COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025499-153
(500-06-000654-133)

DATE: November 30, 2016

CORAM: THE HONOURABLE JULIE DUTIL, J.A.
MARK SCHRAGER, J.A.
ÉTIENNE PARENT, J.A.

GROUPE D'ACTION D'INVESTISSEURS DANS BIOSYNTECH
APPELLANT - Petitioner
VINCENT BLAIS
APPELLANT – Designated Member
v.

JOYCE TSANG
KAREN HONG
ERIC LINSLEY
SOMESH SHARMA
JEANNE BERTONIS
RUDY HUBER
ANDRÉ ARCHIMBAUD
JEAN-PIERRE DESMARAIS
RESPONDENTS - Respondents

JUDGMENT

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[1] On appeal from a judgment of the Superior Court, District of Montreal (the Honourable Justice Stephen W. Hamilton), rendered on June 30, 2015, dismissing Appellants' motion seeking authorization to institute a class action.

[2] For the reasons of Justice Schrager, with which Justices Dutil and Parent agree, **THE COURT**:

[3] **DISMISSES** the appeal with legal costs.

JULIE DUTIL, J.A.

MARK SCHRAGER, J.A.

ÉTIENNE PARENT, J.A.

Mtre Andrew Cleland
Mtre Yves Lauzon
Mtre Anne-Julie Asselin
TRUDEL JOHNSTON & LESPÉRANCE
For Appellants

Mtre Jean Lortie
Mtre Jean-Philippe Mathieu
McCARTHY TÉTRAULT, LLP
For Respondents

Date of hearing: September 27, 2016

REASONS OF SCHRAGER, J.A.

INTRODUCTION

[4] This is an appeal from the judgment of the Superior Court, District of Montreal (the Honourable Justice Stephen W. Hamilton), rendered on June 30, 2015, dismissing Appellants' motion seeking authorization to institute a class action.

[5] Appellants are the proposed representative and designated member, respectively, of a group of shareholders of BioSyntech Inc. ("BioSyntech") who lost the value of their shares when BioSyntech went bankrupt. They blamed the bankruptcy on the Respondents, the former directors of BioSyntech. The judge's refusal to authorize the class action was based on his determination that the damage allegedly suffered by the shareholders was indirect and, thus, not actionable as a matter of law against the directors.

[6] For the reasons which follow, I agree with the judgment and I will propose that the appeal be dismissed with legal costs.

FACTS

[7] The essential facts are not contested and indeed we are dealing with the facts as alleged, assuming them to be true because of the nature of the class action authorization process.[1]

[8] BioSyntech was a bio-technology start-up company continued under the *Canada Business Corporations Act*,[2] whose shares traded publicly. While some of the products that it was developing appeared to have promise, the company operated at a loss. Its accumulated deficit increased from approximately 24 million in 2004 to 77 million in 2009, so that:

> [15] By the summer of 2008, the Board of Directors identified the urgency of the company's financial situation. 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.[3]

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1 *Infineon Technologies AG v. Option consommateurs*, [2013] 3 S.C.R. 600, 2013 SCC 59, paras. 67-68 [*Infineon*].

2 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*C.B.C.A.*].

3 Judgment appealed from (Hamilton, J.), June 30, 2015, 2015 QCCS 3265, para. 15.

[9] In fact, between 2008 and 2010, the board of directors addressed both expenditures and revenues. It raised additional financing and negotiated extended maturities of existing loans and engaged PriceWaterhouseCoopers ("PWC") to investigate possible merger and acquisition transactions to strengthen the balance sheet.

[10] Unfortunately, BioSyntech depleted its cash by May 2010, one month before the forecasted date for the completion of clinical trials that could possibly precede the bringing of a product to market. Thus, on May 12, 2010, the board of directors authorized the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*.[4] PWC was named trustee and interim receiver. All the members of the board resigned. BioSyntech's assets were sold by the interim receiver for 4.5 million dollars shortly thereafter to one of the companies identified in the merger and acquisition process. A group constituting approximately 12.7 % of the shareholdings tried, unsuccessfully, to intervene before the Superior Court which had been petitioned to approve the sale in order to block the disposition of the assets and oblige BioSyntech to seek additional investment capital. The evidence before the Superior Court indicated, *inter alia*, that the cash available to BioSyntech was insufficient to continue operations and that the previous efforts of PWC had yielded a fair purchase price. Given these findings, the Superior Court dismissed the intervention. A judge of this Court refused to suspend the provisional execution and accordingly the assets were sold. The sale proceeds were insufficient to repay accumulated debt of approximately 38 million dollars including debentures which were coming due on June 30, 2010. Needless to say, the liquidation process generated insufficient proceeds to pay creditors let alone leaving any surplus to be distributed to the shareholders.

