Docket: 2009-1057(IT)G

BETWEEN:

LYRTECH RD INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on April 17, 18 and 19, 2012, at Quebec City, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant	René Roy
Counsel for the Respondent:	Anne Poirier
	Dany Leduc

JUDGMENT

The appeals from the assessment dated February 8, 2008, for the appellant's 2005 taxation year and from the assessments dated July 9, 2008, for the appellant's 2006 and 2007 taxation years, made pursuant to the *Income Tax Act* by the Minister of National Revenue, are dismissed with costs in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of January 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 30th day of May 2013.

Erich Klein, Revisor

Citation: 2013 TCC 12
Date: 20130124
Docket: 2009-1057(IT)G

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REASONS FOR JUDGMENT

Favreau J.

[1] These are appeals from assessments dated February 8, 2008, for the 2005 taxation year and July 9, 2008, for the 2006 and 2007 taxation years of the appellant, issued pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.), as amended (the Act), by the Minister of National Revenue (the Minister).

[2] In the February 8, 2008, and July 9, 2008, assessments, the following changes were made to the investment tax credit (ITC) and ITC refunds claimed by the appellant:

	2005 $	2006 $	2007 $
Prior net income (net loss)	(-1,905,513)	(-4,453,027)	(-7,325,312)
R & D expenditures claimed	1,215,211	1,886,261	2,397,527
Revised R & D expenditures	1,046,328	1 626,415	2,611,237
Difference:	(-168,883)	(-259,846)	213,710
Revised net income (net loss)	**(-2,074,396)**	**(-4,712,873)**	**(-7,111,602)**
R & D credits claimed	387,922	697,419	806,599
R & D credits allowed	216,368	334,153	504,288
R & D credits disallowed	**171,554**	**363,266**	**302,311**
ITC refund claimed	384,812	663,130	742,640
ITC refund allowed	0	0	0
ITC carry-forward	216,368	550,521	1,054,809

[3] In its notice of appeal, the appellant does not dispute the Minister's changes regarding the scientific research and experimental development (SR&ED) expenditures claimed by the appellant.

[4] The issue is whether the appellant was a "Canadian-controlled private corporation", as defined in subsection 125(7) of the Act, during the taxation years ending December 31, 2005, 2006 and 2007. If the appellant was not a "Canadian-controlled private corporation" during those taxation years, it would not be entitled to the 15% addition to the investment tax credit provided for in subsection 127(10.1) of the Act and would not be entitled to an investment tax credit refund pursuant to subsection 127.1(1) of the Act, since it would not be a qualifying corporation within the meaning of subsection 127.1(2) of the Act.

Respondent's position

[5] The respondent submits that for the taxation years ending December 31, 2005, 2006 and 2007, the appellant was controlled, directly or indirectly in any manner whatever by Lyrtech Inc. (Lyrtech), a public corporation within the meaning of subsection 89(1) of the Act, because Lyrtech had a direct or indirect influence that, when exercised, resulted in the control in fact of the appellant within the meaning of subsection 256(5.1) of the Act.

[6] Alternatively, the respondent submits that each of the beneficiaries of Fiducie Financière Lyrtech (FFL), namely 4296621 Canada Inc. (4296621), 4296630 Canada

Inc. (4296630) and 4296648 Canada Inc. (4296648), had a conditional right to the shares of the appellant's capital stock such that each was deemed to control the appellant pursuant to subparagraph 251(5)(*b*)(i) of the Act and thus had *de jure* control of the appellant.

Appellant's position

[7] Counsel for the appellant submits there is no need to consider whether there was *de facto* control of the appellant since FFL had *de jure* control of the appellant. In the absence of any express and specific statutory provisions, *de jure* control and *de facto* control cannot be analyzed simultaneously.

[8] Counsel for the appellant also submits that Lyrtech did not have *de facto* control of the appellant because it could not influence the decisions of the appellant's board of directors.

Partial agreed statement of facts

[9] The parties produced a partial agreed statement of facts dated April 13, 2011. I reproduce in its entirety the section of the statement setting out the facts:

> [TRANSLATION]
> **Lyrtech Inc.**
>
> 1. Technologies Lyre Inc. was incorporated on June 26, 1991, under Part 1A of the *Companies Act* (Quebec), and specialized in developing, manufacturing and marketing digital electronic circuits and analog circuits.
>
> 2. Technologies Lyre Inc. was involved in research and developed, for its own benefit or for others, products based on digital signal processors in the field of digital telecommunications and various other electro-optical products.
>
> 3. Louis Bélanger and Louis Chouinard were the founders of Technologies Lyre Inc.
>
> 4. Lyrtech Inc**. (Lyrtech)** was incorporated on March 9, 2000, under Part 1A of the Quebec *Companies Act*.
>
> 5. On September 1, 2000, Technologies Lyre Inc. acquired control of Lyrtech Inc.
>
> 6. On September 1, 2000, Lyrtech Inc. merged with Technologies Lyre Inc. and continued the latter's activities.

7. Following a public offering by means of a prospectus[1] filed on October 4, 2000, Lyrtech became a public corporation that had a class of shares of its capital stock listed on a designated stock exchange in Canada.

8. Before June 1, 2005, Lyrtech conducted R&D activities and on that basis claimed investment tax credits.

9. As a public corporation, Lyrtech claimed against its tax payable non-refundable investment tax credits at the rate of 20% of its eligible R&D expenditure account. For its 2000 to 2004 taxation years, Lyrtech was in a loss position. As a result, it could not benefit from the federal investment tax credit because it was non-refundable.

Restructuring

10. In 2005, Lyrtech restructured its business in order to transfer its R&D activities to a new corporation, the appellant.[2]

11. On May 30, 2005, 4296621 Canada Inc. **(4296621)** was incorporated. Lyrtech subscribed for 400 Class A shares of this new corporation's capital stock for $400.

12. Miguel Caron and Louis Bélanger were appointed directors of 4296621.

13. On May 30, 2005, 4296630 Canada Inc. **(4296630)** was incorporated. 4296621 subscribed for 100 Class A shares of this new corporation's capital stock for $100.

14. Miguel Caron and Louis Bélanger were appointed directors of 4296630.

15. On May 30, 2005, 4296648 Canada Inc. **(4296648)** was incorporated. 4296621 subscribed for 100 Class A shares of this new corporation for $100.

16. Miguel Caron and Louis Bélanger were appointed directors of 4296648.

17. On June 1, 2005, Fiducie Financière Lyrtech (FFL) was created. This trust was set up by 4296621.

18. The income beneficiaries were 4296630, 4296648 and the appellant, while the capital beneficiaries were 4296630, 4296648 and 4296621.[3]

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1 Prospectus dated October 4, 2000.

