

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-061483-224

DATE: May 26, 2023

BEFORE 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.)
12224933 ONTARIO INC., (FORMERLY, COMPRESSED AIR INTERNATIONAL INC.)
APPLIED COMPRESSION SYSTEMS LTD.
FORMERXBC HOLDING USA INC. (FORMERLY, XEBEC HOLDING USA INC.)
ENERPHASE INDUSTRIAL SOLUTIONS, INC.
CDA SYSTEMS, LLC
FORMER XBC ADSORPTION USA INC., (FORMERLY, XEBEC ADSORPTION USA
INC.)
FORMER 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
-AND-
FORMERXBC SYSTEMS USA, LLC (FORMERLY XEBEC SYSTEMS USA, LLC)
Debtors / Petitioners**

And

DELOITTE RESTRUCTURING INC.
Monitor

REASONS FOR ISSUING, ON MAY 24, 2023, THE:

- 1. THE APPROVAL AND VESTING ORDER IN RESPECT OF BIOSTREAM ASSETS**
 - 2. THE CLAIMS PROCEDURE ORDER**
 - 3. THE ORDER EXTENDING THE STAY OF PROCEEDINGS**
 - 4. THE ORDER AUTHORIZING THE USE OF NET PROCEEDS TO FUND CASH-FLOW REQUIREMENTS**
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[1] On September 29, 2022, the Court, relying on its powers conferred under the *Companies' Creditors Arrangement Act* ("CCAA")¹, issued an Initial First Day Order². Since then, it has issued several restated amended orders. Presently, the debtors are subject to a Fifth Restated Amended Initial Order.

[2] In a hearing held on May 24, 2023, the Court was asked and did render the following four orders, with reasons to follow:

- 2.1. *The Approval and Vesting Order in Respect of Biostream Assets of FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC)*
- 2.2. *The Claims Procedure Order*
- 2.3. *The Order Extending the Stay of Proceedings*
- 2.4. *The Order Authorizing the Use of Net Proceeds to Fund Cash-Flow Requirements*

[3] Here are the reasons why it did so for each such order.

1. The Approval and Vesting Order in Respect of Biostream Assets of FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC)

[4] The Court was asked to exercise its powers under s. 36 of the CCAA to issue an approval and vesting order ("AVO") for the sale of five Biostream Units (the "**Units**") presently located at the premises of FormerXBC Systems USA, LLC ("**FormerXBC USA**") in the United States.

[5] Prior to the CCAA proceedings, Xebec Adsorption Inc., now FormerXBC Inc. ("**Former XBC**") and Brightmark LLC entered into a contract to deliver the Units. Work to build and assemble them was being carried out at FormerXBC USA when the CCAA

¹ R.S.C. (1985), c. C-36.

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

proceedings were filed. The work on the Units was at that time, and remains, uncompleted.

[6] On February 17, 2023, the Court issued an AVO in relation to a purchase agreement for certain of FormerXBC's assets which were to be sold to Ivys Energy Solutions ("Ivys")³. This transaction was closed on February 24, 2023. The contract relating to the delivery of the five Units were not part of the assets purchased by Ivys⁴.

[7] On March 16, 2023, the Court issued an AVO in relation to a purchase agreement for certain of FormerXBC USA's assets which were to be sold to EnergyLink U.S. Inc.⁵ This transaction was closed on April 5, 2023. The five Units were excluded from this sale and remain in the hands of Former XBC USA.

[8] The Monitor explained that after the two closings, intense negotiations have been carried out between the Monitor and Ivys for the sale of the five Units. Ivys intends to complete the assembly of the Units and to deliver them to Brightmark. The sale of the unfinished Units is therefore but one piece of a broader agreement to be hammered out between several parties.

[9] A binding letter of intent ("LOI") was entered into between FormerXBC USA and Ivys which was filed in the Court record under seal⁶. The LOI provides that 25% of the sale price will be paid at closing and that the balance will be paid by way of five instalments, each payable upon successful completion of factory acceptance tests for each of the five Units.

[10] The Debtors' Motion explains that to guarantee the timely payment of the outstanding balance, the following conditions were inserted in the LOI:

60. It is also a key condition of the Binding LOI that this Court grant FormerXBC a charge on the 5 Biostream Units in the amount of the Purchase Price to secure all payment obligations of Ivys towards FormerXBC pursuant to the Biostream Transaction (the "Biostream Charge").
61. The Biostream Transaction contemplates that following the initial payment the Biostream Charge will be discharged on a unit-by-unit basis following receipt of each of the five subsequent payments by the Monitor, save and except for the charge on the last of the 5 Biostream Units, which will only be discharged upon receipt by the Monitor of the balance of the Purchase Price.

³ *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 466.

⁴ Filed partially under seal as exhibit P-9A.

