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BIA: EQUITY CLAIMS IN PROPOSALS – A LOOK AT NEW SECTION 54.1 BIA

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ON OCTOBER 28, 2010, JUSTICE YVES POIRIER OF THE QUEBEC SUPERIOR COURT RENDERED A DECISION, WHICH ENFORCED THE APPLICATION OF NEW SECTION 54.1 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (HEREINAFTER THE "BIA"). THE CASE, *ALIMENTS MÖPURE INC. (AVIS D'INTENTION ET DE PROPOSITION DE) ("MÖPURE")*, ADDRESSED THE QUESTION OF WHETHER A CREDITOR ADVANCING AN EQUITY CLAIM HAS THE RIGHT TO VOTE AT CREDITORS' MEETINGS. MORE SPECIFICALLY, THE CASE DISCUSSES THE SCOPE OF THE COURT'S DISCRETIONARY POWERS IN GRANTING OR ANNULLING AN EQUITY CLAIMANT'S RIGHT TO VOTE AT SUCH MEETINGS.

BACKGROUND

On November 26, 2009, the insolvent debtor Möpure, a company in the maple syrup industry, filed a notice of intention. On May 25, 2010, Möpure submitted a proposal to its creditors based on a potentially successful lawsuit before the Court of Appeal, in which the Fédération des Producteurs Acéricoles du Québec ("**FPAQ**") claimed an interest in products that it had sold to Möpure. However, it is important to note that Möpure would be unable to honour its proposal if its lawsuit before the Court of Appeal failed.

At the same time, Ms. Graciana André ("**André**") filed a claim as an unsecured creditor with Möpure's trustee in the amount of \$2,350,000. FPAQ subsequently submitted its own claim as an unsecured creditor in the amount of \$893,258.75, and, in doing so, also contested André's claim. FPAQ argued that André should not be allowed to vote at the creditors' meeting because her claim was an equity claim and she belonged to a separate class of creditors who were not entitled to vote.

On June 15, 2010, Möpure's creditors met to vote on the proposal. Despite the contentiousness of André's proof of claim, the trustee accepted her vote under the proviso that it might later be annulled by the Court pursuant to section 108(3) of the *BIA*. As fate would have it, André's vote was decisive. If Justice Poirier were to allow André's vote, then the proposal would be approved. Conversely, if he were to annul her vote, then the proposal would be rejected and Möpure would be bankrupt.

ISSUES

For the purposes of section 54.1 of the *BIA*, Justice Poirier identified two principal issues:

- (1) Is the claim André makes to the receiver an equity claim?
- (2) If the Court reaches the conclusion that André's claim is an equity claim, may the Court allow André to vote, and in this case, count her vote in favour of the proposition?

ANALYSIS

(1) IS ANDRÉ'S CLAIM AN EQUITY CLAIM?

FPAQ's contestation of André's right to vote was based on section 54.1 of the *BIA*:

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.

In assessing whether André's claim fell within the purview of this section, Justice Poirier considered section 2 of the *BIA*, which defines an "equity claim" as:

- [...] 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);

The facts established that André's claim fell within this definition, as she had acquired preferred shares in Möpure from Investissements O.P.M. inc. ("OPM") on April 29, 2010. She had attempted to sell them back to Möpure for \$2,350,000 on April 30, 2010, but Möpure, hardly in a financial position to make such a considerable payment, immediately refused to buy them.

Interestingly, André did not contest the fact that her claim was an equity claim for the purposes of section 54.1 of the *BIA*. Instead, she contended that the new provision only came into force after her purchase of the preferred shares and that it was therefore of no legal effect with respect to her transaction. Indeed, prior to the coming into force of section 54.1, creditors in her position had the right to vote at creditors' meetings unless the Court ruled otherwise. André therefore submitted that any retrospective application of section 54.1 would be contrary to the rule of law.

The Court was not persuaded by her arguments. Indeed, the facts established a timeline that did not corroborate André's story: (1) Möpure filed its notice of intention on November 26, 2009; (2) André purchased the preferred shares on April 29, 2010; and (3) Möpure's proposal to its creditors was filed on May 25, 2010. Each of these events occurred after section 54.1 *BIA* had come into force on September 18, 2009.

Having found no retroactive application of the *BIA* and that André's claim fell within the definition of an "equity claim", Justice Poirier held that André belonged to a distinct class of equity claimants. As such, André was not entitled to vote at creditors' meetings, unless authorized to do so by the Court.

(2) SHOULD THE COURT GRANT VOTING RIGHTS TO THE HOLDER OF AN EQUITY CLAIM?

Having found that André belonged to a class of equity claim creditors and was therefore not entitled to vote at the creditors' meeting, Justice Poirier then considered whether the Court should grant her a right to vote pursuant to sections 54.1 and 108(3) of the *BIA*. The latter provision states:

"108. (3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

Justice Poirier held that the Court had discretionary power to decide whether a creditor's voting rights should be granted or annulled. Having established such power, Justice Poirier then considered the merits of André's arguments.

First, André contended that FPAQ would not suffer economically whether Möpure's proposal was accepted or not. In this regard, the Court found André's contention to be highly hypothetical; informational deficiencies made it impossible to determine whether FPAQ stood to benefit more from Möpure's proposal or from its bankruptcy. Given this uncertainty, Justice Poirier found no justifiable reason to give André's vote priority over that of FPAQ.

Secondly, André pointed to the fact that nearly 80% of the creditors voted in favour of the proposal. Unfortunately for André, this argument was not persuasive. Indeed, the *BIA* establishes that any proposal to creditors must be approved by (1) a majority of voting creditors (50% + 1) and (2) a two-thirds (66%) majority in value. Without André's vote, 60% of the value votes were in fact against the proposal.

Thirdly, André argued that she would be able to recover her claim if Möpure were allowed to continue its operations. Once again, Justice Poirier did not afford much credence to André's argument, stating that no evidence had been submitted to support such a hypothesis. Moreover, the Court expressed doubt as to André's business motives, finding it curious that she had purchased preferred shares in Möpure only after it had declared insolvency and filed its notice of intention.

While the Court declared that it had the power to grant voting rights to equity claimants pursuant to section 54.1 of the *BIA*, it nevertheless declined to do so in the present case. As a result, the Court set aside André's vote, which supported the proposal, and declared Möpure bankrupt.

CONCLUSION

This decision is of particular interest because it is one of the first applications in Quebec of the newly enacted section 54.1 of the *BIA*. Möpure effectively illustrates the enforcement of a new rule in bankruptcy and insolvency law: creditors advancing equity claims belong to a distinct class of creditors and have no right to vote at creditors' meetings unless a court, exercising its discretionary powers, grants such a right.

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