**Unofficial English Translation of the Judgment of the Court**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Avis d'intention de Azoxco Cryogénique inc. | | | | | 2022 QCCA 1387 |
| COURT OF APPEAL | | | | | |
|  | | | | | |
| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-029728-219 | | | | |
| (700-11-020320-216) | | | | | |
|  | | | | | |
| DATE: | October 11, 2022 | | | | |
|  | | | | | |
|  | | | | | |
| CORAM: | | THE HONOURABLE | | MARTIN VAUCLAIR, J.A.  GENEVIÈVE MARCOTTE, J.A.  BENOÎT MOORE, J.A. | |
|  | | | | | |
| ***IN THE MATTER OF the Notice of Intention to Make a Proposal of AZOXCO CRYOGÉNIQUE inc.:*** | | | | | |
| alain masse, in his capacity as trustee of fiducie familiale alain masse  valérie lacombe, in her capacity as trustee of FIDUCIE FAMILIALE ALAIN MASSE | | | | | |
| APPELLANTS – Creditors | | | | | |
| v. | | | | | |
|  | | | | | |
| azoXco cryogénique inc. | | | | | |
| RESPONDENT – Debtor | | | | | |
|  | | | | | |
|  | | | | | |
| JUDGMENT | | | | | |
|  | | | | | |
|  | | | | | |

1. The appellants appeal against a judgment rendered by the Superior Court on October 1, 2021 (the Honourable Madam Justice Danielle Turcotte),[[1]](#footnote-1) which annulled the decision of the respondent’s trustee to allow their proof of claim as unsecured creditors, characterized said claim as an equity claim under s. 2 of the *Bankruptcy and Insolvency Act*[[2]](#footnote-2) (“*BIA*”) and declared that the appellants are not entitled to vote on the respondent’s proposal.
2. The facts are as follows. On June 28, 2019, the appellants, who were shareholders of Azoxco Cryogénique Inc. (“Pre-amalgamation Azoxco”) at the time, sold all of their shares to 9397-5530 Québec Inc. (“Québec Inc.”). An amount of $2,535,000 was paid, with a balance payable at a later date.
3. That same day, and as provided for in section 0.01.06 of the contract for the sale of shares, Québec Inc. and Pre-amalgamation Azoxco carried out a short-form amalgamation through which the first entity absorbed the second. The amalgamated corporation adopted the name Azoxco Cryogénique. The amalgamated corporation is the respondent, which therefore became the debtor for the balance of the share sale price.
4. On August 25, 2020, the appellants, who had still not been paid, claimed from the respondent an amount of $1,952,817, representing the balance of the selling price. The respondent presented a defence and filed a cross-application, alleging fraud and misrepresentation by the appellants.
5. In February 2021, the respondent filed a notice of intention to make a proposal to its creditors, which led to a stay of the appellants’ proceedings. The stay was subsequently lifted.
6. On February 2, 2021, the appellants filed a proof of claim as unsecured creditors.
7. On July 8, 2021, the meeting of creditors was adjourned for the purpose of obtaining a legal opinion on the admissibility of the appellants’ claim.
8. On August 6, 2021, the trustee announced that it was accepting the appellants’ claim.
9. The effect of this decision would be to cause the respondent’s bankruptcy because the appellants held the deciding vote and, unlike the other creditors, intended to vote against the proposal. The respondent therefore challenged the trustee’s decision under s. 37 *BIA*. This is the issue that was adjudicated in the judgment under appeal.
10. Based on s. 286 of the *Business Corporations Act*[[3]](#footnote-3)(“*BCA*”), the judge concluded that the amalgamation had not changed the nature of the claim, as the rights and obligations of the amalgamating corporations had become those of the amalgamated corporation. The judge also noted that, in their pleadings, the appellants themselves had alleged that the claim was in respect of the balance of the selling price of the Pre‑amalgamation Azoxco shares.
11. Applying the principles developed by the Ontario Court of Appeal in *Sino-Forest*,[[4]](#footnote-4) pursuant to which the notion of equity claim must be given an expansive interpretation and the analysis must focus on the nature of the claim rather than the identity of the claimant, the judge found that the appellants’ claim was in respect of equity. Although the judge did not state it explicitly, she linked the claim to “a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest” set out in paragraph (d) of the definition.