2 KPMG documents concerning the restructuring, filed in a bundle: respondent's book of documents, tab 26; KPMG document entitled [TRANSLATION] "Work Plan, Corporate Restructuring of Lyretch Inc.": respondent's book of documents, tab 27.

3 Trust deed signed June 1, 2005: respondent's book of documents, tab 32.

19. From June 1 to June 17, 2005, the trustees were Miguel Caron, Vincent Bélanger and Louis Bélanger.

20. As of June 17, 2005, Miguel Caron and Louis Bélanger were the trustees.

21. Under the trust deed, the trustees of FFL cease to be trustees when they are no longer directors of Lyrtech, and the number of FFL trustees cannot be greater than the number of directors of Lyrtech.

22. Under the trust deed, FFL must distribute all of its tax revenue to its beneficiaries yearly. The distribution of revenue and capital among the beneficiaries is discretionary.

23. On May 30, 2005, Lyrtech RD Inc. (**the appellant**) was incorporated.

24. On June 1, 2005, 4296621 gave FFL $200.

25. On June 1, 2005, FFL subscribed for 100 Class E shares of the capital stock of 4296630 for $100.

26. On June 1, 2005, FFL subscribed for 100 Class A shares and 100 Class B shares of the appellant's capital stock, for $100 in each case.

27. Miguel Caron and Louis Bélanger were appointed directors of the appellant.

28. On June 1, 2005, 4296621 granted the appellant an option to purchase at fair market value all of the shares of either 4296648 or 4296630. According to the appellant, this transaction was intended to ensure that Lyrtech and the appellant were not at arm's length, within the meaning of section 251 of the *Income Tax Act*, for the purposes of section 7 of that Act.

29. On June 1, 2005, the trustees of FFL, through a sole shareholder declaration, withdrew all the powers held by the appellant's directors and assumed them themselves, in accordance with subsection 146(2) of the *Canada Business Corporations Act*.

30. On June 1, 2005, Lyrtech transferred to the appellant all of its R&D assets (except intellectual property) at fair market value, as well as the employees assigned to R&D activities, in consideration of the issuance by the appellant of 1,016,437 Class C shares of its capital stock.

31. On June 1, 2005, the appellant redeemed the Class C shares of its capital stock held by Lyrtech. As consideration, the appellant issued a demand promissory note to Lyrtech in the amount of $1,016,437.

32. Around June 1, 2005, Lyrtech subscribed for 1,016,437 Class A shares of the capital stock of 4296621. The subscription price was paid by delivery to 4296621 of the appellant's promissory note.

33. On June 1, 2005, 4296621 made a capital contribution to 4296630 by transferring to it the appellant's promissory note.

34. On June 1, 2005, 4296630 paid a dividend of $1,016,437 on the Class E shares of its capital stock held by FFL. This dividend was paid by delivery to FFL of the appellant's promissory note.

35. On June 1, 2005, Lyrtech granted the appellant a research contract under which the appellant agreed to carry out all the R&D work in order to pursue the development of the technologies patented or owned by Lyrtech that Lyrtech might entrust to the appellant.[4]

36. As consideration, the appellant obtained a share in future income. The appellant was entitled to 10% of the income from sales of the products resulting from the R&D work and 25% of the income from licences granted with respect to those products.

37. The research contract is of indeterminate duration. However, Lyrtech may, among other things, terminate the research contract on 60 days' notice to the appellant.

38. The organization chart dated June 1, 2005, appended to the Amended Reply to the Notice of Appeal, accurately represents the organizational structure of Lyrtech and the appellant after the restructuring in stating the following:

- Louis Bélanger, Louis Chouinard and Société Innovatech Qc and Chaudière-Appalaches were not the sole shareholders of Lyrtech;

- according to the information circulars from Lyrtech's management, no Lyrtech shareholder held more than 10% of the Class A shares of Lyrtech's capital stock.

39. After the corporate restructuring, the appellant filed its tax returns as a CCPC and claimed the refundable investment tax credit at the rate of 35%.

Analysis of activities and of the relationships between Lyrtech and the appellant

40. From the time it began operations, the appellant occupied space in the same premises as Lyrtech.

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[4] Research contract between Lyrtech Inc. and Lyrtech RD Inc. signed June 1, 2005: respondent's book of documents, tab 33.

41. These premises were rented by Lyrtech for $15,848 per month, exclusive of taxes.

42. As of January 24, 2007, there was no written lease between Lyrtech and the appellant.

43. From June 1 to December 31, 2005, the appellant did not record any rental expenses.

44. In an allocation based on the number of employees, the appellant would have been responsible for around $60,400 in rent ($15,848 X 7 months X 43/79).

45. Some individuals were members of the administrative personnel of both Lyrtech and the appellant.

46. Miguel Caron was president of both Lyrtech and the appellant.

47. Alain Landry was vice-president of finance and human resources for both Lyrtech and the appellant.

48. Daniel Bellemare was the comptroller for both Lyrtech and the appellant.

49. Sylvie Coulombe was the secretary for both Lyrtech and the appellant.

50. The appellant assumed part of the Lyrtech's expenses related to its business. These expenses appeared as accounting entries and were mostly allocated according to the number of employees, that is, at a ratio of 43/79, and included the following:

(a) The appellant assumed part of the life insurance premium for some directors, although Lyrtech was the sole beneficiary of the life insurance policy.

(b) The appellant assumed part of the premium for the insurance covering damage to equipment that belongs to both companies, although Lyrtech was the sole beneficiary of the insurance policy.

(c) The appellant assumed part of the accounting fees related to the audit of Lyrtech's consolidated financial statements.

(d) The appellant assumed part of the costs related to the director’s fees paid to participants at meetings of Lyrtech's board of directors.

(e) The appellant assumed part of the remuneration paid to Pierre Lortie, chairman of Lyrtech's board of directors.

51. For the year ending December 31, 2005, no royalty was paid to the appellant by Lyrtech under the terms of the June 1, 2005, research contract, and so the appellant had no income for that year.

52. For the period at issue, the appellant had no line of credit.

53. Before March 2006, the appellant had taken out no bank loan. In March 2006, the appellant obtained a credit facility with a banking institution, benefiting from two loans made available to it to finance R&D credits.[5]

54. Lyrtech stood surety with respect to these loans.

55. During the period from June 1 to December 31, 2005, Lyrtech transferred around $2,037,481 to the appellant.

56. For the year ending December 31, 2006, the business expenses incurred by the appellant were determined to be around $224,000. These expenses were initially paid by Lyrtech.

