Federal Court of Appeal  Cour d'appel fédérale

Date: 20130621

Docket: A-141-12

Citation: 2013 FCA 164

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PRICE WATERHOUSE COOPERS INC. ACTING IN THE CAPACITY OF TRUSTEE IN BANKRUPTCY OF BIOARTIFICIAL GEL TECHNOLOGIES (BAGTECH) INC.

Respondent

Heard at Montréal, Quebec, on April 11, 2013.

Judgment delivered at Ottawa, Ontario, on June 21, 2013.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

INTRODUCTION

[1] This is an appeal from the decision of Justice Bédard (the Judge) of the Tax Court of Canada (TCC) (2012 TCC 120), allowing the appeals of Price Waterhouse Coopers Inc. acting as trustee in bankruptcy of Bioartificial Gel Technologies (BAGTECH) Inc. (Bagtech) from the

reassessments for the 2004 and 2005 taxation years made by the Minister of National Revenue (the Minister).

[2] The *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA), provides that a Canadian-controlled private corporation (CCPC) may claim both an investment tax credit of 20%, in accordance with the definition of "investment tax credit" found at subsection 127(9) of the Act, and subject to a computation that is not relevant in the present proceeding, an additional tax credit of 15% for a total of 35% (subsection 127(10.1) of the Act).

[3] Over the 2004 and 2005 taxation years, Bagtech incurred operating expenses and capital expenditures for scientific research and experimental development activities (SR&ED). For these taxation years, Bagtech alleged that it was a CCPC that qualified for the marked-up investment tax credit. The Minister concluded that Bagtech was a non-qualifying corporation and that it was entitled to neither the marked-up investment tax credit nor the refundable investment tax credit provided for in subsection 127.1(1) of the Act.

[4] Bagtech objected to the Minister's notices of determination. The Judge allowed Bagtech's appeal, hence the present appeal filed by Her Majesty the Queen.

[5] As the Judge indicated in paragraph 2 of his reasons, the only issue is whether, during the relevant taxation years, Bagtech was a CCPC within the meaning of subsection 125(7) of the Act, which reads as follows:

Definitions
125(7)

…

"Canadian-controlled private corporation"
« société privée sous contrôle canadien »
"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 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

Définitions
125(7)

[…]

« société privée sous contrôle canadien »
"Canadian-controlled private corporation"
« société privée sous contrôle canadien » Société privée qui est une société canadienne, à l'exception des sociétés suivantes :

a) la société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, par une ou plusieurs sociétés publiques (sauf une société à capital de risque visée par règlement), par une ou plusieurs sociétés visées à l'alinéa *c*) ou par une combinaison de ces personnes ou sociétés;

b) si chaque action du capital-actions d'une société appartenant à une personne non-résidente, à une société publique (sauf une société à capital de risque visée par règlement) ou à une société visée à l'alinéa *c*) appartenait à une personne donnée, la société qui serait contrôlée par cette dernière;

c) la société dont une catégorie d'actions du capital-actions est cotée à une bourse de valeurs désignée;

d) pour l'application du paragraphe (1), des alinéas 87(2)*vv*) et *ww*) (compte tenu des modifications apportées à ces alinéas par l'effet de l'alinéa 88(1)*e.2*)), des définitions de « compte de revenu à taux général », «

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);	compte de revenu à taux réduit » et « désignation excessive de dividende déterminé » au paragraphe 89(1) et des paragraphes 89(4) à (6) et (8) à (10) et 249(3.1), la société qui a fait le choix prévu au paragraphe 89(11) et qui ne l'a pas révoqué selon le paragraphe 89(12).

[6] Paragraph (*b*) is central to this case. The Judge had to, among other things, determine whether the "particular person", that is, the hypothetical shareholder described in this provision, controlled Bagtech in the taxation years in issue. In the affirmative, Bagtech could not be considered to be a CCPC. It is in this context that the Judge had to determine whether the clauses providing for the election of the corporation's directors in an agreement entitled the [TRANSLATION] "Unanimous Shareholder Agreement" (the Agreement) had to be taken into consideration when determining who enjoyed *de jure* control of Bagtech.