⁵ *Arrangement relatif à Xebec Adsorption Inc.*, 2023 QCCS 838

⁶ Exhibit P-5. The order was made under art. 12 of the Civil Code of Procedure to protect the substantial and legitimate interests of various third parties

[11] It is in relation to the transaction set out in the Binding LOI that the Court was asked to issue an AVO.

[12] Ss. 36(3) of the CCAA lists six criteria which the Court must consider when exercising its discretion to grant such an order, namely:

(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;

(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;

(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.

[13] These criteria are neither cumulative nor exhaustive and the Court “must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable”⁷. It must abstain from second-guessing the commercial and business judgment properly exercised by the Monitor. Its recommendation “carries great weight” and “absent some compelling, exceptional factor to the contrary, a Court should accept an applicant’s proposed sale process where it is recommended by the Monitor and supported by the stakeholders”⁸.

[14] The Monitor recommends that this sale process be carried out. Its representative, Mr. Jean-François Nadon, has explained how these Units, in their present state, cannot be readily sold. They will attain far greater value once they are completed. The sale process and payment schedule contemplated in the LOI therefore ensures maximisation of the Units’ value, for the benefit of Debtors but also for all stakeholders. Ivys insists that the balance of payment must be deferred until completion of the Units, but agrees that the Units be subject to a charge to guarantee its payment obligations.

⁷ *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920, par. 36.

⁸ *Id.*, par. 27 and 28.

[15] The Monitor has been closely involved in all discussions leading to the execution of the LOI. In its Tenth Report and through the testimony of Mr. Nadon, the Monitor recommended why the sale should be carried out according to the LOI's terms.

[16] No creditor has opposed the process and the secured creditor, EDC, agreed to the issuance of the AVO. The AVO provides that all Claims and Encumbrances shall attach to the net proceeds from the sale of the Units with the same priority they had with respect to the Units prior to the sale.

[17] This is why the Court found that all the criteria set out in s. 36(3) CCAA were met and, given the Monitor's recommendation, the Court therefore issued the *Approval and Vesting Order in Respect of Biostream Assets of FormerXBC Systems USA, LLC (formerly Xebec Systems USA, LLC)* .

2. The Claims Procedure Order

[18] Presently, excluding the proceeds of sale of the 5 Units and of other minor assets, but including the 3M\$ transfer to the operating accounts dealt with in section 4 below, the outstanding balance of Net Proceeds after payment of the remaining KERP charge is estimated by the Monitor to be approximately 17M\$.

[19] Hence, the Debtors explain that they intend to present one or more plan of arrangements or compromise to their secured and unsecured creditors. Presently, they do not know which of the Debtors will be in a position to distribute funds. They will propose, in a hearing to be held on June 27, 2023, an allocation and distribution plan amongst the various Debtors. In the meantime, they need to establish a process for the determination of claims for all entities and therefore asked the Court to approve their proposed Claims Procedure. The Court did so for the following reasons.

[20] The Claims Procedure Order provides that any claim's "Determination Date" will be September 29, 2022, i.e., the date of the issuance of the Initial First Order. This is in line with what is provided for at sub-par. 19(1)(a)(i) of the CCAA.

[21] A "Claims Package" will be sent to all creditors, the content of which is described at paragraph 10 (3) of the Claims Procedure Order, by regular mail, courier, email or other means of electronic communication. These modes of transmission are satisfactory.

[22] There will be two types of Claims Packages:

- 22.1. Any Scheduled Employee (i.e. a past or present employee of any of the Debtors) will receive a Notice of Scheduled Employee's Claim and a Notice of Dispute. The Notice of Scheduled Employee's Claim, a template of which being appended as Schedule C to the Claims Procedure Order, will contain an amount which corresponds to the Debtors' human resources department's calculations. If

the Scheduled Employee accepts this calculation, he or she will not need to do anything else. However, in the event of disagreement, he or she may fill out and file the Notice of Dispute in the format set out at Schedule B of the Order. This proposed process is efficient and does not impose an undue burden on the Scheduled Employees. The Claims Package materials are clear.

22.2. All creditors who hold a Claim other than Scheduled Employees will receive a Proof of Claim and an Instruction Letter in the format set out at Schedule E to the Claims Procedure Order. The Proof of Claim and the Instruction Letter are clear and comprehensive.

[23] The Claims Procedure Order stipulates that the Claims Bar Date will be July 24, 2023 at 5:00 p.m. As per S. 12 of the CCAA, it is appropriate to set a deadline. This Claims Bar Date arises 32 days after the latest date at which the Newspaper Notice is published and the Claims Package is sent. Considering that close to nine months have already elapsed since CCAA proceedings have commenced and that information has been regularly provided by the Monitor as is explained in its reports, this delay is sufficient and reasonable.