[11] The present proceedings were instituted on May 13, 2013. Appellants seek authorization to institute proceedings against the former directors of BioSyntech on behalf of the following class:

> ... 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.

The judge remarked that this description effectively excluded from the proposed class the principal institutional shareholders who represent 40 % of the share-capital. Such exclusion is not in issue on appeal.

[12] Appellants allege that the following faults committed by the directors gave rise to the bankruptcy and asset sale:

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4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*B.I.A.*].

i) Failing to disclose results of a pivotal clinic trial;

ii) Failing to reduce the excessive rate at which BioSyntech's cash was being depleted (the "burn rate");

iii) Failing to diligently pursue opportunities to obtain additional financing; and

iv) Filing a notice of intention under the *Bankruptcy and Insolvency Act* ("*B.I.A.*") and sending BioSyntech into an avoidable bankruptcy.[5]

[13] The Respondents conceded in first instance that all the conditions precedent to the authorization of a class action as provided in Article 1003 of the former *Code of Civil Procedure* ("f.*C.C.P.*") were satisfied except for sub-paragraph b) of Article 1003 which requires that "the facts alleged seem to justify the conclusions sought". These provisions are unchanged in the corresponding Article 575(2) n.*C.C.P.*

JUDGMENT IN FIRST INSTANCE

[14] Although the judge found that the legal syllogism for an extra-contractual action against the directors was alleged (i.e. fault, damage and causal link) he concluded that the damage alleged was indirect and as such the test foreseen by Article 1003 b) f.*C.C.P.* had not been met.

[15] The judge concluded that some of the alleged faults might be sufficient to satisfy Article 1003 b) f.*C.C.P.* (the failure to disclose the results of a pivotal clinical trial) and, as such, and though unimpressed with the other allegations of fault (qualifying them as weak), he was not prepared to dismiss the authorization motion on the basis that the allegations of fault were insufficient. These conclusions are not in issue in appeal.

[16] After noting the controversy on whether directors owed the duty of care foreseen by Section 122 b) *C.B.C.A.* to shareholders, giving rise to a direct right of action against directors, the judge was willing to recognize such direct right. Consequently, this point is not really an issue in appeal though it is argued by Appellants. Accordingly, I will address the issue later in these reasons in relation to the judge's reasons to refuse authorization and the true point of the appeal which is the directness of the damage alleged.

ISSUE

[17] The issue in appeal, properly defined, is whether the judge erred in law in deciding that the damage alleged in this case, summarized as the loss in share value, was indirect and therefore could not be claimed from the Respondent directors.

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5 Paragraph 37 of the judgment appealed from.

ANALYSIS

[18] The judge certainly directed himself correctly to the general principles guiding the authorization of a class action. He noted that the authorization stage is a filtering process to evaluate the satisfaction of the four prerequisites in Article 1003 f.*C.C.P.* and that the threshold is low since the petitioner need only demonstrate a *prima facie* or arguable case. The judge is to presume true the allegations and evidence filed in support of the motion seeking authorization of the class action.[6]

Direct action

[19] I examine first the right of shareholders to sue directors directly arising from an alleged breach by those directors of their duty of care set forth in Section 122 b) *C.B.C.A.* which provides that:

122 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall	**122** (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir :
...	[...]
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.	b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

Is that duty of care owed by directors directly to shareholders?

[20] Appellants rely heavily on the judgments of the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise*[7] and the matter of *BCE Inc. v. 1976 Debentureholders*.[8]

[21] In both cases, the Supreme Court of Canada acknowledged, in *obiter* that the duty of directors in virtue of Section 122 b) *C.B.C.A.* is not solely due to the corporation "and thus may be the basis for liability to other stakeholders".[9] The "other stakeholders" in *Peoples* were creditors of the corporation who argued that credit policies set in place by the directors had caused them harm. In *BCE*, the "other stakeholders" were debenture holders who instituted an oppression action arising from the treatment of their entitlements by the company in a corporate reorganization. I note that the debenture creditors were "security holders" as defined in the *C.B.C.A.* and that the definition of

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6 *Infineon*, *supra*, note 1, paras. 67-68; *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 3, 2014 SCC 1, paras. 34-35.

