Docket: 2007-2659(IT)G

BETWEEN:

EKAMANT CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on March 18, 2009, at Montreal, Quebec.

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Martin P. Jutras
Counsel for the Respondent:	Alain Gareau

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* in respect of the 2000, 2001, 2002 and 2003 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Magog, Quebec, this 19th day of August 2009.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 30th day of October 2009.

Erich Klein, Revisor

Citation: 2009 TCC 408
Date: 20090819
Docket: 2007-2659(IT)G

BETWEEN:

EKAMANT CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Archambault J.

[1] Ekamant Canada Inc. ("Ekamant") is appealing from a decision of the Minister of National Revenue ("the Minister") disallowing, in respect of the taxation years 2000 through 2003 ("the relevant period"), the small business deduction provided for in section 125 of the *Income Tax Act* ("the Act"). The Minister's position is that Ekamant was not a Canadian-controlled private corporation within the meaning of subsection 125(7) of the Act. The following are the factual assumptions on which the Minister's assessment is based:

> [TRANSLATION]
>
> 7. . . .
>
> (a) The Appellant, Ekamant Canada Inc., is an operating corporation based in Canada. (admitted)
> (b) Since March 18, 1996, the Appellant's common voting shares have been held as follows: (admitted)

Robert Côté	25%
Bruce Fuchs	25%
Phyllis Fuchs	25%
Herman Fuchs	25%

(c) Robert Côté is a Canadian resident, but the other three shareholders reside in the United States of America. (admitted)
(d) The three American shareholders are members of the same family. (admitted)
(e) The three American shareholders collectively hold 75% of the voting shares of the Appellant. (admitted)
(f) The three American shareholders are collectively entitled to 75% of the declared dividends. (denied)[1]
(g) Nearly half the purchases made by the Appellant during the years in issue were made from Ekamant U.S., a corporation owned by one of the Appellant's American shareholders. (admitted)[2]
(h) Robert Côté did not show that he exercised de facto control over the appellant corporation. (denied)

[2] Robert Côté was the only person to testify at the hearing. He set out the circumstances under which he became a shareholder of Ekamant. That corporation was incorporated on April 1, 1992 (see Exhibit A-3) under the *Canada Business Corporations Act* (CBCA). Formerly, a Swedish company had owned a Canadian company whose business was the sale of abrasives for the furniture industry. Apparently, the financial situation of that company was precarious. Herman Fuchs, a manufacturer's agent who lived in the U.S. and was the Swedish company's North American representative, decided to take over the business of its Canadian subsidiary and so incorporated Ekamant.

[1] This paragraph was apparently denied because Ekamant did not declare any dividends during the relevant period. In fact, according to Robert Côté, Ekamant never declared any dividends.

[2] According to Mr. Côté, who testified for Ekamant, purchases from Ekamant USA accounted for 40-60% of the total.

[3] Negotiations were undertaken with Robert Côté with a view to getting him to operate the business. However, he was not interested in such a venture unless he could be a shareholder of the corporation. An agreement was ultimately reached in 1994, and Mr. Côté became a shareholder of Ekamant. According to Mr. Côté, the agreement with Mr. Fuchs provided that he could become the sole shareholder of Ekamant as soon as an amount of roughly $600,000, owed to Mr. Fuchs's company, Ekamant USA, with regard to outstanding accounts, was paid. In addition, Mr. Fuchs apparently advanced about $100,000 to Ekamant. According to Mr. Côté, Ekamant still owed Mr. Fuchs $55,000 on that advance at the time of the hearing.

[4] Unfortunately, the agreement regarding this purchase option was only an oral one. No witnesses were called to corroborate what Mr. Côté said. However, Mr. Côté asserts that in 2007 Ekamant paid Ekamant USA the amounts owing with respect to the invoices and therefore became the owner of all shares held by the Fuchs family. He says that he was unable to purchase the Ekamant shares before 2007 because of the financial problems Ekamant had been faced with in the 1990s. Turning the business around required a great deal of effort. However, no documentary evidence was adduced to confirm that Mr. Côté had held all these shares since 2007. The register of shareholders, tendered as Exhibit I-1, does not show these transfers to Mr. Côté. Neither does the CIDREQ business registry printout dated June 7, 2007 (Exhibit A-3).