57. For the year ending December 31, 2006, Lyrtech owed the appellant around $269,000 in royalties resulting from the research contract between the companies.

58. In light of the facts noted in the two preceding paragraphs, Lyrtech owed the appellant an amount of around $45,000, which was never paid.

59. In its tax returns for the years ending December 31, 2006[6] and 2007,[7] the appellant declared no royalty income.

60. Mr. Bellemare, comptroller for Lyrtech and the appellant, made the electronic transfers of funds between the various companies.

61. Mr. Bellemare performed the transfers of funds according to the expenses incurred by the appellant.

62. The appellant could not operate without the advances of funds from Lyrtech.

63. In 2005, when Lyrtech made loans to the appellant, Mr. Bellemare circulated the funds through the subsidiaries 4296621, 496630 and FFL. After that stage, the appellant returned the funds it received from FFL to Lyrtech, which then returned them directly to the appellant. These last two money transfers in fact cancel each other out.

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5 Document regarding credit facilities for Lyrtech RD Inc.: respondent's book of documents, tab 29.

6 Appellant's 2006 tax return: respondent's book of documents, tab 2.

7 Appellant's 2006 tax return: respondent's book of documents, tab 3.

64. Alain Landry, Miguel Caron and Daniel Bellemare are authorized to sign cheques for Lyrtech and the appellant.

65. An external accounting firm consolidated the financial statements of Lyrtech and the appellant on the basis of Canadian Institute of Chartered Accountants (CICA) Guideline 15[8] that applies when an entity controls another entity otherwise than by holding voting rights, namely through contractual rights or other financial interests, as indicated in the introductory paragraph (paragraph 1) of that guideline.

66. According to the external accounting firm, the main reason for consolidating the appellant's activities with Lyrtech's had to do with the advances of funds the appellant received from Lyrtech, either directly or through its subsidiaries and FFL.

4296630, 4296648 and 4296621

67. For the period from June 1, 2005, to December 31, 2007, around $11,850,000 moved between Lyrtech and the appellant, an amount with respect to which adjustment resolutions were passed on March 6, 2008.[9]

68. The corporate books for 4296630, 4296648 and 4296621 were completed during the corporate restructuring, the transactions respecting which are described at paragraphs 10 to 37 of this agreed statement; however, those books have not been updated since then, except as regards the adjustment resolutions mentioned in the preceding paragraph.

69. There are no 4296621 minutes regarding a subscription by Lyrtech for shares of its capital stock totalling around $2,037,481.

70. There is no mention in 4296621's shareholder register of a subscription totalling around $2,037,481 for shares of its capital stock, but this amount was recognized in 4296621's financial statements.

71. There is no book or record that refers to the advances to 4296630's capital stock by 4296621.

72. The companies 4296648, 4296621 and 4296630 did not file their tax returns for the 2006 and 2007 taxation years until July 30, 2009.

73. There is no information about the dividends 4296630 paid on its Class E shares held by FFL.

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8 CICA Guideline No. 15: respondent's supplementary book of documents, tab 9.

9 Adjusting entries: respondent's book of documents, tab 31.

[10] The organization chart dated June 1, 2005, showing Lyrtech's and the appellant's organizational structure, appended to the Amended Reply to the Notice of Appeal, is reproduced in the Appendix hereto.

Analysis

[11] The relevant provisions of the Act for the purposes of the present case are paragraph (*a*) of the definition of "public corporation" in subsection 89(1), the definition of "Canadian-controlled private corporation" in subsection 125(7), the definition of "non-qualifying corporation" in subsection 127(9), subsection 127(10.1), the definition of "qualifying corporation" in subsection 127.1(2), and subsections 248(25), 251(5), 256(5.1), 256(6.1) and 256(6.2). These provisions read as follows:

> Definitions
>
> 89. (1) In this subdivision,
>
> . . .
>
> "public corporation" at any particular time means
>
> (*a*) a corporation that is resident in Canada at the particular time if at that time a class of shares of the capital stock of the corporation is listed on a designated stock exchange in Canada,
>
> 125. (7) In this section,
>
> . . .
>
> "Canadian-controlled private corporation" means a private corporation that is a Canadian corporation other than
>
> (*a*) a corporation controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or more public corporations (other than a prescribed venture capital corporation), by one or more corporations described in paragraph (*c*), or by any combination of them,
>
> (*b*) a corporation that would, if each share of the capital stock of a corporation that is owned by a non-resident person, by a public corporation (other than a prescribed venture capital corporation), or by a corporation described in paragraph (*c*) were owned by a particular person, be controlled by the particular person,

(*c*) a corporation a class of the shares of the capital stock of which is listed on a designated stock exchange, or

(*d*) in applying subsection (1), paragraphs 87(2)(*vv*) and (*ww*) (including, for greater certainty, in applying those paragraphs as provided under paragraph 88(1)(*e.2*)), the definitions "excessive eligible dividend designation", "general rate income pool" and "low rate income pool" in subsection 89(1) and subsections 89(4) to (6), (8) to (10) and 249(3.1), a corporation that has made an election under subsection 89(11) and that has not revoked the election under subsection 89(12);

127. (9) In this section,

. . .

"non-qualifying corporation" at any time means

(*a*) a corporation that is, at that time, not a Canadian-controlled private corporation,

(*b*) a corporation that would be liable to pay tax under Part I.3 for the taxation year of the corporation that includes that time if that Part were read without reference to subsection 181.1(4) and if the amount determined under subsection 181.2(3) in respect of the corporation for the year were determined without reference to amounts described in any of paragraphs 181.2(3)(*a*), (*b*), (*d*) and (*f*) to the extent that the amounts so described were used to acquire property that would be qualified small-business property if the corporation were not a non-qualifying corporation, or

(*c*) a corporation that at that time is related for the purposes of section 181.5 to a corporation described in paragraph (*b*);

127. (10.1) For the purpose of paragraph (*e*) of the definition "investment tax credit" in subsection (9), where a corporation was throughout a taxation year a Canadian-controlled private corporation, there shall be added in computing the corporation's investment tax credit at the end of the year the amount that is 15% of the least of

(*a*) such amount as the corporation claims;

(*b*) the amount by which the corporation's SR&ED qualified expenditure pool at the end of the year exceeds the total of all amounts each of which is the super-allowance benefit amount for the year in respect of the corporation in respect of a province; and

(*c*) the corporation's expenditure limit for the year.

127.1. (2) In this section,

. . .

