SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-061483-224

DATE: February 17, 2023

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

JI0082

[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 issued an amended initial order and several restated amended orders[4]. Presently, the debtors are subject to a third restated amended initial order. The stay ordered thereunder will expire on March 17, 2023[5].

[2] The Court is being asked today powers under s. 36 of the CCAA and to issue a vesting offer regarding, amongst other assets, a 60% shareholding held in Xebec Adsorption (Shanghai) Co., Ltd., and to assign the ancillary rights and obligations thereto using its powers under s.11.3 of the CCAA.

[3] The seller, Xebec Adsorption Inc. ("**XAI**"), and the petitioners are part of corporate group which has at its head XAI. Some of XAI's affiliates in turn hold all or part of the shares in numerous corporate entities.

[4] Xebec Adsorption (Shanghai) Co. Ltd. ("**XAS**") is such an affiliate, but it is not a petitioner. XAS corporation is incorporated under the laws of the People's Republic of China ("**PRC**"). XAI holds 60% of its outstanding shares. The other two shareholders are Shanghai Shenergy Energy Innovation & Development Co. Ltd. ("**Shenergy**") which owns 35% of outstanding shares and Shanghai Liuhuan Investment Corp. ("**Liuhuan**") which owns 5%. The three shareholders are governed by articles of association ("AA") and a shareholders agreement ("**SA**"). The AA and the SA grant the shareholders rights of first refusal ("**ROFR**"). Liuhuan and Shenergy insist that no transaction can occur before they have been offered the opportunity to exercise their rights of first refusal set out in the SA and the AA be respected. They therefore oppose the vesting order.

[5] When the Petitioners filed for CCAA protection, a very clear path was mapped out which needed to be travelled by early February 2023 at the very latest. The stakes were high: continued employment of hundreds of employees; payment of two secured creditors to whom over $17 million was owed and who had issued an estimated $7.5 million worth of letters of credit; continuity of service and supply to countless clients; maintaining crucial supplies. Also, the nature of the business is key to society's ongoing efforts to ensure the production of renewable energy and employs cutting edge proprietary technology. Members of the Group are part of ventures whose players wish to pursue their operations.

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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 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3916; *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 4443; *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 268

5 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 381

[6] The path set out has been scrupulously followed out by the petitioners and the Monitor under the very active supervision of this Court.

[7] A clear and detailed bidding procedure (the "**SISP**") was put in place, the details of which will be discussed in some greater detail below. It was carried out under the guidance of a financial advisor, the National Bank Financial ("**NBF**"). 474 targeted bidders were solicited. 73 of these signed non-disclosure agreements (NDA). 32 bidders ultimately signed a phase 1 letter of intention. Numerous offers were received.

[8] In parallel, the operations were carried out. Cash flows were continuously updated and adjusted. The secured creditors agreed to provide a $3M DIP financing on October 20, 2022 so as to meet the cash flow needs until the path had been travelled. Employees were retained via KERP charges. The web of intercompany payments was untangled. A small army of professionals relentlessly worked at very great cost, to carry out an extraordinary amount of work to operationalize the game plan. The need for $3.5 million Administration Charge (the present level after two increases) attests to the impressive amount being carried out in real time.

[9] The Court was greatly solicited. It held no less than six hearings where it was provided with six extensive reports from the Monitor. On each occasion, it heard the detailed testimony of the Monitor's representative, Mr. Jean-François Nadon.

[10] Sale of various parts of the Group were carried out. The UK Tiger business unit and the HyGear group operating out of the Netherlands were sold. The Court issued four vesting orders for the assets of Applied Compression Systems Ltd.[6], CDA Systems, LLC and California Compression LLC[7] and GNR Québec Capital L.P.[8]

[11] This was done with minimal loss of employees and with the support of countless suppliers. Clients could, in a very large measure, rely on continuity of service.

[12] We are now at the end of the path. Time has run out.

[13] The last great piece to ensure the perennity of the business and the interests of the greatest number of stakeholders is a transaction which has been entered into by XAI to sell its Blainville assets as a going concern. The equity interest XAI still holds in various affiliates are not being sold, save for those of Compressed Air International, Inc. and the 60% shareholding in XAS.

