SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-061483-224

DATE: December 19, 2023

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

IN THE MATTER OF THE PLANS OF COMPROMISE OF:

FORMERXBC INC. (FORMERLY XEBEC ADSORPTION INC.)
11941666 CANADA INC. (FORMERLY XEBEC RNG HOLDINGS INC.)
APPLIED COMPRESSION SYSTEMS LTD.
1224933 ONTARIO INC. (FORMERLY COMPRESSED AIR INTERNATIONAL INC.)
FORMERXBC HOLDING USA INC. (FORMERLY XEBEC HOLDING USA INC.)
ENERPHASE INDUSTRIAL SOLUTIONS, INC.
CDA SYSTEMS, LLC
FORMERXBC ADSORPTION USA INC. (FORMERLY XEBEC ADSORPTION USA INC.)
FORMERXBC PENNSYLVANIA COMPANY (FORMERLY THE TITUS COMPANY)
FORMERXBC NOR CORPORATION (FORMERLY NORTEKBELAIR CORPORATION)
FORMERXBC FLOW SERVICES – WISCONSIN INC. (FORMERLY XBC FLOW SERVICES – WISCONSIN INC.)
CALIFORNIA COMPRESSION, LLC
FORMERXBC SYSTEMS USA, LLC (FORMERLY XEBEC SYSTEMS USA, LLC)
Debtors / Petitioners

And

DELOITTE RESTRUCTURING INC.
Monitor

REASONS FOR RENDERING THE SANCTION ORDER
(S. 6 And 11of the *Companies Creditors Arrangement Act*)

[1] Fifteen months have elapsed since the Court issued a First Initial Day Order ("IFDO") relying on the powers conferred to me by the *Companies Creditors Arrangement Act* ("CCAA").

[2] On that first day, hundreds of jobs were in jeopardy across Canada and the United States. Clients risked losing their critical supplier or service provider. Secured and unsecured creditors were owed very substantial sums.

[3] It was quickly obvious that this was fated to be a liquidating *CCAA*, and that a reorganization of the Debtors was not possible. To paraphrase the Supreme Court of Canada, the predominant remedial focus was then a liquidation that preserved going-concern value and the ongoing business operations of the Debtors.[1]

[4] A large group collaborated to achieve the best possible outcome for all concerned stakeholders, namely: The debtors and their Canadian and US legal counsel, the monitor and their Canadian and US legal counsel, the financial advisor, the directors and officers, the suppliers, the clients, the unsecured creditors, the secured creditors and their legal counsel.

[5] The following eight transaction were carried out in Canada of the United States, and the Court rendered 8 distinct vesting orders.

	DATE OF THE ORDERS	SELLER(S)	PURCHASER(S)
1	February 3, 2023[2]	Applied Compression Systems Ltd. **(ACS)**	1396905 B.C. Ltd.
2	February 13, 2023[3]	FormerXBC Inc. (formerly Xebec Adsorption Inc.) **(BLA)** and 11941666 Canada Inc. (formerly Xebec RNG Holdings Inc.) **(GNR)**	Fonds de solidarité des travailleurs du Québec (F.T.Q.) *-and-* GNR Québec Capital L.P.
3	February 13, 2023[4]	CDA Systems, LLC **(CDA)** *-and-* California Compression LLC **(CAL)**	Sullair, LLC

1 *9354-9186 Québec inc.* v. *Callidus Capital Corp.*, 2020 SCC 10 (CanLII), [2020] 1 SCR 521, par. 46 « *Callidus* »].
2 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 268.
3 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 378.
4 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 380.

4	February 17, 2023[5]	FormerXBC Inc. (formerly Xebec Adsorption Inc.) **(BLA)** *-and-* 1224933 Ontario Inc. (formerly Compressed Air International Inc.) **(CAI)**	Ivys Adsorption Inc. (asset buyer) *-and-* Ivys, Inc. (equity buyer)
5	March 16, 2023[6]	FormerXBC Pennsylvania Company (formerly The Titus Company) **(TIT)**	FAD Pennsylvania Inc.
6	March 16, 2023[7]	FormerXBC Flow Services – Wisconsin Inc. (formerly XBC Flow Services – Wisconsin Inc.) **(XBC)**	Total Energy Systems, LLC
7	March 16, 2023[8]	FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) **(UEC)**	EnergyLink U.S. Inc.
8	May 24, 2023[9]	FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) **(UEC)**	Ivys Adsorption Inc.

[6] In addition, because of the terms of the ARIOs, the Court authorized the Monitor to carry out further transactions without seeking the Court's approval under certain conditions. Five further transactions were carried out namely:

- the sale of FormerXBC NOR Corporation to Next Air & Gas;
- the sale of certain assets of Enerphase Industrial Solutions, Inc. ("**AIR**") to Curtis Toledo in March 2023 and of other assets to Curtis Toledo;
- the sale of certain assets of FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) ("**UEC**") to Air Products and others to Western Midstream in July 2023.