\* \* \*

1. It will be helpful to reproduce certain provisions of the *BIA*:

|  |  |  |
| --- | --- | --- |
| **2.** […]  **equity interest** means   * **(a)** in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and * **(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)   […]  **equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,   * **(a)** a dividend or similar payment, * **(b)** a return of capital, * **(c)** a redemption or retraction obligation, * **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or * **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)   […]  **54.1** Despite paragraphs 54(2)(a) and (b), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise. | **2.** […]  **intérêt relatif à des capitaux propres**   * **a)** S’agissant d’une personne morale autre qu’une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d’acquérir une telle action et ne provenant pas de la conversion d’une dette convertible; * **b)** s’agissant d’une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d’acquérir une telle part et ne provenant pas de la conversion d’une dette convertible. (*equity interest*)   […]  **réclamation relative à des capitaux propres** Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :   * **a)** un dividende ou un paiement similaire; * **b)** un remboursement de capital; * **c)** tout droit de rachat d’actions au gré de l’actionnaire ou de remboursement anticipé d’actions au gré de l’émetteur; * **d)** des pertes pécuniaires associées à la propriété, à l’achat ou à la vente d’un intérêt relatif à des capitaux propres ou à l’annulation de cet achat ou de cette vente; * **e)** une contribution ou une indemnité relative à toute réclamation visée à l’un des alinéas a) à d). (*equity claim*)   […]  **54.1** Malgré les alinéas 54(2)a) et b), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d’une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal. |  |

1. It will also be helpful to reproduce s. 286 *BCA*:

|  |  |
| --- | --- |
| [**286.**](javascript:displayOtherLang(%22se:286%22);) A certificate of amalgamation, issued by the enterprise registrar in accordance with Chapter XVIII, attests the amalgamation of the corporations as of the date and, if applicable, the time shown on the certificate.  As of that time, the amalgamating corporations are continued as one corporation and, as of that time, their patrimonies are joined together to form the patrimony of the amalgamated corporation. The rights and obligations of the amalgamating corporations become rights and obligations of the amalgamated corporation and the latter becomes a party to any judicial or administrative proceeding to which the amalgamating corporations were parties. | [**286.**](javascript:displayOtherLang(%22se:286%22);) Le certificat de fusion, délivré par le registraire des entreprises conformément aux dispositions du chapitre XVIII, atteste de la fusion des sociétés à la date et, le cas échéant, à l’heure figurant sur ce certificat.  À compter de ce moment, les sociétés fusionnantes continuent leur existence dans la société issue de la fusion et leurs patrimoines n’en forment alors qu’un seul qui est celui de la société issue de la fusion. Les droits et les obligations des sociétés fusionnantes deviennent ceux de la société issue de la fusion et celle-ci devient partie à toute procédure judiciaire ou administrative à laquelle étaient parties les sociétés fusionnantes. |

1. It is necessary to clearly identify what is at issue in this appeal.
2. A corporation’s equity constitutes the shareholders’ assets. It consists, in particular, of the issued and paid-up share capital or the retained earnings.[[5]](#footnote-5)
3. The rule set out in s. 54.1 *BIA*, which prohibits holders of equity claims from voting on a proposal, is intended, on the one hand, to prevent such holders from controlling the outcome of the vote and, on the other hand, to prioritize the protection of creditors who, unlike shareholders and other equity holders, have not participated in a speculative adventure.[[6]](#footnote-6) Insolvency is a risk associated with the investment made by shareholders and, indeed, that risk justifies their potential profits. Author Frank Bennet has the following to say on this point:[[7]](#footnote-7)

**EQUITY CLAIMS**

Claims against a company that result from ownership, purchase or sale of an equity interest in the debtor company and related indemnity claims are considered equity claims. Such claims as shareholders’ claims can result in significant upside while creditors who supply goods and services do not share in the same upside. Consequently, there can be no distribution to holders of equity claims unless non-equity claimants are paid in full. Shareholders cannot expect to receive a dividend until all the creditors are satisfied. Shareholders do not have any financial interest in the debtor company until that happens.

