and a related reduction in overall insurance claims in 2015 and thus far in 2016. FirstOnSite incurred substantial net losses in every year from 2010 to 2013.

Affidavit of Dave Demos sworn April 20, 2016, para. 7, Application Record, Tab 2. [Initial Affidavit]

Demos Affidavit, Application Record, Tab 2 at para. 108.

11. As a result of its financial difficulties and its ongoing and severe liquidity crisis, FirstOnSite has been unable to meet its various financial and other covenants with its secured lenders. On October 31, 2015, FirstOnSite defaulted with respect to its senior secured revolving credit facility and technically triggered a cascade of cross-defaults with respect to its senior and junior subordinated debt.

Initial Affidavit, *supra.*, para 8

¹³ As at November 25, 2014. The Tranche 2 Subordinated Debentures bear interest at 16% per annum, payable in kind interest compounded annually.

D. SISP, Proposed Sale and CCAA Proceedings

12. In November of 2015, FirstOnSite commenced a sales and investor solicitation process (“**SISP**”) to canvass the market for prospective purchasers or investors.

Demos Affidavit, Application Record, Tab 2 at para 123

13. On April 20, 2016, FirstOnSite LP negotiated and executed an asset purchase agreement with 3297167 Nova Scotia Limited (the “**APA**”) for substantially all of the assets of FirstOnSite (the “**Proposed Sale**”).

McElcheran Affidavit, Motion Record, Tab 2 at para. 6.

14. On April 21, 2016, FirstOnSite G.P. sought and obtained the Initial Order with the intention of consummating the Proposed Sale in a short time period in order to preserve of FirstOnSite’s business, maximize value for stakeholders and protect the jobs of FirstOnSite’s employees and Suppliers.

McElcheran Affidavit, Motion Record, Tab 2 at para. 7.

15. It is estimated that the net proceeds of sale from the Proposed Sale, if approved, will be sufficient to repay the DIP Facility and the outstanding indebtedness to Wells Fargo and BDC, and forecast that Capital will suffer a shortfall in recovering on its indebtedness and all subsequent ranking secured creditors, including Torquest, will not receive any distributions. If approved, the Proposed Sale will provide significantly

greater value to its creditors and stakeholders than the value attainable through a bankruptcy or liquidation sale.

McElcheran Affidavit, Motion Record, Tab 2 at para. 13.

E. The Charges

16. The Initial Order, among other things, granted the Administration Charge, the DIP Lender's Charge, the KERP Charge, the Financial Advisor's Charge and the Lien Charge (each as defined in the Initial Order and collectively, the "**Charges**"). Each of the Charges is a charge over the assets of the property and undertakings of FirstOnSite (the "**Property**").

a) The Administration Charge

17. The Administration Charge is a charge in the maximum amount of \$1 million to secure the fees and disbursements of (i) Stikeman Elliott LLP; (ii) FTI Consulting Canada Inc. as Court-appointed Monitor (the "**Monitor**") and its counsel Goodmans LLP; and (iii) A&M for "work fees" incurred in its capacity as Financial Advisor (collectively the "**Professionals**").

McElcheran Affidavit, Motion Record, Tab 2 at para. 29 - 30.

b) *The DIP Lender's Charge*

18. The Initial Order, among other things, approved a DIP Agreement with Wells Fargo.

Initial Order, Application Record, Tab 3 at para 40.

19. The DIP Agreement provides for debtor-in-possession financing to FirstOnSite over the course of these CCAA proceedings to a maximum amount of the lesser of the availability under the DIP Facility or \$40,000,000. Availability under the DIP Facility is limited to a borrowing base calculation comprised of, *inter alia*, the outstanding pre-filing amounts under the ABL Facility, outstanding advances under the DIP Facility, an estimate of the amount of any obligations, liabilities and indebtedness at such time which have a trust, charge or lien ranking or capable of ranking senior to or *pari passu* with the DIP Lender's security under the DIP Lender's Charge or the ABL Agreement and any net credit balance of Post-Filing Collections (as defined in the DIP Agreement) after being applied repay the outstanding advances under the DIP Facility (the **"Borrowing Base Calculation"**).

McElcheran Affidavit, Motion Record, Tab 2 at para. 16.

Demos Affidavit, Application Record, Tab 2 at para 138.

20. The DIP Lender's Charge secures FirstOnSite's indebtedness under the DIP Facility to a maximum amount of \$15 million. Pursuant to the Borrowing Base Calculation, the priority of the DIP Lender's Charge has a direct impact on the availability under the DIP Facility.

Initial Order, Application Record, Tab 3 at para 38.

McElcheran Affidavit, Motion Record, Tab 2 at para. 16.

21. If DIP Lender's Charge is not granted the priority sought in this motion, FirstOnSite may not have sufficient cash to operate through the CCAA Proceedings.