[7] Finally, entities which were not petitioners as such were also sold, namely: Tiger Filtration Limited located in the U.K. and HyGear Technologies and Services B.V. located in the Netherlands.

[8] These transactions allowed operations to continue as seamlessly as possible. The vast majority of employees' positions were saved. Clients continued to be serviced. Supply chains were maintained. Complex transactions were structured to permit assets which were only partly built to be transferred.

---

5 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 467; written reasons provided in *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 466.
6 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 837
7 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 839
8 *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 838.
9 *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.),* 2023 QCCS 1780; written reasons provided in *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 1818.

[9] This in of itself was a remarkable feat which met one of the objectives of the *CCAA*, namely: avoiding the social and economic losses resulting from liquidation of an insolvent company.[10]

[10] As a testament to the inherent fairness of the process and the collaborative effort led by the debtors and the monitor with all stakeholders, there was surprisingly little contestation.

[11] But there was some, and it attacked directly not only the debtors, but also the Monitor, the debtor's legal counsel and the directors and officers. More will be said at the end of these reasons.

[12] Progressively, greater visibility on the ultimate financial outcome was gained as the following milestones were passed:

- Closing of transactions and collection of proceeds;
- Payment of close to $8M to the secured creditor National Bank of Canada("NBC") as a result of the sale of Tiger Filtration Limited on which the NBC had a security;
- Actual drawings on the issued letters of credit;
- Understanding of the impacts of intercompany transactions;
- Determination by the Monitor of the limits of EDC's security on US assets, which in turn led to negotiations and the execution of a support agreement for which the authorization of the Court was obtained. [11]

[13] As all this came into focus, it became clear that distributions could be made to unsecured creditors.

[14] A claims process was presented and the Court found it to be fair, efficient and reasonable.[12] This process provided for the transmission of a Claims Package by the Monitor, the transmission of a claim by the creditor with a claims for claims against the Debtors and the D&Os with a Bar Date by July 24, 2023, the possible transmission of a Notice of Revision or Disallowance by Monitor and the possibility for the claimant to file an appeal application, which would then be submitted to this Court for adjudication.[13]

---

10 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379, par. 15.

11 *Arrangement relatif à Former XBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 4220, par. 18 to 20; reasons provided in *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 4213, paragraphes 8 to 18.

12 *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 1818, par. 27.

13 Id., par. 24.

[15] The Debtors and the Monitor then started working in earnest to determine the allocation of expenses and estimating the net proceeds available for distribution. On June 20, 2023, the Monitor presented the allocation method to the creditors. It then sought and obtained my authorization for its implementation. I indeed concluded that the Proposed Allocation Methodology was equitable and appropriate. Its principled approach, its adaptability to the ever-changing proceeds and costs, and its transparency advanced the policy and remedial objectives of the CCAA.[14]

[16] Plans or arrangement were then drawn up. Prior to this, the Court approved the Plan filing and meeting order.[15]

[17] The meeting was held. The vast majority of creditors of 11 Debtors voted and, save for one lonely vote against, approved the plans by the double majorities set out at par. 6(1) of the *CCAA*.

[18] Unfortunately, the formerly publicly traded parent, FormerXBC (formerly known as Xebec Adsorption Inc.) has no proceeds to distribute. It has presented no plan. Nevertheless, certain ancillary conclusions are sought, which mirror the releases for its directors, officers and slew of categories of professionals, which are granted in the plans.

[19] During the hearing, the Court asked that the language of the release regarding FormerXBC be tightened up and the Debtors and the Monitor provided a new version of par. 35 of the proposed order.

[20] Should the Court now sanction these compromises and order the ancillary relief sought? For the reasons set out below, it concludes that it must.

1. THE SANCTION OF THE 11 PLANS

[21] To explain its decision, the Court will first examine (1.1) 1.1 legal principles, focusing both on (1.1.1) the factors which must govern me generally when sanctioning, and (1.2.1) more focus specifically when examining releases. I will then (1.2) apply these principles to the facts at hand.

1.1 Legal principles

1.1.1 General factors when sanctioning

[22] Paragraph 6(1) CCAA prescribes that if a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be, present and

---

[14] *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 2417, par. 47.

[15] Arrangement relatif à Former XBC Inc. (Xebec Adsorption Inc.), 2023 QCCS 4220 and the reasons therefore at *Arrangement relatif à FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 4213.

voting either in person or by proxy at the meeting or meetings of creditors agree to any compromise, the compromise may be sanctioned.