"qualifying corporation" for a particular taxation year that ends in a calendar year means

(*a*) a corporation that is a Canadian-controlled private corporation throughout the particular year (other than a corporation associated with another corporation in the particular year) the taxable income of which for its immediately preceding taxation year (determined before taking into consideration the specified future tax consequences for that preceding year) does not exceed its business limit for that preceding year, or

(*b*) a corporation that is a Canadian-controlled private corporation throughout the particular year and associated with another corporation in the particular year, where the total of all amounts each of which is the taxable income of the corporation or such an associated corporation for its last taxation year that ended in the preceding calendar year (determined before taking into consideration the specified future tax consequences for that last year) does not exceed the total of all amounts each of which is the business limit of the corporation or such an associated corporation for that last year;

248. (25) For the purposes of this Act,

(*a*) a person or partnership beneficially interested in a particular trust includes any person or partnership that has any right (whether immediate or future, whether absolute or contingent or whether conditional on or subject to the exercise of any discretion by any person or partnership) as a beneficiary under a trust to receive any of the income or capital of the particular trust either directly from the particular trust or indirectly through one or more trusts or partnerships;

(*b*) except for the purpose of this paragraph, a particular person or partnership is deemed to be beneficially interested in a particular trust at a particular time where

(i) the particular person or partnership is not beneficially interested in the particular trust at the particular time,

(ii) because of the terms or conditions of the particular trust or any arrangement in respect of the particular trust at the particular time, the particular person or partnership might, because of the exercise of any discretion by any person or partnership, become beneficially interested in the particular trust at the particular time or at a later time, and

(iii) at or before the particular time, either

(A) the particular trust has acquired property, directly or indirectly in any manner whatever, from

(I) the particular person or partnership,

(II) another person with whom the particular person or partnership, or a member of the particular partnership, does not deal at arm's length,

(III) a person or partnership with whom the other person referred to in subclause (II) does not deal at arm's length,

(IV) a controlled foreign affiliate of the particular person or of another person with whom the particular person or partnership, or a member of the particular partnership, does not deal at arm's length, or

(V) a non-resident corporation that would, if the particular partnership were a corporation resident in Canada, be a controlled foreign affiliate of the particular partnership, or

(B) a person or partnership described in any of subclauses (A)(I) to (V) has given a guarantee on behalf of the particular trust or provided any other financial assistance whatever to the particular trust; and

(*c*) a member of a partnership that is beneficially interested in a trust is deemed to be beneficially interested in the trust.

251. (5) For the purposes of subsection (2) and the definition "Canadian-controlled private corporation" in subsection 125(7),

(*a*) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled;

(*b*) where at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

(i) to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time,

(ii) to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of the corporation, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the shares were so redeemed, acquired or cancelled by the corporation at that time;

(iii) to, or to acquire or control, voting rights in respect of shares of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the person could exercise the voting rights at that time, or

(iv) to cause the reduction of voting rights in respect of shares, owned by other shareholders, of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the voting rights were so reduced at that time; and

(*c*) where a person owns shares in two or more corporations, the person shall as shareholder of one of the corporations be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

256. (5.1) For the purposes of this Act, where the expression "controlled, directly or indirectly in any manner whatever," is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection referred to as the "controller") at any time where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation, except that, where the corporation and the controller are dealing with each other at arm's length and the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the controller regarding the manner in which a business carried on by the corporation is to be conducted, the corporation shall not be considered to be controlled, directly or indirectly in any manner whatever, by the controller by reason only of that agreement or arrangement.

. . .

256. (6.1) For the purposes of this Act and for greater certainty,

(*a*) where a corporation (in this paragraph referred to as the "subsidiary") would be controlled by another corporation (in this paragraph referred to as the "parent") if the parent were not controlled by any person or group of persons, the subsidiary is controlled by

(i) the parent, and

(ii) any person or group of persons by whom the parent is controlled; and

(*b*) where a corporation (in this paragraph referred to as the "subject corporation") would be controlled by a group of persons (in this paragraph referred to as the "first-

> tier group") if no corporation that is a member of the first-tier group were controlled by any person or group of persons, the subject corporation is controlled by
>
> (i) the first-tier group, and
>
> (ii) any group of one or more persons comprised of, in respect of every member of the first-tier group, either the member, or a person or group of persons by whom the member is controlled.
>
> 256. (6.2) In its application to subsection (5.1), subsection (6.1) shall be read as if the references in subsection (6.1) to "controlled" were references to "controlled, directly or indirectly in any manner whatever".

[12] The first issue to resolve is whether a simultaneous analysis of *de jure* control and *de facto* control should be undertaken in the present circumstances. In my opinion, *de jure* control and *de facto* control coexist simultaneously for all provisions of the Act, without it being necessary for the Act to make specific reference thereto.

[13] The term "control" is not defined in the Act and the courts have had to rule a number of times on its meaning. The leading decision with regard to control is *Buckerfield's Ltd. v. Minister of National Revenue*, [1965] 1 Ex. C.R. 299, in which President Jackett stated the principle that the concept of control meant the right of control that results from ownership of such a number of shares as confers upon their holder a majority of votes in the election of the corporation's board of directors. This, of course, is *de jure* control.

[14] In light of the case law, Parliament has had to make many clarifications with respect to the concept of control in order to reach specific legislative goals. Thus, since September 13, 1988, when subsection 256(5.1) was introduced, the Act is clear as to which are the provisions that specifically refer to the concept of *de jure* control as opposed to those that involve, rather, the application of *de facto* control.

[15] The use of the phrase "controlled, directly or indirectly in any manner whatever" specifically refers to *de facto* control, which exists when a dominant entity has direct or indirect influence whose exercise would result in control in fact. The phrase "controlled, directly or indirectly in any manner whatever" is used in particular in subsection 125(7) in the definition of "Canadian-controlled private corporation".

[16] According to the Canada Revenue Agency (CRA), when Parliament refers to the control of a corporation and uses the phrase "directly or indirectly in any manner

whatever", it is indicating that control includes both *de jure* control and *de facto* control (paragraph 19, Interpretation Bulletin IT-64R4 (Consolidated)).

[17] Following the decision by the Federal Court of Appeal in *Parthenon Investments Limited v. M.N.R.*, 97 DTC 5343, which granted control of a corporation to the corporation that had ultimate control rather than to an intermediary corporation, Parliament adopted subsections 256(6.1) and (6.2) to make clear the existence of the concept of simultaneous control that in fact already seemed implicit in the Act.

[18] According to Nicole Prieur, associate professor, HEC Montréal, the adoption of subsections 256(6.1) and (6.2) clearly shows that [TRANSLATION] "simultaneous control applies naturally to all the relevant provisions of the *Income Tax Act* without it being necessary for the text to make specific reference thereto" (Nicole Prieur, "L'utilisation législative du concept de contrôle de droit" ["Statutory use of the concept of *de jure* control"], 2nd quarter 2009, CCH, 2011, page 8).

