SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000654-133

DATE: June 30, 2015

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

GROUPE D'ACTION D'INVESTISSEURS DANS BIOSYNTECH
Petitioner
and
VINCENT BLAIS
Designated Member
v.
JOYCE TSANG
and
KAREN HONG
and
ERIC LINSLEY
and
SOMESH SHARMA
and
JEANNE BERTONIS
and
RUDY HUBER
and
ANDRÉ ARCHIMBAUD
and
JEAN-PIERRE DESMARAIS
Respondents

JUDGMENT ON THE MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION

JH5439

INTRODUCTION

[1] The Petitioner seeks authorization to institute a class action on behalf of certain shareholders of BioSyntech Inc. against its former directors. The Petitioner alleges that the directors committed a pattern of faults that resulted in an avoidable bankruptcy of BioSyntech, and that this avoidable bankruptcy deprived the shareholders of their right to share in the profits that BioSyntech would have earned.

[2] The principal issue in the present case is whether the shareholders have the right to claim these damages from the directors.

CONTEXT[1]

[3] BioSyntech was a biotechnology development stage or start-up company based in Laval, Québec.[2]

[4] It was incorporated on December 14, 1994 under the laws of the State of Nevada and was continued under the *Canada Business Corporations Act*[3] on March 29, 2006.[4] Its shares were listed for trading on NASDAQ prior to June 2004, and on the TSX Venture Exchange from June 2004.[5]

[5] As a biotechnology start-up, its eventual success rested on two key factors: (1) an innovative, beneficial and proprietary technology and (2) access to the capital required to develop and market the products derived from this technology.[6]

[6] BioSyntech seemed to have a promising proprietary technology.[7]

[7] Through its research and development activities, BioSyntech created BST-Gel, a proprietary platform of novel, non-toxic, biodegradable hydrogels which are liquid at room temperature but solidify at human body temperature and which result in a unique biomaterial for therapeutic devices and injectable drug-delivery systems.[8]

[8] By 2006, BioSyntech was developing three products using this technology.[9] The most promising was BST-CarGel, a medical device composed of BST-Gel and the patient's blood that was designed to help rebuild the cartilage of an injured, worn-out or aged joint.[10] The results of a pre-clinical study were very good. Compared to the current treatment options, BST-CarGel could be

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1 The Context is taken from the allegations of the Petitioner's Motion and the exhibits
2 Motion of the Petitioner, par. 2.15; Exhibit P-7.
3 R.S.C. 1985, c. C-44.
4 Motion of the Petitioner, par. 2.15; Exhibit P-7; Exhibit P-8. p. 34.
5 Motion of the Petitioner, par. 2.16; Exhibit C-1 (November 29, 2004 MD&A, p. 1).
6 Motion of the Petitioner, par. 2.17; Exhibit P-8, p. 6.
7 Motion of the Petitioner, par. 2.19.
8 Motion of the Petitioner, par. 2.19.
9 Motion of the Petitioner, par. 2.20; Exhibit P-8, p. 7.
10 Motion of the Petitioner, par. 2.24.

applied during a minimally invasive treatment and regenerated more, higher quality cartilage.[11]

[9] BioSyntech required regulatory and marketing approvals before it could commercialize BST-CarGel. It designed a thorough, 80-patient, pivotal, phase III clinical trial for BST-CarGel in order to fulfill regulatory requirements and obtain market approval from Canada and the European Union.[12] The pivotal trial involved following each patient over a 12-month period to assess the patient's cartilage repair as determined according to three indicators: a biopsy, magnetic resonance imaging (MRI) and a quality of life assessment.[13] It was designed to compare the safety and efficacy of the use of BST-CarGel to microfracture, one of the most common existing cartilage repair surgical treatments.[14]

[10] In November 2005, Health Canada approved the pivotal trial.[15]

[11] According to the testimony of BioSyntech founder Amine Selmani before the Superior Court in separate proceedings, BST-CarGel was one of only four such medical devices in Quebec history to reach stage III clinical trials.[16]

[12] BioSyntech started work on the pivotal trial, and by June 14, 2007, it had enrolled the first 20 patients.[17]

[13] Through the research and development stage and while the trial was going on, and as is typical of biotechnology start-ups, BioSyntech was operating at a loss. It had minimal revenues and incurred substantial costs.[18] Its accumulated deficit would increase from $24,298,023 as of March 31, 2004 to $76,992,684 as of December 31, 2009.[19]

[14] BioSyntech needed to minimize its operating costs and capital expenditures and secure financing to complete its clinical trials and bring its products to market.[20]

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11 Motion of the Petitioner, par. 2.25; Exhibit P-8, p. 7.
12 Motion of the Petitioner, par. 2.30; Exhibit P-10, p. 3-4.
13 Exhibit C-10 (also Exhibit P-5 or P-11), June 1, 2010, p. 222, 253.
14 Motion of the Petitioner, par. 2.31.
15 *Ibid*.
16 Motion of the Petitioner, par. 2.32; Exhibit C-10, June 1, 2010, p. 202.
17 Motion of the Petitioner, par. 2.39; Exhibit P-15.
18 Motion of the Petitioner, par. 2.21. See also the Respondents' Outline of Argument, par. 18, which includes excerpts from BioSyntech's MD&A throughout the period from November 29, 2004 to February 10, 2010, Exhibit C-1, where the need for additional financing was a constant theme.
19 Exhibit C-1. See the Respondents' Outline of Argument, par. 22, which sets out the accumulated deficit from March 31, 2004 to December 31, 2009.
20 Motion of the Petitioner, par. 2.22.

[15] By the summer of 2008, the Board of Directors identified the urgency of the company's financial situation.[21] On June 29, 2009, BioSyntech issued a press release indicating that the company was facing significant financial difficulties and warned of the possibility that it would have to cease activities if it failed to obtain additional financing.[22]

[16] The Board took various steps to address the company's financial situation.

[17] First, the Board implemented a streamlined business plan which involved focusing all research and development expenses on the BST-CarGel clinical trial and suspending work on all other projects.[23]

[18] The Board also raised additional funds and negotiated extensions on the due dates of existing loans:

- BioSyntech raised $12,500,000 in July 2008 through a public offering of subordinated secured convertible debentures that were set to mature on December 31, 2009;[24]
- BioSyntech raised a further $4,500,000 in August 2009, through secured convertible debentures purchased by the major shareholders[25] and a rights offering most of which was purchased by a major shareholder.[26] At the same time, the term for the 2008 debentures was extended from December 31, 2009 to March 31, 2010;[27]
- On March 25, 2010, BioSyntech announced that it had obtained a $1,000,000 loan from Investissement Québec to finance its refundable tax credits for 2009. BioSyntech indicated that this loan was expected to allow BioSyntech to continue its operations until June 2010.[28] On the same day, BioSyntech indicated that the due date on all outstanding debentures had been extended from March 31, 2010 to June 30, 2010.[29]

[19] Finally, the Board retained the services of PricewaterhouseCoopers to act as its financial advisor for its review of strategic alternatives such as partnerships or a mergers and acquisitions (M&A) transaction.[30] From August 2009 to April

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21 Motion of the Petitioner, par. 2.52 and 2.59; Exhibit P-22, p. 2, 7. In fact, the issue goes back to at least 2004. Exhibit C-1A is the MD&A dated November 29, 2004, and the need to raise additional financing is raised in that MD&A and all subsequent MD&As in Exhibit C-1. There are similar notes in the financial statements (Exhibit C-2), the AIFs (Exhibit C-3), the prospectuses (Exhibits C-4 and C-5), the press releases (Exhibit C-6) and the Annual Reports (Exhibits P-8, P-9 and P-10).

22 Motion of the Petitioner, par. 2.71; Exhibit P-26.

23 Motion of the Petitioner, par. 2.60; Exhibit P-22.

24 Motion of the Petitioner, par. 2.53; Exhibits P-22 and P-23.

25 Motion of the Petitioner, par. 2.76; Exhibit P-29.

26 Motion of the Petitioner, par. 2.78 to 2.80; Exhibit P-30.

27 Motion of the Petitioner, par. 2.77; Exhibit P-29.

28 Motion of the Petitioner, par. 2.96.2; Exhibit P-35.

29 Motion of the Petitioner, par. 2.96.3; Exhibit P-35.

30 Motion of the Petitioner, par. 2.74; Exhibit P-28.

2010, PwC contacted 102 companies in order to find a partner, investor or buyer for BioSyntech. PwC received only three non-binding offers between $1 million and $2.2 million.[31]

[20] Notwithstanding these steps, BioSyntech ran out of cash in May 2010 while it was still months away from completing the pivotal trial.

[21] On May 12, 2010, the Board authorized the company to seek court protection under the *Bankruptcy and Insolvency Act*[32] and to have PwC appointed as trustee and interim receiver.[33]

[22] That same day, three further steps were taken:

1. BioSyntech filed a notice of intention to make a proposal to creditors under Subsection 50.4(1) *BIA*;[34]
2. The Respondents resigned as directors;[35] and
3. BioSyntech made a motion to have PwC appointed interim receiver.[36]

[23] BioSyntech never made a proposal to its creditors. Instead, PwC initiated a process to sell BioSyntech's assets.