7 *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68 [*Peoples*].

8 *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, 2008 SCC 69 [*BCE*].

9 *BCE*, *supra*, note 8, para. 44; see also *Peoples*, *supra*, note 7, para. 57.

"security" in the *C.B.C.A.* includes shares and debt instruments.[10] This brief review indicates that the facts of the matters before the Supreme Court did not strictly require consideration of whether shareholders are included in "stakeholders" to whom the directors owed their duty of care under Section 122 b) *C.B.C.A*. The judge recognized that the debate is ongoing as to whether a direct right of action is open to shareholders against directors[11] but he was willing to accept that shareholders do enjoy the possibility of a direct action against the directors for the purpose of the authorization process. Accordingly, the Appellants' position in its factum that the judge interpreted *Peoples* too restrictively is incorrect, or at least incomplete.

Direct damage

[22] The *ratio* of the judge's decision to refuse authorization was that the alleged faults of the directors may have given rise to damage suffered by BioSyntech, but the loss in share value suffered by the shareholders was an indirect consequence of this injury. Since, the *Civil Code of Quebec* ("*C.C.Q.*") only permits recovery of damage which is the direct consequence of a harmful act (Article 1607 *C.C.Q.*), this indirect damage was not actionable as proposed by Appellants. Accordingly, the judge concluded that the facts alleged did not justify the conclusion sought as required by Article 1003 b) f.*C.C.P.* and he dismissed the authorization motion. This is the gravamen of the appeal.

[23] Indirect damage is not that caused by the act of the wrongdoer, but rather is caused by the damage which the wrongdoer caused.[12] In this case, the damages claimed for the loss of share value were not caused directly by the directors alleged breach of their duty of care by not obtaining, for example, adequate financing for BioSyntech. That alleged fault might (arguably) have caused (in whole or in part) the insolvency and inability of BioSyntech to pursue its business. It is the insolvency which caused the shares to lose their value so that such damage would be caused indirectly to the shareholders by the directors.

[24] Such distinction, at least in the corporate context, is hardly exclusive to Quebec civil law. The principle is known in Common Law jurisdictions as the rule in *Foss v. Harbottle*.[13] It is certainly recognized in Quebec[14] and was explained by Laforest, J. speaking for a unanimous bench of the Supreme Court in *Hercules Managements Ltd. v. Ernst & Young* :[15]

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10 Section 2 of *C.B.C.A.*

11 See for example, Paul Martel, *La société par actions au Québec : Les aspects juridiques*, vol. 1, Montreal, Wilson & Lafleur, 2016, pp. 24-102 to 24-108.1 [*Martel*].

12 Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8e ed., vol. 1, Cowansville, Yvon Blais, p. 721, no 1-684.

13 *Foss v. Harbottle*, (1843) 67 ER 189, (1843) 2 Hare 461.

14 *Martel*, *supra*, note 11, p. 24-103, no 24-283.

15 *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Lalumière v. Moquin*, 1995, R.D.J. 440 (QC CA), paras. 7-11; *Michaud v. Groupe Videotron Ltée*, 2003 CanLII 5258 (QC CA), para. 66.

> 59 The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal *in Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354, at p. 367, as follows:
>
> > The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.
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> To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

[25] Absent the rule in *Foss v. Harbottle*, shareholders could potentially sue where a company would also have a right of action against the same wrongdoer who would become liable to compensate both the shareholders and the company for their losses. If only the company sues then all its stakeholders benefit; the proceeds of the lawsuit are notionally used by the company to pay the creditors and any surplus enhances shareholder value. Without the rule, which is the scenario put forward by Appellants, the shareholders would jump the queue or the order of priority under the *B.I.A.* and be paid before creditors[16] for prejudice suffered by the company.

[26] *Peoples* and *BCE* did not change the rule in *Foss v. Harbottle* – they did not (and it was not necessary to) address the rule. Again, and at best, the only assistance to Appellants in *Peoples* and *BCE* is the recognition of the possibility that the Section 122 b) *C.B.C.A.* duty of care is owed by directors directly to shareholders. However, there is really nothing in either of the Supreme Court cases to suggest that a breach of the duty of care entitles shareholders to recover compensation from directors for indirect injury.