[7] It is my opinion that this last issue—the only issue before us—was settled by the Supreme Court of Canada (SCC) in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795 (*Duha Printers*). The Judge did not err in his interpretation and application of the principles set out in that case.

FACTS

[8] The parties filed an agreement as to the relevant facts and documents. The Judge reproduced the admitted facts in paragraph 4 of his reasons.

[9] For our purposes, it is sufficient, in my opinion, to recall the following facts.

[10] Bagtech was incorporated on April 8, 1996, pursuant to the *Canada Business Corporations Act*, R.S.C, 1985, c. C-44 (CBCA). It was active in cutting-edge medical technology and received several rounds of financing over the years. It assigned its property in 2008.

[11] During the years at issue (2004–2005), European investors ("business angels" and others) held over 60% of the (voting and participating) Class A shares of Bagtech.

[12] In 2003, all Bagtech shareholders signed the Agreement. The Agreement was subsequently amended in 2004, and the amended version was again signed by all shareholders.

[13] The parties agree that Appendix 3 of the Judge's reasons contains an exhaustive list of the clauses of the Agreement restricting the powers of Bagtech directors. It is not disputed that, in this respect, the Agreement is a unanimous shareholder agreement (USA) within the meaning of subsection 146(1) of the CBCA.

[14] But, as I have said previously, the Agreement also included clauses providing for the election of directors that allowed Canadian resident shareholders to appoint most of Bagtech's directors during the years at issue (except for the period from July 22 to December 31, 2005, during which they could elect four of the eight directors). The appellant accepts that if it is permissible to consider these clauses in an analysis of the *de jure* control of Bagtech, the Judge correctly concluded that Bagtech was a CCPC.

[15] The parties further agree that, had it not been for the effect these voting clauses in the Agreement had on the majority shareholders' *de jure* control, Bagtech would not have been a CCPC within the meaning of subsection 125(7) of the ITA.

TAX COURT OF CANADA DECISION

[16] To determine whether Bagtech was a CCPC, the Judge had to answer the two questions raised by the parties, namely, (i) whether the hypothetical shareholder contemplated in paragraph (*b*) of the definition of CCPC in subsection 125(7) of the ITA must be considered as a party to the Agreement for the purposes of the legal fiction; and if so, (ii) what impact the Agreement had on the *de jure* control of Bagtech.

[17] The Judge answered the first question in the affirmative (paragraphs 28 to 43 of his reasons). His conclusion is not at issue in the present appeal.

[18] To answer the second question, the Judge had to determine whether the voting clauses in the Agreement governing the election of directors had to be taken into consideration (paragraph 44 of his reasons).

[19] At paragraph 26 of his reasons, the Judge notes as follows:

> Paragraph 85 of *Duha Printers* provides an excellent summary of the current law relating to the concept of "control". That paragraph reads as follows:

> [85] It may be useful at this stage to summarize the principles of corporate and taxation law considered in this appeal, in light of their importance. They are as follows:
>
> (1) Section 111(5) of the *Income Tax Act* contemplates *de jure*, not *de facto*, control.
>
> (2) The general test for *de jure* control is that enunciated in *Buckerfield's, supra*: whether the majority shareholder enjoys "effective control" over the "affairs and fortunes" of the corporation, as manifested in "ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors".
>
> (3) To determine whether such "effective control" exists, one must consider:
>
> (a) the corporation's governing statute;
>
> (b) the share register of the corporation; and
>
> (c) any specific or unique limitation on either the majority shareholder's power to control the election of the board or the board's power to manage the business and affairs of the company, as manifested in either:
>
> (i) the constating documents of the corporation; or
>
> (ii) any unanimous shareholder agreement.
>
> (4) Documents other than the share register, the constating documents, and any unanimous shareholder agreement are not generally to be considered for this purpose.
>
> (5) If there exists any such limitation as contemplated by item 3(c), the majority shareholder may nonetheless possess *de jure* control, unless there remains no other way for that shareholder to exercise "effective control" over the affairs and fortunes of the corporation in a manner analogous or equivalent to the *Buckerfield's* test.
>
> [Emphasis added.]

