SUPERIOR COURT
(Commercial chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-061483-224

DATE: November 3, 2023

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

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT 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 CALLING OF MEETING AND OTHER RELIEF ORDER ON NOVEMBER 1, 2023

[1] On November 1, 2023, the Court signed an order (the "**Order**") calling for a meeting of creditors of eleven of the Debtors to vote on 11 plans of compromise (the "**Debtor Plans**") which the Court approved for filing for the purpose of vote at such meeting. It also approved a Plan Support Agreement entered into between Export Development Canada ("**EDC**"), the Monitor and certain of the Petitioners.

[2] The Court rendered summary oral reasons on November 1, 2023 and signed the Order, indicating that more detailed written reasons would follow.

[3] The creditors meeting and the plans of compromise on which the creditors will be called to vote on rest on numerous building blocks put in place since September 29, 2022, when the Court, relying on the *Companies' Creditors Arrangement Act* ("*CCAA*")[1], issued an Initial First Day Order.

[4] Amongst theses building blocks was the Court's judgement allowing the Monitor to proceed with his proposed Allocation Methodology (the "Allocation Methoterdology Judgment").

[5] At the time the Court rendered its decision, the Allocated Net Proceeds were estimated to be $14,123,000. In its twelfth report, the Monitor now estimates these Allocated Net Proceeds to be $14,479,000.

[6] As a result of the order, 11 Plan Debtors will be voted on, relating to the following entities:

- Applied Compression Systems Ltd. ("**ACS**");
- Enerphase Industrial Solutions Inc. ("**AIR**");
- 1224933 Ontario Inc. ("**CAI**");
- California Compression, LLC ("**CAL**");
- CDA Systems, LLC ("**CDA**");
- FormerXBC NOR Corporation (formerly Nortekbelair Corporation) ("**NOR**");

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

- FormerXBC Pennsylvania Company (formerly The Titus Company) ("**TIT**");
- FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC) ("**UEC**");
- FormerXBC Flow Services – Wisconsin Inc. (formerly XBC Flow Services – Wisconsin Inc.) ("**XBC**");
- FormerXBC Holding USA Inc. Inc. (formerly Xebec Holding USA Inc.) ("**XHU**");
- FormerXBC Adsorption USA Inc. (formerly Sebec Adsorption USA Inc.) ("**XSU**").

[7] Unfortunately, at the present time, FormerXBC Inc. (formerly Xebec Adsorption Inc.) ("**BLA**") does not have any proceeds to distribute in a plan. There will be no plan either for 11941666 Canada Inc. (formerly Xebec RNG Holdings Inc. ("**GNR**") which will be wound up.

THE PLAN SUPPORT AND SETTLEMENT AGREEMENT

[8] Prior to any plan being prepared and prior to any distribution being envisaged, it was necessary to settle a dispute involving EDC, the Monitor and certain Plan Debtors, namely CAL, NOR, UEC and XBC (the "**Four Plan Debtors**"), as to the scope of EDC's secured rights in the proceeds of the sale of the Four Plan Debtors' assets. A Plan Support and Settlement Agreement was entered into on October 26, 2023[2] (the "**Support Agreement**").

[9] At the time of the IFDO, the Four Plan Debtors had assets and cash balances in their bank accounts. EDC was of the opinion that it held security on the assets and on the cash balances.

[10] The cash was used up by the Four Plan Debtors in the course of their operations since the date of the IFDO. The secured assets were sold and proceeds were collected.

[11] Pursuant to an opinion in US law regarding the validity of the EDC security, it was concluded by the Monitor that EDC did not perfect its security on the cash balances and could therefore only be a secured creditor insofar as the Four Plan Debtors' assets were concerned.

[12] Roughly summarized, the dispute was therefore as follows. EDC contended that it is entitled to the full amount of the sale proceeds as their rights on the secured assets also charge the proceeds. The Monitor on the other hand argued that it needed to be taken into account that it was the cash which allowed for the operations to continue and the assets value to be maximized and that therefore, the benefit of the cash should first

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2 Exhibit P-3.

accrue to the creditors who made the sales possible. In a table format, this translates as follows:

	CAL		UEC		XBC		NOR	
	$ (100s)	%	$ (100s)	%	$ (100s)	%	$ (100s)	%
Proceeds from sale of assets	7,712	92,23%	6,254	53,15%	1,477	96,73%	209	39,96%
Cash in account at Filing	650	7,77%	5,750	46,85%	50	3,27%	314	60,04%

[13] This dispute constituted a complete roadblock on the road to distribution.

[14] Negotiations were therefore carried in earnest, the Court being advised generally of their progress. Thankfully, the parties came to an agreement as to the sharing of the Allocated Net Proceeds for each of the Four Plan Debtors, which is subsumed in the Support Agreement, the whole without admission and for the sole purpose of avoiding the costs, delays, risks and inconvenience of litigation.