[5] Mr. Côté says that he told Mr. Fuchs he insisted on being the only one to make decisions about managing Ekamant. He decided where to purchase the materials and equipment needed to operate the business, including the important machinery acquired when Ekamant started making its own products. A single signature was required on the cheques: his signature or that of his wife, who also worked for Ekamant, as comptroller. Mr. Côté reported to no one regarding his management. He identified the three directors of Ekamant during the relevant period as Denis Levac, Herman Fuchs and himself. Mr. Côté says that the board of directors never met.

[6] However, some of Mr. Côté's answers must be viewed with circumspection because there were several mistakes in his account of the relevant facts. For example, he described Mr. Levac as his accountant when in fact he was his lawyer. His accountant was Dominique Tran. In addition, Mr. Côté says that he never invested a cent in the business. When I asked him how he became a shareholder of the corporation, he said he had subscribed for shares. However, on examination of Exhibit I-1, the corporation's share register, one sees that he acquired some of his

shares in Ekamant from Herman Fuchs, from his wife Mina Lee Fuchs, and the Fuchs's two children. When I asked him what he paid for his shares, he said he paid a nominal price of $1. But the register shows that on April 5, 1994, he paid $1,155.70 to Mr. Fuchs for 10 shares, $769.70 to Phyllis Fuchs for 6.66 shares, $769.70 to Bruce David Fuchs for 6.66 shares and $1,155.70 to Mina Lee Fuchs for 10 shares.

[7] Under two Irrevocable Power of Attorney documents signed on October 27, 1994 (Exhibit A-1), Phyllis Fuchs and Bruce David Fuchs mandated their father Herman Fuchs to represent them in Ekamant's affairs. The two documents stated the following:

> 1. The preamble forms an integral part of the present Power of Attorney.
>
> 2. The undersigned hereby appoints Herman Fuchs, President of the Company (the "Proxy"), having its place of business at 394 St-Paul Street, Le Gardeur, Province of Quebec, Canada, J5Z 4H8, as Proxy to attend and vote for the undersigned at any special and annual general meeting of the Shareholders to be held in the Province of Quebec and at any adjournment thereof and to vote and otherwise act thereat for and on behalf of the undersigned, as the Proxy will deemed [*sic*] fit and the undersigned hereby revokes any proxy or power of attorney previously given with reference to the Company.
>
> 3. Without limiting the generality of the foregoing, the present power of attorney includes the right to vote for the Election of the Directors of the Company, to appoint Auditors to the Company and to fix their remuneration, to approve the granting of options and to act upon any other questions to be generally submitted to Shareholders.
>
> 4. The present power of attorney also confers authority for the above named to vote at his discretion with respect to amendments of [*sic*] variations to matters identified in any notice of meeting of [*sic*] other matters which may properly come before any meeting or any adjournment thereof.
>
> [Emphasis added.]

[8] On March 31, 1997, Herman Fuchs signed the following Proxy appointing Mr. Côté as proxy:

> WHEREAS the undersigned is a duly registered holder of shares of the Company.
>
> WHEREAS the undersigned is an American resident.
>
> WHEREAS the undersigned consents to the present proxy in view of permitting that decisions be taken by a Canadian resident in order to improve management decisions, since the Company has its main business in the province of Quebec, Canada. Therefore, the undersigned acknowledges:
>
> 1. The preamble forms an integral part of the present proxy.
>
> 2. The undersigned hereby appoints **Robert Côté**, Director of the Company, having its place of business at 394 St-Paul Street, Le Gardeur, Province of Quebec, Canada, J5Z 4H8, as proxy to attend and vote for the undersigned at any Special and Annual General Meeting of the Shareholders to be held in the province of Quebec and at any adjournment thereof and to vote and otherwise act thereat for and on behalf of the undersigned as the proxy will deem fit and the undersigned hereby revokes any proxy previously given with reference to the Company.
>
> 3. Without limiting the generality of the foregoing, the present proxy includes the right to vote for the Election of the Directors of the Company, to appoint Auditors to the Company and to fix their remuneration, to approve the granting of options and to act upon any other questions to be generally submitted to Shareholders.
>
> 4. The present proxy also confers authority for the above named to vote at his discretion with respect to amendments or variations to matters identified in any notice of meeting or other matters which may properly come before any meeting or any adjournment thereof.
>
> [Emphasis added.]