McElcheran Affidavit, Motion Record, Tab 2 at para. 21.

c) The KERP Charge

22. The KERP Charge secures payments to certain employees ("**Key Employees**") under two Court-approved key executive employee retention plans (the "**KERPs**").

23. The Key Employees occupy essential managerial and operational roles and are considered essential to FirstOnSite continuing to operate on a going concern basis through the CCAA process.

Demos Affidavit, Application Record, Tab 2 at paras. 149-152.

d) The Financial Advisor's Charge

24. The Initial Order approved the fees and expenses set out in an Engagement Letter between A&M and FirstOnSite *nunc pro tunc*. These fees and expenses include, among other things, a success fee of up to \$1.1 million which is secured by the Financial Advisor's Charge.

Initial Order, Application Record, Tab 3 at para 27.

e) The Lien Charge

25. The Initial Order creates a procedure (the "**Lien Claims Procedure**") whereby the rights of potential claimants ("**Lien Claimants**") to register any claim for lien ("**Lien Claim**") are stayed and substituted for a Lien Charge, which is equal in the value to that which could have been secured by way of a lien under Provincial Lien Legislation.

Demos Affidavit, Application Record, Tab 2 at para. 165-166 and 168.

Initial Order, Application Record, Tab 3 at paras 19-24.

26. The Lien Claims Procedure and Lien Charge are intended to permit the restructuring and Proposed Sale of FirstOnSite to continue unimpeded while providing the Lien Claimants with an interest in a pool of assets analogous to their statutory entitlement.

F. Priority of the Charges

27. Under the Initial Order, the Charges rank in priority to the Wells Fargo Security, BDC Security, Capital Security and the existing security interests of Torquest but behind all other security interests, trusts (including constructive trusts), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, the “**Encumbrances**”) with the exception of the Lien Charge which ranks subordinate to the Wells Fargo Security and BDC Security.

Initial Order, Application Record, Tab 3 at para 49, 51.

28. As between each other, the Charges, Well Fargo Security, and BDC Security, rank in the following priority:

First – the Administration Charge, to a maximum amount of \$1 million;

Second – the DIP Lender’s Charge, to a maximum amount of \$15 million;

Third – the KERP Charge, to a maximum amount of \$2.26 million;

Fourth – the Financial Advisor’s Charge, to a maximum amount of \$1.1 million;

Fifth – the Wells Fargo Security and BDC Security in accordance with the terms of an intercreditor agreement between Wells Fargo, BDC and Capital dated November 25, 2016;

Sixth – the Lien Charge, to the extent necessary to secure such Lien Claims as may arise;

Initial Order, Application Record, Tab 3 at para 49, 51.

McElcheran Affidavit, Motion Record, Tab 2 at para. 11.

29. The Initial Order provides that FirstOnSite or the beneficiaries of the Charges shall be at liberty to seek priority ahead of the Encumbrances on notice to parties likely to be affected by such priority.

Initial Order, Application Record, Tab 3 at para 51.

McElcheran Affidavit, Motion Record, Tab 2 at para. 30.

G. Notice of this Motion

30. Motion materials for this motion were served on, among others: (a) all known secured creditors of the Applicant, including all personal property security registrants shown on searches of the personal property security registers of each province in Canada and, (b) various government entities, including environmental agencies and federal and provincial taxing authorities.

McElcharan Affidavit, Motion Record, Tab 2 at para 27.

PART III - ISSUES

31. The issue on this motion is whether this Court should grant the Charges the priority over Encumbrances sought in paragraph 49 the Amended and Restated Order?

PART IV - LAW AND ARGUMENT

A. PRIORITY SHOULD BE GRANTED TO THE CHARGES

32. As expressly permitted and provided for in the Initial Order, FirstOnSite is seeking an order increasing the priority of the Charges to rank ahead of all existing Encumbrances, in favour of any Person, notwithstanding the order of perfection or attachment, except any claims of any person against FirstOnSite for amounts owing for services and/or materials supplied that have priority over Encumbrances by statute (other than the Lien Charge, which shall rank subordinate to the Wells Security and the BDC Security, but otherwise enjoys the same priority as the other Charges, subject to paragraph 49 of the Amended and Restated Order).

Initial Order, Application Record, Tab 3 at para 51.

33. FirstOnSite submits that the priority sought for the Charges is reasonable in the circumstances, and will promote the orderly restructuring of the FirstOnSite business in a manner consistent with the purpose of the CCAA.

34. The following factors militate in favour of granting the priority sought in respect of the Charges:

(a) *The Monitor supports the priority sought for the Charges.*

The First Report of FTI Consulting Canada Inc. (“FTI”) in its capacity as proposed Monitor (the “**First Report**”) at para 28, filed separately.