[Reference omitted]

1. The definition of “equity claim” in s. 2 *BIA* includes, *among others*, a dividend, a redemption obligation, or a monetary loss resulting from the ownership, purchase or sale of an equity interest. The issue in the matter at hand, therefore, is whether the appellants’ claim falls within this list, which, through the use of the words “among others”, indicates that the list is not exhaustive.
2. The uniqueness of this case can be summarized as follows. Upon the sale of the shares, the appellants’ claim against Québec Inc. was in respect of shares – thus equity – of Pre-amalgamation Azoxco, which was a third party to the contract. This means that, as between the parties to the contract, and pursuant to the *BIA*, the appellants had an unsecured claim against Québec Inc. It also means that at this point, if Pre-amalgamation Azoxco had become bankrupt, the appellants would not have had a claim or held equity with respect to it. The shares of Pre-amalgamation Azoxco held by Québec Inc. were an asset of Québec Inc.
3. However, as a result of the amalgamation, the respondent, as the continuation of Québec Inc.’s juridical personality, assumed the debt owed by Québec Inc., and the shares of Pre-amalgamation Azoxco held by Québec Inc. were cancelled. Consequently, the issue is whether the claim, insofar as it is in respect of equity of one of the entities that resulted in the creation of the respondent, is a claim in respect of equity, within the meaning of s. 2 *BIA*, of the respondent. If it is, then, pursuant to s. 54.1 *BIA*, the appellants cannot vote on the proposal. If it is not, they can indeed vote.
4. The appellants submit that the judge erred when, taking into account the amalgamation, she changed the nature of their claim against Québec Inc. – which was merely an unsecured claim – into an equity claim. In their view, the amalgamation could not have had that effect, because under s. 286 *BCA*, the amalgamation merely transferred Québec Inc.’s debt to the respondent, but did not modify that debt. It was an unsecured claim – which is not contested – and remained so.
5. The appellants further argue that in order for their claim to be characterized as an equity claim, it was necessary that, at the time of the notice of intention, they hold a share in the respondent, or a warrant, an option or other analogous right. That said, not only was that not the case, but s. 282 *BCA* provides that the shares of Pre-amalgamation Azoxco, which the appellants sold, no longer existed and were not replaced by shares in the respondent. Therefore, the appellants were never shareholders of the respondent.
6. As for the respondent, it argues that our Court owes great deference to the trial judge, both because she was seized of a question of mixed law and fact and because s. 37 *BIA* confers broad discretion on her. It further argues that the judge was correct in applying the analytical framework set out in *Sino-Forest*, in which the Ontario Court of Appeal established that the important factor is the nature of the claim, not the status of the claimant – that is, whether or not it is a shareholder.[[8]](#footnote-8) In the respondent’s view, applying the appellants’ interpretation would depart from that principle by requiring that, at the moment the notice of intention is filed, the claimant hold a share or other type of equity interest. It would also indirectly achieve what s. 54.1 of the *BIA* seeks to proscribe, by allowing the appellants to vote on the proposal.
7. Before this Court, the parties both contend, as the trial judge did, that the amalgamation did not change the nature of the appellants’ claim, but they draw contrary conclusions. The respondent, however, had argued the opposite in its motion appealing the trustee’s decision. Upon reflection, and as explained below, whether or not the amalgamation changed the nature of the claim ultimately depends on the angle from which one analyzes the case.
8. As stated above, at the time of the sale of the shares, the nature of the appellants’ claim against their debtor, Québec Inc., was not in respect of the latter’s equity, but rather the equity of a third party, namely Pre-amalgamation Azoxco. This means that if Québec Inc. had become bankrupt, the appellants could have filed a claim as unsecured creditors. This perspective supports the appellants’ argument to the effect that by characterizing their claim as an “equity claim” after the amalgamation, the judge altered the nature of the initial claim and, in so doing, the appellants’ insolvency risk.
9. Conversely, the nature of the debt can also be viewed from the perspective of what was sold. In the present case, the appellants sold all the shares of Pre-amalgamation Azoxco, and a balance of sale was owed to them by Québec Inc. Their claim pertained to shares of Pre-amalgamation Azoxco and, consequently, it pertained to an equity interest in that corporation. Following the sale, Pre-amalgamation Azoxco and Québec Inc. carried out a short-form amalgamation and became the respondent. In reality, this type of amalgamation is but a reorganization of the amalgamating corporations’ share capital.[[9]](#footnote-9) As Professor Paul Martel points out, the amalgamated corporation is not a different entity from the amalgamating corporations, but rather their continuation, such that the amalgamated corporation holds all the property, rights and obligations of the original entities, without third-party rights having been affected by the amalgamation.[[10]](#footnote-10) This is the essence of what is set out in the second paragraph of s. 286 *BCA*. The respondent, therefore, found itself with all the assets and liabilities of Pre-amalgamation Azoxco and Québec Inc. As for Pre-amalgamation Azoxco’s equity, it was cancelled and, given the facts, converted into a debt owed by the respondent. The respondent was therefore now obliged to pay a debt related to equity of one of the amalgamating entities whose juridical personality it continued.
10. How should the matter be resolved?
11. In the case at bar, the Court does indeed owe great deference to the trial judge’s findings, because she exercised a power under s. 37 *BIA*, which gave her wide discretion.[[11]](#footnote-11)
12. In addition to this first reason for deference, there is the nature of the issue the trial judge had before her. Contrary to the appellants’ contention, this was not a pure question of law, but rather a mixed question. Indeed, the judge’s characterization of the nature of the claim was not a purely technical exercise; it required her to consider the circumstances of the matter at hand in order to seek out the true nature of the transaction.[[12]](#footnote-12) In the present case, the sale of the shares was inextricably linked to the amalgamation. Not only was the amalgamation provided for in the contract, but it occurred in its wake. This concomitance and the integration of the steps that took place provide a genuine indication of the nature of the transaction and the interests at stake. This approach is all the more necessary as it has been noted that distinguishing equity from unsecured claims may be difficult at times because corporations are finding new mechanisms that can narrow the gap between these two categories.[[13]](#footnote-13)
13. Let us look at the issue differently and assume that the shares the appellants held in Pre-amalgamation Azoxco had been repurchased by Pre-amalgamation Azoxco itself (rather than through Québec Inc.). Logically, and in accordance with a broad interpretation of the definition of equity claim,[[14]](#footnote-14) such a transaction should have been characterized as a transaction under paragraph (d) of the definition, since the unpaid balance indeed constituted a loss resulting from “the ownership, purchase or sale of an equity interest […]”. Accepting the appellants’ position would circumvent the application of s. 54.1 *BIA* by allowing them to vote on the proposal, which would be directly contrary to the legislature’s intent to subordinate the interests of holders of equity interests to those of creditors.
14. Lastly, the Court cannot accept the appellants’ argument that the definition of “equity claim” presupposes that, at the time of the notice of intention, they had to hold a share in the respondent, or a warrant, an option or other such right. Not only would adding such a condition run counter to the broad and liberal interpretation of this definition and depart from the legislature’s intent to subordinate the protection of holders of an equity interest to that of creditors – as already discussed above – but the very wording of the definition does not suggest it. Indeed, paragraph (d) of the definition refers to a monetary loss resulting from, among other things, the *sale* of an equity interest. Consequently, once such equity has been sold, the seller is, by definition, no longer its owner. Nonetheless, its claim can still be characterized as an equity claim under paragraph (d) of the definition. There is no reason to conclude otherwise because the matter at hand involves a balance of sale.
15. This was also the conclusion of the Ontario Court of Appeal in *Sino-Forest*. In that case, the shareholders had sued the accountants, who had failed to detect inaccuracies in the financial information provided by the corporation. The Ontario Court of Appeal, upholding the decision of Morawetz, J., concluded that this claim was included in the definition of “equity claim” even if the claimant did not hold, and had never held, such equity. That case, admittedly, is not identical to the one before us, because, ultimately, the beneficiaries of the claim were equity holders. Nevertheless, in both cases, an analysis of the nature of the claim rather than the nature of the claimant indicates that the claim is in respect of an equity interest.
16. Absent a palpable and overriding error committed by the trial judge in characterizing the genuine nature of the claim, the appeal must be dismissed.