[19] In *Rosario Poirier Inc. v. Canada*, [2002] T.C.J. No. 255, counsel for the appellant argued that there could not be simultaneous control of Trab Inc. by Rosario Poirier Inc. and by Luc Poirier, as Luc Poirier had *de jure* control of 100% of the voting shares in Trab Inc. Judge Archambault did not accept this interpretation and made the following comments:

> **29** In my view, paragraph 256(1)(*a*) is clear and precise and leaves no doubt as to its meaning. Once one corporation controls another directly or indirectly in any manner whatever, those two corporations are associated with one another. The fact that another taxpayer had control in law of Trab is irrelevant here since RPI had control in fact under paragraph 256(1)(*a*) of the Act.
>
> **30** Furthermore, under subparagraph 256(1.2)(*b*)(ii) of the Act, there is nothing to prevent one from concluding that a corporation (RPI) has control in fact of another (Trab) within the meaning of paragraph 256(1)(*a*) of the Act, even if another person (Luc Poirier) exercises control in law over the latter corporation. Subparagraph 256(1.2)(*b*)(ii) of the Act clearly applies to paragraph 256(1)(*a*). In other words, it is not necessary for subsection 256(1.2) of the Act to refer to subsection 256(5.1). Reference to subsection 256(1) is sufficient.

[20] More recently, in *Avotus Corporation v. Canada*, 2006 TCC 505, which was essentially an analysis of *de facto* control, Paris J. indicated in *obiter dictum* that in his opinion one of the shareholders had *de jure* control of the appellant. As chairman of the board of directors, that shareholder had the right to cast the deciding vote, which right was granted by an amalgamation agreement and the appellant's articles of

incorporation. This decision shows that the control analysis can be done simultaneously for *de jure* control and *de facto* control, one not excluding the other.

[21] In the case at bar, all the Class A shares of the appellant, that is, the only voting shares, were held by FFL. In such a situation the Supreme Court of Canada stated in *M.N.R. v. Consolidated Holding Co.*, [1974] S.C.R. 419, that, in addition to the corporation's shareholders' register and articles of incorporation, it was necessary to look at the trust instrument to determine how the voting rights attaching to the shares could be exercised. In that decision, the trustee shareholders were required to vote as a unit. If they were not unanimous, they could not exercise the shares' voting rights.

[22] For the period at issue, except the period of June 1 to June 17, 2005, the trustees were Miguel Caron and Louis Bélanger. Pursuant to the trust deed, the decisions made by the trustees were to be majority decisions. None of the trustees could therefore have sole *de jure* control of the appellant. Tardif J. came to the same conclusion in *Létourneau v. Canada*, 2007 TCC 91, in stating that two of the three trustees of the trust could not have *de jure* control because decisions regarding the corporation always had to be made unanimously under the terms of the trust deed.

[23] Here, it must be noted that, in addition to the shareholders' register, the appellant's articles of incorporation and FFL's trust deed, one should also consider the sole shareholder's statement whereby the trustees of FFL withdrew all powers held by the appellant's directors and assumed them themselves, in accordance with subsection 146(2) of the *Canada Business Corporations Act*. Subsection 146(2) reads as follows:

> 146(2) If a person who is the beneficial owner of all the issued shares of a corporation makes a written declaration that restricts in whole or in part the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, the declaration is deemed to be a unanimous shareholder agreement.

[24] In the recent decision in *Price Waterhouse Coopers Inc., Acting in the Capacity of Trustee in Bankruptcy of Bioartificial Gel Technologies (Bagtech) Inc. v. The Queen*, 2012 TCC 120, Bédard J. held, at paragraph 85, "that, as a general rule, a clause in a unanimous shareholders' agreement that restricts the ability of the majority shareholders to elect the directors must be taken into account in the determination of the *de jure* control of a corporation". It should be noted that this decision has been appealed.

[25] In the present case, the effect of the declaration by the appellant's sole shareholder was simply to confirm that *de jure* control of the appellant truly belonged to the shareholders who were trustees of FFL.

Analysis of *de facto* control of the appellant

[26] In each situation it is the relevant facts that enable one to determine whether a person has de facto control of a corporation. Certain relevant general factors in this regard are listed in paragraph 23 of Interpretation Bulletin IT-64R4 (Consolidated):

> (a) the percentage of ownership of voting shares (when such ownership is not more than 50 per cent) in relation to the holdings of other shareholders;
>
> (b) ownership of a large debt of a corporation which may become payable on demand (unless exempted by subsection 256(3) or (6)) or a substantial investment in retractable preferred shares;
>
> (c) shareholder agreements including the holding of a casting vote;
>
> (d) commercial or contractual relationships of the corporation, e.g., economic dependence on a single supplier or customer;
>
> (e) possession of a unique expertise that is required to operate the business; and
>
> (f) the influence that a family member, who is a shareholder, creditor, supplier, etc., of a corporation, may have over another family member who is a shareholder of the corporation.
>
> . . .
>
> In addition to the general factors described above, the composition of the board of directors and the control of day-to-day management and operation of the business would be considered.

[27] These factors were quoted by Judge Lamarre in *Mimetix Pharmaceuticals Inc. v. Canada*, [2001] T.C.J. No. 749 and she concluded, at paragraph 52 "that the appellant was in fact controlled by Mimetix, the non-resident shareholder, in 1996, and consequently was not a CCPC in that year, within the meaning of subsections 125(7) and 256(5.1)". That decision was affirmed by the Federal Court of Appeal, 2003 FCA 106.

[28] According to the Supreme Court of Canada decision in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, external agreements, such as the trust deed and any agreement that might influence the exercise of voting rights and the composition of the appellant's board of directors, are relevant for determining *de facto* control. According to FFL's trust deed, all of Lyrtech's directors were automatically eligible to be trustees, but only those who signed the acceptance form with regard to acting as a trustee and who submitted that form to the trust could be elected or appointed as trustees by the existing trustees. Under the sole shareholder declaration, all the powers held by the appellant's directors were withdrawn and transferred to the trustees so that they could exercise them themselves.

[29] As a result, it can be concluded that the appellant was indirectly controlled by the two non-independent directors among the seven members of Lyrtech's board of directors. Miguel Caron was appointed director of Lyrtech on April 22, 2003, and he remained in that position until November 20, 2007. He also held the position of president and chief executive officer. Louis N. Bélanger had been a director of Lyrtech since March 15, 2000, and held various positions including vice-chairman of the board of directors and head of technology.

[30] In addition to being trustees of FFL, as of June 8, 2005, Miguel Caron and Louis N. Bélanger were the two sole directors of the appellant, 4296621, 496630 and 496648. Miguel Caron was also the president of each of these companies while Louis N. Bélanger was their secretary.

[31] The many facts set out in paragraphs 40 to 73 of the partial agreed statement of facts show that Lyrtech's power and influence over the appellant was not limited to being able to change the composition of the appellant's board of directors. The analysis of activities and of the relationships existing between Lyrtech and the appellant prepared by the CRA auditor clearly shows that Lyrtech exercised significant influence over the appellant and that the appellant was economically dependent on Lyrtech. Among the main elements the auditor noted, the following are worth mentioning:

- the same people were the directors or executive officers of all the entities in the group;
- the unreasonable allocation of expenses between Lyrtech and the appellant;
- the fact that only one person could transfer funds among all the entities in the group;

- the transfers of funds among Lyrtech, 4296621, FFL, FFL's beneficiary corporations and the appellant;
- the appellant had no royalty income and was dependent on Lyrtech for the financing of its activities. The appellant's income was $0, $77, and $14 for 2005, 2006 and 2007 respectively; for the latter two years, it was interest income;
- Lyrtech stood surety with respect to credit facilities for the appellant;
- the October 2006 organization chart shows the complete integration of the appellant into Lyrtech;
- the consolidation of Lyrtech's and the appellant's financial statements;
- the fact that the appellant was paid on the basis of sales and not according to the expenses it incurred.

[32] Taking all these facts into consideration, I find that Lyrtech exercised a dominant economic influence over the appellant. The appellant was not an independent profit centre and could not survive or continue its activities without the financial support of Lyrtech. To satisfy oneself of this, one need only review the terms and conditions of the research contract between Lyrtech and the appellant. This contract was of indeterminate duration but Lyrtech could terminate it on 60 days' notice without providing any reason. Lyrtech determined what research work the appellant was to conduct, and the intellectual property resulting from this research work belonged to Lyrtech. For its research work, the appellant was entitled to receive only 10% of the royalties Lyrtech collected on the sale of products resulting from the research work and 25% of the proceeds from licences granted by Lyrtech. The appellant was thus paid on the basis of the income generated by the research work and not according to the expenses it incurred. The appellant was undercapitalized and could not assume the costs of its research expenses itself while at the same time deferring its income. The appellant could not finance itself without Lyrtech's help.

[33] In *L.D.G. 2000 Inc. v. Canada*, [2002] T.C.J. No. 659, Judge Angers held that there was *de facto* control of a corporation because the effect of the financial, contractual and commercial arrangements was to make the corporation economically dependent on another corporation. Judge Angers stated the following:

> **51** Because the appellant had only two customers, had no receivables and was dependent on Bermex for the sale of nearly all its production, it was impossible for it to obtain financing. Consequently, Bermex provided it with the financing necessary for its operations, which financing was described by Richard Darveau as being

> advances relating to Bermex's accounts payable to the appellant. Regardless of how this financing is described, the appellant's activities were financially supported by Bermex. In addition, the appellant guaranteed in part Bermex's $4 million line of credit for the financing of its activities as a whole. The appellant's sales to Bermex were grossed up by 15% representing administrative expenses, and the transactions between it and Bermex were adjusted at the end of the year to ensure that profit to the appellant. These adjustments were only possible in the case of the appellant, because, according to Richard Darveau, the same could not be done with Bermex's other subcontractors.
>
> **52** The effect of these financial, contractual and commercial arrangements was, in my opinion, to make the appellant economically dependent on Bermex. It also seems clear to me that the know-how and influence of the directors of Gestion and Bermex were behind the appellant's economic revival and its profitability, and this put the appellant under their control.

[34] Considering all of the facts, I find that during the three years at issue Lyrtech controlled the appellant directly or indirectly in any manner whatever within the meaning of subsections 125(7) and 256(5.1) of the Act. Since there was a non-arm's length relationship between Lyrtech and the appellant after 4296621 granted the appellant an option to purchase all the shares of either 4296648 or 4296630 at fair market value (paragraph 28 of the partial agreed statement of facts), the exception under subsection 256(5.1) for agreements between corporations having an arm's length relationship does not apply in this case.

Alternative argument

[35] Counsel for the respondent also claim that Lyrtech had, in addition to *de facto* control, indirect *de jure* control of the appellant pursuant to subparagraph 251(5)(*b*)(i) and subsection 248(25) of the Act.

[36] Subparagraph 251(5)(*b*)(i) of the Act provides that, for the purposes of the definition "Canadian-controlled private corporation", where a person has a right under a contract, in equity or otherwise, either immediately or in the future, and either absolutely or contingently, to shares of a corporation or to acquire such shares or to control the voting rights of such shares, the person shall be deemed to have the same position in relation to the control of the corporation as if the person owned the shares.

[37] Paragraph 248(25)(*a*) of the Act provides that a person beneficially interested in a trust includes any person who has any right (whether immediate or future, whether absolute or contingent or whether conditional on or subject to the exercise of

any discretion by any person) as a beneficiary under a trust to receive any of the income or capital of the trust, either directly from the trust or indirectly through one or more trusts or partnerships.

[38] The respondent contends that the subsidiaries of Lyrtech, namely 4296621, 4296630 and 4296648, all had a future and conditional right, in equity or otherwise, to all the shares of the appellant's capital stock as beneficiaries of FFL's capital. Under paragraphs 9.1 and 9.2 of the trust deed, the trustees had absolute discretion to eventually distribute all the shares of the appellant's capital stock to one or more beneficiaries. Paragraphs 9.1 and 9.2 of the trust deed read as follows:

> 9. CAPITAL DISTRIBUTIONS
>
> 9.1 During the term of the Trust, the Trustees may, in their absolute and uncontrolled discretion, at any time, withdraw from the capital of the Trust and make payments of such withdrawal to one, the other or any combination of Capital Beneficiaries, in the proportions that the Trustees may determine in their absolute and uncontrolled discretion.
>
> 9.2 At the Time of Division, the Trustees shall deliver the remaining capital for the Trust and accumulated income of the Trust to one, the other or any combination of Capital Beneficiaries, in the proportions that the Trustees may determine, in their absolute and uncontrolled discretion.