[14] As per the break down of the purchase price, a purely nominal value is provided to the XAS shareholding. For the purchaser, it is however an essential part of this significant transaction. XAI is the gateway to the Asian Pacific market. The Purchaser

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6 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 268, par. 5.
7 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 380, par. 3.
8 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 378, par. 6.

has made it crystal clear: without a vesting order regarding this shareholding and a transfer of the AA and the SA, there can be no transaction.

[15] The **Opponents** oppose this request. They insist that the XAS' articles of association (**AA**) XAS' shareholders' agreement (**SA**) between XAI, Shenergy and Liuhuan granting them a ROFR be respected. Hence, they plead that they are entitled to receive a notice of transfer as prescribed by the AA and the SA so as to exercise their ROFR. They consider that they have yet to receive a transfer notice which set the ROFR in motion and which will start the running of the clock for the 20 day delay to exercise the ROFR.

[16] They claim that the CCAA does not give this Court to set aside these rights and to effect transfer of the shares for the following reasons:

16.1. Any order which this Court could issue would not be enforceable in the PRC.

16.2. In any event, the Court cannot use its vesting powers under s. 36 CCAA and more particularly its powers under s. 36(6) CCAA to authorize the transfer free and clear of the ROFR, because there is no purchase of assets.

16.3. The AA and the SA cannot be assigned as per s. 11.3 of the CCAA, by reason of their nature (s. 11.3(2) CCAA).

16.4. Even if they could be assigned, there is no evidence that purchaser would be able to perform its obligations under the XAI (s. 11.3(3)(b)).

16.5. It would not be appropriate within the meaning of par. 11.3(3)(c) to assign the rights as this would unfairly prejudice the Opponents who would simply be dispossessed of their ROFR.

[17] The Court does not agree with these submissions and has signed the vesting order called for by the Debtors and the Monitor and has assigned the rights and obligations under the AA and the SA to the Purchaser for the reasons more fully set out hereunder.

[18] Before analyzing the arguments, the Court must provide some context.

I. Context

A. The SISP process generally

[19] In the summer of 2022, the debtors owed very large sums to their secured creditors, the National Bank of Canada ("NBC") and the Export Development Bank ("EDC"). The cashflow perspectives in the immediate future were dire. The fortunes of

the group and its stakeholders were entirely dependant on new financing by way of credit or investor capitalization or through sales transactions of the businesses as a going concern. To provide some relied from this unrelenting pressure and to preserve the interests of all stakeholders, the petitioners chose to seek the protection of the CCAA.

[20] On the first day, namely September 29, 2022, the Court issued a Bidding Procedure Order.by which it approved and ratified a Sale and Investment Solicitation Process ("SISP")[9]. This decision was not appealed.

[21] The SISP's objectives are set out as follows:

> The SISP is intended to solicit interest in, and opportunities for: (i) one or more sales or partial sales of all, substantially all, or certain portions of the Business; and/or (ii) for an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Petitioners or their Business. Bids considered pursuant to the SISP may include one or more of an investment, restructuring, recapitalization, refinancing or other form of reorganization of the business and affairs of the Petitioners as a going concern or a sale (or partial sales) of all, substantially all, or certain of the Business, or a combination thereof (the "Opportunity").

[22] The Business is defined as: "the shares and/or the business, property and assets of Xebec and of any of its affiliates". Manifestly, XAS is part of the Business. The Opponents always understood it to be so as will be evident from the chronology of events.

[23] The SISP called for a 2 Phase process with fifteen milestones:

Event	Date
1. **Approval of Bidding Procedures**	September 29, 2022
Phase 1	
2. **Solicitation Letter** Financial Advisor to distribute Solicitation Letter, to potentially interested parties	Starting on September 29, 2022
3. **CIM and VDR** Petitioners to prepare and have available for parties having executed the NDA (Potential Bidders) the CIM and VDR	By no later than October 6, 2022

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

[24] The NDA that the parties are called upon to sign incorporates certain elements of the SISP procedure[10].

[25] The SISP process was carried out in earnest. It quickly became obvious that bids under option (ii) would not materialize. This was going to be a "liquidation CCAA". Hence, all the efforts were devoted to pursuing objective (i). After receipt of Phase 1 bids, it also became obvious that no one purchaser would purchase all of the Business. Negotiations were carried out in earnest with Qualified Phase 1 bidders. For some parts of the Business, no offers were received and intense efforts are still ongoing.