[9] To show that he had sole authority to manage Ekamant, Mr. Côté tendered an agreement dated October 26, 2006 (Exhibit A-2). It is an agreement ("the 2006 agreement") between Ekamant and its four shareholders terminating an earlier agreement dated October 27, 1994 ("the 1994 agreement"). Although the 2006 agreement says that 1994 agreement is attached thereto, the 1994 agreement was in fact not tendered in evidence. Moreover, the 2006 agreement states that "since the first Shareholders Agreement new agreements and rules have been put in place regarding the administration of the Corporation, which the parties herein wish to formalize in writing." The 2006 agreement describes the capital stock of Ekamant as being composed of an unlimited number of Class A shares, 166.66 of which were issued and outstanding (paragraph 2 of the agreement). The shares in question were distributed as follows: Bruce David Fuchs 41.67; Herman Fuchs 41.66; Phyllis Gail Fuchs 41.68; and Robert Côté 41.65. Paragraph 3 of the agreement states the following:

> 3. The Shareholders agree to vote their respective shareholdings so that:
>
> a. subject to the Canada Business Corporations Act and as long as RC is a shareholder, RC will be designated as a director and as President of the Corporation;
>
> b. Bruce David Fuchs and Phyllis Gail Fuchs confirm that they have executed in favor of Herman Fuchs an irrevocable power of attorney by which Herman Fuchs represents them as shareholders of the Corporation and represents them as director and officer of the Corporation and without limiting the generality of the foregoing will take any and all decisions for them with respect to the Corporation's activities and the application of the present Shareholder's agreement;
>
> c. Bruce David Fuchs, Phyllis Gail Fuchs and Herman Fuchs confirm, that as long as subparagraph 3a) hereinabove does apply, Robert Côté will take any and all decisions with respect to the Corporation's activities and the application of the present Shareholders Agreement;

> d. In addition, Herman Fuchs confirms the application of the terms contained in the proxy, he gave to Robert Côté on March 31, 1997 said proxy having its full force and effect, unamended (except for the address of the Corporation) as of the said date;
>
> [Emphasis added.]

[10] It must be added that this agreement was prepared by Ekamant's professionals after the Minister's audit began, as is shown by a letter that Mr. Côté sent to the Canada Revenue Agency on January 26, 2005 (Exhibit I-2). In his letter, Mr. Côté confirmed that he had control of Ekamant despite the way in which the share capital was divided up.

Ekamant's position

[11] Counsel for Ekamant submits that Mr. Côté had legal control of Ekamant because he had the right to acquire the shares held by the other three shareholders – the members of the Fuchs family – and because of subparagraph 251(5)(*b*)(i) of the Act, which provides as follows:

> (5) For the purposes of subsection (2) and the definition "Canadian-controlled private corporation" in subsection 125(7),
>
> . . .
>
> (*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,
>
> . . .
>
> [Emphasis added.]

According to Ekamant's counsel, the fact that Mr. Côté had legal control of Ekamant precluded the existence of another group that could control Ekamant. In counsel's submission, Ekamant did not come within any of the exceptions in the definition of "Canadian-controlled private corporation" in subsection 125(7) of the Act.

[12] Moreover, counsel for Ekamant submits that the evidence amply demonstrates that the American group did not have de facto control of Ekamant given Mr. Côté's role in managing the corporation and given his powers under the proxy granted by Herman Fuchs in March 1997. In counsel's submission, when Mr. Fuchs thus appointed Mr. Côté to act as his proxy, he was also acting on behalf of his two children under the powers of attorney that Mr. Fuchs had held since 1994.