(b) *Notice has been provided to secured parties of FirstOnSite:* In granting priority to a charge over a debtor’s property in a CCAA proceeding, the Courts must consider whether notice has been given to the secured creditors who are likely to be affected by the security or charge.

Canwest Global Communications Corp. (Re) (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) [“*Canwest Global*”] at paras. 32, 39 and 46, Applicants’ Book of Authorities [“BOA”], Tab 1.

FirstOnSite gave notice of this motion to all creditors likely to be affected as identified from review of FirstOnSite’ books and records and as identified by searches of the each province and territories’ Personal Property Security Registries.

- (c) *The Charges are necessary and consistent with the purpose of the CCAA. The CCAA is intended as remedial legislation that provides a means of avoiding the “devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations.”*

Elan Corp. v. Comiskey (1990), 41 O.A.C. 282, at para. 57 (Doherty J.A., dissenting), BOA, Tab 2.

As set out in greater detail below with respect to each Charge, the Charges are necessary to promote the orderly restructuring of the FirstOnSite business, maximize results for stakeholders, preserve jobs for the Employees and work for the Suppliers.

Court should grant the Administrative Charge Priority

35. Section 11.52 of the CCAA provides statutory jurisdiction to grant the Administration Charge priority over the Encumbrances:

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

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

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

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

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[Emphasis added]

CCAA, s. 11.52

36. In addition to the submissions at paragraph 34 above, the following factors support the granting of the priority requested to the Administration Charge:

- (a) the Professionals will provide essential legal and financial advice throughout the CCAA proceedings, without which FirstOnSite will not be able to successfully navigate the CCAA proceeding;
- (b) the Professionals each provide unique services, and there is no anticipated unwarranted duplication of their roles; and
- (c) it is unlikely that any qualified financial advisor or law firm would assume the role of the Professionals absent the priority charge being sought on this motion.

Demos Affidavit, Application Record, Tab 2 at paras. 141-144.

Pre-Filing Report at paras. 60 and 63.

37. For the foregoing reasons the Applicant submits that the priority sought in respect of the Administration Charge should be granted.

Court should grant the DIP Lender's Charge Priority

38. Section 11.2 of the CCAA provides express jurisdiction to this Court to grant the

DIP Lender's Charge priority over Encumbrances:

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

11.2(2) Priority — Secured Creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.2.

39. Sub-section 11.2(4) sets out the factors to be considered by the Court in deciding, *inter alia*, whether to grant priority to the DIP Lender's Charge pursuant to section

11.2(2):

11.2(4) Factors to be considered — In deciding whether to make an order, the court is to consider, among other things:

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

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.

CCAA, s. 11.2(4).

40. In addition to the submissions set out in paragraph 34 above, the following factors support granting the DIP Lender's Charge the priority sought:

- (a) Due to the Borrowing Base Calculation, FirstOnSite may not be able to obtain enough financing under the DIP Facility to continue daily operations during these CCAA proceedings without the priority sought for the DIP Lender's Charge. Without sufficient interim financing, FirstOnSite would not be able to function, and the Proposed Sale would not close;
- (b) Based on the FirstOnSite's cash-flow forecast, if the priority sought is granted, the DIP Facility will provide sufficient financing to allow continued operations during the pendency of the CCAA;
- (c) The management of FirstOnSite's business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the DIP Facility; and

- (d) The ability to borrow funds under the DIP Facility is crucial to retaining the confidence of FirstOnSite's creditors, employees and the Suppliers.

McElcheran Affidavit, Motion Record, Tab 2 at para 21.

Demos Affidavit, Application Record, Tab 2 at paras. 136-140, 145-147.

Pre-Filing Report at paras. 31-35

- 41. For the foregoing reasons, FirstOnSite submits that this Court should grant the priority sought in respect of the DIP Lender's Charge.

Court should grant the KERP Charge Priority

- 42. The Initial Order approved the KERP and created the KERP Charge pursuant to s. 11 of the CCAA. In addition to the submissions set out in paragraph 34 above, the following factors support granting the priority sought in respect of the KERP Charge:

- (a) Absent the security provided by granting the KERP Charge the priority sought, the Key Employees are likely to consider other employment options;
- (b) The Key Employees are critical to a successful restructuring, and their continued employment is essential for the stability of FirstOnSite during the pendency of the CCAA;

- (c) Each Key Employee has an extensive history with and knowledge of FirstOnSite's business and operations, including long-standing relationships with key customers and the Suppliers all of which would be very difficult to replace during the pendency of the CCAA;
- (d) If the Key Employees do not continue in their employment, it is very unlikely that FirstOnSite would be able to meet its obligations under the Proposed Sale which could have an extremely detrimental effect on maximizing value for stakeholders
- (e) At minimum, it will be highly disruptive to the restructuring effort and, given FirstOnSite's precarious financial position, expensive to find adequate and qualified replacements; and
- (f) The payments under the KERP are payable only on the closing of the Proposed Sale.

Pre-filing Report at para 61.

McElcheran Affidavit, Motion Record, Tab 2 at para 23.

Demos Affidavit, Application Record, Tab 2 at paras. 148-155.

43. In *Grant Forest*, Justice Newbould stressed that the business judgement of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge:

The business acumen of the board of directors of [the debtor company], including the independent directors, is one that the court should not ignore unless there is good reason of the record to ignore it. This is particularly so in light of the support of the Monitor and [the Chief Restructuring Advisor] for the KERP provisions. Their business judgment cannot be ignored.

Grant Forest Products at para. 18, BOA, Tab 3.

44. In this case, the Board has determined that granting the KERP Charge the priority sought over Encumbrances is necessary to ensure the continued participation of the employees essential to the restructuring process.

McElcheran Affidavit, Motion Record, Tab 2 at para 23.

45. For the foregoing reasons FirstOnSite submits that the priority sought for the KERP Charge should be granted.

Financial Advisor's Charge

46. As set out above, s. 11.52(1)(b) of the CCA grants the jurisdiction to approve the fees and expenses of financial advisors and, in so doing, order a super-priority charge to secure them.

47. Courts routinely grant super-priority charges securing the payment of fees and expenses of financial advisors for services rendered (or to be rendered) during the pendency of CCAA proceedings in order to ensure their participation if such fees are fair and reasonable, applying the factors set out by Justice Pepall (as she then was) in *Canwest Publishing* and referenced above.

U.S. Steel Canada Inc. (Re), 2014 ONSC 6145 at para. 22, BOA, Tab 4.

Canwest Publishing (Re) (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]) at paras. 54-55, BOA, Tab 5.

Target Canada Co. (Re), 2015 ONSC 303 at paras. 73-75, BOA, Tab 6.

48. It is within the jurisdiction of this Court to order a super-priority charge to secure the payment of a success fee contingent on the closing of a sale transaction in a liquidation CCAA.

Essar Algoma Steel Inc. (Re), (29 January 2016), Toronto, Court File No. CV-15-000011169-00CL (S.C.J.), BOA, Tab 7.

49. The priority in respect of the Financial Advisor's Charge is necessary for the continued retention of A&M. In addition to the reasons set out in paragraph [37] above the following factor militate in favour of this Court granting the proposed priority for the Financial Advisor's Charge:

- (a) The priority sought in respect of the Financial Advisor's Charge is necessary for the continued retention of A&M;
- (b) A&M provided essential services in developing and conduct the SISP that resulted in the Proposed Sale;
- (c) A&M's knowledge of and experience with FirstOnSite would be wasted if FirstOnSite were deprived of the benefit of A&M's advice and assistance and were required to retain a new financial advisor;

(d) A&M fulfills a vital role in the CCAA Proceedings which could not be replicated by the other advisors to the Applicants; and

(e) The continued involvement of A&M during the CCAA is essential to the completion of the CCAA process in as expeditious and inexpensive a manner as possible.

McElcheran Affidavit, Motion Record, Tab 2 at para 23.

Demos Affidavit, Application Record, Tab 2 at paras. 125, 172-173.

The Pre-Filing Report at paras. 31-35.

50. For the foregoing reasons FirstOnSite submits that the priority sought for the Financial Advisor's Charge should be granted.

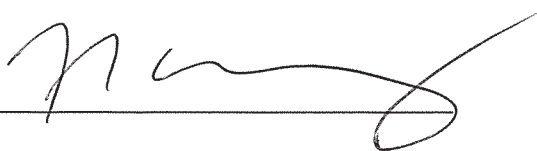
The Lien Charge

51. The Lien Charge is intended to preserve the position of potential lienholders while, at the same time, ensuring that FirstOnSite is able to reorganize in an orderly fashion. The priority sought in respect of the Lien Charge is necessary to provide potential lienholders with the greatest security interest possible without jeopardizing the success of these CCAA proceedings.

PART V - ORDER REQUESTED

52. FirstOnSite therefore requests an Order substantially in the form of the draft Order attached at Tab 3 of FirstOnSite's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of April, 2016.

per: 

Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm. List]).
2. *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282.
3. *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Comm. List]).
4. *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145
5. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]).
6. *Target Canada Co. (Re)*, 2015 ONSC 303
7. *Essar Algoma Steel Inc. (Re)* (29 January 2016), Toronto, Court File No. CV-15-000011169-00CL (S.C.J.).

**SCHEDULE “B”
RELEVANT STATUTES**

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

...

11.51 Security or charge relating to director’s indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

11.52 Court may order security or charge to cover certain costs

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

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

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

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

Priority

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

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

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(RETURNABLE MAY 2, 2016)**

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