B. The Ivys transaction in particular

[26] The Ivys group has, over the last two decades, worked in the emerging energy economy, including hydrogen fuel cells, hydrogen production, delivery and fueling infrastructure, hybrid and electric automobile technology, combined heat and power and energy storage systems, natural gas and liquid fuel reforming, renewable natural gas upgrading infrastructure and hydrogen purification technologies[11].

[27] Ivys' executive chairman, Prahbu Prao is well acquainted with XAI as he was, until 2021, a board member and its Chief Operating Officer.

[28] Ivys presented a satisfactory Phase 1 bid and then was recognized as a qualified bidder. Phase 2 was therefore initiated and this led to an agreement and the execution of an Asset Purchase Agreement ("APA").

[29] The APA has been filed under seal with the Court in the same manner as all other transactions for which vesting orders were issued. The Court accepted to do so, holding that there were legitimate interests to protect, including the fact that the bidding process remains ongoing for certain affiliates and disclosure of the terms and conditions of sale of assets could hamper such negotiations[12].

[30] Shenergy and Liuhuan have received a redacted copy of the APA on February 8, 2023, which excludes the sales price. After discussions on this issue during the hearing, the Court ordered that an unredacted copy of the exhibit P-5A be provided to the attorneys of the Opponents for "lawyers' eyes only". Mes Spiro and Vathi therefore undertook not to communicate its content to any third party, including any representatives of the Opponents.

[31] Very roughly sketched out, this PSA has three components:

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10 See exhibit P-16.
11 Exhibit I-1.
12 See exhibit P-5A.

31.1. The sale of the business carried out directly by XAI at the Blainville.[13]

31.2. The sale of the business CAI carried out in Ontario.

31.3. The sale of the 60% shareholding in XAS.

[32] Closing must occur before February 24, 2023. It is a condition that this transaction be approved by a Canadian Court by way of a vesting order.

C. Chronology of dealings between Shenergy and Liuhuan on the one hand and XAI and the Monitor on the other

[33] The Opponents have been represented by Mr. Peter Cheng whose status is somewhat ambiguous. Mr. Cheng is General Manager of XAS and signs most of the emails he sends which have been filed in the Court record in this capacity. However, he also indicates that he is Executive Director of Shanghai Liuhuan Investment Co. Cheng describes this entity as the "Management Team's shareholding platform".

[34] He also alleges that he is a "duly authorized representative of Shenergy" in his affidavit. This is somewhat odd being that at the outset in October 2022, he stated that Shenergy has "appointed" Sun Jue[14]. Shenergy is a 35 shareholder since this bloc of shares was transferred to it in 2020.

[35] The Court has a limited understanding of the concrete elements of the business relationship between XAI and XAS. Suffice it to say that XAS sells gas purification and generation, filtration, separation and adsorption products in the Asian Pacific market[15]. Essential parts for the assembly of these products originate from XAI's production facilities in Blainville. Of particular importance is a rotary valve. XAI holds intellectual and other proprietary rights for the parts supplied including the valve. There appears to some type of distribution licence granted by XAI to XAS for the production and distribution of products to clients.

[36] Throughout the end of the summer of 2022, large supplies of products including these rotary valves were sold by XAI to XAS. Receivables in the order of $2M were outstanding. It is in this context that the CCAA was filed.

[37] The Monitor and XAI higher management entered into communication with Liuhuan and Shernergy as they were seen as strategic partners. A conference call was

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13 This includes accounts receivable, prepaid expenses, inventory, fixed assets and equipment, vehicles, personal and real property leases, assumed contracts, intellectual property, information technology systems, goodwill, employee records, business records, permits, insurance, actions, loans, plan assets and other assets.

14 Exhibit P-15.

15 Exhibit O-1, s. 4.1.

held on October 7, 2022. After the call, the basic documentation sent to all interested parties was also sent to Cheng, including the NDA to be signed.[16]

[38] Mr. Cheng sent a summary of the October 7, 2022 meeting. Various points are raised[17]:

38.1. XAI requires that before further rotary valve's are put in production, a down payment of 70% to 80% must be received.

38.2. Liuhuan and Shenergy insist that XAI provide a manufacturing licence so that XAS can begin manufacturing the Rotary Valve as soon as possible.