[13] According to counsel for Ekamant, by reason of the combined effect of all the proxy or power of attorney documents that they signed – that is, first of all, those that the two children signed in favour of their father, and subsequently, that signed by their father in favour of Mr. Côté – the three members of the Fuchs family could not control Ekamant. In counsel's submission, the effect of all these agreements is similar to that of a unanimous shareholder agreement contemplated in subsection 146(1) of the CBCA, which states provides as follows:

> An otherwise lawful written agreement among all the shareholders of a corporation, or among all the 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.
>
> [Emphasis added.]

[14] Consequently, since effective control of Ekamant's affairs had been changed and since the board of directors no longer exercised that control but Mr. Côté exercised it, counsel argues that the corporation was not controlled by U.S. residents. Counsel cites, in particular, paragraph 36 of the decision of the Supreme Court of Canada in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795. Iacobucci J. wrote as follows, at paragraphs 36 and 37:

> Thus, *de jure* control has emerged as the Canadian standard, with the test for such control generally accepted to be whether the controlling party enjoys, by virtue of its shareholdings, the ability to elect the majority of the board of directors. However, it must be recognized at the outset that this test is really an attempt to ascertain who is in effective control of the affairs and fortunes of the corporation. That is, although the directors generally have, by operation of the corporate law statute governing the corporation, the formal right to direct the management of the corporation, the majority shareholder enjoys the indirect exercise of this control through his or her ability to elect the board of directors. . . .
>
> Viewed in this light, it becomes apparent that to apply formalistically a test like that set out in *Buckerfield's*, without paying appropriate heed to the reason for the test, can lead to an unfortunately artificial result.

[Emphasis added.]

[15] Owing to the existence of agreements similar to a unanimous shareholder agreement, the three Fuchs family members could not control Ekamant even if paragraph (*b*) of the definition of "Canadian-controlled private corporation" applied.

Respondent's position

[16] Counsel for the Respondent submits that the three American shareholders controlled Ekamant in light of paragraph (*a*) of the definition of "Canadian-controlled private corporation" in subsection 125(7) of the Act. He disputes counsel for Ekamant's interpretation of the nature of the proxy and the two powers of attorney. He submits that they do not constitute a unanimous shareholder agreement contemplated in subsection 146(1) of the CBCA. First of all, there is no unanimous shareholder agreement since there are three distinct documents. Furthermore, the three documents do not have the effect of putting Ekamant's affairs beyond the control of the board of directors. Lastly, the agreement of October 26, 2006, postdates the relevant period.

[17] After a moment's hesitation, counsel for the Respondent also contested counsel for Ekamant's argument that two distinct groups of people cannot simultaneously control a corporation.

[18] He also submitted that the three members of the Fuchs family formed a group of related (by blood relationship) persons and that, on the basis of the decision in *Silicon Graphics Ltd. v. Canada*, [2003] 1 F.C. 447, [2002] 3 C.T.C. 527, the three individuals in question are able to exercise control over Ekamant. Sexton J.A. of the Federal Court of Appeal wrote as follows at paragraph 36 of that decision:

> Based on these cases, I agree with the appellant's submission that simple ownership of a mathematical majority of shares by a random aggregation of shareholders in a widely held corporation with some common identifying feature (e.g. place of residence) but without a common connection does not constitute *de jure* control as that term has been defined in the case law. I also agree with the appellant's submission that in order for more than one person to be in a position to exercise control it is necessary that there be a sufficient common connection between the individual shareholders. The common connection might include, *inter alia*, a voting agreement, an agreement to act in concert, or business or family relationships.

[Emphasis added.]

Consequently, counsel for the Respondent submits, it is unnecessary to rely on paragraph (*b*) of the definition of "Canadian-controlled private corporation" in subsection 125(7) of the Act. However, even if the Court were to find that paragraph (*a*) of this definition is inapplicable, it would have to confirm the assessment by reason of the exclusion in paragraph (*b*) of the definition.