[24] On May 13, 2010, the registrar of the Superior Court granted an order to appoint PwC as interim receiver with the power to initiate a solicitation process for the sale of BioSyntech's core assets and to accept an offer subject to the approval of the Court.[37] That same day, PwC, acting as interim receiver, invited seven companies to bid on BioSyntech's core assets. The deadline for offers was May 19, 2010.[38]

[25] Meanwhile, a group of shareholders representing over 5% of BioSyntech's outstanding shares requested a special meeting of shareholders in order to stop the sale process and explore alternatives for raising capital.[39] That request was refused by Fasken Martineau on behalf of PwC.[40]

[26] The leading offers were from Piramal ($4,556,000) and ProQuest ($4,519,000), two significant shareholders of BioSyntech with representatives on the Board.[41] PwC accepted Piramal's bid because it was higher.[42]

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31 Motion of the Petitioner, par. 2.81; Exhibit P-34, par. 11-12.
32 R.S.C. 1985, c. B-3.
33 Motion of the Petitioner, par. 2.86; Exhibit P-31.
34 Motion of the Petitioner, par. 2.87; Exhibit P-32.
35 Motion of the Petitioner, par. 2.4 to 2.14; Exhibits P-31 and P-34, par. 2.
36 Exhibit P-30 or C-11.
37 Motion of the Petitioner, par. 2.88; Exhibit P-33.
38 Motion of the Petitioner, par. 2.89; Exhibit P-34.
39 Motion of the Petitioner, par. 2.97; Exhibit P-36.
40 Motion of the Petitioner, par. 2.98; Exhibit P-37.
41 Motion of the Petitioner, par. 2.92 and 2.93.
42 Motion of the Petitioner, par. 2.93; Exhibit P-13 (2010 QCCS 2814).

[27] On May 28, 2010, BioSyntech made a motion to have the sale to Piramal approved by the Superior Court.[43] Shareholders holding some 13 million shares (12.7% of the total outstanding shares) sought leave to intervene in order to argue grounds very similar to those raised by the Petitioner in the present proceedings.[44]

[28] The hearing proceeded on June 1 and 2, 2010 before Justice Auclair of the Superior Court.[45] He rendered his judgment on June 3, 2010.[46] Justice Auclair dismissed the intervention by the shareholders[47] and the attempt by ProQuest to outbid Piramal by increasing its offer by $1,000,000 during the hearing.[48] Justice Auclair authorized PwC to accept the earlier offer from Piramal.[49]

[29] The shareholders appealed from Justice Auclair's judgment.[50] They also made a motion to suspend the provisional execution of the judgment.[51] The motion to suspend the provisional execution was dismissed on June 18, 2010.[52] The sale to Piramal was completed on June 21, 2010. This essentially put an end to the appeal.[53]

[30] After the sale to Piramal, BioSyntech took no further steps towards filing a proposal. As a result, BioSyntech was deemed to have filed an assignment in bankruptcy on September 10, 2010.[54]

[31] The result was that BioSyntech had spent 15 years and approximately $76 million in research and development, and that all of its intellectual property was sold for $4,556,000. That amount was not even sufficient to pay the outstanding debentures due on June 30, 2010.[55] There was nothing left for the shareholders.

[32] The parties did not present much evidence as to what Piramal has done with the intellectual property since the purchase. In press releases dated April 11, 2012 and May 14, 2012, almost two years after the sale, Piramal announced that it would be presenting positive data from the BST-CarGel pivotal trial at a symposium in Montreal in May 2012. It also announced that it had received the European CE mark approval for BST-CarGel and that it planned to launch BST-CarGel for commercial sale in the fourth quarter of 2012. It anticipated that European approval would serve as the basis to obtain commercial authorization for BST-CarGel in the Middle East, the Asia Pacific

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43 Exhibit C-12.
44 Exhibit C-13.
45 The transcript of the hearing is produced as Exhibit C-10.
46 Exhibit P-13.
47 *Ibid*, par. 4, 34-36.
48 Motion of the Petitioner, par. 2.94; Exhibit P-13, par. 18-28.
49 Motion of the Petitioner, par. 2.94; Exhibit P-13.
50 Exhibit C-14.
51 Exhibit C-15.
52 Exhibit C-9.
53 Exhibit C-16.
54 Exhibit C-17.
55 Petitioner's Plan of Argument, par. 61.

region and South America. Piramal's chairman estimated the market opportunity at $1 billion.[56]

[33] The present Motion was filed on May 13, 2013, three years and a day after the filing of the notice of intention and the resignation of the Respondents.

POSITION OF THE PARTIES

[34] Vincent Blais held 400,000 shares in BioSyntech on May 12, 2010 which he had purchased for approximately $125,000.[57] He instituted the present proceedings. The Petitioner was substituted as petitioner at the time of the hearing of the Motion and Blais continued as the Designated Member. The Petitioner is a non-profit corporation formed by a group including former BioSyntech shareholders in order to defend and promote the rights of the former shareholders.[58]

[35] The Petitioner has defined the class that it proposes to represent as follows:

> All natural persons and legal persons which, in the 12 months previous to May 13, 2013, had fewer than 50 employees, who held securities of BioSyntech Inc. on May 12, 2010, except the Respondents, ProQuest Investments LLP, Fonds de Solidarité des Travailleurs du Québec, Pappas Ventures, Nicholas Piramal India Limited, and Highland Capital Management.[59]

The entities which are carved out of the proposed class are the principal institutional shareholders of BioSyntech. They hold approximately 40% of the shares of BioSyntech.

[36] The Petitioner alleges that the Respondents, who were the directors of BioSyntech until they resigned on May 12, 2010, committed a series of faults or "oversaw a troubling pattern of negligence"[60] that resulted in the avoidable sale of BioSyntech's intellectual property and the bankruptcy which inevitably followed.[61]

[37] The Petitioner identifies four primary faults: (1) failing to disclose results of the pivotal trial ("disclosure fault"); (2) failing to bring down the excessive burn rate ("burn rate fault"); (3) failing to diligently pursue opportunities to obtain additional financing ("financing fault"); and (4) sending BioSyntech into an avoidable bankruptcy ("proposal fault").[62]

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56 Motion of the Petitioner, par. 2.36 to 2.38; Exhibit P-14.
57 Motion of the Petitioner, par. 2.107-2.108.
58 Exhibit P-40.
59 Motion of the Petitioner, par. 1.
60 Motion of the Petitioner, introductory paragraph.
61 Motion of the Petitioner, par. 2.3.
62 Motion of the Petitioner, par. 2.101. See also the Petitioner's Plan of Argument, par.107.

[38] The Petitioner alleges that the Respondents thereby breached their duty of care as provided under Section 122(1) of the *CBCA* and Articles 322 and 1457 of the *Civil Code of Québec.*[63]

[39] The Petitioner argues that the class members were deprived of the possibility to share in the potential profits of BioSyntech or "were deprived of the fruits of their investment"[64] as a result of these faults, and that they are entitled to compensatory damages for this injury.[65]

[40] The Respondents contend that the Petitioner failed to satisfy the requirements for bringing a class action under Article 1003 of the *Code of Civil Procedure*. While they concede that conditions (a), (c) and (d) are satisfied in the present dispute, they argue that condition (b) has not been fulfilled.

[41] More specifically, with respect to the allegations of fault in the Motion, the Respondents argue that:

1. the Motion contains no allegations of palpable and ascertainable fact, but only conclusions;
2. the allegations of fact are contradicted by the evidence filed by the parties;
3. many of the facts alleged by the Petitioner concern acts that have mistakenly been attributed to the Respondents;
4. the Motion amounts to a collateral attack on the final judgment of Justice Auclair in which he authorized the sale of BioSyntech's core assets, and thereby confirmed that PwC had conducted the sale in a fair and transparent manner and that the sale was necessary under the circumstances;[66] and
5. the allegations are insufficient to set aside the defence of the "Business Judgment Rule".

[42] The Respondents also argue that, as a matter of law, shareholders have no recourse against directors in these circumstances because:

1. the duty of care is owed by the directors to the corporation and not to the shareholders; and
2. The damages suffered by the shareholders are damages by ricochet which cannot be recovered.

ISSUES

[43] The relevant issues can be summarized as follows:

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63 Motion of the Petitioner, par. 2.1.
64 Motion of the Petitioner, introductory paragraph.
65 Motion of the Petitioner, par. 2.106.
66 Exhibit P-13.

1. Are the allegations of fault sufficient at this stage for the Court to authorize the class action?
2. Do the shareholders have the right to sue the directors in these circumstances?
3. Are the damages suffered by the shareholders sufficiently direct to be recoverable?