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal, with legal costs.

|  |  |  |
| --- | --- | --- |
|  | | |
|  | |  |
|  | | MARTIN VAUCLAIR, J.A. |
|  | |  |
|  | |  |
|  | | GENEVIÈVE MARCOTTE, J.A. |
|  | |  |
|  | |  |
|  | | BENOÎT MOORE, J.A. |
|  | | |
| Mtre Bernard Gravel  Mtre Guillaume Hébert | | |
| SOCIÉTÉ D’AVOCATS DEXAR | | |
| For the appellants | | |
|  | | |
| Mtre François D. Gagnon  Mtre Kevin Mailloux | | |
| BORDEN LADNER GERVAIS | | |
| For the respondent | | |
|  | | |
| Date of hearing: | September 22, 2022 | |

1. *Avis d’intention de Azoxco Cryogénique inc.*, 2021 QCCS 4100 [judgment under appeal]. [↑](#footnote-ref-1)
2. R.S.C. (1985), c. B-3 [↑](#footnote-ref-2)
3. CQLR, c. S-31.1. [↑](#footnote-ref-3)
4. *Sino-Forest Corporation (Re)*, 2012 ONCA 816 [*Sino-Forest*]. [↑](#footnote-ref-4)
5. See: Raymonde Crête and Stéphane Rousseau, *Droit des sociétés par actions*, 4th ed., Montreal, Les Éditions Thémis, 2018, nos. 495 and 496. [↑](#footnote-ref-5)
6. *Royal Bank of Canada v. Central Capital Corp.*, 38 C.B.R. (3d) 1, 1996 CanLII 1521 (ON CA), para. 149. [↑](#footnote-ref-6)
7. Frank Bennett, *Bennett on Bankruptcy*, 24th ed., Toronto, LexisNexis, 2022, p. 1371. His comments pertain to the definition of “equity claim” under s. 2 of the *Companies’ Creditors Arrangement Act*, R.S.C. (1985), c. C-36, which is identical to the definition in s. 2 *BIA*. [↑](#footnote-ref-7)
8. *Sino-Forest, supra,* note 4, para. 46. [↑](#footnote-ref-8)
9. André Morisset and Jean Turgeon, *Droit des sociétés par actions*, vol. 2, Toronto, LexisNexis, 1991 (loose-leaf sheets, update no. 248, June 2022), pp. 1620 and 1623. [↑](#footnote-ref-9)
10. Paul Martel, *La société par actions au Québec : les aspects juridiques*, Montreal, Wilson & Lafleur, 2021, nos. 33-129 and 33-130. See also, *Banque Royale du Canada c. Banque Canadienne Impériale de Commerce*, J.E. 2000-1041, 2000 CanLII 8607 (C.A.), paras. 27-28, citing *R. v. Black & Decker Manufacturing Co*., [1975] 1 S.C.R. 411, p. 417 and *Lebeuf c. Groupe SNC-Lavalin inc*., [1999] RJQ 385, 1999 CanLII 13644 (C.A.), pp. 23-24. [↑](#footnote-ref-10)
11. *Medcap Real Estate Holdings Inc. (Re)*, 2022 ONCA 318, para. 25; Lloyd W. Houlden, Geoffry B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., Toronto, Thomson Reuters, 2009 (loose-leaf, updated August 2022), no. 2:128, pp. 2-183 and 2-184. [↑](#footnote-ref-11)
12. *Trakopolis SaaS Corp (2007996 Alberta Ltd) (Re)*, 2020 ABQB 643, para. 65. [↑](#footnote-ref-12)
13. INSOL International, *Update on Shareholder and Equity – Related Claims in Insolvency Proceedings*, October 2013, Technical Series Issue No. 28, p. 6. [↑](#footnote-ref-13)
14. *Sino-Forest, supra,* note 4, paras. 40-41, citing the Supreme Court on the use of the expression “in respect of”: *CanadianOxy Chemicals Ltd.* *v.* *Canada (Attorney General)*, [1999] 1 S.C.R. 743, para. 16. [↑](#footnote-ref-14)