[24] The Claims Procedure Order provides that where a Proof of Claim is received before the Claims Bar Date, the Monitor may send a Notice of Revision or Disallowance of the Proof of Claim. If this Notice is not contested, the Creditor will be deemed to have accepted the value of its claim as set out in this Notice. The Creditor who wishes to dispute the Notice of Revision or Disallowance will have 15 days to file an appeal application. The matter must then be submitted to this Court for adjudication. The Order stipulates that where the Creditor appeals from the Notice of Revision or Disallowance, the Monitor may determine the amount of the Voting Claim without admission that such quantification is acceptable for distribution purposes. This process is in line with what is set out at subsection 20(2) of the CCAA.

[25] A very similar process is provided if a Scheduled Employee files a Notice of Dispute, save for the fact that the delay to file an appeal application is extended to 20 days.

[26] No one opposed this Claims Procedure.

[27] For these reasons, the Court found the modalities of this claims procedure to be fair, efficient, and reasonable and therefore signed the *Claim Procedure Order*.

3. The Order Extending the Stay of Proceedings

[28] The Debtors, supported by the Monitor, are seeking a further extension of the stay. Subsection 11.02(2) of the CCAA provides that the Court may so order if the Debtors can

convince it that circumstances exist that make the order appropriate and that the Debtors are acting in good faith and with due diligence.

[29] As the ten reports of the Monitor show, an considerable amount of work has been carried out over the last nine months, including:

- 29.1. Continued operations of all entities;
- 29.2. Carrying out the Court authorized SISP process;
- 29.3. Negotiating, both during the SISP Process and thereafter, the sale of the substantially all of the assets of CDA Systems LLC, California Compression, LLC, Xebec Inc, Compressed Air International Inc., Titus Company, XBC Flow Services – Wisconsin Inc., the purchase agreements for the certain assets of Xebec Systems USA LLC, the five Biostream Units and the sale of the partnership interest in the capital of GNR Québec Capital L.P.;
- 29.4. Obtaining three DIP financing facilities and reimbursing same;
- 29.5. Setting up and managing the KERP;
- 29.6. Applying for the WEPP Order which in turn provided WEPP relief for 35 employees whose employment was terminated; to date, 28 employees have filed for WEPP relief and 24 have received WEPP relief;
- 29.7. Participation in the negotiation of the settlement of a class action, which still requires the Court's authorization.

[30] The finish line is in sight. The professionals and the Debtors' remaining employees, directors and officers must carry out the Claims Procedure, prepare an allocation and distribution plan, the plans of arrangement, hold the creditors meeting and obtain this Court's and the US court's authorizations and sanctions throughout. Appendix E to the Monitor's report sets out the remaining milestones. It is evaluated that all this work will be completed by the end of 2023.

[31] The Court was therefore convinced that all this strongly favoured extending the stay to September 29, 2023, and did do so via the Order Extending the Stay of Proceedings.

4. The Order Authorizing the Use of Net Proceeds to Fund Cash-Flow Requirements

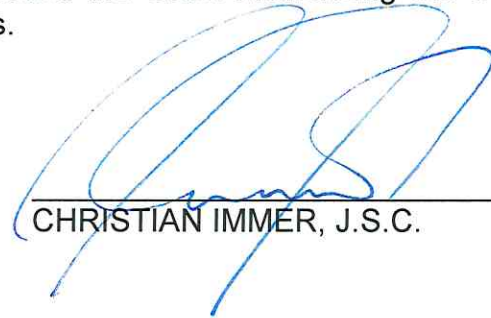
[32] The Monitor has filed, as Appendix G to its report, a cash flow projection for the period from the week ending on May 20, 2023 to the week ending on September 30, 2023.

[33] At the outset, the Net Cash is estimated to be at \$3,168,000. Save for a transfer from a related party and two sales tax reimbursement collections, the Debtors will essentially be disbursing sums for payroll (\$1,530,000), professional fees (\$3,297,000) and certain purchases (\$1,735,000). Cash injections will therefore necessarily be called for to prevent a Net Cash shortfall.

[34] Over the course of the past nine months, any net cash shortfall was covered by DIP financing provided by the secured creditors. This is a cumbersome process as the Court must authorize the DIP financing, create a charge, and eventually permit the reimbursement of the DIP Charge and the cancellation of the charge. Furthermore, such DIP financing carries with it significant financing costs.

[35] Given the Debtor's limited activities and their greater ability to project cash flow and the substantial sums the Monitor holds in its trust account, it is more appropriate to fund the forecasted cash shortfall with advances from the Monitor's trust account than with new DIP financing. The secured creditors do not object to this process.

[36] This explains why the Court also issued the Order Authorizing the Use of Net Proceeds to Fund Cash-Flow Requirements.



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