[23] Indeed, even if the affected creditors voted in favour of the Plan in the requisite double majorities, the sanctioning court must still examine (i) whether there has been strict compliance with all statutory requirements; (ii) whether all materials filed and procedures carried out were authorized by the CCAA; (iii) whether the Plan is fair and reasonable.[16]

[24] In particular, in determining what is fair and reasonable, courts have reviewed the plans using the following six factors [the "**Six Sanction Factors**"]: (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (b) what creditors would have received on bankruptcy or liquidation as compared to the plan; (c) alternatives available to the plan and bankruptcy; (d) oppression of the rights of creditors; (e) unfairness to shareholders; and (f) the public interest.[17]

1.1.2 Principles with regard to releases contained in plans

[25] When determining whether a plan is fair and reasonable, the sanctioning judge must pay particular attention to releases. Additional considerations come into play.

[26] Since 1997, section. 5.1 of the CCAA *explicitly* provides for potential releases of directors in plans:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that;
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> (...)

---

16 *Arrangement relatif à Java-U Group inc.*, 2018 QCCS 2617, par. 9 and the case law cited by Justice Gouin.

17 *Re: Canwest Global Communications Corp.*, 2010 ONSC 4209, par. 15 [« *Canwest* »]

[27] Releases for directors are therefore possible, but strictly limited by the exception set out in para. 5.1(2) *CCAA*. The CCAA does not deal with other third party releasees.

[28] Can releases be extended to third parties and if yes, at what conditions?

[29] In *Metcalfe*, the Ontario Court of Appeal concluded that the *CCAA* permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the CCAA Court where those releases are reasonably connected to the proposed restructuring. To arrive at this conclusion, it relied on the three following grounds: (a) the open-ended, flexible character of the *CCAA* itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it.[18]

[30] While reflecting on the second consideration – the meaning of a compromise or arrangement - the Ontario Court of Appeal found that generally, "there is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party". Hence, as an extension to this proposition, in *CCAA* plans of arrangement, debtors can agree with creditors to compromise claims against the debtor and to release third parties.[19]

[31] The Court of Appeal recognizes that the contractual reasoning has its limits since the plan is frequently imposed on an unwilling minority of creditors. It however concludes that the minority is protected to some extent by the double majority rule.[20]

[32] Third party releases have therefore been extended to officers, professionals or even lenders as a matter of course in plans of arrangement across Canada. [21]

[33] Nevertheless, Courts must still enquire whether such releases are fair and reasonable. As the Chief Justice of the Supreme Court of Canada Wagner explained while sitting in the Superior Court, "in applying and interpreting laws regarding bankruptcy and insolvency, winding-up or companies' creditors arrangements, the courts have consistently recognized that the fairness and reasonableness of the transactions under consideration must prevail".[22]

---

18 *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* , 2008 ONCA 587; par. 43 leave to appeal to the Supreme Court denied: *Jean Coutu Group (PJC) Inc. et al.* v. *Metcalfe & Mansfield Alternative Investments II Corp. and Other Trustees of Asset Backed Commercial Paper Conduits Listed in Schedule "A" to this application et al.*, 2008 CanLII 46997 (SCC).

19 *Ibid.*, para. 63.

20 *Ibid.*, para. 68.

21 For a comprehensive review of the case law, see: Carole J Hunter and Vanessa A Allen, *Please Release Me: The Evolution of Releases in Restructuring Proceedings*, 2021 19th Annual Review of Insolvency Law, 2021 CanLIIDocs 13553.

22 *Hy Bloom inc.* v. *Banque Nationale du Canada*, 2010 QCCS 737, par. 74.

[34] To ensure the fairness and reasonableness of third party releases, Courts generally engage in a principled review of the following five factors [the "**Five Release Examination Factors**"]:[23]

> a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
>
> b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
>
> c) Whether the plan could succeed without the releases;
>
> d) Whether the parties being released were contributing to the plan; and
>
> e) Whether the release benefitted the debtors as well as the creditors generally.

1.2 Applying these principles to the facts at hand

1.2.1 The general principles

[35] There can be no dispute that all the statutory conditions are met. The conditions of s. 4 of the *CCAA* are met. All the conditions of the Meeting order were respected. The documents were transmitted and the Monitor's reports under subparagraph 23(1)d.1) *CCAA* were comprehensive. The statutory majorities of s. 6 *CCAA* were largely exceeded. The releases contain the limitations set out at para. 5.1(2) *CCAA*.

[36] Excluding for the moment the question of releases, are the plans fair and reasonable? To answer this question, the Six Sanction Factors must be examined.

[37] Were the claims properly classified and did the requisite majority of creditors approve the plan? . As the Court more fully explained in its reasons in support of the Plan filing and Credit meeting order, the affected creditors holding claims of $2,000 or less were presumed to have voted in favour. For purposes of convenience, and given the low value of these favourable votes, this was appropriate. Also, the Trustee voted the intercompany claims in favour of the plans. This is also fair and reasonable in the particular circumstances of this case, because, otherwise, these very significant values would not have been accounted for in the votes.

[38] The voting results show that even if one puts aside the deemed votes and intercompany votes, and only takes into consideration the votes of other creditors holding proven claims, *all creditors but one* voted in favour of the plans.

---

[23] *Kitchener Frame Limited (Re)*, 2012 ONSC 234 and *Lydian International Limited (Re)*, 2020 ONSC 4006, par. 54.

[39] The following voting results on each of the Debtor Plans show not only strong creditor participation, but also quasi unanimity in favour of the plans:

- ACS: out of 27 proven claims, 6 were deemed to have voted in favour while 1 intercompany claim voted by EDC, one intercompany claim voted by the trustee and the claims of 13 other creditors were all voted in favour. Six creditors holding proven claims did not vote.

- AIR: out of 13 proven claims, 1 intercompany claim voted by EDC, 2 intercompany claim voted by the trustee and the claims held by 9 other creditors were all voted in favour. Only one creditor holding a proven claim did not vote.

- CAI: out of 18 proven claims, 1 intercompany claim was voted by EDC, 2 intercompany claim were voted by the trustee and 14 claims held by other creditors were all voted in favour. Only one creditor holding a proven claim did not vote.

- CAL: out of 26 proven claims, 4 were deemed to have voted in favour, 1 intercompany claim and one EDC claim voted by EDC, 3 intercompany claims voted by the trustee and the 14 claims held by other creditors were all voted in favour. One creditor voted against. Two creditors holding a proven claim did not vote.

- CDA: out of 11 proven claims, 2 were deemed to have voted in favour, 1 intercompany claim and one EDC claim voted by EDC , two intercompany claims voted by the trustee and the 4 claims held by other creditors were all voted in favour. One creditor holding a proven claim did not vote.

- TIT: out of 19 proven claims, 4 were deemed to have voted in favour, one intercompany claim voted by EDC, one intercompany claim voted by the trustee and the 13 claims held by other creditors were all voted in favour. All creditors therefore voted.

- NOR: out of 27 proven claims, 2 were deemed to have voted in favour, 1 intercompany claim and one EDC claim were voted by EDC, 5 intercompany claims voted by the trustee and the claims of 13 other creditors were all voted in favour. 4 creditors holding proven claims did not vote.

- UEC: out of 109 proven claims, 18 were deemed to have voted in favour, one claim voted by EDC , two intercompany claims voted by the trustee and the claims of 72 other creditors were all voted in favour. 16 creditors holding proven claims did not vote.

- XBC: out of 17 proven claims, 5 were deemed to have voted in favour, one intercompany claim and one EDC claim voted by EDC , three intercompany claims voted by the trustee and the claims of 6 other creditors were all voted in favour. One creditor holding a proven claim did not vote.

- XHU: out of 5 proven claims, one intercompany claim and one EDC claim voted by EDC and the claims of 3 other creditors were all voted in favour. One creditor holding a proven claim did not vote. All claims were voted or deemed to have been voted.

- XSU: out of 6 proven claims, one intercompany claim voted by EDC, one intercompany claim voted by the trustee and the claims of 4 other creditors were all voted in favour. All claims were voted or deemed to have been voted.

[40] What creditors would have received on bankruptcy or liquidation as compared to the plan? More than 7 days before the meeting, in accordance with sub para. 23(1)(d.1) *CCAA*, the Monitor provided to the creditors, for each Debtor, a detailed report on the state of the company's business and financial affairs. [24]

[41] The report set out in exhaustive detail (i) the funds available for distribution, (ii) the estimated distribution to affected creditors holding a proven claim and (iii) a comparison of the estimated distribution with the distribution that could be hoped for in a liquidation.

[42] Given that all assets have been sold, the only difference between the plan and a liquidation is that no support agreement would have been entered into with EDC and this would have triggered significant legal costs, uncertainty and long delays for the US affiliates. All Debtors would have incurred costs related to the liquidation, but the costs of the US affiliates would have been greater due to the particularities of US bankruptcy legislation.

[43] A summary table was filed at the hearing extracting the comparison tables of each of the eleven reports.[25] It evidences that distributions in all the liquidation scenarios are lower than under the plans.

[44] Were alternatives available to the plan and bankruptcy? Given that all assets were sold, there was no alternative.

[45] Was there oppression of the rights of creditors? All creditors are treated equally. There can be no oppression.

[46] Was there unfairness to shareholders? There is no money left for the shareholders and therefore any compromise or arrangement which provides for the payment of equity claims could not be sanctioned per par. 6(8) *CCAA*.

[47] Are the plans in the public interest? Clearly, all transactions which were carried out upstream were in the interest of all stakeholders. Plans which ensure distributions and which do not run counter to the other Sanction Factors are necessarily in the public interest, subject to releases being fair and reasonable.

---

[24] Exhibit P-4.
[25] Exhibit P-6.

1.2.2 Are the releases fair and reasonable

[48] The reasoning set out in *Metcalfe* is applicable to the facts of this case.

[49] No one is contesting the plans or the releases. Indeed, the lone creditor who voted against a plan made no representations to the Court.

[50] Extensive information was provided to the creditors, including, specifically, on the issue of the releases, before they were called to vote:

- Over the course of the course of the CCAA proceedings, the Monitor filed 13 reports.
- The Monitor provided a detailed allocation report. He held an information meeting on June 14, 2023 to explain it.
- The Monitor held numerous meetings with creditors and ensured that there would be a high level of voter participation.
- At the creditors' meeting, the Monitor reviewed in detail the plans, including the releases it contained.

[51] Therefore, the creditors were well informed of the issues at stake before they voted. Clearly, this is a scenario where the creditors voted in favour of plans which contained, without any ambiguity, the releases. Given the extensive level of information they received on this topic, and given that all but one voted in favour, the Court does not see why it should not give effect to their expressed intention.

[52] In any event, it is difficult in this file to see who could be harmed because of the D&O claims process and the settlement of the class action.

[53] Creditor D& O claims: given the terms of the Claims Procedure Order, no creditor any longer holds a valid claim against directors and officers.[26]

[54] Indeed, all unsecured creditors were given the opportunity to file a claim not only against Xebec, but also against the directors and officers by July 24 2023 - the Claims Bar Date. If they did not, the would be forever barred from advancing a Claim against the directors and officers.

[55] The Monitor's 13th report[27] lists the 36 creditors that did file D&O claims. The Monitor to these D&O claims sent out notices rejecting these claims. Mr. Nadon in his testimony surmises that most of these creditors were in fact confused as to their eventual

---

[26] *Arrangement relatif à FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 1773, par. 18 to 20. See reasons at *Arrangement relatif à FormerXBC Inc. (Xebex Adsorption Inc.)*, 2023 QCCS 1818.

[27] Exhibit P-5.

rights and unwittingly checked the D&O Claim box. Indeed, two creditors eventually withdrew their claim, while the rest did not appeal. These claims are now forever barred.

[56] One claim was maintained despite the Monitor's notice. Haffner Energy SA claimed approximately $2,7 M € from the D&Os. This claim was settled subsequently and paid for entirely from insurance proceeds.

[57] Hence, as a result of the claims process, no creditor today has a claim against the D&Os.

[58] The shareholders: prescription and the settlement of the class action on behalf of a large class of shareholders make it highly unlikely that any shareholder could still exercise a claim.

[59] Indeed, in a settlement that the undersigned approved, Releasors forever and absolutely released, relinquished and discharged the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had", in consideration of which the class received payment of $5M financed by Xebec's insurer. The following definitions help to understand the release's scope:[28]

- Released Claims are any and all manner of claims, demands, actions, suits, causes of action, whether class, individual, representative or otherwise in nature, whether personal or subrogated, damages whenever incurred, damages of any kind including compensatory, punitive or other damages, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, and lawyers' fees, known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity that Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to any conduct occurring anywhere, from the beginning of time to the date hereof relating to any conduct alleged (or which could have been alleged) in the Action including, without limitation, any such claims which have been asserted, would have been asserted, or could have been asserted, directly or indirectly, whether in Canada or elsewhere, concerning, based on, arising out of, or in connection with both: (i) the purchase or other acquisition, holding, sale, disposition or other transactions in relation to Securities by Plaintiffs or any other Settlement Class Member during the Class Period; and (ii) the allegations, transactions, acts, facts, matters, occurrences, disclosures, statements, filings, representations, omissions, or events that were or could have been alleged or asserted in the Action

---

[28] See the settlement agreement filed as a schedule to the class action authorization judgment for purposes of settlement, *Leclair* c. *FormerXBC inc. (Xebec Adsorption inc.)*, 2023 QCCS 2416.

- Releasors are, amongst other, the Plaintiffs and Settlement Class Members, who in turn is a person who purchased or otherwise acquired securities of Xebec by any means (whether pursuant to a primary market offering, in the secondary market or otherwise) from November 10, 2019, to March 24, 2021, and held some or all of such securities as of the close of trading on the TSX on March 11, 2021 or March 24, 2021.

- Releasees are amongst others, FormerXBC, the directors Guy Saint-Jacques, William Beckett, Louis Dufour, Stéphane Archambault and Kurt Sorschak, the underwriters, and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, principals, insurers, and all other persons, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present and future officers, directors, employees, agents, shareholders, attorneys, trustees, servants and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators and assigns of each of the foregoing.

[60] A person who wished to opt-out from the class action and the Settlement Agreement could do so by delivering a notice before August 31, 2023. Only one member, who holds 330 shares properly did so.

[61] The Court found this settlement to be fair, reasonable and equitable for all the Class members and approved it.[29] In its conclusions, the Court ordered and declared that the Releasors forever and absolutely release, relinquish and discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any capacity, ever had, now have, or hereafter can, shall or may now have or hereafter can, shall or may have.

[62] Hence, creditors and most likely shareholders do not have any recourse against the D&Os. By adding all professionals, the releases provide final and definitive closure to which all creditors agreed to in the plans.

[63] Given all of the above, the Court finds the releases in the plans to be fair and reasonable.

2. THIRD PARTY RELEASES FOR FORMERXBC

2.1 Legal principles

[64] If no plan is presented, can a *CCAA* court still provide releases?

[65] Relying on s. 11 of the *CCAA*, the *CCAA* supervising judge, may make any "order that it considers appropriate" and which responds "to the circumstances of each case and

---

[29] *Leclerc* c. *FormerXBC Inc. (Xebec Adsorption Inc.)*, 2023 QCCS 3952.

[meets] contemporary business and social needs".[30] This authority is "not boundless". The Court must keep in mind "three "baseline considerations" which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence".[31] Whether the order sought is appropriate must be assessed "by considering whether the order would advance the policy and remedial objectives of the CCAA".

[66] Courts have relied on their discretionary powers under s. 11 to grant releases. They are commonly granted in vesting orders or reverse vesting orders.[32]

[67] In exercising discretion under s. 11 CCAA, it is not sufficient to simply acknowledge that it is common practice in *CCAA* proceedings to grant releases. A more principled approach is required.

[68] As a first step, it must first be determined whether the releasees are clearly set out. Simply listing releasees generically is inappropriate and will in any event most likely not be executory. Clearly identifying the intended releasees will ensure the ability to make a proper assessment of the contributions the directors, officers, the professionals or other releasees.

[69] What considerations should be applied when examining releases benefiting directors, officers, and professionals, including the monitor and legal counsel?

[70] Obviously, directors and officers need to be incentivized to support the *CCAA* process. For officers, this can partly be ensured by key employment retention programs (KERPs) secured by KERP charges for officers and by trailer liability insurance. The prospect of a release is an additional strong - if not essential - incentive for D&Os not to leave the ship and be fully invested in their work. Otherwise, they could simply resign.

[71] These considerations are not perfectly transferable to professionals.

[72] Legal counsel and the monitor are undoubtedly essential to the proper running of a *CCAA.* This is why their remuneration will generally be guaranteed by superpriority administrative charges. The Supreme Court of Canada deems that this is required "to derive the most value for the stakeholders". The financiers and the professionals will not act if there was a "high level of risk involved". In the particular context of determining whether the deemed trusts under the *Income Tax Act* could trump any superpriority, the Supreme Court stated that "for a monitor and financiers to put themselves at risk to

---

30 *Callidus*, par. 48.

31 *Id.*, par. 49.

32 The Québec Superior Court Chief Justice Paquette states that "it is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction"*Arrangement relatif à Blackrock Metals Inc.,* 2022 QCCS 2828, par. 128. Leave to appeal refused by the Court of Appeal of *Quebec Arrangement relatif à Blackrock Metals Inc.,* 2022 QCCA 1073 and by the Supreme Court of Canada, *Winner World Holdings Limited, et al.* v. *Blackrock Metals Inc., et al.*, 2023 CanLII 36969.

restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness".[33]

[73] Superpriority charges coupled with interim financing will generally ensure that the monitor and its and the debtors' legal counsel are paid. They are, at that point, arguably, in a better position than most Canadian professionals, and in particular lawyers who carry out transactional work.

[74] No doubt, obtaining releases will enhance their interest to render services.

[75] When examining the Five Release Factors, professionals are essential to the plan. Providing them a release will therefore necessarily be rationally connected to the plan, which could not succeed without their contribution. This will benefit the debtors. This reasoning will hold true in any *CCAA* file. If this is enough, the review of the Five Release Factors will be a mere formality.

[76] The monitor and the debtor have argued forcefully that, by extension of *Canada North*'s reasons, it would be just as unfair for potential claimants to hide in the weeds during the restructuring and then attack the professionals once the plans are approved or the CCAA stay ended. Releases are essential to protect professionals against such tactics.

[77] For better or for worse, the fear of being sued after completion of a mandate is the lot of any lawyer or professional. They do not obtain releases at the end of their mandate unless this is explicitly included in a release. Protection is assured through liability insurance. In Québec, the professional who has liability insurance, and is sued for contractual or extracontractual liability, benefits from the measure set out at art. 2503 C.C.Q.: "legal costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance".

[78] A contribution, as brilliant as it may be, does not entitle the professionals, in of itself, to releases.

[79] The fairness and reasonableness of releases must be justified on the facts of each case, in a context where the creditors do not vote and do not agree to these releases. Most likely, this will occur in a liquidating *CCAA* scenario.

[80] A Court should therefore examine, at a minimum, who benefits from the release and who is negatively impacted by the release.

- Does a large group of stakeholders namely employees, clients and participants in the supply chain stand to benefit from the *CCAA* proceedings as the operations of the Debtors will be continued in a new entity? In such a scenario, for the sake

---

[33] *Canada* v. *Canada North Group Inc.*, 2021 SCC 30, par. 30.

closure and preventing unwanted disruptions and costs flowing from ongoing litigation, releases may be fair and reasonable.

- If the proceedings have maximized payout solely for the secured creditor, should the professionals not rather seek indemnities from them?

[81] A Court could also consider whether there already have been manifestations of potential recourses, most likely unfounded, which may be directed against the professionals. This may also speak in favour of the releases.

[82] In the particular context of this case, the examination of such considerations leads to the conclusion that the clearly delineated releases are fair and reasonable.

2.2 Should the Court exercise its discretion in favour of the releasees?

[83] FormerXBC could not file a plan, having no funds to distribute.

[84] This gives rise to the following curious situation: in the eleven Debtor plans sanctioned by me, all for FormerXBC's affiliates, third party releases are provided while for the parent, FormerXBC, none are provided.

[85] A release was asked for by the Debtors in the February 8, 2023 application for the 3rd ARIO and AVOs for the sale of substantially all or all the assets of GNR LP, CDA, CAL and CAI and FormerXBC.

[86] At that date, CDA, CAL and CAI still alleged that it was not envisaged that there would be sufficient funds to finance a plan of arrangement or compromise, including one that would provide for what they alleged were "customary releases in favour of the D&Os". For CDA, CAL and CAI, that turned out to be wrong as plans were presented and voted on. But not for FormerXBC.

[87] The Sellers argued that it was appropriate and fair in the circumstances that the D&Os benefit from a release "so as to enable them to turn the page once these CCAA Proceedings will have been completed". They stressed that the board of directors composed of independent directors (with the exception of the CEO), were meeting on a no-less-than-weekly basis throughout these CCAA Proceedings and were fully engaged with management and providing continuous support in connection with the ongoing operations and the SISP and were instrumental in maximizing the value of the assets of the Xebec Group. The officers were also working "tirelessly" throughout these CCAA Proceedings, the whole for the benefit of all stakeholders, including notably the employees. They claimed that the D&O Releases were "in line with releases granted by Courts across Canada in similar CCAA proceedings". [34]

---

[34] See the Application for the Issuance of a Third Amended And Restated Initial Order and Approval and Vesting Orders dated February 8, 2023, par. 76 to 83.

[88] At the time, the Court believed that given all the work that was still to be carried out, that it was premature to consider granting releases to the D&Os. To consider eventual releases, the D&O's feet needed to be held close to the fire. Hence, it deferred the examination of the request to a later date. This decision has now been sufficiently deferred and it is now the appropriate time to consider this request.

[89] The Debtors and the Monitor ask for the following order:

> [35] **ORDERS** that effective as of the date of the issuance of the Certificate of Implementation in respect of each Plan Debtor (in such capacities, collectively, the "FormerXBC Released Parties"):
>
> (a) current Directors of FormerXBC;
>
> (b) Jim Vounassis, Mike Munro, Russel Warner, Nathalie Théberge, Stéphane Archambault, in their capacity as Officers and/or consultants of FormerXBC;
>
> (c) FormerXBC's legal counsel (Osler, Hoskin & Harcourt LLP, McDonald Hopkins, Bielli & Klauder LLC, Clifford Chance LLP, Stevens & Bolton LLP) in relation to these CCAA Proceedings and the U.S. Case;
>
> (d) financial advisors (National Bank Financial) in relation to these CCAA Proceedings and the U.S. Case; and
>
> (e) the Monitor (Deloitte Restructuring LLP) and its legal counsel (McCarthy Tétrault LLP, Holland & Knight LLP) in relation to these CCAA Proceedings and the U.S. Case;
>
> shall all be deemed to be forever irrevocably released and discharged from any demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, Taxes, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence based in whole or in part on any act or omission, transaction, that constitute or are in any way relating to, arising out of, or in connection with any Claims (including any and all D&O Claims as well as any Claims in respect of statutory liabilities of all Directors, Officers and Employees of Former XBC and any alleged fiduciary or other duty), the business and affairs of FormerXBC, the administration and/or management of FormerXBC, the CCAA Proceedings or the U.S. Case as they relate to FormerXBC, or any Claim that has been barred or extinguished by the Claims Procedure Order (collectively, the "FormerXBC Released Claims"), which FormerXBC Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the FormerXBC Released Parties, all to the fullest extent permitted by Applicable Law, provided that nothing herein shall release or

> discharge (i) the Directors with respect to matters set out in Section 5.1(2) of the CCAA; and (ii) the FormerXBC Released Parties with respect to intentional or gross fault, a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.

[90] The capitalized terms refer to those used in the plans which I have sanctioned.

[91] For the reasons set out above, it is appropriate that the current directors be released. The testimony of Mr. Vounassis and the Monitor convince the Court that their solid and unwavering commitment ensured that all the work was carried out. The last lines of the release contain the required limitations set out in par. 5.1(2) *CCAA*.