ANALYSIS

[44] The class action is a procedural vehicle whereby a single person can start a legal action for the benefit of all of the members of a group who face an identical, similar or related issue, without the need to obtain a mandate from each member of the group.[67] It is intended to facilitate access to justice, modify harmful behaviour and conserve judicial resources.[68] Because of these objectives, it has received a broad and liberal interpretation.[69]

[45] Article 1003 *CCP* establishes the conditions for the exercise of a class action:

> **Art 1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> *a)* the recourses of the members raise identical, similar or related questions of law or fact;
>
> *b)* the facts alleged seem to justify the conclusions sought;
>
> *c)* the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> *d)* the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[46] If all four conditions are satisfied, the class action will be authorized. If any condition is not met, the authorization will be refused. [70]

[47] The authorization stage serves only as a filtering mechanism to evaluate whether the four conditions are satisfied. In evaluating whether or not these conditions are satisfied, the Court must bear in mind that the threshold for meeting each condition is low.[71]

[48] Since the Respondents concede that the other conditions under Article 1003 *CCP* are satisfied, the Court will turn its attention exclusively to Article 1003(b) *CCP*.

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67 *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, par. 1.
68 *Ibid*, par. 2.
69 *Marcotte* v. *Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, par. 22.
70 *Vivendi*, *supra* note 67, par. 2.
71 *Infineon Technologies AG* v. *Option Consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, par. 59.

[49] This is the condition that comes closest to the merits of the dispute, and it has given rise to the most debate. In its recent decisions in *Infineon*[72] and *Vivendi*,[73] the Supreme Court has made it clear that the test for meeting this condition is not onerous. The Court stated that the authorization stage serves only as a filtering mechanism to exclude motions that are frivolous or untenable.[74] Under Article 1003(b) *CCP*, the applicant must only establish a "*prima facie* case" or an "arguable case":

> [65] [...] the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "*apparence sérieuse de droit*", or a "*prima facie* case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.[75]

[50] The Supreme Court has provided additional guidance as to what the "arguable case" means:

- The applicant must allege facts which, if proven at the trial, may *prima facie* justify the conclusions sought[76] (this is referred to as the legal syllogism);
- The applicant's allegations of fact are therefore assumed to be true;[77]
- However, the allegations must not be vague, general or imprecise[78] and must be more than mere speculation or hypotheses;[79]
- Further, bare allegations are not sufficient. The allegations must be supported by some evidence,[80] and the Court can set aside an allegation which is "carrément contredite pas une preuve documentaire fiable";[81] and
- The applicant is not required to prove its allegations on a balance of probabilities.[82]

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72 *Ibid.*
73 *Supra* note 67.
74 *Infineon*, *supra* note 71, par. 61, 67; *Pharmascience inc.* c. *Option Consommateurs*, 2005 QCCA 437, par. 34.
75 *Infineon*, *supra* note 71, par. 65.
76 *Guimond* v. *Québec (Attorney General)*, [1996] 3 S.C.R. 347, par. 10-12; *Breslaw* v. *Montreal (City)*, 2009 SCC 44, [2009] 3 S.C.R. 131, par. 27.
77 *Vivendi*, *supra* note 67, par. 37; *Infineon*, *supra* note 71, par. 67-68; *Rouleau* c. *Canada (Procureur Général)*, [1998] R.R.A. 58 (C.A.), par. 32-34.
78 *Infineon*, *supra* note 71, par. 67. See also *Harmegnies* c. *Toyota Canada inc.*, 2008 QCCA 380, par. 44; *Perreault* c. *McNeil PDI inc.*, 2012 QCCA 713, par. 73.
79 *Option Consommateurs* c. *Bell Mobilité*, 2008 QCCA 2201, par. 36-37.
80 *Infineon*, *supra* note 71, par. 134.
81 *Bell Mobilité*, *supra* note 79, par. 38.
82 *Infineon*, *supra* note 71, par. 94.

[51] In other words, "[a]t this stage, all [the applicant] needs to do is demonstrate an arguable case by means of allegations and supporting evidence."[83]

[52] In *Dieudonné* c. *Apple inc.*, the Superior Court discussed the *Infineon* decision and other recent cases, and summarized the state of the law in the following manner:

> [48] Au stade de l'autorisation, le juge doit s'assurer que les allégations de la requête, le début de preuve et les moyens de droit invoqués démontrent un syllogisme juridique logique, solide, plausible et susceptible d'être prouvé, si le recours est autorisé.[84]

[53] The case put forward by the Petitioner is that the Respondents did certain things that amount to breaches of their duties under Section 122(1)(b) *CBCA*, and that these faults caused damage to the shareholders.

[54] Some of the arguments put forward by the Respondents are factual in nature, and they are subject to all of the limitations described above. At this stage, the Court does not have all of the evidence and it must exercise caution before refusing authorization based on an incomplete record.

[55] However, the Respondents also advance legal arguments, namely that the directors do not owe the duty under Section 122(1)(b) *CBCA* to the shareholders, and that the loss claimed by the shareholders is only indirectly caused by the acts of directors and cannot be recovered. The Court will assume that the facts alleged by the Petitioner underlying those legal issues have been proven, and the Court is in just as good a position at the authorization stage as it will be after the trial to deal with those issues. In these circumstances, the Court is required to decide the legal issues.[85]

1. Allegations of fault

[56] According to the Petitioner, the directors committed a series of faults that resulted in the avoidable sale of BioSyntech's intellectual property and the bankruptcy which inevitably followed.

[57] The Petitioner identifies four primary faults: the disclosure fault, the burn rate fault, the financing fault and the proposal fault.[86]

Disclosure fault

[58] The first fault that the Petitioner asserts relates to the failure to disclose the results of the pivotal trial.

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[83] *Infineon*, *supra* note 71, par. 94.
[84] 2014 QCCS 4450.
[85] *Trudel* c. *Banque Toronto-Dominion*, 2007 QCCA 413, par. 2-3; *Fortier* c. *Meubles Léon ltée*, 2014 QCCA 195, par. 90-91.
[86] Motion of the Petitioner, par. 2.101. The disclosure fault is not included in the list in this paragraph.

[59] The facts alleged in the Motion with respect to the disclosure of the results of the pivotal trial are as follows:

- June 14, 2007: BioSyntech announced that it had enrolled the first 20 patients in the pivotal trial.[87]
- March 17, 2008: BioSyntech announced positive preliminary results from a six-month interim analysis of the first 20 patients, and indicated that it had enrolled over half of the 80 patients in the pivotal trial.[88]
- February 2, 2009: BioSyntech announced that it had enrolled the full 80 patients necessary for its pivotal trial, and indicated that it expected final results in the first quarter of 2010.[89]
- March 12, 2009: BioSyntech announced that it would conduct an interim analysis on the first 40 patients who had completed their 12-month follow-up and that it expected these interim results in the second quarter of 2009. It also announced that it expected the final results for all 80 patients in the first half of 2010.[90]
- June 17, 2009: BioSyntech released partial results of the 40-patient interim analysis. These partial results only covered 22 of the 40 patients and contained data gathered from the biopsies only. The biopsies showed statistically significant evidence of improved repair tissue quality. BioSyntech reiterated that it expected the remaining data from the 40-patient interim analysis in the coming months, and the final results on all 80 patients in the first half of 2010.[91] The Petitioner suggests that the Board did not want to issue these positive results.[92]
- November 13, 2009: BioSyntech reported positive MRI results for the 22 patients and reiterated that the final results on all 80 patients would be ready by the summer of 2010. The Petitioner complains that this good news is buried in a press release announcing financial data.[93]
- February 12, 2010: BioSyntech declared that it expected the final results of the trial during the summer of 2010.[94] It had completed gathering data for the remaining 40 patients in its pivotal trial.[95]

[60] The Petitioner goes on to allege that BioSyntech was "within months" of successfully completing the pivotal trial when the Respondents put BioSyntech

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87 Motion of the Petitioner, par. 2.39; Exhibit P-15.
88 Motion of the Petitioner, par. 2.40 and 2.41; Exhibit P-16.
89 Motion of the Petitioner, par. 2.42 and 2.43; Exhibit P-17.
90 Motion of the Petitioner, par. 2.44 and 2.45; Exhibit P-18.
91 Motion of the Petitioner, par. 2.46 and 2.47; Exhibit P-19.
92 Motion of the Petitioner, par. 2.73; Exhibit C-10, June 1, 2010, p. 182-183.
93 Motion of the Petitioner, par. 2.49 and 2.50; Exhibit P-20.
94 Motion of the Petitioner, par. 2.51; Exhibit P-21.
95 Motion of the Petitioner, par. 2.96.1; Exhibit C-10, June 1, 2010, p. 165-166, 176.

into bankruptcy, and that the positive results "were well within the reach of BioSyntech".[96]

[61] Finally, the Petitioner alleges a link between the disclosure of positive trial results and investor confidence. It suggests that obtaining positive results for the final 40 patients was essential for BioSyntech to demonstrate that it had an innovative, beneficial and safe product.[97] It suggests that BioSyntech needed to complete the pivotal trial to assure potential investors, partners or buyers that it would obtain market approval and raise the money required to commercialize BST-CarGel.[98]

[62] In May 2009, for example, Laurentian Bank Securities identified positive test results as "a potential significant value creation event" that may cause "a significant change to the share price".[99] When BioSyntech released partial results of the 40-patient interim analysis on June 17, 2009, its stock price more than doubled from $0.12 to $0.29.[100] In two separate valuations both dated May 2009, Laurentian gave BioSyntech a valuation range of between $77 million and $182 million in one document[101] or between $90 million and $280 million in the other[102] if it obtained positive BST-CarGel pivotal trial results. Laurentian also suggested that if the trial results were negative or mixed, financing will be challenging and the company might be forced to seek protection from its creditors.[103]

[63] The precise fault alleged against the Respondents in the Motion is not clear. The only allegations in the Motion are that the test results were not disclosed, that BioSyntech was close to completing the test, and that completing the test would have had an impact on BioSyntech's financing. There is an allegation that the Board did not want to release the positive results in June 2009, but it did release them and also referred to them in subsequent documents released to the public.[104] There is no specific allegation that the Respondents were negligent in not completing the trials more quickly, or that the Respondents withheld data from the market. There is no allegation of fault in relation to the disclosure issue in the enumeration of faults in paragraph 2.101 of the Motion.

