

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
C.S. 500-06-000654-133
C.A. 500-09-

(class action)

SUPERIOR COURT

**GROUPE D'ACTION D'INVESTISSEURS DANS
BIOSYNTECH**

APPELLANT (Petitioner)

VINCENT BLAIS,

APPELLANT (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 (Respondents)

**INSCRIPTION IN APPEAL
(C.C.P. Articles 495 and 496)**

1. On May 13, 2013, the Appellants filed a motion to institute a class action and obtain the status of representative (the “**authorization motion**”) on behalf of persons forming part of the class hereinafter described:

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.¹

¹ Amended Motion for Authorization to Institute a Class Action and Obtain the Status of Representative (Schedule 1).

2. The Appellants appeal the decision rendered on June 30, 2015 by the Honourable Justice Stephen W. Hamilton of the Superior Court of Quebec, sitting in the district of Montreal. After a two day hearing held on November 26 and 27, 2014, the motion judge dismissed the Appellants' authorization motion because it did not meet the requirements of *CCP* article 1003 (b).²
3. The Appellants filed 39 exhibits with its authorization motion, while the Respondents filed an additional 16 exhibits. Neither party examined witnesses at the authorization hearing.
4. The Appellants inscribe the present decision in appeal because the motion judge erred in law when he ruled that shareholders lack the causation required to bring an extra-contractual claim against the directors of a corporation governed by the *Canada Business Corporations Act* ("**CBCA**"). This error is significant to the point of invalidating the judgment in first instance.

The General Context

5. On May 12, 2010, the designated member, Vincent Blais held approximately 400,000 shares in BioSyntech Inc ("**BioSyntech**"). BioSyntech was a public biotechnology corporation based in Laval, governed by the *CBCA* and listed on the Toronto Stock Exchange. The Respondents were the eight members of the Board of Directors of BioSyntech on May 12, 2010.
6. As the directors of a late-stage, biotechnology start-up, the Respondents' primary objective was to complete stage III, clinical results for its flagship medical device, BST-Cargel, to repair damaged knee cartilage. After fifteen years of work on this device and the investment of \$76 million, the Respondents initiated a fire sale for all of BioSyntech's assets when the company was within months of obtaining its clinical trial results for BST-Cargel. At the deadline, the leading offers came from Nicholas Piramal India Limited ("**Piramal**") and ProQuest Investments LLP, two companies with representatives on the board of directors.

² Judgment appealed from at paras 153-154 (Schedule 2).

7. The Appellants alleged that the Respondents oversaw a troubling pattern of negligence that resulted in an avoidable bankruptcy and caused the class members to lose their security rights in the company. To support their allegation, the Appellants submitted evidence to establish an arguable case that the Respondents breached the duty of care that they owed as directors of BioSyntech to security holders under s. 122(1) (b) *CBCA* and article 1457 *CCQ*.
8. The evidence firstly revealed that the Respondents failed to disclose the full results of a 40-patient interim analysis for BST-Cargel when it was material information and likely to affect share price. It secondly showed that the Respondents failed to bring down the company's burn rate to ensure that the company could complete the BST-Cargel trial. It thirdly demonstrated that the Respondents failed to diligently pursue opportunities to obtain additional financing to complete the BST-Cargel trial.
9. It fourthly evinced that the Respondents negligently put the company into bankruptcy, initiating a rushed sale of the company's assets when it was within months of obtaining the final BST-Cargel trial results. This sale occurred without any attempt to negotiate the survival of the company with security holders and benefited Piramal, a company with a representative on the board of directors.
10. The reasonable person in comparable circumstances would have foreseen that the failure to take these precautions would have bankrupted the company and injured class members. The class action thus sought compensatory damages to repair the injury that the Respondents' negligence caused class members.

The Motion Judge's Decision

11. In his June 30, 2015 decision, the first instance judge dismissed the Appellants' authorization motion because it did not satisfy *CCP* article 1003 (b). He did not

rule on the three other conditions of article 1003 *CCP* because the Respondents conceded that they were satisfied.³

12. Justice Hamilton first held that some of the alleged faults could meet the test for an arguable case.⁴ He then recognized that the Supreme Court's decisions in *Peoples Department Stores Inc. (Trustee of) v. Wise*⁵ and *BCE Inc. v. 1976 Debentureholders*⁶ established that the directors of a *CBCA* corporation owe a duty of care to its shareholders.⁷
13. The first instance judge nonetheless dismissed the Appellants' motion because article 1607 *CCQ* prevents shareholders from claiming a loss of share value against directors when their negligence first causes an injury to the corporation. He held that in such a context, the loss of share value suffered by shareholders constitutes an indirect result of the injury directly caused to the corporation. He posited that to claim their loss, shareholders must bring a derivative action in the name of the corporation because only the corporation can sue the directors.⁸

Error in Law

14. The first instance judge erred in law when he applied article 1607 *CCQ* to deny security holders of a *CBCA* corporation the right to claim against its directors for damages that result from their breach of their duty of care.
15. This interpretation of article 1607 *CCQ* frustrates the objectives of article 1457 *CCQ* and s. 122(1) (b) *CBCA* by establishing an absolute bar to the extra-contractual liability of a *CBCA* corporation's directors to its shareholders. In so doing, it reverses the Supreme Court of Canada's recognition that directors owe a duty of care to not only the corporation but also to its creditors and stakeholders.⁹

³ Schedule 2 at para 48.

⁴ *Ibid.* at para 118. See generally paras 56-118.

⁵ [2004] 3 S.C.R. 461, 2004 SCC 68 [*Peoples*].

⁶ [2008] 3 S.C.R. 560, 2008 SCC 69 [*BCE*].

⁷ Schedule 2 at para 135. See generally paras 119-135.

⁸ *Ibid.* at para 141, 152. See generally paras 134-152.

⁹ *Peoples*, *supra* note 5 at paras 56-57; *BCE*, *supra* note 6 at para 44.

16. This error is significant to the point of invalidating the judgment below because it constitutes the sole basis of the first instance judge's dismissal of the authorization motion. This Court should thus intervene to set aside this ruling and restore the class members' legitimate right to seek a remedy under article 1457 CCQ.

Conclusions Sought by the Appellants

17. For these reasons, may it please the Court to:

ALLOW the applicant's appeal;

SET ASIDE the judgment of the Superior Court rendered by the Honourable Mr. Justice Stephen Hamilton on June 30, 2015;

GRANT the Appellants' motion for authorization to institute a class action and obtain the status of representative according to its conclusions;

THE WHOLE, with costs.

Notice of this inscription on appeal is given to :

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Montreal, July 30, 2015

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