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[16] Contrary to Sections 136 and 140.1 *B.I.A.*

[27] Appellants produce no authority to rebut this. Indeed, the doctrinal articles cited by them, when read completely and properly, do not support their thesis.[17]

[28] Appellate decisions in Canada after *Peoples* and *BCE* also maintained that the rule in *Foss v. Harbottle* continues to apply. Thus, in *Roback v. Gardner*, the British-Columbia Court of Appeal, while recognizing that the shareholders could exercise a direct right of action against directors, dismissed the action since the damage claimed (loss of share value) stemmed from the company's injury. The shareholders alleged that the loss of share value was caused by a number of measures taken by the directors, including illegal transactions. The shareholders unsuccessfully appealed arguing that their loss was independent of the company's loss since the diminished share value resulted from the forces of the market in which those shares were traded and not strictly from harm suffered by the company. The British-Columbia Court of Appeal disagreed holding that the shareholders suffered a "reflective loss" or what civilians would call, indirect damage.

[29] The Newfoundland Court of Appeal came to similar conclusions in *Npv Management Limited v. Anthony.*[18]

[30] Appellants submit that *Foss v. Harbottle* establishes no more than a *prima facie* rule.[19] Whatever be the consequence of this statement, if true, does not alter the principle of Article 1607 *C.C.Q.* that damage be direct. It is not denied that shareholders can potentially suffer injury directly, independent from that suffered by the company. In *Houle v. Banque Canadienne Nationale*,[20] the shareholders successfully sued the company's banker for damage caused by the bank which abruptly and negligently called for repayment of the company's borrowings and realized under its security on the tangible assets. The Supreme Court pointed out that the bank was aware when it called the loan that the shareholders were in the midst of negotiations to sell their shares. In addition to its contractual obligations owed to the company, the bank owed a distinct legal obligation to the shareholders to act reasonably and more specifically not to prejudice the imminent sale of shares by exercising its contractual rights (i.e. demanding payment of the loan) in a negligent manner. The shareholders completed their sale but received far less for the shares than the price tabled at the time the bank demanded repayment of its loans. The bank was held liable for the difference as damages. Of interest for present purposes is that Madam Justice L'Heureux-Dubé was particularly careful in qualifying liability and damage:[21]

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17 Articles cited by Appellant: Wayne D. Gray, "A Solicitor's Perspective on *Peoples v. Wise*", (2004-2005) 41 Can. Bus. L.J. 184, p. 191; and Catherine Francis, "*Peoples Department Stores inc. v. Wise* : The Expended Scope of Directors' and Officers' Fiduciary Duties and Duties of Care", (2004-2005) 41 Can. Bus. L.J. 175.

18 *Npv Management Limited v. Anthony*, 2008 NLCA 7.

19 *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (C.A.), p. 1066.

20 *Houle v. Banque Canadienne Nationale*, [1990] 3 S.C.R. 122 [*Houle*].

21 *Id.*, p. 180.

> It is important to note that the respondents are not claiming damages as "ricochet" victims since no delictual liability arises out of the contract between the appellant bank and the company, but only a contractual one. It would offend both logic and law to sustain that, as victims, the respondents suffered here by the "ricochet" of a delictual fault.

Moreover, she stated clearly that a shareholder has no action against a person who caused harm to the company.[22] The Supreme Court has since confirmed in *Infineon* that a victim by ricochet has a recourse as long as the damage claimed is not by ricochet, i.e. it is direct.[23] Appellants (or other shareholders of the class) have admitted, in the proceedings before the Superior Court sitting in bankruptcy and insolvency, that the damages claimed are by ricochet.[24]

[31] Another example of direct damage suffered by a shareholder resulting from the acts of a director was described by the judge as the hypothetical case of the shareholder who purchases his shares based on the negligent or fraudulent misrepresentation of directors. Such a scenario causes the shareholder to have parted with his money to buy worthless shares and thus, suffers harm independent from the company giving rise to a good cause of action against directors for damages directly suffered by the shareholder.

[32] The four faults alleged by Appellant and referred to above gave rise, according to Appellants' allegations, to the demise of BioSyntech's business, followed by its bankruptcy and the sale of its assets. Such damage was caused to BioSyntech and this damage, in turn, caused the loss of share value claimed by the Appellants. The damage claimed is indirect and so cannot be claimed by shareholders. Appellants' legal syllogism underpinning the proposed class action is incorrect and the judge rightly refused authorization.