[64] The Petitioner makes additional allegations against the Respondents in its Plan of Argument and its oral argument before the Court:

- BioSyntech had positive data on the 40 patients which it did not disclose to the public, although it shared that data with interested

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96 Motion of the Petitioner, par. 2.104 and 2.105.
97 Motion of the Petitioner, par. 2.102.
98 Motion of the Petitioner, par. 2.103.
99 Exhibit C-7, p. 10 and 16.
100 Exhibit C-8. Petitioner's Plan of Argument, par. 44, 45.
101 Motion of the Petitioner, par. 2.34; Exhibits P-12, p. 14.
102 Exhibit C-7, p. 14.
103 Exhibit C-7, p. 17.
104 Exhibits C-1R (MD&A dated August 14, 2009, p. 3), C-5 (prospectus dated August 31, 2009, p. 7) and C-1S (MD&A dated November 13, 2009, p. 2).

parties in the context of the PwC M&A process conducted from August 2009 to April 2010;[105] and

- BioSyntech had more than enough resources at its disposal to complete the interim results in the summer of 2009 or shortly thereafter.[106]

[65] These allegations are not made in the Motion. As a result, the Court is not required to accept them as true. In principle, the Court should consider these additional arguments only if every element of the argument is supported by the evidence filed. For purposes of the Motion and any possible appeal, and given the conclusion the Court has come to on the merits of the Motion, the Court will take a broader view and will consider additional arguments not raised in the Motion to the extent that they are consistent with (as opposed to every element of the argument being supported by) the evidence filed.

[66] There is evidence to support the allegation that BioSyntech had positive data on the 40 patients in the interim results group.[107] The evidence is not clear as to whether BioSyntech had the resources to complete the analysis of the results for the interim group.

[67] With respect to causation, it is plausible that the disclosure of positive results may have had a positive impact on investor confidence and potential partnerships, and may have increased the share price and allowed BioSyntech to exercise the right to convert some debentures into shares. In that sense, the failure to disclose the positive results may have been a factor in BioSyntech's failure. The argument is logical but somewhat speculative.

[68] With respect to the disclosure fault, the Court therefore concludes that the allegations might be sufficient to meet the test in Article 1003(b).

Burn rate fault

[69] The second fault the Petitioner asserts is that the Respondents failed to reduce the excessive burn rate experienced by BioSyntech.

[70] The Petitioner alleges very few facts in the Motion to support this conclusion:

- BioSyntech had 17 employees and six management consultants on May 12, 2010, and 12 of the 17 employees worked on research and development;[108]
- Dr. Abdellatif Chenite testified that he was the only person carrying out research and development at BioSyntech and he was being paid to

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105 Petitioner's Plan of Argument, par. 110.
106 Petitioner's Plan of Argument, par. 114.
107 Exhibit C-10, June 1, 2010, p. 221-223.
108 Motion of the Petitioner, par. 2.83; Exhibit P-30.

> read and write articles. All other research and development activities had stopped two years earlier.[109]

[71] The Petitioner argues that the continued employment of 12 employees in research and development two years after BioSyntech's research and development activities had ceased when in fact Dr. Chenite was the only person carrying out research and development at BioSyntech, shows that the Board failed to manage expenditures.

[72] However, the cross-examination of Dr. Chenite made it clear that he did not consider clinical trials to be part of research and development and that he did not know what was happening with the clinical trials. It therefore seems likely that BioSyntech did stop its other research and development activities and that the additional employees that the Petitioner complains about were involved in the clinical trials whose importance to BioSyntech's survival is admitted by the Petitioner.

[73] As a result, these allegations, on their own, are not sufficient to meet Article 1003(b) *CCP*.

[74] The Petitioner makes further arguments in its Plan of Argument and at the hearing which are not reflected in its Motion. Again, the Court will consider these arguments to the extent that they are consistent with the evidence filed.

[75] First, the Petitioner argues in its Plan of Argument and at the hearing that BioSyntech did not need these 11 or 12 additional employees to work on the clinical trials, particularly not after it had enrolled the 80 patients in February 2009, or after the 80 patients had completed their follow ups at the end of January 2010. There is no evidence on this issue.

[76] The Petitioner goes on to argue in its Plan of Argument that BioSyntech was passing off general and administrative costs as research and development expenses. The Petitioner presents a list of research and development subcontractors from the 2010 financial statements that it suggests are general and administrative expenses.[110] This is pure speculation based solely on the names of the subcontractors.

[77] On the other hand, the Respondents point to evidence in the record supporting their argument that the burn rate was reduced. The Laurentian Bank Securities Action Note dated February 17, 2008 states:

> At December 31, 2008, BioSyntech had $6.3 million in cash. Although the company has significantly reduced its burn rate in recent months, we believe that it currently has less than 10 months of cash."[111]
>
> (Emphasis added)

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[109] Motion of the Petitioner, par. 2.84; Testimony of Dr. Abdellatif Chenite before Justice Auclair, Exhibit C-10, June 1, 2010, p.191-197.
[110] Petitioner's Plan of Argument, par. 122.
[111] Exhibit C-8A.

[78] Other documents issued by BioSyntech between June 2009 and February 2010 also indicate a reduction in the burn rate.[112] This reduction is partially offset by the fees paid to PwC and other professionals, but those fees are the result of BioSyntech's financial difficulties and cannot be avoided in that context.

[79] On balance, the burn rate argument is very weak.

Financing fault

[80] The third fault the Petitioner asserts is that the Respondents failed to diligently pursue opportunities to obtain additional financing for BioSyntech.

[81] The Petitioner points to the following facts in its Motion:

> 2.99. The Respondents never approached shareholders to provide further financing or buy more shares in the company;
>
> 2.100. Other sources of financing were available in order to allow [BioSyntech] to complete the BST-CarGel pivotal trial in September 2010:
>
> > 2.100.1. In August 2009, shareholders participated in a $3M public offering and could have been called upon again;
> >
> > 2.100.2. Shareholder and BioSyntech founder, Amine Selmani, testified that he was willing to mortgage his house, use his own money, and work for free until September, 2010, [...];
> >
> > 2.100.3. On June 17, 2010 as shareholders appealed the sale of BioSyntech, Charles Beaudoin, a partner at real estate firm Multivesco and shareholder of BioSyntech, send [*sic*] a letter of intent to provide $1 000 000 of financing to BioSyntech in order to allow it to complete the pivotal trial and conclude a financing with an investment bank to restructure company. Mr. Beaudouin [*sic*] further provided a plan for achieving the objectives [...] and indicated that he was willing to increase the amount if it did not prove to be sufficient [...].

[82] The last two grounds are clearly insufficient.

[83] Mr. Selmani's willingness to lend BioSyntech $1.5 million borrowed against his house and to use his own money and work for free until September 2010 was presented to Justice Auclair during the hearing to authorize the sale. He found that "son offre de financement est encore hypothétique [...]".[113]

[84] The allegation pertaining to Mr. Beaudoin is equally unhelpful, since this offer was made more than one month after the core assets of BioSyntech had already been sold, at which point the Respondents had already resigned from the Board.

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[112] Exhibit P-30 (AIF dated June 18, 2009, p. 2), Exhibit P-26 (June 29, 2009), Exhibit P-29 (August 14, 2009), Exhibit P-1, p. 1 (August 24, 2009), Exhibit C-5, p. 6 (August 31, 2009), Exhibit P-20 (November 13, 2009), and Exhibit P-21 (February 12, 2010).

[113] Exhibit P-13, par. 35.

[85] Further, the amounts that the Petitioner suggests were available from Mr. Selmani and Mr. Beaudoin seem insufficient, based on the evidence in the record. On August 31, 2009, BioSyntech indicated to the market that it needed between $8,000,000 and $12,000,000 to maintain its operations until the summer of 2010 and to complete the pivotal trials, and it needed a further $1,000,000 to $2,000,000 to reach the commercialization stage for BST-CarGel, for a total of $9,000,000 to $14,000,000.[114] BioSyntech raised only $5,500,000 after August 31, 2009. Further, debentures worth $17,000,000 were to mature on June 30, 2010.[115] Mr. Selmani was talking of mortgaging his house and working for free, and Mr. Beaudoin was offering $1,000,000. Even combining the two offers would leave BioSyntech well short of the amounts that it needed.