38.3. On a possible reduction of XAI's shareholding, Shenergy has two "pre-requisites": "1) stability of [XAS]'s management team and 2) XAS can resolve RV production issue subsequently to ensure stable operation, Shenergy can increase its shares in [XAS] otherwise the share of [XAS] has not much value.

38.4. Explanations of Phase 1 and 2 SISP process. It is indicated: "base on the principle of handling [XAI]'s restructuring affairs to support & promote [XAS]'s development, Shenergy and Liuhuan Investment will point contact persons to follow up and participate in the potential assets sales and cash raising activities during [XAS] restructuring".

[39] Me Nathalie Théberge, XAI's Chief Legal Officer sends an email correcting or providing particulars on certain points. In particular, with regard to a manufacturing licence, she indicates that this "is a complicated issue which may take some time to resolve".[18]

[40] Thereafter, it is unclear what happens with deposits for further RV manufacturing and reduction of accounts payable. Mr. Cheng visits the Montreal operations on November 1, 2022 and expresses Liuhaun's interest to participate alone or with its persons acting in concert in the SISP.[19] He seems to do this with a perspective to manufacture the rotary valve in China. He signs a NDA on November 2, 2022[20] . In particular, he therefore acknowledges, in paragraph 6, the Bidding procedures Order and agrees to be bound by it.

[41] He does not make mention of any ROFR which could be exercised by Shenergy.

[42] He then files the following bid:

To whom it may concern…

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16 Exhibit O-5.
17 Exhibit P-15.
18 Idem.
19 Exhibit P-15.
20 Exhibit P-16.

> Shanghai Liuhuan Investment Co. Ltd. would like to act alone or with its persons acting in concert to make an offer as below:
>
> 1) Get Rotary Valve manufacturing license
>
> **AND**
>
> 2) Acuire all (60% Xebec adsorption Inc.'s share in Xebec Adsoprtion (Shanghai) Co. Ltd. for a price of One Million (1,000,000) Canada dollar.
>
> Peter Cheng P. Eng. Ph.D. MBA
>
> Executive Director of Shanghai Liuhuan Investment Ltd.

[43] This offer does not respect several of the criteria set par. 12 of the SISP. Hence, on November 19, 2022, NBF informs Luahuan that its bid does not qualify by sending the standard form email (P-18).

[44] Cheng writes back. Given the position the Opponents now adopt, it is necessary to reproduce his comments in their entirety:

> I truly thank you, BNC and Deloitte teams for the hard work of saving Xebec group. I joined Xebec some 8.5 years ago, and held shares of XBC since 10th of June 2020, not a single share has been sold since then, despite ups and downs! Employees like me have much affiliation to this company. I hope that with your help the mismanagement can be terminated, value preserved for Xebec group investors and Xebec group can have a rebirth after her nirvana!
>
> In addition, I have already seen more efficient operation and predictable delivery from Blainville plant. Thanks to the monitor's involvement, shorter command line and quicker decision making now in effect!
>
> Looking forward to seeing good results!

[45] The Monitor and the Petitioners carry out extensive Phase 2 work.

[46] On January 2, 2023, Cheng writes to the Monitor. There is obviously disagreement on how the payments sent for manufacturing new valves has been applied in light of unpaid receivables. He now raises the ROFR for the first time:

> ***3)*** Although Xebec Inc. management might have already informed you, just in case to avoid any invalid share transaction and legal problems, I would like to bring to your attention that in Shareholder's agreement of Xebec Shanghai, Chapter 6 Total Investment and Registered Capital of JV, Clause 6.5 Transfer of Share in the JV, specific rules and conditions are defined on share transfer. ***In any case, Xebec Inc. does not have rights to sell its shares in Xebec Shanghai alone without other shareholders' involvement.***

[Underlined, italicized and in bold as in the original]

[47] The Monitor testifies that this is when he learns of the ROFR for the first time.

[48] On January 26, Cheng, now appears to be willing to make an offer for all of Blainville's assets. On February 2, 2023, Cheng, acting on behalf of Liuhuan and Shenergy formulates an offer for three potential transactions:

48.1. $11 million offer to buy all Blainville assets, the PSA and rotary valve related intellectual property rights and all inventory; the 60% shareholding in XAS and th permanent right ot use XEebec and all related trademarks thereto;

48.2. $1 million offer of the 60% shareholding and a manufacturing license for rotary valves;

48.3. $150,000 offer for the 60% shares and the permanent use of the Xebec licence.

[49] No detail is offered as to financing. Once again, the type of information sought in clause 12 of the SISP is missing. Of much greater concern in light of the timing issues is the following statement: "We expect the time needed will be about 3.5weeks if the regulatory approval process runs very smoothly, otherwise it will need about 6 weeks".

[50] No written response is provided by Monitor.

[51] The APA with Ivys is finalized.

[52] On February 8, 2023, the application for the vesting order is served on Liuhuan and Shenergy.

[53] On February 10, 2023, a Chinese law firm sends a letter of demand indicating that "the matter relating to the equity change of [XAS] shall comply with Shareholders Agreement and Articles of Association of [XAS], and shall be handled in accordance with Chinese law".[21]

[54] Oppositions were filed on February 12, 2023 and all parties appeared before this Court on February 13, 2023.

[55] They agreed to postpone the hearing for the vesting order to February 16, 2023 in order that discussions may be held to see if a business solution could not be found which would satisfy Ivys, the Petitioners and the Monitor and the .

[56] The Monitor testified that a meeting was held where Ivys' management made a detailed presentation as to its capacities, its intentions and its business plan. When he

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21 Exhibit O-10.

wanted to relate what the Opponents said during the meeting, the Opponents counsel objected stating that this was a settlement discussion. No further questions were asked.

[57] Clearly the Opponents must live with the result of this tactical decision. The Court now has no explanation why the Opponents find Ivys to be unsuitable and why it would be inappropriate for an assignment to them of the AA and SA.

II. Analysis

A. Command centre

[58] Courts have repeatedly insisted on the importance of a single "command centre" and single control for CCAA proceedings being carried out in multiple fora. As Justice Hamilton has stated:[22]

> [29] In principle, all issues relating to a debtor's insolvency are decided before a single court. This rule is based on the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse." This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts.
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> [References omitted]

[59] Clearly, Montreal is the command centre. This Court has stated so repeatedly over the last months. Decisions rendered by this Court have been rendered executory in the United States by U.S. courts.

[60] Chen indicates in his affidavit that a vesting order of this Court will not be enforceable under Chinese law. He relies on a legal opinion.[23]

[61] This legal opinion is signed by the same law firm that sent the February 10, 2023 letter[24]. This *per se* raises strong doubts as to the impartiality of the purported expert and to the admissibility of his opinion.

[62] Be that as it may, the legal opinion certainly does not say that a vesting order issued by this Court will not be enforceable in the PRC. It states that there is no treaty for the enforcement of Canadian judgments. The opinion's author recognizes that "legal instruments of Chinese courts" are recognized and enforced in Canada citing several such instances and then concludes that "due to the existence of precedents for recognizing and enforcing judgments rendered by Chinese courts, it is theoretically

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22 *Arrangement relatif à Bloom Lake*, 2017 QCCS 284; applied in *Arrangement relatif à Bloom Lake*, 2021 QCCS 3402.

23 Exhibit O-3.

24 Exhibit O-10.

possible for Chinese courts to recognize and enforce the Court order on the basis of the de facto reciprocity".

[63] Ivys accepts that exemplification of the vesting order may be required by Chinese courts. It does not make such exemplification a condition to the transaction.

[64] There is therefore no reason for this Court not to entertain the request for a vesting order.

B. Exercise of vesting powers under s. 36 CCAA

[65] The present CCAA proceedings can be qualified as a "liquidating CCAA". As the Supreme Court explains in *Callidus*,[25] liquidating CCAAs can take diverse forms, including sale of the debtor company as a going concern or "en bloc" sale of assets that are capable of being operationalized by a buyer[26]. In the present case, the focus has been to ensure the continued operation of the business of the petitioners and affiliates under a different going concern entity. As the Supreme Court states: "when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus".[27]

[66] This has indeed been the predominant remedial focus throughout and, all the more so, today. The Court has no doubt that the Petitioners have reached the end of the path. If the Ivys transaction does not close, the cash will have dried up. Lay-offs will be required. Over 100 jobs are at stake. Clients will not be supplied. Suppliers will lose clients. The second tranche of the Secondary DIP financing will not be paid. This will in turn lead to difficulties to pay the professionals.

[67] Having made these preliminary remarks, can and should the Court exercise its powers under s. 36 and issue the vesting order?

[68] Opponents make a curious argument to the effect that in this case, the sale of the 60% shareholding is not a sale of assets which can be disposed of under s. 36 and that the matter must be dealt with as an assignment and therefore must abide to the conditions of s. 11.3. The Court cannot agree. Shares are assets. These assets can and are sold. Hence, vesting orders can be rendered.

[69] Ss. 36(1) states that "despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even

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25 *9354-9186 Québec inc.* v.*Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521,
26 *Ibid.*, par. 43.
27 *Ibid.*, par. 46.

if the shareholder approval was not obtained". Hence, even if Liuhuan and Shenergy oppose the sale, the Court may nevertheless approve the sale. Ss. 36(6) provides that the "Court may authorize a sale or disposition free and clear (…) of any (…) restriction".

[70] As Justice Fitzpatrick has noted in *Re Quest*, Courts have vested off ROFRs in the context of sale of assets. As evidence thereof, the template Approval Vesting Order published by the Barreau de Montréal provides a formulation where the assets are fee and clear of contractual rights (for assets in Québec) and free and clear of rights of first refusal out of the province. Many vesting orders have since used these clauses. Most likely though, they were not contested.

[71] The CCAA set out at s. 36(3) the factors that must be taken into account:

> In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
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> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
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> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[72] Factors a) to d) and f) are met. The APA is the result of the court mandated SISP. The Monitor was central to this process and he fully supports this transaction which is the best if not the only transaction which can be made. He has filed the Sixth Report which provides his reasons to support it including regarding the value given which must be evaluated as a whole or as a bundle, both for the Purchased Assets and the Equity Interest in XAS.

[73] The secured creditors explicitly support this transaction and no other creditor has made its opposition known.

[74] The paragraph which therefore must preoccupy the Court is par. 36(3)e), namely the effect of the disposition of the 60% shareholding of XAS to Ivys and more

particularly the fact that its disposition will be free and clear of the ROFR on "certain interested parties", namely the Opponents.

[75] Valerie Cross in her article ""3, 2, 1, Vest Off!" New Case Law on Extinguishing Third-Party Interests in Insolvency Proceedings" reviews the state of the case law regarding ROFRs in vesting orders issued under the *Bankruptcy or Insolvency Act* or the *CCAA*. She finds that there are two approaches.

[76] A first approach is applied in *Third Eye*, in the context of the *BIA*. At issue was a ROFR on land. The Ontario Court of Appeal posits that two factors must first be considered when extinguishing rights. If the analysis of these two conditions is ambiguous or inconclusive, only then should the court engage in the consideration of equities:[28]

> [102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.
>
> [103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.
>
> [106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. (...)
>
> [109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.
>
> [110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

[77] Another approach is that taken by Justice Fitzpatrick of the Supreme Court of British Columbia in *Re Quest*. In a CCAA context, she solely uses a balancing of equities approach to see if this favours the interested party or the Petitioners. A number of considerations are then reviewed which Valerie Cross has usefully regrouped under

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[28] Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508.

four headings: [29] (1) the parties' conduct; (2) the ROFR terms; (3) prejudice; and (4) the monitor's opinion.

[78] It serves no use to discuss at length whether the simple balance of equities approach suffices or if the court must first convince itself that the rights are ambiguous or inconclusive. In this instance, both approaches lead to the same conclusion. These are some of the reasons why:

78.1. The nature of the interest: Liuhuan and Shenergy will not lose their shares. They will preserve all their rights in the AA and SA. The ROFR will not be lost. It simply cannot be exercised on this transaction. The ROFR is fundamentally ill-suited to a CCAA bidding process and will have a chilling effect. The final sentence of s. 36(1) is an indication of this when it indicates that shareholder approval need not be obtained.

78.2. The parties' behaviour: Throughout the last six months, Liuhuan and Shenergy have been made aware of the SISP, have signed a NDA, have made a bid. They have not contested the Bidding Procedure Order. Necessarily, they envisaged and accepted that scenarios could lead to the XAS' shareholding to be modified without their ROFR being exercised. Also, the SISP is fundamentally incompatible with a right of first refusal. This should have been clear to the Opponents from the outset. They should have contested the bidding process and asked to be carved out. It is not appropriate for them to wait until the last minute and see what this SISP generates as a result.[30] To recognize such pre-emption rights is completely destructive of the SISP's aims.