[33] It is suggested, based on recent jurisprudence of this Court that, the judge's analysis went beyond the filtering mechanism applicable at the authorization stage. However, in *Sibiga v. Fido Solutions inc.*, the judge's refusal to authorize was based on an analysis and weighing of the evidence alleged in support of the allegations in the motion.[25] Writing for the Court, Kasirer J.A. said:

> [86] ... He [the trial judge] engaged the motion and its supporting evidence on the merits in concluding that, at this early stage, the facts alleged did not seem to support the conclusions sought. This amounts to a refusal to apply the *Infineon*

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22 *Houle*, *supra*, note 20, p. 179.

23 *Infineon*, *supra*, note 1, paras. 142-144.

24 See "Déclaration d'intervention volontaire agressive", May 31, 2010, Superior Court, District of Laval, 500-11-006711-107, para. 13.

25 *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, paras. 69-86 [*Sibiga*]; see also *Charles c. Boiron Canada inc.*, 2016 QCCA 1716, paras. 44-52

> standard to the interpretation of article 1003(b) which, in my respectful view, amounts to an error of law.[26]

The "*Infineon* standard" was succinctly summarized by the Supreme Court, thus:

> ... At this stage, all it [the Applicant] needs to do is demonstrate an arguable case by means of allegations and supporting evidence.[27]

The case at bar raises an entirely different situation. The trial judge assumed the allegations and the supporting evidentiary material to be true. He did not refuse authorization as a result of weighing the evidence or inquiring into the probative value of the allegations. Rather, he denied authorization based purely on a meticulous analysis of the legal argument under-pinning the factual allegations. [28] I believe he was correct.

[34] The Appellants have submitted that given the facts and the view of the law related above, the shareholders are left with no recourse so that they submit that the above legal analysis must be incorrect. In such regard, the Appellants state that there is no danger of double recovery – i.e. the company is bankrupt and because of the passage of three years from the events giving rise to the cause of action, any claim by BioSyntech (or by the trustee on its behalf) is time barred or prescribed. I do not accept this argument. The Appellants confuse a rationale for the rule in *Foss v. Harbottle* with the rule. That there would be no double recovery in this particular case if the class action was authorized, does not make the damages claimed by the shareholders direct.

[35] The shareholders also state that they were not able to seek permission to institute a derivative action because the company is bankrupt so that the trustee was vested with the company's rights of action. They add that they could not exercise the trustee's recourse following its refusal to act because Section 38 *B.I.A.* grants such right to creditors only:

38 (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors	**38 (1)** Lorsqu'un créancier demande au syndic d'intenter des procédures qui, à son avis, seraient à l'avantage de l'actif du failli, et que le syndic refuse ou néglige d'intenter ces procédures, le créancier peut obtenir du tribunal une ordonnance l'autorisant à intenter des procédures en son propre nom et à ses propres frais et risques, en donnant aux autres

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26 *Sibiga*, *supra*, note 25, para. 86.

27 *Infineon*, *supra*, note 1, para. 94

28 *Trudel c. Banque Toronto Dominion*, 2007 QCCA 413, paras. 2-3; *Fortier c. Meubles Léon ltée*, 2014 QCCA 195, paras. 90-91; *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433 (application for leave to appeal to the Supreme Court dismissed), paras. 12-13.

of the contemplated proceeding, and on such other terms and conditions as the court may direct. ...	créanciers avis des procédures projetées, et selon les autres modalités que peut ordonner le tribunal. [...]

[Emphasis added]

[36] The decided cases cited by Appellants[29] to support the assertion that the shareholders cannot avail themselves of Section 38 *B.I.A.* do not consider the amendment to the *B.I.A.* in 2005 by the addition in this instance of Section 140.1 *B.I.A.*:

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.	**140.1** Le créancier qui a une réclamation relative à des capitaux propres n'a pas droit à un dividende à cet égard avant que toutes les réclamations qui ne sont pas des réclamations relatives à des capitaux propres aient été satisfaites.

and Section 2 *B.I.A.* defines "equity claim" as follows:

2. ... **equity claim** means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of	**2.** [...] **réclamation relative à des capitaux propres** Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment : a) un dividende ou un paiement similaire; b) un remboursement de capital; c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur; d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente; e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (equity claim)

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[29] *Re Patricia Appliance Shops Ltd.*, (1922) 2 C.B.R. 466 (Ont. S.c.), p. 468, cited with approval in *Grandview Ford Lincoln Sales Ltd.*, RE, 22 C.B.R. (4th) 210, 2001 CanLII 28435 (ON SC), para. 10; *Isabelle Estate (Trustee of) v. Royal Bank of Canada*, 2008 NBCA 69, para. 41; *Rickerd v. Weber*, 15 C.B.R. 218, [1934] 1 W.W.R. 116, 1934 Carswell Alta 1 (Alta T.D.).

paragraphs (a) to (d); (réclamation relative à des capitaux propres)	
...	[...]