[86] There is no evidence to suggest that any other shareholder was willing to provide any further financing. The major institutional shareholders were represented on the Board and must have known what was going on, and none of them offered to provide any financing or objected to the insolvency filing. No other shareholder came forward. Justice Auclair concluded that none of the shareholders was prepared to finance BioSyntech's operations, even for a three month period.[116]

[87] In its Plan of Argument and oral argument, the Petitioner adds the following arguments:

- BioSyntech had unclaimed tax deductions that it could have financed;[117]
- The Respondents negligently rejected the two investment banks recommended by their interim Chief Executive officer and the Chief Scientific Officer after a rigorous selection process in favour of PwC;[118] and
- The Respondents negligently allowed PwC to conduct an M&A process before the company had publicly disclosed the positive 40-patient interim results and before the company had obtained a valuation of its intellectual property upon achievement of a positive pivotal trial.[119]

[88] The Petitioner alleges in the Motion that, before hiring PwC on July 21, 2009, the Board rejected two candidates.[120] However, there is no specific allegation of a fault in this context. The other two grounds are entirely new. Again, the Court will consider these new grounds to the extent that they are supported by the evidence.

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114 Exhibit C-5, p. 7.
115 Motion of the Petitioner, par. 2.96.3; Exhibit P-35.
116 Exhibit P-13, par. 47.
117 Petitioner's Plan of Argument, par. 125-126.
118 Petitioner's Plan of Argument, par. 127.
119 Petitioner's Plan of Argument, par. 128.
120 Motion of the Petitioner, par. 2.64 to 2.70; Exhibit C-10, p. 8-13 and Exhibit P-25.

[89] The evidence shows that BioSyntech did have unclaimed tax deductions. However, the witness from Investissement Québec, which had financed the 2009 tax credits, testified before Justice Auclair that Investissement Québec would not have considered making a loan on the 2010 tax credits until BioSyntech reimbursed the loan on the 2009 tax credits. Moreover, Investissement Québec would not have made the loan if BioSyntech was insolvent or did not appear likely to remain in operations for at least the time required to receive the tax refund.[121] This does not appear to be a very promising financing option.

[90] The criticism with respect to the appointment of PwC and the M&A process conducted by PwC does not appear to lead to the conclusions sought by the Petitioner. There is no allegation and no evidence that there were potential partners or investors that PwC missed.

[91] Further, the M&A process conducted by PwC was reviewed in detail in the hearing before Justice Auclair.[122] He qualified the process as "longue" and "sérieuse, précise et documentée".[123] He was satisfied with it.[124] This was an important factor in his decision to accept the short solicitation process.[125]

[92] The Respondents also argue that the exhibits produced by the parties show that substantial efforts were made by the Board to obtain financing, to reduce expenses or to find another solution:

- The Board had a constant preoccupation with financing that went back to at least 2004;[126]
- BioSyntech raised $12,500,000 in July 2008 through a public offering of subordinated secured convertible debentures;[127]
- the Respondents adopted a streamlined business plan that focused all of BioSyntech's research and development expenses on BST-CarGel;[128]
- the Respondents retained PwC as their financial advisor.[129] PwC conducted a merger and acquisition process from August 2009 until April 2010 in order to find a partner, investor or buyer for BioSyntech, but the process did not result in any serious offers;[130]

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121 Exhibit C-10, June 1, 2010, p. 209-218.
122 Exhibit C-10, June 1, 2010, p. 34, 37-41 and 106-107; June 2, 2010, p. 7-21.
123 Exhibit P-13, par. 30.2.
124 *Ibid*, par. 45.
125 *Ibid*, par. 38, 40 (31.1.1), 44, 49 and 53.
126 *Supra*, note 21.
127 Motion of the Petitioner, par. 2.53; Exhibits P-22 and P-23.
128 Motion of the Petitioner, par. 2.60.
129 Motion of the Petitioner, par. 2.74; Exhibit P-28.
130 Motion of the Petitioner, par. 2.81; Exhibit P-13.

- BioSyntech raised $1.4 million through a private placement of secured convertible debentures with the institutional shareholders of BioSyntech in August 2009;[131]
- BioSyntech made a rights offering to the existing shareholders which raised a further $3.1 million in August 2009;[132]
- the Respondents released partial trial results prior to their planned disclosure of the full pivotal trial results in an effort to attract investors and partners; and
- BioSyntech obtained a $1 million loan from Investissement Québec to finance its refundable tax credits for 2009.[133]

[93] For all of these reasons, the Court concludes that the allegations with respect to the financing fault are weak.

Proposal fault

[94] The Petitioner argues (1) that there was a pattern of faults that resulted in an avoidable bankruptcy, and (2) that the Respondents allowed BioSyntech to file a notice of intention to make a proposal to its creditors which was immediately followed by a motion to allow the sale of the core assets thus rendering any proposal clearly moot.[134]

[95] The pattern of faults leading to the bankruptcy refers to the disclosure fault, the burn-rate fault and the financing fault, which were considered above.

[96] With respect to the notice of intention and subsequent events, there are a number of steps taken (or not taken) by the Respondents, BioSyntech and/or PwC:

- The filing of the notice of intention (May 12, 2010);
- The resignation of the Respondents (May 12, 2010);
- Motion to have PwC appointed interim receiver (May 12, 2010);
- Invitation to seven companies to bid on BioSyntech's core assets with a deadline of May 19, 2010 (May 13, 2010);
- Refusal of the shareholders' request for a special meeting of shareholders (May 17, 2010);
- Acceptance of the Piramal offer (May 19, 2010);
- Motion to have the sale to Piramal authorized by the Court (May 28, 2010) and related proceedings and judgments;

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131 Motion of the Petitioner, par. 2.76; Exhibit P-29.
132 Motion of the Petitioner, par. 2.78 to 2.80; Exhibit C-6B.
133 Motion of the Petitioner, par. 2.96.2.
134 Motion of the Petitioner, par. 2.101.

- Completion of the sale to Piramal (June 21, 2010);
- No further steps taken towards filing a proposal, with the result that BioSyntech was deemed to have filed an assignment in bankruptcy (September 10, 2010).

[97] As is clear from this chronology, most of the steps were taken (or not taken) after the Respondents had resigned as directors. Counsel for the Petitioner made it very clear at the hearing that he was not challenging any of the steps taken by PwC after the notice of intention.

[98] The only step clearly taken by the Respondents is the decision to authorize BioSyntech to file a notice of intention. The Respondents can be held responsible for that decision, in appropriate circumstances. However, the Petitioner does not challenge that decision directly in the Motion, apparently recognizing that BioSyntech's financial difficulties as of May 2010 rendered that step necessary. As detailed below, this decision does seem to be challenged for the first time in the written and oral argument.

[99] Rather, the Petitioner alleges in the Motion that the decision to not file a proposal and instead sell BioSyntech's core assets was negligent:

> 2.96. The Respondents' decision to not file a proposal and instead sell BioSyntech's core assets, thereby rendering any continued operations impossible, was negligent and shocked many class members for primarily four reasons:
>
> > 2.96.1. By February 12, 2010, BioSyntech had completed gathering data for the remaining 40 patients in its pivotal trial and announced that it expected the final results in the summer of 2010, [...];
> >
> > 2.96.2. On March 25, 2010, BioSyntech announced that it had obtained a $1,000,000 loan with Investissement Québec to finance its refundable tax credits for 2009. BioSyntech indicated that this loan was expected to provide BioSyntech with the resources required to continue its operations until June 2010, [...];
> >
> > 2.96.3. At the same time as it announced this loan, BioSyntech indicated that the due date on all outstanding debentures had been extended from March 31 to June 30, 2010, [...];
> >
> > 2.96.4. As of May 12, 2010, not a single creditor had demanded repayment of money owed by BioSyntech, [...];

[100] The Petitioner also attacks the sale process, alleging that the five-business day deadline to submit a bid was exceptionally and needlessly short.[135]

[101] The Petitioner will have two difficulties with these arguments: (1) although the Petitioner refers to the decision to not file a proposal and instead sell the core assets as the Respondents' decision, the steps were taken by PwC after the Respondents resigned on May 12, 2010, and (2) the steps taken by PwC were

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[135] Motion of the Petitioner, par. 2.91.

approved by another judge of the Superior Court after contestation by a number of parties, including certain shareholders who raised essentially the same arguments as the Petitioner is raising now. The Court must consider these difficulties before authorizing a class action.

[102] Since the Respondents resigned as directors on May 12, 2010 and PwC was acting as trustee and interim receiver for BioSyntech as of May 13, 2010, any fault pertaining to the liquidation of the assets or the eventual bankruptcy cannot in principle be attributed to the Respondents as directors.

[103] The Respondents can only be responsible for the steps taken after their resignation as directors if it is alleged and might be shown that (1) PwC had no choice but to take the steps that it did because of the way that the Respondents had left matters, or (2) the Respondents somehow continued to influence matters beyond their resignations.

[104] There is no allegation of the Respondents exercising any influence on PwC. The Petitioner attempts to link the Respondents to the decisions taken by PwC by alleging that the one-day delay between the filing of the notice of intention on May 12, 2010 and the initiation of the sale process by PwC on May 13, 2010 shows that there was never any intention to make a proposal nor to ensure the survival of the company.[136]

[105] This allegation seeks to link the Respondents' intentions and PwC's acts, but it is very weak. There is no evidence that the sale process was pre-ordained.