[20] Following a review of the doctrine and the case law submitted by the parties and a careful examination of *Duha Printers*, specifically paragraph 85, above, the Judge concluded that, even

if the result could be unusual, he had no choice but to follow that decision of the SCC and to take into consideration the impact of the voting clauses in the Agreement to determine whether the hypothetical shareholder had *de jure* control of Bagtech.

[21] Since, in his opinion, the hypothetical shareholder within the meaning of subsection 125(7) of the ITA could not appoint the majority of Bagtech's directors in 2004 and 2005, he concluded that the private corporation Bagtech was under Canadian control.

[22] In his reasons, the Judge dealt at length with the appellant's argument that a USA containing provisions other than restrictions of the powers of the directors is a severable agreement and whether, as the appellant alleged, *Duha Printers* allowed such an approach.

[23] He notes, among other things, that Robert Couzin interprets *Duha Printers* as holding that a unanimous shareholder agreement must "be read as inseverable". That author criticizes that approach since he is of the opinion that it is strange to take into account the voting clauses dealing with the election of directors when analyzing *de jure* control when a USA has effectively restricted the powers of these directors and the purpose of this exercise is to determine who has "effective control" of the company (paragraph 77 of the reasons).

[24] The Judge ends his discussion of the appellant's argument with the following remark:

> 80. For my part, I agree with both the interpretation of *Duha Printers* offered by Robert Couzin and with his criticism of that decision: see Robert Couzin, *Some Reflections on Corporate Control*, *supra*, at pages 317 to 320.

[25] Before analyzing the appellant's arguments, it is useful to recall the issue before us.

ISSUE ON APPEAL

[26] The parties agree that the issue here in is the following:

> [TRANSLATION]
> Did the trial judge err in law in concluding that, in the analysis of *de jure* control, one must take into consideration the shareholders' voting agreements regarding the election of directors when these have been inserted in a unanimous shareholder agreement established under the CBCA? (Appellant's memorandum, paragraph 15)

LEGISLATION

[27] It is therefore appropriate to reproduce here the most relevant provisions of the CBCA, that is, those that define the USA and those that address voting agreements between shareholders:

***Canada Business Corporations Act*, R.S.C., 1985, c. C-44**	***Loi canadienne sur les sociétés par actions*, L.R.C. (1985), ch. C-44**
2. Definitions "unanimous shareholder agreement" *« convention unanime des actionnaires »* "unanimous shareholder agreement" means an agreement described in subsection 146(1) or a declaration of a shareholder described in subsection 146(2).	**2. Définitions** « convention unanime des tionnaires » *"unanimous shareholder agreement"* « convention unanime des actionnaires » Convention visée au paragraphe 146(1) ou déclaration d'un actionnaire visée au paragraphe 146(2).
145.1 A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as provided in the agreement.	**145.1** Des actionnaires peuvent conclure entre eux une convention écrite régissant l'exercice de leur droit de vote.
146.(1) An otherwise lawful written agreement among all the shareholders of a corporation, or among all the	**146.**(1) Est valide, si elle est par ailleurs licite, la convention écrite

shareholders and one or more persons who are not shareholders, 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 is valid.

(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.

(3) A purchaser or transferee of shares subject to a unanimous shareholder agreement is deemed to be a party to the agreement.

(4) If notice is not given to a purchaser or transferee of the existence of a unanimous shareholder agreement, in the manner referred to in subsection 49(8) or otherwise, the purchaser or transferee may, no later than 30 days after they become aware of the existence of the unanimous shareholder agreement, rescind the transaction by which they acquired the shares.

(5) To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and

conclue par tous les actionnaires d'une société soit entre eux, soit avec des tiers, qui restreint, en tout ou en partie, les pouvoirs des administrateurs de gérer les activités commerciales et les affaires internes de la société ou d'en surveiller la gestion.

(2) Est réputée être une convention unanime des actionnaires la déclaration écrite de l'unique et véritable propriétaire de la totalité des actions émises de la société, qui restreint, en tout ou en partie, les pouvoirs des administrateurs de gérer les activités commerciales et les affaires internes de la société ou d'en surveiller la gestion.

(3) L'acquéreur ou le cessionnaire des actions assujetties à une convention unanime des actionnaires est réputé être partie à celle-ci.

(4) Si l'acquéreur ou le cessionnaire n'est pas avisé de l'existence de la convention unanime des actionnaires par une mention ou un renvoi visés au paragraphe 49(8) ou autrement, il peut, dans les trente jours après avoir pris connaissance de son existence, annuler l'opération par laquelle il est devenu acquéreur ou cessionnaire.

(5) Dans la mesure où la convention unanime des actionnaires restreint le pouvoir des administrateurs de gérer les activités commerciales et les affaires internes de la société ou d'en surveiller la gestion, les droits, pouvoirs, obligations et responsabilités d'un administrateur —

affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities, including their liabilities under section 119, to the same extent.	notamment les moyens de défense dont il peut se prévaloir — qui découlent d'une règle de droit sont dévolus aux parties à la convention auxquelles est conféré ce pouvoir; et les administrateurs sont déchargés des obligations et responsabilités corrélatives, notamment de la responsabilité visée à l'article 119 dans la même mesure.
(6) Nothing in this section prevents shareholders from fettering their discretion when exercising the powers of directors under a unanimous shareholder agreement.	(6) Il est entendu que le présent article n'empêche pas les actionnaires de lier à l'avance leur discrétion lorsqu'ils exercent les pouvoirs des administrateurs aux termes d'une convention unanime des actionnaires.

ANALYSIS

[28] Since the issue before us is a question of law, the applicable standard is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8).

[29] The appellant argues that the Judge erred because he interpreted paragraph 85, item (3)(c), of *Duha Printers* too literally.

[30] In the alternative, she submits that the Judge could not apply the doctrine of this decision given the history and legislative evolution of the relevant provisions of the CBCA since 1998.

[31] I will now examine these two arguments.

(1) Interpretation of *Duha Printers*

[32] The appellant first notes that the Court should not let itself be fooled by the title of the document signed by all Bagtech shareholders. She states that, under section 2 and subsection 146(1) of the CBCA, a unanimous shareholder agreement can only include clauses that restrict, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation.

[33] I cannot accept this argument since it seems contrary to the approach adopted by the SCC in *Duha Printers*, which I will address later on.

[34] The appellant also recalls that the summary of *Duha Printers* at paragraph 85 must be interpreted in context. According to her, the SCC attempted to propound general principles applicable throughout Canada. This necessary implies that one can take into consideration the two types of clauses specifically mentioned in item (3)(c) (clauses restricting the powers of directors and clauses restricting the power of majority shareholders to appoint the board of directors) only when the applicable statute expressly permits the inclusion of such clauses in a USA, as is the case in Alberta (*Business Corporations Act*, R.S.A. 2000, c. B-9, at section 146 (the Alberta statute)). In other cases, such as when the Manitoba statute applicable in *Duha Printers* or the CBCA apply, one must read item (3)(c) of paragraph 85 as referring only to the restrictions imposed on the powers of directors in the USA. I disagree.

[35] First, I note that the appellant has not produced any authorities (be it doctrinal or casuistic) to support such an interpretation of paragraph 85, item (3)(c), of *Duha Printers*. The

excerpts taken from doctrinal works submitted by the appellant to support her submission that a USA can only include the restrictions set out in subsection 146(1) do not address *Duha Printers*. In fact, the only item submitted that does address it is the article by Robert Couzin to which the Judge refers (see paragraphs 24 and 25, above), which supports the opposite theory.

[36] The appellant is relying on *Leblanc c. Fertek*, REJB 2000-20884, J.E. 2000-2060 (QC C. S.), where the judge examined section 146 of the CBCA and divided the shareholder agreement before him into two separate parts, treating as a USA only the clauses restricting the shareholders' powers (at paragraphs 49 to 53). To this, Bagtech counters that, in *Systemcorp A.L.G. Ltd. (Re)*, (2004), 50 B.L.R. (3d) 163, 135 A.C.W.S. (3d) 246, the Ontario Superior Court of Justice applied subsection 146(3) of the CBCA to a buyout clause in a USA.

[37] In my view, these decisions are of little assistance since neither address expressly *Duha Printers* and *de jure* control of a corporation or contains a specific analysis in support of its respective conclusion.

[38] It is, of course, obvious that context is always important in determining what was decided by the SCC, but I cannot agree with the narrow interpretation proposed by the appellant in order to avoid the application of *Duha Printers* applying in the present proceeding, especially when this interpretation requires, as the appellant confirmed at the hearing, adding words that are missing.

[39] It therefore seems appropriate to recall certain facts and the context in which Justice Iacobucci, who was writing on behalf of the SCC, summarized the principles considered in that decision at paragraph 85.

[40] In *Duha Printers*, the company concerned (Duha No. 2) had been incorporated under the *Corporations Act*, R.S.M. 1987, c. C225 (the Manitoba statute), which, in terms of the relevant provisions, was almost identical to the CBCA, which it was modelled on.

[41] Even if the relevant provisions from the ITA before the SCC were not the same as those at stake in the present appeal, it is not disputed that the doctrine of *Duha Printers* is relevant here in since the issue was who had *de jure* control of the corporation.

[42] All shareholders had signed an agreement entitled "unanimous shareholder agreement", which, like the Agreement before us, addressed several topics. According to the Minister of Revenue, the minority shareholders, members of the Duha family, had effective control of Duha No. 2. The Minister of Revenue relied on, among other things, a voting clause that obliged the majority shareholder to elect the three company directors from a list of four nominees who, in his opinion, effectively represented the Duha family.

[43] For the Minister of Revenue, this agreement was a USA within the meaning of the Manitoba statute and had to be considered to determine who had *de jure* control of Duha No. 2. At the trial (. *Duha Printers (Western) Ltd. v. Canada*, [1995] 1 C.T.C. 2481, 51 A.C.W.S. (3d) 1381), Justice Rip (later Chief Justice) of the TCC had written that despite its title, the agreement

before him was not a USA contemplated by the Manitoba statute because it did not restrict the powers of the directors—one of the essential conditions set out in subsection 140(2) of the Manitoba statute. He added that, even though he had had to take into account the clause regarding the election of directors, that clause did not deprive the majority shareholder of *de jure* control of Duha No 2. The latter conclusion is important for our purposes.

[44] Since the Federal Court of Appeal quashed this decision on various grounds (*Canada v. Duha Printers (Western) Ltd.*, [1996] 3 F.C. 78, 198 N.R. 359 (FCA)), the SCC had to determine whether a court could consider documents other than the constating documents and the share register in order to verify whether the majority shareholder controlled the election of the board of directors (an essential condition for determining who has effective control of a corporation) and, more specifically, what impact a USA had on *de jure* control of the corporation.

[45] After determining that, as a general rule, external documents, including agreements between shareholders, should not be taken into account, the SCC concluded that a USA could be considered because it was not just a private agreement, it having the special nature of a constating document.

[46] After paving the way for a review of unanimous shareholder agreements, the SCC had to determine whether, according to the facts, the agreement before it qualified as a USA under the Manitoba statute and, if so, whether it deprived the majority shareholder of *de jure* control of Duha No. 2 . This is exactly what the Judge had to do in the case at bar, except in the light of the CBCA.

[47] Before even beginning its analysis of this issue, the SCC had already clearly stated at paragraph 71 that a USA must incorporate restrictions of the directors' powers. As I will explain later on, when disposing of the second issue raised by the appellant, it is clear that this comment addressed the unanimous shareholder agreements provided for in section 1 and subsection 140(2) of the Manitoba statute (see paragraph 61, below).