[37] I should not be taken as saying that the shareholders of the proposed class could have been considered creditors for purposes of an application under Section 38 *B.I.A.* because the record before me does not provide sufficient information about any of the rights attached to or exercised in relation to the shareholdings. In any event, such a determination is not absolutely necessary for a resolution of the appeal since, as Appellants assert, the trustee's recourse on behalf of BioSyntech is now prescribed or time barred. However, it is not open to Appellants to refute the judge's reference to Section 38 *B.I.A.* as a possible avenue to a recourse by saying that the section could not apply. It might have.

[38] Respondents have suggested that, faced with the bankruptcy trustee's refusal to institute proceedings against the directors, the Appellants or the shareholders could have sought an order against the trustee pursuant to Section 37 *B.I.A.*:

37 Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.	**37** Lorsqu'un acte ou une décision du syndic lèse le failli ou l'un des créanciers ou toute autre personne, l'intéressé peut s'adresser au tribunal, et ce dernier peut confirmer, infirmer ou modifier l'acte ou la décision qui fait l'objet de la plainte et rendre à ce sujet l'ordonnance qu'il juge équitable.

While Respondents have cited some decided cases[30] in support of this submission that Section 37 *B.I.A.* could be invoked in this way, it is not necessary in this case to decide whether Section 37 *B.I.A.* could be relied upon by the shareholders to order the trustee to institute legal proceedings to enforce rights of the bankrupt, BioSyntech.

[39] Lastly, on the subject of alternate recourses open to Appellants, they conceded that an oppression remedy by the shareholders[31] against the directors, pursuant to Section 241 *C.B.C.A.*, is a possible recourse in the circumstances and that, as they state: "[n]othing bars the oppression relief from being exercised in the form of a class action":[32]

241 (1) ...	241 (1) [...]
(2) If, on an application under subsection (1), the court is satisfied	(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation

30 *Liu v. Sung*, 1989 Carswell BC 327 (BCSC); *Redipac Recycling Corp., Re*, 1998 Carswell Ont 4402 (Ontario Supreme Court).

31 In *BCE*, the shareholders action was an oppression remedy against the company.

32 Appellant's factum, footnote 80.

that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

...

provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[...]

[40] Thus, the shareholders (who are "security holders") as "complainants" alleging the four reproaches against the Respondents and the manner in which they directed BioSyntech could have sought compensation. This would not change the indirect nature of the damage, but the judge's wide discretion of possible remedies, including compensating shareholders, could take into account that the first dollars recovered should be notionally marshalled to the payment of creditors.[33]

[41] The oppression remedy was not discussed by the trial judge. A judge of this Court has questioned in *obiter* whether an oppression recourse could be authorized as a class action because the former is already representative in nature in that it provides a potential remedy not only to the petitioner but to all shareholders of a class who suffer from the oppressive conduct.[34] Courts of other Canadian jurisdictions have decided otherwise holding that the oppression remedy may be the basis of a class action.[35] The appeal

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33 See generally Section 241(3) *C.B.C.A.* and specifically sub-paragraph (j).

34 *Fradet c. Société Asbestos ltée*, 1990 CanLII 3345 (QC CA), per Gendreau at para. 59; leave to appeal dismissed S.C.C. # 21900, 05/10/1990.

35 *Noble v. North Halton Golf and Country Club*, 2016 ONSC 2962 (CanLII), applying, *Stern v. Imasco Ltd.*, 1999 CanLII 14934 (ONSC); *Jellema v. American Bullion Minerals Ltd.*, 2010 BCCA 495, paras. 21-25.

before us, as framed, does not require that this question be answered and thus, I make no finding on it.

[42] For the foregoing reasons, I agree with the judge, and thus propose that the appeal be dismissed with legal costs.

MARK SCHRAGER, J.A.