78.3. The balancing of equities: It overwhelmingly favours the petitioners. On the one hand, if no vesting order is issued, the Ivys transaction will not go through and the Blainville operations will be shut down. This will spell the end of the Blainville operations, will lead to massive lay offs, will prevent disbursement of the second Tranche of the Secondary DIP financing and will prevent service to clients. It will greatly reduce the value of the asset putting at risk payment of the various charges and the secured creditors including the DIP financing. On the other hand, Opponents offer no credible explanation how they could operate with the demise of Blainville and how this could be a favourable outcome. The Ivys group is a credible business partner. The Opponents have deliberately raised privilege on the negotiations that were carried out over the last week and the Court is left with no explanation from the Opponents why they do not consider Ivys to be a proper partner.

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[29] "3, 2, 1, Vest Off!" New Case Law on Extinguishing Third-Party Interests in Insolvency Proceedings, 2021 CanLIIDocs 13566, p.

[30] See in this regard the comments of Justice Mongeon in *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915, par. 37 and foll. Confirmed in *White Birch Paper Holding Company (Proposition de)*, 2010 QCCA 1950.

[79] For all these reasons, the Court deems that the vesting order as requested should be granted.

C. The assignment of the AA and SA

[80] The Court has the power under s. 11.3(1) of the CCAA to assign rights and obligations of agreements to which XAI is a party.

[81] The Court considers that per se, the SA and the AA are agreements and the rights and obligations of XAI under these agreements can be assigned to Ivys who agrees thereto, as long as the exception set out in ss. 11.3(2) CCAA does not apply.

[82] Ss. 11.3(2) reads as follows:

> (2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
>
> (a) an agreement entered into on or after the day on which proceedings commence under this Act;
>
> (b) an eligible financial contract; or
>
> (c) a collective agreement.

[83] The Opponents argue that by their nature, the joint venture fits within this exception.

[84] The Court does not agree. To come to this conclusion, the Court relies on the precedent set by the Alberta Court of Appeal in *Ford Motor Company of Canada* which deals with the same type of argument made with regard to the bankruptcy courts powers under the s. 84.1 of the BIA are determinative. The Court of Appeal held that it could assign the rights and obligations of the dealership agreement to new dealer. [31] The type of "joint venture" that the AA an SA show are no more personal in nature that the relationship between Ford and its dealers.

[85] Ss. 11.3(3) lists the consideration, amongst others, than can be taken into account by the Court when exercising its discretion under s. 11.3:

> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;

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31 *Ford Motor Company of Canada, Limited* v.

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

[86] Factors a) is met as the Court has already indicated.

[87] As regards factor b) and c), the same considerations apply as those which they Court has already set out for the exercise of its discretion under s. 36 CCAA.

[88] The Opponents raise two additional specific points. Firstly, they indicate that under the AA, the partners have indemnification obligations and that no proof was made that they can meet these obligations. Secondly, they indicate that it does not have any evidence that it could execute its responsibilities as set out at ss. 7.1 of the Joint Venture.

[89] This is once again not convincing. Firstly, clearly, XAI cannot meet any indemnification obligation at present. Hence, if the contract was not assigned and the transaction would not go forward, XAI would have no assets to back up any indemnity. Furthermore, it could not supply any rotary valves and this could put XAS in default towards its clients. Nothing shows that Ivys who has that necessary funds to make the very significant purchase could not meet its liabilities in due course. Also, Ivys is stepping into the shoes of XAI. It will operate with the same employees, the same assets and the same technology but will not be burdened.

[90] At the end, the Court is left with the impression that the Opponents are using the CCAA process and the Court mandated SISP to obtain an advantage it would never have had, were it not for the CCAA. After having sat on the sidelines and let all parties work for months at a huge cost and high risk for all the parties who benefit from charges or other security, it now wants to obtain the 60% shareholding at a nominal value despite the devastating effects this will have.

[91] This is fundamentally incompatible with the remedial focus of the CCAA.

[92] At the end of the day, all this vesting order will do is permit the Opponents to continue the same business it has been carrying out since 2020, with the same technology, the same production facility and the same people without any disruption. In the delicate balancing exercise that the Court must carry out, the overwhelming interests of numerous stakeholders must supersede the Opponents' opportunity to make a windfall.

[93] It is for these reasons that the Court has signed the vesting order concurrently hereto.

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