Analysis

[19] The starting point for resolving the dispute before the Court in these proceedings is the definition of "Canadian-controlled private corporation" in subsection 125(7) of the Act:

> "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, or
>
> *(c)* a corporation a class of the shares of the capital stock of which is listed on a prescribed stock exchange.
>
> [Emphasis added.]

[20] Subsection 256(5.1) of the Act defines the phrase "controlled, directly or indirectly in any manner whatever" as follows:

> **Control in fact**
>
> 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.
>
> [Emphasis added.]

[21] In *Transport M.L. Couture Inc. v. The Queen*, 2003 DTC 134,[3] I made the following remarks about the scope of the concept of control in those provisions.

> [26] . . . Prior to the enactment of subsection 256(5.1), which was applicable to taxation years beginning after 1988, the *Act* did not define what constituted control of a corporation. The courts decided that control meant *de jure* control, namely, the fact of owning enough voting shares to have a majority in the directors of a corporation. The classic decision was rendered by Jackett, President of the Exchequer Court of Canada, in *Buckerfield's Limited et al. v. M.N.R.*, 64 DTC 5301. This is what he wrote at page 5303:
>
> > Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of

[3] The excerpt in question is alluded to by Noël J.A. of the Federal Court of Appeal in the decision on the appeal from my decision (*9044-2807 Québec Inc. v. The Queen*, 2004 DTC 6141, at paragraph 14).

> the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests 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. See *British American Tobacco Co. v. I.R.C.*, [1943] 1 A. E. R. 13, where Viscount Simon L.C., at page 15, says:
>
> The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

[27] That interpretation has been confirmed by the Supreme Court of Canada in *M.N.R. v. Dworkin Furs (Pembroke) Ltd. et al.*, 67 DTC 5035, and more recently in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, ([1998] S.C.J. No. 41 and 98 D.T.C. 6334). The concept of control recognized by the courts rejected any concept of *de facto* control. According to Judge Iacobucci in *Duha Printers*, at paragraph 58: "The *de facto* concept was rejected because it involves ascertaining control in fact, which can lead to a myriad of indicators which may exist apart from these sources." In addition, he said in paragraph 52: "If the distinction between *de jure* and *de facto* control is to be eliminated at this time, this should be left to Parliament, not to the courts."

[28] It just so happens that this is what Parliament did in 1988 by enacting subsection 256(5.1) of the Act. For the purposes of the rule of associated corporations, *inter alia*, the concepts of *de jure* control and *de facto* control must thus now be used. Moreover, subparagraph 256(1.2)(*b*)(ii) of the Act expressly provides that a corporation may be controlled by a person notwithstanding that the corporation is also controlled or deemed to be controlled by another person. . . .

[Emphasis added.]

[22] At paragraph 85 of the decision in *Duha Printers*, Iacobucci J. summarized as follows the rules for determining whether there is *de jure* control:

> (1) . . .
> (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;

> *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.

[23] The argument of Ekamant's counsel that the presumption in paragraph 251(5)(*b*) determines who controls Ekamant is ill-founded because, under the circumstances of these appeals, that legal fiction is not relevant for the purpose of applying the definition of "Canadian-controlled private corporation" in subsection 125(7) of the Act in order to determine whether the three American shareholders controlled Ekamant during the relevant period. There can in a sense, be two distinct persons or groups of persons that are simultaneously in a position of control with respect to a corporation, namely: the person or group determined on the basis of reality, and the person or group determined on the basis of the legal fiction. The fiction created by paragraph 251(5)(*b*) of the Act does not state that the real owners of the shares that are the subject of an option are deemed no longer to be the owners of those shares, or that they are deemed no longer to control the corporation. This is what President Jackett of the Exchequer Court held in the appendix to his reasons in *Viking Food Products Ltd. v. Minister of National Revenue*, 67 DTC 5067, at page 5073:[4]