[15] The formula generated as is more fully set out in section 2.1 of the Support Agreement and which is reflected in the Debtor Plans.

[16] The Court approved this Support Agreement.

[17] Firstly, it finds that as the *CCAA* court for the Debtors, it is appropriate that it decide on such approval. Indeed, even though US law governs the interpretation and validity of the security interest, "it is local law that applies to the insolvency estate established pursuant to the CCAA so that issues of distribution in the insolvency or questions of priority of payment are decided by application of the *lex fori*".[3]

[18] Secondly, the Court finds that the Support Agreement is the result of reasonable compromises given the strength and weaknesses of each party and given the very deleterious impact, both in terms and delays and costs, that would result from further litigation or drawn-out negotiations on these questions.

THE MEETING AND FILING OF PLANS OF COMPROMISE

[19] The Court was also asked to accept the filing of the eleven Debtor Plans. The plans have yet to be voted on.

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3 *Homburg Invest Inc. (Arrangement relatif à)*, 2014 QCCS 3135, par. 31.

[20] At the present stage, the Court does not to sanction the plans, an exercise which will be carried out after the vote as per s. 6 of the *CCAA*.[4] It is only then that the Court will determine if the Debtor Plans meet the applicable three-pronged test, namely: (1) strict compliance with all statutory requirements and adherence to previous orders of the court, (2) nothing has been done or purported to be done that is not authorized by the CCAA; and (3) the plan is fair and reasonable.

[21] The Petitioners/Debtors and the Monitor admit that there are two elements which are novel in the Debtor Plans:

21.1. The establishment of one class and the convenience creditors sub-group: out of the estimated approximately 250 creditors who will be voting on one or the other plans of arrangement, there are 39 who have Afffected Claims of $2,000 or less. The plans create a subclass of "Convenience Creditors", i.e. Affected Creditord holding a Proven Claim in an amount of less than, or equal to, the Convenience Amount, i.e. $2,000. That being said, the distribution method would also provide that each Affected Creditor that is not a Convenience Creditor, will be paid an amount equal to the Convenience Amount. The Convenience Creditors are deemed, as per par. 44 of the Order, to vote in favour of the resolution to approve the Plan at the Creditors' Meeting.

21.2. The assignment for voting purposes of the intercompany claims: pursuant to all the decisions rendered by this Court, proofs of claim were provided by the Debtors. The Monitor revised these in order to effect compensation. Technically, and without taking into account the fact that the Debtors were de facto run on a consolidated basis, it could be argued that these intercompany claims are filed by a related party. Hence, as per s. 22(3) CCAA, it could perhaps be argued that they could not be voted in favour but only against the proposed plans. To deal with this surprising result, given the genesis of these intercompany claims, it was proposed that the following paragraph 46 was included in the Order:

> [46] ORDERS that solely for the purpose of voting at the Creditors' Meeting, (a) a Plan Debtor shall be deemed to assign its votes attached to the Intercompany Claims to the Affected Creditors as a whole; (b) the Affected Creditors as a whole nominate, constitute and appoint Mr. Jean-François Nadon of Deloitte Restructuring Inc., in its capacity as Monitor, or such person as he, in his sole discretion, may designate to attend on behalf of and act for the Affected Creditors of the Plan Debtor at the Creditors' Meeting, to vote the Intercompany Claims in favour of the Plan(s) of such other Petitioner(s); and (c) solely in respect of the Intercompany Claims, to

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4 One can draw certain parallels with the exercise courts are called upon to carry out when rendering interim orders to call, hold and conduct a meetings of holders of securities or options or rights to acquire securities in matters of arrangement under par. 192(4)c) of the *Canadian Business Corporations Act* R.S.C. 1985, c. C-44 where the purpose is merely to "set the wheels in motion". At that stage, the court must establish, amongst other, the petitioners good faith and not that the arrangement is fair and reasonable. See the *Yellow Media Inc. et Yellow Pages Income Fund*, 2010 QCCS 1127, par. 6.

> vote at his discretion and otherwise act for and on behalf of the Affected Creditors of the Plan Debtor with respect to any amendments or variations to the matters identified in the notice of such Creditors' Meeting and in such Plan, and with respect to other matters that may properly presented at such Creditors' Meeting; the whole under reserve of the right of any Affected Creditor to make representations in relation to the matters set forth in the present paragraph at the Sanction Hearing.

[22] Does this run counter to the *CCAA* and in particular s. 6 and par. 22(3)?

[23] The representative of the monitor, Julie Mortreux, and the Monitor's and Debtors' counsel have provided clear explanations and convincing arguments as to why this is proprer and in accordance with the *CCAA*'s objectives and how it does not violate the letter and the intent and purpose of the *CCAA*.

[24] Had the Court been of the view that the Debtor Plans will necessarily not meet the three requisite conditions for sanction or that the vote was irremediably skewed, then it perhaps would not have allowed the creditors to vote on the plans. It is not of that opinion for the following reasons.

[25] Indeed, deeming that the Convenience Creditors will vote in favour of the plan does not for any of the Plan Debtors allow in of itself to meet the majority in number threshold. Indeed, Appendix D to the Monitor's Report shows that for no category do they exceed 29,4% in numbers and in most cases, they represent a far lower percentage.

[26] Given the proportionate value of the intercompany claims, allowing them to be voted and counted, may, on a preliminary review of Appendix B to the Monitor's Report, be determinative of a vote in favour of the Debtor Plans of XSU, ACS, CAI, AIR, NOR, XBC and XHU. However, not allowing these votes to be taken into account would lead a group of voters to have a disproportionate impact on all Affected Creditors who would benefit from the Intercompany Claims.

[27] Presently, no creditor is contesting these plans. Perhaps some will; perhaps none will. It may be that the thresholds in favour of the plans are reached, independently of the Convenience Creditors deemed favourable votes or the intercompany claims related votes.

[28] The Court believes this question should best be left to the sanction hearing. In this regard, it finds support for this approach in multiple decisions rendered in *Re Steinberg*. In that case, the plan contained a single class for purposes of voting, but this class was sub-divided into sub-classes, each of which was subject to a different distribution method. A creditor was arguing that this was a mechanism put in place to ensure, inescapably, a favourable vote. He attempted to have this issue decided, not once, but twice before the vote. Both times, it was deemed that this debate should occur after the vote. Leave was

not granted to the Court of Appeal in both cases. In dismissing the second leave application, Bisson J. explained[5]:

> De plus, et avec égard pour l'opinion contraire, aucune des décisions citées par les requérants-appelants ne me paraît appuyer leur thèse à l'effet que de telles requêtes doivent être présentées et jugées avant que les créanciers ne se prononcent sur le plan d'arrangement qui leur est soumis ou à l'effet qu'il serait trop tard pour faire valoir une telle contestation de fond du plan d'arrangement au moment d'une demande d'homologation de l'approbation d'un tel plan par les créanciers.
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> Il est évident que la Cour supérieure, siégeant comme tribunal désigné en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, devra se prononcer sur le fond de la requête des requérants-appelants avant que l'homologation d'une approbation du plan d'arrangement par les créanciers puisse être prononcée. Mais, sous cette seule réserve, il ne me paraît d'aucune importance, sur le plan juridique, que cette décision ou détermination judiciaire ait lieu avant plutôt qu'à l'occasion de l'audition d'une telle demande d'homologation, surtout lorsque l'on considère qu'elle pourrait même être totalement académique et inutile si, par exemple, le plan d'arrangement soumis était refusé de toute façon par l'assemblée des créanciers.
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> Enfin, quant à la complication administrative qui pourrait résulter, le cas échéant, à la suite d'une décision favorable aux requérants-appelants, de la nécessité de procéder à une nouvelle computation des votes qui auraient déjà été donnés en faveur du ou contre le plan d'arrangement soumis, elle me paraît relever essentiellement de la discrétion relative à la gestion et à la conduite du dossier.
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> [The Court's underlinings]

[29] The Court sees great wisdom in this approach and therefore for the moment orders, as requested, that the Debtors Plans G to Q annexed to the order be accepted for filing for the purpose of the vote.

[30] Finally, the Court found that the modalities set out in section F of the Order are appropriate and that the annexes B (Creditor Letter), C (Notice of Creditors' Meeting), D (Proxy and Voting Form) and E (Registration Form) are clear, concise and instructive. It also found the notification procedures set out in section G of the Order and the manner in which the Meeting was to be carried out, including the Proxy Deadline and eventual notices of transfer and assignments of Voting Claims to be adequate and appropriate.

OTHER RELIEF

[31] EDC is the sole beneficiary of any amounts to be recovered by BLA, including in respect of intercompany claims. In order to allow it to be entitled to the exercise its rights

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5 *Michaud c. Steinberg*, 1993 CanLII 3459 (QCCA), p.4.

to vote the BLA claims, it wishes to withdraw the authorization of BLA to collect these claims. It is of the opinion that the stay must also be lifted.

[32] The Court also exercised its discretion and granted the request to partially lift the stay finding that this was in accordance with the purposes of the stay, namely to assist the debtor in the restructuring process[6], and that no stakeholder would be harmed by the lifting.

[33] It is for all these reasons that the Court signed the Order.

CHRISTIAN IMMER, J.S.C.

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Hearing date: October 31, 2023

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6 *Re Timminco Ltd.*, 2014 ONSC, at par. 38.