

**SUPERIOR COURT**  
(Commercial Division)

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

No.: 500-11-061483-224

DATE: November 29, 2022

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**BEFORE THE HONOURABLE CHRISTIAN IMMER, J.S.C.**

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***IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF:***

**XEBEC ADSORPTION INC.  
XEBEC RNG HOLDINGS INC.  
APPLIED COMPRESSION SYSTEMS LTD.  
COMPRESSED AIR INTERNATIONAL INC.  
XEBEC HOLDING USA INC.  
ENERPHASE INDUSTRIAL SOLUTIONS, INC.  
CDA SYSTEMS, LLC  
XEBEC ADSORPTION USA INC.  
THE TITUS COMPANY  
NORTEKBELAIR CORPORATION  
XBC FLOW SERVICES – WISCONSIN INC.  
CALIFORNIA COMPRESSION, LLC  
XEBEC SYSTEMS USA, LLC  
Debtors / Petitioners**

And

**DELOITTE RESTRUCTURING INC.**  
Monitor

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**REASONS FOR EXTENDING THE STAY PERIOD AND JUDGMENT ON THE  
URGENT EX PARTE APPLICATION FOR INVESTIGATION**

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[1] The Court is called upon to extend the stay period set out in the Amended and Restated Initial Order (“ARIO”) issued on October 20, 2022.

[2] At the end of the November 28, 2022 hearing, it extended the stay period. The Court provides below the reasons for which it extended the stay.

[3] The Court is also seized of an “Urgent Ex parte application for Investigation”. It dismisses this application for the reasons also set out below.

### **THE EXTENSION OF THE STAY PERIOD**

[4] In its application, the Debtors seek an extension of the stay period to February 3, 2022.

[5] The Court read the Monitor’s fourth report and heard his testimony as to the significant work which continues to be carried out in earnest, namely:

- 5.1. Phase I has been completed and notice has been given to 18 entities that they have provided a Phase 2 Satisfactory Bid within the meaning of the SISP. Hence, the team will now work towards the next deadline, namely the Phase 2 Bid Deadline. Much work must be carried out including management presentations and physical site visits (in Canada, the USA and in Europe).
- 5.2. The cash position continues to be better than expected in the cashflow projections and it is envisaged that the interim financing will only be tapped into in the week of December 3, 2022.
- 5.3. Limited payments have been made to critical suppliers, well below the \$700,000 authorized in the ARIO.
- 5.4. A protocol has been put in place and is being applied to govern intercompany payments.

[6] The Monitor therefore is of the opinion that the extension of the stay period is required to continue the restructuring process which includes completing the SISP.

[7] The secured creditors support the process. No unsecured creditor has manifested any objection.

[8] All this shows that the CCAA process continues to be used for its intended purpose.

[9] A minor modification must be brought to the list of employees benefiting from the KERP program. This does not require a change the amount of the KERP charge. This was also authorized.

[10] It is for these reasons that the Court signed the Order Extending the Stay of Proceedings and Granting Ancillary Relief on November 28, 2022.

[11] Also, the time delays to carry out the SISP are extremely tight. Any delays could cause serious, if not irreparable harm to the SISP process and therefore the restructuring process. This would have dramatic impacts on employees, clients and suppliers. This is why the Court has ordered the provisional execution during appeal.

### **SHAREHOLDERS' CONTESTATIONS**

[12] As already noted by the Court in its October 24, 2022 reasons, Mr. Simon Arnsby, a shareholder who claims to hold "several million shares", is dissatisfied with the process which has been set in place, including the SISP. He had initially made a number of requests by way of a letter which the Court addressed in its October 24, 2022 reasons.

[13] He has since notified an "Urgent Ex parte application for investigation". Initially, he hoped to present this application *ex parte*, a prospect which the Court would not entertain. He was advised that he could present the motion on November 28, 2022.

[14] Mr. Arnsby's application is supported only by his affidavit. He was invited to, and did indeed testify at the hearing.

[15] In essence, Mr. Arnsby disagrees with the fact that the debtor's management team and the Monitor carry out the SISP process without the guidance or direction of two key persons, namely Xebec's former Chairman, President and CEO Kurt Sorschak who retired on May 12, 2022 and Marinus van Driel, the founder of HyGear and the VP Europe and Asia who is still an employee of Xebec.

[16] He therefore asks the Court to issue three types of orders which the Court understands to be as follows:

- 16.1. That there be an investigation why the members of Xebec's Board of directors, who collectively own less than 0,5% of Xebec shares, were unable to ensure financing, then filed for CCAA relief and are not now calling on Sorschak and van Driel to drive the quest for financing, restructuring or divesting solutions.
- 16.2. That an Equity Committee financed by the Debtors be set up to help steer the SISP process and to assist Xebec in obtaining financing and restructuring its business.



16.3. That an order be rendered” incorporating duties granting Sorschak and Van Driel the authority, power, releases and indemnifications”.

[17] As stated by the Supreme Court in *Callidus*, the CCAA supervising judge has a unique supervisory role. He or she acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties. “The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and “meet contemporary business and social needs””.<sup>1</sup>

[18] The Court is indeed in such a positional advantage pursuant to the testimony it has heard in the course of various hearings and by carefully reviewing four detailed reports of the Monitor. It is from this advantageous position that, with great respect, it sees no merit in making the orders which Mr. Arnsby seeks.

[19] The Monitor testified on the extensive work he has carried out to monitor the work being carried out by the management team. As the Supreme Court has said in *Callidus*, “ The monitor is an independent and impartial expert, acting as “the eyes and the ears of the court” throughout the proceedings”.<sup>2</sup> The Monitor explained clearly why he sees no use in carrying out further investigations. The Court does not either. These investigations would only serve to revisit with hindsight past decisions, while all should be intently focused on finding the best solutions for the future.

[20] Pursuant to Mr. Arnsby’s testimony, the Court was left with the clear sense that the investigation’s true purpose would be to convince the Court and the Monitor that Sorschak and Van Driel could and should be put at the centre of any SISF process.

[21] Even if the Court were open to consider, at this late hour, a fundamental modification of the SISF process and the clear milestones it entails - a prospect the Court would be exceedingly reticent to entertain - it is for Sorschak and Van Driel, and not Arnsby, to make known their willingness to take on such a leadership position. This is not what they have done. Well to the contrary, they have expressed the following positions:

- 21.1. In his email response to Mr. Arnsby, Van Driel has confirmed that he is still an employee of Xebec and that he has decided to be a “passive investor”. He is an employee but he is open to consider a different role, “when asked by the board”.
- 21.2. In his email, Sorschak stated that he is “somewhat surprised regarding [Arnsby’s] request to the judge, and the confidence [Arnsby] puts in him to

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<sup>1</sup> 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, par. 47 and 48.

<sup>2</sup> *Id.*, par. 52.

be able to help the situation". He did not agree to sign an affidavit and explained that his lawyers "are already in contact with the company and the monitor in relation to the CCAA filing and certain issues as they pertain to [him] personally".

[22] Taking into account their positions, it is inconceivable that the Court nevertheless entrust Sorschak and Van Driel with great responsibilities.

[23] Even if they had manifested their interest, what would these two individuals do, that is not being done by the Monitor, NBF and the management team? What new or different powers should be vested in them?

[24] Mr. Arnsby explains that given his lack of financial means due to Xebec's unfortunate situation and given his limited knowledge of the law, he cannot make any concrete proposal as to the powers that should be granted to Sorschak and Van Driel. He does not file a draft order. The Court empathizes with Mr. Arnsby's personal situation but failing a detailed proposal with clear timelines, it cannot entertain Mr. Arnsby's vague application.

[25] Unfortunately, Mr. Arnsby's request for an Equity Committee is just as puzzling. Who would sit on this Committee? How would decisions be made? What financing is sought? Why would the creditors, both secured and unsecured finance this?

[26] Once again, the Court understand and empathizes with any alleged lack of financial resources, but it is not for the Court to devise a committee out of thin air and define its mission. Furthermore, as the Court has already indicated in its reasons relating to the ARIO, and as it is even more clear today as a result of the Monitor's review of the Phase I bids, it is highly unlikely that there will be sufficient proceeds for a compromise or arrangement to generate funds to satisfy all the secured and unsecured creditors. Hence, no payment of equity claims can be envisaged. It would not be fair to use Xebec's financial resources to finance the operations of an Equity Committee, whose purpose is doubtful at best. Also, the interim lender's financing could not be used to fund this Committee.

[27] It is for these reasons that the Court will not accede to Mr. Arnsby's requests and will dismiss his application.

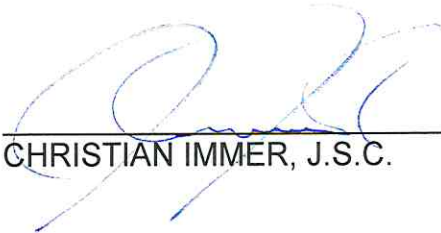
[28] By way of concluding remarks, if indeed the monitor, NBF or the management team believe that it is useful to call upon Van Driel's or Sorschak's knowledge, contacts or skills, nothing suggests that they would not do so.



**FOR THESE REASONS, THE COURT:**

[29] **DISMISSES** Simon Arnsby's *Urgent Ex Parte Application for Investigation*;

[30] **THE WHOLE**, without costs.



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CHRISTIAN IMMER, J.S.C.

Me Sandra Abitan  
Me Julien Morissette  
Me Jessica Harding  
Me Sophie Courville-LeBouyonnec  
OSLER, HOSKIN & HARCOURT LLP  
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Me Audrey Turcotte  
Representing the Attorney General of Canada

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NORTON ROSE FULBRIGHT  
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Mr. Simon Arnsby (absent)  
Self represented