[48] But other than these mandatory restrictions, the SCC stated in its discussion of whether the agreement before it qualified as a USA under the Manitoba statute that, in practice, USAs were especially used in the case of private corporations, to address major issues facing a corporation, such as the election of directors (paragraph 78).

[49] After determining that the agreement in question imposed at least one clear restriction on the directors' power to manage enacted under subsection 25(1) of the Manitoba statute, Justice Iacobucci wrote at paragraph 79:

> To my mind, there is no doubt that this brings the Agreement within the terms of s. 140(2).
> [Emphasis added.]

[50] However, having examined the impact of the Agreement on *de jure* control in the matter at bar, Justice Iacobucci concluded at paragraph 84:

> Thus, I would conclude that, in the circumstances of this case, the general rule holds. Marr's [the majority shareholder], by virtue of its ability to elect the majority of the board of directors, enjoyed *de jure* control over Duha No. 2 immediately prior to its amalgamation with Outdoor. Nothing in the constating documents, including the USA, served to alter this state of affairs.
> [Emphasis added.]

[51] In my opinion, the SCC did not ignore the clause providing for the election of directors on which the Minister of Revenue relied because it was not part of the USA within the meaning of the Manitoba statute. It simply determined from the outset that, on its face, this clause did not deprive the principal shareholder of its right to appoint the Board (paragraphs 19, 44 *in fine* and 54 of *Duha Printers*). In that respect, the SCC noted the difference between this clause and that examined in *Alteco Inc. v. Canada*, [1993] 2 C.T.C. 2087; [1993] T.C.J. No. 213 (T.C.C.) (*Alteco*). In *Alteco*, the TCC had taken into consideration a clause of a USA that guaranteed the minority shareholder control of the majority of the seats on the Board of Directors in determining who had *de jure* control of the corporation (the definition of USA was identical to that in the CBCA). The SCC is not distancing itself from this approach. It merely notes that, in Alteco, the TCC erred in stating that a USA is not a constating document (paragraph 71 of *Duha Printers*).

[52] The fact that, in *Duha Printers*, the clause providing for the election of directors did not in fact restrict the majority shareholder's power does not mean that the clearly expressed principle at item (3)(c) can be set aside.

[53] I therefore read *Duha Printers* as holding that once the conditions set out in section 146(1) of the CBCA have been fulfilled, the Agreement qualifies as a USA and the two types of restrictions described at item (3)(c) of paragraph 85 must be taken into consideration when determining who has *de jure* control of the Corporation. In my opinion, the Judge therefore did not err in his reading of *Duha Printers*.

(2) Impact of the amendments since *Duha Printers*

[54] The appellant submits that, even if the Court accepts the Judge's interpretation of *Duha Printers*, the Judge still should have concluded that he could not continue applying the principle set out in item (3)(c) of paragraph 85 because, since that decision, Canada's Parliament has clarified its intention to treat voting agreements between shareholders as simple shareholder agreements even if they are binding on all shareholders. The appellant adds that in moving the provision on ordinary agreements to section 145.1 of the CBCA (before, it was at subsection 146(1), while subsection 146(2) dealt with USAs), Parliament indicated that such voting agreements should not be confused with USAs and that they do not have the special nature of the latter.

[55] This is essentially the same argument to the effect that a USA can only include restrictions on the directors' powers. The only distinction is that, here, the appellant is asking the Court to examine the discussion paper published by Industry Canada in April 1996 (Industry Canada, *Canada Business Corporations Act*, Discussion Paper, *Unanimous Shareholder Agreements*, April 1996), the 2001 amendments to the CBCA and Industry's Canada's comments on the amendment regarding section 145.1. According to the appellant, these support the appellant's position.