[106] Finally, each of the steps taken by PwC was approved by the Court. In particular, and although he expressed concern about the speed with which the assets were being sold, Justice Auclair authorized the sale to Piramal:

> [29] Le Tribunal rappelle que n'eût été des circonstances exceptionnelles du présent dossier, il en aurait peut-être conclu autrement vu le court délai alloué aux futurs offrants pour examiner la situation.
>
> [30] Le Tribunal résume les circonstances exceptionnelles comme suit :
>
> 30.1. Absence de revenu des débitrices;
>
> 30.2. Longue période de démarchage sérieuse, précise et documentée avant le dépôt de l'avis d'intention, et ce, auprès de 102 entreprises à travers le monde;
>
> 30.3. Consentement par la presque totalité des créanciers garantis et ordinaires, les détenteurs de débentures recevant moins que 15 % de leur mise de fonds;
>
> 30.4. Les essais cliniques seront terminés au mieux dans trois mois puisqu'il reste encore du travail d'analyse, de compilation et des tests à effectuer;

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[136] Motion of the Petitioner, par. 2.90.

> 30.5. L'imminence de l'échéance de la dette de 17 M$ puisque cette somme est due le 30 juin 2010;
>
> 30.6. Les débitrices sont clairement insolvables, il n'y a pas d'encaisse et un déficit important du passif sur l'actif;
>
> 30.7. ProQuest est actionnaire à la hauteur de 14 % et Piramal à 7 % et les deux avaient des représentants à titre d'administrateurs au conseil d'administration;
>
> 30.8. M. Selmani a été appelé à formuler une offre.
>
> [31] En conséquence, le Tribunal conclut que l'appel d'offres répond aux critères de la jurisprudence et que la sollicitation était équitable et transparente.[137]

[107] Justice Dufresne of the Court of Appeal found that the shareholders who appealed from Justice Auclair's judgment had not established any error or significant weakness in the judgment.[138]

[108] Authorizing a class action that challenged the sale process would involve allowing a collateral attack on the decision made by another judge of the Superior Court in 2010. The Court will not allow the Petitioner to relitigate the issues relating to the sale process through this class action.[139]

[109] In its written and oral argument, the Petitioner suggests that the bankruptcy could have been postponed until later in 2010 or 2011 because there was no pressure from the creditors and the creditors were exposed to very little risk.[140] This is a new argument, although it is hinted at in paragraph 2.96 of the Motion.

[110] The evidence does not support this argument. In its report to the Court dated May 28, 2010, PwC concluded:

> 12. As a result of Biosyntech's cash depletion and inability to raise capital to fund ongoing operations and to repay maturing debt due on June 30, 2010, the Company's alternatives were limited and led to the filing of the Notices.[141]

[111] Further, PwC disclosed that the final pivotal trial results were not expected until September 2010.[142] The combination of that delay and the cash situation appeared to make the filing inevitable. Justice Auclair authorized the sale on the basis that BioSyntech had no cash and was clearly insolvent, that a further

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137 Exhibit P-13, par. 29-31.
138 Exhibit C-9, par. 13-16.
139 See *Wilson* v. *The Queen*, [1983] 2 S.C.R. 594, p. 599-600; *Toronto (City)* v. *C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, par. 37; *Garland* v. *Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, par. 71; *Centre Marcel-Boivin inc.* c. *Société immobilière du Québec*, 2006 QCCS 5072 (confirmed on appeal, 2007 QCCA 749), par. 19; *Reliance Power Equipment Ltd.* c. *Pointe-Claire (Ville de)* (1999), AZ-99021615 (C.S.) (confirmed on appeal, [2002] R.J.Q. 2317 (C.A.)), p. 54-57.
140 Petitioner's Plan of Argument, par. 134.
141 Exhibit P-34, par. 12.
142 Exhibit P-34, p. 3.

$17,000,000 coming due on June 30, 2010, and that the clinical trials required at least another three months.[143]

[112] In any event, Jeanne Bertonis, the Chief Executive Officer of BioSyntech at the time of the filing, testified before Justice Auclair that the potential investors had been shown positive results for the first 40 patients during the PwC M&A process, and that the 80 patient results would not have changed their level of interest. As a result, the idea that it was important to keep the company alive until the final results became available in September 2010 and that all would have been well is not supported by the evidence.

[113] The Petitioner also alleged in oral argument that the bankruptcy was a scheme designed to squeeze out the small individual shareholders for the benefit of the major institutional shareholders. There is a logical flaw in this argument. There were five major institutional shareholders. Only one of them bought the assets. The other four lost their investments, just like the small individual shareholders. It does not make sense that they would have gone along with this scheme to their detriment and for the sole benefit of Piramal. The Petitioner did not allege a side deal whereby Piramal would share the benefit with the other four shareholders. The fact that ProQuest tried to outbid Piramal at the hearing shows that ProQuest was not a party to any such deal. This argument is dismissed.

[114] As a result, the evidence does not support a finding that the Respondents committed a fault in authorizing the filing of a notice of intention on May 12, 2010, and the subsequent acts cannot be attributed to the Respondents.

Business Judgment Rule

[115] The Respondents invoke as a defence the "business judgment rule". They argue at this stage that the Petitioner does not allege any facts that demonstrate an arguable case that a Court should set aside the business judgment rule.

[116] While it is possible that the court hearing the merits of this dispute would conclude that the Respondents exercised their business judgment reasonably in making the decisions which are now attacked, and therefore should not be held liable, that is clearly a matter which should be left for the merits. It would not be appropriate for the Court to dismiss the Motion on the basis of the business judgment rule.

Conclusion

[117] The Court concludes that the allegations of fault by the Respondents are, at best, weak: some arguments were not specifically alleged, the evidence is not clear on some arguments and contradicts others, and some of the arguments are somewhat speculative.

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[143] Exhibit P-13, par. 23, 26, 30.

[118] However, some of the alleged faults may meet the test of an arguable case. For that reason, the Court is not prepared to dismiss the Motion on the basis of the sufficiency of the allegations of fault.

2. The Shareholders' Right to sue the Directors

[119] The Petitioner alleges that the Respondents breached their duty of care as provided under Section 122(1)(b) *CBCA:*

> **Section 122. (1)** Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> [...]
>
> *(b)* exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[120] The Petitioner also alleges that this obligation under the *CBCA* is supplemented by the duty of care provided under Articles 322 and 1457 *CCQ*.

[121] In determining whether the Respondents breached their duty of care to the shareholders under Section 122(1)(b) *CBCA*, the Court must first determine whether the directors owe a duty under Section 122(1)(b) *CBCA* to the shareholders. An obligation does not exist in a vacuum. It exists between persons, who are the creditor and the debtor of the obligation. Article 1371 *CCQ* provides as follows:

> **Art 1371.** It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.
>
> (Emphasis added)

[122] In *Les Obligations*, Jean-Louis Baudouin provides the following explanation of the legal relationship and elucidates the link between the rights and obligations that exist therein:

> [L'obligation] consiste en un lien de droit, existant entre deux ou plusieurs personnes, par lequel l'une d'elles, appelée débiteur, est tenue envers une autre, appelée créancier, d'exécuter une prestation consistant à faire ou à ne pas faire quelque chose, sous peine d'une contrainte juridique. [...] L'obligation possède deux faces. D'un côté, elle constitue un lien auquel est assujetti le débiteur; de l'autre côté, c'est un droit, « la créance », dont est titulaire le créancier.[144]
>
> (Emphasis added, references omitted)

[123] In the context of Section 122(1)(b) *CBCA*, the traditional view is that the corporation is the sole creditor of the director's obligations:

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[144] Jean-Louis BAUDOUIN, Pierre-Gabriel JOBIN and Nathalie VÉZINA, *Les Obligations*, 4th ed., Cowansville, Éditions Yvon Blais, 2013, no. 18, p. 27.

> Les administrateurs [...] ne sont pas les mandataires des actionnaires. C'est envers la société, personne distincte, qu'ils ont des devoirs et une responsabilité. La conséquence de ceci est que les actionnaires ne peuvent, règle générale, se prévaloir de la responsabilité contractuelle ou extracontractuelle des administrateurs envers la société pour les poursuivre directement; ils ne peuvent le faire qu' « obliquement » au nom de la société.[145]
>
> (Emphasis added, references omitted)

[124] The consequence is that, under the traditional view, the shareholders have no right to sue for a breach of Section 122(1)(b) *CBCA*. Instead, the recourse for the shareholder is a derivative action in the name of the corporation, or, in appropriate cases, an oppression remedy.

[125] However, two recent Supreme Court of Canada decisions appear to expand the range of parties who are vested with a right flowing from Section 122(1)(b) *CBCA*.

[126] In *Peoples Department Stores Inc. (Trustee of)* v. *Wise*, the Supreme Court of Canada stated:

> [56] [...] Three elements of art. 1457 C.C.Q. are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). It is clear that directors and officers come within the expression "every person". It is equally clear that the word "another" can include the creditors. The reach of art 1457 C.C.Q. is broad and it has been given an open and inclusive meaning. [...]
>
> [57] This interpretation can be harmoniously integrated with the wording of the CBCA. Indeed, unlike the statement of the fiduciary duty in s. 122(1)(*a*) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(*b*) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising their powers and discharging their duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. This result is clearly consistent with the civil law interpretation of the word "another". Therefore, if breach of the standard of care, causation and damages are established, creditors can resort to art. 1457 to have their rights vindicated. The only issue thus remaining is the determination of the "rules of conduct" likely to trigger extracontractual liability. On this issue, art. 1457 is explicit.[146]

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[145] Paul MARTEL, *La société par actions au Québec*, Ottawa, Éditions Wilson & Lafleur, Martel ltée, 2015, no. 24-228, p. 24-80.

[146] 2004 SCC 68, [2004] 3 S.C.R. 461, par. 56-57.

(Emphasis added)

[127] The Supreme Court took this reasoning one step further in *BCE Inc.* v. *1976 Debentureholders*, where it stated:

> [44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores.* Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.[147]

(Emphasis added)

[128] In these decisions, the Supreme Court effectively held that Section 122(1) *CBCA* defines the standard of behaviour of the director towards the creditors (*Peoples*) or towards the other stakeholders (*BCE*) and that the creditors or other stakeholders can invoke the breach of the standard of behaviour under Section 122(1)(b) as the basis for a claim under Article 1457 *CCQ*. [148] In the present case, the Petitioner has invoked Articles 322 and 1457 *CCQ*.

[129] The authors in Québec are divided on how to interpret *Peoples* and *BCE*.

[130]Paul Martel, as set out above, supports the traditional view that the directors owe duties only to the corporation and he expresses "de sérieuses difficultés" with the *Peoples* decision which he suggests is "non conforme aux principes fondamentaux du droit corporatif":

> Avec déférence, nous éprouvons de sérieuses difficultés à accepter cette position, qui nous apparait comme non conforme aux principes fondamentaux du droit corporatif. La Cour suprême nous parait en effet avoir négligé le fait que le devoir de prudence et de diligence des administrateurs, tout comme celui d'honnêteté et de bonne foi, a un bénéficiaire en droit civil québécois : la personne morale. En effet, les administrateurs sont considérés comme ses mandataires en vertu de l'article 321 du *Code civil du Québec*, et l'article 2138 de ce Code impose ces deux séries de devoirs aux mandataires, dans la section « Des obligations du mandataire envers le mandant ». Ces devoirs sont de nature contractuelle, et non extracontractuelle : ils s'adressent au mandant qu'est la personne morale, avec pour conséquence qu'elle seule peut s'en prévaloir ou encore un actionnaire ou un créancier en son nom, par action dérivée. Si les créanciers (ou les actionnaires, qui entrent

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[147] 2008 SCC 69, [2008] 3 S.C.R. 560, par. 44.

[148] *Peoples, supra* note 146, par. 29 (citing art 300 *CCQ* and *Interpretation Act*, R.S.C. 1985, c. I-21, s. 8.1).

> autant qu'eux sous le vocable « autrui » de l'article 1457) pouvaient réclamer des dommages directs aux administrateurs pour leurs manquements à leur devoir de prudence et de diligence, les administrateurs seraient tenus à une double ou triple indemnisation : celle de la personne morale et celle de ses créanciers et actionnaires.[149]
>
> (Emphasis added, references omitted)

[131] He suggests that this excerpt from the *Peoples* decision can be treated as *obiter* given that the recourse at issue in that decision was not brought by a creditor but instead was brought by the corporation in its own name.[150]

[132] Stéphane Rousseau also considers that *Peoples* "reverses a fundamental principle of corporate law" whereby "directors are the mandataries (or agents) of the corporation and owe their duties to the latter, their mandatory (or principal)."[151] However, he accepts that the effect of the *Peoples* decision is to create a personal right of action for every shareholder. He suggests that this will have little impact because the derivative action and the oppression remedy already give the shareholder a remedy.

[133] However, Rousseau recognizes the same issue as Martel: giving a right of action to the shareholders and the creditors creates a risk of double or triple indemnification. He suggests that the solution lies in the courts being vigilant in applying the requirement that damages be direct:

> This interpretation may raise fears that the liability of directors toward creditors and other stakeholders will expand. However, it is important to emphasize that the liability of directors will not be triggered only by the proof of a fault. Recall that creditors will have to establish that they have suffered damage as a result of this fault. They will have to prove that their damage is direct, *i.e.* that their damage is not the consequence of the damage caused to the primary victim, the corporation. The importance of this condition has been recognized in corporate law since *Burland v. Earle*. Admittedly, this distinction is lost in the *Peoples* decision. The Supreme Court seems to suggest that the Wise brothers would have had to indemnify the creditors if they had been found to have breached their duty of care when adopting the procurement policy. This opinion is unfortunate. The direct damage requirement serves to prevent double recovery. Where the directors indemnify the corporation, the creditors and other stakeholders benefit in the same proportion as they were injured. Furthermore, this requirement secures "the *pari passu* principle that all creditors should be treated equally upon the insolvency of the corporation". In effect, "[i]f each creditor were able to sue for his own loss, then those rules aimed at achieving some measure of justice and certainty between creditors would be effectively by-passed". To avoid these negative consequences, courts applying the

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[149] Martel, *supra* note 145, no. 24-283, p. 24-103.
[150] *Ibid*, no. 24-286, p. 24-104.
[151] Stéphane ROUSSEAU, "Directors' Duty of Care after *Peoples* : Would it be Wise to Start Worrying about Liability?" (2005), 41 Can Bus. L.J. 223 at 225.

> *Peoples* decision will have to be vigilant to limit liability claims against directors to direct damages.[152]
>
> (Emphasis added, references omitted)

[134] The issue of the directness of the damages claimed by the Petitioner will be considered in the next section.

[135] With respect to the right of action of the shareholders against the directors, the better view appears to be that the shareholders do now have a right of action against the directors.

3. The directness of the damages

[136] The Petitioner alleges that the negligence of the directors deprived the shareholders of their ability to share in the potential profits of BioSyntech, thereby entitling them to compensatory damages.

[137] Assuming that the facts alleged by the Petitioner are true, the conclusions sought by the Petitioner must appear to be justified according to the requirements for extra-contractual liability as defined in the *CCQ*.

[138] Article 1457 *CCQ* provides as follows:

> **Art 1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.
>
> (Emphasis added)

[139] Article 1607 *CCQ* contains the test for determining whether or not an individual's fault is a cause of an injury for which damages may be recovered:

> **Art 1607.** The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor's default.
>
> (Emphasis added)

[140] Damages that are indirect or "par ricochet" are not generally recoverable in extra-contractual liability. As Jean-Louis Baudouin explains:

> Comme on le sait, la jurisprudence respecte le critère direct du dommage édicté par le législateur. Le problème de déterminer ce que constitue un dommage « direct » est complexe et, là encore, il serait présomptueux de vouloir généraliser. Toutefois, une tendance se dégage. Les tribunaux ne

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[152] *Ibid*, p. 230.

> reconnaissent pas le préjudice qui puise sa source immédiate non dans la faute elle-même, mais dans un autre préjudice déjà causé par la faute. En d'autres termes, est indirect le dommage issu du dommage, le dommage par ricochet, le dommage au « second degré ».[153]
>
> (Emphasis added)

[141] The application of this principle in the corporate law context is clear. When the directors cause damage to the corporation, shareholders cannot claim against directors for the resulting loss of share value because this loss is an indirect result of the injury directly caused to the corporation. In those circumstances, the recourse belongs to the corporation and not to the shareholders. If the corporation sues, the shareholders will benefit indirectly from any recovery. If the corporation fails to pursue its recourse, the shareholders can bring a derivative action in the name of the corporation.[154] If the corporation is bankrupt, the trustee in bankruptcy can bring the action.[155] If the trustee fails to act, the creditors can take the proceedings.[156]

[142] In the leading case of *Houle* v. *Canadian National Bank*, L'Heureux-Dubé J. wrote:

> Quebec courts have been extremely reluctant to allow shareholders' actions where the damage is suffered by the corporation. In the leading case of *Silverman v. Heaps*, [1967] C.S. 536, Mayrand J. so states, at p. 539:
>
> > The shareholder of a company has no action against the person who causes damage to the company. One cannot limit his responsibility by investing in a company and still consider as a personal damage any damage caused to such company; the shareholder's damage is indirect.
>
> This is a clearly established principle and, I conclude, the correct position concerning shareholders' recourses.
>
> The consequences of any other position would not be logical. There would be no value to the corporate structure if whoever does business with a corporation would, at the same time, become liable not only to the company but also to every shareholder for any damage that may be caused to the company. Wilson J. in *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, so says, at p. 11:

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[153] Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile – Volume 1 : Principes généraux*, Cowansville, Éditions Yvon Blais, 2014, no. 1-684, p. 721. See also *Benakezouh* c. *Les immeubles Henry Ho*, 2003 CanLII 41798 (QC CA), par. 77; *Société d'habitation du Québec* c. *Leduc*, 2008 QCCA 2065, par. 33-34.

[154] In this case, the derivative action would be brought under Sections 239 and 240 CBCA.

[155] See, for example, *Banque de Montréal* c. *TMI-Éducaction.com inc. (Syndic de)*, 2014 QCCA 1431, where the trustee in bankruptcy sued the corporation's bank for abuse of right.

[156] Section 38 BIA. See *Ozesezginer* v. *Royal Bank of Canada*, 1990 CanLII 5855 (AB QB).

> Having chosen to receive the benefits of incorporation, he [Mr. Kosmopoulos] should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.[157]
>
> (Emphasis added)

[143] The Courts have consistently dismissed actions by shareholders in which the shareholders claim the loss in value of their shares resulting from damage caused to the corporation. In *Bérubé* c. *Gauthier*, St-Julien J. of the Superior Court concluded:

> [16] En droit, rien n'est prévu pour l'actionnaire d'une compagnie et pour un recours contre le tiers qui cause un dommage à la compagnie.
>
> [17] Il en est de même pour les dommages indirects, telle perte de valeur des actions et possibilité de recevoir des dividendes.[158]

[144] Similarly, Mayrand J. of the Superior Court, discussing the aspect of directness with respect to shareholders claiming for injury caused to the company, stated in *Leblanc* c. *Capital d'Amérique CDPQ inc.*:

> [70] Mais il y a plus : le recours, si tant est qu'il y en ait un, n'appartient pas aux actionnaires de la société, mais à [la corporation].
>
> [71] Les actionnaires ne peuvent invoquer ni la responsabilité contractuelle ni la responsabilité extracontractuelle d'un actionnaire qui a nommé un administrateur, de manière directe. Ils ne peuvent le faire « qu'obliquement » au nom de la société lésée.
>
> [72] Quant aux fautes de gestion, d'information ou d'interférence pour la sauver de la débâcle, même si elles étaient prouvées, cela ne donne aucun droit aux actionnaires de poursuive CDPQ. Bien que le préjudice « causé à la compagnie » affecte la valeur des actions détenues par les actionnaires, ce préjudice est trop indirect pour justifier un recours de leur part.
>
> [73] Dans l'arrêt *Lalumière* c. *Moquin*, la Cour d'appel du Québec reprend les énoncés de l'arrêt *Houle* c. *Banque Nationale du Canada*, voulant que les actionnaires n'aient pas de recours contre celui qui a causé des dommages à la compagnie.[159]
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> (Emphasis added; References omitted)

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[157] [1990] 3 S.C.R. 122, p. 178-179.

[158] 2008 QCCS 2909, par. 16-17.

[159] 2008 QCCS 3188, par. 70-73. See also *Crevier* c. *Paquin*, [1975] C.S. 260, p. 263-264; *Les entreprises A&C Godbout* c. *Taillefer*, (1997), AZ-97021694 (C.S.), p. 19; *Cartier* c. *Tessier* (1999), AZ-99021670 (C.S.), p. 18-22; *Tardif* c. *Huot* (2001), AZ-50082813 (C.S.), par. 110-112; *Pellin* c. *Bedco* (2002), AZ-50154142 (C.S.), par. 44-51; *Michaud* c. *Le Groupe Vidéotron ltée* (2003), AZ-50207349 (C.A.), par. 66; and *St-Germain* c. *St-Germain*, 2012 QCCS 7148, par. 52.

[145] This principle, known as the rule in *Foss* v. *Harbottle*[160] in common law jurisdictions, is of fundamental importance in the corporate context. As stated by Martel and Rousseau, in the absence of such a principle, the directors would be exposed to double or triple indemnification: they would be sued by the corporation for the loss that it suffered, then they would be sued by the shareholders for the loss in value of their shares and they would be sued by the creditors that the corporation was unable to pay.[161] Instead, the directors should be sued by the corporation, and the proceeds that the corporation recovers will enable it to pay its creditors with the excess going to the shareholders. If the corporation does not exercise its right to sue the directors, the shareholders can sue the directors in a derivative action. If the shareholders are allowed to sue directly for damages of this nature, they effectively jump the queue and recover amounts which should have gone to the creditors:

> [76] Le requérant [a shareholder] ne peut, de manière détournée, s'accaparer une réclamation qui, si elle existe, appartient à CSII [the corporation], au bénéfice de ses créanciers.[162]

[146] In the present case, it should also be noted that the Petitioner is not proposing to represent all of the shareholders. It defines the class as excluding the large institutional shareholders who hold some 40% of the shares in BioSyntech. The result is that the class not only passes in front of the creditors, but it also passes in front of the 40% of the shareholders excluded from the class.

[147] There are circumstances in which the shareholders suffer a direct loss as a result of the acts of the directors, and in those circumstances the shareholders have a claim in extra-contractual liability for breach of the duty of care.

[148] In *Houle*, for example, the shareholders were successful in their suit against the bank, on the basis that they had suffered a direct personal loss distinct from and independent of the loss suffered by the corporation:

> In the present appeal, as before the Superior Court, appellant relied on the decision of the Supreme Court of Canada in *Houle* v. *Canadian National Bank* (*supra*), where damages were, in fact, awarded to the shareholders of a corporation by reason of the abusive manner in which the bank had recalled the corporation's loan. But in that case, the shareholders were able to prove a direct, personal loss, distinct from and independent of the loss suffered by the corporation, which resulted from the acts of the bank. The shareholders had been in the process of negotiating a sale of their shares when the loan was precipitously recalled

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[160] (1843), 2 Hare 460, 67 E.R. 189. See also *Ozesezginer, supra* note 156; *Hercules Management Ltd.* v. *Ernst & Young*, [1997] 2 S.C.R. 165, par. 58-59; *Robak Industries Ltd.* v. *Gardner*, 2007 BCCA 61, par. 34-38; and *Everest Canadian Properties Ltd.* v. *CIBC World Markets Inc.*, 2008 BCCA 276, par. 7-11.

[161] Martel, *supra* note 145, no. 24-283; Rousseau, *supra* note 151, p. 230. See also *Lalumière* c. *Moquin*, [1995] R.D.J. 440, p. 446.

[162] *Leblanc*, *supra* note 159, par. 76. See also *Lalumière*, *supra* note 161, p. 446; *Robak Industries*, *supra* note 160, par. 37.

> from the corporation, and this had a drastic effect on the price they received for their shares. The Supreme Court held that the bank was delictually liable to the shareholders by reason of the personal loss they had suffered.
>
> No such direct, personal and independent damage to the partners is alleged in this case. On the contrary, from the allegations and the conclusions of appellant's motion, it seems evident that what appellant is seeking to recover from the auditors is the loss suffered by each of the partnerships so that this can be distributed among the partners.[163]
>
> (Emphasis added)

[149] As a further example, the shareholders have a direct action against the directors if they buy shares based on the misrepresentations of the directors.[164] In those circumstances, the loss is suffered by the shareholders who bought shares and not by the corporation.

[150] However, in the present circumstances, the Petitioner claims that the shareholders were deprived of the right to share in the potential profits of BioSyntech.[165] This alleged injury to the shareholders is a loss in share value. All of the faults alleged by the Petitioner would cause damage directly to BioSyntech, and only indirectly to the shareholders in that the damage suffered by the corporation had a negative effect on the value of their shares. There is no allegation of any direct damage suffered by the shareholders that would be distinct from and independent of the loss allegedly suffered by the corporation. There is no allegation that the shareholders made an investment decision to buy or sell shares based on any fault of the Respondents.

[151] It is interesting to note that when the shareholders sought to intervene to block the sale of the assets to Piramal, they described their interest as follows:

> Les requérants ont intérêt à intervenir dans la présente et ce en vue de demander à la présente Cour d'ordonner que soient prises des mesures autant dans l'intérêt des créanciers de la Compagnie ainsi que celui de la Compagnie et par ricochet celui de ses actionnaires.[166]
>
> (Emphasis added)

This is an accurate description of the Petitioner's claim in the present case.

[152] As a result, there exists no possible claim in law against the Respondents and accordingly the legal syllogism proposed by the Petitioner fails. This is sufficient to justify the dismissal of the Motion.[167]

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163 *Lalumière*, *supra* note 161, p. 446-447.
164 *Paris* c. *Lafrance*, 2011 QCCS 4619.
165 Motion of the Petitioner, par. 2.106.
166 Exhibit C-13, par. 13.
167 *Lalumière*, *supra* note 161, p. 448; *Leblanc*, *supra* note 159, par. 70-76.

CONCLUSION

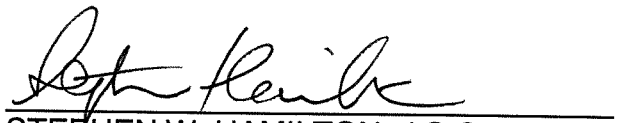
[153] The shareholders cannot, in law, recover the loss of share value from the directors, even if the directors were negligent. As a result, the class action proposed by the Petitioner cannot succeed. The Petitioner has failed to demonstrate a *prima facie* right of action against the Respondents pursuant to Article 1003(b) *CCP*.

[154] The Petitioner's Motion is accordingly dismissed without costs.

FOR THESE REASONS, THE COURT:

[155] **DISMISSES** the Motion submitted by the Petitioner;

[156] **WITHOUT COSTS.**



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Dates of hearing: November 26-27, 2014