[39] The CRA is of the opinion that paragraph 251(5)(*b*) of the Act applies to beneficiaries of a discretionary trust holding shares of the capital stock of a corporation, unless it is clearly shown in the trust deed that they will never be entitled to become owners of these shares or to control the voting rights attached to the shares. The CRA stated in the following terms, in external interpretation 2007-0246721E5 dated February 20, 2008, its position regarding related companies, at page 6:

> [TRANSLATION]
> There is no consensus, however, on the application of paragraph 251(5)(*b*) in a trust context. Some feel that discretionary beneficiaries of a trust have no right to trust property as long as the trustees' discretion is not exercised in their favour. On the other hand, others consider the wording of paragraph 251(5)(*b*) broad enough that it could in fact apply to a discretionary beneficiary of a trust's capital.
>
> It should be noted that in a technical interpretation (F9730395), we have already stated that paragraph 251(5)(*b*) could apply to beneficiaries of a trust. We did specify, however, that paragraph 251(5)(*b*) could not apply to beneficiaries of a trust

> who held shares in a corporation if, under the terms of the trust agreement, the beneficiaries could never obtain ownership of the corporation's shares or control the voting rights attached to these shares.

[40] The appellant for its part submits that the beneficiaries of an entirely discretionary trust do not possess a right referred to in paragraph 251(5)(*b*) of the Act as they do a right of first refusal or a right resulting from a forced purchase/sale provision ("shotgun arrangement") included in a shareholder agreement.

[41] The appellant's position is based on paragraphs 10.1 and 10.2 of the trust deed, which state that the persons designated as beneficiaries are only potential beneficiaries of the trust and that until they have received some part of the revenue or capital of the trust, they have no right, either pursuant to a statute or under the trust deed, as beneficiaries of the trust. Paragraphs 10.1 and 10.2 of the trust deed state the following:

> 10.1 For greater certainty, it is specified that the persons designated as Beneficiaries are merely potential beneficiaries of the Trust.
>
> 10.2 As a result, insofar as they shall not have received any part of the Revenue or the Capital of the Trust, a person designated in subparagraph 1.1(a) shall have no right, either by law or pursuant to the terms of the present Agreement, as a beneficiary of a trust, including, without limiting the generality of the foregoing, the right of supervision and control over the Trust, the right to examine the trust records, the right to require the Trustee to furnish any account, report or information, the right to examine the books and vouchers relating to the administration of the Trust and the right to ask for or to obtain a final accounting.

[42] FFL was created under the laws of Quebec and the respondent does not dispute its validity. The language used in paragraphs 10.1 and 10.2 of the trust deed is intended precisely to avoid the application of subsection 248(25) of the Act.

[43] In an article entitled "Strangers in Strange Lands: The Hidden Traps of Offshore Trusts", published by the Canadian Tax Foundation in the 1999 annual conference report at pages 40:1 et seq., Guy Fortin reviewed the doctrine and case law related to the application of subsection 248(25) of the Act to the interest of a beneficiary under a discretionary trust. His study showed that the two following conclusions were inescapable: (a) first, the right held by a beneficiary of a discretionary trust is in the nature of a limited personal right as opposed to a proprietary right in the trust property and only entitles the beneficiary to be

considered as a potential beneficiary of the trust, the beneficiary's only recourse being against the trustee or trustees if they committed a breach of duty in exercising their discretion; (b) second, despite the legal nature of a beneficiary's right under a discretionary trust, the wording of a statutory provision may be very broad so as to include the personal right of a beneficiary under a discretionary trust. The following excerpt from page 40:12 of Mr. Fortin's article clearly sets out the findings of his study:

> Under a discretionary trust, where the trustee is obliged to distribute the whole of the income (or capital or both) among the potential beneficiaries in the manner that he or she sees fit, the interest of the beneficiary cannot be described as a proprietary right. It is merely a limited personal right to be considered as a potential beneficiary that can be exercised only against the trustee. The right of a beneficiary under a non-exhaustive discretionary trust is even more limited in that, under such a trust, the trustee can choose whether and to what extent a distribution is to be made at all. However, it appears from an examination of the doctrine and jurisprudence on this issue that despite the legal nature of the interest of a beneficiary under a discretionary trust, in practice the language of a particular statutory provision may be drafted in a manner that is broad enough to bring within its ambit the non-proprietary interest referred to above. In the context of tax law, the result may well be that the non-proprietary interest of a beneficiary under a discretionary trust could be covered by the definition.
>
> . . .

[44] In an article entitled "Discretionary Trusts: Civil Law Perspectives", published in the Canadian Tax Journal (2003), Vol. 51, No. 4, pages 1647 et seq., Marilyn Piccini Roy describes the nature of the rights of a beneficiary of a discretionary trust governed by the *Civil Code of Québec* as follows, at pages 1670 and 1671:

> The beneficiaries' rights are personal in nature and may therefore be exercised only against the trustees. . . .
>
> . . .
>
> It follows that the right of beneficiaries under a discretionary trust is not a right to receive income or capital under the trust. It is a limited right that entitles them to make a claim against the trustees if the trustees refuse to exercise their discretion or if the discretion is exercised improperly.
>
> By contrast, the holder of a power of appointment is not subject to such control. The principal reason is that a power of appointment does not revolve around the notion

> of predetermined beneficiaries; it merely confers upon a potential appointee the opportunity to become a beneficiary. . . .
>
> . . .
>
> . . . The beneficiaries and the amounts of the entitlement are not fixed until the trustees have appointed the beneficiaries and indicated the extent of the benefit. . . . until their appointment, they have no claim or right except to force the trustees judicially to perform their obligation to exercise their discretion.

[45] In *Sachs v. Canada*, [1980] F.C.J. No. 611, paragraph 26, Heald J.A. of the Federal Court of Appeal described as follows the right of beneficiaries of a discretionary trust to receive trust capital:

> . . .
>
> . . . The situation of a beneficiary under a discretionary trust was described by Lord Wilberforce in the case of *Gartside et al. v. Inland Revenue Commissioners* as follows:
>
> No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. . . .
>
> . . .

[46] Despite the personal nature of the right of the beneficiaries of FFL's capital and the precariousness of this right, it seems to me that subsection 248(25) is broad enough to apply thereto.

[47] In *Propep Inc. v. Canada*, [2009] F.C.J. No. 1155, Noël J.A. of the Federal Court of Appeal clearly states at paragraph 22 that a taxpayer is deemed to be "beneficially interested" when that taxpayer has a right, "whether absolute or contingent", to receive income or capital from a trust. In that case, the right of a beneficiary to receive income or capital from a discretionary trust was conditional on the winding up of a company.

[48] According to counsel for the respondent, a "conditional right" is broad enough to include cases where a discretionary power must be exercised in order for a fact to arise. The exercise of a discretionary power is a future and uncertain event that may or may not happen.

[49] Once it has been determined that each beneficiary of FFL's capital was "beneficially interested" within the meaning of subsection 248(25), it should be considered whether they were also "beneficially interested" for the purposes of subparagraph 251(5)(*b*)(i).

[50] The expression "beneficially interested" does not appear in paragraph 251(5)(*b*), but in Propep *Inc.*, *supra*, Noël J.A. held that the expression "beneficially interested" applied for the purposes of provisions dealing with associated corporations, namely paragraph 256(1)(*c*) and subsections 256(1.2) and 256(1.3), even though the expression "beneficially interested" was not used in any of these provisions. At paragraph 24 of the decision, Noël J.A. stated the following:

> With respect, the expression "beneficially interested" does not have to be reproduced in each provision where it is likely to be applied. This concept applies each time the question arises whether a person is "beneficially interested" in a particular trust. A person who has a contingent right to the capital or income of a trust is "beneficially interested" for the purposes of the Act.

[51] Moreover, it must be noted that the rights referred to in paragraph 251(5)(*b*) are not limited to those resulting from a contract. As Mahoney J. of the Federal Court indicated in *Lusita Holdings Limited v. The Queen*, [1983] 1 F.C. 439, paragraph 3, affirmed on appeal [1984] F.C.J. No. 414 (QL), they could also be, as in the present case, rights held "in equity or otherwise". Collier J. of the Federal Court also adopted this approach in *Rostal Sales Agency Ltd. v. Canada*, [1982] F.C.J. No. 153, at paragraphs 13 and 14.

[52] The wording of paragraph 251(5)(*b*) is very broad in scope such that a person who, under a contract or otherwise, has a future right to shares or to acquire shares, is deemed to be in the same position in relation to the control of the corporation as if the person owned the shares at that time.

[53] The fiction in paragraph 251(5)(*b*) relates to the concept of ownership of shares and not the concept of control of shares. Malone J.A. of the Federal Court of Appeal stated the matter in the following terms in *Sedona Networks Corp. v. Canada*, 2007 FCA 169 at paragraph 27:

> In my analysis, the legal fiction created by the paragraph 251(5)(*b*) is directed at the concept of ownership, not control. Once it is determined that a person has an option to acquire treasury shares that falls within the scope of paragraph 251(5)(*b*), it is necessary to assume that the option is exercised and the related shares are actually acquired by the holder of the option. . . .

[54] The question to be determined at this stage is whether the beneficial interest of each beneficiary of FFL's capital is a right within the contemplation of paragraph 251(5)(*b*).

[55] I do not believe that the beneficial interest of each beneficiary of FFL's capital is a right within the contemplation of paragraph 251(5)(*b*), considering the wording, context and object of that paragraph. It seems to me that the nature of the beneficial interest of each beneficiary of FFL's capital is too aleatory, uncertain or indirect to be a right to the appellant's shares under paragraph 251(5)(*b*). The beneficial interest in question here does not confer any right on the holder of that interest to acquire shares in the appellant.

[56] I highly doubt that Parliament's intent was for subsection 248(25) to apply to paragraph 251(5)(*b*) because the concept of beneficial interest is far too broad in scope and much too vague for it to apply to the concept of *de jure* control for the purposes of the definition of "Canadian-controlled private corporation".

[57] If Parliament had intended that the beneficiaries of the income and capital of a discretionary trust be deemed owners of the shares that are part of the trust property, it would have clearly expressed that intent, as it did by introducing paragraph 256(1.2)(*f*) into the Act for the purposes of the rules concerning associated corporations. Paragraph 256(1.2)(*f*) reads as follows:

> **Control, etc.** — For the purposes of this subsection and subsections (1), (1.1) and (1.3) to (5):
>
> . . .
>
> (*f*) where shares of the capital stock of a corporation are owned, or deemed by this subsection to be owned, at any time by a trust,
>
> . . .
>
> (ii) where a beneficiary's share of the accumulating income or capital therefrom depends on the exercise by any person of, or the failure by any person to exercise, any discretionary power, those shares shall be deemed to be owned at that time by the beneficiary . . .
>
> . . .

[58] To achieve such an end, Parliament could simply have reproduced the concept from paragraph 256(1.2)(*f*) for the purposes of subsection 251(2) and the definition of "Canadian-controlled private corporation", as it did in subsection 256(1.4), a provision similar to paragraph 251(5)(*b*).

[59] Parliament's inaction in not reproducing the concept from paragraph 256(1.2)(*f*) for the purposes of *de jure* control of corporations whose shares are held by discretionary trusts tends to confirm that the rule laid down by the Supreme Court of Canada in *M.N.R. v. Consolidated Holding Co.*, [1974] S.C.R. 419—i.e. that control of a corporation, the majority of the shares of which belong to a trust, is in the hands of the trustees who can bind the trust—is satisfactory and adequate.

[60] For all these reasons, the appeals are dismissed with costs.

Signed at Ottawa, Canada, this 24th day of January 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 30th day of May 2013.

Erich Klein, Revisor

APPENDIX

June-01-05

Louis Bélanger

According to IGIF
1st shareholder
Director

Louis Chouinard

According to IGIF
2nd shareholder

Innovatech QC and Chaudière-Appalaches

According to IGIF
3rd shareholder

Lyrtech Inc (public)

Chair/Adm IGIF
Miguel Caron

Minutes-Chair
Miguel Caron

Fiducie Financière Lyrtech

Settlor of the trust
4296621 Canada Inc

Trustees
Miguel Caron
Louis Bélanger

Income Beneficiaries
4296630 Canada Inc
4296648 Canada Inc
Lyrtech RD Inc

4296621 Canada Inc

Chair/Adm IGIF
Miguel Caron

Minutes-Chair
Miguel Caron

Lyrtech RD Inc

Capital Beneficiaries
4296630 Canada Inc
4296648 Canada Inc

Chair/Adm IGIF
Miguel Caron

4296621 Canada Inc

Minutes-Chair
Miguel Caron

4296648 Canada Inc

Chair/Adm IGIF
Miguel Caron

Minutes-Chair
Miguel Caron

4296630 Canada Inc

Chair/Adm IGIF
Miguel Caron

Minutes-Chair
Miguel Caron

CITATION:	2013 TCC 12
COURT FILE NO.:	2009-1057(IT)G
STYLE OF CAUSE:	Lyrtech RD Inc. v. Her Majesty the Queen
PLACE OF HEARING:	Quebec City, Quebec
DATE OF HEARING:	April 17, 18 and 19, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	January 24, 2013

APPEARANCES:

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Counsel for the respondent:	Anne Poirier Dany Leduc

COUNSEL OF RECORD:

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