[56] Recently, in *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paragraphs 18 to 23, the SCC reiterated that only the SCC has the power to modify the rules propounded in its decisions. At most, and where necessary, a court may state in its reasons why, in its opinion, it

would be desirable for the SCC to review an issue it has already disposed of. The Judge therefore had to apply the doctrine of *Duha Printers*.

[57] As I have already pointed out, the Judge had reservations about the soundness of that case, indicating that he agreed with the criticism of Robert Couzin given the unusual and perhaps even illogical result to which it leads, namely that a restriction on the majority shareholder's right to appoint the directors will not be relevant to the analysis of *de jure* control if it appears in a simple voting agreement, but will be if it is included in a USA (paragraph 82 of the reasons).

[58] With respect, I do not share this opinion. In my view, the SCC adopted a pragmatic, flexible approach that seems as valid today as it was in 1998. Clearly, clauses regarding the election of the board of directors can have a crucial impact on a majority shareholder's ability to effectively control a corporation. In order to avoid creating uncertainty for taxpayers, the SCC concluded that such clauses should not be taken into consideration when simply included in private agreements between shareholders. In seeking to strike a fair balance between these two concerns, it is logical that the special nature of USAs, which are constating documents, and the fact that USAs are easily accessible (for example, under subsections 20(1) and 21(2) of the CBCA, USAs are entered in the records of a corporation and kept at the corporation's registered office, and may be consulted by any representative of the corporation's shareholders or creditors) make a difference. It is not unusual in tax law to obtain a different result by using one form rather than another.

[59] Having said that, and even though they are not necessary to dispose of the appeal, I wish to make two further observations. First, my review of the documents filed in support of this alternative argument has not satisfied me that they support the appellant's position. In my opinion, neither Industry Canada's discussion paper (see, in particular, paragraphs 30, 67, 69 and 72, and note 73) nor the fact of moving the provision on simple agreements between shareholders without changing its wording suggest that one must distinguish between a USA covered by subsection 146(1) of the CBCA and a USA covered by subsection 140(2) of the Manitoba statute examined by the SCC. I note that Parliament had the option of changing its definition of USA during the consultation period had it not been satisfied with the approach adopted in *Duha Printers* a few years earlier. It did not do so. Moreover, it is important to emphasize that the appellant bases her interpretation of Parliament's intention entirely on the Industry Canada discussion paper. This alone cannot establish Parliament's intention or the meaning of the provisions at issue.

[60] Second, the appellant put great emphasis on the distinctions between the definition of USA in the CBCA and its equivalent in the Alberta statute, a matter that is not discussed in *Duha Printers*. The Judge sets out the appellant's questions in that respect at paragraph 71 of his reasons, without answering them. For my part, I agree with the explanation proposed by Bagtech, to the effect that this enumeration was necessary in the Alberta statute given a basic difference between the Alberta statute and the CBCA, the former, unlike the latter, not requiring a USA to include restrictions on shareholder powers in order to qualify as such (see paragraph (1)(*z*) of the Alberta statute reproduced in Schedule D to the discussion paper which

states that a USA provides for any of the matters enumerated in subsection 140(1). This provision is now found at paragraph (1)(*jj*).

[61] It is also useful to note that despite this enumeration and the fact that a voting clause on the election of administrators can be used to qualify an agreement as a USA, the Alberta statute also contains distinct provision on voting agreements (in 1996, this was section 145; in the current version, it is section 139.1). In the comparison proposed by the appellant, I therefore see no specific indication that it would be desirable for the SCC to review the principles propounded in *Duha Printers*.

CONCLUSION

[62] In conclusion, it is my opinion that the Judge did not err in law by applying the principles described at paragraph 85 of *Duha Printers*. I would therefore dismiss this appeal with costs.

"Johanne Gauthier"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Trudel J.A."

Traduction certifiée conforme
François Brunet, réviseur

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-141-12
STYLE OF CAUSE:	Her Majesty the Queen v. Price Waterhouse Coopers Inc. acting in the capacity of trustee in bankruptcy of Bioartificial Gel Technologies (Bagtech) Inc.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 11, 2013
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.
DATED:	June 21, 2013

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