A business acquisition strategy put to the test in the context of a proposal

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Does a claim for a balance of sale of shares, originally owed by one of the two entities that amalgamated to become the debtor, constitute an equity claim pursuant to section 2(1) of the *Bankruptcy and Insolvency Act*[1] (hereafter the BIA) in the context of a proposal of that same debtor?

If so, what are the consequences for the Seller?

Background

In June 2019, Fiducie Alain Masse (the Seller) sells the shares it holds in Azoxco Cryogénique Inc. (the Target) to 9397-5530 Québec Inc. (the Purchaser) for approximately $4 million. A portion of this price is paid upon closing of the transaction, while another portion is payable at a later point in time (the Balance of Sale). The Balance of Sale is secured by a hypothec on the universality of the Target's movable assets.

On the same day as the transaction becomes effective, the Target and the Purchaser amalgamate. This amalgamation was outlined in the share purchase agreement. The resulting corporation will also bear the name Azoxco Cryogenics Inc. (the Resulting Corporation). This is an acquisition strategy frequently used for various reasons, whether to facilitate the financing of an acquisition or to protect the tax attributes of certain shares. In accordance with the provisions of Section 286 of the Québec *Business Corporations Act*[2] (hereafter the QBCA), the Resulting Corporation assumes all liabilities of the Target and the Purchaser, including the obligation to pay the Balance of Sale.

In the present case, a dispute arises between the Seller and the Resulting Corporation with respect to the representations made during the sale. On August 25, 2020, the Seller institutes proceedings against the Resulting Corporation to claim the Balance of Sale. The Resulting Corporation counterclaims for the sum of $2.5 million, alleging, among other things, that it was the victim of false representations made by the Seller in the context of the sale.

On February 19, 2021, the Resulting Corporation files a notice of intention to make a proposal with Ginsberg, Gingras et Associés (the Trustee). On June 19, it files a proposal addressed to its unsecured creditors only.

On July 7, the Seller files an unsecured proof of claim for the entire amount of the Balance of Sale (Proof of Claim) and registers a vote against the proposal. Given the amount of the Balance of Sale, the Seller's vote alone suffices to defeat the proposal. Ultimately, the Seller's vote is the only vote against the proposal.

Following an adjournment of the meeting of creditors and the Trustee's reception of a legal opinion regarding the status of the Seller's claim, the Trustee admits the Proof of Claim as filed and rejects the Resulting Corporation's position that it constitutes an equity claim. This decision would have the effect of condemning the Resulting Corporation to bankruptcy at the continuation of the creditors' meeting.

The Resulting Corporation immediately appeals the Trustee's decision and asks the Court, in its main conclusions, to declare that the claim, if valid on the merits, constitutes an equity claim under section 2 (1) of the BIA and that, consequently, it does not confer any voting rights to the Seller pursuant to section 54.1 of the BIA. In its alternative conclusions, the Resulting Corporation asks the Court to suspend the effect of the Seller's vote until the resolution of the civil litigation regarding the Balance of Sale.

Interim Decision

On September 10, 2021, the Honorable David Collier temporarily suspends the effect of the vote of the Resulting Corporation's creditors until a final judgment is rendered regarding the qualification of the Proof of Claim in accordance with section 115.1 of the BIA.

Analysis

On October 1, 2021, the Honorable Danielle Turcotte accepts the Resulting Corporation's arguments in a succinct but clear decision regarding the analysis the Court must perform in order to determine whether a claim constitutes an equity claim.

Justice Turcotte begins her analysis by recalling that the holder of a share issued by a corporation possess an "equity interest" under section 2(1) of the BIA. Justice Turcotte, relying on paragraph (d) of the definition of an "equity claim", continues her analysis and indicates that a balance of sale relating to the sale of shares owed to a shareholder constitutes, for this shareholder, an equity claim.

As for the effect of the amalgamation between the Target and the Purchaser, Justice Turcotte explains that the amalgamation did not modify the nature of the Seller's claim, but that under section 286 of the QBCA, the legal effect of an amalgamation on the rights and obligations of the entities is very clear: they become those of the amalgamated company. Consequently, the obligation initially incumbent on the Purchaser to pay the Balance of Sale now falls on the Resulting Corporation, the whole without affecting the nature of the claim.

Finally, Justice Turcotte emphasizes the teachings of the Ontario Court of Appeal in *Sino Forest Corporation (Re)*[3] concerning the interpretation of the expression "in respect of" used in the definition of the term "equity claim". In order to give full meaning to the terms used by the legislator, this expression must be interpreted very broadly by the courts and the Proof of Claim analysis must focus on the nature of the claim rather than the identity of the claimant.

Consequences

The consequences of this decision for the Seller are numerous and significant.

First, the Seller will not be able to vote on the proposal at the creditors' meeting in accordance with section 54.1 of the BIA. In the particular circumstances of this case, this means that the proposal will receive the support of the statutory majority of creditors (50 per cent+1 in number and 66.66 per cent in value).

Thereafter, the Seller will not be entitled to receive any dividend in respect of its Proof of Claim until all other unsecured creditors have been paid in full, in accordance with sections 60 (1.7) and 140.1 of the BIA. In the circumstances of the proposal, in which the amount payable to the unsecured creditors is less than the total amount of the claims of the unsecured creditors, this means that the Seller will not receive any dividend in the context of the proposal.

Conclusion

First and foremost, the Court must consider the nature of the claim rather than the status of the amalgamated debtor when determining whether the claim in question constitutes an equity claim.

This determination must be made using a broad and liberal interpretation of what is meant by "in respect of" an equity interest, the whole in order to be consistent with the legislator's intention.

In addition, this judgment raises an important risk to the seller of the shares in a transaction financed by a Balance of Sale involving the amalgamation of the operating entity and the purchaser of the shares.

This decision highlights the importance of evaluating a security and the determination of the unsecured portion by a secured creditor in the context of a proposal.

A notice of appeal was notified onto the Resulting Company on October 12, 2021.

[1] R.C.S. (1985), c B-3 at art. 2 (1).

[2] CQLR, c S-31.1 at art.286.

[3] *Sino Forest Corporation (Re),* 2021 ONCA 816, at paras 37- 41.

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