[92] The same level of commitment has been evidenced by the officers listed above. There is no doubt in the Court's mind that it is appropriate that they be granted releases. The restrictions of par. 5.1(2) of the *CCAA* do not apply to officers. The release is extended to the "fullest extent permitted by Applicable Law". Applicable Law is defined in the plans as ""any law (including any principle of civil law, common law or equity)". To ensure greater certainty, the Debtors proposed in response to my request, that it be explicitly specified that nothing in the release shall release or discharge "the FormerXBC Released Parties with respect to intentional or gross fault, a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence". This is a reflection of the public order principle set out at art. 1474 CCQ and properly addresses my concerns regarding over-extending the scope of the release.

[93] Is it appropriate that the professionals listed in subparagraphs 35 (c), (d) and (e) of the proposed order cited above be released? The Court believes that in the specific circumstances of this file, it is indeed appropriate that all professionals be released:

- It is known since February 2023 that releases would be sought.
- Although FormerXBC is a liquidating CCAA without any distribution for creditors, ongoing operations ensure future business for suppliers, preservation of numerous employee positions and servicing of clients. Ensure closure regarding any potential future litigation is an important consideration.
- The professionals are clearly identified in the release and the Court can assess what contributions they have made.
- The creditors of all the affiliates have voted in favour of broad releases.
- All claims against FormerXBC directors and officers are barred and the class settlement shareholders have provided broad releases.
- Early on, a shareholder, Simon Arnsby, who claimed to hold millions of shares wrote a letter alleging that XBC's legal counsel, Osler, Hoskin & Harcourt LLP was in a conflict of interest, because Me Brian Levitt, co-chair and co-president

of Osler is or was a XBC board member.[35] I invited him to file a formal motion with precise information, supported by an affidavit. None was filed but he has never formally withdrawn these allegations.

- Mr. Simon Arnsby also wrote that the Monitor was in a conflict of interest given that Peter Bowie, "Chief Executive of Deloitte China and Chairman of Deloitte Canada", was a XBC board member. I also invited him to present a motion, but none came.[36] He complained of insufficient dissemination of information. Once again, he did not file any motion, but he has not formally withdrawn these accusations.

- Mr. Arnsby made allegations that the financial advisor, National Bank Financial, was in a conflict of interest given that National Bank of Canada was one of the two secured lenders.[37] No motion was presented, but he has not formally withdrawn his accusations.

- He then presented an *Urgent ex parte application for investigation*. He asked that there be an investigation as to 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 former officers Sorschak and van Driel to drive the quest for financing, restructuring or divesting solutions. The Court heard and dismissed this application.[38]

- Mr. Arnsby was obviously still dissatisfied since he filed a complaint against the Monitor with the Superintendent of Bankruptcy. It was investigated but not accepted.

- An arbitration was instituted in the People's Republic of China where Chinese based joint venturers are seeking to enforce rights of first refusal, which the Court after a contested hearing specifically suspended. Mr. Archambault remains a director and the Chinese joint venture partners are refusing to replace him.

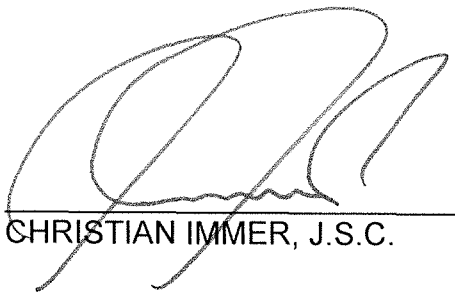
[94] All these facts show that formal closure is called for and appropriate.

[95] The Court will therefore exercise my discretion in favour of the releasees and will order the releases sought in favour of the FormerXBC releasees.

---

35 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 3888, par. 53 to 63.
36 *Id.*
37 *Id.*
38 *Arrangement relatif à Xebec Adsorption Inc.*, 2022 QCCS 4440, par. 12 to 28.

[96] It is for all these reasons that I have today signed the Sanction Order.



CHRISTIAN IMMER, J.S.C.

MTRE SANDRA ABITAN
MTRE JULIEN MORISSETTE
MTRE ILIA KRAVTSOV
MTRE SOPHIE COURVILLE-LE BOUYONNEC
(OSLER HOSKIN & HARCOURT LLP)
ATTORNEYS OF PETITIONERS

MTRE JOCELYN PERREAULT
MTRE MARC-ETIENNE BOUCHER
MCCARTHY TÉTRAULT S.E.N.C.R.L., S.R.L.
ATTORNEYS OF MONITOR

MTRE SAMUEL PERRON
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., S.R.L.
ATTORNEY OF EXPORT DEVELOPMENT CANADA

MTRE SE-LINE DUONG
MILLER THOMSON SENCRL / LLP
ATTORNEY OF LNRG

MTRE ARIANNE GAUTHIER
MINISTÈRE DE LA JUSTICE DU CANADA
ATTORNEY OF PROCUREUR GENERAL DU CANADA

Hearing date: December 15, 2023