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[4] A similar approach was adopted by the Supreme Court of Canada in *Vina-Rug (Canada) Limited v. Minister of National Revenue,* 68 DTC 5021, *per* Abbott J., at page 5023:

> Applying these principles, once it is established that a group of shareholders owns a majority of the voting shares of a company, and the same group a majority of the voting shares of a second company, that fact is sufficient, in my opinion, to constitute the two companies associated within the provisions of section 39 of the *Income Tax Act*. Moreover, in determining *de jure* control more than one group of persons can be aptly described as a "group of persons" within the meaning of section 39(4)*(b*). In my view, it is immaterial whether or not other combinations of shareholders may own a majority of voting shares in either company, provided each combination is in a position to control at least a majority of votes to be cast at a general meeting of shareholders.
>
> [Emphasis added.]

See also R. Couzin, "Some Reflections on Corporate Control" (2005) 53 *Can. Tax J.* 305, at page 317.

> . . . That subsection applies, when the question arises as to whether the owner of a "right" controlled the corporation and it directs that he should be deemed to have had the same position in relation to control of the corporation "as if" he owned "the shares". When the question arises as to whether the real owner of the shares controlled the corporation, there is no occasion to apply the deeming provision in subsection (5d). There is no possible justification for reading the provision as deeming the existence of two sets of shares in place of the one set that actually existed.
>
> [Emphasis added.]

[24] As counsel for the respondent rightly argued, the three members of the Fuchs family together controlled Ekamant during the relevant period because they owned enough shares to cast a majority of the votes in the election of the directors. The family relationship between them warranted the inference that they were acting in concert under these circumstances – circumstances in which no one person was able to exercise a right of control. That the two Fuchs children gave their father power of attorney warrants the finding of fact that the three members of the family were acting in concert. It was always the board of directors that had "effective control" over Ekamant's "affairs and fortunes". There is no unanimous shareholder agreement and no constating document of the corporation suspending the application of the general rule that corporations are controlled by their board of directors. The only document relied upon by counsel for Mr. Côté is the one in which Herman Fuchs appointed Mr. Côté as his proxy. Not only is it not an irrevocable proxy, it is also a type of document that, according to Iacobucci J., is "not generally to be considered". Even if Herman Fuchs's proxy were combined with the two powers of attorney from the Fuchs children, Mr. Côté's intervention, at the very least, would still be needed in order for those documents to be considered a unanimous shareholder agreement within the meaning of the CBCA.[5] Only the three members of the Fuchs family signed these documents. Moreover, the proxy given by Herman Fuchs is not aimed at restricting the powers of the directors to manage, or supervise the management of, the business activities and internal affairs of the corporation. Lastly, the 2006 agreement was not in force during the relevant period and is of no help in these appeals. Consequently, Ekamant was not a Canadian-controlled private corporation during the relevant period by reason of the exclusion in paragraph (*a*) of the definition of "Canadian-controlled private corporation" in subsection 125(7) of the Act.

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[5] In fact, this was also one of the problems in *Sedona Networks Corporation* v. *The Queen*, 2006 CarswellNat 573, 2006 DTC 2486, at paragraph 25.

[25] If this were not sufficient, the exclusion set out in paragraph (*b*) of the same definition would, in my opinion, also warrant the finding that Ekamant was not a Canadian-controlled private corporation during the relevant period. Since this case does not involve a suspension of the rule that the board of directors controls the affairs and fortunes of a business, the "particular person" referred to in paragraph (*b*) would have enough votes to control Ekamant.

[26] For all these reasons, Ekamant's appeal is dismissed, with costs.

Signed at Magog, Quebec, this 19th day of August 2009.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 30th day of October 2009.

Erich Klein, Revisor

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APPEARANCES:

Counsel for the Appellant:	Martin P. Jutras
Counsel for the Respondent:	Alain Gareau

COUNSEL OF RECORD:

For the Appellant:

Name:	Martin P. Jutras
Firm:	Kaufman Laramée Montreal, Quebec

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada