SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-061483-224

DATE: October 24, 2022

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

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

REASONS FOR ISSUING THE AMENDED RESTATED INITIAL ORDER DATED OCTOBER 20, 2022

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[1] On September 29, 2022, the Court, relying on the powers conferred to it by the *Companies' Creditors Arrangement Act* ("*CCAA*"),[1] issued an Initial First Day Order ("**IFO**")[2] as well as a Bidding Procedures Order.[3] It then extended this initial ten day stay of proceedings period to October 20, 2022, at which time it held a "come-back hearing" to determine whether it would issue an Amended and Restated Initial Order ("**ARIO**").

[2] At the end of this October 20, 2022 hearing, it issued the requested ARIO with reasons to follow. These are the Court's reasons for issuing the ARIO.[4]

CONTEXT

[3] The Debtors (collectively "**Xebec Group**") primarily supply a wide range of renewable and low-emission gas products and services. Xebec Adsorption Inc. ("**XIA**") is Xebec Group's parent company while the other twelve Debtors are direct or indirect subsidiaries.

[4] XIA is headquartered in Montréal, Québec, but the Xebec Group operates across Canada, the USA, the Middle East and Asia in the following three business segments:

4.1. Cleantech solutions: the company manufactures equipment the following equipment:

4.1.1. *PSA systems*: In Blainville, Québec, it manufactures PSA systems, e.g., proprietary pressure swing adsorption systems ("PSA") which remove targeted impurities or separate bulk mixtures of gases. To date, 10,000 PSA systems have been sold to over 1,500 customers.

4.1.2. *Biogas conversion*: It manufactures biogas conversion to renewable natural gas solutions, including the containerized Biostream units. They are manufactured in facilities in Colorado and Blainville.

4.1.3. *Hydrogen purification, generation and distribution*: Amongst other activities in this sector, it manufactures portable hydrogen generation units which creates hydrogen from water and natural gas. These units are manufactured in the Netherlands.

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1 R.S.C. (1985), c. C-36.

2 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3596.

3 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3595.

4 The Court renders its decision in English, so that it can be easily understood by foreign courts and litigants. For all interested parties' reference, the Court does stress that testimony, proceedings and pleadings are carried out mainly in French and that no simultaneous translation services are provided by the Superior Court.

4.1.4. *On site Oxygen and Nitrogen Generation systems*: the products allow customers to generate oxygen and nitrogen with on-site generators. These generators are manufactured in a facility situated in Germany.

4.1.5. *Carbon capture and sequestration*: it is trying to develop this emerging segment with its PSA systems.

4.2. Industrial service and support: this core segment of the Xebec Group supplies compressed air-dryers and compressed air and gas filters and provides customers with parts, service, operations and maintenance, including a network of fifteen cleantech service centers.[5] The equipment is manufactured in facilities in Blainville, and Tenessee. Assembly of compressors is also carried out in British Columbia and Colorado. This segment provides a recurring revenue base.

4.3. Renewable gas infrastructure: XIA holds, directly or indirectly, a 50% interest in GNR Québec Capital L.P. ("Partnership"). The Fonds de solidarité des travailleurs du Québec F.T.Q. ("FSTQ") is the other partner. The Partnership's mission is to accelerate the development of renewable gas generation. It is actively engaged with 18 projects in agriculture, municipal, landfill, mixed use, and industrial waste applications.

[5] Aside from the aforementioned manufacturing facilities and cleantech service centers, there are two R&D facilities.

[6] The Xebec group employs close to 600 employees globally, 198 of which are situated in Canada (157 in Québec), 205 in the USA, 164 in Europe and 19 in the Middle and Far East.

[7] Xebec's operations are financed by two secured creditors, the National Bank of Canada ("NBC") and Export Development Canada ("EDC"). NBC and EDC hold security on different Xebec entities.

[8] From 2019 to 2021, Xebec Group made numerous acquisitions. In order to finance some of these acquisitions, Xebec initiated a public offering in December 2020. Since then, and up to the IFO, XIA's shares were listed on the TSX.

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[5] The application for the IFO mentions both 15 (par. 38) and 17 (par. 32) such cleantech service centers.

[9] The latest financial statements for the six month period ending on June 30, 2022 show a net loss of $42M. At the time of filing the hearing of the IFO, Xebec Group owes the following amounts to secured and unsecured creditors :

9.1. Secured debts;

- Canadian entities: $7M excluding interest, costs, fees and expenses; there are also outstanding letters of credit ("L/C"), totalling $7.5M. Xebec's true exposure under this L/C facility is still being precisely assessed.
- US entities: CDN$17,633M.

9.2. Unsecured debt:

- Canadian entities: $91.6M.
- US entities: CDN $166,2M.

[10] As explained by the Monitor in his first report, Xebec, at the time of filing for the IFO, was witnessing significant cash outflows and cash flow strains. These were the result, *inter alia*, of optimizing integration of all acquired business units, legacy RNG contracts, unforeseen supply chain issues and higher capital investments required to support the decentralized production hub strategy, declining oxygen demand to the declining COVID-19 pandemic and increased supply chain and logistical costs.

[11] Throughout the summer of 2022, with the assistance of National Bank Financial ("NBF"), Xebec undertook a structured process to raise additional funds or otherwise effect a beneficial transaction, but to no avail.

[12] Xebec therefore concluded that a restructuring process was called for. This would be carried out via a Sales and Investment Solicitation Process ("SISP") within a short and critical timeframe, with the assistance of NBF.

[13] The Application for the issuance of the IFO was therefore presented at 14:00 on September 29, 2022 to ensure that this SISP be carried out.

THE IFO HEARING AND THE IFO

[14] The Court granted the initial stay of proceedings in the IFO. Applying the criteria which the Supreme Court of Canada mandates, it held that Xebec was in good faith, that it was acting with due diligence and that an order was appropriate as it would further the policy and remedial objectives of the CCAA.[6]

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6 See *Canada* v. *Canada North Group Inc.*, 2021 SCC 30, par. 21 ["*Canada North Group*"].

[15] At the IFO hearing, the Debtors asked the Court and the Court did indeed grant the following super-priority charges as permitted amongst other by sections 11.51 of the 11.52 *CCAA*:

15.1. Administration Charge: this $250,000 charge would serve to cover the costs of the Monitor, its legal advisors and those of the debtor companies and the first fixed term $150,000 monthly instalment under the NFB engagement letter during the initial stay period.

15.2. D & O Charge: this $2,2M charge protects the Directors and officers from any liability which may accrue during the initial stay period. It was set at an amount equivalent to the aggregate of 1.5 weeks of wages, vacation and fringe benefits of all Xebec employees and 2 months of sales taxes remittances.

15.3. A Transaction Charge: this charge of $975,000 secures the payment of the variable remuneration provided for in NFB's engagement letter which was approved on the same day as the IFO.

[16] The Court found these charges to be appropriate and accepted that they shall rank in priority to any and all other hypothecs, mortgages, liens, security interest, priorities, charges, options, encumbrances or security of any kind. However, the federal and provincial authorities argued that these charges should not rank prior to their statutory rights. At the time of the hearing, it appeared that there were no outstanding remittances.

[17] After having heard the parties, the Court was of the opinion that on the basis of the exercise of its wide discretion as recognized by the Supreme Court of Canada in *Canada North Group*, it was appropriate for the Administration Charge and the D & O charge to rank in priority to the federal or provincial authorities statutory rights. The Court entertained certain doubts as to the appropriateness of having the Transaction Charge also rank in priority. However, given the late hour of the day and the complexity of the issue to be decided, all parties agreed that the debate would be postponed to another day, if necessary. The following clause was therefore inserted in the IFO to deal with the matter:

> [50] DECLARES that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interest, priorities, charges, options, encumbrances or security of any kind (collectively, the "**Encumbrances**") affecting the Property whether or not charged by such Encumbrances, save that, as regards any amounts owing by the Petitioners pursuant to paragraph [25] (a) of this Order shall be determined by the Court at a later date in time.

[18] Xebec also needed DIP financing to meet its liquidity challenges, in the absence of which it would have to carry out deep cost-cutting measures. However, by September 29, 2022, Xebec had not yet secured such DIP financing, despite being in contact with

15 potential lenders. Furthermore, Xebec needed to ensure key employee loyalty in order to carry out its restructuring process. However, the modalities of a Key Employee Retention Plan were not yet fleshed out.

[19] Xebec asked the Court to approve the SISP and the terms of the NBF confidential engagement letter. The Court did so through the Bidding Procedures Order also rendered on September 29, 2022. Given the urgency to launch the complex and multi-phased SISP process, including preparing the virtual data room, the Court also allowed this process to go forward immediately. The Monitor will report, and has indeed reported in his second and third reports, on the SISP's progress. This allows any interested party to make their views known to the Court on any envisaged course of action, in due course.

THE ARIO

[20] In its application for the issuance of the ARIO, Xebec seeks an extension of the stay to November 28, 2022.

[21] The Court read the Monitor's third report and heard his testimony as to the significant work that is being carried out in earnest. The milestones set out in the SISP are being met. Actual cash flow is somewhat better than projected in the first Monitor's report. Relationships have been maintained with clients and suppliers. The employees have in large part been retained.

[22] All this shows that the *CCAA* process is indeed being used for its intended purpose and it militates for the stays extension to November 28, 2022. On that date, the Phase I of the SISP will have run its course and Xebec should be set on the further course of action.

[23] The secured creditors support the plan. No unsecured creditor has manifested any objection.

[24] Convincing evidence was also tendered to show that it is necessary to increase the Administration and D&O Charge which the Court declared in the IFO, as follows:

24.1. Given the extensive work that is being carried out by the Monitor and the Monitor's and Debtor's legal counsel and NFB's ongoing work, the Administration Charge must be increased to $900,000.

24.2. In light of the new stay period, the D&Os are exposed to an eventual claim for 2.5 weeks of salary, vacation and fringe benefits as well as for 2 months of sales taxes. As is more fully set out in Appendix A to the Monitor's Third Report, the Charge must be increased to $3.7M.

[25] Xebec has been able to negotiate DIP financing at terms which the Monitor finds satisfactory. It is the secured creditors, the NBC and EDC, which will provide this DIP financing. Despite the efforts that were deployed, no other lender was willing to provide such interim financing. The DIP financing will significantly improve Xebec's cash flow and will prevent extensive cost-cutting measures which would have undesired effects on the SISP process. It will also provide much needed comfort to employees who are a key component in the success of the SISP process and any future compromise or arrangement. The Court therefore agreed to declare a $3.6M DIP charge which would rank after the Administration and D&O charges, but before the Transaction Charge.

[26] Furthermore, Xebec has now been able to finalize its Key Employee Retention Plan. The details thereof which the Court has agreed to keep confidential to protect Xebec's and the employees' legitimate interests, have been provided by the Monitor. As explained in par. 28 of the Application for the Issuance of the ARIO, they provide for three KERP payments: a first payment equivalent to 30% of base salary after two months, a second 30% payment after four months and a 40% payment after 8 months, date at which the SISP process should be substantially completed. The Monitor has provided convincing testimony that these payments are needed to retain key personnel which are essential to carrying out the SISP, and who would otherwise be susceptible to be hired away by competitors in the present day highly competitive labour market. A $1.08M KERP Charge is therefore declared which will rank after the Transaction Charge.

[27] The federal and provincial authorities agree to continue to manage their potential opposition to the Transaction Charge superpriority, and now also the KERP Charge's superpriority, in the manner set forth in the IFO. Hence, par. 62 of the ARIO as worded accordingly.

SHAREHOLDERS' CONTESTATIONS

[28] Two shareholders, Maurice Leclair and Evert Schuringa, seek a limited lifting of the stay while another, Mr. Simon Arnsby, filed a letter with the Court that sets out several requests and objections. The Court will deal with each in turn.

1. The Leclair and Schuringa Request for a Limited Lifting of the Stay

[29] Leclair and Schuringa (the "Class Action Applicants") have filed an application in October 2021 to the Superior Court to be authorized to institute a class action and a statutory misrepresentation claim pursuant to art. 574 of the Civil Code of Procedure and s. 225.4 of the *Securities Act* against Xebec Adsorption Inc., underwriters and five of Xebec's directors (the "Class Action Application").

[30] Certain preliminary measures have been argued and decided and the Class Action Application was set to be heard before Justice Donald Bisson on December 6, 2022[7], prior to the IFO.

[31] They ask the Court to partially lift the stay so that the Class Action Application hearing can go ahead in order for Justice Bisson to decide on the matter.

[32] Ss. 11.02(2) and 11.03 of the *CCAA* deal with stay of proceedings for the benefit of the debtor corporation and directors and officers.

[33] The ARIO would extend the stay until November 28, 2022, amongst others, to XIA and the Directors and Officers.

[34] Justice Stephen Hamilton, when he was sitting at the Superior Court, explained in *Wabush Iron Co. (Arrangement relative à)* that stays "should be given a broad interpretation in order to achieve its goals" and that "they should only be lifted in circumstances where to do so is consistent with the goals of the stay".[8]

[35] Justice Hamilton, citing Professor MacLaren provided a useful analysis grid to determine whether a partial lifting of the stay shall be ordered:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

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7 *Davarina* v. *Xebec Adsorption Inc.*, 2022 QCCS 1785.

8 *Wabush Iron Co. (Arrangement relative à)*, 2016 QCCS 6061.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so

[36] Justice Hamilton also stressed that an "overriding consideration" is the impact of proceedings on the CCAA process and whether they would "seriously impair [...] the debtor's ability to focus on the business purpose of negotiating the compromise or arrangement".[9]

[37] Applying these principles to the case at hand, the Court will not accede to the Class Action Applicants request. Here is why.

[38] The allegations of the Class Action Application can be summarized in the following broad strokes:

38.1. In December 2020, Xebec acquired all the issued and outstanding shares of Green Holding B.V., which, through various HyGear entities, carried out hydrogen generation clean tech activities.

38.2. In order to finance this acquisition, Xebec used the proceeds of an offering which comprised a public and private component.

38.3. For the public component, Xebec issued a preliminary prospectus and a final prospectus (collectively "Prospectus").

38.4. Desjardins Securities Inc., TD Securities Inc., National Bank Financial Inc., Canaccord Genuity Group Inc., Raymond James Ltd., Beacon Securities Limited and Stifel Nicolaus Canada Inc. all acted as underwriters for the public component (the "Underwriters").

38.5. Kurt Sorschack was XIA's President and CEO and a director and Chairman of the board of directors. Louis Dufour was its CFO until his resignation on November 10, 2020. He was replaced by Stéphane Archambault. William Beckett and Guy Saint-Jacques were Xebec directors and members of the Audit Committee.

38.6. Schuringa was initially holder of Green Holding B.V. shares. When Xebec acquired all of the issued and outstanding shares of Green Holding B.V. which now are integrated into Xebec's,[10] his shares were converted into 18,416 Xebec shares.

38.7. Leclair, who is described in the proceedings as a retail investor,

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9 *Ibid.*, par. 35.

10 The date when this occurred is not alleged in the Re-Amended Application for Authorixation to Institute a Class Action and to Bring a Statutory Misrepresentation Claim.

purchased 2,000 Xebec shares on March 4, 2021.

38.8. Leclair and Schuringa claim that the Prospectus and the 2020 Q3 Interim Financial Statements and accompanying Management's Discussion and Analysis (MD&A) overstated Xebec's revenue, misrepresented the revenue forecast and "misrepresented the fact that Xebec failed to maintain proper internal controls necessary to ensure that its financial statements were reliable and free of material representation". They allege that Xebec had long standing internal control deficiencies and execution and delivery issues with long-term production contracts. Project costs increased with ensuing reduced margins and negatively impacted revenue.

38.9. They allege that in breach of their duties, Xebec, the D&Os and the Underwriters "continued to include overstated revenue and provided FY 2020 revenue forecast of $70 to $80 million, which was a misrepresentation".

38.10. They claim that on March 12, 2021, Xebec announced that $12.9M in previously recognized revenue would be corrected and that as a result the FY 2020 revenue would be 24% less than expected. Furthermore, in March, Xebec also announced that revenue reversals and adjustments would continue to negatively impact Xebec's financial results during Q1 and Q2 of 2021. According to Leclair and Schuringa, these disclosures allegedly "revealed that Xebec had improperly applied the "percentage of completion" revenue accounting method and, consequently, it had improperly recognized revenues before it was probable that the economic value of the contract would flow to Xebec". Xebec was therefore required to reverse revenues and hence the overstated revenue constituted a misrepresentation.

38.11. They claim that "as a result of Xebec's disclosures on March 12, 2021, the Xebec's securities share price plummeted by approximately 31% overnight on March 21, 2021" and that further declines occurred on March 25, 2021.

38.12. They allege that Sorschack and Dufour provided certifications of the Q3 2020 interim filings, but that they failed to fairly present Xebec's financial conditions and financial performance. Leclair and Schubinga claim that these certifications constitute a misrepresentation.

38.13. The Prospectus incorporated the Q3 interim filings and MD&A and the fiscal year 2019 financial statements. Sorschack, Archambault, Beckett and Saint-Jacques all signed a Certificate of the Corporation in which they attested that the Prospectus together with the documents it incorporates by reference "constitutes full, true, and plain disclosure of all material facts relating to the securities offered". Leclair and Schubinga claim that this constitutes a misprepresentation.

38.14. The Underwriters signed a Certificate of Underwriters making essentially the same attestation, "to the best of their knowledge". Leclair and Schuringa

allege that "the Prospectus, the Certificate of the Corporation and of the Underwriters were false, and that they constituted misrepresentations".

38.15. In addition, they claim D&Os would have failed to meet their obligations to act honestly and in good faith with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstance, thereby violating s. 122 of the *Canadian Business Corporations Act*. Furthermore, they failed to take "proper care to ensure that is financial statements were free of misrepresentations".

38.16. Leclair and Schuringa therefore want to exercise a class action on behalf of all persons and entities, wherever they may reside or may be domiciled, who purchased or otherwise acquired Xebec securities from November 10, 2020 to March 24, 2021, and who held some or all of such securities as of the close of trading on the TSX on March 11, 2021 or March 24, 2021.

[39] Class Action Applicants argue that the prejudice they would suffer from the stay weighs more heavily in the scale of the balance of convenience than the prejudice which would be suffered by Xebec were the stay to be lifted partially.

[40] They argue that, on the one hand, it is necessary for them to attempt to be declared representatives so as to advance the interests of the class of shareholders, as opposed to a situation where innumerable shareholders deal individually with the Monitor. The recognized class would be tantamount to an Equity Committee. This would allow them to make representations on the fairness of an eventual compromise or arrangement. It would also allow them to pursue indemnification under the D&O policy. They indicate that Mr. Arnsby's distinct intervention clearly shows how a lack of concerted action by the shareholders would not provide for efficient advocacy.

[41] They argue that on the other hand, Xebec suffers no prejudice. The hearing is scheduled for one day only. It is a hearing on the face of the record, and no testimony of any Xebec employee or officer is required. The defense costs are being assumed by Xebec's insurers. Furthermore, potentially, Mr. Justice Bisson could dismiss the Class Action Application and this could well be beneficial to Xebec.

[42] With great respect, the Court does not agree with Leclair and Schubinga's reading of the situation.

[43] Manifestly, as Class Action Applicants admit, the claims to be pursued in the Class Action Application are "equity claims" within the meaning of ss. 2(1) of the *CCAA*. As a result, were these claims to be liquidated and recognized, ss. 6(8) of *CCAA* provides that no compromise or arrangement "can be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid". Furthermore, as provided for in s. 6(1) *CCAA*, the class members

holding equity claims could not vote on any proposal or arrangement, "unless the court orders otherwise".

[44] The Canadian entities are burdened by secured debt in the order of $7M, excluding the $7.5M L/C exposure and unsecured debt in the order of $91.6M. The US entities are burdened by secured debt in the order of $17.6M and unsecured debt of $166,2M.

[45] At present it is highly speculative, if not unlikely, that there would 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. The developments flowing from the SISP and any eventual application by the Monitor to approve a claims procedure order will provide greater insight on Xebec's future.

[46] Therefore, at present, the Court can certainly not conclude that Plaintiffs suffer a significant prejudice by not being allowed to pursue the authorization.

[47] Also, it is far from evident when Mr. Justice Bisson will render his decision in due time. Leclair and Schubinga argue that the authorization is a fairly straightforward matter, and the fact that Mr Justice Bisson only set one day for the hearing, attests to this. The Court respectfully disagrees with their reading of the situation. The legal questions for which authorization is sought are complex and the Court is held to a higher threshold when authorizing recourses under the *Securities Act* then under the Civil Code of procedure.

[48] Be that as it may, there still appears to be some procedural wrangling ahead, as the Underwriters wish to stay the proceedings. Also, even if a decision is rendered in due time, it is still susceptible of being appealed, as of right, or by seeking leave. If a favourable decision is rendered and no appeal is lodged, then the delicate matter of notices to class members and opting out will have to be dealt with.

[49] Hence, the Court does not see any benefit, at this juncture, to allow the Class Action Application to go forward.

[50] Also, the Court does not agree that Xebec will not suffer any prejudice if the matter goes forward for authorization only:

50.1. Even though the debate is one "on the face of the record" and that no testimony will be given, the involvement of executives will be required to assist class action counsel.

50.2. Stéphane Archambault's attention, who is a personally a party to the Class Action Application attention will be diverted away from carrying out the crucial tasks, as CFO, required of him in carrying out the SISP and providing accurate financial reporting.

50.3. One of the issues which is the heart of the Class Action Application, namely long-term production contracts, still appears very much to be a live matter which must be managed by Xebec. The full attention of Xebec's employees must be given to provide an optimal resolution of these contracts, for the benefit of all stakeholders, unburdened by the impact their management may have on any eventual class action outcome.

[51] Clearly, it does not make any sense for Xebec to focus its attention on litigating the class authorization. Their efforts are better served on focusing on the restructuring. This "will enable creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor companies". Such a course of action embraces the CCAA simultaneous objectives of "maximizing creditor recovery, preservation of going-concern value where possible [and] preservation of jobs".[11]

[52] It is for these reasons that, at the present time, and in the present context, the Court will not grant the partial lifting of the stay.

2. The Arnsby Letter

[53] On October 19, the Court received a letter from Simon Arnsby who claims to be "a significant, and at times the largest, shareholder in Xebec since 2012". In his letter, Mr. Arnsby makes a request for the Court to appoint an Equity Committee and lists a number of issues or grievances.

[54] Mr. Arnsby was not present before the Court when the hearing began at 10:00. At 11:59, while the Court was sitting, the undersigned's assistant received an email from him indicating that he had been placed in a waiting room and that he could not accede to the hearing by phone conference.

[55] After verification, the Court noted that the notice of presentation which was attached to the Motion and sent to the distribution list provided the correct court room and the web link to the permanent links of the Superior Court where the correct video and the telephone links were provided. Unfortunately, the notice also provided distinct information for a phone conference number of a different court room.

[56] The Court then wrote during the lunch break to Mr. Arnsby to advise him to use the web link of the Superior Court that had been provided to him. At 14:00, when the hearing resumed, he was not present, either by phone or Teams video link.

[57] The Court is not seized of any formal motion. Filing letters without affidavits and seeking the Court's intervention is not a proper course of action.

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[11] Canada North Group, par. 20.

[58] However, given the special circumstances arising from the notice of presentation and the short presentation delays, the Court will exceptionally address Mr. Arnsby's concerns despite not being seized of any formal motion.

[59] The issues raised by Mr. Arnsby can be summarized as follows:

59.1. Xebec's legal counsel, Osler, Hoskin & Harcourt LLP is in conflict of interest. Me Brian Levitt, co-chair and co-president of Osler is or was a Xebec board member.

59.2. The Monitor is in a conflict of interest. Peter Bowie is "Chief Executive of Deloitte China and Chairman of Deloitte Canada". He is or was a director of Xebec.

59.3. The "party running the SISP" is the National Bank. National Bank is a creditor of Xebec.

59.4. The shareholders had "absolutely no warning that Xebec was at risk of filing for bankruptcy". Nevertheless, the Xebec Board requested to increase "the compensation". Also, ties should not have been severed with two Xebec executives in May 2022, one of which being Sorschack. Mr. Arnsby calls into question compensation packages which were granted in May 2022, when the share price plummeted.

59.5. Since the IFO, information has been disseminated slowly by Deloitte.

59.6. The financial data shows that value can be salvaged for shareholders and an Equity Committee should be constituted and it should be allotted a budget.

[60] If Mr. Arnsby believes that Osler's should be removed as counsel, then he must file a formal motion with precise information, supported by an affidavit. The Court may then perhaps hold a hearing to determine if there is indeed a conflict of interest and whether the interests of justice justify Osler's removal.

[61] A motion would also be required for the Court to entertain a request to remove Deloitte. An alternate Monitor would need to be proposed. That being said, the Court must stress that Deloitte has been named as Monitor by the Court on the basis of their experience and competence, pursuant to the convincing testimony of the partner in charge, Mr. Jean-François Nadon. The Court has since then received two further reports and has heard Mr. Nadon's further testimony. The Court is favourably impressed with his team's diligence and competence. Very significant resources are being deployed and the SISP is moving along according to the milestones which were announced at the IFO hearing.

[62] In his related complaint, Mr. Arnsby complains about the timeliness of Deloitte's dissemination of information. Mr. Arnsby was not present to provide further particulars. It is unfortunate that he feels so. However, Mr. Nadon provided detailed testimony which

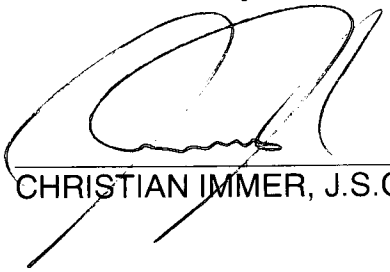
shows that there are no issues with regard to timely dissemination of information. He filed a table of the Publication dates on Deloitte's website.[12]

[63] Mr. Arnsby erroneously states that National Bank has been engaged to assist in carrying out the SISP. That is not the case. It is NBF which has been engaged. This is a different legal entity. He is also wrong when he states that "this is the first time" that NBF has been engaged by Xebec. NBF has been assisting Xebec since the summer of 2022. This has been a factor which led the Court to approve the NFB Engagement Letter at the IFO hearing. The Court also heard satisfactory evidence as to the NBF's qualifications. The third report of the Monitor shows the considerable work being carried out by NBF in the context of the SISP and the Court has no reason to doubt FBN's competence and diligence in carrying out its obligations set out in the Engagement Letter.

[64] Mr. Arnsby also appears to be mistaken as to the role of the Court in a *CCAA* context. It is *per se* not for the Court to question what occurred with regard to the employment of executives five months before the IFO. If Mr. Arnsby somehow believes this should have an influence the Court's supervision of the CCAA proceedings, then he will have to explain this in a Motion in which he will also set out what remedies he seeks from the Court.

[65] Finally, Mr. Arnsby believes an Equity Committee should be set up. For the Court to consider this, at a minimum, a motion would need to be presented which sets out who would sit on such Committee, how it could contribute to the questions before the Court and why it should be financed by Xebec, at the detriment of its creditors who rank prior to any equity claims, as explained above.

[66] These are therefore the reasons why the Court dismissed Leclair and Schubinga's limited contestation, what consideration it gave to Mr. Arnsby's letter and why it signed the AFIO.



CHRISTIAN IMMER, J.S.C.

Me Sandra Abitan
Me Julien Morissette
Me Ilia Kravtsov
Me Jessica Harding

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[12] P-4A.

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